U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **20-04075-hb**

ORDER

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

FILED BY THE COURT
03/16/2021

Chief US Bankruptcy Judge
District of South Carolina

Entered: 03/16/2021

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 20-04075-HB
Donovan Christopher Cullison,	Chapter 13
Debtor(s).	**ORDER OVERRULING OBJECTION TO CONFIRMATION & DETERMINING CLAIM**

THIS MATTER is before the Court for consideration of Eileen M. Toth's objection to the plan filed by Debtor Donovan Christopher Cullison.[1] Also pending is Cullison's objection to the priority status and amount of a claim filed by Toth.[2] Cullison and his counsel, F. Lee O'Steen, appeared in-person at the hearing and counsel for Toth, Kristen N. Nichols and Mark B. Peduto, and Christine Loftis on behalf of the Chapter 13 Trustee appeared by telephone. The parties stipulated to a record of various state court orders resulting from a contentious divorce. To resolve the primary dispute, the Court must determine if any portion of Toth's claim is entitled to priority status pursuant to § 507(a)(1)(A).

FACTS

In January 2007, Cullison and Toth entered stipulations related to alimony, child support, and the division of a considerable list of property that included one of several retirement plans ("Plan"). They agreed this particular asset would be divided equally with the aid of a qualified domestic relations order ("QDRO"). After a trial on the parties' equitable distribution claims as part of the divorce proceedings, the state court entered an order that divided property equally, incorporated the stipulations (including those involving the Plan), and ordered Cullison pay Toth alimony in amounts that decreased over time, pay child support, and be responsible for 70% of all

[1] ECF No. 15, filed Jan. 7, 2021.
[2] ECF No. 19, filed Jan. 29, 2021.

unreimbursed medical expenses for the child. Relevant orders in that proceeding did not explain why property was divided equally or include details of the parties' relative financial positions. In December 2008, the parties executed an amended QDRO that identified Toth as the alternate payee of the Plan with a half interest in the total vested balance as of September 15, 2008.

Cullison retired in 2015. Between May 2015 and July 2017, the Plan balance decreased significantly. After extensive litigation, the state court determined in a detailed decision that Cullison "knowingly allowed the wasting of [the Plan] so as to defeat [Toth's] interest therein," valued Toth's half interest in the Plan on a non-distribution date when the value was higher, and found Cullison owed Toth $197,286.00, plus $5,000.00 in attorney's fees related to the litigation because he prolonged the proceedings by failing to provide requested discovery. The order was affirmed on appeal on September 1, 2020.

Two months later, Cullison filed a petition for Chapter 13 relief. Cullison proposed a plan that does not recognize any amount owed to Toth as entitled to priority and does not propose payment of the claim in full. Toth filed a proof of claim in the amount of $236,049.42, of which she asserts $229,400.00 is entitled to priority under 11 U.S.C. § 507(a)(1): $224,400.00 resulting from her interest in the Plan and $5,000.00 in attorney's fees. The remainder of the claim is for interest and other amounts. Toth argues Cullison intentionally mischaracterizes her claim because it is entitled to priority and the plan and this case were not filed in good faith, noting the state court's decision that Cullison wasted the benefits of the Plan to defeat her award to a half interest. Other than pointing to Cullison's pre-petition conduct as discussed in the state court orders, Toth did not develop the record with further evidence or arguments of a lack of good faith.

Cullison argues Toth's claim results from a property division and does not constitute a "domestic support obligation" under § 507(a)(1)(A). Therefore, Toth's claim is not entitled to

priority and is treated appropriately in the plan. Cullison's claim objection detailed his reasons that the correct combined debt amount related to the Plan and resulting attorney's fees should be set at $199,556.74 ($197,286.00 for the Plan and $2,270.74 for attorney's fees), pointing to documents in this record. Toth did not file a response to Cullison's claim objection. The Chapter 13 Trustee's counsel reported that even if the claim is not entitled to priority, she cannot yet recommend confirmation for various other reasons.

APPLICABLE LAW

A "domestic support obligation" is defined by the Bankruptcy Code as:

> 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.

