IT IS ORDERED as set forth below:

Date: April 30, 2014

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
ERIC CORTEZ WADE,	CASE NO. 13-67411-BEM
Debtor.	CHAPTER 13
ERIC CORTEZ WADE,	
Movant,	
v.	Contested Matter
CHERYL CUNNINGHAM,	
Respondent.	

O R D E R

This Chapter 13 case came before the Court on April 22, 2014, for a hearing (the "Hearing") on Debtor's Objection to Claim of Creditor Cheryl D.

Cunningham ("Cunningham") (the "Objection") and confirmation of Debtor's Amended Chapter 13 Plan (the "Proposed Plan"). [Doc. No. 63, 77 and 74]. Cunningham, Debtor's former spouse, filed Proof of Claim No. 7 in the instant case, asserting a priority claim in the amount of $22,000 for obligations owed under a final divorce (the "Obligations") entered in the parties' divorce proceeding. Debtor objects to the priority status of the claim, asserting that the Obligations are in the nature of a property settlement and not entitled to priority treatment. Cunningham objected to confirmation (the "Confirmation Objection") of Debtor's Proposed Plan based upon her assertion that the Obligations are in the nature of alimony, maintenance or support and are entitled to priority treatment and that the plan fails to provide for such treatment. [Doc. No. 51] In addition, at the Hearing, Cunningham argued that Debtor's case was not filed in good faith as required by 11 U.S.C. §1325(a)(7) and in the Confirmation Objection asserted that the Proposed Plan was not filed in good faith as required by 11 U.S.C. §1325(a)(3). These matters are core proceedings 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.

I. Facts

The parties stipulated to certain facts relevant to resolution of the Objection and to the Confirmation Objection. The Debtor and Cunningham were married in November, 2005 and divorced in June, 2008. The parties separated in March, 2008. The marriage was 29-30 months in duration. There were no children from the marriage. Both

Debtor and Cunningham had college degrees when they were married. Cunningham earned approximately $70,000 per year while Debtor earned approximately $36,000 per year. Both Cunningham and Debtor were employed during the marriage and at the time of the divorce. Neither party suffers from any disability. The parties entered into an Agreement dated May 13, 2008 (the "Agreement") that was incorporated into a Final Judgment and Decree Of Divorce dated June 26, 2008 by the Superior Court of Gwinnett County, Georgia. Cunningham was represented by counsel when the parties negotiated the Agreement; Debtor was not. Neither party made any claim on their tax return for alimony or otherwise. The amount owed under the Agreement is $15,949.90 with the balance of the amount asserted attributable to attorney's fees in the domestic action.

The Agreement provides for the division of property including three vehicles, one that Debtor kept and was responsible for paying the debt on and two that Cunningham retained and was responsible for paying the debt on. *See* Agreement ¶ 4. Cunningham received the martial residence which Debtor was to quit claim to Cunningham. *See* Agreement ¶ 5. The Agreement recites that there is no equity in the residence. *See* Agreement ¶ 5. Each party retained their own retirement accounts. *See* Agreement ¶ 6. Each party was to hold the other harmless from each debt associated with each item of property. *See* Agreement ¶ ¶ 4, 5, 10.

The Agreement provides further that Debtor owes Cunningham $12,000 on account of a loan she made to him and that this loan is to be repaid at the rate of $200.00

per month for 60 months. *See* Agreement ¶ 6.[1] In addition to repaying this loan, Debtor was to pay three specific debts to: (i) Whitehall Jewlers for Cunningham's engagement ring (Cunningham was to keep the ring); (ii) Dillards; and (iii) Barclays. *See* Agreement ¶6. These payments were to be made directly to the creditor and in the event any payment was not made to a third party creditor or to Cunningham, Cunningham could accelerate the entire debt and exercise the rights of a judgment creditor to collect the Obligations. *See* Agreement ¶ 6.

In addition to these provisions with regard to property and debts, the Agreement provides at paragraph 7, that,

> Neither party asks for alimony from the other, now or in the future. Both parties specifically waive and release any and all rights they have or may acquire, because of this marriage, to alimony or spousal support from the other, now or in the future.

And as follows at paragraph 14:

> The parties acknowledge that the equitable division of marital property and the payment of marital and joint debts, as provided in this Agreement, shall not be deductible nor taxable for income tax purposes. Each party also acknowledges that, if not for the payments provided here, the other party's financial independence would be impaired. Therefore, it is the parties, intention that if either party seeks bankruptcy protection, the amounts payable under this Agreement shall not be dischargeable in bankruptcy under 11 United States Code Section 523(a)(5), as the payments are in the nature of spousal support and maintenance. Alternatively, the payments shall be nondischargeable in bankruptcy under 11 United States Code Section 523(a)(15).

[1] The Agreement contains two paragraphs captioned as number 6. This reference is to the second paragraph 6.

The parties disagree whether the Obligations are in the nature of alimony, maintenance or support or are a property settlement. The answer to that question will determine the appropriate treatment of Cunningham's claim.

II. Conclusions of Law

Section 1325 of the Bankruptcy Code provides the requirements for confirmation of a proposed Chapter 13 plan. Section 1325(a) provides nine requirements for confirmation, including that a case be filed in good faith and the plan be proposed in good faith. *See* 11 U.S.C. § 1325(a)(3) and (7). The Court has an independent duty to review the Debtor's proposed chapter 13 plan and evaluate whether it complies with the Code. *United Student Aid Funds, Inc. v. Espinosa (In re Espinosa),* 559 U.S. 260 (2010).

If the debt at issue in this case is a "domestic support obligation," unless the claimant agrees to a different treatment, the Debtor is required to propose a plan that pays the debt in full. *See* 11 U.S.C. § 507(a)(1)(A); 11 U.S.C. § 1322(a)(2). Section 101(14A) of the Code 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).

The parties agree that the Obligations at issue meet 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)).[2] 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).

Although the labels used by the parties do not necessarily bind the Court, the terms of the Settlement Agreement and apparent intentions of the parties are important considerations. *See Cummings*, 244 F.3d at 1265; *In re Peterson*, 2012 WL

[2] "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)).

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)). Further, provisions precluding discharge in an agreement are against public policy, but do provide some 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).

III. Analysis

1. Are the Obligations In the Nature of Support?

Considering the factors identified in the *Benson*, the majority are indicative of a property settlement rather than a support obligation. Payment of the Obligations is not contingent in that the Obligations do not terminate upon death, remarriage or entry into a meretricious relationship, nor is the tax treatment consistent with an award of alimony. Both Debtor and Cunningham hold college degrees and at the time the Agreement was made, both Debtor and Cunningham were employed with Cunningham making approximately twice as much as the Debtor. Neither party has any disabilities, the parties did not have children and the marriage was of short duration. The division of property was weighted in favor of Cunningham rather than Debtor who retained his vehicle, his retirement account and the parties' joint bank account, but otherwise did not receive any property under the Agreement. The Agreement provides that neither party can claim any payments for tax purposes.

With respect to the language of the Agreement and the nature of the Obligations, the Agreement is inconsistent because paragraph 7 states that the parties waive all claims to support while paragraph 14 states that all obligations are to be "in the nature of spousal support and maintenance." But for the statement in paragraph 14 and the provisions for paying the Obligations in monthly installments, there are no other indications in the Agreement that the Obligations are in the nature of support. Because paragraph 14 also refers to §523(a)(15), which addresses property settlement claims, and because paragraph 7 does not indicate that any provision for support is made in the Agreement, the Court finds that the language of paragraph 7, which states that all claims for support are waived, is more indicative of the parties' intentions with respect to the Obligations than paragraph 14, which was intended to "bankruptcy proof" the Agreement without regard for the actual nature of the Obligations. *See, Engram v. MacDonald,* at 287.

Given the disparate income of the parties, the short duration of the marriage and the tenor of the Agreement as a whole, the Court concludes that the Obligations are not a "domestic support obligation" under § 101 and the Obligations are not entitled to priority treatment under § 507.

2. Was This Case Filed In Good Faith?

Cunningham also argues that this case was not filed in good faith because Debtor is seeking to avoid paying the Obligations, was released from incarceration associated with a contempt order for non-payment of the Obligations and is funding a new car in his plan. Section 1325(a)(3) requires that a plan be "proposed in good faith

and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3). The Eleventh Circuit, in *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983), set forth several non-exclusive factors a court should consider when determining if a plan is filed in good faith. One of the factors this Court is to consider is "the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13." *Id.* at 889. "Ultimately, the good faith inquiry requires a court to determine whether a plan . . . 'constitutes an abuse of the provisions, purpose, or spirit of Chapter 13.'" *See In re Lopez*, 2011 Bankr. LEXIS 3331, *13 (Bankr. N.D. Ga. 2011) (*quoting In re Lundahl*, 307 B.R. 233, 243 (Bankr. D. Utah 2003); *see generally Shell Oil Co. v. Waldron (In re Waldron)*, 785 F.2d 936 (11th Cir. 1986) (good faith standard requires case be filed with "honest intent and genuine desire to utilize the provisions of Chapter X for its intended purpose – to effectuate a corporate reorganization" and is applicable in Chapter 13). "The purpose and goal of Chapter 13 is 'to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period.'" *In re Lopez* at *17 (*quoting In re Smith*, 848 F.2d 813, 816-17 (7th Cir. 1988) and citing cases).

Neither party presented any evidence with respect to the issue of good faith, but to the extent the Debtor filed this case to deal with the Obligations, the Code provides for discharge of property settlements in chapter 13. *See*, 11 U.S.C. §§1328(a)(2). This being the case, the Court finds that a filing to address settlement obligations does not evidence lack of good faith.[3] With respect to the allegation that

[3]The Court notes that neither the Trustee nor the objecting creditor alleged that Debtor was not committing all of his disposable income to fund plan payments which is certainly relevant to the good faith analysis.

Debtor's funding of a new car through the Proposed Plan evidences a lack of good faith, this too is provided for through specific Code provisions and by itself is not sufficient to establish bad faith. *See*, 11 U.S.C. §1325(a)(*).[4]

Conclusion

Having given the matter careful consideration, the Court concludes that the Obligations are not entitled to priority treatment under 11 U.S.C. 507(a)(1). The Court concludes further that the objecting party did not establish that the case was not filed in good faith. Accordingly, it is now, hereby

ORDERED that the Debtor's Objection to Claim is SUSTAINED; it is further

ORDERED that the Debtor's Amended Chapter 13 Plan [Doc. No. 74] is CONFIRMED.

END OF ORDER

[4] The hanging paragraph is so called because it was inserted into the Code in 2005 as a separate, unenumerated paragraph following §1325(a)(9). It is often cited as §1325(a)(*).

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