

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>95-11415</u>
JACK ALLEN HORNER)	
)	
Debtor)	
_____)	
)	
JACK ALLEN HORNER)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>95-01090A</u>
BARBARA HORNER)	
)	
Defendant)	

ORDER

Before this court is the remand of this matter from the United States District Court for the Southern District of Georgia upon reversal of a prior judgment in favor of defendant Barbara Horner determining that a debt created pursuant to a separation agreement between the parties entered as a part of their divorce decree in the Superior Court of Georgia was in the nature of maintenance, alimony or support and was therefore not discharged in Mr. Horner's Chapter 7 bankruptcy case. At the conclusion of the trial of this adversary proceeding I entered my findings on the

record. Mr. Horner appealed that determination and the District Court found that "[t]he Bankruptcy Judge did little more than tick off the Suarez factors without stating the significance, relevance, and weight of each particular factor . . ." and "[b]esides being unclear, the Bankruptcy Court's analysis seemed thin and superficial." I will attempt to be clearer in articulating my reasons for determining the obligation created under paragraph 9 of the separation agreement between the parties dated February 1, 1991 and incorporated into the final judgment and decree of total divorce between the parties entered March 26, 1991 in the Superior Court of Columbia County, Georgia is in the nature of support for the benefit of Barbara Horner as provided under 11 U.S.C. § 523(a)(5)¹ and is therefore not discharged in Mr. Horner's Chapter 7 bankruptcy case.

¹11 U.S.C. § 523(a)(5) provides in relevant part:

a) A discharge under section 727, . . . of this title does not discharge an individual debtor from any debt- . . .

(5) 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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-

B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

Jack and Barbara Horner were divorced in 1991 after 23 years of marriage. During their marriage they had two children, a son age 22 and a daughter age 17, at the time the separation agreement was executed. The daughter turned 18 shortly after the divorce became final. In the year preceding the divorce (1990), Jack Horner earned approximately \$60,000.00, and Barbara Horner approximately \$40,000.00. The separation agreement relevant to the issue now before me provides as follows:

2. **Alimony Waiver.** Each party waives and forever relinquishes any claims each has or may have to alimony, maintenance and support of any nature from the other or his or her estate whether in the form of periodic payments, lump sum payments or awards of property from his or her separate estate or otherwise, except as set forth in this agreement.² (Emphasis added).

3. **PROPERTY DIVISION.** . . .
(a) Home Place. The wife presently owns the house and 15.96 acres of land used by the parties as their residence and the residence of the children, the husband having Quit-Claimed his interest in said property to the wife in November of 1989. In addition the wife owns and (sic) adjacent 10.487 acres of land which was purchased by her separately. As a division of property and not as alimony the wife alone shall retain ownership of the home place and the adjacent tract of land. It is understood

²The District Court found that "Barbara Horner agreed to waive any claim to alimony, maintenance or support, but ¶ 9 contained the following provisions... [with verbatim from the separation agreement]." The District Court's findings imply a conflict between paragraph 2 and paragraph 9. I find no conflict because the "except as set forth in this agreement" language of paragraph 2, in my view, incorporates paragraph 9 as an exception to the waiver of support.

and agreed that said Home Place is subject to a first mortgage now held by BarclaysAmerican/Mortgage Corporation and a second Mortgage held by Bankers First Federal Savings and Loan Association, which mortgages the wife assumes and agrees to pay.

(d) Other Real Property of Wife. The wife presently owns four other parcels of real estate consisting of a lot in Ponderosa Subdivision in Lincoln (sic) and rental property (sic) located at 1806 Wrightsboro Road, Augusta, Georgia, 4502 Evanston Drive, Martinez, Georgia, and 520 Highview Way, Martinez, Georgia. These properties were purchased with the separate funds of the wife and the husband waives any claim which he may have to said properties.

6. CUSTODY OF CHILD AND VISITATION RIGHTS. The parties shall have joint custody and control of the minor child of the marriage Susan Leigh Horner. The wife shall have primary custody and provide a home for the child subject to reasonable visitation rights in favor of the husband. The parties agree to co-operate on all decisions requiring the joint consent of the parties. (Emphasis added).

7. CHILD SUPPORT PAYMENTS. The husband shall pay to the wife as and for the support of the minor child of the parties, Susan Leigh Horner, the sum of \$1100.00 every four weeks beginning February 21, 1991. It is contemplated that said child shall obtain college and post-graduate education and said child support shall continue beyond the age of eighteen (18) years provided that said child in (sic) enrolled as a full time student in an institution of higher learning (College, Graduate School, Law School, etc.). It is contemplated that said child will attend university, college for nine months out of the year, and failure of the child to attend an institution of higher learning for twelve months out of the year shall not void this provision, unless she makes an affirmative

declaration of her cessation of higher learning. Furthermore the temporary cessation of education due to illness or other means beyond the control of said child shall not void this provision. However, in any event the child support provided for herein shall terminate in June 2001 if not previously terminated. In the event that the child elects to attend school for less than nine months of the year or otherwise temporarily discontinue (sic) or defer (sic) her education, the obligation to make the support payments call (sic) for herein shall temporarily abate until the education may be resumed at which time the full payment shall once again be made. Wife waives any right to claim said child as her dependant (sic) as long as such payments are current and wife agrees to sign IRS Form 8382 for each year. Wife agrees to use so much of said support payments as may be necessary for the education of said child and not for her personal expenses. The wife agrees to hold such support payments in trust to expend them for the benefit of the child.

9. **SUPPORT FOR WIFE.** The husband shall pay to the wife or her heirs or personal representative in the event of her death FOURTEEN THOUSAND THREE HUNDRED (\$14,300.) DOLLARS annually, payable ELEVEN HUNDRED (\$1,100.00) DOLLARS every fourth (4) week beginning March 7, 1991 to enable her to make the mortgage payments on the [marital residence]. Upon the cessation or temporary abatement of the obligation of the husband to pay child support under paragraph seven (7) of this agreement the support payments shall be increased at the rate of SEVEN THOUSAND ONE HUNDRED FIFTY (\$7,150.00) DOLLARS per year payable at a rate of FIVE HUNDRED FIFTY (\$550.00) DOLLARS every fourth week on the same weeks that the child support payments would have been made. All obligations of the husband to pay the support payments provided for herein shall terminate upon his attaining the age of 65 years on January 31, 2005. The payments

provided for in this paragraph for the benefit of the Wife by the Husband shall not be included in the gross income of the Wife under Section 67(b)(1)(B) of the Internal Revenue Code, and not allowable as a deduction to the Husband under section 215 of the Internal Revenue Code of 1954, as amended. (Emphasis added).

According to the testimony of Mr. Jack Minor, a real estate appraiser, the real estate owned by Ms. Horner, including the home place had a value of \$508,500.00 as of March 11, 1996, the date of his appraisals. Mr. Minor testified that these appraisal values held true as of the date of the separation agreement on March 26, 1991. According to the 1989 and 1990 joint federal income tax returns filed by the parties, the income producing real estate had a resulting annual net loss which included depreciation. At the time of the separation agreement, the rental properties produced a positive cash flow in excess of \$500.00 per month. No evidence was introduced as to the net equity in the properties.

In accordance with the separation agreement, Jack Horner made payments as defined by paragraph 9 to Barbara Horner until March 1993. Before cashing some of the checks, Barbara Horner wrote "debt repayment" on them. The parties complied with the tax provisions in paragraph 9.

In August 1993, Jack Horner filed an action for modification of alimony in the Superior Court of Columbia County, Georgia. The superior court denied the request for modification, holding that the payments under paragraph 9 were "not periodic

payments subject to modification, but constitute[d] instead, lump sum alimony payable in installments[.]”

In October 1995, after filing a Chapter 7 case, Jack Horner instituted this adversary proceeding to discharge the debt to Barbara Horner created by paragraph 9.

The District Court in its order generally set forth the legal standard to be applied in this matter.

In general, a Chapter 7 debtor may obtain a discharge from ‘all debts that arose before the date of the order for relief.’ 11 U.S.C. § 727(b). A division of property pursuant to a divorce decree is a debt dischargeable under § 727. In re Bedingfield, 42 B.R. 641, 645 (S.D. Ga. 1983). However, a debt that is ‘actually in the nature of alimony, maintenance, or support’ is excluded from the § 727 discharge. 11 U.S.C. § 523(a)(5); In re Harrell, 754 F.2d 902, 904 [(11th Cir., 1985)]. The party opposing discharge bears the burden of establishing that the Debtor’s obligation is actually in the nature of alimony, maintenance, or support. In re Montgomery, 169 B.R. 442, 444 (Bankr. M.D. Fla. 1994) (citation omitted).

[The burden of proof in establishing non-dischargeability is by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287 111 S.Ct. 654, 1122 L.Ed.2d 755 (1991).]³

Federal law, not state law, governs the determination of whether a debt is non-dischargeable alimony, maintenance, or support. In re Harrell, 754 F.2d at 905 (citation omitted). However, state law may still provide useful non-dispositive guidance on this issue.

³The bracketed material in the long quotation from the District Court’s order represents additional conclusions of law made by me.

See In re Rosenblatt, 176 B.R. 76, 78 (Bankr. S.D. Fla. 1994); In re Jackson, 102 B.R. 524, 531 n. 11 (Bankr. M.D. La. 1989). Where, as here, the final divorce decree merely approves an agreement between the parties, the intent of the parties is the focus of the inquiry[,] West v. West, 95 B.R. 395, 399 (Bankr. E.D. Va. 1989) [and is dispositive. See In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996); In re Samson, 997 F.2d 717, 723 (10th Cir. 1993) (“the critical inquiry is the shared intent of the parties at the time the obligation arose”).]⁴

A federal court is not bound by the label that the parties or the state court attach to an award; the substance and function of the obligation rather than its form determine whether an obligation is dischargeable[;] See Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); In re Spong, 661 F.2d 6, 9 (2nd Cir. 1981)[; but it is indicative of the parties intent. See In re MacDonald, 194 B.R. 283, 287 (Bankr. N.D. Ga. 1996); Matter of Bell, 189 B.R. 543, 547 n.2 (Bankr. N.D. Ga. 1995)];⁵ Ersparn v. Badgett, 647 F.2d 550, 554 (5th Cir. 1981). To ascertain the intent of the parties and the substance and function of the obligation, the bankruptcy court may consider any or all of the following factors:

- (1) The amount of alimony, if any, awarded by the state court and the adequacy of any such award;
- (2) the need for support and the relative income of the parties at the time the divorce decree was entered;
- (3) the number and age of children;
- (4) the length of the marriage;
- (5) whether the obligation terminates on death

⁴Id.

⁵Id.

or remarriage of the former spouse;

(6) whether the obligation is payable over a long period of time;

(7) the age, health, education, and work experience of both parties;

(8) whether the payments are intended as economic security or retirement benefits;

(9) the standard of living established during the marriage.

Suarez v. Suarez (In re Suarez), Ch. 11 Case No. 91-20276, Adv. No. 92-2009, slip op. at 23-24 (Bankr. S.D. Ga. Dec. 23, 1992) (citing In re Hart, 130 B.R. 817, 836-37 (Bankr. N.D. Ind. 1991)). This list, which is similar to others formulated by other courts, [footnote omitted] is a non-exhaustive checklist of considerations that need not be proven or even considered in every case. See In re Jackson, 102 B.R. 524, 531 (Bankr. M.D. La. 1989); see also In re Benich, 811 F.2d 943, 945 (5th Cir. 1987) (explaining that such factors 'are not legal criteria, . . . but relevant evidentiary factors that assist the bankruptcy court as trier of fact in determining the true nature of the debt created by the agreement').

In addition to the Suarez factors, the District Court admonished me to consider the following additional factors:

1. Whether there are minor children requiring support.
2. "[Ms.] Horner's need for support and the fairly substantial amount of assets accumulated by [her] during the marriage (including real estate valued at more than \$500,000.00)."
3. The deductibility for federal and state income tax purposes of the payment at issue.

4. "[A]ppropriate weight [should be given] to the Columbia County Superior Court's characterization of the obligation under ¶ 9 as a division of property (lump sum alimony) rather than support."

I will now analyze each of the factors enumerated by the District Court in fulfilling the requirements established by the Eleventh Circuit Court of Appeals that I conduct "a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support." (Emphasis added as to "simple" and original as to "nature.") In re Harrell, 754 F.2d at 906. All to determine the intent of the parties in reaching the terms of the separation agreement specifically paragraph 9 now at issue beginning with the phrase "**SUPPORT FOR WIFE.**"

1. The amount of alimony, if any, awarded by the state court and the adequacy of such award.

Paragraph 2 of the separation agreement

" . . . waives . . . any claims each has or may have to alimony, maintenance and support of any nature from the other . . . whether in the form of periodic payments, lump sum payments or awards of property from his or her separate estate or otherwise, except as set forth in this agreement.

This factor, based upon the language of the separation agreement, supports a finding of a support obligation. The superior court made no award of alimony. Paragraph 2 waives support except as set forth in the agreement itself such as the "**SUPPORT FOR WIFE**" provided in paragraph 9.

2. Need for support and the relative income of the parties at the time the divorce decree was entered.

The District Court's order of reversal stated that I failed to consider Ms. Horner's substantial assets valued at more than \$500,000.00 in assessing her need for support. The District Court left undisturbed my determination that Mr. Horner earned approximately \$20,000.00 per year more than Ms. Horner (\$60,000.00 vs. \$40,000.00). In addition, the evidence established that first and second mortgages against the home place, annual taxes and insurance required an equivalent monthly payment of "a little over \$1,400.00. (Testimony of Barbara Horner Transcript p. 1-24 line 14). Ms. Horner had a disposable income of \$1,900.00 per month. (Testimony of Barbara Horner Transcript p. 1-24 line 17). Clearly, Ms. Horner lacked sufficient income to maintain the family home place awarded to her under paragraph 3(a) of the separation agreement. She had substantial other assets which if sold apparently could generate funds to satisfy or reduce the mortgages against the home place. However, two of the properties owned by Ms. Horner were purchased to provide funds for the two children's college education in the event that the parties developed financial problems and were unable to provide the education. (Testimony of Jack Horner Transcript p. 1-103 line 23 - p. 1-104 line 4). At the time of the separation agreement the son, then 22, was still in school and the daughter, then 17, was to enter college that fall.

Again, this factor provides little guidance. If Ms. Horner was to maintain her rental property for her own future security and that of her children's education and to retain the home place, she lacked sufficient income to do so and required a contribution of support from Mr. Horner. If the rental properties were liquidated, there would appear to have been funds generated to reduce the first and second mortgages on the home place thus lessening her need for support from Mr. Horner in order to maintain the family home place, but that would have eliminated the security provided for the children's education.

3. The number and age of children.

At the time of the separation agreement the two children were 22 and 17. This factor clearly mitigates against an award of support.

4. The length of the marriage.

The Horners were married more than 23 years at the time they entered into the separation agreement. This factor considered in conjunction with the disparity of income of the parties and the standard of living established during the course of the marriage supports a determination of support. See Fitzgerald v. Fitzgerald (In re Fitzgerald), 9 F.3d 517, 521 (6th Cir. 1993) (standard of living is a long-standing standard for finding award of alimony); Goin v. Rives (In re Goin), 808 F.2d 1391, 1393 (10th Cir. 1987)

(many years married and disproportionate earning power helps determine award is for support), aff'g 58 B.R. 136 (D. Kan. 1985).

5. Whether the obligation terminates on the death or remarriage of the former spouse.

As stated by the District Court, "the provision that Jack Horner's obligation under paragraph 9 would not terminate upon Barbara Horner's death strongly indicates that the Horners intended ¶ 9 to create a division of property. See Adler v. Nicholas, 381 F.2d 168, 171 (5th Cir. 1967) ('Payment of a continuing obligation after the wife's need for support terminates strongly supports an intent to divide property and strongly refutes an argument that it is alimony.')

6. Whether the obligation is payable over a long period of time.

Paragraph 9 required Mr. Horner to pay to Ms. Horner \$14,300.00 annually, payable in \$1,100.00 every fourth week beginning March 7, 1991 and continuing until January 31, 2005. The periodic nature of these payments is an indicator of support. See Iler v. Iler (In re Iler), Ch. 7 Case No. 95-42815 Adv. No. 96-4050 slip op. at 13 (Bankr. S.D. Ga. Sep. 3, 1997) (twelve monthly payments of \$1,440.25 are support); Garrard v. Garrard (In re Garrard), 151 B.R. 598, 600-01 (Bankr. M.D. Fl. 1993) ("periodic payments of \$500.00 per month for a period of 120 months" are support); Bowsman v. Morrell (In re Bowsman), 128 B.R. 485, 487

(Bankr. M.D. Fl. 1991) (obligation to pay installments over a substantial period of time, weekly \$100.00 payments for 156 weeks, is support).

7. The age, health, education and work experience of both parties.

This factor provides little guidance. At the time of the entry of the separation agreement the parties were of comparable age, reasonable good health and employed. As noted under factor 2 above, Mr. Horner enjoyed an annual income of about \$60,000.00 or 1/3 higher than that of Ms. Horner.

8. Whether the payments are intended as economic security or retirement benefits.

Again, this factor is of no help. The plain language of paragraph 9 provides that the payments were necessary "to enable [Ms. Horner] to make the mortgage payments on the [marital residence]" and the evidence supports this statement. This clear and unambiguous statement indicates that the payments are for her economic security. However, taking into consideration the value of other properties owned by Ms. Horner it does not appear that these payments were necessary for her long term economic security.

9. The standard of living established during the marriage.

By far, this is the strongest indicator of the intent of the parties regarding the payments provided under paragraph 9.

During the course of the marriage the parties enjoyed a very good combined income of approximately \$100,000.00 per year and lived quite comfortably. (Testimony of Jack Horner Transcript p. 1-102 line 7). This lifestyle included family vacation trips to Europe and owning and maintaining horses at the home place. The payments described under both paragraphs 7 and 9 of the separation agreement were clearly designed to maintain Ms. Horner and their daughter in the standard of living established during the course of the more than 23-year marriage, a clear indicator of support. See, Fitzgerald 9 F.3d @ 521.

10. Whether there are minor children requiring support.

The younger child under paragraph 7 of the separation agreement received \$1,100.00 every fourth week. Additionally, as the daughter, then 17, would soon reach the age of majority and typically conclude her education before the termination of payment requirements under paragraph 9, January 31, 2005, it would appear less likely that the payments required under paragraph 9 to facilitate Ms. Horner's meeting the mortgage payment obligation on the family residence would inure to the benefit of the daughter. This factor mitigates against a determination that the obligation in paragraph 9 is in the nature of support.

11. The tax treatment of the payment.

This factor also mitigates against a determination of support. In the agreement under paragraph 9 the parties established that the payment to Ms. Horner would not be included in her gross income for federal income tax purposes and not be allowed as a deduction to Mr. Horner. See Engram v. MacDonald (In re McDonald), 194 B.R. 283, 288 (Bankr. N.D. Ga. 1996) (identifying the tax treatment of the payment by the debtor's spouse as a factor to consider); Copeland v. Copeland (In re Copeland), 151 B.R. 907, 910 (Bankr. W.D. Ark. 1993) ("The tax treatment chosen by the parties is relevant and very probative to the determination of the parties' intent."). But see Hardy v. Hardy (In re Hardy), Ch. 13 Case No. 95-42178 Adv. No. 96-4004, slip op. at 6-8 (Bankr. S.D. Ga. July 17, 1996) (tax treatment is only probative, not per se, evidence of parties' intent).

12. Appropriate weight should be accorded the Columbia County Superior Court's characterization of the obligation under paragraph 9 as a division of property (lump sum alimony) rather than support.

The District Court in its order determined that under Georgia law, lump sum alimony is considered "in the nature of a final property settlement." See Hamilton v. Finch, 230 S.E.2d 881, 238 Ga. 78, 79 (1976). The District Court also opined that the Georgia court's opinion, while not controlling, is entitled to due deference, citing In re Montgomery, 169 B.R. at 444 and Toony v.

Ploski (In re Ploski), 44 B.R. 911, 913 (Bankr. D.N.H. 1984).

Affording deference to the state court decision requires an analysis of the underlying state law. Georgia law defines alimony as "an allowance out of one party's estate, made for the support of the other party when living separately." Official Code of Georgia Annotated (O.C.G.A.) § 19-6-1. Despite this definition, the label of "alimony" has been applied in Georgia to asset or fund transfers between spouses as a result of a divorce decree, whether the transfer is intended for support or is actually an equitable division of property. The Supreme Court of Georgia has identified several means by which a divorce decree may accomplish a transfer of assets or funds from one spouse to the other:

1. specifically enumerating real or personal property to be transferred;
2. stating a specific or variable amount of money payable either at once or in specific installments;
3. stating a specific or variable amount of money to be paid at stated intervals for an indefinite period of time, at least until the death or remarriage of the receiving spouse; or
4. any combination of the above.

Stone v. Stone, 330 S.E.2d 887, 254 Ga. 519 (1985) (adopting the above from the concurring opinion of Justice Weltner in Rooks v. Rooks, 311 S.E.2d 169, 171, 252 Ga. 11 (1984)). Georgia law ignores the label placed upon an award and looks only to the

substance of the award. Distinguishing between the forms of asset distribution becomes important only when the obligor seeks to modify the divorce obligations. Under O.C.G.A. § 19-6-19, "permanent alimony" or "periodic alimony" is subject to modification. However, "lump sum alimony" is

not subject to modification under O.C.G.A. § 19-6-21. In this case, the negotiated payment constituted "lump sum alimony" as determined by the superior court. However, this determination is relevant only in a state action for modification due to a change in circumstances. This labeling is

not a determinative factor of whether the award was intended for the support of the wife or whether it was intended as an equitable division of property. See Appling v. Rees (In re Appling), 186 B.R. 1013 (Bankr. N.D. Ga. 1995) (decision making an independent factual determination that lump sum

alimony award was intended for the support of the non-debtor spouse and therefore finding the debt non-dischargeable).; Ackley v. Ackley (In re Ackley), 186 B.R. 1005 (Bankr. N.D. Ga. 1994) (same); Nix v. Nix (In re Nix), 185 B.R. 929 (Bankr. N.D. Ga. 1994) (same). Although I am admonished by the

District Court to give due deference to the superior court's determination of lump sum alimony, as such determination is only relevant in considering a modification of a divorce decree due to subsequent change in circumstance, it does not address the intent of the parties at the time they entered into the

separation agreement.

In this case the factors set forth above are at best inconclusive and at worst confusing. Having read the separation agreement and heard the testimony of the parties at trial, a clear understanding of the intent of the

parties at the time of the entry of the separation agreement can be made. Under paragraph 3(a) of the separation agreement Ms. Horner retained ownership of the home place together with 15.96 acres of land and an adjacent 10.487 acres free and clear of any claim of Mr. Horner. Additionally the separation agreement acknowledges that the home place was subject to two mortgages which Ms. Horner assumed and agreed to pay. The two mortgage payments, taxes and

insurance on the home place equaled approximately \$1,400.00 per month and at the time of the separation agreement Ms. Horner's monthly disposable income equaled \$1,900.00 per month, an insufficient sum to maintain the property and to meet her other living expenses based upon the standard of living enjoyed by the family during the course of the marriage. In paragraph 9 of the separation agreement, designated by the parties "**SUPPORT FOR WIFE,**" Mr. Horner

agreed to pay to Ms. Horner \$14,300.00 annually paid at a rate of \$1,100.00 every fourth week. The agreement specifically provided that this payment was "to enable [Ms. Horner] to make the mortgage payments on the real estate referred to in item 3(a)", the home place. Additionally, paragraph 9 took into consideration the payments made by Mr. Horner as child support for the benefit of the minor daughter and provided for an increase in the support

payments to Ms. Horner in the event that the child support payments under paragraph 7 ceased. Under paragraph 7 Mr. Horner agreed to pay as child support \$1,100.00 every four weeks while the daughter continued her education as a full time student. It is clear that the parties intended Mr. Horner provide two-thirds of his disposable income for the benefit of his ex-wife and his minor daughter in order to provide the minor daughter with college and

post graduate education if she so desired and to maintain Ms. Horner and their daughter, during the daughter's post secondary education, in the standard of living the family attained and enjoyed during the course of the 23-year marriage. (Testimony of Barbara Horner Transcript p. 1-22 line 16-20).

From examining the totality of the circumstances existing at the time of the divorce with emphasis given to the length of the marriage, the

income disparity between the parties at the time of the divorce, and the standard of living of the family at the time of the divorce, as well as the language used in the separation agreement, the payments under paragraph 9 designated "**SUPPORT FOR WIFE**" were intended by the parties as support for Mrs. Horner. The obligation under paragraph 9 of the separation agreement between the parties, incorporated in the divorce decree in the Superior Court of

Columbia County, Georgia requiring Jack Allen Horner to pay to Barbara Horner \$1,100.00 every fourth week until January 31, 2005, is in the nature of support for Ms. Horner and **ORDERED** excepted from the discharge order in Mr. Horner's underlying Chapter 7 bankruptcy case.⁶

⁶In its order of reversal, the District Court instructed me to determine the validity of an additional ground for reversal of my previous determination that "the separation agreement was unconscionable and Barbara Horner was guilty of actual fraud and concealment in the preparation of the separation

agreement." This legal theory for Mr. Horner was first raised on appeal. Following the remand from the District Court, by order filed February 24, 1997, the parties to this adversary proceeding were required to file a request for an additional evidentiary hearing within ten (10) days of the date of the order. Barring a request for an evidentiary hearing, the parties were afforded 30 days in which to file any additional argument by letter brief. In response to the order, Mr. Horner filed a request for an evidentiary hearing which was withdrawn based upon the consent of the parties to the admission into evidence of Mr. Horner's 1992 through 1995 federal income tax returns. No brief was submitted on behalf of Mr. Horner. Mr. Horner's failure to pursue his claim that the separation agreement was unconscionable and that Ms.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this ____ day of September, 1997.

Horner was guilty of actual fraud and concealment in the preparation of the agreement is taken as an abandonment of that assertion.