

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
 )  
BRIAN EUGENE LEWIS, ) CASE NO. 07-31051 HCD  
 ) CHAPTER 13  
 )  
DEBTOR. )

Appearances:

Joseph F. Zielinski, Esq., counsel for creditor Kim Lewis, Debra Voltz-Miller & Associates, 1951 East Fox Street, South Bend, Indiana 46613; and

James K. Tamke, Esq., counsel for debtor, 115 South Lafayette Boulevard, Suite 512, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 15, 2007.

Before the court is “Creditor Kim Lewis’s Objection to Confirmation of Plan,” filed by Kim Lewis (“creditor” or “Kim”), the former spouse of the debtor, Brian Eugene Lewis (“debtor” or “Brian”).<sup>1</sup> The creditor objects that the debtor’s chapter 13 plan does not provide for the payment of certain domestic support debts, a payment obligation of \$81,250, and her attorney’s compensation for enforcing child support arrearages.<sup>2</sup> After the parties filed briefs on the issues, the court took the matters under advisement. For the reasons stated below, the court overrules the objection by Kim Lewis to confirmation of Brian Lewis’s chapter 13 plan.

Jurisdiction

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<sup>1</sup> Other objections to confirmation have been filed by Beacon Credit Union, Indiana Department of Revenue, Teacher’s Credit Union, and the Chapter 13 Trustee.

<sup>2</sup> The creditor also filed a Motion for Relief from Stay concerning these issues. By this court’s Agreed Order of August 10, 2007, the parties stipulated that the automatic stay could be lifted so that Kim could obtain a state court order concerning child support and could file a proof of claim for that judgment amount. *See* R. 40. The Order required the debtor to modify his chapter 13 plan to provide for payment of that judgment. It also required the parties to file supplemental briefs concerning the debtor’s obligation to pay (1) \$81,250 owed to the creditor; (2) \$750 owed to the creditor’s attorney; and (3) joint tax obligations paid by the creditor.

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(L) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The almost twenty-three year marriage of Brian and Kim Lewis was dissolved on June 28, 2004. The couple had two daughters; only one is a minor. After participating in a mediation, Brian and Kim resolved many issues. The “Marriage Settlement Agreement” between them provided the “supporting details to implement the terms and conditions of the Mediation Settlement Agreement.” R. 32, Ex. A, ¶ 6(A). The parties signed the Marriage Settlement Agreement on February 28, 2005, and the court approved it on September 9, 2005. It settled the parties’ rights to the property acquired by them in their marriage. *See id.*, ¶ 2. The Agreement allocated the financial indebtedness and set forth the parties’ agreement to release all claims against one another. It resolved the issues concerning the marital property, real and personal. Brian agreed to “execute a Real Estate Mortgage giving [Kim] a second mortgage on the marital real estate to secure the payment of the sum of \$81,250 as provided in the Mediation Settlement Agreement.” *Id.*, ¶ 6(C). Moreover, according to the Agreement, Brian’s payment obligation of \$81,250 was “not dischargeable in bankruptcy.” *Id.*, ¶ F.

On April 12, 2005, the Pulaski Superior Court issued an Order presenting the agreed support arrangement for Stephanie, the minor child of Brian and Kim. *See* R. 54, Ex. 1. The parents agreed that they would have joint legal custody of Stephanie, that Kim would have primary physical custody, and that Brian would

have visitation rights “at all reasonable times and places” as agreed upon by Brian and Stephanie. Brian agreed to make support payments of \$81 per week. The parties also agreed that, instead of Brian’s paying support to Kim, he would pay the following expenses directly for Stephanie:

- a. her car insurance (approximately \$1,400.00 per year);
- b. her cell phone expense, not to exceed 100.00 per month; and
- c. maintenance on Stephanie’s car, not to exceed \$1,200.00 per year.

