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Family First: Bankruptcy and Family Law

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CONCURRENT SESSION

2020

2020 ABI Rocky Mountain Bankruptcy Conference
Family Law and Bankruptcy

OVERVIEW OF DOMESTIC SUPPORT ORDER DISCHARGEABILITY ISSUES

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Support Debt vs. Property Settlement

Two subsections of U.S.C. § 523(a) determine the dischargeability of marital debts in bankruptcy:

> 1.) § 523(a)(5), which applies to "domestic support obligation(s)" applies to all individual bankruptcy cases, and
> 2.) § 523(a)(15), which applies to Chapters 7, 11 and 12 but NOT in Chapter 13 cases and renders debts "to a spouse, former spouse, or child of the debtor," other than a domestic support obligation, "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".

In summary, support debts are not discharged in any chapter of bankruptcy, whereas property settlements or debts found to fit within § 523(a)(15) may be discharged in a Chapter 13.

Domestic Support Obligation: The Code

U.S.C. § 101(14A)(A)) establishes four elements that must be met in order for a debt to be considered a domestic support obligation:

> 1.) The debt must be owed to or recoverable by the debtor's spouse, former spouse, or child (or the child's parent, legal guardian, or responsible relative), or a governmental unit.
>
> 2.) It must be in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of the spouse, former spouse, or child, without regard to whether the debt is expressly so designated.
>
> 3.) It must be established or subject to establishment before, on, or after the date of the order for relief, by reason of applicable provisions of (i) a separation agreement, divorce decree, or property settlement agreement; (ii) an order of a court of record; or (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit.
>
> 4.) The debt must not be assigned to a nongovernmental entity, unless that obligation is assigned voluntarily for the purpose of collecting the debt.

Burden of Proof

The party seeking to hold the debt nondischargeable has the burden of proof. In re Sampson, 997 F.2d 717 (10th Cir. 1993).

Federal Law

Federal law, not state law, governs the determination of whether a debt is in the nature of support. *Cline v. Cline*, 259 Fed. Appx. 127 (10th Cir. 2007). State law does, however, provide guidance as to whether a debt is to be considered "in the nature of support". *In re Yeates*, 807 F.2d 874, 878 (10th Cir. 1986). **But** *Yeates* held that a debt could be considered "in nature of support" under federal bankruptcy law even though it would not qualify as support under state law.

Effect of Determination

Debt determined to fall within § 523(a)(5) vs. debt determined to fall under § 523(a)(15) has practical implications for the administration and terms and a Chapter 13 plan. Debts that fall under § 523(a)(5) (those "in the nature of support") are entitled to priority status under § 507(a)(1) AND are therefore required to be paid in full over the life of the plan under § 1322(a)(2).

"In the Nature of Support": The Interpretation

The 10th Circuit has interpreted the (a)(5) vs. (a)(15) issue by taking a broad view of what is nondischargeable. The 10th Circuit BAP has held that "because Congress enacted § 523(a)(15 to broaden the types of marital debts that are nondischargeable beyond those described in § 523(a)(5), by implication a § 523(a)(15) exception from discharge would also be construed more liberally than other § 523 exceptions. *In re Taylor*, 478 B.R. 419, 427 (10th Cir. BAP 2012).

The 10th Circuit approach is to conduct a "**dual inquiry**" in determining whether an obligation is a nondischargeable domestic support obligation. This dual inquiry examines 1) whether the intent of the parties agreeing to the obligation or the court imposing it was for the debt to be support; and 2) whether the debt is, in substance, support. *In re Lobato*, Bankr. Court D. Colorado 2011.

Intent of the Parties/Court:

The inquiry into the intent of the parties is far from clear cut. This determination "does not turn on one party's *post hoc* explanation as to his or her state of mind at the time of the agreement, even if uncontradicted. Rather, the critical inquiry is the shared intent of the parties at the time the obligation arose." *In re Sampson*, 997 F. 2d 717, 723 (10th Cir. 1993).

While the structure and wording if a divorce decree or separation agreement can provide some evidence of intent, the Court's **inquiry into the parties' shared intent is not limited to the**

words of an agreement between them even if unambiguous. *In re Sargis*, 197 B.R. 681, 685-686 (Bankr. D. Colorado 1996).

The nature of the obligation is not restricted to the parties' label in the settlement agreement and is a question of federal law…the bankruptcy court has the responsibility to make its own determination of the character of the obligation from the facts at hand, not rely on the denomination of the obligation in the divorce decree. *In re Busch*, 369 B.R. 614, 622 (10th Cir. BAP 2007).

In Substance, Support

In determining whether a debt is, in substance, support, the court will consider the following non-exclusive factors:

1. If the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support;
2. When there are minor children and an imbalance of income, the payments are likely to be in the nature of support;
3. Support or maintenance is indicated when the payments are made directly to the recipient and are paid in installments over a substantial period of time; and
4. An obligation hat terminates on remarriage or death is indicative of an agreement for support.

In re Goin, 808 F. 2d 1391, 1392-1393 (10th Cir. 1987).

Holdings for Context

Attachments: Two recent orders from two of the Colorado Bankruptcy benches. We will discuss facts and holdings.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: RICKIE LEE SIEGFRIED, Debtor.	Case No. 11-21022 KHT Chapter 13
RICKIE LEE SIEGFRIED, Plaintiff, v. SHELLY MENTER, Defendant.	Adversary No. 15-01165 KHT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court for trial on the Plaintiff's Complaint. Following post-trial submissions (docket ##86, 87, 90), the Court took the matter under advisement. The Court is now prepared to rule, and hereby finds and concludes as follows:

I. JURISDICTION

The Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334. This is a core proceeding within 28 U.S.C. § 157(b)(2)(I). The Plaintiff's complaint seeks a determination of the dischargeability of his debt to Defendant under 11 U.S.C. §§ 523(a)(15) and 1328(a).

II. BACKGROUND

Plaintiff Rickie Lee Siegfried ("Mr. Siegfried") is the former spouse of Defendant Shelly Menter ("Ms. Menter"). The parties were married in 1999. During their marriage, the parties lived in a home Ms. Menter owned before she met Mr. Siegfried, located at 2411 East Cottonwood Avenue (the "Home"). When the parties married, the Home was subject to one mortgage in the amount of $153,000. During the marriage, the parties maintained a high level of spending, financed by credit obtained in Ms. Menter's name. Ms. Menter purchased a new

truck for Mr. Siegfried and purchased Marriott and Disney vacation timeshares for the couple's use. Ms. Menter refinanced the Home and took out additional mortgages during the marriage; by the end of 2003, the Home was subject to $380,000 in mortgages.

In 2003, Ms. Menter filed a dissolution of marriage proceeding in Douglas County, Colorado District Court (the "District Court"), case number 2003 DR 92. The District Court held a trial over several days in the first few months of 2005 and entered permanent orders on July 11, 2005 (the "2005 District Court Order"). The District Court required Mr. Siegfried to pay Ms. Menter $163,700, finding in part as follows:

> There has been no evidence or testimony presented that H contributed any separate assets or premarital funds into this marriage. All funds contributed by H, to the extent he contributed funds, were marital. The husband did, however, receive the benefit of his own and wife's labors, and contributed to the parties' incurring significant marital debt. W's contributions of income and assets were both separate and marital. W's separate estate suffered significantly because of the actions of both parties in incurring marital debt, but W has not received fair compensation from H for her share of the marital assets, nor any significant contribution by H to the marital debt in W's name that he also incurred.
> . . .
>
> The Court finds, based on the standards set forth in §14-10-113 C.R.S. that the parties should equally divide all marital assets and marital debts. Court finds all debt on W's home from date of marriage through December 31, 2003 ($198,000 + $147,000 + $35,000 = $380,000) over and above the amount of W's pre-marital mortgages ($153,000) is marital. Parties will each pay ½ this $227,200 debt. Since all this debt is in W's name, H shall reimburse W a total of $113,500 in marital debt.
>
> The Court finds H received $204,200 in gross income from N. 3rd street. The Court finds that said income was marital, and that none of it was shared with W. H shall pay W ½ of income he received, or a total of $102,100. N. 3rd street shall hereinafter be H's sole and separate property.
> . . .
>
> The Court finds that no maintenance shall be awarded to either party under §14-10-144 C.R.S., based on the short duration of the marriage

> and on the fact that W is currently earning approximately the same amount as she was when the parties married. However, the Court considers the funds owed by H to W (division of marital property and debt) to be in the nature of support, and shall not be dischargeable in bankruptcy.

2005 District Court Order at 1-2.

Mr. Siegfried appealed the 2005 District Court Order to the Colorado Court of Appeals, case number 2005CA1631. In May 2008, the Court of Appeals entered an Order affirming in part, vacating in part, and remanding the 2005 District Court Order for further findings of fact (the "2008 Appellate Order"). On remand, the District Court was to consider the classification of the parties' vacation timeshares, the valuation of the North Third Street Property Mr. Siegfried remodeled during the parties' marriage, and whether Mr. Siegfried dissipated marital assets when he failed to pay any of the sale proceeds of the North Third Street Property to Ms. Menter. Regarding the District Court's finding that the amount Mr. Siegfried owed to Ms. Menter was nondischargeable in bankruptcy, the Court of Appeals held:

> We agree with husband that, because no bankruptcy petition had been filed, the trial court lacked jurisdiction to enter an order precluding dischargeability of the lump sum payment he was ordered to pay to wife. *See In re Whittaker*, 225 B.R. 131 (Bank[r]. E.D. La. 1998); *In re Freeman*, 165 B.R. 307 (Bank[r]. S.D. Fla. 1994). Therefore, we need not address husband's alternate argument that the property equalization payment is not actually in the nature of support.

2008 Appellate Order at 7.

The District Court entered its order on remand in October 2008 (the "2008 District Court Order"). The District Court made further findings of fact regarding the timeshares and the valuation of the North Third Street Property. The District Court did not at that time make specific findings as to whether Mr. Siegfried dissipated marital assets, nor did the District Court address whether the amount Mr. Siegfried owed to Ms. Menter was in the nature of support.

Mr. Siegfried appealed the 2008 District Court Order to the Colorado Court of Appeals, case number 2009CA01. In October 2010, the Court of Appeals reversed and remanded the 2008 District Court Order for additional findings of fact. As set forth in the 2010 Appellate Order, the District Court was to make further findings regarding the valuation of the North Third Street Property and regarding

Mr. Siegfried's dissipation of marital assets.

In April 2011, the District Court entered its Order re: Issues on Remand (the "2011 District Court Order"). The District Court made specific findings regarding the valuation of the North Third Street Property and made specific findings Mr. Siegfried had dissipated marital assets in the amount of $125,000, in connection with the North Third Street Property. The District Court ordered Mr. Siegfried to pay Ms. Menter $140,600 "in the same amounts and manner as originally Ordered by the Court at Permanent Orders." 2011 District Court Order at 4.

On May 10, 2011, Mr. Siegfried filed his Chapter 13 bankruptcy petition, case number 11-21022 HRT (now case number 11-21022 KHT). On July 15, 2011, Mr. Siegfried filed an appeal of the 2011 District Court Order. In January 2015, this Court granted relief from stay to allow the appeal to continue. In July 2017, the Court of Appeals entered an order affirming the 2011 District Court Order. No further appeals were filed.

In April 2015, while the appeal of the 2011 District Court Order was pending, Mr. Siegfried filed the instant adversary proceeding, seeking a determination his debt to Ms. Menter fell within 11 U.S.C. § 523(a)(15) and was, therefore, dischargeable in his Chapter 13 bankruptcy case under 11 U.S.C. § 1328(a). By Order entered in July 2015, the adversary proceeding was held in abeyance pending resolution of the appeal of the 2011 District Court Order.

After the Court of Appeals entered its order affirming the 2011 District Court Order, the adversary proceeding abeyance was terminated, and the parties each sought partial summary judgment. By Order entered June 14, 2018, this Court held as follows:

> Debts owed to a former spouse may fall within one of two subsections of 11 U.S.C. § 523: subsection (a)(5), which applies to "domestic support obligations" that are "in the nature of alimony, maintenance, or support," or subsection (a)(15), which applies to debts that do not meet the requirements of subsection (a)(5). See 11 U.S.C. §§ 523(a)(5), 101(14A) (defining "domestic support obligation"), and 523(a)(15). Debts under § 523(a)(5) are commonly referred to as "support" obligations, while debts under § 523(a)(15) are commonly referred to as "property settlement" or "property division" obligations. 4 *Collier on Bankruptcy* ¶ 523.11[1] (16th ed. 2017). In a Chapter 13 case, the distinction is significant, because only § 523(a)(5) debts are excepted from the discharge of a Chapter 13 debtor who has made all his plan payments. See

> 11 U.S.C. § 1328(a); *In re Okrepka*, 533 B.R. 327, 333 (Bankr. D. Kan. 2015). In this adversary proceeding, [Mr. Siegfried] asserts his payment obligations under the 2005 District Court Order, the 2008 District Court Order, and the 2011 District Court Order are dischargeable property division obligations within § 523(a)(15), while [Ms. Menter] asserts the obligations are nondischargeable support obligations within § 523(a)(5).
>
> The determination of whether an obligation is "in the nature of alimony, maintenance, or support" within § 523(a)(5) is twofold. First, the Court looks to intent, determining whether the drafter(s) of the document creating the obligation intended the obligation to provide support. *See Taylor v. Taylor (In re Taylor)*, 737 F.3d 670, 676-77 (10th Cir. 2013) (citing *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 723 (10th Cir. 1993); *Sylvester v. Sylvester*, 865 F.2d 1164, 1165 (10th Cir. 1989)). Second, the Court looks to the substance of the obligation, determining whether it is, in fact, support. *Id.* The determination is a question of federal law, but state law may inform the nature of the interest. *Id.*

Order on Pending Motions (docket #62), at 4.

As to the question of intent, the Court looked to the intent of the District Court, which created Mr. Siegfried's obligation to pay Ms. Menter. *Id.* (citing *Robinson v. Robinson (In re Robinson)*, 113 B.R. 687, 689 (D. Colo. 1990)). This Court found the District Court intended to create a support obligation, and that intent was not negated by the Court of Appeals' subsequent orders. The Court granted summary judgment in favor of Ms. Menter on the question of intent. As to the question of substance, the Court found genuine issues of material fact remained for trial. The Court, therefore, denied summary judgment on that issue.

The Court held a trial on the issue of whether Mr. Siegfried's obligation to pay Ms. Menter was, in substance, support. Considering the evidence admitted at trial, and the parties' post-trial submissions, the Court will discuss the remaining issue of fact, the nature of Mr. Siegfried's obligation. On this issue, Ms. Menter bears the burden of proof. *Sampson*, 997 F.2d at 723.

III. DISCUSSION

Whether a court-ordered domestic obligation falls within the parameters of § 523(a)(5) is an issue of federal law. *See Sampson*, 997 F.2d at 721. State law does provide guidance as to whether a debt is to be considered in the "nature of support." *Yeates v. Yeates (In re Yeates)*, 807 F.2d 874, 878 (10th Cir.1986).

However, "a debt could be in the 'nature of support' under section 523(a)(5) even though it would not legally qualify as alimony or support under state law." *In re Jones*, 9 F.3d 878, 880 (10th Cir. 1993). "[T]he term 'support' as used in § 523(a)(5) is entitled to a broad application," *id.* at 881-82, and "the policy underlying section 523(a)(5) . . . favors enforcement of familial support obligations over a 'fresh start' for the debtor." *In re Miller*, 55 F.3d 1487, 1489 (10th Cir.1995).

In determining whether Mr. Siegfried's debt to Ms. Menter is, in substance, support, the Court considers the following non-exclusive factors:

> (1) if the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support; (2) when there are minor children and an imbalance of income, the payments are likely to be in the nature of support; (3) support or maintenance is indicated when the payments are made directly to the recipient and are paid in installments over a substantial period of time; and (4) an obligation that terminates on remarriage or death is indicative of an agreement for support.

In re Goin, 808 F.2d 1391,1392-93 (10th Cir. 1987) (citing *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984)).

A. Ms. Menter's need for support.

The District Court found Ms. Menter was not entitled to an award of maintenance under Colo. Rev. Stat. § 14-10-144, because the parties' marriage was relatively short and because Ms. Menter was earning approximately the same amount at the end of the marriage as she was at the beginning of the marriage. But, the question of whether Ms. Menter was entitled to maintenance as a matter of state law is separate from the question of whether Ms. Menter needed support at the time of the award.[1] As to the latter question, this Court finds Ms. Menter did need support at that time.

Ms. Menter came into the marriage with the Home subject to a modest mortgage, a payment Ms. Menter could afford to make on her own. During the marriage, the parties spent lavishly, incurring substantial obligations such as a new truck for Mr. Siegfried and four timeshares for the couple's vacation use.

[1] Colorado law allows a district court to take property division into account when determining a maintenance award. *See, e.g., In re Marriage of Sewell*, 817 P.2d 594, 597 (Colo. Ct. App. 1991). Accordingly, the District Court's decision not to award maintenance does not mean Ms. Menter was not in need of support. And, as *Goin* notes, when an agreement fails to provide explicitly for spousal support, the Court may presume that a property settlement is intended for support if it appears under the circumstances the spouse needs support.

Mr. Siegfried did not contribute any separate property toward the parties' lifestyle, which was financed through credit obtained in Ms. Menter's name, including additional mortgages on the Home. Mr. Siegfried further exacerbated Ms. Menter's financial situation by dissipating marital funds he received from the sale of the North Third Street Property he renovated. Ms. Menter testified that at the time of the parties' divorce, Mr. Siegfried's payments were necessary for her to be able to remain in the Home, as she could not afford the much larger mortgage payments on her own. Subsequently, when Mr. Siegfried failed to make his payments to Ms. Menter, Ms. Menter lost the Home in foreclosure.

Shelter is an essential component of support. Courts often find obligations to be in the nature of support when those obligations are necessary for a former spouse to remain in the formerly-marital home. *See, e.g., In re Yeates,* 807 F.2d at 879 (when necessary for wife to maintain her home, husband's obligation to pay debt secured by home was in the nature of support); *Sylvester*, 865 F.2d at 1166 (an obligation that enables a spouse to maintain a home and have a monthly income has the actual effect of providing support to the spouse); *Robinson v. Robinson (In re Robinson)*, 921 F.2d 252, 253 (10th Cir. 1990) (debtor's second mortgage obligation on former marital home assigned to ex-spouse and order to hold ex-spouse harmless was support); *Hancock v Busch* (*In re Busch)*, 369 B.R. 614, 622 (10th Cir. BAP 2007) (party's obligation to pay second mortgage was nondischargeable support); *Lewis v. Trump (In re Trump)*, 309 B.R. 585, 595 (Bankr. D. Kan. 2004) (the function of husband's obligation to pay the second mortgage was to allow the wife and children to remain in the marital home as shelter; accordingly, the obligation was in the nature of support); *In re Marriage of Wisdom*, 833 P.2d 884, 889 (Colo. Ct. App. 1992) (an obligation to pay a mortgage may be in the nature of support or in lieu of maintenance, notwithstanding party's waiver of maintenance). Here, the Court finds the function and substance of Mr. Siegfried's obligation to Ms. Menter was to allow her to make the mortgage payments on the Home, and the Home was necessary for Ms. Menter's support. This factor shows Mr. Siegfried's obligation is one in the nature of support.

B. Minor children, imbalance of income.

The parties' marriage was not the first for either party. Ms. Menter's child was living with her at the time of the parties' divorce, but that child was from Ms. Menter's prior marriage and was not Mr. Siegfried's. This is not a case in which one spouse remained at home with minor children while the other spouse worked outside the home, earning significantly more income. The parties did not experience an imbalance of income. The factor does not show Mr. Siegfried's obligation is one in the nature of support.

C. Form of payments.

The District Court set Mr. Siegfried's obligation as a lump sum amount, which he had the option to pay in monthly installments. The payments were to be made directly to Ms. Menter over a substantial period of time. This factor shows Mr. Siegfried's obligation is one in the nature of support.

D. Termination on remarriage or death.

Mr. Siegfried's obligation did not terminate on Ms. Menter's remarriage or death. This factor does not show Mr. Siegfried's obligation is one in the nature of support.

E. Other factors.

Mr. Siegfried made some of the payments required by the District Court Orders. He did not deduct those payments from his income taxes, and Ms. Menter did not pay taxes on those amounts as income. This other factor does not show Mr. Siegfried's obligation is one in the nature of support.

F. Conclusion.

The Court has considered each of the *Goin* factors and one additional factor. Some factors are inapplicable. Not all factors need be present in order to make a determination of the nature of an obligation. *See, e.g., Cline v. Cline (In re Cline)*, 259 Fed.Appx. 127 (10th Cir. 2007) (affirming finding of nondischargeability when only the first *Goin* factor was satisfied). In this case, the Court finds the most significant factor is Ms. Menter's need for support. Although there was no imbalance of the parties' income, there was a substantial imbalance of the debt the parties incurred during the marriage. Ms. Menter believed the debts incurred solely in her name would be paid off or substantially paid down when Mr. Siegfried received funds from construction projects with which he was involved. One construction project did not materialize as hoped. Another, the North Third Street Property, produced a significant return, but Mr. Siegfried dissipated those funds. Ms. Menter was left without an ability to pay the debts incurred during the marriage. She needed the payments from Mr. Siegfried to pay the mortgage on the Home. Her clear need for support likely motivated the District Court to find Mr. Siegfried's payments to be in the nature of support and, therefore, nondischargeable in bankruptcy, even though that latter determination was premature. This Court similarly finds Mr. Siegfried's payments to be in the nature of support and nondischargeable under § 523(a)(5).

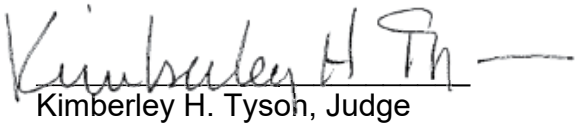
IV. CONCLUSION

For the reasons discussed above, the Court finds Mr. Siegfried's obligations under the 2005 District Court Order, the 2008 District Court Order, and the 2011 District Court Order are nondischargeable support obligations within § 523(a)(5). The Court will enter a separate judgment to that effect.

IT IS SO ORDERED.

Dated September 16, 2019

BY THE COURT:



Kimberley H. Tyson, Judge
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable Michael E. Romero

In re:	
DANIEL RICHARD DOLL,	Case No. 17-20831 MER
Debtor.	Chapter 13

ORDER

THIS MATTER comes before the Court on confirmation of the Amended Chapter 13 Plan of Debtor Daniel Ricahrd Doll ("**Debtor**") and the objections to confirmation filed by Wendy Kuhlman ("**Kuhlman**"), Charles Willman ("**Willman**"), and the Chapter 13 Trustee, Adam Goodman ("**Trustee**").

BACKGROUND

A. The Separation Agreement.

In connection with divorce proceedings, on October 5, 2015, the Debtor and Ms. Kuhlman entered into a separation agreement ("**Separation Agreement**"). The Separation Agreement was the product of mediation between the Debtor and Ms. Kuhlman. They twice entered into mediation, once for temporary child support and a second time to enter into the Separation Agreement. Both parties were represented by counsel during the mediations and in connection with the Separation Agreement.

The Separation Agreement provides for a division of marital property and an allocation of debt obligations, including with respect to real property owned by the Debtor and Ms. Kuhlman located in Rifle, Colorado ("**Marital Home**"). Relevant to these proceedings, Section 2 of the Separation Agreement provides:

> 2. REAL PROPERTY.
>
> a. The parties own as joint tenants a house located at 356 Columbine Drive, Rifle, Colorado. The parties agree that such residence will be the sole and separate property of the Wife. Wife shall be responsible for all expenses of the Home, including but not limited to, water and utility bills, real property taxes, telephone bills, insurance premiums, pest control, and all necessary repairs, both major and minor and shall hold Husband harmless therefrom.
>
> b. The parties agree they currently have a 1st and 2nd mortgage on the home. The Wife will be solely responsible for payment

> of the 1st mortgage and will either sell the home or refinance the home to remove the Husband's name from the loan by September 1, 2016. In the event the husband fails to refinance the 2nd mortgage or pay the 2nd mortgage on or before December 31, 2015, the parties agree the Wife, in addition to any other remedies, will be entitled to 8 months from the time the 2nd is paid or refinanced in which to sell the home or refinance the home and remove the Husband's name from the 1st mortgage.
>
> c. The Husband shall solely be responsible for payment in full of the 2nd mortgage on the marital home. Husband shall pay off such debt or refinance the 2nd mortgage no later than December 31, 2015.
>
> d. Each party shall keep the payments current on the 1st and 2nd mortgages, at all times, until paid.[1]

Further, Section 4 of the Separation Agreement provides:

> 4. MAINTENANCE. In consideration of the division of marital property and with full knowledge of the assets and circumstances of one another, both parties hereby waive, now and for all time, any right to maintenance or spousal support from one another arising out of their present marriage to one another. Both parties hereby state their understanding that once waived, their right to maintenance can never be reasserted.[2]

The Debtor was also required under the Separation Agreement to pay "$10,000 of [Ms. Kuhlman's] outstanding attorney's fees to Mr. Charles H. Willman."[3]

When the Debtor failed to pay off or refinance the second mortgage by December 31, 2015, Ms. Kuhlman brought a contempt action against the Debtor in the divorce proceedings. In September 2017, the divorce court found the Debtor in contempt for failing to pay off or refinance the second mortgage by the deadline to do so.[4] In its contempt order, the divorce court ordered the Debtor to pay Ms. Kuhlman $3,000 per month, as well as pay Ms. Kuhlman's attorney's fees incurred in connection with the contempt

[1] Debtor Ex. 3, § 2, pp. 3-4.

[2] *Id*. at § 4, p. 4.

[3] *Id*. at § 9, pp. 4-5.

[4] Kuhlman Ex. 2.

proceedings.[5] The divorce court subsequently affirmed its prior ruling on November 21, 2017.[6]

B. The Debtor's Bankruptcy Case.

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on November 28, 2017 ("**Petition Date**"), and his original proposed Chapter 13 plan on that date.[7] The Debtor's original Chapter 13 plan was met with several objections, including objections by Ms. Kuhlman and the Trustee.[8] The Debtor's first amended Chapter 13 Plan was filed February 26, 2018,[9] and met with objections by Ms. Kuhlman,[10] Mr. Willman,[11] and the Trustee.[12]

The Debtor filed his second amended Chapter 13 plan ("**Second Amended Plan**") – the operative plan presently before the Court – on May 14, 2018.[13] As before, the Second Amended Plan was objected to by Ms. Kuhlman,[14] Mr. Willman,[15] and the Trustee.[16]

Both Ms. Kuhlman and Mr. Willman filed proofs of claim in the bankruptcy case. Ms. Kuhlman filed a claim for a $44,200 nondischargeable domestic support obligation.[17] Mr. Willman filed a claim for a $14,888.50

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[5] The divorce court's contempt order was not entered into evidence at trial. Instead, the evidence available with respect to that order is from testimony given at trial, as well as the divorce court's order following the Debtor's motion for reconsideration of the contempt order, which was admitted into evidence. *See* Kuhlman Ex. 2.

[6] Kuhlman Ex. 2.

[7] Unless otherwise specified, all references herein to "Section," "§," "Bankruptcy Code" and "Code" refer to the U.S. Bankruptcy Code, 11 U.S.C. § 101, *et seq*.

[8] ECF Nos. 15, 19.

[9] ECF No. 26.

[10] ECF No. 32.

[11] ECF No. 33.

[12] ECF No. 31.

[13] ECF No. 42.

[14] ECF No. 45.

[15] ECF No. 46.

[16] ECF No. 47.

[17] Proof of Claim No. 7-1.

nondischargeable domestic support obligation.[18] The Debtor has not formally objected to either claim.

Ms. Kuhlman objects to the Second Amended Plan on the basis the Debtor failed to include the debt owed to her as a priority domestic support obligation under § 101(14A), § 523(a)(5), and § 507(a)(1)(A). Ms. Kuhlman argues the Debtor's obligation to pay the second mortgage on the Marital Home imposed by the Separation Agreement is a nondischargeable domestic support obligation which must be listed as a priority debt in the Debtor's plan.

It is the Debtor's position the obligation to pay the second mortgage is not a nondischargeable domestic support obligation under § 523(a)(5), but instead is in the nature of a property division falling under § 523(a)(15). As the Court discusses below, debts falling under the latter section of the Bankruptcy Code are not entitled to priority treatment or payment in full in a Chapter 13 plan, and are dischargeable in a Chapter 13 case.

Mr. Willman objects to confirmation of the Second Amended Plan on the basis of the Debtor's failure to list his obligation to Mr. Willman under the divorce court's contempt order as a nondischargeable priority debt. According to Mr. Willman, he represented Ms. Kuhlman in the divorce proceedings between her and the Debtor, including in her efforts, via the contempt motion, to enforce the Debtor's obligations under the Separation Agreement to pay the second mortgage on the Marital Home. As dicussed above, the divorce court granted Ms. Kuhlman's contempt motion and ordered the Debtor to pay Mr. Willman's fees. Mr. Willman argues because the Debtor's obligaton on the second mortgage is a domestic support obligation under the Bankruptcy Code, the fees payable to Mr. Willman by the Debtor via the contempt order are also a nondischargeable priority obligation.

At trial, Debtor's counsel conceded if the Debtor's obligation on the second mortgage is determined to be a nondischargeable domestic support obligation under § 523(a)(5), the Debtor's obligation to Willman under the contempt order is also a nondischargeable obligation and must be treated accordingly in the Second Amended Plan.

The Trustee made several objections to confirmation of the Second Amened Plan. First, the Trustee argues the Second Amended Plan is underfunded and incapable of being administered. The Trustee agrees the Second Amended Plan does not provide for the domestic support obligation debts owed to Ms. Kuhlman and Mr. Willman, and also fails to fund a secured claim filed by Calvary SPV I, LLC. Further, the Trustee contends,

[18] Proof of Claim No. 8-1.

based on the underfunding of the Second Amended Plan, its term would need to extend beyond 60 months to be fully funded.

Second, the Trustee raises objections to the Debtor's gross income on his Form 122C-1. The Trustee asserts he is unable to determine whether the Second Amended Plan provides for the appropriate applicable commitment period and if all disposable income is being contributed to plan payments, and based on documentation received by the Trustee, believes the Debtor's income is understated. The Trustee also objects to deductions taken on the Debtor's Schedule J, including deductions for state and federal taxes, FICA, Medicare, and for alimony, maintenance and support. In addition, the Trustee states the Debtor has not provided documentation to show he is current on his domestic support obligations.

Lastly, in his objection the Trustee contends the Second Amended Plan fails to satisfy the "best-interest-of-creditors" test under § 1325(a)(4). Specifically, the Trustee states the Debtor testified at his § 341 meeting of creditors he sold a camper for approximately $13,000, but the Debtor has not provided an accounting of the proceeds. Additionally, the Trustee states the Debtor must provide documentation and a valuation for a "2017 KT350" and reconcile this asset within the Second Amended Plan.

ANALYSIS

The Debtor, as the proponent of the Second Amended Plan, bears the burden of proof to show the plan meets the requirements for confirmation found in § 1325(a). Ms. Kuhlman's and Mr. Willman's objections raise the argument the Second Amended Plan fails to properly treat their claims as domestic support obligations pursuant to §§ 523(a)(5), 507(a)(1)(A), and 1322(a)(2), thus violating § 1325(a)(1)'s requirement "[t]he plan complies with the provisions of [Chapter 13] and with the other applicable provisions of this title."[19] In addition to the same objection raised by Ms. Kuhlman and Mr. Willman, the Trustee asserts the Second Amended Plan violates §§ 1322(d), 1325(a)(3), 1325(b)(2) and (3), 1325(b)(4), and the "best-interest-of-creditors" test under § 1325(a)(4).

A. Dischargeability of Domestic Support Obligations.

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act ("**BAPCA**") amendments to the Bankruptcy Code in 2005, § 523(a)(5) provided for an exception to discharge for a debt owed:

> 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

[19] 11 U.S.C. § 1325(a).

> territorial law by a governmental unit, or property settlement agreement, but not the extent that—
>
> > (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) 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
> >
> > (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.*[20]

BAPCPA amended § 523(a)(5) to simply provide for an exception for discharge "for a domestic support obligation."[21] Section 101(14A) of the Bankruptcy Code defines the term "domestic support obligation" to mean:

> a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--
>
> > (A) owed to or recoverable by--
> >
> > > (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> > >
> > > (ii) a governmental unit;
> >
> > (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
> >
> > (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--
> >
> > > (i) a separation agreement, divorce decree, or property settlement agreement;
> > >
> > > (ii) an order of a court of record; or

[20] 11 U.S.C. § 523(a)(5) (2000) (emphasis added).

[21] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, 119 Stat. 23.

> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.[22]

"This new definition 'give[s] section 523(a)(5) a broader scope than the former terms' in the following ways: the definition now explicitly includes support obligations that accrue post-petition; the order, agreement, or determination creating the obligation can now be either pre- or post-petition; and, as pertinent here, the definition now expressly includes 'assistance provided by a governmental unit.'"[23]

Another division of this Court previously stated:

> The primary goal of bankruptcy is to provide debtors with a "fresh start." However, the policy underlying § 523(a)(5) favors the enforcement of familial support obligations over the debtor's clean slate. As a result, courts apply a broad interpretation of the term "support."[24]

Claims qualifying as domestic support obligations are afforded special treatment in Chapter 13. First, such obligations are excepted from discharge pursuant to § 1328(a)(2). Section 1328(a)(2) excepts from discharge in Chapter 13 cases debts "of the kind specified in . . . paragraph (5) . . . of section 523(a)."[25] Section 523(a)(5) expressly excludes from a debtor's discharge a debt "for a domestic support obligation."[26]

Setion 507(a)(1)(A) also gives first priority to "[a]llowed unsecured claims for domestic support obligations that . . . are owed to or recoverable

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[22] 11 U.S.C. § 101(14A).

[23] *In re Taylor*, 737 F.3d 670, 676 (10th Cir. 2013) (quoting William Houston Brown, *Bankruptcy and Domestic Relations Manual*, § 6.1 (2012)). In *Taylor*, the Tenth Circuit concluded pre-BAPCPA case law continues to be relevant post-BAPCPA because both versions of the statute require a determination the debt be in the nature of support. *Id*. at n. 4. "Pre-BAPCPA § 523(a)(5) explicitly required the debt to be 'actually in the nature of alimony, maintenance, or support.' Post-BAPCPA § 101(14A) requires the debt to be 'in the nature of alimony, maintenance, or support," without consideration of the parties' label." *Id*.

[24] *In re Loomas*, 2013 WL 74477, *3 (Bankr. D. Colo. Jan. 4, 2013) (internal citations omitted).

[25] 11 U.S.C. § 1328(a)(2).

[26] 11 U.S.C. § 523(a)(5).

by a spouse, former spouse, or child of the debtor[.]"[27] Additionally, pursuant to § 1322(a)(2), a Chapter 13 plan is required to "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different reatment of such claim."[28] Thus, a domestic support obligation is excepted from discharge, and, if it is an allowed, unsecured claim, is entitled to first priority and must be paid in full by a Chapter 13 plan.

On the other hand, debts which are *not* domestic support obligations but nonetheless arise out of a divorce or separation or in connection with a separation agreement *are* dischargeable in a Chapter 13 case. Nor are such debts afforded the same priority or payment-in-full treatment in a Chapter 13 plan as a domestic support obligation. Section 523(a)(15) provides an exception to discharge in a Chapter 7 case for a debt:

> to a spouse, former spouse, or child of the debtor and not of the kind specified in [§ 523(a)(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.[29]

Section 523(a)(15) "expands the range of marital obligations beyond those covered by § 523(a)(5), and is construed more liberally than other exceptions to discharge found in § 523(a)."[30]

In a Chapter 7 case, the distinctions between domestic support obligations, governed by § 523(a)(5), and other post-marital obligations, governed by § 523(a)(15), are immaterial because both types of debts are nondischargeable and must be paid in full. However, debts for other post-marital obligations, including property settlements, *are* dischargeable in a Chapter 13 case. Section 1328(a)(2) only excepts from discharge in a Chapter 13 case debts "of the kind specified in . . . paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8) or (9) of section 523(a)."[31]

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[27] 11 U.S.C. § 507(a)(1)(A).

[28] 11 U.S.C. § 1322(a)(2).

[29] 11 U.S.C. § 523(a)(15).

[30] *In re Kelly*, 549 B.R. 275, 281 (Bankr. D. N.M. 2016) (citing *In re Taylor*, 478 B.R. 419, 427 n. 26 (10th Cir. BAP 2012) ("Because Congress enacted § 523(a)(15) to broaden the types of marital debts that are nondischargeable beyond those described in § 523(a)(5), by implication a § 523(a)(15) exception from discharge would also be construed more liberally than other § 523 exceptions.").

[31] U.S.C. § 1328(a)(2).

Further, such debts are not entitled to priority treatment or payment in full in a Chapter 13 plan. Section 523(a)(15) expressly excludes from its nondischargeability reach a domestic support obligation (a debt "of the kind described in [§ 523(a)(5)]"), and thus takes debts nondischargeable under § 523(a)(15) out of the scope of the first priority treatment given to domestic support obligations by § 507(a)(1)(A). Because a debt which is nondischargeable under § 523(a)(15) is not entitled to priority treatment under § 507(a)(1)(A), a Chapter 13 plan is not required to pay such a debt in full pursuant to § 1322(a)(2).

It cannot reasonably be disputed the Debtor's obligation to pay the second mortgage on his and Ms. Kuhlman's marital home arises out of terms of the Separation Agreement. Thus, the obligation satisfies at least one of the elements of a nondischargeable debt under both § 523(a)(5) and § 523(a)(15). What separates the two provisions, and what will determine whether the Debtor's plan is confirmable over the objections filed against it, is whether the obligation is a "domestic support obligation" under the meaning of § 523(a)(5). If so, the Debtor's obligation is nondischargeable in this case and entitled to priority treatment and payment in full in the Second Amended Plan. If the Debtor's obligation to pay the second mortgage is not in the nature of alimony, maintenance, or support, it is dischargeable pursuant to § 523(a)(15), and the claim is not entitled to priority or payment in full under the Second Amended Plan.

For a debt or obligation to fall within § 523(a)(5)'s exception for domestic support obligations, the debt must be in "the nature of support." The creditor seeking to determine the debt is a nondischargeable domestic support obligation under § 523(a)(5) bears the burden of demonstrating, by a preponderance of the evidence, the obligation is in "the nature of support."[32]

B. Whether the Debtor's Obligation to Make Payments on the Second Mortgage Constitutes a Nondischargeable Priority Domestic Support Obligation.

Some courts, including within this Circuit, examining a similar question concluded, based on the facts of each case, a debtor's obligation to pay a second mortgage was in the nature of support and a domestic support

[32] *In re Sampson*, 997 F.2d 717, 723 (10th Cir. 1993); *In re Turner*, 266 B.R. 491, 496 (10th Cir. BAP 2001).

obligation, and must be treated as a priority claim in a Chapter 13 plan.[33] In determining whether an obligation is a nondischargeable domestic support obligation, courts within this Circuit conduct a "dual inquiry," examining: 1) whether the intent of the parties agreeing to the obligation or the court imposing it was for the debt to be support; and 2) whether the debt is, in substance, support.[34]

The intention of the parties at the time the agreement was executed is the threshold determination.[35] This inquiry "does not turn on one party's *post hoc* explanation as to his or her state of mind at the time of the agreement, even if uncontradicted. Rather, the critical inquiry is the shared intent of the parties at the time the obligation arose."[36] While the structure and the wording of a divorce decree or separation agreement can provide some evidence of intent,[37] the Court's inquiry into the parties' shared intent is not limited to the words of an agreement between them, even if unambiguous.[38] "The nature of the obligation is not restricted to the parties' label in the settlement agreement and is a question of federal law . . . [t]hat said, "[t]he bankruptcy court has the responsibility to make its own determination of the character of the obligation from the facts at hand, not rely on the denomination of the obligation in the divorce decree."[39] Additionally, "[b]ankruptcy courts examine the respective financial situations

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[33] *See In re Busch*, 369 B.R. at 623; *In re Rivet*, 2014 WL 1876285 (Bankr. D. Kan. May 8, 2014); *In re Bright*, 2012 WL 346643 (Bankr. D. Kan. Feb. 1, 2012) (noting "[n]umerous courts across the country have determined in circumstances similar to those existing here, that a mortgage debt on a former marital home ordered to be paid by debtor is support. These cases reason that the purpose or function of such an obligation is to provide a home for debtor's children and ex-spouse that they otherwise would not have been able to afford."); *In re Trump*, 309 B.R. 585 (Bankr. D. Kan. 2004); *In re Robinson*, 113 B.R. 687 (D. Colo. 1990), *aff'd In re Robinson*, 921 F.2d 252 (10th Cir. 1990).

[34] *In re Lobato*, 2011 WL 5974674, *3 (Bankr. D. Colo. Nov. 29, 2011) (citing *In re Sampson*, 997 F.2d at 723; also citing *Robinson v. Robinson (In re Robinson)*, 113 B.R. at 689 (where parties' obligations were determined by court order, relevant inquiry is the divorce court's intent).

[35] *In re Duca*, 2004 WL 2274968, *2 (Bankr. D. Colo. Aug. 9, 2004).

[36] *In re Sampson*, 997 F.2d at 723; *In re Trump*, 309 B.R. at 591 ("It is the charge of this Court to determine the parties' shared intent at the time of the divorce and the substance of the Agreement predicated on the circumstances that existed at the time of their divorce.").

[37] *In re Lobato*, 2011 WL 5974674 at *4.

[38] *In re Sargis*, 197 B.R. 681, 685-86 (Bankr. D. Colo. 1996); *see also Sampson*, 997 F.2d at 723 ("Because the label attached to an obligation does not control, an unambiguous agreement cannot end the inquiry.").

