IT IS ORDERED as set forth below:

Date: April 26, 2013

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
JERRY WILLIAM DOUTHIT,	CASE NO. 12-75289-BEM
Debtor.	CHAPTER 13
JERRY WILLIAM DOUTHIT,	
Movant,	
v.	Contested Matter
PAULA SUSAN PARRIS,	
Respondent.	

O R D E R

This Chapter 13 case came before the Court on April 4, 2013, for the continued hearing on Debtor's Objection to Claim of Creditor Paula Susan Parris ("Parris") (the "Objection"). [Doc. No. 30] Parris, Debtor's former spouse, filed Proof of Claim No. 1-1 in the instant case, asserting a priority claim in the amount of $94,300 for lump sum and periodic

alimony owed pursuant to a final decree entered in the parties' divorce proceeding. Debtor objects to the priority status of the claim, asserting that part of the debt, an $86,000.00 lump sum payment due to Parris,[1] is a property settlement and is thus not entitled to priority treatment. Parris filed a Response to Debtor's Objection to Claim (the "Response") asserting that the claim amounts are in the nature of alimony, maintenance or support and are entitled to priority treatment. [Doc. No. 36] This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

After carefully considering the pleadings, the evidence presented and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Fed. R. Bankr. P. 7052.

Facts

The Debtor and Parris were married in November of 1983 and after approximately 25 years of marriage divorced in 2008. The couple had three children during the marriage who had all reached the age of 18 by the time of the divorce. In November 2008, the parties entered into a Settlement Agreement (the "Settlement Agreement") which was adopted by, and became the judgment of, the Cobb County Superior Court in its December 10, 2008, Final Judgment And Decree of Divorce. *See* Debtor's Ex. 1.

At the time of the divorce, the parties owned a home and Debtor had a 100% interest in J.D. Glassworks, Inc. and the property on which it operated, and a 50% interest in Thornton & Douthit. *See* Respondent's Ex. 1. In addition to these properties, Debtor had a 401(k) account valued, as of April 16, 2007, at $61,193 and an IRA account valued at $80,511, while Parris had a 401(k) account valued at $3,738. The Settlement Agreement provided that the

[1] The parties announced at the hearing that they had resolved the issue related to the treatment of periodic alimony. Thus, the sole issue before the Court is treatment of an $86,000 lump sum payment due pursuant to Article VII of the Settlement Agreement (as defined herein).

marital home was to be sold with the proceeds divided equally between the parties, except that Parris was to receive no less than $300,000 from the sale of the residence after payment of a first mortgage, home equity line of credit and loan from Parris' mother. Parris also received a vehicle. Debtor retained 4 vehicles titled in his name, in addition to a boat, a Seadoo and an off-road vehicle. One of the vehicles retained by Debtor was primarily driven by the parties' youngest child and upon paying off the loan, Debtor intended for his daughter to receive the vehicle. All property was retained subject to liens and the party receiving the property was responsible for payment of the loans. Debtor's 401(k) plan from J.D. Glassworks was awarded to Parris,[2] while Debtor retained all interests in his businesses and the real property owned by each of those entities. The parties' household furnishings were to be divided at a later time. Debtor testified that although it took some length of time to accomplish, the household goods and furnishings have been divided by the parties. *See* Debtor's Ex. 1, Art. 4.

In addition to the above property division, Debtor was required to pay $4,200 per month in alimony (the "Periodic Award"). The Periodic Award was to continue until the earliest to occur of 144 months or Parris' death, remarriage or entry into a meretricious relationship. The Periodic Award was to be deductible by Debtor on his tax returns and included as income on Parris' tax returns. Debtor was also required to provide 24 months of COBRA insurance coverage for Parris and life insurance with a death benefit in the amount of $800,000.00 to insure payment of obligations owed pursuant to the Settlement Agreement. *See* Debtor's Ex. 1, Art. 6.02.

[2] The value of this 401(k) plan in the Settlement Agreement is set forth as $39,180.67. There was no evidence presented as to the change in value from the April, 2007 financial affidavit to the date of the Settlement Agreement. The Court notes, however, that between April, 2007 and December, 2008 the stock market declined precipitously.

