

U.S. BANKRUPTCY COURT  
District of South Carolina

Case Number: 08-03606

ORDER

The relief set forth on the following pages, for a total of 8 pages including this page, is hereby ORDERED.

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**FILED BY THE COURT**  
**10/31/2008**



Entered: 10/31/2008

US Bankruptcy Court Judge  
District of South Carolina

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Stephen Alec Rhodes,

Debtor(s).

C/A No. 08-03606-HB

Chapter 13

**ORDER**

This matter came before the court for consideration of confirmation of the plan filed by Debtor Steven Alec Rhodes, and the objections thereto of creditors Peggy Sue Clark Rhodes, the Debtor's ex-spouse and Robert M. Rosenfeld, her family court attorney. The court also heard the Debtor's objections to the claims filed by both creditors. The parties offered arguments and asked the court to consider the court order that established the debts in question. After a review of that evidence and the arguments, the court finds as follows.

**FINDINGS OF FACT**

The Debtor filed for Chapter 13 protection on June 18, 2008. He scheduled debts in favor of the objecting creditors and filed a chapter 13 plan proposing treatment of their claims as general unsecured debt. Rosenfeld filed a timely priority claim for \$5,000 plus interest, for his attorney's fees incurred in family court litigation. Ms. Rhodes filed a timely priority claim for \$12,876 plus interest due from the Debtor "as a final division of the marital estate" as established by the family court's order. Ms. Rhodes and Rosenfeld also objected to their treatment in the plan as unsecured non-priority creditors. The Debtor objected to these claims asserting that they are not domestic support obligations as defined in 11 U.S.C. 101(14A) and are therefore not priority debts.

The family court heard the matter on April 1, 2008, and entered its order on April 18, 2008. That order states that the parties stipulated and agreed as follows:

1. Wife will have the sole and exclusive care, custody and control of the minor child.
2. Husband will have visitation on alternating weekends from 6:00 p.m. Friday until 6:00 p.m. Sunday.
3. Both parties waive alimony.
4. Wife will continue to provide health insurance for the minor child as long as it is available to her through her employer.
5. Wife will have the sole and exclusive ownership, use and possession of all household furnishings and fixtures without consideration of their value for equitable division purposes.
6. While not specifically stated as an Agreement between the parties, their testimony indicated that each party wishes to retain the vehicle currently in his/her respective possession subject to all liens, taxes, insurance and other costs, fees and expenses incidental to the ownership of said vehicles. Both parties have agreed to sign all documents necessary to transfer title to the vehicles into the name of the party in possession of the same.

The order also identified matters in controversy.

1. Attorney's fees and costs for Wife incurred after August 2, 2006.
2. Child Support.
3. Equitable division of the marital estate except as otherwise stipulated hereinabove.

Both the Debtor and Ms. Rhodes were represented by counsel in the proceedings. The order indicates that the parties were married since 1995 and had one child (age 12) at the time the order was entered. After hearing the evidence, the court ordered the Debtor to pay weekly child support of \$120 to Ms. Rhodes. The order provided each of the parties with possession of and responsibility for a vehicle. The court found in its Child

Support Calculation that the Debtor's income is \$3,000 per month<sup>1</sup>, or 68.6% of the funds available to the parties for living expenses, and Ms. Rhodes earns \$1,375, or 31.4%. The court found that the marital estate had a net value of \$62,390, but that this figure should be reduced by \$55,000 to consider a loan given to the Debtor by his mother as a down payment on the purchase of his business, leaving \$7,390 in assets. The court therefore found that the Debtor should pay the sum of \$12,876 to Ms. Rhodes as equitable division, determining "under the totality of the circumstances in this case" that the assets should be divided 55% in favor of Ms. Rhodes and 45% in favor of the Debtor, and that there will be no tax consequences to either party as a result.

The court also found that "Husband shall pay to Wife through the law office of Porter and Rosenfeld . . . \$5,000 as a contribution toward the attorney's fees and costs incurred by Wife as of August 2, 2006," stating that "wife does not have the ability to pay for her attorney's fees in this action. While Husband claims that he earns no income, he has the ability to do so. There is a great disparity of the incomes of the parties." The court found both parties in good health, able to work, and that "child custody arrangements have affected the employment positions of Wife."

### **Discussion and Conclusions of Law**

If one or both of the claims are domestic support obligations as defined by § 101(14A) the plan cannot be confirmed. A plan must provide for payment in full of a domestic support obligation as required by § 1325(a)(1) and § 1322(a)(2). Domestic support obligations are entitled to full priority under § 507(a)(1)(A) and are non-

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<sup>1</sup> The court found that "The income of Father should be imputed to be \$36,000.00 annually."

dischargeable pursuant to §§ 1328(a)(2) and 523(a)(5).<sup>2</sup> Alternatively, if the Debtor's Objections to both claims are sustained, the plan is confirmable.

