

They divorced on October 12, 1995. On June 12, 1996, the master in divorce appointed by the Philadelphia Court of Common Pleas, Family Court Division ("Family Court"), issued a report recommending an equitable distribution of the parties' marital property. The Family Court approved and implemented the master's recommendations. The master found the parties' marital estate to consist of the gross sum of \$36,348. Of this total, Ms. Shirey was awarded 55%. After subtracting the value of marital assets already in Ms. Shirey's possession, there remained a balance due and owing from husband to wife, for equitable distribution, in the amount of \$7,791.00. The master further recommended an award from husband to wife in the amount of \$8,962.00 for the assumed rental value of the marital home where the husband resided alone during a period in which he failed to pay the couple's joint mortgage debt. These two awards together totaled \$16,753.00.

The master recommended and the Family Court directed that \$10,148.00 of that amount be paid to Ms. Shirey via transfer to her of all funds in Mr. Shirey's pension plan. Mr. Shirey was ordered to pay the balance to Ms. Shirey in cash within sixty (60) days of the Family Court's order approving the master's report. The master further recommended and the Family Court ordered the husband to pay Ms. Shirey's \$7,500.00 counsel fee bill due to his obstreperous conduct during the divorce and equitable distribution litigation. Mr. Shirey failed to make either of the required cash payments within the allotted time,

leading Ms. Shirey to file a petition for contempt. A December 12, 1996 contempt hearing in state court was stayed when Mr. Shirey filed a Chapter 13 bankruptcy petition on December 11, 1996.

On January 27, 1997, Ms. Shirey filed with the bankruptcy court for relief from the automatic stay in bankruptcy. She requested authority to pursue her state law remedies with regard to the unpaid Family Court awards in the amounts of \$6,605.00 and \$7,500.00. Her argument was that these two monetary awards were in the nature of "maintenance" and therefore not dischargeable under 11 U.S.C. § 523(a)(5)(B). Mr. Shirey responded that all of the awards, including the pension, were equitable distribution awards and potentially dischargeable under Chapter 13.

The bankruptcy court modified the automatic stay to permit Ms. Shirey to return to the state court and obtain, if possible, a clarification as to whether the monetary awards granted her were part of the equitable distribution of the couples' marital estate or were awards in the nature of alimony, support, and/or maintenance. On August 8, 1997, the Family Court issued findings and an order declining to make that clarification, indicating only that the bankruptcy court lacked jurisdiction over those specific items of marital property which the Family Court had awarded to the parties conditionally. The Family Court held that the marital estate property was held in "custodia legis"¹ by that

¹ Black's Law Dictionary defines Custodia Legis as,

court subject to § 3502(e) of the Pennsylvania Divorce Code. 23 Pa. C.S.A. § 3502(e). In view of that order, the bankruptcy court relisted for hearing the original motion for relief from the automatic stay and stayed all proceedings in the Family Court pending further action by the bankruptcy court. A supplemental hearing was held on October 23, 1997.

At that hearing, the bankruptcy court granted Ms. Shirey relief from the stay to proceed against Mr. Shirey's pension plan as non-bankruptcy property. As to the monetary awards for the marital home's rental value and counsel fees, however, the bankruptcy court found that they were not in the nature of maintenance or support, and therefore were potentially dischargeable in bankruptcy. It based this determination on the master's report and Family Court orders, which made clear: (1) that alimony was considered and rejected; and (2) that support

[i]n the custody of the law. Doctrine of 'custodia legis' provides that when personal property is repossessed under writ of replevin, property is considered to be in custody of the court, though actual possession may be in either of the parties to the replevin action, and that property remains in custody of court until judgment in replevin action finally determines whether replevining party or prior holder is entitled to possession. . . . This doctrine is nothing more than a practical 'first come, first serve' method of resolving jurisdictional disputes between two courts with concurrent jurisdiction, and, under such doctrine, court that first secures custody of property administers it.