*Id.* at 1-2. The parties agreed that Stephanie’s health expenses would be divided equally between them until Kim or Brian was able to obtain insurance for her benefit. *See id.*, ¶ 5 at 2. Brian also agreed to make weekly payments on the arrearage of his support obligation. At the end of the Agreement, the court stated its approval of “the support arrangement.” *Id.*, ¶ 7 at 2.

On February 15, 2007, following a hearing attended by the parties and their counsel, the Pulaski Superior Court issued an Order on Rule to Show Cause. *See* R. 32 Ex. B. The state court determined that Brian was “in indirect contempt of Court” (a) for failing to pay Kim \$300 per week (as required under the Mediation Settlement Agreement); (b) for failing to provide tax documentation; and (c) for failing to pay his share of Stephanie’s medical expenses (in the amount of \$1,789.70). It listed the remedies by which the debtor could purge himself of the indirect contempt. *See id.* at 2-4.

On May 1, 2007, Brian filed a chapter 13 voluntary petition. He listed Kim, on Schedule D, as a secured creditor holding a second mortgage on the marital real estate. On Schedule E, the list of creditors holding unsecured nonpriority claims, the debtor noted: “Per agreed order approved by the Pulaski Superior Court, instead of paying support to Kim Lewis, Debtor shall pay their daughter’s vehicle insurance & maintenance, and cell phone.”

Brian’s chapter 13 plan, filed May 16, 2007, intends to pay in full the priority child support claim, estimated to have a balance of \$1,700. *See* R. 11, Plan at 4, ¶ 6. However, the plan provides for a 0% dividend on the unsecured claims. In his brief, the debtor explains his treatment of the other debts owed to Kim:

On page 6 of the Plan, Debtor is surrendering the former marital residence to Kim Lewis (second mortgage holder) and to Litton Loan Servicing (the first mortgage holder). On page 3 of the Plan, Debtor proposes to strip Kim Lewis's mortgage on the business real estate (shop and 12.23 acres) and to also strip her lien on Debtor's common stock in his corporation, AgTrans, Inc., because her interest in the estate's interest is \$0. As a Class Five Secured Creditor in which her lien(s) are voided under the Plan, she consequently has a Class Eight general unsecured claim for her property settlement debts.

R. 54 at 3. He acknowledges that he is paying his ongoing domestic support obligation, which includes vehicle, cell phone, and medical expenses. *See id.* at 5. However, he considers the debts of \$81,250, joint income tax liabilities, and attorney's fees to be property settlement debts which are dischargeable. *See id.*

### Discussion

Brian Lewis's chapter 13 plan is governed by the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ["BAPCPA"]. Sections 1322(a)(2) and 507(a)(1)(A) require a debtor's chapter 13 plan to provide for the full payment of such priority claims as domestic support obligations. The term "domestic support obligation," newly defined by BAPCPA under § 101(14A), provides:

(14A) The term 'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –

A. owed to or recoverable by –

- (i) a spouse, former spouse, or child of the debtor . . . ; or
- (ii) a governmental unit;

B. in the nature of alimony, maintenance, or support . . . of such spouse, former spouse or child . . . ;

C. established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –

- (i) a separation agreement, divorce decree, or property settlement agreement;
- (ii) an order of a court of record; or
- (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

D. not assigned to a nongovernmental entity, unless . . . for the purpose of collecting the debt.

11 U.S.C. § 101(14A). This broad term added by the BAPCPA encompasses debts that are considered alimony, maintenance or support; debts owed either prepetition or postpetition; interest accruing on such debts; and obligations recoverable by a governmental unit as well as by a spouse, former spouse, child of debtor, or child's parent, legal guardian, or responsible relative. *See* 2 Collier on Bankruptcy ¶ 101.14A at 101-98 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 15th ed. rev'd 2007). A chapter 13 plan can be confirmed only if the debtor is current with respect to the domestic support obligation that first becomes payable after the debtor files his chapter 13 petition. "Support 'arrearages' at the petition would be priority claims that must be paid in full through the plan [*see* 11 U.S.C. § 1322(a)(2)] but would not have to be paid as of confirmation." 5 Keith M. Lundin, *Chapter 13 Bankruptcy, 3d Edition* § 498.1 at 498-1 (2000 & Supp. 2006).

