



IT IS ORDERED as set forth below:

Date: November 05, 2008

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
CHARLES ELLIS BOLAR,	:	08-10350-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

Currently before the Court is the Objection to Confirmation of Debtor's Chapter 13 Plan, filed by Lillie A. Bolar (hereinafter the "Creditor"), and the Objection to Claim, filed by Charles Ellis Bolar (hereinafter the "Debtor"). The Creditor raises certain objections to the confirmation of the Chapter 13 plan proposed by the Debtor, and the Debtor objects to the classification of the Creditor's claim as a priority claim. Accordingly, this matter falls within the subject matter jurisdiction of the Court. *See* 28 U.S.C. §§ 157(b)(2)(B); (L); 1334.

FINDINGS OF FACT

The Creditor and the Debtor were married in 1988, separated in 2003, and divorced by entry of a final decree in February 2005. The Debtor and the Creditor had no children. During the majority of the marriage, with of a few months during the year 1992, both the Debtor and the Creditor worked outside of the home. During the last year of the marriage, the Debtor earned approximately \$37,000, and the Creditor earned approximately \$15,000. In 2003, however, the Creditor made an additional \$20,000 by selling Tupperware.

The Creditor and the Debtor were co-debtors on a mortgage secured by their marital residence. Additionally, the parties obtained a second mortgage on the residence to pay off a vehicle and some other joint debts. Prior to their separation, the Debtor made the first mortgage payment, both parties made the second mortgage payment and the vehicle debt, and the Creditor paid the other household bills. Following the separation, the Creditor made the second mortgage payment. During the two-year separation, the Creditor did not seek court-ordered support, and the Debtor provided no support to the Creditor during that time. At the time of the divorce, the Debtor had retirement funds in a 401(k) account in the amount of \$29,000.

Prior to the entry of the divorce decree, the parties executed a settlement agreement (hereinafter the "Agreement"). The Agreement provided that the Debtor would pay \$150 per month to the Creditor until 2012 "as his part of the marital debt which was paid from the proceeds of a second mortgage against" the marital residence. Under the Agreement, the

Creditor received ownership of the marital residence, the personal property within the marital residence, and a vehicle, and the Debtor retained a vehicle and a separate piece of real property located in Mableton, Georgia. The Agreement did not provide the Creditor with any interest in the funds in the Debtor's 401(k) account.

The Debtor defaulted on his obligation to pay the Creditor \$150 per month. On February 6, 2008, the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code. On March 26, 2008, the Creditor filed a proof of a priority unsecured claim in the amount of \$15,063.50. The Debtor has objected to the classification of the Creditor's claim as a priority claim and has proposed a Chapter 13 plan that would provide for payment of the Creditor's claim as a general unsecured claim. If confirmed, the Debtor's plan would pay approximately 25% of the Debtor's unsecured claims over the course of five years. Following an evidentiary hearing, the Court took both matters under advisement.

CONCLUSIONS OF LAW

Section 1325(a)(1) provides that "the court shall confirm a plan if . . . the plan complies with the provisions of [Chapter 13] and with the other applicable provisions of" the Bankruptcy Code. 11 U.S.C. 1325(a)(1). One such provision is found in section 1322(a)(2), under which, the plan must provide for the full payment of all unsecured claims entitled to priority treatment under section 507, unless the holder of the claim agrees to a different treatment. *See* 11 U.S.C. § 1322(a)(2). Pursuant to section 507(a)(1)(A), a claim for a "domestic support obligation" is entitled to priority treatment. *See* 11 U.S.C. §

507(a)(1)(A). Section 101(14A) defines a "domestic support obligation" as a debt: 1) that accrues before, on, or after the petition date; 2) that is owed to or recoverable by a spouse, former spouse, or child of the debtor, or a governmental unit; 3) that is "in the nature of alimony, maintenance, or support" of such spouse, former spouse, or child "without regard to whether such debt is expressly so designated"; 4) that is established or subject to establishment before, on, or after the petition date "by reason of applicable provisions of . . . a separation agreement, divorce decree, or property settlement agreement; . . . an order of a court of record; or . . . a determination made in accordance with applicable nonbankruptcy law by a governmental unit"; and 5) not assigned to a nongovernmental entity unless assigned voluntarily for the purpose of collecting the debt. 11 U.S.C. § 101(14A).¹

Accordingly, if the debt at issue in this case is a "domestic support obligation," the Debtor is required to propose a plan that pays the debt in full. There is no question that the debt at issue meets all of the criteria of section 101(14A), except for whether the debt is "in the nature of alimony, maintenance, or support." Whether a debt is in the nature of support is a question of federal law. *See In re Strickland*, 90 F.3d 444 (11th Cir. 1996); *see also In re Blad*, 2008 WL 3979468 (Bankr. D. Kan. Aug. 22, 2008). "Thus, a label placed upon the obligation by the consent agreement or court order which created it will not determine"

¹ Section 101(14A) was added to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Pre-BAPCPA case law as to whether a debt is "in the nature of support" within the meaning of section 523(a)(5) remains applicable to a determination as to whether a debt is "in the nature of alimony, maintenance, or support" under section 101(14A). *See In re Boller*, 393 B.R. 569 (Bankr. E.D. Tenn. 2006).