Black's Law Dictionary 384 (6th ed. 1990) (citations omitted).

for the couples' minor child was being separately paid. As a result, the bankruptcy court found that the only marital asset to which the monetary awards attached prior to bankruptcy was the couple's marital home, which was held in custodia legis by virtue of the Family Court's pre-petition orders and the applicable provisions of the Pennsylvania Divorce Code. The bankruptcy court then granted Ms. Shirey relief from the automatic stay to pursue any rights in the marital residence under applicable non-bankruptcy law, but denied her relief to seek attachment of Mr. Shirey's post-petition wages or to pursue the monetary awards by any other means.² Ms. Shirey now appeals that ruling.

II. Discussion

This appeal presents the issue whether the bankruptcy court erred in finding that the Family Court's rental value and counsel fee awards to Ms. Shirey were in the nature of equitable distribution, and therefore potentially dischargeable under 11 U.S.C. § 523(a)(5). The findings of fact by the bankruptcy court on the underlying or historical facts, such as the intent of the state court in issuing an order in divorce proceedings, are subject to review for clear error. See In re Gianakis, 917 F.2d 759, 762 (3d Cir. 1990). A finding of fact is clearly erroneous if, after examining the record, the reviewing court is "left with the definite and firm conviction that a mistake has been

² At the same time, the bankruptcy court recognized that this limited relief from the stay would be of little use to Ms. Shirey due to the presence of a first mortgage on the property.

committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

A. Legal Standard

Under 11 U.S.C. § 523(a)(5), an obligation arising from a court order in divorce proceedings is not dischargeable if found to be in the nature of alimony to, maintenance for, or support of the debtor's former spouse or child. "[W]hether an obligation is in the nature of alimony, maintenance or support, as distinguished from a property settlement, depends on a finding as to the intent of the parties at the time of the agreement." In re Gianakis, 917 F.2d 759, 762 (3d Cir. 1990). Where, as here, the controlling document is a Family Court order rather than an agreement between the parties, the court applying § 523(a)(5) should make a finding as to the intention of the Family Court in issuing the order. See Pollock v. Pollock, 150 B.R. 584, 588 (M.D. Pa. Bankr. 1992); Marker v. Marker, 139 B.R. 615, 621 n.2 (M.D. Pa. Bankr. 1992); Rooker v. Rooker, 116 B.R. 415, 417 (M.D. Pa. Bankr. 1990).

A section 523(a)(5) inquiry requires consideration of three factors: (1) the language and substance of the court order in the context of the surrounding circumstances, using extrinsic evidence when necessary; (2) the financial circumstances of the parties at the time the order was issued; and (3) the function served by the obligation at the time of the order. Marker v. Marker, 139 B.R. 615, 621 n.2 (M.D. Pa. Bankr. 1992) (citing In re Gianakis, 917 F.2d at 762-63).

Whether the obligation is in the nature of support for purposes of the bankruptcy code is a question of federal, not state, law. In re Gianakis, 917 F.2d at 762. The court applying § 523(a)(5) must therefore look behind the label given an obligation in a state court order and make a factual inquiry into whether the award is actually in the nature of support. Id. Thus, "a debt could be in the nature of support under section 523(a)(5) even though it would not legally qualify as alimony or support under state law." Id. (quoting In re Yeates, 807 F.2d 874, 878 (10th Cir. 1986)) (internal quotation marks omitted). The party who objects to the discharge of the particular debt has the burden of proving its nondischargeability. Id.

B. Analysis

In its August 7, 1996 order, the Family Court did not label the rental value and counsel fee awards as either support or property distribution. Nothing on the face of the order indicates that the obligations were imposed in lieu of alimony or support. Therefore, because the Family Court adopted the recommendations of the master in divorce, the court will look to the master's report to determine the nature of the monetary awards in question here. See Rooker v. Rooker, 116 B.R. 415, 416 (Bankr. M.D. Pa. 1990). The focal point for evaluating an obligation arising under an order in divorce proceedings is the court's -- and in this case, the master's -- intent at the time the obligation was imposed. In re Gianakas, 917 F.2d at 763.

1. Rental Value

The Family Court awarded Ms. Shirey half the rental value of the former marital home for the time period in which Mr. Shirey occupied the home by himself without paying the mortgage. Applying the Gianakis factors here, the court concludes that the bankruptcy court did not commit clear error in finding that the rental value award was in the nature of equitable distribution.

First, the language and substance of the master's report indicate that the rental value award was intended to be part of the equitable distribution of the marital estate. In re Gianakis, 917 F.2d 759, 763 (3d Cir. 1990). The award is discussed in section III of the report, entitled "Components of the Marital Estate." Master's Rep. at 7. Nowhere in that discussion -- or anywhere in the master's report -- does the master discuss support, maintenance or alimony as a factor in assigning Ms. Shirey this or any other monetary award. The master instead found that the circumstances of the case "clearly do not warrant" an award of alimony.³ Master's Rep. at 12. The master also did not consider child support because that issue was dealt with separately. Master's Rep. at 2.

³ Although not stated in the master's report, one likely reason for the master's unequivocal rejection of alimony is that Pennsylvania law bars an award of alimony "where the petitioner, subsequent to the divorce pursuant to which alimony is being sought, has entered into cohabitation with a person of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity." 23 Pa. C.S.A. § 3706. At the time of the hearing, Ms. Shirey was "residing with a male friend." Master's Rep. at 3.

Second, the parties' respective financial positions do not indicate that the rental value award was intended to serve as support. "The facts that one spouse had custody of minor children, was not employed, or was employed in a less remunerative position than the other spouse are aspects of the parties' financial circumstances at the time the obligation was fixed which shed light on the inquiry into the nature of the obligation as support." Gianakis, 917 F.2d at 763. At the time of the master's hearing, Ms. Shirey was employed "one or two days a week" as title clerk of a car lot. Id. at 3. She had graduated from beauty school but was not working in that field. Her most recent tax return, from 1993, reported gross earnings of \$23,875.00. She received child support in the amount of \$95.00 per week plus \$5.00 in arrears via attachment of Mr. Shirey's wages. Her only extraordinary child care expenses were for her daughter's dance lessons and pre-school attendance, totaling \$222.00 per month. Because she resided with a male friend at the time of the hearing, Ms. Shirey's housing expenses were only \$100.00 per month. The master noted that Ms. Shirey's custody of the parties' daughter curtailed her earning potential.

Mr. Shirey's 1993 tax return showed earnings of \$32,986.00 from his employment at Midas Muffler, where he had worked in excess of nine years after training at a technical institute. He received medical insurance and participated in a retirement plan through his employer. Mr. Shirey had no housing expenses, as he was ignoring the \$630.00 monthly mortgage payments on the former

marital home. He was also responsible for a \$370.00 monthly home equity payment, although the report does not make clear whether he was making those payments.

The parties' financial circumstances at the time of the master's hearing do not indicate that the master intended the rental value award to serve as support for Ms. Shirey. To the contrary, although Ms. Shirey earned substantially less than her ex-husband and had custody of the parties' daughter, it appears that her and her child's financial needs were being adequately met at the time of the master's hearing.

Third, the function of the rental value award was not to maintain daily necessities for Ms. Shirey or her child. The master awarded Ms. Shirey rental value pursuant to Trembach v. Trembach, 615 A.2d 33 (Pa. Super. Ct. 1999). In Trembach, the Superior Court of Pennsylvania stated that "[t]he basis of the award of rental value is that the party out of possession of jointly owned property (generally the party that has moved out of the former marital residence) is entitled to compensation for her/his interest in the property." Id. at 37. While federal courts are not bound by state law characterizations of such obligations, the master clearly intended the award to recompense Ms. Shirey for half the value of her ex-husband's use of the marital home during the time he failed to pay the mortgage, not to provide her with support.

For the foregoing reasons, the court affirms the bankruptcy court's treatment of Ms. Shirey's rental value award.

2. Counsel Fees

The analysis is not so simple with regard to the counsel fees Ms. Shirey incurred as a result of Mr. Shirey's refusal to cooperate with the litigation. In awarding fees, the master stated,

Wife had to incur counsel fees that are disproportionate to the size of the marital estate due to Husband's completely non-cooperative stance throughout the litigation. Among the otherwise avoidable services Wife's counsel had to perform were a Motion to Compel Discovery, a Petition for Return of the Motor Vehicle, two separate Petitions to Prevent Dissipation of Marital Assets, and a Petition for Sanctions. Upon consideration of the criteria established under the relevant case law, including the excellent quality of the services rendered on Wife's behalf, the Master recommends that she be awarded fees in the amount of \$7,500.00, which sum is to be paid within 60 days of the date hereof.