Any party in interest may object to confirmation of a chapter 13 plan. *See* 11 U.S.C. § 1324. In this case, Kim argues that the debtor's chapter 13 plan does not provide for the payment of three obligations he is required to pay: (1) the \$81,250 obligation, which she labels a "domestic support" debt awarded to her in the Marriage Settlement Agreement; (2) compensation in the amount of \$750 to her attorney, for her enforcement of child support arrearages; and (3) Brian's contribution to joint tax obligations. The debtor's plan lists his debt to Kim as an unsecured claim, and under the plan unsecured debts are to be paid zero percent. Kim points out that the "Marriage Settlement Agreement" states that Brian's payment to Kim of \$81,250 "is not dischargeable in bankruptcy."<sup>3</sup>

The court finds that a domestic support obligation, as that term has been defined in the bankruptcy lexicon by BAPCPA, is broad in scope, "in keeping with 'BAPCPA's general effort to give special treatment to family and domestic obligations in bankruptcy.'" *In re Gellington*, 363 B.R. 497, 501 (Bankr. N.D. Tex. 2007) (quoting David B. Young, *Overview of Changes to the Automatic Stay Under the Bankruptcy Abuse Prevention and*

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<sup>3</sup> Kim raised other objections. She asserted that the plan was not feasible because of the discrepancy between Brian's income reported under the means test and under Schedule I. *See* R. 32 at 2. She also alleged that Brian "appears to be manipulating his income . . . leaving said Creditor to believe that he has additional funds that could be applied towards the plan." *Id.*, ¶ 7. She claimed that Brian's plan was not proposed in good faith, as well. However, none of these cursory allegations was argued to the court, and thus they all are waived.

*Consumer Protection Act of 2005*, 887 PLI/COMM 411, 470 (2006)). The term is used, for example, in § 523(a)(5) as an exception to discharge and in § 362(b)(2) as an exception to the automatic stay. *See Gellington*, 363 B.R. at 502 (determining that “Congress did not intend to automatically stay the collection of a domestic support obligation”). In fact, the § 101(14A) definition “was derived in significant part from the definition of a non-dischargeable debt for alimony, maintenance and support contained in pre-BAPCPA § 523(a)(5).” *In re Lepley*, 2007 WL 2669128 (Bankr. W.D. Mo. Sept. 6, 2007) (citing *In re Knox*, 2007 WL 1541957 (Bankr. E.D. Tenn. May 23, 2007)) (citing in turn *In re Loehrs*, 2007 WL 188364 at \*3 n. 3 (Bankr. N.D. Okla. Jan. 22, 2007)).

Whether a marital debt is a nondischargeable support obligation or a potentially dischargeable property settlement debt is a question of federal bankruptcy law, not state law.<sup>4</sup> *See Kolodziej v. Reines (In re Reines)*, 142 F. 3d 970, 972 (7th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999); *Drazin v. Irons (In re Irons)*, 325 B.R. 219, 222 (Bankr. N.D. Ill. 2005); *Hill v. Hale (In re Hill)*, 133 B.R. 126, 131 (Bankr. N.D. Ind. 1989). The court considers whether the language of the dissolution agreement or state court decree makes clear the nature of the obligation, or whether the parties intended it to function as support. *See Hill*, 133 B.R. at 133 ff. (finding that the debtor’s obligation to pay the marital residence mortgage was a support debt). Courts may accord a deference

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<sup>4</sup> It is noteworthy that the BAPCPA amendment of § 523(a)(15) eliminated the affirmative defenses – “that is, such debts are nondischargeable regardless of the debtor’s ability to pay or the benefit of discharge.” *Asberry v. Asberry (In re Asberry)*, 2006 WL 2548184 at \*1 n.2 (Bankr. E.D. Va. 2006). Thus, after the BAPCPA changes to §§ 523(a)(5) and (15), all marital and domestic relations obligations, both support and property division debts, are excluded from discharge under chapters 7, 11 and 12. However chapter 13 debtors still may discharge § 523(a)(15) property settlement debts:

The only chapter in which a debtor might obtain a discharge of section 523(a)(15) debts, or a portion thereof, is Chapter 13. Section 1328(a) still permits the discharge of 523(a)(15) debts for debtors that obtain confirmed plans and that complete those plan payments. Thus, a Chapter 13 debtor could propose a plan that pays less than 100% of these types of debts; whereas, section 523(a)(5) debts must be paid in full in the plan. The exceptions from Chapter 13 discharges were expanded by the 2005 Act, but section 523(a)(15) was not added to the list.

*Douglas v. Douglas (In re Douglas)*, 369 B.R. 462, 465 (Bankr. E.D. Ark. 2007) (quoting Hon. William Houston Brown, *Bankruptcy and Domestic Relations Manual*, § 7:11 (2006)).

to the express intention of the parties stated in a stipulated agreement, as well. *See In re Batzek*, 314 B.R. 464, 468 (Bankr. M.D. Fla. 2004).

In this case, the Pulaski Superior Court Order of April 12, 2005 set forth the parties' agreed domestic support arrangement for Stephanie, the minor child of Brian and Kim. *See* R. 54, Ex. 1. It is clear that the "domestic support obligation" includes the debtor's weekly support payments, his daughter's automobile insurance and maintenance costs, her cell phone expense, and half of her medical and health expenses.<sup>5</sup> The term also encompasses the debtor's weekly payments on the arrearage of his support obligation. *See In re Gellington*, 363 B.R. at 501 (determining that arrears of child support qualify under § 101(14A)). The debtor recognizes that he is legally responsible for payment of these obligations through his chapter 13 plan. If, however, any obligation arising out of the state court Order of April 12, 2005, is not encompassed in his chapter 13 plan, the court requires it to be incorporated into the plan and to be paid in full as a § 507(a)(1) priority claim.

The creditor also asserts that the debtor is required to pay the \$81,250 obligation, the compensation owed to her attorney, and joint tax obligations as "domestic support obligations." She relies on the fact that the Marriage Settlement Agreement states that Brian's payment to Kim of \$81,250 "is not dischargeable in bankruptcy." Brian insists they are property settlement debts which are dischargeable under chapter 13.

The court finds that the Marriage Settlement Agreement explicitly pronounces that its subject matter "is the settlement of the respective rights of the Husband and Wife to property, both [*sic*] real, personal and mixed, acquired by them during the course of their marriage and allocation of indebtedness." R. 32, Ex. A. The parties entered first into a Mediation Settlement Agreement and then into a more detailed Marriage Settlement Agreement concerning the property division. *See id.*, ¶ 6(A). In Paragraph 6, entitled "Division of Property and Debt," the parties stated that the creditor had executed a quitclaim deed conveying her interest in the marital property to the debtor, and that the debtor had agreed (a) to execute a real estate mortgage giving Kim a second

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<sup>5</sup> The debtor therefore is required to pay his share of Stephanie's medical expenses, which were in the amount of \$1,789.70 on February 15, 2007, the date of the Order on Rule to Show Cause issued by the Pulaski Superior Court. *See* R. 32, Ex. B.

mortgage on the marital residence to secure the payment of \$81,250; (b) to provide to Kim a copy of the life insurance policy, naming her the primary beneficiary, in an amount of at least \$81,250; and (c) to entitle Kim to vote her stock certificates in two corporations if the debtor's payments on the \$81,250 debt did not remain current. *See id.*, ¶ 6(C), (D), (E). The court finds that the Agreement, in language and structure, clearly characterizes the \$81,250 payment as a property settlement, not as support. Moreover, nothing in the language of the Agreement suggests that the parties intended that payment to function as support. Nor do the state court's Orders reflect any intent to treat the payment as a support obligation. Indeed, during the dissolution process the parties separated the drafting and final composition of a domestic support agreement from the property settlement agreement. The court finds, therefore that the debtor's \$81,250 obligation is a settlement of marital property interests and is not in the nature of support under federal bankruptcy law.

