

SIGNED.



Dated: September 15, 2008

James M. Marlara
JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

<p>10 In re:</p> <p>11 JASON R. WALLACE,</p> <p>12 _____ Debtor(s).</p> <p>13 KIMBERLY SUOR (WALLACE),</p> <p>14 Plaintiff,</p> <p>15 vs.</p> <p>16 JASON R. WALLACE,</p> <p>17 _____ Defendant.</p>	<p>) Chapter 7</p> <p>) No. 4:07-bk-02592-JMM</p> <p>) Adversary No. 4:08-ap-00139-JMM</p> <p>) MEMORANDUM DECISION</p>
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18 On September 11, 2008, this adversary proceeding came on for trial. The Plaintiff
19 represented herself; the Defendant was represented by James J. Gentile. After consideration of the
20 facts and the law, the court renders its decision.

FACTS

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24 The parties were previously married. On June 12, 2006, their marriage was dissolved.
25 The parties were granted joint custody of their two children, one of whom requires special needs.

26 The consent decree included an agreement wherein the wife (Plaintiff in this action)
27 agreed to waive future spousal support payments, with a proviso that the husband
28

1 (Debtor/Defendant) "shall pay the lump sum of \$100,000, directing to [wife] in lieu of a spousal
2 maintenance award." (Consent Decree of Dissolution Order, filed June 12, 2006 at 2, para. 7, 5,
3 para. 3(a)).
4

5 **ISSUES**
6

- 7 1. Is the Defendant/Debtor's agreement to pay \$100,000 intended as a property
8 settlement or is it instead in the nature of support?
9 2. Has the wife/Plaintiff waived her right to claim the \$100,000, since the Debtor
10 failed to timely pay it?
11 3. Is the \$100,000 debt a non-dischargeable obligation?
12

13 **LAW**
14

15 Domestic support obligations are non-dischargeable. 11 U.S.C. § 523(a)(5). A
16 "domestic support obligation" is defined in 11 U.S.C. § 101(14A) as a pre-petition debt that is
17 recoverable by a former spouse that is in the nature of alimony, maintenance, or support, without
18 regard to whether such debt expressly so designates, pursuant to an agreement, divorce decree or
19 property settlement agreement, or by a court order.
20

21 **A, Spousal Maintenance or Property Settlement**
22

23 As for the first issue, the court finds that the \$100,000 was intended by the parties to
24 be "in the nature of" alimony or spousal support. The agreement clearly expresses this intent. It is
25 apparent that the husband/Defendant desired to be relieved of future ongoing alimony payments, and
26 "in lieu" thereof, agreed to pay wife/Plaintiff \$100,000. The words "in lieu of" mean "instead of or
27 in place of" or "in exchange for." BLACK'S LAW DICTIONARY (8th ed. 2004)
28

1 That this lump-sum payment was not intended as part of a property division is also
2 demonstrated by the specific list of property divided, attached to the decree, where all of the couple's
3 tangible property was equitably divided.

4 While property division of the couple's tangible property is dealt with in a separate
5 section of the court's order, the \$100,000 lump-sum payment is found in its own, separate section
6 entitled: "Spousal Maintenance/Support."

7 The parties' intention is clear, to provide a one-time payment to wife, to relieve the
8 husband of future spousal maintenance obligations.

9 The court finds that the \$100,000 payment is a domestic support obligation.

10
11 **B. Waiver**

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13 The Defendant maintains that his failure to timely pay this \$100,000 debt constitutes
14 a legal waiver by wife of her right to receive it. Nothing in the record, or the agreement, supports
15 this argument. Nowhere do the divorce instruments provide such a windfall to the Defendant, for
16 his voluntary decision not to pay.

17 That he chose not to pay a legal obligation does not relieve Defendant of that
18 responsibility. He is merely delinquent. Wife/Plaintiff is therefore entitled to reapply to the Superior
19 Court either for a contempt citation, or to enforce the provision as one would any other unpaid debt.
20 There is no indication that the Wife agreed to voluntarily waive her right to this one time payment
21 of \$100,000.

22 Moreover, nothing in the "Exhibit A" attached to the decree mentions the \$100,000
23 owed to wife as being a "debt" of the community.

24 The Defendant's defense of legal waiver, therefore, fails for lack of any evidence
25 supporting that conclusion.

1 **C. Application of Law to the Facts**

2
3 As noted above, pursuant to § 523(a)(5), "domestic support obligations" are
4 nondischargeable. Section 101(14)(A) defines that term to mean a debt that is "in the nature of
5 alimony, maintenance, or support ...," so the issue of what obligations are "in the nature of support"
6 remains an issue for the court to decide. *In re MacGibbon*, 383 B.R. 749, 760 (Bankr. W.D. Wash.
7 2008)

8 The plaintiff must establish her case by a preponderance of the evidence. *Grogan v.*
9 *Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991).

10 Where, as here, the award was made in a contested proceeding, the intent of the state
11 court trial judge is dispositive in determining the nature of the award. *MacGibbon*, 383 B.R. at
12 762-63 (citing *Gionis v. Wayne (In re Gionis)*, 170 B.R. 675, 682 (9th Cir. BAP 1994), *aff'd*, 92 F.3d
13 1192 (9th Cir.1996); *In re Jodoin*, 209 B.R. 132, 138 (9th Cir. BAP 1997)).

14 As explained by Chief Judge Pappas in *In re Kimball*, 253 B.R. 920, 923 (Bankr. D.
15 Idaho 2000):

16
17 Because this Court is primarily concerned with discerning the intent of
18 the state court judge in characterizing the various obligations imposed
19 upon Defendant in the divorce action, it is the state court's formal
Findings, Conclusions, and Decree that are the primary focus of this
Court's inquiry.

20 A bankruptcy court is not bound by the labels used in the state court but rather is able to make an
21 independent decision. See 11 U.S.C. § 101(14)(A) (defining "domestic support obligation" as a debt
22 "in the nature of alimony, maintenance, or support . . . without regard to whether such debt is
23 expressly so designated"); see also *Shine v. Shine*, 802 F.2d 583, 586 (1st Cir. 1986). The relevant
24 time period for the inquiry is the time when the state court's order was entered. *In re Seixas*, 239
25 B.R. 398, 402 (9th Cir. BAP 1999).

26 This court's task is to examine all of the circumstances and decide if the award is in
27 the nature of spousal maintenance. Support payments tend to mirror the recipient spouse's need for
28 support. See *In re Chang*, 163 F.3d 1138, 1140 (9th Cir. 1998); *Shaver v. Shaver*, 736 F.2d 1314,

1 1317 (9th Cir. 1984). Debts actually in the nature of alimony, maintenance, or support are
2 nondischargeable.

3 According to the Ninth Circuit, the foremost consideration in determining if a debt is
4 in the nature of support is:

5
6 . . . whether the recipient spouse actually needed spousal support at the
7 time of the divorce. . . . In determining whether spousal support was
8 necessary, the trial court should examine if there was an "imbalance in
9 the relative income of the parties" at the time of the divorce decree.

10 *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996) (citations omitted), *rev'd* on other grounds, *In*
11 *re Bammer*, 131 F.3d 788 (9th Cir.1997) (en banc).

12 The main factors a court needs to consider are "(1) an absence of support payments
13 in the decree, then (2) the presence of minor children in the marriage and (3) a disparity of income
14 between the parties may serve as indicia of need." *MacGibbon*, 383 B.R. at 762 (citing *In re Gionis*,
15 170 B.R. 675, 682 (9th Cir. BAP 1994) and *Shaver*, 736 F.2d at 1316).

16 In *In re Gibbons*, 160 B.R. 473, (Bankr. D. R.I. 1993), the state court had ordered the
17 husband to transfer 75 percent of the marital assets to the wife "in lieu of alimony." The bankruptcy
18 court determined, based on the application of a seven-factor test, that this award was
19 nondischargeable alimony. *Id.* at 7. The district court affirmed, stating: "Under these circumstances,
20 it appears obvious that those words signified the maker's intent that the property serve the purpose
21 of alimony by providing for [the wife's] future support." *Gibbons v. Gibbons*, 1995 WL 17017348
22 *1 (D.R.I. 1995).

23 In *In re Zaino*, 316 B.R. 1 (Bankr. D. R.I. 2004), the bankruptcy court cited *Gibbons*
24 in finding that an award of \$208,000 payable at \$1,000 per week for four years, which was labeled
25 "in lieu of alimony," was nondischargeable. Importantly, in *Zaino*, as in this case, the Settlement
26 Agreement also stated that the parties had waived any alimony, and yet it still held that the cash
27 award was in the nature of alimony. *Id.* at 6-8.

1 Even though Suor agreed, and the state court found, in the Consent Order, that neither
2 party was “entitled” to future “spousal maintenance,” the bankruptcy court may look behind the
3 parties’ labels to the substance of the obligation in the agreement. *In re Krit*, 190 B.R. 382, 387
4 (9th Cir. BAP 1995). In *Kritt*, the debtor had actually waived her right to spousal support in the
5 marital settlement agreement, and the obligation of the debtor-husband to pay her a sum of \$325,000
6 was specifically designated as an award of community property. Nonetheless, the bankruptcy court
7 decided that the award was nondischargeable spousal maintenance, pursuant to § 523(a)(5), and the
8 BAP affirmed. *Id.*

9 Application of the Ninth Circuit's *MacGibbon* factors favors the wife in this case. She
10 agreed to accept a \$100,000 lump sum instead of periodic spousal support payments; she remained
11 the primary custodial parent of the parties' two minor children, and there is a disparity of income,
12 evidenced by the husband Defendant's agreement to pay \$913,000 in community debt obligations,
13 while wife was responsible for none. Moreover, the wife in this case had remained at home for
14 many years, caring for the couple's children.

15
16 **RULING**

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18 A separate order will issue which finds the Defendant's \$100,000 obligation to wife
19 Plaintiff to be a non-dischargeable obligation. Wife / Plaintiff may return to the Superior Court to
20 enforce it.

21 A separate judgment will issue. FED. R. BANKR. P. 9021.

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23 DATED AND SIGNED ABOVE.
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1 COPIES to be sent by the Bankruptcy Notification
Center ("BNC") to the following:

2
3 James J. Gentile
Attorney for Debtor/Defendant

4 Kimberly Suor (Wallace)
Plaintiff

5
6 Gayle Eskay Mills
Trustee

7 Office of the U.S. Trustee

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