



**IT IS ORDERED as set forth below:**

**Date: January 20, 2016**

*Paul Baisier*

**Paul Baisier  
U.S. Bankruptcy Court Judge**

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

IN RE:	:	CASE NO. 14-72302-PMB
BRADLEY THOMAS MALLET,	:	
	:	
Debtor.	:	
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JENNIFER PATRICE SOTO,	:	ADVERSARY PROCEEDING
	:	NO. 14-5446
Plaintiff,	:	
	:	
v.	:	
	:	CHAPTER 13
BRADLEY THOMAS MALLET,	:	
	:	
Defendant.	:	JUDGE BAISIER
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**ORDER GRANTING IN PART AND HOLDING IN ABEYANCE IN PART  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT  
AND DENYING IN PART AND HOLDING IN ABEYANCE IN PART  
DEFENDANT-DEBTOR’S MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on cross motions for summary judgment and related pleadings filed by Plaintiff Jennifer Patrice Soto (the “Plaintiff”) and Defendant-Debtor Bradley

Thomas Mallet (the “Debtor”). Under consideration by the Court are the following pleadings:

- (1) “*Plaintiff’s Motion for Summary Judgment*”, filed on August 28, 2015 (Docket No. 31), including Exhibits A-F thereto (the “Plaintiff’s Motion”);
- (2) “*Defendant’s Response to Plaintiff’s Motion for Summary Judgment*”, filed on September 30, 2015 (Docket No. 38);
- (3) “*Plaintiff’s Reply to Defendant’s Response to Plaintiff’s Motion for Summary Judgment*”, filed on October 13, 2015 (Docket No. 39);
- (4) “*Defendant’s Motion for Summary Judgment*”, filed on August 28, 2015 (Docket No. 32) (the “Debtor’s Motion”);
- (5) “*Defendant’s Brief in Support of Motion for Summary Judgment*”, including Exhibits A-J thereto (Docket No. 33); and
- (6) “*Plaintiff’s Brief in Response to Defendant’s Motion for Summary Judgment*”, filed on September 21, 2015 (Docket No. 35).

Plaintiff commenced this adversary proceeding on December 18, 2014, and amended her complaint on February 17, 2015. In the complaint as amended, Plaintiff seeks a determination that certain obligations of her former husband are excepted from discharge in this case as “domestic support obligations” under 11 U.S.C. § 523(a)(5) & (a)(15). The obligations at issue arise out of the *Final Judgment and Decree of Divorce* (the “Divorce Decree”) entered in the parties’ divorce action in the Superior Court of Cobb County, Georgia (the “Superior Court”),<sup>1</sup>

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<sup>1</sup> See Final Judgment and Decree of Divorce, filed August 13, 2013, *Bradley Thomas Mallet v. Jennifer Patrice Soto*, Civil Action File No. 11-1-03909-51, Cobb County, Georgia, Superior Court, a copy of which is attached as Exhibit “A” to the Plaintiff’s Motion.

and two (2) Orders issued by the Superior Court - a *Final Order of Contempt* (the “Contempt Order”),<sup>2</sup> and a *Temporary Order on Modification* (the “Modification Order”).<sup>3</sup> Those obligations include \$11,426.57 in payments under the Divorce Decree that were not made by the Debtor, an award of \$7,732.37 in attorney’s fees under the Contempt Order, and an additional \$20,000.00 of attorney’s fees provided for in the Modification Order. Based upon a review of the case file (including the aforementioned pleadings), the record in this bankruptcy case, and an analysis of applicable law, for the reasons stated herein, the Plaintiff’s Motion will be granted in part and held in abeyance in part, and Debtor’s Motion will be denied in part and held in abeyance in part.<sup>4</sup>

### FACTS

The following facts are undisputed. The Debtor and Plaintiff were formerly husband and wife. The parties were married in 2006, and lived together until separating in 2011. Their marriage was dissolved by the Divorce Decree following a contested action of divorce. At the time of the divorce, they had two (2) minor children, ages seven and four. In its findings in the Divorce Decree, the Superior Court concluded that the Debtor had monthly income of \$3,500.00

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<sup>2</sup> See Final Order of Contempt, filed November 13, 2014, *Jennifer Patrice Soto v. Bradley Thomas Mallet*, Civil Action File No. 13-1-10435-51, Cobb County, Georgia, Superior Court, a copy of which is attached as Exhibit “E” to Plaintiff’s Motion.

