

Chapter 13 Trustee, Sylvia Ford Brown (hereinafter "Trustee"), opposes the motion and asks for a declaratory judgment that the property conveyed pursuant to that agreement is property of the estate and should be administered for the benefit of creditors. In the present case, the issues that predominate are bankruptcy issues concerning the administration of the estate and, therefore, this Court will retain jurisdiction to adjudicate this core proceeding. *See* 28 U.S.C. § 157(b)(1)(A). This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

At the hearing the evidence revealed the following. On June 14, 1996, prior to the filing of the petition, Debtor's former spouse filed an action in the Superior Court of Chatham County, Georgia, which sought a dissolution of their marriage, an award of child support and alimony, and a division of property. On or about July 18, 1995, Debtor and his now ex-wife, Pamela S. Moretz, reached an oral agreement, with the assistance of counsel, on the terms of a settlement of all issues. During the month of August, Debtor's counsel withdrew from his case and soon thereafter Debtor, acting *pro se*, reaffirmed his commitment to the proposed agreement. However, on September 1, 1995, Debtor filed for Chapter 13 protection to prevent a lender's foreclosure of his residence. Ultimately, the parties executed a written settlement agreement on October 31, 1995, and incorporated that agreement into a final judgment and decree of divorce of the Superior Court of Chatham County on November 7, 1995. In short, Debtor commenced divorce proceedings, agreed to

settlement terms, filed for bankruptcy protection, and then obtained a final decree of divorce.

Although the parties redrafted the divorce settlement because of the withdrawal of Debtor's prior counsel and to include bankruptcy court approval language, the substance of the agreement is identical to the previous draft with respect to the division of property, alimony, and child support issues. In relevant part the agreement requires that the Debtor pay child support to his ex-wife in the amount of \$1,050.00 per month for a defined period relating to the age and emancipation of the older child at which point the child support reduces to \$750.00 per month. The agreement further provides that the husband pay \$550.00 per month as temporary alimony, that the parties' residence be quitclaimed to the wife in contemplation of the sale of the house, and upon the sale of the house that the Debtor's alimony payments drop to \$275.00 per month for five years. The agreement also contains a provision that requires the approval of any settlement by the Bankruptcy Court of any post-petition transfer that affects property of the estate.

Pursuant to the agreement Debtor's ex-wife listed the property on the market, located a purchaser, and ultimately, through the consent of all parties, and by order of this Court, closed the sale with one-half of the net proceeds being tendered to the Chapter 13 Trustee pending a decision in this case.

Debtor's ex-wife previously owned a one-half undivided interest in the property and has already received payment of her interest. Both Mr. and Mrs. Moretz testified at the hearing, credibly, and affirmed that their meeting of the minds as to this divorce and alimony agreement occurred in July 1995, pre-bankruptcy, although the execution of the written agreement occurred after the Debtor filed for Chapter 13 protection.

Debtor and Debtor's ex-wife contend that because they reached an agreement pre-bankruptcy, even though a one-half undivided interest in the property remained in the husband's name as of the date of filing, the property in issue is not property of the estate inasmuch as their agreement was ultimately approved by the Superior Court of Chatham County, Georgia. They both argue that the divestment of any title in the husband should be considered effective as of the date the parties reached their agreement. Alternatively, Debtor's counsel argues that even if the Court concludes that the real estate remained property of the estate on the date of filing of the bankruptcy case, the property was subject to the inchoate rights to division of property, alimony, and child support held by the wife. Counsel notes that the parties, through an arm's length negotiation, reached an agreement that subsequently has been approved by the Superior Court of Chatham County, Georgia. Counsel also asserts that any claim which this Court determines as belonging to Debtor's ex-wife should be considered a pre-petition priority claim and paid under 11 U.S.C. Section 507(a)(7) out of proceeds from the sale of the house in preference to the claims of

unsecured creditors.

Trustee disputes the pre-petition status of the wife's claim and asserts that the home was property of the Debtor's estate as of the date of the bankruptcy filing. As a result, Trustee claims that the funds in dispute should be distributed to all of the unsecured creditors in the case.

CONCLUSIONS OF LAW

Initially, this Court must decide whether the husband's interest in the home is property of the estate. In pertinent part Section 541(a)(1) encompasses within the estate all legal or equitable interests of the debtor in property as of the commencement of the case. Here, the issue is whether the filing of the action for dissolution of the marriage prior to the filing of the bankruptcy petition acts to divest property from the debtor's estate. For the following reasons, I hold that the disputed property remains estate property.

Federal law governs this analysis although state law is necessarily incorporated by reference. *See In re Roberge*, 181 B.R. 187 (Bankr.E.D.Va.1995) ("[t]he question of what constitutes the property of a bankruptcy estate . . . is ultimately a federal question"). Section 541(a) defines the property of the estate as all legal and equitable interests of the debtor in property as of the commencement of the case. *See* 11 U.S.C. §

541(a)(1). In regard to unrecorded interests, such as the spouse's, Section 544(a) of the Bankruptcy Code provides the trustee with special avoidance powers. Specifically, the trustee has the rights of a hypothetical bona fide purchaser, judicial lienholder, and creditor holding an execution returned unsatisfied. *See* 11 U.S.C. § 544(a)(1)-(3). To determine whether the trustee's strong-arm prevails over a spouse's equitable interest, a court must consider state law to evaluate the spouse's interest as compared to that of a hypothetical bona fide purchaser or judicial lienholder. *See In re Roberge*, 188 B.R. 366 (E.D.Va.1995) (state law determines the vesting of equitable distribution rights).

In Georgia, both bankruptcy courts and state courts have long recognized that "Georgia law provides that a bona fide purchaser for value is protected against outstanding equitable interests in land of which the purchaser has no notice." *In re Briglevich*, 147 B.R. 1015, 1021 (Bankr.N.D.Ga. 1992) (holding that former wife's equitable interest in property was superseded by strong-arm powers of trustee); *See Eavenson v. Parker*, 261 Ga. 607, 608, 409 S.E.2d 520, 521 (holding that bona fide purchaser's interest was superior to husband's interest where no *lis pendens* notice was filed); *Dime Sav. Bank v. Sandy Spring Assoc.*, 261 Ga. 485, 487, 405 S.E.2d 491, 493 (1991). I, therefore, hold that under the law of the State of Georgia, absent a notice of *lis pendens*, if a final decree of divorce has not been entered at the time the bankruptcy petition is filed then the trustee's strong-arm power prevails over the spouse's equitable distribution rights. In the present

case, the parties filed for bankruptcy before the state court issued a final decree of divorce. Thus, the disputed proceeds will be treated as property of the estate.¹

The recipient spouse is, however, no longer reduced to the status of a general unsecured creditor as held in In re Briglevich, 147 B.R. at 1022. In 1994, Congress, recognizing the necessity of protecting a former spouse's interest, created a priority position for payments of allowed claims for debts of a spouse. *See* 11 U.S.C. § 507(a)(7). This provision favors a former spouse over the tax and general unsecured claimants although it subordinates that claim to certain administrative claims and a few enumerated priority claims. Although the final decree of divorce was executed post-petition, the claim of Debtor's ex-wife in the amount of the value of ex-husband's half interest shall be considered a pre-petition claim. 11 U.S.C. Section 101(5)(A) provides:

(5) "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, legal, equitable, secured, or unsecured;

¹ Although in this instance the parties failed to file a notice of lis pendens, it should be noted that the substantial authority exists to support the proposition that the filing of a lis pendens notice defeats a trustee's interest. *See* O.C.G.A. 23-1-18 "Pending action as notice; effect on purchaser;" O.C.G.A. 44-14-610 "Necessity of recordation for operation of lis pendens as to real property;" Vance v. Lomas Mortgage USA, Inc., 263 Ga. 33, 426 S.E.2d 873 (holding that lis pendens provides constructive notice and binds third parties to the outcome of the litigation); In re Fisher, 67 B.R. 666 (Bankr.D.Colo. 1986); In re Perlow, 128 B.R. at 415; In re Gurs, 27 B.R. 163 (B.A.P.9th Cir.1983); McCannon v. Marston, 679 F.2d 13 (3rd Cir.1982); *see also* In re Gulino, 779 F.2d 546, 551 ("[Section 544(a)(3)] was not intended to provide the trustee immunity from constructive notice which state law imputes to everyone by virtue of recordation or some other act").

In general, pre-petition debts should be paid from pre-petition assets; post-petition debts should be paid from post-petition assets. *See* 11 U.S.C. § 502(b)(5). Under Georgia law, a wife's claim to both (1) support and (2) equitable distribution arises on the date of filing for separation. *See* Davenport v. Davenport, 243 Ga. 613, 618, 255 S.E.2d 695 (1979) (holding that wife possesses a claim for support against husband's estate from the date of separation even if husband dies before an award of temporary alimony or issuance of divorce decree); Segars, Admrx. v. Brooks, 248 Ga. 427, 428 ("equitable distribution claim arises either after or contemporaneously with the filing of a claim for divorce"). In this case, the claim of Debtor's ex-wife to her former husband's interest in the real estate did not vest until the date of the final decree. Since her interest was not perfected by a notice of *lis pendens* the trustee is empowered to set aside the transfer, but her claim to the value of that interest came into existence pre-petition on the filing of the petition for divorce. To hold otherwise and permit the trustee to both avoid a spouse's pre-petition claim in specific pre-petition property and treat that claim as post-petition, yet allow the sale of the property and disbursement of the proceeds to every creditor except the spouse would be contrary to the provisions of the Bankruptcy Code and to the deference this Court owes the state domestic process. I, therefore, hold that Pamela S. Moretz is entitled to a pre-petition priority claim in an amount equivalent to her ex-husband's interest in their former residence.