Pursuant to § 101(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 such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(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 that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the Bankruptcy Code. The text of the definition is somewhat similar to the text of the former § 523(a)(5). The lengthy text of that subsection, which contained an exception to certain discharges available to a debtor under the Bankruptcy Code, was replaced by the BAPCPA with a simple exception for "a domestic support obligation," requiring reference to § 101(14A) above. Since the language of the former exception and new definition are similar, the pre-BAPCPA case law applicable to § 523(a)(5)

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While the parties cited as part of their authority § 523(a)(5) relating to the dischargeability of the debt in question in a Chapter 13 proceeding, the direct issue of whether the debt is dischargeable pursuant to this or any other section of the Code is not properly before the Court at this time as no adversary proceeding has been filed pursuant to Fed. R. Bankr. P. 7001.

is helpful in determining if a debt fits within the definition of a “domestic support obligation.”

In re Poole, 383 B.R. 308, 312-13 (Bankr. D.S.C. 2007); see also In re Braun, No. 08-80400, 2008 WL 2130313, slip op. at 2 (Bankr. D. Neb. May 15, 2008).

Although the claims in question are payable directly to Mr. Rosenfeld, the order states that they are “for the benefit of” Ms. Rhodes. This satisfies the requirement that the obligation be recoverable by a spouse, former spouse, or parent. In re Hudson, No. 07-8011, 2007 WL 4219421 (Bankr. C.D. Ill. Nov. 27, 2007); In re Van Dermark, No. 06-35493, 2008 WL 319107, slip op. at 4 (Bankr. N.D. Tex. Feb. 1, 2008). The claims meet the remaining requirements of § 101(14A), except that the court must review the evidence to determine if the claims in question are in the nature of alimony, maintenance, or support.

The court must look to federal law to determine if the claims are in the nature of support. In re Davis, No. 06-10581-DHW, 2007 WL 865683, at \*2 (Bankr. M.D. Ala. Mar. 15, 2007) (citing In re Harrell, 754 F.2d 902, 905 (11<sup>th</sup> Cir. 1985)). When deciding whether a debt should be characterized as one for support or property settlement, courts must consider whether the obligation was intended to be one for support. In re Baker, 274 B.R. 176, 188 (Bankr. D.S.C. 2000); Tilley v. Jessee, 789 F.2d 1074, 1077 (4<sup>th</sup> Cir. 1986); see also In re Fitzgerald, C/A No. 02-15275-W, slip op. at 5 (Bankr. D.S.C. Mar. 12, 2003).

The debts in question were not created by any agreement of the parties, but rather by the court after a contested hearing. The award of \$5,000 in attorney fees that the family court ordered paid to Rosenfeld for the benefit of Ms. Rhodes for his attorneys’ fees incurred through August of 2006 clearly was intended as support based on the

language of the court's order. The order directs the husband to pay referencing a disparity in the income of the parties and the inability of Ms. Rhodes to pay these fees. This court finds that the family court intended these fees to be in the nature of support, that such fees are a domestic support obligation, and, therefore, should be treated as priority claims in the plan.

The remaining "equitable distribution" of \$12,876 is more difficult to analyze. If the intent of the court is not as clear, the bankruptcy courts can consider factors such as the "relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments" to determine whether a debt is a domestic support obligation. Braun, slip op. at 3. Courts have considered whether the obligation is fixed and non-modifiable, indicating a property settlement; however, the presence of this factor alone is not decisive. See Kinder v. Kinder (In re Kinder), C/A No. 02-10519-W, Adv. Pro. No. 02-80342, slip op. at 4 (Bankr. D.S.C. Feb. 10, 2003); Fitzgerald, slip op. at 7. Also, the court may examine whether the obligation allows the recipient to "maintain daily necessities." Seybt v. Seybt (In re Seybt), C/A No. 01-03549, Adv. Pro. No. 01-80128-W, 2002 WL 342346, at \*2 (Bankr. D.S.C. Jan. 14, 2002) (citing Burton v. Burton (In re Burton), 242 B.R. 674, 679 (Bankr. W.D. Mo. 1999)).

The debt to Ms. Rhodes is not labeled as support—it is labeled as a final settlement of marital property. It is payable in a lump sum and does not terminate on any future event or change in circumstances. The family court thoroughly examined the

parties' financial history and prospects as part of the order for the purposes of determining the rights between the parties, which is required of the family court in South Carolina under S.C. Code of Laws § 20-7-472, and this analysis was also necessary to determine the attorney fees and child support issues. While any financial award to Ms. Rhodes would improve her financial condition, it does not appear from a review of the entire order that the equitable division award was intended by the family court to meet Ms. Rhodes's basic needs going forward. An analysis of the language of the order indicates that the court divided assets, after considering relevant debt, based on the past acts of the parties rather than in anticipation of their needs at the time of the hearing or in the future. Therefore, based on this record this court cannot find that the equitable division award of \$12,876 was intended to be in the nature of alimony, maintenance or support.

**IT IS, THEREFORE, ORDERED.**

1. That the objection to the claim of \$5,000 filed by Robert M. Rosenfeld is overruled, and the claim is entitled to priority treatment as a domestic support obligation defined in 11 U.S.C. § 101(14A);
2. That the objection to the claim of \$12,876 filed by Peggy Sue Clark Rhodes is sustained and the claim is not entitled to priority treatment as a domestic support obligation defined in 11 U.S.C. § 101(14A);
3. That confirmation of the plan filed on August 14, 2008 is hereby denied as it fails to properly address all priority debt.