<sup>3</sup> See Temporary Order on Modification, filed December 4, 2014, *Bradley Thomas Mallet v. Jennifer Patrice Soto*, Civil Action File No. 13-1-10245-51, Cobb County, Georgia, Superior Court, a copy of which is attached as Exhibit “F” to Plaintiff’s Motion.

<sup>4</sup> As this matter arises in connection with the determination of dischargeability of debt, it constitutes a core proceeding over which this Court has subject matter jurisdiction and as to which this Court may enter a final order. See 28 U.S.C. § 1334 and § 157(b)(2)(I).

and that Plaintiff was unemployed, receiving \$1,430.00 in monthly unemployment benefits. *See generally*, Divorce Decree.

In the Divorce Decree, the Superior Court ordered that the parties share joint legal custody of the children, with Plaintiff to hold primary custody. The court awarded child support to Plaintiff in the sum of \$918.00 per month. The parties were also directed to cooperate in maintaining Medicaid benefits for the children. In addition, the Superior Court found that the Debtor had acquired an interest in Georgia Tree Pro, Inc. during the marriage, and that the value of the business and its assets ranged between \$50,000.00 and \$75,000.00. The court ordered the Debtor to pay Plaintiff \$25,000.00 for her share of the business, payable in monthly installments of \$500.00 for two (2) years, when payments were to increase to \$1,000.00 per month until the \$25,000.00 was paid in full (the "Property Payments"). Under the Divorce Decree, the court awarded sole possession of the marital residence and a vehicle to Plaintiff. The Divorce Decree further provided that Plaintiff would be responsible for paying the first mortgage on the marital residence, and the Debtor would be responsible for paying the second mortgage.

Shortly after entry of the Divorce Decree, the Debtor filed a Petition for Modification and Contempt against Plaintiff on November 27, 2013, seeking changes to custody, visitation, and child support. Thereafter, Plaintiff filed a Petition for Citation of Contempt against the Debtor on December 12, 2013, in which she alleged the Debtor had failed to pay the \$500.00 monthly payments as awarded. Plaintiff amended her Petition on October 7, 2014, adding that the Debtor had also failed to pay child support.

The Superior Court heard evidence on both matters on October 28, 2014 and entered the Contempt Order on November 13, 2014, finding the Debtor in arrears for \$4,526.57 in child

support and \$6,900.00 for the Property Payments. In addition, the court concluded that the Debtor was in willful contempt for his failure to pay child support, and awarded attorney's fees of \$7,732.37 to be paid by the Debtor to Plaintiff's attorney at a rate of \$300.00 per month. The court further ordered that the Debtor be incarcerated, with such incarceration to be stayed pending the Debtor's purging himself of contempt by paying \$11,426.57 by November 21, 2014.

In the Modification Order, the Superior Court found that the Debtor had failed at the hearing to demonstrate either a change in status regarding the parties' financial situation or needs of the children to support a modification of the prior child support award as requested.<sup>5</sup> Because the Debtor was also seeking to alter the child custody arrangement, the court awarded Plaintiff attorney's fees in the amount of \$20,000.00 "on account" pursuant to O.C.G.A. § 19-9-3(g), to be paid within ninety (90) days. The Debtor filed his petition for relief under Chapter 13 herein on November 10, 2014.<sup>6</sup>

## LEGAL ANALYSIS

### Standard for Summary Judgment

Summary judgment may be granted pursuant to Federal Rule of Civil Procedure 56, applicable herein by and through Federal Rule of Bankruptcy Procedure 7056, if "there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court "is not to

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<sup>5</sup> The Debtor also sought a jury trial on these issues.

<sup>6</sup> Although the Contempt Order was filed of record on November 13, 2014, it bears a signature date of November 11, 2014, *nunc pro tunc* to October 29, 2014. Neither party raised as relevant any impact of the automatic stay on that order.

weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Further, all reasonable doubts should be resolved in favor of the non-moving party, and “if reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.” *Twiss v. Kury*, 25 F.3d 1551, 1555 (11<sup>th</sup> Cir. 1994), citing *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11<sup>th</sup> Cir. 1985). Presumptions or disputed inferences drawn from a limited factual record cannot support entry of summary judgment, and the court cannot choose between competing inferences. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11<sup>th</sup> Cir. 1997); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11<sup>th</sup> Cir. 1997).<sup>7</sup>

This matter is before the Court on cross motions for summary judgment and has been fully briefed. Based on the material submitted by the parties, there do not appear to be any outstanding factual disputes (other than with regard to the \$20,000.00 award regarding attorneys’ fees, as discussed further below).<sup>8</sup> Although both motions are opposed, neither responding party set forth specific facts for trial, but instead couched their response in terms of asserted legal conclusions as supported by what appear to be agreed facts of record. Thus, although this matter presents

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<sup>7</sup> Once the party moving for summary judgment has identified those materials demonstrating the absence of a genuine issue of material fact, the non-moving party cannot rest on mere denials or conclusory allegations, but must go beyond the pleadings and designate, through proper evidence such as by affidavits on personal knowledge or otherwise, specific facts showing the existence of a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 948-49 (11<sup>th</sup> Cir. 1993); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11<sup>th</sup> Cir. 1993).

<sup>8</sup> *See* p. 18, below.

questions of ultimate fact regarding the proper characterization of the obligations in question for purposes of determining dischargeability of same, the Court concludes that it may enter its ruling based upon a review of the documentary evidence of record as presented.<sup>9</sup>

### **Dischargeability of Obligations Awarded and Enforced Under Divorce Decree**

Plaintiff argues that the arrearages for child support and the Property Payments, along with the award of attorney's fees, owed by the Debtor and as set forth in the Contempt Order and the Modification Order are excepted from discharge herein under 11 U.S.C. § 523(a)(5) & (a)(15) because they are in the nature of "domestic support obligations" and constitute debts owed to a former spouse.<sup>10</sup> Section 523(a)(5), as referenced in Section 1328(a)(2), provides that "domestic support obligations" are excepted from discharge and, therefore, are not dischargeable. These obligations are defined in Section 101(14A) and include an indebtedness, created before or after the filing of the bankruptcy petition, owed to a former spouse that is "in the nature of alimony, maintenance, or support" as set forth in a "separation agreement, divorce decree, or property settlement agreement" or "order of a court of record," and is not assigned unless done so voluntarily for purposes of collecting same. *See* 11 U.S.C. § 101(14A).<sup>11</sup>

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<sup>9</sup> *See generally Rodriguez v. Rodriguez (In re Rodriguez)*, 456 B.R. 532 (Bankr. D.N.M. 2011); *accord Robinson v. Robinson (In re Robinson)*, 193 B.R. 367, 372-73 (Bankr. N.D.Ga. 1996); *but see Chaney v. Chaney (In re Chaney)*, 229 B.R. 266 (Bankr. D.N.H. 1999).

<sup>10</sup> The Debtor does not dispute that the \$4,526.57 designated as child support arrears (the "Child Support Arrears") is nondischargeable (*see* Debtor's Brief at 8 (Docket No. 33); Debtor's Response at 6 (Docket No. 38)), and this sum is treated in his Chapter 13 plan. Accordingly, the Court will only address the issues pertaining to the Property Payments and the attorney's fee awards, analyzing each award separately.

<sup>11</sup> Plaintiff also filed a claim in Debtor's Chapter 13 case on February 11, 2015 in the amount of \$11,426.57 (Proof of Claim No. 1). The claim is designated as secured and based on Domestic

Exceptions to discharge are narrowly construed and must be proven by a preponderance of the evidence, although exceptions for support receive a more liberal consideration. *See Terhune v. Houser (In re Houser)*, 458 B.R. 771, 776 (Bankr. N.D.Ga. 2011); *see also McCollum v. McCollum (In re McCollum)*, 415 B.R. 625, 630 (Bankr. M.D.Ga. 2009); *Whitmarsh v. Whitmarsh (In re Whitmarsh)*, 2005 WL 1320146 (Bankr. N.D.Iowa May 31, 2005). The determination of whether a debt is in the nature of support for purposes of Section 523(a)(5) is a question of federal law. *See Strickland v. Shannon (In re Strickland)*, 90 F.3d 444 (11<sup>th</sup> Cir. 1996); *see also In re Bolar*, 2008 WL 7880900 (Bankr. N.D.Ga. Nov. 5, 2008). Accordingly, the label used in a consent agreement by the parties or by a state court order is not conclusive, although it is taken into account. In analyzing whether the debt is in the nature of support, the bankruptcy court evaluates each term in relation to the overall structure of the divorce decree to decide whether the state court, as in this instance, intended the pre-filing debts of the Debtor at issue to function as alimony or support or whether it is a division of property.<sup>12</sup>

Plaintiff also cites Section 523(a)(15), which provides that certain property division obligations are excepted from discharge if they arise in the context of marital dissolution

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Support Obligation/Child Support. The Debtor filed an objection to this Claim on June 29, 2015 (Docket No. 34), challenging allowance of same to the extent it includes Property Payments of \$6,900.00. The objection remains pending and currently scheduled for hearing. For the reasons as set forth in this Order herein, the Court will enter a separate order overruling the objection and allowing the claim. Plaintiff also filed an objection to confirmation of Debtor's Chapter 13 plan on August 6, 2015 (Docket No. 38), contesting its partial treatment of Plaintiff's overall claim. The Debtor's Chapter 13 plan will likely need to be amended to address the content of this Order.

<sup>12</sup> *Bolar, supra*, 2008 WL 7880900, at \*2; *see also O'Brien v. Silver (In re Silver)*, 2013 WL 4498813 (Bankr. N.D.Ga. July 22, 2013), citing *Cummings v. Cummings*, 244 F.3d 1263, 1265 (11<sup>th</sup> Cir. 2001).

proceedings.<sup>13</sup> In a case under Chapter 13 case, however, although debts properly described under Section 523(a)(5) as support cannot be discharged, debts for property division *otherwise* encompassed by Section 523(a)(15) as amended in 2005 are dischargeable. This conclusion follows because although Section 1328(a)(2) includes Section 523(a)(5) in its description of debts excepted from discharge, it contains no reference to Section 523(a)(15).

Therefore, property settlement obligations arising in a marital dissolution context that are payable pre-filing and might otherwise fall within Section 523(a)(15) in another chapter of the Bankruptcy Code *are* dischargeable in case under Chapter 13 once the debtor completes his plan. *See Smith v. Smith (In re Smith)*, 2013 WL 6199148 (Bankr. N.D.Ga. Oct. 3, 2013); *Silver, supra*, 2013 WL 4498813. Here, then, the same factors used before 2005 to analyze an obligation (i.e., whether an obligation is in the *nature* of support *or* a division of property) remain applicable, since the distinction between domestic support obligations and *other* debt obligations arising from the dissolution of a marital relationship is *still* viable in a case under Chapter 13.

Bankruptcy courts use various factors to determine the nature of an award and whether its underlying intent is to divide certain marital assets as a settlement of property, or, instead, whether it is intended to provide for the support of the non-debtor former spouse. *Bolar, supra*, at \* 3; *Silver, supra*, at \* 6. For instance, courts examine whether the non-debtor spouse had a need for support at the time of the award, as well as his or her age, health, work skills, experience, and level of education, and relative ability to generate income. In addition, the duration of the marriage, the

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<sup>13</sup> *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). This amendment means that the difference between support debt and property division has become *less* important, but *only* in individual cases under Chapter 7 and Chapter 11, as well as cases under Chapter 12 and Chapter 13 cases where the debtor is seeking a hardship discharge.

financial resources at the disposal of each spouse, and whether the award seems intended to balance any disparity in income are relevant. Other factors include whether the obligation is to be paid on a periodic basis or in a lump sum, and whether it terminates upon death or remarriage of the spouse. The standard of living during the marriage, circumstances contributing to the parties' estrangement, whether there are minor children in the care of the non-debtor spouse, and the tax treatment of the award(s) by the parties are also considerations. *See e.g. Smith, supra*, at \* 2; *Bolar, supra*, at \* 3; *Engram v. MacDonald (In re MacDonald)*, 194 B.R. 283, 288 (Bankr. N.D.Ga. 1996).

Similar factors have been cited in connection with the examination of a divorce decree when entered by a court, as distinguished from an agreement between the parties, as is the case here. *See Silver, supra*, at \*6, citing *Benson v. Benson (In re Benson)*, 441 Fed.App'x. 650 (11<sup>th</sup> Cir. 2011) (citing *McCollum*, 415 B.R. 625, 631). These factors include the language of the agreement, whether it sets out a waiver of other support rights, and whether the obligation can be modified or enforced in state court.

#### **The Property Payments - The Parties' Contentions**

The Property Payment arrearage of \$6,900.00 arises in connection with the Superior Court's determination of Plaintiff's share of the Debtor's ownership interest in Georgia Tree Pro, Inc. in the divorce action. Finding that the Debtor acquired this interest during the marriage, the court awarded the Debtor exclusive rights to and profits from the business going forward. After hearing testimony on value, the court further ordered that for purposes of the divorce, "the value of the business shall be divided as follows: \$25,000.00 to the [Plaintiff], paid in installments of \$500.00 per month beginning August 1, 2013 and continuing for 2 years thereafter at the rate of

\$500.00 per month.” *See* Divorce Decree, pp. 10, 11.

Plaintiff asserts that notwithstanding their labelling by the Superior Court, the Property Payments were intended to function as support, as they helped to balance the parties’ disparate incomes and the obligation is enforceable by contempt. *See e.g. Strickland*, 90 F.3d 444; *MacDonald*, 194 B.R. 283. Further, Plaintiff asserts that the Superior Court found a clear need for Plaintiff’s support because the Debtor earned twice as much as Plaintiff, and she had primary physical custody of the minor children. Similarly, she claims that the attorney’s fees award was issued in connection with the enforcement of the Divorce Decree as necessitated by the Debtor’s willful contempt regarding the terms of the dissolution of the parties’ marriage set by the court.

The Debtor contends in response that the Property Payment arrearage is a dischargeable division of property for several reasons. First, as evidenced by the structure and terms of the Divorce Decree itself, the award is in a section specifically labelled “Property Division,” along with an award of the marital residence to Plaintiff and other divisions of marital property.<sup>14</sup> Second, the Debtor counters the claim that the Property Payments were intended as support or to balance disparate incomes citing the relatively “high” award of monthly child support at \$918.00 as provided in the Decree (p. 8). The Debtor adds that he paid child support of \$100.00 per week during the two-year pendency of the divorce action and, even though Plaintiff may have had unsteady employment, she was able to stay current on the first mortgage. *See* Consent Temporary Order, ¶ 5, filed March 20, 2012 (attached as Exhibit “J” to Debtor’s Brief in Support of Motion for Summary Judgment, Docket No. 33). The Debtor maintains that all these facts were fully

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<sup>14</sup> Although Plaintiff was made responsible for the first mortgage on the residence, the Debtor was ordered to pay the second mortgage. *See* Divorce Decree, pp. 11-12.

taken into account by the Superior Court as part of its effort to balance the parties' income levels as evidenced by the amount of child support awarded and its decision to assign to Plaintiff responsibility for the mortgage payment on the marital home where she resided. Finally, by holding Plaintiff responsible for placing the children on her medical insurance once employed and holding both parties responsible for other medical expenses, along with granting the Debtor generous visitation rights, the Superior Court saw no need for additional support. *See* Divorce Decree, p. 9. Given the foregoing, the Debtor contends that the division of the value of the business cannot properly be construed as support.

In reply, Plaintiff asserts that her receipt of child support as awarded in the Divorce Decree has no bearing on whether or not the Property Payments are also in the nature of support. Moreover, she asserts that the facts recited above by the Debtor are not valid factors under the accepted analytical framework for examining such obligations as presented herein. Similarly, Plaintiff states that the claim that the Superior Court judge determined no additional support was needed based on the health care coverage terms is misleading since the children received Medicaid benefits.

Plaintiff further contends that two statements of the Debtor actually tend to show that the Property Payments are in the nature of support. First, although she was awarded the marital home and assigned responsibility for the first mortgage, this arrangement was intended to promote stability for the children by allowing them to remain in their home. By ordering the division of the business through the payment of monthly installments, the court furnished the means for Plaintiff to support herself and the children. This observation, she asserts, is bolstered by the fact that Plaintiff's employment was not consistent during the period of the divorce proceedings.

Second, not only is the statement that the child support award was “high” unsupported, the amount of the award is actually generated strictly from a statutory calculation based on the parties’ incomes and the needs of the minor children. *See* O.C.G.A. § 19-6-15. Plaintiff claims that she was receiving unemployment benefits and that the Superior Court looked to the income the Debtor received from the business to supplement her child support. The absence of an upward deviation in the child support award is offered as further proof that the court intended the Property Payments to serve this function on behalf of Plaintiff and the children.

### ***The Property Payments – The Court’s Conclusion***

Upon examination of the Debtor’s obligation arising from a division of the value of the business as set forth in the Divorce Decree, as well as the parties’ relative earnings at that time and the Divorce Decree as a whole, the Court finds that the Property Payments are in the nature of support. The Court recognizes that this obligation is not subject to remarriage or death, and there is no explicit waiver of other support rights. The fact that it is payable in installments coupled with the failure of the Divorce Decree to provide any alimony whatsoever and the significant disparity in the parties’ respective incomes (Debtor earned 2½ times what Plaintiff received in unemployment benefits), however, show that the Property Payments were intended to function as a supplement to the Debtor’s support, especially in maintaining a home and other necessities for their two (2) children.<sup>15</sup>

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<sup>15</sup> In the Divorce Decree, the Superior Court did not explicitly address other factors such as the Plaintiff’s age, health, work skills, experience, or level of education, nor did it address the length of the marriage or the cause for the dissolution in connection with the terms of its order, other than as directed under the applicable state statute. Although the Debtor filed the complaint for divorce in which he set forth allegations including that Plaintiff had committed acts of family violence, the Superior Court made no such findings and as noted above, awarded primary custody

As the Debtor observes, this obligation is set forth in the section of the Divorce Decree designated “Property Division,” and support is specifically addressed in a separate section. Yet, during the marriage both parties worked at Georgia Tree Pro, Inc. and the Superior Court awarded the parties’ means of income to the Debtor. Through the division in the Divorce Decree, the Debtor could continue to operate the business and retain its profits, while contributing to the household of his former wife and their children by providing Plaintiff her share of the value of the business through monthly Property Payments for a period of 37 months.<sup>16</sup> Along with the award of child support, the court sought in this way to balance the parties’ level of income going forward and address Plaintiff’s financial needs. These Property Payments also enabled Plaintiff to maintain the family’s standard of living, since the children lived with her and since she was liable for the first mortgage.<sup>17</sup> In addition, the source of the payment is not conclusive if the payment is necessary for ongoing support.

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of the minor children to Plaintiff. *See* Complaint for Divorce, attached as Exhibit “A” to Debtor’s Motion. In addition, although the Debtor alleged he and the children were dependent upon Plaintiff for their support and that he was only self-employed with varying income, the Superior Court entered specific findings as to the parties’ relative earning capacities, and awarded payments to Plaintiff for her share of the business the Debtor had acquired.

<sup>16</sup> Though less than the time period support payments were awarded (i.e. fourteen years or when youngest child attained majority or becomes otherwise emancipated), still, this period is not insubstantial, and the court did not order a lump sum payment, which would be more typical of a property settlement. *See e.g. Douthit v. Parris (In re Douthit)*, 2013 WL 4714404, \*6 (Bankr. N.D.Ga. April 26, 2013).

<sup>17</sup> For instance, when added to Plaintiff’s monthly unemployment benefit as stated in the Divorce Decree to be \$1,430.00, the Property Payments increase her total monthly income to \$1,930.00 for two years, and to \$2,430.00 for an additional year. In addition, although the utilization of periodic payments may have been for the benefit of the Debtor, the Debtor offered no evidence on this point to diminish the fact that such an income stream for just over three (3) years would have a significant effect on Plaintiff’s budget.

In this Court's view, it is also noteworthy that the Property Payments obligation is enforceable through contempt. See *Benson*, 441 Fed.App'x. at 651; *MacDonald*, 194 B.R. at 288. As discussed below, in the Contempt Order, the Superior Court specifically included the Property Payment arrears with the child support arrearage in computing the amount the Debtor needed to pay to purge himself of willful contempt and avoid incarceration. Use of such an enforcement mechanism is indicative of the public nature of the concern that families not be left in difficult financial circumstances by spouses or parents who do not fulfill their obligations.<sup>18</sup>

In sum, consideration of the above factors<sup>19</sup> and the undisputed facts of record indicates that the Property Payments were designed to address Plaintiff's demonstrated need for support, and the Debtor may not discharge them herein under 11 U.S.C. § 523(a)(5).

#### **The Attorney's Fees Awards**

Next, the Court turns to the issue of whether the award of attorney's fees in connection with the enforcement of the Divorce Decree may be characterized as support. Focusing on the substantive nature of the obligation, bankruptcy courts discern the intent of the state court, examining the function the award serves and the relative financial position of the parties. In

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<sup>18</sup> It is true that during the hearing on Plaintiff's Petition for Citation of Contempt, the parties referred to the \$25,000.00 award as a property division. Hearing Transcript of October 28, 2014, at 74, 77, attached as Exhibit "I" to Debtor's Brief (Docket No. 33). As revealed by the Contempt Order, however, the Property Payments arrearage and child support arrearage obligations were functionally intertwined in relation to Plaintiff's support needs.

<sup>19</sup> As noted above, the Superior Court did not explicitly address Plaintiff's age, health, work skills, experience, or level of education, or the length of the marriage or the cause for the dissolution in connection with its order. Although these factors could have some bearing on this Court's analysis under Section 523(a)(5), no evidence was offered regarding such factors for consideration in this matter, other than the length of the marriage, which the Court does not find to be probative.

addition, courts consider the nature of the litigation giving rise to the fees in question. *See Robinson*, 193 B.R. at 372-76.<sup>20</sup>

Plaintiff argues that because the fee award arose out of actions associated with the Divorce Decree, it constitutes a domestic support obligation of the Debtor. *See Marshall v. Marshall (In re Marshall)*, 489 B.R. 630, 634 (Bankr. M.D.Ga. 2013). As provided in the Contempt Order, the Superior Court awarded attorney's fees of \$7,732.37 to Plaintiff "for the necessity of having to prepare and present her *Petition for Citation of Contempt*," based on the finding that the Debtor had failed "to pay in full the Child Support he was ordered to pay under *Final Judgment and Decree of Divorce*." Contempt Order, ¶¶ 7, 8 (emphasis in original). Citing O.C.G.A. § 19-6-2, the Superior Court entered its award "after considering the financial circumstances of the parties," payable in installments of \$300.00 per month to counsel.

The Debtor contends that the award is not in the nature of support because Plaintiff initially filed her petition for contempt on grounds of the Debtor's failure to pay the Property Payments, and only amended her petition to include the alleged child support arrearage nearly ten (10) months later. Further, the Debtor maintains that although the Superior Court heard both the contempt petition and his own petition for modification due to an asserted loss of income, because he requested a jury trial on the latter, the court reserved issues pertaining to child support and most of the discussion centered on the Property Payments arrearage and the second mortgage

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<sup>20</sup> Here, the Superior Court had reserved the issue of attorney's fees in the Divorce Decree itself (Debtor's Brief, Exhibit "B," p. 13), and later denied same (Exhibit "B," p. 25), but found an award of fees appropriate in the enforcement of same as set forth in the Contempt Order. Further, the fact that the Contempt Order stated fees were to be paid directly to Plaintiff's attorney (Exhibit "G," ¶ 8) does not preclude a finding that same are excepted from discharge under Section 523(a)(5). *Robinson*, 193 B.R. at 373.

obligation.

The Court has reviewed the hearing transcript provided by the Debtor. It appears from such review that the Superior Court judge understood that all the contempt evidence was being heard that day, and awarded fees as warranted. *See* Hearing Transcript of October 28, 2014, Exhibit "I" (Docket No. 33). (As discussed below, temporary fees were awarded in connection with the Debtor's anticipated prosecution of his petition for a modification with respect to custody, visitation, and child support). Thus, although the separate issue of modification may have been reserved, the scope of the hearing was not limited to contempt for failing to pay the Property Payments or the second mortgage as the Debtor suggests, but also addressed the matter of the child support arrearage. *See e.g.* Transcript, at 74-76, 78, 88. The Superior Court awarded fees on the contempt issue broadly construed, as reflected in its written order.

The Contempt Order, entered after the hearing, sets forth the controlling terms of the court's ruling and clearly states that attorney's fees were awarded for contempt in the Debtor's failing to pay child support. Because these fees were awarded as part of the expenses of litigation in connection with a contempt action arising out of a divorce case, expressly based upon a consideration of the parties' financial disparity as directed by state law, the Court concludes this award may be excepted from discharge and is in the nature of support.

Finally, with respect to the award of \$20,000.00 in attorney's fees in the Modification Order, these fees appear to have been awarded in view of the Debtor's intention to alter the child custody arrangement along with modifying the award of child support. As mentioned above, the Superior Court awarded them "on account" under O.C.G.A. § 19-9-3(g) to be paid within ninety (90) days. There is no indication that Plaintiff ever incurred these fees, or that the Debtor ever

paid them. Plaintiff maintains these fees are not dischargeable because they were ordered in connection with Plaintiff's forced defense of the child support award the Debtor sought to have reduced. The Debtor states he did not need to pay this amount and, because he never received a jury trial on this matter, no debt is owed to Plaintiff regarding same.<sup>21</sup>

From a review of the record, it appears that the jury trial may not have occurred, which seems to have been anticipated as a predicate for the award under the Superior Court's order and state law. In fact, at the hearing the court raised the question whether a failure to pay the fees could be construed as a waiver of the Debtor's jury trial demand. In any event, there is insufficient evidence in the record as to whether the further litigation occurred and the asserted attorneys' fees were incurred. As such, the Court concludes that Plaintiff's Motion should be held in abeyance as it relates to this award, as Plaintiff has not established the existence of an actual debt for purposes of determining its dischargeability. Similarly, Debtor's Motion is also held in abeyance to this extent due to the existence of this issue of fact.

In view of the foregoing, Plaintiff and the Debtor are each hereby allowed **ten (10) days** to submit any evidence and legal authority to the Court (as well as serving opposing counsel with a copy of same) regarding whether the obligation to pay \$20,000.00 in attorneys' fees exists and remains enforceable under applicable Georgia law. Should Plaintiff or the Debtor submit any such evidence or argument, the opposing party shall have **ten (10) days** to file and serve a response.

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<sup>21</sup> Counsel for Plaintiff has filed a claim in this case for attorney's fees in the total amount of \$27,732.37 (Proof of Claim No. 2). Unfortunately, the proof of claim merely sets forth an amount owed, which is simply the sum of the two Superior Court awards, and does not provide any further information on how the claimed obligation was calculated. The fact that the award regarding the jury trial is precisely \$20,000.00 suggests that it does not represent an amount actually incurred.

## CONCLUSION

Upon review of Plaintiff's Motion, Debtor's Motion, the related pleadings filed by the parties, and all other matters of record, as well as the argument of the parties as set forth therein, and based upon the above analysis, the Court concludes that Plaintiff is entitled to judgment as a matter of law on the complaint in part on the terms set forth hereafter.

Accordingly, it is hereby

**ORDERED** that Plaintiff's Motion for summary judgment be, and the same hereby is, **granted in part** and Debtor's Motion for summary judgment be, and the same hereby is, **denied in part**, as follows:

- (1) The child support arrearage arising in connection with the Divorce Decree and as set forth in the Contempt Order and owed by Debtor Bradley Thomas Mallet to Plaintiff Jennifer Patrice Soto in the amount of \$4,526.57 is nondischargeable as support under 11 U.S.C. § 523(a)(5); and,
- (2) The obligation consisting of the Property Payments arising in connection with the Divorce Decree and as set forth in the Contempt Order and owed by Debtor Bradley Thomas Mallet to Plaintiff Jennifer Patrice Soto in the amount of \$6,900.00 is nondischargeable as support under 11 U.S.C. § 523(a)(5); and,
- (3) The award of attorney's fees set forth in the Contempt Order in the amount of \$7,732.37, as owed by the Debtor and payable to Baskin & Baskin, P.C. as Plaintiff's attorneys in the state court divorce proceedings and related matters, is also nondischargeable as support under 11 U.S.C. § 523(a)(5). And it is

**FURTHER ORDERED** that Plaintiff's Motion be, and the same hereby is, **held in**

**abeyance** consistent with the above discussion and direction regarding the alleged obligation of the Debtor to pay attorney's fees in the amount of \$20,000.00 as set forth in the Temporary Order on Modification, pending the provision by the parties of further information as provided herein.

And it is

**FURTHER ORDERED** that Debtor's Motion for summary judgment be, and the same hereby is, also **held in abeyance** consistent with the foregoing as to the \$20,000.00 award of attorney's fees, pending the provision by the parties of further information as provided herein.

A final judgment will be entered upon disposition of the issues held in abeyance herein.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff, counsel for Defendant-Debtor, and the Chapter 13 Trustee.

**[END OF DOCUMENT]**