The final issue to be decided is what effect should this Court give to the parties consent agreement, recognizing that the parties settled all issues in their divorce action, that a decree was entered by the Superior Court and that it contemplated Bankruptcy Court approval. When considering issues concerning bankruptcy and domestic relation law, the Eleventh Circuit Court of Appeals has held that:

[A]limony, maintenance, or support are not standard debtor/creditor situations, but involve important issues of family law. Traditionally, the federal courts have been wary of becoming embroiled in family law matters The reasons for federal abstention in these cases are apparent: the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision, and the problems of congested dockets in federal courts the concerns underlying this abstention doctrine are also present in bankruptcy Nor was it the intent of the new Bankruptcy Code to convert the bankruptcy courts into family or domestic relations courts—courts that would in turn, willy-nilly, modify divorce decrees of state courts insofar as these courts had previously fixed that amount of alimony and child support obligations of debtors. (citations omitted).

Carver v. Carver, 954 F.2d at 1578-79. See also Matter of Robbins, 964 F.2d 342 (4th Cir.1992) (bankruptcy courts should grant great deference to state courts in domestic matters). Bankruptcy courts are not courts of domestic relations. See In re Fisher, 67 B.R. at 669. Moreover, the determination of an ex-wife's interest in marital property concerns

the application and interpretation of state domestic relations law and, therefore, should not be fixed by this Court. *See In re MacDonald*, 755 F.2d 715, 719 (9th Cir. 1985). Nevertheless, federal law determines what constitutes estate property and also regulates its distribution. As such, at least when a case has been settled, and not actually litigated pre-petition, this Court has a duty to review the terms of the agreement. *See In re Hohenberg* 143 B.R. 480, 488 (holding that the court has the authority to condition relief from the stay and to order that the parties obtain court approval regarding any consensual agreement involving estate property); *see also In re White*, 851 F.2d 170, 174 (No per se rule to lift the stay established in cases involving domestic relations when the bankruptcy court suspects collusion between the spouses).

While the standards for making such an analysis are sparse, I hold the following factors are to be considered. First, a court should decide whether the settlement was made pre or post-petition. Second, if pre-petition, is there evidence that would make the agreement subject to attack under 11 U.S.C. Section 548(a)? Third, if post-petition, are the substantive terms within the realm of likely outcome that would be expected in a case that was actually litigated? When applying this analysis a court should keep in mind that public policy favors the voluntary resolution of disputes and that federalism demands great deference to state proceedings in domestic relations.

In this case, the parties settled their dispute pre-petition but the settlement

was approved by the Superior Court post-petition. In such a case I hold the standard to apply is that governing post-petition settlements. The order entered in In re Sorlucco, 68 B.R. 748 (Bankr.D.N.H. 1986), is persuasive. In that instance, a trustee attacked the transfers made by debtor-husband to wife in conjunction with pending divorce proceeding in state court. Balancing the interests between bankruptcy and state domestic relation law, the Sorlucco Court held that:

[T]he standard in this context should be interpreted to require only a "surface determination" by the bankruptcy court that the division of marital property between the divorcing parties was within the range of likely distribution that would be ordered by the state divorce court if the property division had actually been litigated in state court.

Id. at 753; *see also* Matter of Topgallant Lines Inc., Ch. 11 Case No. 89-41996, Adv. Proc. No. 90-4202, slip. op. (Bankr.S.D.Ga., June 1, 1994) (Davis, J.) (holding that trustee's proposed settlement was within the "lowest point in the range of reasonableness"). In this case, both Debtor and his ex-wife testified that the parties reached an agreement approximately two months prior to the filing of the bankruptcy petition at a time when bankruptcy was not contemplated. Although circumstances changed and Debtor was required to file for bankruptcy protection, the substance of the initial agreement remained unchanged. The Superior Court of Chatham County ultimately approved the agreement. The terms are not manifestly unreasonable, given the circumstances of the parties and the

range of likely outcomes if the case had been litigated. Accordingly, the agreement is approved in amount, although the Code will govern the timing of the ex-wife's distribution of the value of her interest in the real estate, as held earlier in this opinion.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the proceeds in dispute which were derived from the sale of debtor's residence are property of the estate.

FURTHER ORDERED that the Debtor's settlement agreement incorporated by the Superior Court of Chatham County's Decree of Divorce is approved although the Bankruptcy Code shall govern the order and timing of the distribution of the real estate proceeds pursuant to 11 U.S.C. Section 507(a)(7).

FURTHER ORDERED that Pamela S. Moretz is allowed a pre-petition claim equal to the value of her husband's interest in their former residence together with any accrued and unpaid pre-petition alimony and support payments.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of June, 1996.