[39] *In re Busch*, 369 B.R. 614, 622 (10th Cir. BAP 2007); *In re Rivet*, 2014 WL 1876285 at *3 (Courts "are required to independently examine whether a matrimonial obligation is support or property division.").

of the parties at the time of their divorce to determine if they or the domestic court intended the payment of the home mortgage to be support or part of a property settlement."[40]

The second prong of the Court's dual inquiry requires it to examine whether the debt is, in substance, support. With respect to determining the substance of the obligation, the U.S. Court of Appeals for the Tenth Circuit states:

> 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." *In re Gianakas,* 917 F.2d 759, 763 (3d Cir.1990). This may be determined by considering the relative financial circumstances of the parties at the time of the divorce. We recognized as much in *Yeates* in relying on the former spouse's "dire financial circumstances at the time of the divorce" to affirm the district court's finding that the debt was in the nature of support. 807 F.2d at 879. Similarly, in [*In re Goin,* 808 F.2d 1391 (10th Cir. 1987)], we recognized that a separate child support award was insufficient "to provide the spouse and children with the standard of living to which they had grown accustomed," and relied on this fact in affirming the bankruptcy court's finding that the obligation was in the nature of support. 808 F.2d at 1393. And, in *Sylvester,* we recognized that "the provisions in the agreement in dispute had the actual effect of providing support to [the spouse]-enabling her to maintain a home . . . and have a monthly income," in affirming the bankruptcy court's finding that the obligation was in the nature of support. 865 F.2d at 1166 (quotations omitted). Thus, if an obligation effectively functions as the former spouse's source of income at the time of the divorce, it is, in substance, a support obligation.[41]

One bankruptcy court from within this Circuit stated: "[i]f the effect of the debtor's obligation is to maintain a standard of living for his ex-spouse and children, to provide monthly income, and to enable the ex-spouse to maintain a home, then these are indicia that the debtor's obligation is intended as support."[42] Further, "[t]he provision of shelter for one's family

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[40] *In re Rivet*, 2014 WL 1876285, *1 (Bankr. D. Kan. May 8, 2014).

[41] *In re Sampson*, 997 F.2d at 725-26; *In re Rodriguez*, 465 B.R. 882, 890 (Bankr. D. N.M. 2012 ("Factors used to determine the true nature of an obligation include: 1) the relative financial cirumstances of the parties; 2) the language and substance or the marital settlement agreement or divorce decree; 3) the degree to which the obligation enables the receiving spouse to afford daily living expenses; and 4) the parties' future prospects for financial support.").

[42] *In re Trump*, 309 B.R. at 593.

is ordinarily in the nature of support and, although not conclusive, represents strong indicia" the debtor's obligation is in the nature of support.[43]

Based on the evidence presented to it, the Court concludes the Debtor's obligation under the Separation Agreement to pay or refinance the second mortgage on the Marital Home is a nondischargeable domestic support obligation under § 523(a)(5).

The terms of the Separation Agreement are not clear or certain with respect to the parties' intent. Even if it were, the Court is not bound by the terms therein, it is merely some evidence of the parties' intent. In the Separation Agreement, the Debtor and Ms. Kuhlman agreed to a division of property and an allocation of certain debts. This included, among other agreements, for Ms. Kuhlman to obtain sole ownership of the Marital Home, her responsibility for payment of the first mortgage, and agreement to hold the Debtor harmless for all expenses, utilities, insurance, and repairs of the home.[44] Ms. Kuhlman is also obligated to sell or refinance the Marital Home to remove the Debtor's name from the first mortgage by September 1, 2016.[45] The Debtor agreed to be solely responsible for payment or refinancing of the second mortgage on the Marital Home by December 31, 2015.[46] Additionally, in the Separation Agreement the parties expressly waived any right to maintenance and spousal support.[47]

The parties' testimony at trial was more illuminative, and supports a finding of the parties' shared intent for the Debtor's obligation to pay the second mortgage to be in the nature of support. The Debtor stated at trial he did not feel he had an obligation to make any maintenance or spousal support payments because of the amount of Ms. Kuhlman's income. Instead of providing ongoing maintenance and support payments to assist with Ms. Kuhlman's and her children's living expenses, to which he concedes he was opposed, the Debtor agreed to take on sole responsibility for the second mortgage obligation. The Debtor testified his understanding of taking on the second mortgage obligation was to replace the maintenance and support for Ms. Kuhlman and her children expressly waived by the parties.

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[43] *Id*. at 594; *In re Rivet*, 2014 WL 1876285 at *4 ("in general, an allocation of debt secured by a lien on the home of the non-debtor and dependent children is likely to be support.") (citing *In re Busch*, 369 B.R. at 622).

[44] Debtor Ex. 3, § 2, ¶ a.

[45] *Id*. at ¶ b.

[46] *Id*. at ¶ c.

[47] Debtor Ex. 3, § 4, p. 4

Ms. Kuhlman testified she agreed to the waiver of support and maintenance because the Debtor was adamantly against paying any child support. Rather than prolong the divorce proceedings further, Ms. Kuhlman agreed to waive direct support for hers and her children's living expenses in exchange for the Debtor taking on the second mortgage obligation. Ms. Kuhlman testified her ultimate goal with this agreement was for the Debtor to pay off the second mortgage by December 1, 2015, allow her to sell the Marital Home in spring 2016, and purchase a new home in Glenwood Springs, Colorado, where she works and her children attend school. Ms. Kuhlman stated she could not have afforded to do so without this agreement, and she could not have afforded to live on her own with her children absent the Debtor's payments on the second mortgage.

The Debtor's and Ms. Kuhlman's testimony is not necessarily in conflict with respect to their intent for the Debtor's obligations on the second mortgage. Even if the Separation Agreement does not expressly refer to Debtor's obligation on the second mortgage as maintenance or spousal support, the evidence shows the parties intended the Debtor's payments on the second mortgage to effectively become such payments. The Court is not bound by the parties' waiver of maintenance and support in the Separation Agreement from concluding they intended for the Debtor's payment of the second mortgage to constitute support for Ms. Kuhlman and her children.

The parties' shared intent for the mortgage payments to be support for Ms. Kuhlman and her children is also evidenced by Ms. Kuhlman's and the Debtor's relative financial circumstances at the time of the Separation Agreement. The Tenth Circuit has stated: "[i]n addition to being extremely relevant in the determination of the substance of the obligation, a spouse's need for support at the time of the divorce is sufficient to presume that the parties' intended the obligation as support."[48]

According to her Sworn Financial Statement and Child Support Obligation worksheets submitted in the divorce proceedings, at the time the Separation Agreement was entered into Ms. Kuhlman's gross monthly income was approximately $5,487.00.[49] The Child Support Obligation worksheet submitted by Debtor in the divorce proceeding reflects that amount for Ms. Kuhlman's income, and shows the Debtor's monthly gross income at the time was $13,085.00.[50] Ms. Kuhlman's Sworn Financial Statement shows montly payments on the first mortgage for the Marital Home for which Ms. Kuhlman is obligated were $1,010.60 and the monthly

[48] *In re Sampson*, 997 F.2d at 726 n. 7.

[49] Kuhlman Exs. 4, 5, 7.

[50] Debtor Ex. 4.

payments on the second mortgage were $242.44.[51] After deducting the mortgage payments, other debt and monthly expenses, Ms. Kuhlman's net income after expenses at the time of the Separation Agreement was minus $1,170.15.[52] During the divorce proceedings, Ms. Kuhlman asserted she was entitled to receive as much as $3,056 per month in spousal maintenance from the Debtor,[53] and as much as $1,050.84 in child support from the Debtor.[54]

Ms. Kuhlman testified one of the reasons she agreed to the waiver of spousal maintenance and child support and allocation of the mortgage debts was because the Debtor was "dead set" against paying child support. Absent the agreement for the Debtor to pay the second mortgage, she could not afford payments on both the first and second mortgages herself. Nor does it appear, based on the evidence of the parties' relative financial circumstances, Ms. Kuhlman could have provided for her children without the Debtor making payments on the second mortgage. The rental income Ms. Kuhlman received from the tenant at the Marital home was enough to pay her obligation on the first mortgage for the property, and Ms. Kuhlman testified she would not have been able to live on her own if the Debtor was not paying the second mortgage. In fact, Ms. Kuhlman also testified she had to move at least once after her divorce to lower her monthly rental payments after the Debtor stopped making his payments on the second mortgage for the Marital Home.

Based on the terms of the Separation Agreement and the testimony and other evidence at trial, the Court thus concludes Ms. Kuhlman and the Debtor intended their agreement for the Debtor's payment of the second mortgage to constitute support under the meaning of § 523(a)(5).

The Court also concludes, based on the considerations enumerated by the Tenth Circuit in *Sampson*, and by other courts addressing similar facts, the evidence in this case demonstrates the Debtor's obligation is, in substance, support for Ms. Kuhlman and her children. The Tenth Circuit has stated the "critical question" in determining whether an obligation is in the nature of support is "the function served by the obligation at the time of divorce."[55] The Court takes a realistic approach to what constitutes "support" for purposes of § 523(a)(5). "In the Tenth Circuit, the terms

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[51] *Id*.

[52] *Id*.

[53] Kuhlman Ex. 5.

[54] Debtor Ex. 4. This amount reflected $0 in monthly spousal maintenance by the Debtor.

[55] *In re Sampson*, 997 F.2d at 725-26.

'maintenance' and 'support' are entitled to broad application in a realistic manner."[56]

Ms. Kuhlman's and the Debtor's relative financial circumstances support a finding the Debtor's obligation to pay the second mortgage functioned as support for Ms. Kuhlman. The Debtor's payments on the second mortgage enabled Ms. Kuhlman to maintain a standard of living for herself and her children. In light of the Debtor's apparent refusal to make child support payments, the payments on the second mortgage were necessary to provide her and her children the ability to afford daily living expenses. Ms. Kuhlman could not make both mortgage payments on her own. Additionally, Debtor's payments on the second mortgage were to enable Ms. Kuhlman to maintain a home for herself and her children, even if that home was not the Marital Home. The Debtor's payment of the second mortgage in full by December 31, 2015, was intended to allow Ms. Kuhlman to take advantage of any resulting equity in the Marital Home to purchase a new home for herself and her children. Ms. Kuhlman gave up support payments for hers and her children's living expenses to do so. While the Debtor was making payments on the second mortgage, Ms. Kuhlman was able to afford renting a home in Glenwood Springs, where she works and her children attend school. When the Debtor stopped making payments, she was required to move to a new home to afford a lower rent. Although not labeled as such, the Debtor's payments on the second mortgage effectively functioned as a source of income for Ms. Kuhlman to enable her to provide for her children and provide for their home. Accordingly, the Court finds the Debtor's obligation to pay the second mortgage on the Marital Home was in the nature of a nondischargeable support obligation under § 523(a)(5).

Therefore, the Court concludes Ms. Kuhlman demonstrated the Debtor's obligation to pay the second mortgage on the Marital Home is a nondischargeable domestic support obligation under § 523(a)(5). Accordingly, pursuant to §§ 507(a)(1) and 1322(a)(2), Ms. Kuhlman's claim must be treated as a first priority claim and paid in full under the Debtor's Chapter 13 plan. Likewise, Mr. Willman's claim for attorneys' fees arising out of enforcement of the Debtor's domestic support obligation must be afforded the same treatment under the plan.[57] Because the Second

[56] *In re Busch*, 369 B.R. at 622 (citing *Miller v. Miller (In re Miller)*, 284 B.R. 734, 738 (10th Cir. BAP 2002) (citing *Jones v. Jones (In re Jones)*, 9 F.3d 878, 881 (10th Cir. 1993) (The term support "should not be read so narrowly as to exclude everything bearing on the welfare of the child but the bare paying of bills on the child's behalf.")).

[57] *See In re Loomas*, 2013 WL 7477 at *5 ("Attorney fees which have been incurred in the process of litigating alimony or support issues are considered obligations in the nature of support.") (citing *In re Jones*, 9 F.3d 878, 881 (10th Cir. 1993)); *see also In re Laver*, 2012 WL 3848643, *1 (Bankr. D. Utah Sept. 5, 2012) ("Attorney fees that have necessarily been expended to enforce a domestic support obligation are excepted from discharge.").

Amended Plan does not propose such treatment for their claims, it cannot be confirmed.

In light of the Court's determination the Second Amended Plan is unconfirmable based on its proposed treatment of Ms. Kuhlman's and Mr. Willman's claims, the Court need not determine whether the Second Amended Plan is confirmable over the Trustee's objections. The Court will permit the Debtor an opportunity to file a third amended Chapter 13 plan to afford the correct treatment to Ms. Kuhlman's and Mr. Willman's claims, and, in so doing, permit the Debtor an opportunity to address the Trustee's objections and provide the Trustee with any documentation necessary to allay or resolve his concerns.

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED Ms. Kuhlman's and Mr. Willman's objections to confirmation are sustained, and confirmation of the Second Amended Plan is denied.

IT IS FURTHER ORDERED the Debtor may elect to file a third amended Chapter 13 plan, to be accompanied by a Confirmation Status Report, consistent with the Court's findings within sixty (60) days of entry of this order.

Further, the Court was notified Debtor's counsel, Randall B. Pearce, was suspended from the practice of law by the Colorado Supreme Court on or about January 14, 2019.

IT IS THEREFORE ORDERED counsel for Wendy Kuhlman shall serve the Debtor individually with a copy of this Order, and in such a manner as for delivery to be as quickly as practicable. Additionally, counsel shall file in this proceeding a certificate of service of this Order upon Debtor.

Dated January 18, 2019

BY THE COURT:

Michael E. Romero, Chief Judge
United States Bankruptcy Court

TITLE 14 REQUIREMENTS/TIMING AND TACTICS FROM THE FAMILY COURT PERSPECTIVE

Brian DeBauche, Esq.

I. A DOMESTIC RELATIONS ORDER IS IMPACTED BY BANKRUPTCY IN A VARIETY OF WAYS.

A. Generally
   a. Any domestic relations order will provide domestic support obligations, or DSO
      i. A domestic support obligation is defined under §101(14A);
         1. A debt that accrues before, on, or after the date of the order for relief in a case under this title,
         2. that is owed to or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or a governmental unit;
         3. Is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
         4. Established or subject to establishment before, on, or after the date of the order for relief in a case under this title, set forth in a separation agreement, divorce decree, or property settlement agreement; an order of a court of record; or a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily.

   b. "the evolution of domestic relations law has made it increasingly difficult to distinguish between support and property division." *Buccino v. Buccino,* 397 Pa.Super. 241, 580 A.2d 13, 18-19 (1990).

   c. Many courts have observed that "even an obligation designated as a property settlement may be related to support because **state courts often will adjust alimony awards depending on the nature and amount of marital assets available for distribution.**" *In re Adams,* 200 B.R. 630, 633 (N.D.Ill.1996); *In re Gianakas,* 917 F.2d 759, 763 (3rd Cir.1990); *Buccino,* at 18.

B. Colorado factors for award of support or maintenance:
   a. C.R.S. 14-10-113 states the court shall make initial written or oral findings concerning:
   b. (A) The amount of each party's gross income;

c. (B) The marital property apportioned to each party;
d. (C) The financial resources of each party, including but not limited to the actual or potential income from separate or marital property;
e. (D) Reasonable financial need as established during the marriage;

C. Colorado factors for the amount and duration of maintenance then include:
a. C.R.S. 14-10-113(3)(c) the court shall consider all relevant factors, including but not limited to:
b. (I) The financial resources of the recipient spouse, including the actual or potential income from separate or marital property or any other source and the ability of the recipient spouse to meet his or her needs independently;
c. (II) The financial resources of the payor spouse, including the actual or potential income from separate or marital property or any other source and the ability of the payor spouse to meet his or her reasonable needs while paying maintenance;
d. (III) The lifestyle during the marriage;
e. (IV) The distribution of marital property, including whether additional marital property may be awarded to reduce or alleviate the need for maintenance;
f. (V) Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, if necessary, and any necessary reduction in employment due to the needs of an unemancipated child of the marriage or the circumstances of the parties;
g. (VI) Whether one party has historically earned higher or lower income than the income reflected at the time of permanent orders and the duration and consistency of income from overtime or secondary employment;
h. (VII) The duration of the marriage;
i. (VIII) The amount of temporary maintenance and the number of months that temporary maintenance was paid to the recipient spouse;
j. (IX) The age and health of the parties, including consideration of significant health care needs or uninsured or unreimbursed health care expenses;
k. (X) Significant economic or noneconomic contribution to the marriage or to the economic, educational, or occupational advancement of a party, including but not limited to completing an education or job training, payment by one spouse of the other spouse's separate debts, or enhancement of the other spouse's personal or real property;
l. (XI) Whether the circumstances of the parties at the time of permanent orders warrant the award of a nominal amount of maintenance in order to preserve a claim of maintenance in the future;
m. (XII) Whether the maintenance is deductible for federal income tax purposes by the payor and taxable income to the recipient, and any adjustments to the amount of maintenance to equitably allocate the tax burden between the parties; and
n. (XIII) Any other factor that the court deems relevant.

D. The catch all provision for both maintenance and property awards:
   a. C.R.C.P. 16.2(e)(10), provides for the following:
   b. (10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. **If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years** to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities. The provisions of C.R.C.P. 60 shall not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph shall not limit other remedies that may be available to a party by law.
   c. C.R.C.P. 60(b)(5), allows for a motion to reconsider based on subsequent discovery of facts that make the original judgment unfair, and merely requires the movant show "any other reason justifying relief from the operation of the judgment."
      i. Not time barred like Rule 59, or 60(b)(1) and (2) which limits request to 182 days.
      ii. Must merely be made within a "reasonable time".

E. Factors to determine a DSO for bankruptcy court

   a. Factors to determine DSO, see, *Buccino v. Buccino*, Id.:
      i. The amount of alimony, if any, awarded by the state court and the adequacy of any such award;
      ii. The need for support and the relative income of the parties at the time the divorce decree was entered;
      iii. The number and age of children;
      iv. The length of the marriage;
      v. Whether the obligation terminates on death or remarriage of the former spouse;
      vi. whether the obligation is payable over a long period of time;
      vii. the age, health, education, and work experience of both parties;
      viii. whether the payments are intended as economic security or retirement benefits;
      ix. the standard of living established during the marriage.
      x. the express language of the divorce agreement: "Having considered the relative financial circumstances of the parties, including, but not limited to . . ., the Court finds . . . " and consider very carefully, 'hold harmless' clauses, see below.
      xi. the relative financial positions of the parties at the time of the agreement;
      xii. the amount of the property division;
      xiii. the number and frequency of payments;
      xiv. whether the agreement includes a waiver of support rights;

xv. whether the obligation can be modified or enforced in state court; and
xvi. whether the obligation is treated as support for tax purposes.

b. From *In re Fosco*, 289 B.R. 78 (Bankr.N.D. Ill.2002) the court used the following factors:

i. the language and substance of the divorce judgment in the context of surrounding circumstances;
ii. the function served by the obligation;
iii. the relative incomes and financial circumstances of the parties;
iv. the nature and duration of the payments;
v. the comparative ages, employability and educational levels of the parties;
vi. waivers of maintenance, and
vii. other factors bearing on the spouse's need for support at the time the order was entered, Hansel v. Hansel, 1992 WL 280799 (N.D.Ill.),
viii. including whether there are children of the marriage who require support. In re LeRoy, at 503.
ix. Notwithstanding this list, however, the critical inquiry is ultimately whether the intent of the divorce court and the parties *90 was to provide support or to divide marital property. Id. at 503. In order to find that the debt qualifies as support, Sarah must show that at the time of entry of the divorce judgment, the payment of the debt was essential to maintain the necessities of life, such as food, housing, clothing, and transportation. Hansel, at *4; Yeates v. Yeates, 807 F.2d 874, 879 (10th Cir.1986).

c. DSOs are NEVER dischargeable pursuant to §523(a)(5);

d. **However**: Property Settlement or "Other" Debts under §523(a)(15) may be dischargeable, based upon which Chapter the Bankruptcy was filed under:
   i. Chapters 7, 11 and 12 – Property Settlement and other divorce-related debt are not dischargeable, automatically! No adversary complaint is needed; proof of claims must be filed.

   ii. Chapter 13 – Property Settlement and Other (non-support debt) can be discharged in a completed Chapter 13 case.

      1. National failure rate stands at approximately 2/3 of all filings; only about one-third of all Chapter 13 cases make it to discharge). See, fn.[i]
      2. Proof of claims, and objection to confirmation, must be filed.
      3. The discharge is not automatic; and with research and work, some property settlements and divisions, particularly given protection by language in a separation agreement, can be rendered non-dischargeable.

iii. In the Tenth Circuit, the terms "maintenance" and "support" are entitled to broad application in a realistic manner. Miller v. Miller (In re Miller), 284 B.R. 734, 738 (10th Cir.BAP2002) (citing Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir.1993) (The term support "should not be read so narrowly as to exclude everything bearing on the welfare of the child but the bare paying of bills on the child's behalf.") Therefore a second mortgage obligation can be in the nature of nondischargeable support. See, *In re Busch*, 369 B.R. 614 Bankr.A.P.10th Cir.2007); and see e.g., In re Bright, Bankr.Court 11-10214 (non-published D.Kan.2012).

e. Exceptions to the automatic stay in §362(b)(2) are the following:

i. • Establishment of paternity;
ii. • Establishment or modification of an order for domestic support obligations;
iii. • Child custody or visitation;
iv. • Terminating marital status;
v. • Domestic violence proceedings;
vi. • Collecting DSO obligation from property that is not part of estate.

II. JURISDICTION TO DETERMINE: CONCURRENT OR EXCLUSIVE.

a. Courts split on whether there is concurrent jurisdiction on the question of whether an automatic stay applies; but sanctions are available for any willful violation.
   i. Courts have held that only the bankruptcy court has jurisdiction[1];

   ii. and alternatively, courts including Colorado, have held that there is concurrent jurisdiction between the state court and the bankruptcy court.[2]

b. Concurrent Jurisdiction may exist between the State and Federal Courts as to Which Court can Decide if a Debt is a DSO and Discharged.

[1] Gruntz v. County of Los Angeles (In re Gruntz), 166 F.3d 1020, reh'g granted, 177 F.3d 729 (9th Cir. 1999); Rainwater v. State of Alabama (In re Rainwater), 233 B.R. 126 (Bankr. N.D. Ala. 1999); In re Raboin, 135 B.R. 682 (Bankr. D. Kan. 1991); and In re Sermersheim, 97 B.R. 885 (Bankr. N.D. Ohio 1989)

[2] H.U.D. v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc., 64 F.3d 920 (4th Cir. 1995); Picco v. Global Marine Drilling Co., 900 F.2d 846 (5th Cir. 1990); Brock v. Morysville Body Works, Inc., 829 F.2d 383 (3d Cir. 1987); Hunt v. Bankers Trust Co., 799 F.2d 1060 (5th Cir. 1986); NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986); Erti v. Paine Webber, Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.), 765 F.2d 343 (2d Cir. 1985); In re Glass, 240 B.R. 782 (Bankr. M.D. Fla. 1999); Pope v. Wagner (In re Pope), 209 B.R. 1015 (Bankr. N.D. Ga. 1997); and Martinez v. Buckley (In re Martinez), 227 B.R. 442 (Bankr. D.N.H. 1998).

i. Although the DSO determination is a matter of federal law, significant authority exists to grant concurrent jurisdiction to the state and federal courts to determine if a debt was discharged as one that is in the nature of support.[3]
ii. Colorado clearly adopted concurrent jurisdiction. *In re Marriage of Yates*, 148 P.3d 304 (Colo.App.2006).

III. BAPCPA (2005) AND DISCHARGEABILITY LITIGATION

There is an expressed Congressional preference for the rights of spouses to alimony, maintenance or support over the rights of debtors to a "fresh start" free of debts. *Forsdick v. Turgeon*, 812 F.2d 801, 804 (2d Cir.1987).

DISCHARGEABILITY LITIGATION.

A. A party who objects to the discharge of a particular debt has the burden of proving non-dischargeability. Bankruptcy Rule 4005; *Matter of Long*, 794 F.2d 928, 930 (4th Cir.1986); *In re Kleppinger*, 27 B.R. 530, 531 (Bankr.M.D.Pa.1982).

B. In the end, almost all Marital Debt should be Non-Dischargeable

C. DSOs are NEVER dischargeable pursuant to §523(a)(5).

D. Property Settlement or "Other" Debts under §523(a)(15) differ depending upon which Chapter the Bankruptcy was filed under:

1. Chapters 7, 11 and 12 – Property Settlement and other divorce-related debt is NOT dischargeable, automatically! No adversary complaint is needed;

[3] 7 See, e.g., Eden v. Robert A. Chapski, Ltd., 405 F.3d 582 (7th Cir. 2005); In re Siragusa, 27 F.3d 406 (9th Cir. 1994); Swartling v. Swartling (In re Swartling), 337 B.R. 569 (Bankr. E.D. Va. 2005); In re McGregor, 233 B.R. 406 (Bankr. S.D. Ohio 1999); In re Antonio, 241 B.R. 883 (Bankr. N.D. Ill. 1999); Henry v. Henry (In re Henry), 238 B.R. 472 (Bankr. D.N.D. 1999); In re LaCasse, 238 B.R. 351 (Bankr. W.D. Mich.1999); Hopson v. Hopson (In re Hopson), 216 B.R. 297 (Bankr. N.D. Ga. 1997); Granados v. Granados (In re Granados), 214 B.R. 241 (Bankr. E.D. Cal. 1997); Brennick v. Brennick (In re Brennick), 208 B.R. 613 (Bankr. D.N.H. 1997); In re Ladak, 205 B.R. 709 (Bankr. D. Vt. 1997); Pope v. Wagner (In re Pope), 209 B.R. 1015 (Bankr. N.D. Ga. 1997); In re Smithers, 194 B.R. 102, 106 (Bankr. W.D. Ky. 1996); In re Cummings, 201 B.R. 586 (Bankr. S.D. Fla. 1996); Collins v. Hesson (In re Hesson), 190 B.R. 229, 236 (Bankr. D. Md. 1995); Adkins v. Adkins (In re Adkins), 191 B.R. 941 (Bankr. M.D. Fla. 1996); Brothers v. Tremaine (In re Tramaine), 188 B.R. 380, 384 (Bankr. S.D. Ohio 1995); In re Crawford, 183 B.R. 103 (Bankr. W.D. Va. 1995); In re Thaggard, 180 B.R. 659 (M.D. Ala. 1995); and Fidelity National Title Ins. Co. v. Franklin (In re Franklin), 179 B.R. 913 (Bankr. E.D. Cal. 1995).

2. Chapter 13 – Property Settlement and Other (non-support debt) can be discharged in a completed Chapter 13 case. (60-70% national failure rate – only about one-third of all Chapter 13 cases make it to discharge).
3. Must file proof of claim from dissolution matter, and an objection to confirmation of the Chapter 13 Plan.
4. No need to file an adversary action for a property claim for the non-filing spouse.

E. Determining Dischargeability of arguable property division issues

1. First, the court must review the language of the property settlement agreement or the judgment of divorce. If this review does not answer this question, then the court must review additional evidence to determine the nature of the debt. See, In re Gianakas, 917 F. 2d 759 762 (3rd Cir. 1990).
2. The court must look beyond the label attached to an obligation by a settlement agreement to examine its true nature. See 3 Collier On Bankruptcy p 523.15 (15th ed.1990). As the court noted in In re Yeates, 807 F.2d 874, 878 (10th Cir.1986), "a debt could be in the 'nature of support' under section 523(a)(5) even though it would not legally qualify as alimony or support under state law."
3. Although the decree or settlement establishing the obligation almost invariably arises in the context of a state court proceeding, whether the obligation is in the nature of alimony, maintenance or support for the purposes of the Bankruptcy Code is a question of federal, not state, law. H.R.Rep. No. 595, 95th Cong., 1st Sess. 364 (1977), reprinted in 1978 U.S.Code Cong. & Admin.News 5963, 6320; S.R. No. 989, 95th Cong., 2d Sess. 79 (1978), reprinted in 1978 U.S.Code Cong. & Admin.News 5787, 5865; Sylvester v. Sylvester,865 F.2d 1164, 1166 (10th Cir.1989).
4. Mortgages: In re Herbert, 321 B.R. 628 (EDNY 2005)(debtor's obligation to make lump sum payments for shelter was non-dischargeable support even though parties waived support under the separation agreement).
5. Birth expenses. Williams v. Kemp (In re Kemp), 232 F.3d 652 (8th Cir. 2000).
6. College expenses. In re Pheegley, 443 B.R. 154 (8th Cir. BAP 2011)(Chapter 13 debtor's obligation to former spouse to continue her education so that she could become a teacher and earn an income sufficient to support herself was a non-dischargeable DSO).
7. Day care expenses. Rouse v. Rouse (In re Rouse), 212 B.R. 885 (Bankr. E.D. Tenn. 1997). These expenses in Colorado are routinely ordered as part of any support order, however.
8. Car Payments. In re Merrill, 252 B.R. 497 (B.A.P. 10th Cir. 2000); and In re Krueger, 457 B.R. 465 (Bankr. D.S.C. 2011).

F. Examples of non-dischargeable obligations other than property division.

1. An attorney who was owed attorneys fees filed a Complaint under §523(a)(2)(A) for fraud, misrepresentations and/or false representations because her client failed to pay her fees. The first Circuit B.A.P. (Bankruptcy Appellate Panel) determined that the attorney failed to show that the debtor's actions rose to a level beyond mere inability to repay. The Court left open the possibility that the attorney/creditor could have shown facts and circumstances to prove a case under §523(a)(2)(A) if the evidence had been more in line with the statute. See, deBenedictis v. BradyZell (In re Brady-Zell), 500 B.R. 295 (1st Cir. B.A.P. 2013).

2. Fees and costs arising from custody litigation.

Debts to professionals involved in a domestic relations case, are considered to be covered by the 'support' provisions and therefore non-dischargeable; in *In re Miller,*55 F.3d 1487 (10th Cir.1995) the state court had entered judgments ordering the debtor to pay directly to the guardian ad litem and the court-appointed psychologist, the fees owed connection with the divorce proceeding. The judgments also stated that they were "in the nature of support on behalf of the parties' minor children and, as such, neither were dischargeable in bankruptcy." *Miller,* 55 F.3d at 1488. The debtor asked the bankruptcy court to declare the judgment debts dischargeable in her bankruptcy case. Based on the plain language of § 523(a)(5), the bankruptcy court concluded that the debts did not fall within the exception to discharge because the obligations "were not owed to a spouse, former spouse, or child of the debtor. . . ." *Id.* The district court reversed based on the Tenth Circuit's earlier decision in *Jones v. Jones (In re Jones),* 9 F.3d 878, 881-82 (10th Cir. 1993), which held that "the term `support' as used in § 523(a)(5) is entitled to broad application" and that "court-ordered attorney's fees arising from post-divorce custody actions are deemed in the nature of support . . . and nondischargeable." *See Miller,* 55 F.3d at 1489. **[425 B.R. 476]**

In its opinion affirming the district court, the Tenth Circuit in *Miller* reasoned that "[e]xceptions to discharge are to be narrowly construed, so as to effect the `fresh start' purpose of bankruptcy. The policy underlying § 523(a)(5), however, favors enforcement of familial support obligations over a `fresh start' for the debtor." *Id.* at 1489 (citation omitted). The court reasoned:

> [D]ebts to a guardian ad litem, who is specifically charged with representing the child's best interests, and a psychologist hired to evaluate the family in child custody proceedings, can be said to relate just as directly to the support of the child as attorney's fees incurred by the parents in a custody proceeding.

Id. at 1490. Thus, in *Miller,* the Tenth Circuit followed its previous decision in *Jones* and held that the guardian ad litem fees were nondischargeable and accordingly reaffirmed the principle that the nature of debt, rather than the identity of the creditor, should determine the outcome of § 523(a)(5) litigation. See also, *Madden v. Staggs (In re Staggs),* 203 B.R. 712,

714-16 (Bankr.W.D.Mo.1996), *Brown v. Brown (In re Brown),* 177 B.R. 116, 119 (Bankr. M.D.Fla.1994).

3. This may include fees for litigation in bankruptcy court over non-dischargeability. The Tenth Circuit allows for such fees claims in dischargeability litigation, when provided for either by state law (C.R.S. 14-10-119 for domestic fees apportionment) or a fee-shifting agreement (clearly set forth in the separation agreement in the event of enforceability problems).

4. In re Wohleber, 596 B.R. 554, 6th Cir. Bankruptcy App. 2019, considered property division and enforcement issues for a DSO; Enforcement of child support and spousal support are not stayed by the automatic stay unless the collection is being sought from property of the estate.

5. More recent cases in other districts appear to be uniform in holding that creditors have a duty to stay the post-petition enforcement of **pre-petition civil contempt orders** issued by state courts. See In re Johnston, 321 B.R. 262, 282–86 (D. Ariz. 2005); Siskin v. Complete Aircraft Servs., Inc. (In re Siskin), 231 B.R. 514, 520 (Bankr. E.D.N.Y. 1999) ("defendants had an affirmative obligation to ensure that the outstanding Warrant of Arrest was not enforced."); Goodman v. Albany Realty Co. (In re Goodman), 277 B.R. 839, 842 (Bankr. M.D. Ga. 2001) ("even if the warrant were based on Debtor's disrespect for the superior court, it is still being used as a collection device. As a result ... the arrest warrant is covered by the automatic stay.").

6. In re Caffey, 384 Fed.Appx. 882 (11th Cir., 2010); on the whole, the concern about bankruptcy courts interfering with essential state court functions like domestic support obligations is not triggered in a case like this where the imposition of sanctions has no effect on the validity of the state court judgment.

    a. Russell sued Caffey in Alabama state court to recover unpaid child support. Caffey failed to appear at the July 2007 hearing, so the state court orally determined his liability and ordered that he be held in contempt. Shortly thereafter, on August 3, 2007, Caffey filed for bankruptcy protection in the Southern District of Alabama. On August 8, 2007, the state court judge signed the written order concerning Caffey's child support obligations and, on August 17, 2007, executed a writ of arrest.
    b. The court still found Russell violated the automatic stay imposed by the bankruptcy court even though the court determined Caffey would be held in contempt before he filed for bankruptcy

7. There are other provisions of non-dischargeability that creditors can (and have) considered and creatively pursued, including, but not limited to,
    a. §§ 523(a)(2)(fraud);

Successfully in *In re Fosco*, where the debtor represented he was using wife's paychecks to make payments on a mortgage; however the home was owned by his father, was never transferred, and was distributed by a dissolution court when the debtor lied directly to that court about ownership.

b. breach of fiduciary duty;
c. embezzlement or larceny, and willful and malicious conduct.

8. RETIREMENT ACCOUNT DIVISION

Divisions of retirement or pension funds pursuant to a Qualified Domestic Relations Order • The courts generally hold that "claims" do not arise under a QDRO as the QDRO transfers title under the state court order and, accordingly, does not constitute a debt subject to discharge.

Alternatively, courts determine that the divorce order impresses a constructive trust against the retirement asset or that the asset belongs to the nonfiling spouse as of the time of entry of the divorce order. Patterson v. Shumate, 112 S. Ct. 2242 (1992).

• Military retirement benefits granted to a party within a divorce decree are also generally protected by the bankruptcy court. Courts generally find that these obligations are on dischargeable support or conclude that the wife's interest was not property of the estate. The divorce decree must contain a provision dividing the military retirement benefits. Ziemski v. Ziemski (In re Ziemski), 338 B.R. 802 (B.A.P. 8th Cir. 2006) and Albert v. Albert (In re Albert), 194 B.R. 907 (D. Kan. 1996).

9. EDUCATION EXPENSES

Education Expenses are generally considered a form of support. This is true, even for postmajority education expenses ("the nature of debtor's promise to pay educational expenses and child support is not determined by the legal age of majority under state law. The bankruptcy court characterized the agreement to pay educational expenses as in the nature of support, and the only ground on which debtor has challenged that characterization on appeal relates to the state law legal duty as determined by the age of majority." In re Harrell, 754 F.2d 902 (11th Cir. 1985)).

10. MEDICAL AND HEALTH INSURANCE

Courts typically examine the relative financial circumstances of the parties to determine whether an obligation to pay health insurance is a support obligation. ("In addition to the Final Decree's assessment of $400.00 per child as monthly child support, the Interlocutory Orders of the court ordered the Debtor to pay any and all existing debts related to the medical care of the four children. Like the creation of the Debtor's direct support obligation, the assessment of

responsibility for these debts formed part and parcel of an unmistakably clear program by the state court to insure the present and future well-being of the children. As such, to the extent that these debts still remain outstanding, the Debtor may not discharge responsibility for them in bankruptcy." In re Robinson, 193 B.R. 367 (Bankr. N.D. Ga. 1996).

11. THE THIRD PARTY DEBT OR CONTRACT, and HOLD HARMLESS LANGUAGE

I. Marital debt can in reality be a third party contract, only collaterally involving one of the parties to the divorce.
II. The Divorce Decree is a contract and order between the two divorcing parties. It does not impact third party creditors.
III. If a bankruptcy is filed, the underlying creditor has every right to collect from any other individual that signed on the debt and to negatively report on that person's credit.
IV. Hold harmless language can be absolutely required and essential; and must be inserted into any court order, if not resolved by separation agreement.
V. A 2013 case allowed the discharge of co-signed business debts in a Chapter 7 case because there was no hold-harmless clause between the divorcing parties with regard to an SBA loan for the business. There is a very thoughtful and thorough discussion of the history and purpose of hold harmless provisions in this case. Sherman v. Proyect (In re Proyect), Case No. 12-81457-JRS, A.P. No. 13-05121-JRS [Doc. No. 21], December 11, 2013.
VI. Bankruptcy court decisions have uniformly found hold harmless clauses to create non-dischargeable obligations. E.g., Petoske v. Petoske (In re Petoske)], 16 B.R. 412 (Bankr.E.D.N.Y. 1982); [Gentile v. Gentile (In re Gentile)], 16 B.R. 381 (Bankr.S.D.Ohio 1982); [French v. Prante (In re French)], 9 B.R. 464, 466-67 (Bankr. S.D.Cal.1981). Payments in the nature of support need not be made directly to the spouse or dependent to be non-dischargeable. *In re Kassicieh, 425 B.R. 467 (Bankr.S.D.Ohio.2010).*
VII. Cases split on whether such a clause will save a marital division of property from scrutiny and potential discharge of obligations.

IV. ENFORCEABILITY OR CONTEMPT.

1. The divorcing spouse can choose to enforce in state court, those obligations required by a clear court order; under criminal contempt, but not typically under remedial contempt.
2. The court will not likely allow, in the face of a bankruptcy stay, a civil or remedial contempt citation. See, *In re Marriage of Weis*, 232 P.3d 789 (Colo.2010).
3. The solitary exception is expressed in Weis, and is suggested by the court's own consideration of whether non-bankruptcy estate assets were available to meet any payment obligation.

4. A request for relief from the automatic stay, or some modification of the bankruptcy court's jurisdiction, appears to be necessary to prosecute in the state court any civil contempt citation otherwise.
5. Punitive contempt however is designed to punish a contemnor for willful violation of a court order; and would not involve a bankruptcy stay and concurrent jurisdiction over the same subject. The punitive contempt citation likely fits within the exception for criminal proceedings, 11 U.S.C. 362(b)(1).
6. One partial problem in any punitive contempt is the contemnor must be expressly found to be able to pay. See, *In re Nussbeck*, 974 P.2d at 498. Impliedly a bankrupt debtor lacks some ability to pay on debts, and can use the bankruptcy as part of any defense to contempt.
7. This directly means no attorney's fees can be requested on the contempt; since punitive contempt does not allow for collection of fees. C.R.C.P. 107.

V. Motion for Relief from Stay:

In re Holland, 562 B.R. 305, Bankruptcy Court E.D. Virginia, 2016

- The divorce case was filed on September 5, 2014, and had been pending more than a year when the debtor filed this chapter 13 case on October 8, 2015, on the eve of trial.
- The court considered three principal factors in deciding whether to grant relief from the automatic stay: (1) the extent to which state law is applicable; (2) judicial *308 economy and the efficient administration of the bankruptcy case; and (3) protection of the bankruptcy estate.
- In this case, no purpose is served by making a monetary equitable distribution award whether based on the marital debt of the parties or otherwise. It causes additional litigation, expense and delay for something that would have no significance. The claim cannot be paid by the chapter 13 trustee during the case and the claim is discharged at the end of the case.

In re Taub 413 B.R. 55, Bankruptcy Court E.D. New York

- The progress of this bankruptcy case requires the determination of what is the Debtor's and Mr. Taub's marital property and the equitable distribution of that property.
- "bankruptcy courts will generally defer to state courts in the interest of judicial economy and restraint and out of respect for the state courts' expertise in domestic relations issues."
- The stay was lifted and the second divorce action was permitted to proceed in state court so long as enforcement could take place in Bankruptcy court.

[i] Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes, Greene, Patel and Porter, in fn. 4: TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 217 (1989) (estimating that one-third of 1,529 chapter 13 cases in their study completed plan payments); Gordon Bermant & Ed Flynn, Measuring Projected Performance in Chapter 13: Comparisons Across the States, AM. BANKR. INST. J. 22, 22 (2000) (stating that chapter 13 completion rates hover nationally at about one-third of confirmed plans); Jean Braucher,An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown, 9 AM.BANKR.INST. L. REV. 557, 571 (2001) (reporting five judicial districts' chapter 13 completion rates in 1994, which ranged from 18.2% to 54.9%); Henry E. Hildebrand III, Administering Chapter 13—At What Price?, AM. BANKR. INST. J., July-Aug. 1994, at 16, 16 (reporting that chapter 13 trustees estimated a completion rate of 32.89% based on their experiences); Scott Norberg & Andrew J. Velkey, Debtor Discharge and Creditor Repayment in Chapter 13, 39 CREIGHTON L. REV.473, 476 (2006) (reporting discharge rate in seven district sample of 33%); William C. Whitford, The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy, 68 AM. BANKR. L.J. 397, 411 (1994) (stating that national average reported rate in 1993 for completed cases was 31%).

FAMILY LAW ISSUES IN BANKRUPTCY - TIMING AND THE TRUSTEE

Megan K. Baker, Esq.

Timing Is Everything

Timing is everything when filing a bankruptcy case for a debtor involved in a divorce proceeding. The Petition Date determines both property of the estate and applicable exemptions.

Property of the Estate

Property of the estate is determined as of the Petition Date. 11 U.S.C. § 541; *In re Dittmar*, 618 F.3d 1199, 2017 (10th Cir. 2010) ("On the petition date all legal and equitable interests became property of the estate").

Under Utah law, a debtor holds an equitable interest in marital assets prior to the entry of a divorce decree:

- *Woodward v. Woodward*, 656 P.2d 431, 432-433 (Utah 1982) (benefits or assets accrued in whole or part during the marriage are subject to equitable distribution, regardless of whether or not the spouse can presently use or control it or whether the resource can be given a present dollar value)

- *Dahl v. Dahl*, 2016 UT 23 (Utah 2015) ("Prior to the entry of a divorce decree, all property acquired by parties to a marriage is marital property, owned equally by each party.")

- *West v. Christensen*, 576 B.R. 223, 232 (D. Utah 2017) (regardless of whose name property is titled in, marital property is presumed to be owned by both spouses from the time of its acquisition).

As such, if the debtor holds an equitable interest in marital assets on the Petition Date due to a pending divorce proceeding, that interest become property of the debtor's bankruptcy estate.

- *See Rogers v. Rogers*, 671 P.2d 160, 163 (Utah 1983).

- *In re Kiley*, 595 B.R. 595 (Bankr. Utah 2018).

If a divorce proceeding is pending when the bankruptcy petition is filed, the Trustee has the authority to intervene in the pending divorce proceeding and/or negotiate property settlements with the debtor's spouse.

- *See generally*, *Sender v. Simon*, 84 F.3d 1299, 1395 (10th Cir. 1996) (with regard to claims under section 541, the trustee "steps into the shoes of the debtor").

Exemptions

Exemptions are determined as of the Petition Date.

- *Owen v. Owen*, 500 U.S. 306, 314, n.6 (1991) (citing to11 U.S.C. § 522(b)(2)(A)) ("exempt property is determined 'on the date of the filing of the petition'").

Property that is exempt in the hands of one person may not be exempt in the hands of another.

- *Clark v. Rameker*, 573 U.S. 122 (2014) (funds held in an inherited IRA are not "retirement funds" for purposes of 11 U.S.C. §522(b)(3)(c)).

It is the debtor's interest in the property, not his/her former spouse's interest, that determines the applicability of exemptions. The fact that the debtor's spouse may have been entitled to an exemption in the property does not necessarily mean that the debtor will be entitled to an exemption in his or her interest in that property.

The legal characteristics of the debtor's interest in the property, regardless of how the debtor classifies such interest, determines if the property is exempt. "The fact that parties agree to call an apple an orange does not mean that a court must adjudicate that it is an orange." *In re Christensen*, 561 B.R. 195, 215 (Bankr. Utah 2016).

- *In re Kiley*, 595 B.R. 595 (Bankr. Utah 2018) (debtor's interest in a property settlement consisting of funds held in her former husband's 401k was not exempt and was property of the estate not subject to the anti-alienation provisions of ERISA).

- *Lerbakken v. Sieloff and Assocs. P.A. (In re Lerbakken)*, 2018 Bankr. LEXIS 3219 (B.A.P. 8th Cir. Oct. 16, 2018) (property settlement from divorce not exempt as retirement funds under 522(d)(12)).

- *In re Romero*, 533 B.R. 807, 816 (Bankr. Colo. 2015), aff'd *Romero v. Tyson (In re Romero)*, 2016 U.S. Dist. LEXIS 39446 (D. Colo., Mar. 24, 2016) (declining to extend a homestead exemption to include the debtor's interest in a Peterbilt Truck, even though the debtor used it as his home).

Neutral
As of: November 26, 2019 5:23 PM Z

In re Kiley

United States Bankruptcy Court for the District of Utah

December 4, 2018, Decided

Bankruptcy Number: 15-27838, Chapter 7

Reporter
595 B.R. 595 *; 2018 Bankr. LEXIS 3787 **

In re: DEBORAH MICHELLE KILEY

Case Summary

Overview

HOLDINGS: [1]-As of the petition date, debtor's interest in her ex-husband's retirement plan as a survivor beneficiary was excluded from property of the estate under *11 U.S.C.S. § 541(c)(2)* because it was subject to ERISA's anti-alienation provisions under *29 U.S.C.S. § 1056(d)(1)*; [2]-As of the petition date, debtor's presumed, one-half equitable interest in the value of the retirement plan was property of the bankruptcy estate, but subject to a final allocation by the Divorce Court; [3]-Because debtor acquired, or became entitled to acquire, a property settlement within 180 days of her bankruptcy filing, it became property of the bankruptcy estate under *§ 541(a)(5)(B)*; [4]-Because debtor was not an alternate payee under a QDRO on the petition date, she did not qualify for an exemption under *Utah Code Ann. § 78B-5-505(1)(a)(xv)*.

LexisNexis® Headnotes

Bankruptcy Law > ... > Bankruptcy > Estate Property > Contents of Estate

HN1 **Estate Property, Contents of Estate**

Property of the estate includes all legal or equitable interests of the debtor in property as of the commencement of the case. *11 U.S.C.S. § 541(a)(1)*. A debtor's property interests are created and defined by state law. What constitutes property of the estate under *11 U.S.C.S. § 541* is broad, consistent with the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors. Accordingly, even a contingent, reversionary interest is included in a debtor's estate under *§ 541*.

Bankruptcy Law > ... > Bankruptcy > Estate Property > Contents of Estate

HN2 **Estate Property, Contents of Estate**

11 U.S.C.S. § 541(c)(2) provides that a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title. Where the "applicable nonbankruptcy law" is ERISA, the Supreme Court has held that by definition an ERISA-qualified plan contains the requisite restriction on transfer to exclude it from property of the bankruptcy estate.

Bankruptcy Law > ... > Bankruptcy > Estate Property > Contents of Estate

Family Law > ... > Property Rights > Characterization > Marital Property

HN3 **Estate Property, Contents of Estate**

Property interests in bankruptcy are created and defined by state law. The Utah divorce statute does not define marital property, but its delineations are established by Utah case law. These decisions hold that regardless of whose name property is titled in, if the property was acquired during the marriage by the joint efforts of the parties, the property is presumed to be owned by both of them from the time of its acquisition. When dividing marital property, the divorce court starts with the presumption that each spouse holds a one-half interest therein. The court then considers the parties' circumstances and proceeds to effect an equitable distribution in light of those circumstances. Marital property includes retirement benefits that accrue to one spouse during a marriage.

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

HN4 **State Law Exemptions, Specific Exemptions**

Utah Code Ann. § 78B-5-505(1)(a)(xv) exempts the interest of or any money or other assets payable to an Alternate Payee under a qualified domestic relations order as those terms are defined in *26 U.S.C.S. § 414(p)*.

Bankruptcy Law > Exemptions > State Law Exemptions

HN5 **Exemptions, State Law Exemptions**

11 U.S.C.S. § 522(b)(3)(A) allows exemptions under state law applicable on the date of the filing of the petition.

Counsel: **[**1]** For Deborah Michelle Kiley, fka Deborah Michelle Marrott, Debtor: Matthew Wadsworth, Arnold, Wadsworth & Coggins, Ogden, UT.

For Mary M. Hunt tr, Trustee: Megan K Baker, Mary Margaret Hunt, Michael F. Thomson, Dorsey & Whitney, LLP, Salt Lake City, UT.

Judges: Hon. Kevin R. Anderson, United States Bankruptcy Judge.

Opinion by: Kevin R. Anderson

Opinion

[*597] MEMORANDUM DECISION ON TRUSTEE'S OBJECTION TO DEBTOR'S AMENDED CLAIM OF EXEMPTION (DOCKET NO. 21)

The matter before the Court is the Objection to Debtor's Amended Claim of Exemption (hereinafter the "Trustee's Objection") filed by the Chapter 7 Trustee assigned to the above-captioned bankruptcy case, Mary M. Hunt.[1] The issues are: (1) what constitutes property of the estate when a divorce is filed pre-petition, but a divorce decree is entered post-petition; and (2) what portion, if any, of a divorce award in the value of the ex-spouse's ERISA-qualified retirement plan is excluded from property of the estate or is otherwise exempt? The events relevant to a determination of this matter illustrate the myriad factual permutations at the intersection of bankruptcy and divorce law and confirm that timing is everything when determining property of the estate. Both bankruptcy **[**2]** and divorce attorneys need to carefully consider these timing issues when advising clients.

Some years before filing for bankruptcy, Deborah Kiley (the "Debtor") sued for divorce. A day before her bankruptcy filing, the Debtor and her ex-husband stipulated in the divorce proceeding that the Debtor would receive 100% of the value of his retirement account. Shortly after the bankruptcy filing, the Utah divorce court memorialized the award and entered a Qualified Domestic Relations Order naming the Debtor as an "Alternate Payee" of the retirement account.[2] The Debtor claims her interest in the retirement account is excluded from property of the estate under *11 U.S.C. § 541(c)(2)*,[3] or in the alternative, that it is exempt under *U.C.A. § 78B-5-505(1)(a)(xv)*.[4] The Debtor **[*598]** also asserts that because approximately half of the award was for past-due alimony and child support, this amount is exempt under *U.C.A. § 78B-5-505(1)(a)(vi)* and *(vii)*.

The Court held an evidentiary hearing on the Trustee's Objection on January 23, 2017 and permitted the parties to submit supplemental briefs no later than February 6, 2017. Thereafter, the Court took the matter under advisement.

On June 7, 2017, the Court entered an Order Certifying State Law Questions to Utah State Supreme Court.[5] The Utah **[**3]** Supreme Court issued an order granting the certification on July 5, 2017.[6] On August 14, 2018 the Utah Supreme Court entered an Opinion revoking certification and on September 24, 2018 entered a Remittitur.[7]

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[1] Docket No. 21.

[2] An "alternate payee" is a term of art defined under the *Employee Retirement Income Security Act* or "ERISA" at *26 U.S.C. § 414(p)(8)* as "any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant."

[3] All subsequent references to the United States Code are to Title 11 unless otherwise specified.

[4] Docket No. 47. *U.C.A. § 78B-5-505(1)(a)(xv)* provides: "An individual is entitled to exemption of . . . the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those terms are defined in *Section 414(p), Internal Revenue Code*."

[5] Docket No. 62.

[6] Docket No. 66.

[7] Docket No. 69.

The Court held a status conference on October 2, 2018. Mary Margaret Hunt appeared in her capacity as Chapter 7 Trustee and Michael F. Thomson appeared as counsel for the Trustee. Olivia Rossi appeared on behalf of the Debtor. At the conclusion of the status conference, the Court took the matter under advisement.

The Court now issues this Memorandum Decision which constitutes the Court's findings of fact and conclusions of law under *Federal Rule of Civil Procedure 52*, made applicable to this proceeding by *Fed. R. Bankr. P. 9014* and *7052*.[8]

I. JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to *28 U.S.C. §§ 157* and *1334*. The matter is a core proceeding pursuant to *28 U.S.C. § 157(b)(2)(B)*. Venue is proper in this district pursuant to *28 U.S.C. §§ 1408* and *1409*.

II. FACTS[9]

A. The Pre-Petition Divorce Proceedings

On February 7, 2012, the Debtor, Deborah Michelle Marrott (n/k/a Kiley), filed a petition for divorce against Jarod R. Marrott in the Third Judicial Court for Salt Lake County, State of Utah (the "Divorce Court").[10] The divorce proceeding was later bifurcated pending a resolution of **[**4]** issues related in part to the distribution of marital property.[11] At the time of the divorce filing, Mr. Marrott had a retirement plan through his employer (the "Retirement Plan").[12]

Pursuant to previous orders in the divorce proceeding, Mr. Marrott was required to pay the Debtor support payments of $7,199 per month ($4,273 in child support and $2,926 in alimony).[13] Mr. Marrott **[*599]** became delinquent on both alimony and child support payments.[14] The Divorce Court issued an Order to Show Cause and set a "Mediated Settlement Conference" for August 20, 2015.[15]

On August 20, 2015, the settlement conference was held, and a divorce court commissioner approved a stipulation between the Debtor and Mr. Marrott (the "Mediated Stipulation").[16] The Divorce Court minute entry states that Mr. Marrott "will pay $225,000.00 from his retirement fund to [Ms. Kiley] for a full and total satisfaction of past arrears and owing's [sic] through August 21, 2015."[17]

B. Post-Petition Divorce Events

On August 21, 2015, the day following the divorce settlement conference, the Debtor filed this Chapter 7 petition for relief.[18] On the petition date, Mr. Marrott was living, and the funds remained in the Retirement Plan.[19] At all relevant **[**5]** times through the petition date, the Debtor was the primary, survivor beneficiary of Mr. Marrott's Retirement Plan.[20]

On September 23, 2015, approximately one month after the petition date, the Divorce Court entered Findings of Fact and Conclusions of Law ("Findings & Conclusions")[21] and a Decree of Divorce ("Divorce Decree").[22] The Findings & Conclusions, under the heading "Division of Assets and Liabilities," awarded the Debtor the following (the "Divorce Award"):

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[8] Any of the findings of fact herein are also deemed to be conclusions of law, and any conclusions of law herein are also deemed to be findings of fact, and they shall be equally binding as both.

[9] The Trustee and the Debtor submitted a Pretrial Order that contained uncontroverted facts as stipulated by Counsel for the parties. The Court entered the Pretrial Order on January 19, 2017 (Docket No. 57), and to the extent they are not expressly stated, the Court incorporates those uncontroverted facts herein.

[10] Docket No. 57, para. 4(a).

[11] *Id*. at para. 4(b).

[12] *Id*. at para. 4(c).

[13] Debtor's Exh. 2, p. 8, lines 2, 11.

[14] Trustee's Exh. 2, pg. 3, line 11 ("In lieu of the agreements made herein, the Petitioner waives any and all support arrearages up and through August 2015.").

[15] Debtor's Exh. 2, pp. 15-16.

[16] Docket No. 57, para. 4(d).

[17] Docket No. 57, at para. 4(d); Debtor's Exh. 2, p. 17.

[18] Docket No. 1.

[19] Docket No. 57, paras. 4(k), (l).

[20] Debtor's Exh. 1. The Trustee and the Debtor stipulated on the record at the January 23, 2017 hearing that Debtor was the principal beneficiary of the former husband's retirement account up to and including the Petition Date and that Debtor's former husband was not deceased. January 23, 2017 Hearing Recording, Docket No. 59, 9:09:31 to 9:09:57 a m.

[21] Docket No. 57, para. 4(e).

[22] *Id*. para. 4(f).

> **401 K, Pension, Retirement Plans**. The Respondent [Jarod Marrott] has acquired certain retirement accounts. He represents that the accounts total of $225,142. The Petitioner [Debtor] is awarded all of the value in any and all of the Respondent's retirement accounts . . . . The Respondent shall pay for any costs associated with the preparation of a QDRO (no more than $500) or transfer of the retirement funds into Petitioner's possession. If the plan administrator(s) will not release the total amount of the retirement account due to the loans, the Respondent shall pay to the Petitioner $200 per month until the loan amounts are paid in full.[23]

On October 7, 2015, the Trustee conducted the first meeting of creditors under *11 U.S.C. § 341* where she **[**6]** directed the Debtor to produce a "copy of ruling for debtor's claim to ex-husband's 401k" and to amend her bankruptcy schedules to "disclose claim to ex-husband's 401k."[24]

On December 4, 2015, the Divorce Court entered a Qualified Domestic Relations Order **[*600]** (the "QDRO").[25] The QDRO designated the Debtor as the Alternate Payee of the Retirement Plan and Mr. Marrott as the Participant.[26] With respect to the "Time and Manner of Payment" the QDRO provides:

> 11. The Plan shall pay, in lump sum, the amount designated in paragraph 7 of this QDRO, 100% of the Participant's account, less the value of any outstanding loans, as of the date of segregation. The Participant shall assume any and all outstanding loans on the account. The Plan shall pay this amount as soon as administratively feasible.
>
> 12. This QDRO does not require the Alternate Payee's consent to the distribution, and the Plan may distribute the amount described in paragraph 11 of this Part IV without obtaining any further consent from the Alternate Payee.[27]

A week later, the Retirement Plan administrator certified that the QDRO complied with ERISA and did not violate the Retirement Plan's anti-alienation provisions.[28]

The Debtor's original **[**7]** bankruptcy schedules did not list the pending divorce proceedings.[29] The Debtor amended Schedules B and C several times, and ultimately disclosed an interest in a "Retirement: 401K" in the amount of $225,142.00.[30] The Debtor also claimed an exemption in the amount of $225,142.00 in the "Retirement 401K" pursuant to *U.C.A. § 78B-5-505(1)(a)(xv)*, which references the interest of alternate payees under a QDRO.[31]

The Debtor's amended Schedule B also lists an interest in "Child Support arrears as of date of filing the petition: $60,478.07" and "Alimony arrears as of the date of filing the petition:$53,299.71."[32] On amended Schedule C, the Debtor claimed an exemption in these amounts under *U.C.A. § 78B-5-505(1)(a)(vi)* and *(vii)*.[33] The Trustee and the Debtor stipulated on the record at the January 23, 2017 hearing that $113,777.78 of the $225,142.00 claimed on Schedule B as the "Retirement: 401K" is attributable to past due child support and alimony.[34] However, the Trustee has objected to the Debtor's exemption in alimony because *U.C.A. § 78B-5-505(1)(a)(vii)* only allows an exemption "to the extent reasonably necessary for the support of the individual and the individual's dependents."[35] The Trustee asserts she will need to conduct additional discovery as to what amounts are reasonable under **[**8]** the Debtor's circumstances.

[*601] III. ANALYSIS

A. Summary of the Issues

In the broadest terms, the issue is what, if any, portion of the Divorce Award is property of the bankruptcy estate that must

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[23] Trustee's Exh. 1, para. 23; Trustee's Exh. 2, para. 23.

[24] Trustee's Exh. 6.

[25] Trustee's Exh. 3.

[26] *Id*. at para. 4.

[27] *Id*. at paras. 11-12.

[28] Trustee's Exh. 4; *29 U.S.C. § 1056(d)(3)(G)*; *26 U.S.C. § 414(p)*.

[29] Docket No. 2; Trustee's Exh. 5. The Debtor's Original Schedules B and C list an interest in "Retirement: 401K" in the amount of $1,129.00. It is unclear if this disclosure related to the ex-husband's Retirement Plan.

[30] Docket No. 47.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] Docket No. 60, para. 3. The minute entries from the mediated settlement conference indicate that a significant portion of the award in the Retirement Plan related to past due family Support Payments. The issue was discussed at the Bankruptcy Court's January 23, 2017 hearing, and the parties stipulated on the record that of the $225,142 listed in the Divorce Decree, $113,777.78 was for delinquent alimony and child support.

[35] Docket No. 51.

be turned over to the Trustee for distribution to creditors. The answer to this question involves the following discrete issues;

> 1. On the petition date, or within 180 days thereafter, did the Debtor have an interest in the Retirement Plan that constituted property of the estate under § 541?
>
> 2. If the Debtor had an interest in the Retirement Plan on the petition date, did its anti-alienation provisions exclude all or a part of that interest from property of the estate under § 541(c)(2)?
>
> 3. If the Debtor had an interest in the Retirement Plan on the petition date, is that interest exempt pursuant to the resulting, post-petition QDRO under U.C.A. § 78B-5-505(1)(a)(xv)?
>
> 4. Is the Debtor's interest in the Divorce Award for pre-petition alimony and child support exempt under U.C.A. § 78B-5-505(1)(a)(vi) and (vii)?

B. Property of the Estate

HN1[↑] Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[36] A debtor's property interests "are created and defined by state law."[37] What constitutes property of the estate under **[**9]** § 541 is broad, consistent with the "congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors."[38] Accordingly, "[e]ven a contingent, reversionary interest is included in a debtor's estate under § 541."[39]

Determining what is property of the bankruptcy estate in this case is complicated due to the following timeline: (1) more than three years before her bankruptcy filing, the Debtor sued for divorce; (2) the day before her bankruptcy filing, the parties agreed on the record, after a mediated divorce settlement conference, that the Debtor was entitled to 100% of the value of her ex-husband's Retirement Plan in the estimated amount of $225,000, with $113,777.78 of this amount constituting past-due alimony and child support; (4) a month after the bankruptcy filing, the Divorce Court entered the Divorce Decree memorializing the Divorce Award; (5) three months after the bankruptcy filing, the Divorce Court entered a QDRO naming the Debtor as payee; and (6) to date, the funds remain in the Retirement Plan.[40]

For the following reasons, the Court finds under Utah law, ERISA,[41] and the Bankruptcy Code that the Debtor held the following interests in the **[**10]** Retirement Plan as of the petition date: (1) an interest in the Retirement Plan as a primary survivor beneficiary with rights of survivorship **[*602]** upon the death of her ex-husband; (2) an interest in the Support Payments as a pre-petition property interest; and (3) an equitable interest in the Retirement Plan as marital property that became choate upon the entry of the Divorce Decree. Further, within 180 days of her bankruptcy filing, the Debtor acquired, or became entitled to acquire, a property settlement pursuant to a final divorce decree. Thus, under § 541(a)(5)(B), that property settlement became property of the estate.

C. Is the Debtor's Interest in the Retirement Plan as a Survivor Beneficiary Property of the Estate?

1. On the Petition Date, the Debtor held a Beneficial Interest in the Retirement Plan as a Survivor Beneficiary.

The Trustee has not challenged the Debtor's assertion that the Retirement Plan is ERISA qualified. The Court has reviewed the evidence, including the QDRO Determination Checklist wherein the Retirement Plan administrator certified the Debtor's QDRO as a qualified domestic relations order as defined by 29 U.S.C. § 1056(d)(3) and 26 U.S.C. § 414(p).[42] Based on this evidence, the Court finds that the Retirement Plan **[**11]** and the QDRO are ERISA qualified. It is also undisputed that through the petition date, the Debtor was the principal, survivor beneficiary of her ex-husband's Retirement Plan.[43] Therefore the Court finds that on the petition date, the

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[36] § 541(a)(1).

[37] Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

[38] United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983).

[39] Redmond v. Lentz & Clark, P.A. (In re Wagers), 514 F.3d 1021, 355 B.R. 268, 276 (B.A.P. 10th Cir. 2006).

[40] As of March 21, 2016, the funds were held by the plan administrator in a separate account in the Debtor's name as the Alternate Payee. Trustee's Exh. 18. *See also* 26 U.S.C. § 414(p)(7)(A) which requires the plan administrator to segregate the alternate payee's share of plan funds into a separate account pending a distribution under the QDRO.

[41] 29 U.S.C. §§ 1001-1461.

[42] Trustee's Exh. 4.

[43] January 23, 2017 Hearing Recording, Docket No. 59, 9:09:31 to

Debtor held an interest in the Retirement Plan as a survivor beneficiary.

2. The Debtor's Beneficial Interest in the Retirement Plan as a Survivor Beneficiary is Excluded from the Estate Pursuant to § 541(c)(2).

The Debtor argues that the Retirement Plan is not property of the estate because of its transfer restrictions. HN2[↑] Section 541(c)(2) provides that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." In this case, the "applicable nonbankruptcy law" is ERISA,[44] and the Supreme Court has held that by definition[45] an ERISA-qualified plan contains the requisite restriction on transfer to exclude it from property of the bankruptcy estate.[46]

[*603] As a result, the Court finds that as of the petition date, the Debtor's interest in the Retirement Plan as a survivor beneficiary was subject to ERISA's anti-alienation provisions that exclude it from property of **[**12]** the estate under § 541(c)(2).

D. On the Petition Date, Did the Debtor Also Hold an Equitable Interest in the Retirement Plan as Marital Property?

However, this is not the end of the analysis, because the Debtor also held an interest in the Retirement Plan as marital property. HN3[↑] Property interests in bankruptcy "are created and defined by state law."[47] The Utah divorce statute does not define marital property,[48] but its delineations are established by Utah case law. These decisions hold that "regardless of whose name property is titled in, if the property was acquired during the marriage by the joint efforts of the parties, the property is presumed to be owned by both of them from the time of its acquisition."[49] When dividing marital property, the divorce court starts with the presumption that each spouse holds a one-half interest therein.[50] The court then considers the parties' circumstances and proceeds to "effect an equitable distribution in light of those circumstances."[51] Marital property includes retirement benefits that accrue to one spouse during a marriage.[52]

Turning to the facts, the Retirement Plan Enrollment Form and the Divorce Court's Findings & Conclusions establish that Mr. Marrott **[**13]** enrolled in the Retirement Plan while the parties were married.[53] Thus, under Utah law the Retirement

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[44] Patterson v. Shumate, 504 U.S. 753, 758, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992); In re West, 507 B.R. 252, 255-56 (Bankr. N.D. Ill. 2014) (citing Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979)). *See also* Peters v. Wise (In re Wise), 346 F.3d 1239, 1242 (10th Cir. 2003) (once property rights are determined by a state divorce court, federal law applies to establish the extent to which such property interest is property of the bankruptcy estate).

[45] 29 U.S.C. § 1056(d)(1): "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

[46] Patterson v. Shumate, 504 U.S. 753, 759, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992) (holding that the anti-alienation provisions of a retirement plan exclude it from property of the estate under § 541(c)(2)); *see also* Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009) (A plan participant's interest in an ERISA-qualified plan is not affected by a divorce decree, and a third person can only assert an interest in such plan as a survivor beneficiary upon the death of the plan participant, or as an alternate payee under a QDRO); Nelson v. Ramette (In re Nelson), 322 F.3d 541 (8th Cir. 2003) (debtor's pre-petition QDRO interest in ERISA-qualified plan, with funds not disbursed as of petition date, was excluded from bankruptcy estate under § 541(c)(2)).

[47] Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

[48] West v. Christensen, 576 B.R. 223, 232 (D. Utah 2017) (citing to U.C.A. § 30-3-5(1) and holding that "[t]he nature of property interests owned by spouses is not defined in Utah divorce statutes, although Utah divorce statutes do establish the court's authority to make an equitable division of any property interests owned by the parties to a divorce.").

[49] West, 576 B.R. at 232; *see also* Preston v. Preston, 646 P.2d 705, 706 (Utah 1982); Georgedes v. Georgedes, 627 P.2d 44 (Utah 1981); Jesperson v. Jesperson, 610 P.2d 326 (Utah 1980); Humphreys v. Humphreys, 520 P.2d 193 (Utah 1974).

[50] Burt v. Burt, 799 P.2d 1166, 1172 (Utah Ct. App. 1990) ("Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property."); *accord* West, 576 B.R. at 233.

[51] *Id.*

[52] Woodward v. Woodward, 656 P.2d 431, 432-33 (Utah 1982) (in divorce settlement, wife entitled to equitable distribution of husband's retirement plan).

[53] The Retirement Plan Enrollment Form is signed June 28, 2005 by Mr. Marrott and the State Court's Supplemental Findings of Fact indicate that the parties "are the natural parents of two (2) minor children born as issue of their marriage" in 1999 and 2001. Trustee's

Plan was marital property. Further, upon filing for divorce, the Debtor was presumed to have a one-half, equitable interest in the Retirement Plan even though she was not a named participant. Therefore, the Court finds that on the petition date, the Debtor's presumed, one-half equitable interest in the value of the Retirement Plan was property of the bankruptcy estate, but subject to a final allocation by the Divorce Court.[54]

[*604] E. Did the Divorce Award Include a Property Settlement?

The next issue is whether the Divorce Award was for support or as a property settlement. If a property settlement, the Divorce Award would be property of the estate under *§ 541(a)(5)(B)* because it was acquired within 180 days of the petition date.[55] The Trustee argues that pursuant to the language of the pre-petition settlement conference, the Divorce Court's post-petition orders and findings, and the QDRO that the Debtor's Divorce Award of the value of the Retirement Plan was a property settlement.[56] Under the heading of "Division of Assets & Liabilities," and the subheading of "401k, Pension Retirement Plans," **[**14]** the Divorce Court awarded the Debtor "all of the value in any and all" of the ex-husband's retirement accounts. The Divorce Court went on to find that the value of the Retirement Plan was $225,142. However, the parties stipulated that the Divorce Award included $113,777.78 in Support Payments.[57] Thus, the headings and language of the Divorce Decree indicates that, other than the Support Payments, the Divorce Award was intended as a property settlement.

Furthermore, the Divorce Decree provided that Mr. Marrott could pay the costs for "the preparation of a QDRO (no more than $500) **or** transfer of the retirement funds into Petitioner's possession."[58] Shortly after entry of the Divorce Decree, the Debtor's divorce attorney submitted a QDRO, and on December 5, 2015 the Divorce Court entered the QDRO with the following language: "The [Retirement] Plan shall pay, **in lump sum**, the amount designated in paragraph 7 of this QDRO, 100% of the Participant's account, less the value of any outstanding loans, as of the date of segregation."[59] The phrase "lump sum" indicates that the Debtor elected to receive the value of the Retirement Plan in a single, cash payment. The QDRO also provides: (1) **[**15]** "The plan shall pay this amount as soon as administratively feasible"; (2) "This QDRO does not require the Alternate Payee's consent to the distribution, **[*605]** and the Plan may distribute the amount described . . . [herein] without obtaining any further consent from the Alternate Payee"; and (3) "The Alternate Payee assumes sole responsibility for the tax consequences of the distribution under this QDRO." All of these provisions suggest that the intent was to make a lump sum, cash distribution to the Debtor equal to the value of the Retirement Plan.

There is nothing in the divorce documents or the QDRO to suggest that any portion of the Retirement Plan was to be rolled over into an ERISA plan in the Debtor's name. Further, there is no evidence that the Debtor intended to roll the funds in the Retirement Plan into an ERISA plan in her name.

As a result, the Court finds that other than the Support Payments of $113,777.78, the balance of the Divorce Award

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Exh. 1, ¶1.

[54] While Utah does not have a case directly on point, other jurisdictions examining the issue of a spouse's interest in marital property upon filing for divorce support this Court's conclusion. *See e.g., Gertz v. Warner (In re Warner), 570 B.R. 582 (Bankr. N.D. Ohio 2017)* ("[U]pon a spouse filing for divorce, and until a formal distribution of the parties' property is made, the interest of the spouse acquires in the other's separately titled property is strictly contingent, therefore subject to later divestment if the state court with jurisdiction over the parties' property does not enter an order awarding the property to a non-title holding spouse."); *see also Ford v. Skorich (In re Skorich), 482 F.3d 21 (1st Cir. 2007)* (debtor's equitable interest in marital property vanished once divorce court, after relief from stay, awarded non-bankrupt spouse a 100% interest in the asset at issue).

[55] *Peters v. Wise (In re Wise), 346 F.3d 1239, 1241 (10th Cir. 2003)* (discussing that a divorce property settlement created within 180-days of a bankruptcy filing is an exception to the general rule that property acquired post-petition is not included in the bankruptcy estate).

[56] The Court notes that the prepetition oral stipulation at the settlement conference was only advisory and not binding on the Divorce Court. *See Colman v. Colman, 743 P.2d 782 (Utah Ct. App. 1987)* (Holding that a stipulation as to property rights in a divorce action are advisory and not necessarily binding on the trial court); *see also Jackson v. Jackson, 617 P.2d 338 (Utah 1980)*; *Klein v. Klein, 544 P.2d 472 (Utah 1975)*; *Johnson v. Johnson, 21 Utah 2d 23, 439 P.2d 843 (Utah 1968)*.

[57] Docket No. 60.

[58] Trustee's Exh. 1, para. 23.

[59] Trustee's Exh. 3 (emphasis added). The Court notes that the QDRO does not state the amount of $225,142, as is designated in the Divorce Decree. Rather, the QDRO lists the Debtor's portion as "100% of the Participant's account, less the value of any outstanding loans, as of the date of segregation." Trustee's Exh. 18 suggests that the amount in the Retirement Plan at the time of the QDRO was $194,164.62. It may require a subsequent evidentiary hearing to determine the precise amount in the Retirement Plan and the amount that should be considered property of the estate.

was a property settlement (the "Property Settlement"). Further, because the Debtor acquired, or became entitled to acquire, the Property Settlement within 180 days of her bankruptcy filing, it became property of the bankruptcy estate under § 541(a)(5)(B) **[**16]** .

F. Is the Debtor's Interest in the Retirement Plan Through the Post-Petition QDRO Exempt Under U.C.A. § 78B-5-505(1)(a)(xv)?

Having found that the Property Settlement is property of the estate, the Court next considers the Debtor's claimed exemption therein under U.C.A. § 78B-5-505(1)(a)(xv).[60] HN4[↑] This section exempts "the interest of or any money or other assets payable to an Alternate Payee under a qualified domestic relations order as those terms are defined in Section 414(p), Internal Revenue Code."[61] The parties make statutory interpretation arguments as to whether this language applies to the funds in the hand of the payor or the payee. However, the Court need not rule on these arguments.

HN5[↑] Section 522(b)(3)(A) allows exemptions under state law "applicable on the date of the filing of the petition."[62] The parties agree that on the petition date, the Debtor was not an "Alternate Payee under a QDRO."[63] It was only after the bankruptcy filing that the Divorce Court entered the QDRO defining the Debtor as Alternate Payee.[64] Therefore, because the Debtor was not an alternate payee on the petition date, the Court finds that she did **[*606]** not qualify for an exemption under U.C.A. § 78B-5-505(1)(a)(xv).

G. Can the Debtor Exempt that Portion of the Divorce Award Consisting of Past-Due Alimony and Child Support?

The Debtor's amended Schedule **[**17]** B states that on the petition date, the Debtor was owed $60,478.07 for child support arrears and $53,299.71 for alimony arrears for a total domestic support claim of $113,777.78.[65] The Debtor's amended Schedule C then claims these amounts as exempt under U.C.A. 78B-5-505(1)(a)(vi) and (vii).[66]

The Trustee objected to these exemptions, saying she had not verified the amounts allocated to alimony and child support and because the exemption for alimony is limited "to the extent reasonably necessary for the support of the individual and the individual's dependents."[67] However, the Trustee has since stipulated to these amounts as past-due alimony and child support.[68] Nonetheless, the Trustee asserts she needs to do additional discovery to determine what amount of alimony qualified as reasonably necessary for the Debtor's support. The Court agrees that such discovery is appropriate before ruling on the Debtor's claimed exemption for $53,299.71 in pre-petition alimony.

However, with the stipulation as to the pre-petition child support, the Court finds that the Debtor has an allowed exemption of $60,478.07 in the Retirement Plan proceeds as child support under U.C.A. 78B-5-505(1)(a)(vi).

H. Effect of the Automatic Stay on the Post-Petition Divorce Court [18] Orders**

Normally, the bankruptcy filing would stay a divorce court's post-petition division of marital property, and the Chapter 7 trustee would make a business decision whether to intervene in the divorce proceedings to assert the estate's interest in

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[60] The Court notes that the Trustee's Reply to the Debtor's Response to Trustee's Objection to Claimed Exemption (Docket No. 24) indicates that the Trustee "reserves all rights" with respect to whether the former husband's retirement plan is one that qualifies under I.R.C. § 414(p). Docket No. 24, Trustee's Reply. The Trustee's Reply indicates that the "Trustee has never been provided documentation as to the Debtor's former spouse's retirement plan and the Debtors does not discuss this in her papers." The Court is unclear what the Trustee's "reservation of rights" on this point is meant to accomplish. The Trustee objected to the Debtor's exemption under U.C.A. § 78B-5-505(1)(a)(xv) and now has the burden to establish that the exemption is not properly claimed. For this reason, the Court declines to accept the Trustee's reservation of rights on whether the Retirement Plan is a plan as defined under I.R.C. § 414(p), and instead will consider the Trustee's primary argument — whether the exemption applies to assets in the hands of the payee or the payor.

[61] U.C.A. § 78B-5-505(1)(a)(xv).

[62] In re Parks, 255 B.R. 768, 772 n.3 (Bankr. D. Utah 2000) (citing Marcus v. Zeman (In re Marcus), 1 F.3d 1050 (10th Cir. 1993)); *see also* Williamson v. Hall (In re Hall), 441 B.R. 680, 685 (10th Cir. BAP 2009); Robinson v. Brown (In re Robinson), 295 B.R. 147, 153 (B.A.P. 10th Cir. 2003).

[63] U.C.A. § 78B-5-505(1)(a)(xv).

[64] Trustee's Exh. 3.

[65] Docket No. 47.

[66] *Id*.

[67] Docket No. 51.

[68] Docket No. 60 at ¶ 3.

marital property.[69] However, in this case, the pending divorce proceeding was not disclosed in time for the Trustee to take such action.

Further, the Trustee has not challenged the validity of the Divorce Court's post-petition orders under § 362(b)(2)(A)(iv).[70] The Court understands the Trustee's position to be that she does not object to the Divorce Court's post-petition award of the Property Settlement and Support Payments **[*607]** to the Debtor.[71] For purposes of this opinion, the Court will therefore deem the Divorce Court's post-petition orders to be valid, binding, and controlling as to the disposition of the Trustee's motion.

If a party later seeks to lift or annul the automatic stay with respect to the Divorce Court's post-petition orders, this Court will consider such arguments at that time. The Court notes that the delay in bringing such a motion (the Divorce Decree has been entered for over 3 years); the potential for serious confusion if the **[**19]** Divorce Decree is voided; and the interests of judicial economy would weigh heavily in favor of annulling the stay so that the Divorce Decree remained valid and binding.[72]

IV. CONCLUSION

For the reasons set forth above, the Court finds that the Debtor held the following interests in the Retirement Plan as of the petition date: (1) the status of a primary survivor beneficiary under the Retirement Plan; (2) a one-half, equitable interest in the Retirement Plan as marital property, but subject to a final allocation by the Divorce Court; and (3) an interest in the Retirement Plan for past-due alimony and child support in the amount of $113,777.78.

As to the Debtor's interest in the Retirement Plan as primary survivor beneficiary, the Court finds that interest is excluded from property of the estate under § 541(c)(2) and *Patterson v. Shumate*.[73]

As to the Debtor's interest in the Retirement Plan as marital property, the Divorce Court made a final allocation of marital property by awarding the Debtor the value of the Retirement Plan, with $113,777.78 of that amount being for past-due alimony and child support. While that was done post-petition, the Trustee has not objected to the terms of the Divorce Decree, **[**20]** and the Court finds that it thus fixed the Debtor's interest in marital property. Alternatively, the Debtor became entitled to the Property Settlement (the difference between the value of the Retirement Plan less the Support Payments) within 180 days of the petition date. Thus, the Property Settlement amount also became property of the estate under § 541(a)(5)(B).

As to the QDRO, the Court sustains the Trustee's objection to the Debtor's claimed exemption under U.C.A. § 78B-5-505(1)(a)(xv) because on the petition date, the Debtor was not an "alternate payee" of a QDRO.

As to the Debtor's interest in the Support Payments, the Court allows the Debtor's claimed exemption for child support in the amount of $60,478.07. As to the exemption of $53,299.71 for alimony, the Debtor must establish what portion of this amount is reasonably necessary for her support and support of any dependents.[74] Thus, a final ruling on the Trustee's objection to the exemption in alimony is a matter for another day.

Accordingly, the Court directs that of the funds presently held in the Retirement Plan, the sum of $60,478.07 shall be released and delivered to the Debtor in full satisfaction of her child support exemption. **[*608]** The sum of $53,299.71, representing **[**21]** the Debtor's alimony award, shall

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[69] *See e.g.*, *In re Zachmann, 2013 Bankr. LEXIS 1176 (Bankr. N.D. Ill. 2013)* (Chapter 7 trustee intervened in pending divorce proceeding and participated in thirteen-day trial to determine estate's interest in marital property).

[70] This section provides that the filing of a bankruptcy petition does not operate as a stay as to the continuation of a civil proceeding "for the dissolution of a marriage, except to the extent such seeks to determine the division of property that is property of estate." *See also Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371 (10th Cir. 1990)*; *Meeks v. Nalley (In re Nalley), 507 B.R. 411 (Bankr. S.D. Ga. 2014)* (consent divorce decree that awarded property to debtor's former spouse was void); *In re Kallabat, 482 B.R. 563 (Bankr. E.D. Mich. 2012)* (automatic stay voided divorce court findings that determined debtor's property interests); ***Hopkins v. Idaho State Univ. Credit Union (In re Herter), 456 B.R. 455 (Bankr. D. Idaho 2011)*** (post-petition divorce decree was void to the extent it determined debtor's property interests).

[71] October 2, 2018 Hearing Recording, Docket No. 72, at 11:09:39 a.m. to 11:10:15 a.m.

[72] *See In re Eastlick, 349 B.R. 216, 228 (Bankr. D. Idaho 2004)* (Determining that the automatic stay should be annulled to permit post-petition divorce decree to stand and render movant's stay violations motion moot.)

[73] *Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992)* (holding that the anti-alienation provisions of a retirement plan exclude it from property of the estate under § 541(c)(2)).

[74] See U.C.A. § 78B-5-505(1)(a)(vii).

likewise be released and delivered to the Trustee to hold in trust pending further order of the Court. The balance of funds in the Retirement Plan shall be released and delivered to the Trustee for distribution to creditors. The Trustee may seek such additional orders from the Court as is necessary to accomplish the release of the funds. The Court will enter a separate order consistent with this Memorandum Decision.

This order is SIGNED.

Dated: December 4, 2018

/s/ Kevin R. Anderson

KEVIN R. ANDERSON

U.S. Bankruptcy Judge

DESIGNATION OF PARTIES TO BE SERVED

Service of the foregoing **MEMORANDUM DECISION** will be provided to the parties and in the manner designated below:

By Electronic Service:

- Megan K Baker baker.megan@dorsey.com, long.candy@dorsey.com
- Mary Margaret Hunt hunt.peggy@dorsey.com, long.candy@dorsey.com
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- Matthew Wadsworth wadsworth@arnoldwadsworth.com

By U.S. Mail:

None.

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West v. Christensen

United States District Court for the District of Utah, Central Division

August 1, 2017, Decided; August 1, 2017, Filed

Case No. 2:16-cv-01180-CW

Reporter
576 B.R. 223 *; 2017 U.S. Dist. LEXIS 120961 **; 2017 WL 3278885

DAVID C. WEST, CHAPTER 7 TRUSTEE, Plaintiff/Appellant, vs. MARLESE CHRISTENSEN, Defendant/Appellee.

Prior History: *West v. Christensen (In re Christensen), 561 B.R. 218, 2016 Bankr. LEXIS 3921 (Bankr. D. Utah, Nov. 4, 2016)*

Case Summary

Overview

HOLDINGS: [1]-The bankruptcy court did not err in concluding that the Chapter 7 trustee could not avoid a transfer of proceeds of a property sale to debtor's ex-wife as fraudulent or preferential under *11 U.S.C.S. §§ 547* and *548* because, under Utah divorce law, the ex-wife owned an equitable interest exceeding $120,000 in the property and/or its proceeds at the time of its sale.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN1 **Standards of Review, Clear Error Review**

The district court reviews a bankruptcy court's findings of fact for clear error, its legal conclusions de novo, and mixed questions of law and fact de novo.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN2 **Estoppel, Collateral Estoppel**

Under Utah law, a state court judgment has a preclusive effect on an issue in a later federal court action when four elements are satisfied: (1) the party against whom issue preclusion is invoked was a party or in privity with a party to the prior adjudication; (2) the issue previously decided is identical with the one presented in the action in question; (3) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action and (4) the prior action has been finally adjudicated on the merits.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN3 **Estoppel, Collateral Estoppel**

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Whether this doctrine is applicable does not depend on whether the claims for relief are the same. Rather, what is critical is whether the issue that was actually litigated in the first suit was essential to resolution of that suit and is the same factual issue as that raised in a second suit. The nature of the action, however, is not the critical question: It is not the identity of the thing sued for, or of the cause of action, which determines the conclusiveness of a former judgment upon a subsequent action, but merely the identity of the issue involved in the two suits. If an issue presented in a subsequent suit between the

same parties or their privies is shown to have been determined in a former one, the question is res judicata or collateral estoppel, although the actions are based on different grounds, or tried on different theories, or are instituted for different purposes and seek different relief.

Family Law > ... > Property Rights > Characterization > Marital Property

Family Law > ... > Property Rights > Characterization > Separate Property

HN4 **Characterization, Marital Property**

Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property. Furthermore, if the nature of the property was marital, the property itself as well as the funds obtained from its sale were owned equally during the marriage. Prior to the entry of a divorce decree, all property acquired by parties to a marriage is marital property, owned equally by each party.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Elements

Bankruptcy Law > ... > Prepetition Transfers > Preferential Transfers > Elements

HN5 **Fraudulent Transfers, Elements**

Under *11 U.S.C.S. §§ 547* and *548*, only the transfer of an "interest of the debtor in property" can be avoided as a preferential or fraudulent transfer.

Family Law > ... > Dissolution & Divorce > Property Distribution > Equitable Distribution

HN6 **Property Distribution, Equitable Distribution**

The nature of property interests owned by spouses is not defined in Utah divorce statutes, although Utah divorce statutes do establish the court's authority to make an equitable division of any property interests owned by the parties to a divorce. *Utah Code Ann. § 30-3-5(1)*. This statute has been interpreted broadly to allow divorce courts to address property of every kind and however owned by spouses. As for the actual ownership of property interests between spouses, however, Utah case law established the general concept early on that property purchased during the marriage belongs equally to both spouses. To the extent that the ownership interest in real property is not a title interest, it is an equitable interest. For example, as early as 1928, the Utah Supreme Court determined that a wife not named on the title of real estate purchased during the marriage using the joint earnings of both parties was the equitable owner of an undivided one-half interest in the home, independent of the decree of divorce.

Family Law > ... > Property Rights > Characterization > Marital Property

HN7 **Characterization, Marital Property**

Other than in special circumstances, regardless of whose name property is titled in, if the property was acquired during the marriage by the joint efforts of the parties, the property is presumed to be owned by both of them from the time of its acquisition.

Family Law > ... > Dissolution & Divorce > Property Distribution > Classification

Family Law > ... > Dissolution & Divorce > Property Distribution > Inferences & Presumptions

HN8 **Property Distribution, Classification**

Case law has formalized the steps a court should take in defining and resolving property issues between spouses upon divorce. First, the court should categorize the parties' property as part of the marital estate or as the separate property of one or the other. Marital property is ordinarily all property acquired during marriage and it encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived. Just as in Jensen v. Jensen, the name in which title is held is not conclusive to this classification, and a decree of divorce need not first be entered before it is considered jointly owned, or marital property. Second, the court should then presume that each party is entitled to all of his or her separate property and fifty percent of the marital property. A party who seeks either to establish "unique circumstances" that converts otherwise separate property into marital property, or a party who seeks a finding that property acquired during the marriage is not jointly owned but should be considered separately owned property, must take affirmative steps to challenge these ownership presumptions.

Family Law > ... > Property Distribution > Inferences & Presumptions > Marital Property

HN9[] **Inferences & Presumptions, Marital Property**

The court should consider whether there are exceptional circumstances that overcome the general presumption that marital property should be divided equally between the parties. The essential criterion is whether a right to the benefit or the asset has accrued in whole or in part during the marriage. Only then does the court assign values to the various items of marital property and equitably distribute the property between the parties.

Family Law > ... > Dissolution & Divorce > Property Distribution > Equitable Distribution

Family Law > ... > Property Distribution > Characterization > Marital Property

HN10[] **Property Distribution, Equitable Distribution**

A divorce court can do more than equitably distribute property in a divorce action regardless of title. It can also acknowledge property interests created by marriage and create an ownership interest, either legal or equitable by classifying property as marital property.

Estate, Gift & Trust Law > Trusts > Constructive Trusts

HN11[] **Trusts, Constructive Trusts**

A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. Contributions made by one person to the acquisition of property titled in another's name is one of many means by which the equitable duty to convey arises. Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner. Another means that gives rise to a constructive trust is when a title owner becomes a "conscious wrongdoer," by, among other acts, unilaterally disposing or attempting to dispose of real property in which another person has an equitable interest. In such circumstances, a constructive trust is the formula through which the conscience of equity finds expression and the court has broad powers to fashion an equitable remedy.

Counsel: **[**1]** For David C. West, Chapter 7 Trustee, Appellant: Elizabeth R. Loveridge, LEAD ATTORNEY, David R. Williams, Reid W. Lambert, WOODBURY & KESLER PC, SALT LAKE CITY, UT.

For Marlese Christensen, Appellee: Brent D. Wride, LEAD ATTORNEY, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT.

Bankruptcy Clerk's Office, Notice Party, Pro se.

Judges: Clark Waddoups, United States District Judge.

Opinion by: Clark Waddoups

Opinion

[*226] MEMORANDUM DECISION AND ORDER

Appellant David C. West, Trustee of the Chapter 7 Bankruptcy Estate of Louis R. Christensen, challenges the November 7, 2016 Memorandum Decision of the bankruptcy court and its judgment denying the Trustee's Motion for Summary Judgment and granting Defendant/Appellee Marlese Christensen's Cross-Motion for Summary Judgment. After full consideration of the written briefing from the parties, the court has determined that oral argument would not be helpful to the court in deciding the appeal. *See* DUCivR 7-1(f). For the reasons stated below, the court AFFIRMS the bankruptcy court's determination that the Trustee has not established that Marlese Christensen received a "transfer of an interest of the debtor in property" and thus the Trustee cannot avoid the transfer as preferential **[**2]** or fraudulent.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to *28 U.S.C. § 158 (a)* and *(c)*. Venue is proper under the provisions of *28 U.S.C. §§ 1408* **[*227]** and *1409*. This is a core proceeding under *28 U.S.C. § 157 (b)(2)(F)* and *(H)*.

HN1[] This court reviews a "bankruptcy court's findings of fact for clear error, its legal conclusions de novo, and mixed questions of law and fact de novo." *In re Adam Aircraft Industries, Inc., 805 F.3d 888, 893 (10th Cir. 2015)*. The parties agree that there are no contested issues of fact in this appeal, only questions of law.

BACKGROUND

The Debtor, Louis R. Christensen, married Marlese

Christensen, the appellee, in 2006. Prior to their marriage—a second marriage for both of them—the couple entered into a prenuptial agreement which, among other things, reserved to each of them their pre-marital, separate property including real property owned by Marlese in Washington Terrace, Utah. In 2010, the couple concluded they needed a larger home and decided to buy property located at 1706 Bonita Bay Drive in St. George, Utah (the "Bonita Bay Property"). (Appellant's App'x, *Findings of Fact, Conclusions of Law, and Final Judgment* 1-4; Dkt. No. 8.) The couple jointly selected the home, used over $40,000 in marital funds to make an initial down payment and purchase the home, lived in the home **[**3]** together, and used another approximately $40,000 of marital funds to landscape the home and increase its value. Both husband and wife contributed income to the household and home-related expenses. (*Id*.) The title to the property, however, was conveyed solely in the Debtor's name. In approximately mid-March 2010, about two weeks after the Debtor obtained title to the property, he presented Marlese with two signature pages for documents he represented were intended to place title to the Bonita Bay Property in both of their names. Marlese signed the pages without being shown the rest of either document. She later discovered that one signature page was actually for a quitclaim deed purporting to give the Debtor an equal ownership interest in her Washington Terrace separate property, while the other signature page was for a trust deed on her Washington Terrace home purporting to secure a $120,000 loan the Debtor independently obtained using Marlese's separate property as collateral. The Debtor subsequently arranged for Marlese's signatures on these pages to be notarized and attached to the documents described above, all without Marlese's presence or knowledge. (Appellant's App'x, *Decl. **[**4]** of Marlese Christensen* 2-4, *Second Decl. of Marlese Christensen* 2-3; Dkt. No. 8.)

Eventually Marlese discovered the existence of the loan against her separate property and the facts concerning how it was obtained. She hired a lawyer to assist her. The Debtor responded on November 3, 2010 by "kicking [Marlese] out" of the Bonita Bay Property and filing for divorce on December 6, 2010. (*Id*.) Marlese then learned that the Debtor was attempting to sell the Bonita Bay Property and learned, for the first time, that her name was not on the title to the Bonita Bay Property as she had believed. In an effort to put potential purchasers on notice of her interest in the property, Marlese's attorney recorded a Notice of Interest. (*Id*.) In January 2011, a buyer was located for the property at a sales price of $290,000. The net proceeds after paying closing costs were $272,133.76, which were held by the title company. On January 26, 2011, Marlese released her Notice of Interest on the Bonita Bay Property in exchange for the title company issuing her a check for $120,000 on January 27, which she immediately used to pay off the Debtor's loan and thus secure the release of the fraudulently obtained trust **[**5]** deed on her separate Washington **[*228]** Terrace property.[1] The Debtor received the remaining proceeds of $152,133.76. (*see id*., *Findings of Fact, Conclusions of Law, and Final Judgment* 5; Dkt. No. 8.)

Before the divorce could be finalized, the Debtor filed a bankruptcy petition with the United States Bankruptcy Court for the District of Utah on July 22, 2011. A bifurcated divorce decree was entered on April 11, 2013 terminating the marriage, but because of the Debtor's pending bankruptcy case, the divorce court reserved the property division for later disposition. (Appellant App'x, *Findings of Fact, Conclusions of Law, and Final Judgment* 2; Dkt. No. 8.) On July 11, 2013, the bankruptcy Trustee—the appellant here—filed a complaint against Marlese seeking to recover the $120,000 she received after the sale of the Bonita Bay Property.[2] Following a number of proceedings in the bankruptcy court, the automatic stay was lifted to allow the Debtor and Marlese "to return to state court and litigate the division of their marital property and [Marlese's] interest in the $120,000 that was transferred to her." (Appellant App'x, *Order and Judgment on Def.'s Mot. for Summ. J. and Pl.'s Mot. for Partial Summ. **[**6]** J.*; Dkt. No. 8.) Marlese then sought to resolve the remaining property issues by filing a motion for summary judgment in the divorce court, which was unopposed and granted on January 22, 2016. The bankruptcy Trustee chose not to participate in the divorce court proceedings. (Appellant App'x, *Supp. Memo. re Mot. for Summ. J. and Mem. in Support filed by David C. West* 12; Dkt. No. 8.)

The divorce court entered findings of fact to include that "[a]lthough title to the Bonita Bay Property was solely in [the Debtor's] name, the home was marital property in which both spouses had an interest at the time the petition in this case was filed and also at the time of [the Debtor's] subsequent bankruptcy petition." (Appellant App'x, *Findings of Fact, Conclusions of Law, and Final Judgment* 5; Dkt. No. 8.) The divorce court also entered conclusions of law that upheld the

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[1] The record is silent as to any correction that may have been made to the fraudulently conveyed title to Marlese's separate Washington Terrace property.

[2] The Complaint alleged that the payment was a fraudulent transfer under *11 U.S.C. § 548(a)(1)(A)* and *(B)* as well as under *11 U.S.C. § 544* and *Utah Code Ann. §§ 25-6-5* and *25-6-6*. The Complaint also alleged that the payment was an avoidable preferential transfer under ***11 U.S.C. § 547*** and sought to recover the money from Marlese under *11 U.S.C. §550*. (Appellant App'x, *Complaint* 1-23; Dkt. No. 8.)

prenuptial agreement and confirmed that each spouse retained his or her separate property. In addition, the divorce court concluded that "[t]he Bonita Bay Property was marital property in which each party had an equal interest at the time the petition in this case was filed;" "[w]hen the divorce petition was filed, the Bonita Bay Property came **[**7]** under the auspices of this Court;" [t]he subsequent bankruptcy petition filed by [the Debtor] did not divest this Court of jurisdiction over the Bonita Bay Property or any of the other marital property;" and "[the Debtor's] bankruptcy petition did not divest Marlese of her equal ownership interest in the Bonita Bay Property." (*Id*. at 6.) Then, to equitably adjust the division of marital property, the divorce court awarded Marlese "an additional $12,000 from the proceeds of the sale of the Bonita Bay Property above and beyond the one-half to which she was entitled as a result of her ownership interest." (*Id*.) The value of Marlese's one-half interest in the Bonita Bay Property was set at $136,066.88. (*Id*. at 8.)

[*229] The divorce court's findings, conclusions, and final judgment were filed with the bankruptcy court on August 18, 2016, approximately one month after all briefing on a third round of competing summary judgment motions had been filed in bankruptcy court. The bankruptcy court issued a Memorandum Decision on November 4, 2016, concluding that the Trustee's claim, seeking to avoid the $120,000 distribution of the Bonita Bay Property proceeds to Marlese as a preferential transfer under *§ 547*, is barred by issue **[**8]** preclusion. The bankruptcy court reasoned that because the divorce court concluded that the Bonita Bay Property was marital property to which Marlese had an equal interest exceeding $120,000 at the time of the transfer, when Marlese received $120,000 in proceeds from its sale, she was not receiving a "transfer of an interest of the debtor in property" under *11 U.S.C. §547(b)*, but receiving her own property. (*Mem. Decision* 20, Dkt. No. 1-2.) Alternatively, based on equitable considerations under Utah divorce law, the Debtor's fraudulent actions, policy concerns about a bankruptcy court undermining property settlements by finding preferential or fraudulent transfers in the absence of evidence of collusion, and in the absence of Utah or Tenth Circuit law requiring otherwise, the bankruptcy court determined that the Bonita Bay Property and its sales proceeds were equally owned at the time of the transfer notwithstanding that title was held solely in the Debtor's name. (*Id*.) The Trustee raises three issues on appeal: (1) whether the bankruptcy court erred by determining that the Trustee's suit is barred by issue preclusion because the issue of ownership was decided by the state divorce court; (2) whether **[**9]** the bankruptcy court erred when it ruled that Marlese Christensen was not receiving a "transfer of an interest of the debtor in property" under *11 U.S.C. § 547(b)* but was instead receiving her own property; and (3) whether the bankruptcy court erred by concluding that the holding in *In re Harrell*, 2001 WL 2986130 (Bankr. D. Utah 2007) is distinguishable and/or otherwise not applicable to this action.

ANALYSIS

I. Issue preclusion

HN2[] Under Utah law, a state court judgment has a preclusive effect on an issue in a later federal court action when four elements are satisfied: (1) "the party against whom [issue preclusion] is invoked was a party or in privity with a party to the prior adjudication;" (2) "the issue previously decided is identical with the one presented in the action in question;" (3) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action" and (4) "the prior action has been finally adjudicated on the merits." *Moss v. Kopp, 559 F.3d 1155, 1161 (10th Cir. 2009)*. The bankruptcy court determined that all four elements of issue preclusion had been met, although it ruled separately on the merits of the Trustee's ownership argument in the event that a decision rendered by the state divorce court on an unopposed motion for summary judgment did **[**10]** not constitute the "complete, full, and fair litigation" element of the test. (*Mem. Decision* 15, Dkt. No. 1-2.) The Trustee does not challenge this element, however. The Trustee challenges only the bankruptcy court's determination that issue preclusion applies based on an argument that the state court decision addressed a different issue than the issue in this action. The court disagrees with the Trustee and affirms the bankruptcy court.

HN3[] "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination **[*230]** is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Restatement (Second) of Judgments § 27*, Issue Preclusion—General Rule (1982). Whether this doctrine is applicable "does not depend on whether the claims for relief are the same." *Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983)*. Rather, "[w]hat is critical is whether the issue that was actually litigated in the first suit was essential to resolution of that suit and is the same factual issue as that raised in a second suit." *Id*. The Trustee argues that the divorce court action was not a "quiet title action to determine ownership" of the Bonita Bay Property, but rather a "divorce **[**11]** proceeding to make an equitable division." (Appellant Br. 23, Dkt. No. 7.) The nature of the action, however, is not the critical question:

> It is not the identity of the thing sued for, or of the cause of action, which determines the conclusiveness of a former judgment upon a subsequent action, but *merely*

> *the identity of the issue involved in the two suits*. If an issue presented in a subsequent suit between the same parties or their privies is shown to have been determined in a former one, the question is res judicata [or collateral estoppel], although the actions are based on different grounds, or tried on different theories, or are instituted for different purposes and seek different relief.

Robertson, 674 P.2d at 1230 (citing *Pickeral v. Federal Land Bank, 177 Va. 743, 15 S.E.2d 82, 85 (Va. 1941)* (emphasis added). In *Robertson*, for example, a factual finding of undue influence in a prior proceeding concerning the validity of a will was found to be res judicata as to the issue of undue influence in a subsequent proceeding involving the validity of a trust executed the same day. *Id*. Similarly, a jury's rejection of an employer's allegedly good faith reliance on drug test results when firing an employee who claimed discrimination under the *Americans with Disabilities Act* was res **[**12]** judicata in a subsequent proceeding involving whether the employee could maintain a suit against the test providers for negligence and negligent misrepresentation of those drug test results. *Fowler v. Teynor, 2014 UT App 66, 323 P.3d 594 (Utah Ct. App. 2014)*. The *Fowler* court concluded that the same issue was at stake, namely the answer to the question of why the employee was fired. Because the jury in the first action rejected the employer's stated reason—reliance on the test results—the court barred the employee from re-litigating whether the employer relied on the allegedly negligently misrepresented test results in the second action against the medical providers.

The same principles apply here. In the bankruptcy action, the court lifted the stay specifically to allow Marlese and the Debtor "to return to state court and litigate the division of their marital property and [Marlese's] interest in the $120,000 that was transferred to her." (Appellant App'x; *Order and Judgment dated Aug. 10, 2015*; Dkt. No. 8.) Because it was undisputed that the Debtor held sole legal title to the Bonita Bay Property at the time it was sold, the only purpose for this order was to determine whether Marlese had some other type of interest in the property at the time of **[**13]** its sale, and if so, for what amount. If Marlese had an interest in the Bonita Bay Property that exceeded $120,000 at the time of its sale, then the proceeds she received from the sale were not a "transfer of an interest of the debtor in property" under the bankruptcy code. In the divorce action, it was similarly essential for the state court to determine whether Marlese had an interest in the Bonita Bay Property and its sale proceeds and when that interest arose. This is because the Bonita Bay Property and its proceeds represented the largest asset she claimed as being marital **[*231]** property. If the facts gave rise to the court's determination that the nature of the property was marital, as opposed to separate, a presumption that Marlese had an equal interest in that property would apply. *See Goggin v. Goggin, 2013 UT 16, 299 P.3d 1079, 1094 (Utah 2013)* (***HN4***[↑] "[E]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property.") Furthermore, if the nature of the Bonita Bay Property was marital, the property itself as well as the funds obtained from its sale were owned equally during the marriage. *Dahl v. Dahl, 2015 UT 23, 345 P.3d 566, 600 (Utah 2015)* ("Prior to the entry of a divorce decree, all property acquired by parties to a marriage is marital property, **[**14]** owned equally by each party.") Thus, the key issues—whether Marlese had an interest in the Bonita Bay Property and/or its proceeds on January 27, 2011, and if so, the value of that interest—were the same and are dispositive in both actions.

The divorce court made specific findings of fact as to the nature of Marlese's interest and when that interest was operative: "Although title to the Bonita Bay Property was solely in [the Debtor's] name, the home was marital property in which both spouses had an interest at the time the petition in this case was filed [December 6, 2010, well before the transfer took place] and also at the time of [the Debtor's] subsequent bankruptcy petition [filed on July 22, 2011]." (Appellant App'x, *Findings of Fact, Conclusions of Law, and Final Judgment* 5; Dkt. No. 8.) The divorce court also determined the extent of Marlese's interest: "The Court decrees that the value of each party's interest in the Bonita Bay Property was $136,066.88." (*Id*. at 7.) In the bankruptcy action, the Trustee is seeking to re-litigate both the nature of Marlese's interest in the Bonita Bay Property as well as when that interest was acquired. Even though the two actions were instituted for **[**15]** different purposes, seek different relief, and propose different theories or grounds to justify relief, *see Robertson, 674 P.2d at 1230*, the identical issue of Marlese's interest in the Bonita Bay Property and its proceeds was decided in the state action and is correctly precluded here.

II. Marlese Christensen received her own property

The Trustee has asserted a claim that the $120,000 Marlese received from the Bonita Bay Property proceeds was an avoidable transfer. ***HN5***[↑] Under *11 U.S.C. §§ 547* and *548*, only the transfer of an "interest of the debtor in property" can be avoided as a preferential or fraudulent transfer. Accordingly, if the $120,000 Marlese received was her own property, rather than the Debtor's property, the Trustee cannot avoid the transfer. Although the court affirms the bankruptcy court's determination that this claim is barred by issue preclusion, *supra*, it separately and independently reviews the Trustee's claim that the bankruptcy court erred in determining that Utah law gave Marlese an ownership interest in the

Bonita Bay Property and/or its proceeds that precludes the transfer from being avoided.