11 U.S.C. § 101(14A) (emphasis added). In Chapter 13 cases, domestic support obligations are entitled to priority and payment in full under §§ 507(a)(1)(A) and 1322(a)(2).[3]

[3] In a Chapter 7 case, both domestic support obligations and debts arising from a property settlement or an equitable distribution award are excepted from discharge. 11 U.S.C. § 523(a)(5) & (15). However, in a Chapter 13 case,

"The determination of whether an award arising out of marital dissolution proceedings was intended to serve as an award for alimony, maintenance or support, or whether it was intended to serve as a property settlement is a question of fact to be decided by the bankruptcy court." *In re Krueger*, 457 B.R. 465, 474 (Bankr. D.S.C. 2011) (quoting *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (8th Cir. BAP 1997)). "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 Poole*, 383 B.R. 308, 314 (Bankr. D.S.C. 2007) (citations omitted). The Court must look to federal law to determine if a claim is in the nature of support. *Krueger*, 457 B.R. at 474. This Court has previously adopted the following factors in determining whether a claim constitutes a domestic support obligation:

> (1) the substance and language of the document in question; (2) the financial condition of the parties at the time of the decree or agreement; (3) the function served by the obligation and intent of the parties at the time of the agreement; and (4) whether there is evidence to question the intent of a spouse or evidence of overbearing by either party.

Id. at 474-75 (quoting *Poole*, 383 B.R. at 314).

Toth's counsel directed attention to *In re Smith*, 2018 WL 4087682 (Bankr. W.D.N.C. Aug. 24, 2018), where the bankruptcy court found a spouse's half interest in a 401(k) distributed to her through a QDRO was a domestic support obligation. *Id.* at *1. Notably, in that case the parties obtained a clarification from the issuing state court that the "401(k) benefits which were to accrue to [the spouse] were in the nature of support and were considered as such by the court." *Id.* at *4. Additionally, the bankruptcy court found the spouse's economic prospects and financial reserves were much worse than the debtor. *Id.* at *6. In this regard, the bankruptcy court noted the state court's unequal distribution of the marital estate of 65% to the spouse and 35% to the debtor. *Id.*

equitable distribution awards may be discharged under § 1328(a)(2), while domestic support obligations are entitled to priority status. 11 U.S.C. §§ 507(a)(1) & 1322(a)(2).

at *2. The bankruptcy court also found the context surrounding the equitable distribution and alimony orders indicated the 401(k) was intended to serve as support for the spouse, including "[t]he use of a QDRO, as opposed to cash or another type of property division." *Id.* at *7.

In *In re Gaetaniello*, 496 B.R. 238 (Bankr. M.D. Fla. 2013), the spouse's claim arose from a settlement agreement and was comprised of a distribution of marital property and an "equalizer payment." *Id.* at 240. The spouse filed a complaint in bankruptcy court asserting her claim was a domestic support obligation. *Id.* at 241. The bankruptcy court noted both the spouse and the debtor were employed prior to and during their marriage and the spouse had not been awarded alimony or child support. *Id.* The court concluded the spouse's claim was not transformed into a domestic support obligation simply because the debtor "consented to the imposition of a QDRO of his retirement funds to effectuate the payment." *Id.* The court reasoned that "QDROs are a means of distributing funds from an employee's pension or retirement fund without imposing tax consequences on the parties…[and] are not used exclusively for domestic support obligations." *Id.* at 241-42 (citations omitted).

A Chapter 13 plan may be confirmed only if the Court finds the petition was filed, and the plan was proposed, in good faith. 11 U.S.C. § 1325(a)(3), (7). Courts in the Fourth Circuit examine the totality of the circumstances in making the good faith determination. *Deans,* 692 F.2d at 972.

> The relevant factors include the percentage of proposed repayment, the debtor's financial situation, the period of time payment will be made, the employment history and prospects of a debtor, the nature and amount of unsecured claims, a debtor's past bankruptcy filings, the debtor's honesty in representing facts, any unusual or exceptional problems, the debtor's pre-filing conduct and the possibility of non-dischargeability in a chapter 7 proceeding . . . The object is to determine whether there has been "an abuse of the provisions, purpose, or spirit" of Chapter 13 in the proposal or plan.

In re Anstett, 383 B.R. 380, 385 (Bankr. D.S.C. 2008) (quoting *Deans*, 692 F.2d at 972). "These factors are not exhaustive and are not intended to be a 'check-list,' as a 'court's discretion in

making the good faith determination is necessarily a broad one' and should be based on an examination of the totality of the circumstances on a case by case basis." *In re Martellini*, 482 B.R. 537, 542 (Bankr. D.S.C. 2012) (quoting *Deans*, 692 F.2d at 972).

The Code provides a burden-shifting framework for establishing the validity and amount of a claim. "A proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f).

> The burden then shifts to the debtor to object to the claim. 11 U.S.C. § 502(b) . . . The debtor must introduce evidence to rebut the claim's presumptive validity. Fed. R. Bankr. P. 9017; Fed. R. Evid. 301; 4 *Collier* at ¶ 501.02[3][d]. If the debtor carries its burden, the creditor has the ultimate burden of proving the amount and validity of the claim by a preponderance of the evidence. *Id.* at ¶ 502.02[3][f].

In re Harford Sands Inc., 372 F.3d 637, 640 (4th Cir. 2004). For confirmation, "Debtor has 'the burden of proving by a preponderance of the evidence that [the] plan meets the confirmation requirements of § 1325(a) . . .'" *In re Martellini*, 482 B.R. 537, 541-42 (Bankr. D.S.C. 2012) (quoting *In re Bridges*, 326 B.R. 345, 349 (Bankr. D.S.C. 2005))). "However, it is generally accepted that a party objecting to confirmation bears the burden of proof." *Krueger*, 457 B.R. at 475 (quotation marks and citations omitted). "Ultimately, '[t]he complaining spouse has the burden to demonstrate that the obligation at issue is in the nature of alimony, maintenance, or support." *Id.* (quoting *In re Johnson*, 397 B.R. 289, 296 (Bankr. M.D.N.C. 2008)).

CONCLUSIONS

Whether considered as an objection to claim or an objection to confirmation, the underlying result is the same: the record does not support a finding that any portion of Toth's claim is entitled to priority status pursuant to § 507(a)(1)(A). In addition to child support and alimony (both clearly in the nature of support), the state court split the marital property evenly, but did not provide any reasoning or discuss the parties' relative financial positions in doing so. All relevant orders reference Toth's interest in the Plan was the result of a division of this asset. The even division of

marital property and gradual reduction of alimony payments to Toth, awarded for a limited time, lead to a conclusion that Toth was not entirely financially dependent on Cullison at the time the obligation was imposed. From this record the Court must find that the division of the Plan and any resulting debt are a property settlement. The mere fact that the obligation involved a QDRO does not necessarily transform it into a domestic support obligation entitled to priority. Further, Cullison was ordered to pay attorney's fees to Toth for his role in prolonging the proceedings over the division and distribution of this asset. Thus, that award also arises from the division of property and the evidence does not support a priority claim for that amount under § 507(a)(1)(A).

Cullison properly objected to the amount of the claim with specificity. Thereafter Toth did not properly respond and failed to present sufficient evidence to support the full amount of the claim. Therefore, the amount of the allowed claim is $199,556.74 ($197,286.00 for the Plan and $2,270.74 for attorney's fees).

After a careful review of the record, the path to a finding of a lack of good faith in filing the case or the plan on this record is unclear. *See* § 1325(a)(3) & (7). Toth mentioned Cullison's pre-petition wasting of the Plan benefits detailed by the prior state court orders, followed by the filing of this bankruptcy case. However, there was no testimony or further evidence to sufficiently develop this theory under applicable law.

IT IS, THEREFORE, ORDERED that Toth's objection to the plan is overruled and Cullison's objection to Toth's claim is sustained. The claim is allowed as a general unsecured claim in the amount of $199,556.75. If a further hearing to consider confirmation of this plan or any modified plan is necessary, Cullison shall issue the appropriate notice pursuant to applicable authorities.