whether it is in the nature of support in bankruptcy. *In re Robinson*, 193 B.R. 367, 372 (Bankr. N.D. Ga. 1996) (Drake, J.); *see also Blad*, 2008 WL 397468 at *3 ("While that characterization may be persuasive if the four corners of the Judgment Form support a conclusion that the award is in fact in the nature of maintenance, the Court is permitted to look beyond the language of the document to the shared intent of the parties and the substance of the obligation, even where the document is unambiguous."). Rather than accept the label placed on the obligation, the Court "should undertake 'a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support.'" *Cummings v. Cummings*, 244 F.3d 1263, 1265 (11th Cir. 2001) (citing *In re Harrell*, 754 F.2d 902, 904 (11th Cir. 1985)). "A debt is in the nature of support or alimony if at the time of its creation the parties intended the obligation to function as support or alimony." *Id.*

If the evidence suggests that the parties intended to provide support for the former spouse, the Court should find that the obligation is in the nature of support. On the other hand, if the evidence suggests that the parties were attempting to divide the marital property or liabilities, the Court should find that the obligation is not in the nature of support. In determining the intent of the parties, it is helpful for the Court to consider such factors as: 1) whether the obligation is tied to a contingency, such as death or remarriage of the former spouse; 2) whether the obligation appears to have been imposed as a means of balancing the disparate incomes of the parties; 3) whether the obligation is payable in a lump sum or in installments; 4) the respective physical health of the spouses and their work experience and

levels of education; 5) whether additional amounts of "alimony" were awarded; 6) the length of the marriage; 7) whether there was an actual need for support at the time of the divorce; 8) the number and age of children; and 9) the standard of living during the marriage. *Id.*; *In re Horner*, 222 B.R. 918, 922 (Bankr. S.D. Fla. 1998). The Creditor has the burden of proof as to the nature of her claim. *See In re Alston*, 2008 WL 3981811, *2(Bankr. E.D.N.C. Aug. 22, 2008); *Blad*, 2008 WL 3979468 at *4.

Having considered the evidence and arguments of the parties, the Court finds that, under the circumstances in existence at the time the parties entered into the Agreement, the Debtor's obligation to pay \$150 per month was simply a means of dividing the marital property and liabilities. The parties' agreement obligated the Debtor to make the \$150 per month payment for a set number years and did not utilize a contingency, such as the Creditor's death or remarriage, to terminate the obligation. This suggests that the payment was intended to provide a certain amount of money to the Creditor, rather than to provide for her ongoing support until she no longer required such support.

Second, it does not appear that the \$150 per month payment was intended to balance the disparate incomes of the Debtor and the Creditor. Although the Creditor made less than half of the Debtor's annual salary at the time of the divorce, she testified that in 2003, just two years before the divorce, she made an additional \$20,000 selling Tupperware. Accordingly, the parties would have gone into the negotiations knowing that the Creditor had a proven ability to earn more than her regular salary. Further, if the intent was to balance the disparate incomes, one would expect that a sum greater than \$1800 per year

would be required to do so. The sum of \$150 per month over seven years equals \$12,600, which is almost half of the \$29,000 contained in the Debtor's retirement account. This fact, combined with the Creditor's own testimony that she accepted the \$150 per month in lieu of obtaining a portion of the Debtor's retirement account and alimony, persuades the Court that the parties primarily intended this monthly payment to compensate the Debtor for her share of the Debtor's retirement account

Finally, although the label placed by the parties on this obligation is not conclusive, it is some evidence as to the intent of the parties. The parties' agreement states that the \$150 per month obligation was intended to represent the Debtor's portion of debts incurred by the parties and paid with proceeds obtained from a second mortgage on the marital residence. The label indicates that the parties intended the \$150 payment to repay the Creditor for the loss of equity in the marital home which occurred when the parties obtained a second mortgage on the residence to pay off joint debt. As with the above factors, this factor supports the Debtor's contention that the \$150 per month obligation was intended as a division of the marital property and liabilities.

The Court has no further evidence before it as to the other factors, such as the respective physical health of the spouses or their levels of education and future job prospects, the standard of living during the marriage, or the tax treatment given to the payments by the parties, the Court must consider only the factors outlined above. Having considered the available evidence, the Court concludes that the parties intended the Debtor's obligation to pay \$150 per month to the Creditor simply as a means of ensuring that Creditor

obtained sufficient funds to offset her decision to give up her claim to the Debtor's retirement funds and to compensate her for the loss of equity in the marital residence due to the use of that equity to pay the parties' joint debts.

CONCLUSION

Having given this matter its careful consideration, the Court concludes that the Debtor's obligation to pay \$150 per month to the Creditor is not entitled to priority treatment under section 507 of the Bankruptcy Code. Accordingly, the Debtor's Objection to Claim is **SUSTAINED**, and the Creditor's Objection to Confirmation is **OVERRULED**.

The Chapter 13 Trustee shall report to the Court on or before **November 14, 2008** as to whether the Debtor's plan remains in a confirmable posture. If the Trustee reports that the plan remains confirmable, the Court will enter the confirmation order without further hearing.

END OF DOCUMENT