The final paragraph of the Agreement, however, states that the debtor's \$81,250 payment obligation "is not dischargeable in bankruptcy." *Id.*, ¶ 7. This clear statement of the parties' intent clashes with the equally clear designation of that obligation as a property settlement. Nothing in the agreements between the parties or in the state court orders suggested that the \$81,250 amount was meant as support, or that the parties intended to use that payment to balance or equalize their different financial situations at the time of the divorce, or that the creditor needed the payment to maintain her daily needs. *See In re Lepley*, 2007 WL 2669128 at \*6 (Bankr. W.D. Mo. Sept. 6, 2007). In any case, for post-BAPCPA chapter 13 bankruptcy cases such as the one now before the court, domestic support obligations cannot be discharged and must be paid in full, but property settlement debts are dischargeable and need not be paid in full under the debtor's chapter 13 plan. *See Douglas v. Douglas (In re Douglas)*, 369 B.R. 462, 465 (Bankr. E.D. Ark. 2007); *Asberry v. Asberry (In re Asberry)*, 2006 WL 2548184 at \*1, n.2 (Bankr. E.D. Va. 2006). The parties' agreement that their obligation is nondischargeable is not enforceable. *See In re Knox*, 2007 WL 1541957 at \*3 (Bankr. E.D. Tenn. May 23, 2007) ("Section 523(a)(15) debts are only nondischargeable in Chapter 13 when the discharge is pursuant to 11 U.S.C. § 1328(b), the hardship discharge section, and that section is not applicable here."). In the view of this court, the \$81,250

payment clearly was meant solely as a means of dividing the parties' property. Therefore, the debtor may propose a plan that pays less than 100% of the \$81,250 property settlement obligation.

The creditor also asserts that her attorney represented her in state court actions against the debtor to enforce child support and marriage settlement agreements. She claims, without citation to any cases, that the compensation to be paid to her attorney is in the nature of a domestic support obligation and is not dischargeable in bankruptcy. The court finds that the new definition of domestic support obligation presented in § 101(14A) presents an extensive list of entities that may assert claims related to such obligations – including a legal guardian, a non-spouse “responsible relative,” and a governmental unit – and attorneys are not among the claimants. “A law firm may not assert a claim for non-dischargeable attorneys’ fees as either a ‘domestic support obligation’ under section 523(a)(5), or a divorce-related debt under section 523(a)(15).” *Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C., v. Brooks (In re Brooks)*, 371 B.R. 761, 768 (Bankr. N.D. Tex. 2007) (concluding that law firm may not assert a claim for nondischargeable attorneys’ fees). The court determines, therefore, that in this post-BAPCPA case the creditor has provided no basis to treat her attorney’s fees as a nondischargeable domestic support obligation.

Finally, the creditor claims that the amount owed to her for repayment of a joint tax obligation is not dischargeable. She characterizes the debt as a domestic support obligation – a pre-petition obligation owed to her, a former spouse, and ordered by the court of record. However, the tax obligation is not a debt “in the nature of alimony, maintenance, or support” of that former spouse, and the court cannot find that the tax obligation qualifies as a domestic support obligation.

The court determines, therefore, that the three debts claimed by the creditor to be domestic support obligations – the \$81,250 debt owed to the creditor, the \$750 in compensation owed to the creditor’s attorney, and the joint tax obligations paid by the creditor – do not constitute domestic support obligations as that term is defined in § 101(14A). For that reason, they are properly classified as unsecured claims and are not required to be paid in full under the debtor’s chapter 13 plan.

Conclusion

For the reasons stated in this Memorandum of Decision, Creditor Kim Lewis's Objection to Confirmation of Plan is overruled.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT