

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE
 SOUTHERN DISTRICT OF GEORGIA
 Dublin Division

IN RE:)	
)	Chapter 7 Case
MICHAEL E. MCLENDON)	Number <u>93-30049</u>
)	
Debtor)	
<hr style="border: 0.5px solid black;"/>		
)	
MICHAEL E. MCLENDON)	
)	
Plaintiff)	
)	
v.)	Adversary Proceeding
)	Number <u>94-3001</u>
)	
KATHY L. MCLENDON)	
)	
Defendant)	

ORDER

Plaintiff Michael E. McLendon initiated this adversary proceeding on February 11, 1994 against pro se defendant Kathy L. McLendon seeking to have his property obligations under a judgment and decree of total divorce between the parties to this litigation declared dischargeable in his chapter 7 case. Based upon the evidence put forth at trial on April 21, 1994 and the record in the underlying case file,¹ I make the following findings of fact and

¹The court may take judicial notice of the record in the underlying case in considering an adversary proceeding. In re

conclusions of law.

Plaintiff and defendant were married for approximately fourteen years before receiving a divorce on June 2, 1993. Prior to the divorce, on February 22, 1993 plaintiff had filed a chapter 13 case with this court. On December 28, 1993, subsequent to the divorce, plaintiff's bankruptcy case was voluntarily converted to chapter 7.

The parties had two minor children, 12 and 9 years of age at the time of the divorce. The settlement agreement incorporated in to the decree of divorce gives defendant full custody of the parties minor children and obligates plaintiff to pay \$100.00 per week to defendant as child support, to maintain health and medical insurance for the minor children until they reach the age of maturity or become self-supporting, and to pay the cost of education of the minor children through high school and college. Plaintiff does not seek to have these child support obligations discharged.

The divorce decree also provided for defendant to make all future installment payments on a 1984 24 x 40 jointly owned mobile home to become due after the divorce decree became final. Debtor's chapter 13 schedules list a debt owed on the mobile home of \$9,443.23 and having a value of \$8112.00. Upon completion of

Carey, Chapter 7 case no. 91-10130, Adv. Pro. No. 91-1033, slip op. at 5 n.4, (Bankr. S.D. Ga. May 14, 1992); see also In re Jackson, 49 B.R. 298 (Bankr. D. Kan. 1985).

payments, plaintiff was to transfer clear title to defendant. Plaintiff testified at trial that he made payments until the divorce decree became final. As a result of defendant's failure to make the payments as required by the divorce decree after that date, the mobile home was repossessed.²

The only debt at issue in this adversary is plaintiff's obligation under the divorce decree to make installment payments on 16.79 acres of jointly owned land in Toombs county with title to be transferred to defendant. A house that the parties began building on the property remains unfinished is uninhabitable. The improvements consist of foundation, stud frame and plywood and presswood flooring and roof. The press board and plywood on the house had began buckling and delaminating due to exposure to the weather. Defendant estimated it would cost approximately \$20,000.00 to finish the house. The debt on the property is approximately \$12,000.00. On the same day as the hearing on this adversary proceeding, the secured creditor was granted relief from the automatic stay in debtor's chapter 7 case to pursue any state law remedies against the property. Neither party occupied the property.

From plaintiff's bankruptcy schedules it appears that at

²A consent order was entered in plaintiff's chapter 13 case on November 16, 1993 granting the secured creditor relief from the automatic stay as to the mobile home, plaintiff claiming no interest therein.

the time of the divorce in June 1993, plaintiff was earning a net monthly income of \$1,195.00 and defendant was not employed. Subsequent to the divorce, in January 1994 plaintiff re-injured his back and has been unemployed since that time. Plaintiff has made no child payments since that date. Currently, plaintiff's new wife supports him and her three children from unemployment benefits.

Defendant testified that she began attending nursing school in April 1993. Defendant remains unemployed, residing with her father and receiving AFDC benefits.

The parties did not obtain representation in reaching a settlement agreement. Defendant drafted the settlement agreement and it was typed up by another individual. Defendant testified that she did not want alimony, but that she wanted to retain the land for her children and that plaintiff agreed to pay for it. Upon cross-examination, defendant reiterated that the parties agreed that there was no alimony.

Bankruptcy Code § 727 provides for a discharge in Chapter 7 cases of all debts that arose before the order for relief under that chapter. In this case plaintiff seeks to have discharged a debt that was incurred subsequent to his chapter 13 filing but prior to the case conversion to chapter 7. Under 11 U.S.C. § 348(b) and § 727(b) debts such as plaintiff's arising after the original filing but preconversion are deemed prepetition debts subject to discharge

in the chapter 7 case. 2 Norton Bankruptcy Law & Practice 2d § 33:7 at 33-8 (W. Norton ed. 1994); 4 Collier on Bankruptcy ¶ 727.13 (1. King 15th ed. 1994). However, 11 U.S.C. § 523(as)(5) creates an exception to discharge in a chapter 7 case for any debt

. . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . designated as alimony maintenance or support, unless such liability is actually in the nature of alimony, maintenance or support.

The party objecting to discharge bears the burden of proof that debt in question is excepted from discharge, Federal Rule of Bankruptcy Procedure 4005, which must be shown by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

Section 523(a)(5) "suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support." In re Harrell, 754 F.2d 902, 906 (11th Cir. 1985). If the obligation is in the nature of a property settlement, it is dischargeable. Id. at 906-07. The substance and function of the obligation determine whether it is "alimony," "maintenance," or "support" as meant in § 523(a)(5). "The initial inquiry must be to ascertain whether the State Court or the parties to the divorce intended to create an obligation to provide support; if they did not, the inquiry ends there." In re

Bedingfield, 42 B.R. 641, 646 (S.D. Ga. 1983).³ The bankruptcy court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Long v. Calhoun, 715 F.2d 1103, 1109 (6th Cir. 1983). The following factors have been used by other courts as guidelines in determining whether a debt is in the nature of support:

(1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984).

(2) "The presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. (citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977)).

(3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

³Bedingfield was overruled by the Eleventh Circuit in Harrell to the extent the court in Bedingfield held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding." Bedingfield at 646. In all other respects, Bedingfield is binding authority in this district.

(4) Finally, the court should examine the function of the obligation, including whether or not the payment at issue is used to provide necessities such as food, housing or transportation. In re Gianakas, 917 F.2d 759, 763 (3rd Cir. 1990).

In this case, the settlement agreement did not characterize the plaintiff's obligation as either "alimony" or as a "property settlement." However, that the parties intended the obligation at issue to be a property settlement at the time the settlement agreement was executed was clearly established by defendant's own testimony that there was to be no alimony payments under the agreement. By the agreement, defendant sought only to retain both the land and the mobile home.

While at the time the agreement was executed defendant was unemployed and in need of support, the agreement is only structured to provide for defendant's children by payment of \$100.00 in child support and medical and educational expenses. The provisions relating to property simply do not act to provide support for defendant herself. Plaintiff's payments on the land in Toombs county did not function to secure housing for defendant or her children - that duty being placed on defendant under the agreement by the requirement that she make payments on the mobile home. Plaintiff's land payment obligation does not serve to provide for defendant's necessities or serve any function other than to divide the property acquired during the marriage thereby allowing the

defendant to retain the property in accordance with her wishes. I find that defendant has failed to carry her burden of proof to establish that the obligation of plaintiff to make payments on the Toombs county property is in the nature of support.

It is therefore ORDERED that judgment is entered in favor of plaintiff Michael E. McLendon and against defendant Kathy L. McLendon finding that the plaintiff's obligation to pay the debt on the Toombs County property under the parties decree of divorce to be discharged in the plaintiff's underlying Chapter 7 case. No monetary relief is awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this _____ day of May, 1994.