IT IS ORDERED as set forth below:

Date: October 26, 2010

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	
	)	CASE NO. 07-70036-WLH
BARBARA R. BARKER	)	
	)	CHAPTER 7
Debtor.	)	
	)	
BARBARA R. BARKER	)	
	)	
Movant,	)	
	)	
v.	)	CONTESTED MATTER
	)	
C. WENDELL WHITTINGTON	)	
	)	
Respondent.	)	
	)	
BARBARA R. BARKER	)	
	)	
Movant,	)	
	)	
v.	)	CONTESTED MATTER
	)	
C. WESLEY WHITTINGTON,	)	
	)	
Respondent.	)	

ORDER ON OBJECTIONS TO PROOFS OF CLAIM
OF C. WENDELL WHITTINGTON AND C. WESLEY WHITTINGTON

The matters before the Court are the Debtor's objection to the proof of claim of C. Wendell Whittington and to the proof of claim of C. Wesley Whittington each filed in the referenced case. (C. Wendell Whittington and C. Wesley Whittington will be collectively referred to as "Claimants".) The Claims (as defined below) arise under the same set of facts and, as amended, make the same claim, so the Court will address the objections together.

FACTS

The parties agree on the following facts. The Debtor was married to Curtis Wendell Whittington. The Whittingtons had two sons, who are the Claimants in this case, as well as a daughter, who has not filed a claim in this case. On April 2, 1996, the Superior Court of Fulton County entered its Final Judgment and Decree of Divorce ("Divorce Decree") dissolving the marriage of Debtor and Curtis Wendell Whittington. The Divorce Decree also addressed several items of property and their division between the Debtor and Curtis Whittington. As relevant to the Claims and objections thereto, the Divorce Decree orders:

1. Curtis Whittington's stock (166.66 shares) in Advanced Petroleum, Inc. d/b/a Atlanta Oil Services ("AP") was held by the Debtor in a "resulting trust" and each of the Debtor and Curtis Whittington own 166.66 shares of stock in AP.

2. The Debtor was given the option to either (i) be the sole owner of AP and acquire Curtis Whittington's stock in AP for $12,500 per month for ten (10) years, or (ii) to require Curtis Whittington to be the sole owner of AP and acquire the Debtor's stock for the same price. In lieu of the monthly payments, either party could acquire the other party's stock in AP for a lump sum payment of $1.5 million. The Divorce Decree recites, "The parties in open court

agreed that Plaintiff [Debtor]would exercise the option to be the sole owner of the Corporation [AP] by acquiring defendant's [Curtis Whittington's] stock, and the first payment of $12,500 would be made on March 11, 1996, and each every month thereafter until a total of 120 monthly installments have been made."

3. With respect to the AP stock, the Divorce Decree provides, "Upon death of either party, the terms above provided shall be conferred to the respective party's estate."

4. The Divorce Decree orders that the house located at 1095 West Conway, Atlanta, Georgia ("House"), is to be sold. The Divorce Decree does not recite the ownership of the House. The Divorce Decree requires Curtis Whittington to be responsible for the payment of the mortgage, taxes and insurance premiums associated with the House and also to be in charge of the sale of the House. The Divorce Decree provides for the division of the proceeds of the sale of the House, if any, after payment of any security deeds, taxes, insurance and other liens and encumbrances associated with the House and also payment in full of an SBA loan to AP.

Unfortunately, Curtis Whittington died on November 7, 1998, after an accident. Curtis Whittington died intestate. No administrator has ever been appointed for his estate. On June 29, 2007, the Debtor filed a Chapter 11 bankruptcy case in this Court, which was converted to a Chapter 7 case on May 21, 2008.

CLAIMS

Wendell Whittington filed Claim No. 9 on October 6, 2008, claiming $500,000 plus one-third of any interest of the Claimant's father's estate in the House and any other property awarded to his father in the divorce. Wendell Whittington filed an amended proof of claim on September 14, 2010, claiming (i) one-third of 166.66 shares of AP stock and (ii) an undivided one-third interest of an undivided one-half interest in the proceeds from the sale of the House.

The amended claim states, "Wendell Whittington does not file his claim as a creditor of the Debtor's estate. Rather he files it as one of his father's three heirs."

On October 3, 2008, Wesley Whittington filed Claim No. 8, stating the amount of his claim as $2 million as a beneficiary of a will. Wesley Whittington's claim was amended on September 14, 2010, to make the same claim as Wendell Whittington, i.e., for one-third of 166.66 shares of AP stock and an undivided one-third interest in an undivided one-half interest in the proceeds from the sale of the House. The amended claim also said it was not being made as a creditor, but as an heir. (Claims 8 and 9 are collectively referred to as the "Claims.") The estate of Curtis Whittington has not filed a claim. The bar date for filing claims was October 6, 2008.

The Debtor has objected to both Claims, alleging that the Claimants do not have standing to assert the Claims, that the Divorce Decree is dormant, and that, in any event, there was an agreement between the Debtor and Curtis Whittington that resolved all issues between them. A hearing was held before the undersigned on August 26, 2010, at which Frank Bradford appeared on behalf of both Claimants, and David Trippe appeared on behalf of the Debtor. The Trustee, Robert Trauner, also appeared at the hearing. The Debtor, both Claimants, and the Debtor's daughter were also in attendance at the hearing. At the conclusion of the hearing, the parties were provided additional time to brief the legal issues, and it was agreed that the Court would rule only on the issues of standing and dormancy at this time. Since the issue of whether there was an agreement between the Debtor and Curtis Whittington prior to his death with regard to the Divorce Decree has not been put before the Court at this time, the Court will presume that no such agreement exists for purposes of this opinion. However, this opinion is without prejudice to

the rights of the parties with the respect to the existence of any agreement between Curtis Whittington and the Debtor on these matters.

LEGAL ANALYSIS

A claim as defined in 11 U.S.C. § 101(5) means, "(a) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment …". Congress intended the broadest possible definition of "claim". *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991). Whether the Claimants have a right to payment or right to an equitable remedy giving rise to a right of payment, and therefore a "claim" in this case, is a matter of state law. The initial Claims were clearly claims for money. The Claimants have each amended the Claims to take the position they are not creditors. The amended Claims now claim an interest in stock and in the proceeds of the sale of real estate. The Court finds, nevertheless, that the amended Claims are "claims" under the Bankruptcy Code. A claim for a share of proceeds is a claim for money, which satisfies 11 U.S.C. § 101(5)(a). A claim for stock not delivered could be satisfied by money, even if an equitable remedy is also available, as a court could determine the value of the stock not delivered. *See Ohio v. Kovacs*, 469 U.S. 274, 280 (1985); *In re Rabin*, 361 B.R. 282 (Bankr. S.D. Fla. 2007). Moreover, in this case, the Divorce Decree "monetizes" the claim to the stock, thus making it clear that a right to payment exists for the stock. Thus, the Claims are "claims" under § 101(5) and subject to the Bankruptcy Code.

STANDING

In order to have standing to assert the Claims, the Claimants must be the parties who have the right to bring the claim against the debtor under state law. Assuming, as referenced

above, no conflicting agreement between the Debtor and Curtis Whittington, as of November 7, 1998, when Curtis Whittington died, Curtis Whittington's estate had the right to the following:

(i) 166.66 shares of AP stock which were held by the Debtor in a "resulting trust" for Curtis Whittington's estate.
(ii) Payment for the AP stock in accordance with the Divorce Decree. As of the date of death, payments of $12,500 each were due for 31 months. The estate would have had the right to insist on a new payment of $12,500 each month through March, 2006.
(iii) 50% of the net proceeds from the sale of the House but only after the various costs and expenses identified in the Divorce Decree were paid.

The Court has no evidence as to the legal ownership of the House and so does not know if Curtis Whittington actually held a legal real estate interest in the House at the time of his death, or only a claim for net proceeds upon the sale of the House. The Court notes that the Debtor's schedules list the House as being held in fee ownership, so it appears the Debtor takes the position that she is the sole legal owner of the House. The Court notes further that the obligation to market and sell the House was that of Curtis Whittington, and therefore of his estate, and the obligation to pay the mortgage, insurance and taxes on the House was that of Curtis Whittington and therefore of his estate.

The right to collect assets of a decedent's estate is established by state law. At the time of Curtis Whittington's death, O.C.G.A. § 53-2-7 provided,

> a. Upon the appointment of an administrator of the estate of an intestate decedent, the title to all property owned by the decedent, both real and personal, shall vest in the administrator for the benefit of the heirs and creditors of the decedent, and title to such property shall not vest in the heirs until the administrator assents to such vesting…
>
> b. If no administrator is appointed within three (3) years after the death of an intestate, the title to all property owned by the decedent, both real and personal, shall vest in the decedent's heirs and shall be deemed to have become vested in them as of the date of the decedent's death.
>
> c. If an order is entered pursuant to Code Section 53-2-41 that no administration is necessary on the estate of a decedent, the title to all

> property owned by the decedent, both real and personal, shall vest in the decedent's heirs and shall deemed to have become vested in them in a manner that is consistent with the terms of the order as of the date of the decedent's death.

This Code section was part of the Revised Probate Code of 1998, which became effective January 1, 1998. O.C.G.A. § 53-1-1. A further amendment became effective July 1, 1998, substituting three years for five years near the beginning of subsection (b). Thus, if there had been no subsequent changes to the law, in November 2001 the real and personal property of Curtis Whittington, including the claims of his estate pursuant to the Divorce Decree, would have passed to his heirs. However, on May 1, 2000, O.C.G.A. § 53-2-7 was rewritten and the provision allowing property to vest in the heirs if no administrator is appointed was completely omitted. Rather, under this revised O.C.G.A. § 53-2-7 as of May 1, 2000, vesting of title to property is as follows:

> a. Upon the death of an intestate decedent who is the owner of any interest in real property, the title to any such interest which survives the intestate decedent shall vest immediately in the decedent's heirs at law, subject to divestment by the appointment of an administrator of the estate.
>
> b. The title to all other property owned by an intestate decedent shall vest in the administrator of the estate for the benefit of the decedent's heirs and creditors.
>
> c. Upon the appointment of an administrator, the title to any interest in real property which survives the intestate decedent shall vest in the administrator for the benefit of the heirs and creditors of the decedent, and title to such property shall not revest in the heirs until the administrator assents to such revesting. …
>
> …
>
> e. If an order has been entered under Code Section 53-2-41 that no administration is necessary, or if the administrator has assented to the vesting of title in the heirs, the heirs may take possession of the property or may sue for possession of the property in their own right.

In reviewing the two statutes, it appears that, under either statute, any interest that the decedent Curtis Whittington had in real estate vested in his heirs immediately upon death (although such an interest may be divested if an administrator is appointed). Consequently, if either of the Claimants states a claim for an interest in real estate, they have standing to assert that claim as heirs of Curtis Whittington. However, there is no evidence that Curtis Whittington held a real estate interest at the time of his death and Claimants only assert a claim to proceeds. The Divorce Decree does not state that Curtis Whittington is the owner of the real estate nor is a co-owner of the real estate (contrasted with the Court's finding that Curtis Whittington owned certain shares of stock and was a co-owner of AP). Rather, the Divorce Decree only gives Curtis Whittington the right to certain money upon the sale of the real estate. A right to proceeds from real estate is not an interest in the real estate. *See Sisk v. Sisk*, 214 Ga. 223 (1958); *Lawrence v. Smith*, 213 Ga. 57 (1957). Therefore, it appears that the issue of whether the Claimants have standing to assert the Claims turns on the vesting of the decedent's personalty and not the decedent's realty.[1]

With respect to personalty, the outcome varies based on whether the 1998 version of the statute or the 2000 version of the statute is applied. If the 1998 version of the statute is applied, the heirs of Curtis Whittington have standing to sue for and collect all personalty of their father if no administrator is appointed within three years of the date of death. It is undisputed that no administrator has been appointed, and it is also undisputed that there has been no order entered that no administration is necessary. However, if the 2000 version of O.C.G.A. § 53-2-7 is applied, there is no mechanism for the heirs to pursue collection of personalty other than through

[1] The cases cited by the Claimants only address the issue of heirs pursuing claims to realty. As stated above, there is no evidence before the Court which would allow the Court to determine if in fact the heirs have a claim to realty as opposed to only a claim for money. The Court, however, agrees that if the heirs do in fact have a claim for realty, they have standing to make that claim, consistent with the cases cited by Claimants.

the appointment of an administrator or the entry of an order that no administration is necessary. Consequently, the next question is whether the amendment of O.C.G.A. § 53-2-7 in 2000 applies to the estate of a decedent who died prior to 2000.

The Georgia Constitution, Article 1, Section 1, Paragraph X prohibits the passage of retroactive laws. Unless a statute "either expressly or by necessary implication, shows that the General Assembly intended it to operate retroactively, it will be given only prospective application." *Robert & Co. Associates v. Pinkerton & Law Co.*, 124 Ga. App. 309 (1971). Assuming legislative intent to apply a statute retroactively, the courts look to whether the change is "procedural or evidentiary" which may act retroactively or "affects substantive rights" which may operate prospectively only. *Hargis v. Dept. of Human Res.*, 272 Ga. 617 (2000). "Substantive law is that law which creates rights, duties and obligations. Procedural law is that law which proscribes the methods of enforcement of rights, duties and obligations." *Polito v. Holland*, 258 Ga. 54, 55 (1988).

As mentioned above, the entire Probate Code was extensively revised effective January 1, 1998. The reports surrounding the Revised Probate Code reflect that there was a fair amount of discussion as to the retroactive application of the Revised Probate Code. One version would only have applied to the estates of decedents who died after the effective date of the statute. However, the drafters were concerned that requiring probate courts to apply two different probate codes based upon the date of death would be confusing and inefficient. *See* Stephen M. Dickson, *Wills, Trusts and Administration of Estates*, 14 Ga. St. U.L.Rev. 313 (Dec. 1997). The conclusion was that the statute was passed in 1996 but did not become effective until 1998 to give parties an opportunity to gradually transition to the new probate code. O.C.G.A. § 53-1-1. The probate code which became effective January 1, 1998, applies then to all estates, regardless

of the date of death, "provided however that no vested rights of title, years support, succession or inheritance shall be impaired." O.C.G.A. § 53-1-1. The legislature, therefore, expressed its intent for the Probate Code to apply retroactively except as to certain vested rights. This provision is consistent with the Georgia Constitution because inheritance and similar rights that had actually vested as of January 1, 1998, could not be changed, as those were substantive rights. However, the process of administering an estate, even an estate of a decedent who had already died, could be modified retroactively. Although there is no specific legislative history that the Court has located with respect to the 2000 amendment and its retroactive application, it seems to the Court in keeping with the overall legislative intent of the Revised Probate Code that the amendment should apply to all estates regardless of the date of death except that "no vested rights of title, years support, succession or inheritance shall be impaired."

As of the amendment date in 2000, there were no vested rights of title, years support, succession or inheritance in the Claimants that were impaired by the amendment. The three years from the date of death without the appointment of an administrator had not yet expired, so title to the decedent's property had not yet vested in the heirs. These Claims do not raise any issues of years support or succession or inheritance. The modification to the statute in 2000 did not change the fact that the Claimants are heirs or that they are ultimately entitled to inherit from the decedent. Rather, the 2000 modification only changed the procedure for administering the estate of an intestate decedent. Thus, the Court concludes that the 2000 amendment governs these Claims, and that claims for personalty must be brought by an administrator unless the heirs have received an order from the appropriate court that no administration is necessary.

DORMANCY

Because the Court cannot determine based on the evidence before it whether the Claimants have a claim to realty, the Court will address the second issue raised by the Debtor, which is the alleged dormancy of the Divorce Decree. Under Georgia law, "A judgment shall become dormant and shall not be enforced: (1) when seven years shall elapse after the rendition of the judgment before execution is issued thereon and is entered on the general execution docket of the county in which the judgment was rendered; …". O.C.G.A. § 9-12-60. However, O.C.G.A. § 9-12-61 provides, "When any judgment obtained in any court becomes dormant, the same may be renewed or revived by an action or by *scire facias*, at the option of the holder of the judgment, within three years from the time it becomes dormant." Thus, a combination of the two statutes generally provides a ten-year period after which a judgment becomes dormant. This section only applies to judgments for money, however. The dormancy rule does not apply to a decree, which is not a judgment for a sum of money. *See Brown v. Parks*, 190 Ga. 540 (1940)(where a decree is for the recovery of specific property or for the performance of some act or duty, the dormancy statute is inapplicable); *Collier v. Bank of Tupelo*, 190 Ga. 598 (1940).

Applying these concepts to the Divorce Decree, the order of the Fulton Superior Court that the Debtor holds 166.66 shares of AP stock in a "resulting trust" for Curtis Whittington is not dormant and may still be enforced by Curtis Whittington's estate. Moreover, the portion of the Divorce Decree ordering the sale of the House and the division of the proceeds is also not dormant, because it decrees an act to be done. The fact that money may result from the act to be done is not sufficient to turn the decree into a money judgment. *See Brown v. Parks*, 190 Ga. 540.

The portion of the Divorce Decree that orders the payment of money does appear to be in the nature of a money judgment that would become dormant under the terms of the statute. The seven years of inactivity which leads to dormancy, however, only begins to run when the judgment could be enforced. *See Copeland v. Pope*, 90 Ga. App. 304 (1954). In the cases of child support and other periodic payments, the courts have held that each installment is a new judgment. *Bryant v. Bryant*, 232 Ga. 160 (1974). Under the Divorce Decree, the payment of $12,500 per month was to be made for 120 months up through March 2006. Curtis Whittington could not have enforced the final payment, for example, until March 2006. Consequently, while it appears that much of the Debtor's obligation to make the payments of money has become dormant because of inactivity over a 10-year period, not all of the obligations are more than 10 years old. Since the Court has held in the earlier part of this opinion that a claim for money is a claim that may only be brought by the administrator of the estate, the Court does not rule on how much, if any, of the payments due under the Divorce Decree the administrator could claim but reserves all the parties' rights with respect to the issue.[2]

RESULTING TRUST

The Divorce Decree provides that the Debtor is holding 166.66 shares of stock in AP in a "resulting trust" for Curtis Whittington. Property of the estate includes all legal or equitable interests of the debtor as of the petition date. 11 U.S.C. § 541(a)(1). However, property in which the Debtor holds only legal title and not an equitable interest is included in the estate only to the extent of the legal interest. 11 U.S.C. § 541(d). A resulting trust under Georgia law is one where legal title is in one person, but the beneficial interest is in another. *Shivers v. Hunnicutt*,

[2] For example, additional issues arise as to exactly when the 10 years would have expired, the effect of the filing of the bankruptcy case during any portion of the period on the dormancy of the judgment for payments, and whether the estate has a claim for money if in fact it receives its share of the stock, or whether the Debtor retains the option to "put" her shares of the stock back to the estate. These matters await the proper claimant.

220 Ga. 620 (1965). Thus, only the Debtor's legal interest, and not beneficial interest, in the 166.66 shares of AP stock is property of the estate. *See Waner v. Maxwell* 146 B.R. 973, 979 (Bankr. N.D. Ill. 1992); *In re Stewart*, 325 Fed. Appx. 82 (3rd Cir. 2009).

CONCLUSION

Based on the foregoing, the Court rules as follows:

1. The Debtor held 166.66 shares of stock in AP as trustee for Curtis Whittington and his estate. As such, the beneficial interest in those shares of stock is not property of the estate. Any claim for the stock must be brought by an administrator of the estate of Curtis Whittington, but such claim is not dormant.

2. The heirs of Curtis Whittington cannot bring a claim for money for the Debtor's alleged failure to purchase the stock of AP from Curtis Whittington. That claim, if any exists, is a claim of the administrator of Curtis Whittington's estate until a court enters an order that no administration is necessary. The portion of the Divorce Decree related to the payment for the stock is not necessarily entirely dormant.

3. To the extent that Claimants are claiming a real estate interest in the House, they have standing to assert that claim. However, the Court has not been presented with any evidence as to the ownership of the House at the time of Curtis Whittington's death. To the extent the Claimants are seeking to assert a claim for the payment of money from the sale of the House, such a claim is a claim for personalty which can only be brought by the administrator. Neither a claim for an interest in the House or from the proceeds of the sale under the Divorce Decree is dormant.

Based on the foregoing,

a. The Court GRANTS the objections to the Claims of C. Wendell Whittington and C. Wesley Whittington in the bankruptcy case as filed, without prejudice to the rights of an administrator to bring a claim within sixty (60) days of the entry of this Order. If no such claim is timely filed, it will be forever barred.

b. Claimants have thirty (30) days from the entry of this Order to amend the Claims to reflect any real estate interest in the House and attach proof thereof.

END OF DOCUMENT