"Property interests are created and defined by state law." *Parks v. FIA Card Services, N.A. (In re Marshall), 550 F.3d 1251, 1255 (10th Cir. 2008)*; *see also Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979)*. Thus, in the bankruptcy action, whether Marlese **[**16]** had a property interest in the Bonita Bay Property or its sales proceeds at the time she received it is determined by examining Utah law. Because it is undisputed that title to the Bonita Bay Property was held solely in the Debtor's name, on de novo review, the court examines Utah law to determine if the Debtor's title ownership represented **[*232]** an exclusive interest in the Bonita Bay Property and/or its proceeds that would enable the Trustee to avoid the transfer of $120,000 to Marlese. The court concludes that Marlese had an undivided one half equitable interest in the property and its proceeds at the time of the transfer under both Utah divorce law and Utah law governing constructive trusts.

A. **Utah Divorce Law**

HN6[] The nature of property interests owned by spouses is not defined in Utah divorce statutes, although Utah divorce statutes do establish the court's authority to make an equitable division of any property interests owned by the parties to a divorce. *See Utah Code Ann. § 30-3-5(1)*. This statute has been interpreted broadly to allow divorce courts to address property of every kind and however owned by spouses. *See Englert v. Englert, 576 P.2d 1274, 1276 (Utah 1978)*. As for the actual ownership of property interests between spouses, however, Utah case law established **[**17]** the general concept early on that property purchased during the marriage belongs equally to both spouses. To the extent that the ownership interest in real property is not a title interest, it is an equitable interest. For example, as early as 1928, the Utah Supreme Court determined that a wife not named on the title of real estate purchased during the marriage using the joint earnings of both parties was the "equitable owner of an undivided one-half interest in the home, independent of the decree of divorce." *Jensen v. Jensen, 72 Utah 189, 269 P. 485, 487 (Utah 1928)*.

Over time and based on a wide variety of circumstances, a number of clarifications and caveats to this basic principle have been identified. For example, courts began to evaluate more carefully what kind of property each spouse brought into the marriage, the property that was acquired during the marriage, and by whose contributions the property was acquired. *MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066, 1070 (Utah 1951)*. Generally, gifts and inheritances received by one spouse during the marriage were considered separate, rather than jointly owned property, although a number of factors determine whether distribution solely to that spouse is equitable. *See Burke v. Burke, 733 P.2d 133, 135 (Utah 1987)*. For a court to convert premarital property owned solely by one spouse into jointly **[**18]** owned marital property subject to equitable division requires a finding of "unique circumstances." *Walters v. Walters, 812 P.2d 64, 68 (Utah Ct. App. 1991)*. For example, a spouse can acquire an "equitable interest" in the separate property of the other spouse by contributing "to the enhancement, maintenance, or protection of that property." *Osguthorpe v. Osguthorpe, 804 P.2d 530, 535 (Utah Ct. App. 1990)*. *See also Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988)*. Yet over the years, it has remained a constant that *HN7*[] other than in these and similar special circumstances, regardless of whose name property is titled in, if the property was acquired during the marriage by the joint efforts of the parties, the property is presumed to be owned by both of them from the time of its acquisition.[3]

[*233] More recently, *HN8*[] case law has formalized the steps a court should take in defining and resolving property issues between spouses upon divorce. First, the court should "categorize the parties' property as part of the marital estate or as the separate property of one or the other." *Burt v. Burt, 799 P.2d 1166, 1172 (Utah Ct. App. 1990)*. "Marital property is ordinarily all property acquired during marriage and it encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived." *Dunn v. Dunn, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990)* (internal quotation marks omitted). Just as in *Jensen* fifty years previously, the name **[**19]** in which title is held is not conclusive to this classification, and a decree of divorce need not first be entered before it is considered jointly owned, or marital property. *Jensen, 269 P. at 487* (wife was the "equitable owner of an undivided one-half interest in the home, independent of the decree of divorce.") *See also Dahl, 345 P.3d at 600* ("Prior to the entry of a divorce decree, all property acquired by parties to a marriage is marital property, owned equally by each party.") Second, the court should then presume that each party is "entitled to all of his or her

[3] Parties are, of course, free to enter into premarital agreements to contract around these fundamental principles of marital property law. *See U.C.A. § 30-8-1 et seq.* (defining how parties to a marriage may contract with respect to all property whenever and wherever acquired or located, including interests both present or future, legal or equitable, vested or contingent, in real or personal property including income and earnings). Here, the parties' premarital agreement appears to have limited the operation of Utah law to convert the parties' defined pre-marital separate property into marital property, but there is no evidence to suggest that the parties intended to alter otherwise applicable Utah law as to the creation and definition of marital property.

separate property and fifty percent of the marital property." *Burt, 799 P.2d at 1172*. A party who seeks either to establish "unique circumstances" that converts otherwise separate property into marital property, or a party who seeks a finding that property acquired during the marriage is not jointly owned but should be considered separately owned property, must take affirmative steps to challenge these ownership presumptions. *See Boyer v. Boyer, 2011 UT App 141, 259 P.3d 1063, 1066 (Utah Ct. App. 2011)* ***HN9***[] (the court "should consider whether there are exceptional circumstances that overcome the general presumption that marital property should be divided equally between the parties"). *See also Dahl, 345 P.3d at 579*, citing *Woodward v. Woodward, 656 P.2d 431, 432-33 (Utah 1982)* ("The essential criterion is whether a right to the benefit **[**20]** or the asset has accrued in whole or in part during the marriage."). Only then does the court assign values to the various items of marital property and equitably distribute the property between the parties. *Boyer, 259 P.3d at 1066*.

Applying those principles here, Marlese Christensen was not listed on the title to the Bonita Bay Property. Nevertheless, the divorce court made factual findings that it was purchased during the marriage using marital funds and that its value was enhanced by the joint efforts and income of both parties during the marriage. The divorce court's resulting conclusion that the Bonita Bay Property and/or its proceeds were marital property, notwithstanding having been legally titled solely in the Debtor's name, correctly resolved the question of ownership. Irrespective of the decree of divorce, these facts establish that Marlese was the equitable owner of an undivided one-half interest in the property at the time of its sale. Neither the Debtor nor the Trustee challenged those facts before the divorce court, and they do not challenge those facts here. Notwithstanding Debtor's separate legal title to the property, under Utah divorce law there is no factual evidence to support a finding **[**21]** of separate ownership in the context of a marriage between the Debtor and Marlese.[4]

[4] Where there was no court order prohibiting dissipation of the marital estate at the time, the Debtor's effort to sell the Bonita Bay Property titled solely in his name was not unlawful while the divorce was pending, notwithstanding Marlese's equitable interest in it. *Hamilton v. Hamilton, 562 P.2d 235 (Utah 1977)* (*Utah Code Ann. § 30-3-5* does not authorize or prohibit a party to a divorce action from transferring assets during the pendency of a divorce proceeding). Marlese's Notice of Interest was properly recorded to protect her equitable interest in the home under these circumstances. Had she failed to record her interest, she could not have prevailed in a title action against a bona fide purchaser, but she would still have had an equitable interest that would have to be satisfied by a distribution of other assets in the divorce action. *See id*. (Wife could not prevail in quiet title action against bona fide purchaser, but court retained jurisdiction over remaining assets from which wife's equitable interest could be satisfied.)

[*234] These principles also demonstrate that***HN10***[] a divorce court can do more than equitably distribute property in a divorce action regardless of title. Contrary to the Trustee's argument, it can also "acknowledge . . . property interest[s] created by marriage" and "create an ownership interest, either legal or equitable" by classifying property as marital property. (Appellant Br. 27, Dkt. No. 7.) Even the cases cited by the Trustee acknowledge this. The Trustee argues that *Hoagland v. Hoagland, 852 P.2d 1025 (Utah Ct. App. 1993)* stands for the principle that a court-ordered conveyance is necessary to change ownership of separately titled property to facilitate a just and equitable distribution upon divorce. While this is not an incorrect statement of law at the distribution stage of a divorce action if a change in title ownership is required to facilitate the court's distribution, the facts of *Hoagland* do not support the use the Trustee hopes to make of the case.

In *Hoagland*, upon the parties' marriage they lived in a home awarded to the wife from a prior marriage. *Id. at 1026*. After three years, the wife sold the home and used the proceeds to purchase a home titled in both parties' **[**22]** names, where they lived for another ten years. *Id*. Both parties quit their jobs, established a partnership, and began operating a family grocery business. *Id*. Later, when the business failed, the husband executed a quit claim deed on the home in the wife's favor to protect the house from business creditors. *Id. at 1026*. The court concluded the house was marital property and ordered it sold, whereupon the court awarded the wife the nearly $20,000 she had in premarital equity and then equally divided the remaining proceeds between the parties. *Id. at 1027*. The appeals court upheld the classification of the home as marital property, notwithstanding the quit claim deed in the wife's favor. *Id. at 1028*. If anything, this decision supports the bankruptcy court's conclusion that in Utah title ownership is not determinative of equitable ownership in the context of a marriage. The *Hoagland* court recognized that even though the husband executed a quit claim deed renouncing his legal title to the home, the home retained its character as marital property and remained equitably owned by both parties, which resulted in its classification as marital property and its subsequent distribution using additional equitable principles.

[23]** The Trustee also claims that a factual finding the court did not expressly state in *Hogue v. Hogue, 831 P.2d 120 (Utah Ct. App. 1992)*, namely that a husband owned an equitable interest in ranch property because of the parties' marriage, supports his position. The Trustee, however, fails to recognize that the court decided just this without stating it explicitly. In *Hogue*, the parties married, divorced, and then re-married and divorced a second time. *Id. at 121*. Ranch

property was acquired by Mr. Hogue after the parties' first divorce. Ms. Hogue began working for Mr. Hogue's business and, about three years later, moved into the ranch house with Mr. Hogue. During this time, Mr. Hogue conveyed sole title of the ranch to Ms. Hogue **[*235]** to protect the property from his business creditors. The parties also jointly executed a contract to purchase an eleven acre parcel adjoining the ranch property. Then the parties married for the second time, and went on to jointly purchase a number of items of personal property for use on the ranch. *Id*. Two years later, Mr. Hogue filed for Chapter 7 bankruptcy relief and claimed no interest in the ranch. Four years later, the parties again filed for divorce and Mr. Hogue was awarded an undivided one half interest in the ranch. *Id*. This distribution was upheld on appeal based on the principles stated in *Burke, 733 P.2d 133*, and *Haumont v. Haumont, 793 P.2d 421 (Utah App. 1990)* that premarital and/or separate property can become so commingled as to lose its separate character and allow it to be more appropriately characterized as marital property. *Id. at 122*.

Hogue presents a set of facts not comparable to the factual situation here. The issue there was whether premarital property was more appropriately classified as jointly owned marital property for distribution. Here, there was no claim in the divorce action and there is no factual dispute here that the Bonita Bay Property was acquired during the marriage with joint funds. Although the Trustee points out that the *Hogue* court never explicitly stated that the husband was awarded an interest in the separately titled ranch *because* he owned an equitable interest in it due to the parties' marriage, that was the whole point of the decision. The unique factual circumstances outlined by the *Hogue* court caused the separate premarital property titled in wife's name to become marital property owned by both spouses and thus become subject to equitable division.[5]

The court is also not persuaded by the Trustee's argument that under Utah law a spouse is not an equitable owner of marital property, but rather a creditor of the title owner spouse and entitled only to an equitable distribution. (Appellant **[**24]** Br. 21-22; Dkt. No. 7.) Trustee states his argument thus: "In a Utah divorce proceeding, each spouse has a claim against the other for an equitable share of the other's marital property but does not own an interest [in] her spouse's property." (*Id*. at 31.) Trustee cites *Bradford v. Bradford, 1999 UT App 373, 993 P.2d 887, 893-894 (Utah Ct. App. 1999)* for this argument, but *Bradford* does not support it. *Bradford* involved two cases tried together by agreement, a divorce action between Mr. and Mrs. Bradford and a fraudulent conveyance action under the Uniform Fraudulent Transfer Act involving both Bradfords and Mrs. Bradford's adult son, Mr. Demita. *Id. at 889*. The property at issue was the premarital home Mr. Bradford brought into the marriage titled solely in his name. Improvements to the home during the marriage were paid for entirely from Mr. Bradford's premarital funds, and the court found that Mrs. Bradford made no significant contribution toward the improvements. *Id*. About four years into the marriage, however, Mr. Bradford executed a warranty deed to transfer the home into joint tenancy with Mrs. Bradford. *Id. at 890*. Seven years **[*236]** later, without notice to Mr. Bradford and after numerous problems in the marriage and threats of divorce, Mrs. Bradford executed a quit claim deed transferring **[**25]** her interest in the home to her son, which transfer precipitated both lawsuits. *Id*. On appeal, the court upheld the trial court's determination that Mr. Bradford was a creditor of Mrs. Bradford for purposes of the *Uniform Fraudulent Transfer Act (UFTA)*, *see Utah Code Ann. §§ 25-6-1 to-13* (1998) and declared the transfer void. In finding Mr. Bradford a creditor, the court followed the reasoning of the Oregon Supreme Court in a fraudulent transfer action between divorcing parties, where a conveyance "was obtained by fraud to hinder or prevent [one spouse's] recovery of [the other spouse's] equitable interest" in the property. *Id. at 891*. Having determined that Mr. Bradford met the definition of creditor for that purpose, the court then proceeded to analyze whether Mrs. Bradford fraudulently conveyed the property and concluded that the transfer was void. *Id*.

Only after Mr. Dimitri was determined to have acquired no interest in the home did the court then address the nature of the property and the manner in which it had been distributed between Mr. and Mrs. Bradford under the principles of Utah divorce law. *Id*. The court concluded that what would otherwise have been Mr. Bradford's separate, premarital property was converted **[**26]** into marital property in which Mrs. Bradford had an equal interest because four years into the marriage Mr. Bradford made a gift by warranty deed naming Mrs. Bradford as a joint tenant. *Id. at 892*. Finally, because the trial court had awarded the home solely to Mr. Bradford without sufficient findings to support the unequal award of marital property, the case was remanded to the trial court for further findings or an altered distribution of marital assets that accounted for Mrs. Bradford's equitable interest in

[5] Utah divorce courts make a distinction between separate property that becomes converted to jointly owned marital property subject to equitable division and separate property that is nonetheless awarded to the non-owner spouse during the distribution stage due to other equitable considerations (such as in lieu of alimony, for attorney's fees, or because of lack of other marital assets from which to make equitable property settlements). *Compare Hogue and Moon v. Moon, 790 P.2d 52 (Utah Ct. App. 1990) with Burt, 799 P.2d 1166*; *Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988)*; and *Noble v. Noble, 761 P.2d 1369 (Utah 1988)*.

the home. *Id. at 894*.

Nothing in this case supports the Trustee's argument that under Utah divorce law, a spouse is a creditor rather than an equitable owner of marital property. After *Bradford*, in the context of a fraudulent transfer claim, when a spouse tries to transfer legal title in property away from herself in a misguided effort to defeat the other spouse's interest in the property upon divorce, the spouse can maintain an action as a "creditor" under the UFTA to set aside the transaction. *Bradford* did not change Utah law as to when and how spouses acquire equitable interests in marital property. The undisputed facts here demonstrate that the bankruptcy court correctly decided that under Utah **[**27]** divorce law, Marlese owned an equitable interest exceeding $120,000 in the Bonita Bay Property and/or its proceeds at the time of its sale.

B. **Constructive Trust**

HN11[] "A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Rawlings v. Rawlings, 2015 UT 85, 358 P.3d 1103, 1110 (Utah 2015)* (internal punctuation omitted). Contributions made by one person to the acquisition of property titled in another's name is one of many means by which the equitable duty to convey arises. *Id. at 1112* ("Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner."). Another means that gives rise to a constructive trust is when a title owner becomes a "conscious wrongdoer," by, among other acts, unilaterally disposing or attempting to dispose of real property in which another person has an equitable interest. **[*237]** *Id*. In such circumstances, "[a] constructive trust is the formula through which the conscience of equity finds expression" and the court has "broad powers to fashion an equitable remedy." *Id. at 1113*.

The undisputed facts here are **[**28]** that Marlese contributed to the acquisition of the Bonita Bay Property, giving rise to a constructive trust. Moreover, the Debtor engaged in conscious wrongdoing, fraudulently representing to Marlese that she was signing paperwork to place her name on the title to the Bonita Bay Property. In fact, the Debtor obtained her signatures to defraud her of her separate interest in her Washington Terrace property and subject that property to a trust deed securing a loan whose proceeds were issued solely to the Debtor. This conscious wrongdoing made it inequitable for the Debtor to solely retain the proceeds from the sale of the Bonita Bay Property in which Marlese had an equitable interest. The fact that Marlese accepted the false representation and signed the documents presented to her supports an inference that the couple had always understood and intended that the Bonita Bay Property be titled jointly. And most importantly here, because these acts—Marlese's contributions to acquisition and the Debtor's conscious wrongdoing—gave rise to a constructive trust prior to the subsequent sale of the Bonita Bay Property, the restitution to which Marlese was entitled included a title, or possessory, **[**29]** interest, as opposed to merely a security interest, in the property. *Id. at 1111*. The court's equitable power to impose a constructive trust to avoid injustice and unjust enrichment can alter the record title at the relevant time. *See Goggin, 2011 UT 76, 267 P.3d 885*.

Thus, even if the Trustee were correct—which he is not—that Marlese was essentially required to have legal title ownership of the Bonita Bay Property at the time it was sold to avoid receiving a "transfer of an interest of the debtor in property," the facts giving rise to the constructive trust had already occurred, which means the court has the ability to change the record title at the relevant time. Marlese had an ownership interest in the Bonita Bay Property and/or its proceeds at the time she received them under either Utah divorce law or Utah's doctrine of constructive trusts.

III. The holding in In re Harrell accurately reflects Utah law and is not applicable here.

The court now turns to the Trustee's final assignment of error. The Trustee argues that the bankruptcy court failed to correctly apply the principles set forth in *In re Harrell*, 2001 WL 2986130 (Bankr. D. Utah 2007). There, the bankruptcy trustee sought to sell, for the benefit of the bankruptcy estate, real property solely owned by the debtor following **[**30]** the debtor's divorce. The problem was that at the time the bankruptcy petition was filed, the debtor equally held legal title with his then-spouse, and *section 541(a)(1)* of the bankruptcy code provides that property of the bankruptcy estate only includes "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id*. at *2. The trustee argued that because the debtor and his spouse were separated and contemplating divorce at the time the bankruptcy petition was filed, the debtor not only had a one-half legal interest in the property, but a 100% equitable interest in the property subject to division in the divorce proceedings. *Id*.

The court in *In re Harrell* concluded that under Utah law, "Utah is a 'legal title state,' meaning that a spouse is held to own any property to which he or she owns legal title" and that "until a divorce decree is entered one spouse does not have ownership **[*238]** to property titled in the other spouse." *Id*.,

citing *Bradford, 1999 UT App 373, 993 P.2d 887*. Specifically, it stated that:

> Under Utah law a debtor spouse is held to own only property to which he or she holds legal title at the time of filing for bankruptcy relief. If the debtor is involved in divorce proceedings at the time of filing **[**31]** (or even one commenced months after the bankruptcy filing, as is the case here), the debtor does not have an equitable interest in the property beyond that to which he or she has legal title. *Until and unless a state court enters a divorce decree dividing marital property, the debtor cannot be said to have an interest in property unless he or she has legal title to that property*.

Id. (emphasis added). The appellant Trustee here argues that this language should preclude the bankruptcy court from determining that Marlese had an equitable interest in the Bonita Bay Property because she did not have legal title to it at the time the bankruptcy petition was filed. The bankruptcy court concluded that its finding that Marlese had an ownership interest in the Bonita Bay Property and/or its proceeds at the time the bankruptcy petition was filed is consistent with *In re Harrell* because the divorce decree vested Marlese with that interest.

This court agrees with the bankruptcy court's result and reasoning as to the divorce court's findings about Marlese's interest, but concludes there is a key factual and legal difference between this case and *In re Harrell* that more simply determines the outcome. **[**32]** That difference is that the trustee in *In re Harrell* argued that notwithstanding the parties' marriage and joint legal title to the property at the time the petition was filed, the debtor had a 100% equitable interest in the property due to the parties' marital separation and contemplated divorce proceedings. As explained in the analysis in part II, *supra*, this is incorrect under Utah divorce law. Rather, the presumption as to equitable ownership of marital property is that each spouse owns an undivided one-half equitable interest in marital property, notwithstanding legal title, that is subject to equitable distribution. *See Jensen, 269 P. at 487; Dahl, 345 P.3d at 600*. In both *In re Harrell* and *Bradford* (upon which the court in *In re Harrell* relied), each married couple had joint legal title to the real property at issue, which fixed the presumption of each spouse's equitable ownership interest at fifty percent prior to the divorce court's equitable distribution of the properties. In those circumstances, the *In re Harrell* court's statement that "the debtor does not have an equitable interest in property beyond that to which he or she has legal title" is accurate. Neither the facts of *In re Harrell* or the facts of *Bradford* support **[**33]** the court's application of that statement here, when only one spouse holds legal title to marital property and Utah law establishes a presumption of fifty percent equitable ownership interest between spouses. Accordingly, the court concludes that the bankruptcy court did not err in concluding that the holding in *In re Harrell* is distinguishable and/or otherwise not applicable to this action.

CONCLUSION

For the foregoing reasons, the court AFFIRMS the result of the bankruptcy court that the Trustee may not avoid the transfer of $120,000 from the proceeds of the Bonita Bay Property to Marlese Christensen.

DATED this 1st day of August, 2017.

BY THE COURT:

/s/ Clark Waddoups

Clark Waddoups

United States District Court Judge

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