The Settlement Agreement also provides for Lump Sum Alimony. Article VII states:

> 7.01. Husband shall pay to Wife the sum of $115,000.00 as lump sum alimony. This lump sum alimony shall be paid to Wife by Husband paying $5,000.000 in cash to Wife, and paying to Wife the sum of $667.00 per month for a period of thirty-six (36) months; and at the end of 36 months, Husband shall pay to Wife in cash the sum of $86,000.00, the total payments to Wife being $115,000.00
>
> This payment is an integral part of the financial support of the Wife. This payment is intended to be non dischargeable under Section 523(a)(5) of the Federal Bankruptcy Code (or any provision thereof). This payment is not intended to be income to the Wife nor a deduction on any tax return, nor shall the wife claim the payment as income.

Settlement Agreement, Article VII, pgs. 11 & 12.

The parties disagree whether the $86,000 lump sum payment (hereinafter, the "Award") required by Article VII is in the nature of alimony, maintenance or support or is a property settlement. The answer to that question will determine the appropriate treatment of Parris' claim.

Conclusions of Law

A claim for a "domestic support obligation" is entitled to priority treatment. *See* 11 U.S.C. § 507(a)(1)(A). Under § 1322(a)(2), a debtor's Chapter 13 plan must provide for the full payment of all unsecured claims entitled to priority treatment under § 507, unless the holder of the claim agrees to a different treatment. *See* 11 U.S.C. § 1322(a)(2). 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).

Thus, 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. The parties agree that the Award at issue meets all of the criteria of § 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 Bolar*, 2008 WL 7880900 (Bankr.N.D.Ga. 2008) (Drake, J.). "Thus, a label placed upon the obligation by the consent agreement or court order which created it will not determine" 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 Bolar,* 2008 WL 7880900 at *5. 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.*

The courts have identified numerous factors that assist in determining the intention of the parties. In *Bolar,* the Court identified nine factors relevant to divining the intention of the parties 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. *Bolar*, 2008 WL 7880900 at *6-7.

More recently, the Eleventh Circuit cited with approval the following factors for determining the intent of the court issuing a divorce decree: (1) the agreement's language; (2) the parties financial positions when the agreement was made; (3) the amount of the division; (4) whether the obligation ends upon death or remarriage of the beneficiary; (5) the frequency and number of payments; (6) whether the agreement waives other support rights; (7) whether the obligation can be modified or enforced in state court; and finally (8) how the obligation is treated for tax purposes. *Benson v. Benson (In re Benson)*, 441 Fed. Appx. 650, 651 (11th Cir. 2011) (*citing In re McCollum*, 415 B.R 625, 431 (Bankr.M.D.Ga. 2009)).[3] The creditor has the burden of proof as to the nature of her claim. *Bolar*, 2008 WL 7880900 at *3. "No single factor is controlling or more important than any other." *Plyant v. Plyant (In re Plyant)*, 467 B.R. 246, 252 (Bankr.M.D.Ga. 2012).

Analysis

There are several factors that support Parris' argument that the Award is in the nature of alimony, maintenance or support. First, while the labels used by the parties do not necessarily bind the Court, the terms of the Settlement Agreement and apparent intentions of the

[3] "In determining whether an obligation constitutes a [domestic support obligation], the Court looks to the interpretation of [domestic support obligations] in case law involving the dischargeability of debts under § 523(a)(5), as enacted prior to the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)." *In re O'Neal*, 2012 WL 1940594, at *3 n.1 (Bankr.N.D.Ga. 2012) (quoting *In re Krueger*, 457 B.R. 465, 474 (Bankr.D.S.C. 2011)).

parties are important considerations. *See Cummings*, 244 F.3d at 1265; *In re Peterson*, 2012 WL 5985269 (Bankr.E.D.N.C. 2012) (citing *In re Alston*, 2008 WL 3981811 (Bankr.E.D.N.C. 2008); *Tilley v. Jessee (In re Tilley)*, 789 F.2d 1074, 1077–78 (4th Cir. 1986); *In re Sewell*, 2008 WL 8130029 at *4 (Bankr.E.D.N.C. 2008)). The starting point in examining a contract is the language of the agreement itself. *See* O.C.G.A. 13-2-2(1); *see also Int'l Union v. ZF Boge Elastmetall LLC*, 649 F.3d 641, 646 (7th Cir. 2011). Under the Georgia rules of contract interpretation, the Court must attempt to give meaning to all provisions of the contract and look to "the whole contract . . . in arriving at the construction of any part." *Allen v. Sea Gardens Seafood, Inc.*, 290 Ga. 715, 718, 723 S.E.2d 669, 671 (2012) (quoting OCGA § 13–2–2(4)). Thus, the Court will first examine the terms of the Settlement Agreement.

Article VII states that the Award is an "integral part of the financial support of" Parris and that the "[p]ayment is intended to be non-dischargeable under Section 523(a)(5) . . . ." Debtor's Ex. 1. While provisions precluding discharge in an agreement are against public policy, such provisions constitute evidence of the intentions of the parties. *See Engram v. MacDonald*, 194 B.R. 283, 287 (Bankr. N.D. Ga. 1996); *see also Infinity Group LLC v. Lucas (In re Lucas)*, 477 B.R. 236, 246 (Bankr. M.D. Ala. 2012) (listing cases); *see also Hester v. Daniel (In re Daniel)*, 290 B.R. 914, 921–22 (Bankr.M.D.Ga. 2003)

In addition to the express statement that the Award is integral to Parris' support and intended to be non-dischargeable, the structure of the Settlement Agreement supports such a finding because the Settlement Agreement is generally divided into two parts, one that deals with division of property in Articles III and IV and the second that deals with support in Articles V and VI. Specifically, Article V provides for the Periodic Award while Article VI requires that Debtor pay for Parris' COBRA insurance coverage for two years and entitles him to "any and all

state and federal health care credit" while he makes premium payments. Article VI also provides for additional insurance to protect Parris' ability to collect the amounts due under the Settlement Agreement in the event of Debtor's death prior to all payments being made. Thus, the location of the Award in Article VII of the Settlement Agreement supports Parris' contention that the Award is for her support and is not a property distribution.

Further support for Parris' argument is found in Article VII which provides, in part, that Debtor will pay $667 per month for 36 months for the car Parris received in Article III. Both Debtor and Parris testified that these payments were to provide Parris a car. The testimony was clear that Parris could not otherwise pay for the vehicle and needed a car after the divorce. Given Parris' inability to pay for the car and her inability to otherwise obtain transportation these provisions in Article VII support a finding that the Award provides support for Parris.

Both Debtor and Parris have high school educations, however; Debtor continued to work and own two businesses while Parris left the work force to raise the parties' children. In addition, Parris had, and continues to have, certain health issues involving her back and neck that may limit her ability to work, while the Debtor is generally healthy. In the financial affidavit prepared in the divorce proceeding in April, 2007, Debtor reported net monthly income of $19,137.00. *See* Respondent's Ex. 1. Debtor further reported expenses of $15,490 and payments to secured creditors, exclusive of the mortgage creditor, of $2,957. Thus, Debtor's income was substantial in April 2007. Debtor testified, however, that the economic downturn that occurred around the time the financial affidavit was prepared and continued through and after their divorce, substantially and negatively impacted Debtor's businesses. Debtor testified that he reduced the staff at J.D. Glassworks and that revenue dropped from $5.5 million a year around 2005 and 2006, to $2.8 million in 2008. Debtor further testified that the parties lived beyond

their means and that he began the real estate partnership (Thornton & Douthit) in an effort to generate additional income to support the family's lifestyle. The financial affidavit certainly evidences a very comfortable lifestyle, with only $690 per month left after payment of expenses. Given the disparity in income between Debtor and Parris at the time of the parties' divorce, Parris' health and her long absence from the job market, it is clear that Parris was in need of support at the time of the divorce. Thus, it is certainly possible that that the Award, like the provisions for paying the car loan, were structured to provide future support for Parris, above and beyond the Periodic Award.

As noted above, Article VI states, "[i]n order to provide and assure that there will be sufficient funds in [Debtor's] estate upon his death to satisfy the above obligations under this Agreement and any judgment into which this Agreement may be incorporated, [Debtor] promises to maintain and pay the premiums for life insurance on his life providing death benefits in the amount of $800,000.00." The amount of the death benefit required exceeds the total of all payments to be made under the Settlement Agreement. Because the Periodic Award lasts longer than the Award, it is possible that the insurance provisions in Article VI were intended to ensure payment of the Award as well as the Periodic Award. Ensuring the continued payment of the Award would support the assertion that the Award was in the nature of support. However, the terms of Article VI could also support a conclusion that the Award was not intended as support because the Award established in Article VII follows the life insurance provisions in Article VI and is thus not an "above obligation" as provided in Article VI. Ultimately, the intention of the parties with respect to the life insurance requirement is unclear for the reasons previously stated, and because Article VI also provides for yearly reductions in the policy amounts but does not

provide for a larger reduction in year four, or for that matter, any specifics on the amount of reduction allowed each year.

In contrast, there are several provisions in the Settlement Agreement that support Debtor's contention that the Award is not in the nature of support. Initially, in contrast to the Periodic Award, the Award is not contingent in that it does not terminate upon Parris' death, remarriage or her entering into a meretricious relationship, nor is the tax treatment consistent with an award of alimony. Indeed, Article VII specifically prohibits Debtor's deducting the Award amount. This difference in language is persuasive evidence that the Award was not in the nature of support, but instead a property distribution. *See McCollum*, 415 B.R. at 632.

Next, the fact that the Award was to be paid in lump sum is consistent with a property distribution rather than an alimony payment. *See In re Horner*, 222 B.R. 918, 923-24 (S.D.Ga. 1998) (citing *Hamilton v. Finch*, 238 Ga. 78, 78, 230 S.E.2d 881 (1976) ("Alimony in gross, or in a lump sum, is in the nature of a final property settlement, and hence in some jurisdictions is not included in the term 'alimony,' which in its strict or technical sense contemplates money payments at regular intervals.")). This is particularly true when monthly alimony is provided for elsewhere in the Settlement Agreement. *See Wilbur v. Wilbur (In re Wilbur)*, 304 B.R. 521, 527 (Bankr.M.D.Fla. 2003) (citing *In re Evert*, 342 F.3d 358, 369 (5th Cir. 2003)) (recognizing that property settlements are generally lump sum amounts but finding separate provision for "nontrivial alimony" significant). Although a portion of the payments provided in Article VII were periodic, these payments were for a relatively short time compared to the Periodic Award and the vast majority of the amounts set forth in Article VII are, in fact, lump sum distributions. *See Wilbur*, 304 B.R. 521 (finding non terminable nature more significant to nature of award than payment over time). In addition, the provisions of Article VII

relating to Parris' car have the hallmarks of a property settlement because Article VII provides for paying the liabilities secured by the car. *See Horner*, 222 B.R. 918, 923-24 (S.D.Ga. 1998) (alimony payments expressly intended to pay mortgage are incident to division of property); *see also McCollum*, 415 B.R. at 632.

Finally, the Court notes that the Award does not appear to have been necessary to Parris' support in the three years prior to the Debtor's scheduled payment of the Award. First, the parties contemplated the Award being made in a lump sum three years after entering into the Settlement Agreement, as opposed to a more immediate payout to Parris or an increase to the Periodic Award. Given Parris' lengthy absence from the job market one would suppose that if she were to obtain training or employment this would occur at some date removed from entry into the Settlement Agreement and could reduce her need for support in the future rather than having the need increase three years after the divorce. Further, although the Court found Parris to be a credible witness, the only relevant testimony she provided was that she "tried to go with what was fair" and that she believed the $4,200 per month Periodic Award was "appropriate" and "fair" and that she needed a car. Neither Parris nor Debtor testified that the Award was for support or because Parris had a specific need; rather Debtor, who was a similarly credible witness, testified that he got his businesses and Parris got the Award. It was clear that Debtor had a better understanding of the purpose of the Award than did Parris. Parris testified that Debtor provided her with four different settlement options and she simply chose one and did not provide any sort of counter-offer. Because Debtor's counsel prepared the offers it makes sense that Debtor would be more attuned to the rationale behind the proposals, while Parris was solely focused on the Periodic Award and obtaining a car. Michael Kramer, counsel for Parris in the divorce action, testified that the intent was for the Award to not be modifiable or dischargeable.

Kramer further testified that the Settlement Agreement was "substantially negotiated," but did not provide any further insight into the specific purpose of the Award. Thus, it appears that the Periodic Award was sufficient to support Parris, which supports the contention that the Award was not for Parris' support, but was designed to be a future property distribution.

Considering the totality of the evidence presented, the Court finds that the Award was intended to account for the Debtor's retention of his businesses and was not in the nature of alimony, maintenance or support, given the provisions of the Settlement Agreement, the amount of the Periodic Award, the Debtor's assumption of liabilities, the lack of contingencies on payment of the Award, the lump sum nature of the Award, the tax treatment of the Award, and the parties' testimony as to the Award's purpose. *See Cummings,* 244 F.3d at 1266. Thus the Award is not a "domestic support obligation" under § 101.

Conclusion

Having given the matter careful consideration, the Court concludes that Debtor's obligation to pay the $86,000.00 Award is not entitled to priority treatment under § 507.

Accordingly, the Debtor's Objection to Claim is SUSTAINED.

END OF ORDER

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