Master's Rep. at 13.

Counsel fees and other expenses are in the nature of support when they relate to services concerning nondischargeable alimony or support. See In re Marker, 139 B.R. 615, 623 (Bankr. W.D. Pa. 1992); In re Borzillo, 130 B.R. 438, 445 (Bankr. E.D. Pa. 1991); In re Horner, 125 B.R. 458, 462 (Bankr. W.D. Pa. 1991). However, absent indications that a fee award is intended to function as support, counsel fees arising from equitable distribution litigation are considered to be in the nature of equitable distribution and dischargeable. See Rooker v. Rooker, 116 B.R. 415, 417 (Bankr. M.D. Pa. 1990) (finding that indebtedness in a divorce decree that merely divides the marital property is

dischargeable).

Applying the first Gianakis factor -- a review of the report's language and substance -- sheds little light on the master's motivation for awarding counsel fees. Structurally, the report addresses the fee award apart from its discussions on equitable distribution and alimony. Substantively, the report does not identify the fee award as stemming from either equitable distribution or alimony. While the award was made pursuant to the "criteria established under relevant case law," Master's Rep. at 13, the legal criteria for awarding counsel fees in divorce litigation do not include support or maintenance as a consideration.⁴

Application of the second Gianakis factor, the Shireys' respective financial circumstances at the time of the master's hearing, does not reveal the master's intent as to the counsel fee award any more so than with the rental value award. Supra part II.B.1.

However, the third Gianakis factor, an examination of the fee award's function, is more illuminating. The master's report

⁴ 23 Pa. C.S.A. § 3502(e)(7) governs the award of counsel fees in a Pennsylvania divorce action. "To determine whether to award counsel fees, the court should consider the parties' incomes, assets, expenses, and future earnings capacity." Endy v. Endy, 603 A.2d 641, 646 (Pa. Super. Ct. 1992) (citing Wayda v. Wayda, 576 A.2d 1060 (1990); Verdile v. Verdile, 536 A.2d 1364, 1368-69 (Pa. Super. Ct. 1988)). These factors, however, are among the statutory criteria routinely considered by Pennsylvania courts in equitable distribution proceedings under 23 Pa. C.S.A. § 3502(a)(3)&(5)-(6)&(8). As a consequence, the counsel fee considerations set forth in Endy do not significantly impact this court's § 523(a)(5) analysis.

lists the services Ms. Shirey's attorney had to perform because of Mr. Shirey's intransigence: "a Motion to Compel Discovery, a Petition for Return of the Motor Vehicle, two separate Petitions to Prevent Dissipation of Marital Assets, and a Petition for Sanctions." Master's Rep. at 13. Of these services, one clearly relates to a support obligation -- the Petition for Return of the Motor Vehicle. "An obligation that serves to maintain daily necessities such as food, housing and transportation is indicative of a debt intended to be in the nature of support." In re Gianakis, 917 F.3d at 763 (emphasis added). As the bankruptcy court noted in In re Swiczkowski, "transportation is an essential commodity for a family with minor children. A dependable vehicle is a necessity for both everyday and emergency transportation." 84 B.R. 487, 490 (Bankr. N.D. Ohio 1988). The Family Court issued an order on September 21, 1994 directing Mr. Shirey to transfer sole possession of the vehicle to Ms. Shirey. Master's Rep. at 9. While the parties' automobile was listed as an asset of the marital estate for equitable distribution, Master's Rep. at 10, Ms. Shirey's petition for the automobile's return prior to the master's equitable distribution hearing indicates a need for transportation on the part of Ms. Shirey and her child. As a result, the court can infer that the portion of the counsel fee award relating to the Petition for Return of the Motor Vehicle was intended by the master to function as maintenance or support. See In re Clark, 207 B.R. 651, 654-5 (Bankr. E.D. Mo. 1997) (Chapter 7 debtor-former husband's

obligation to make payments for automobile awarded to former spouse was nondischargeable as support); In re Swiczkowski, 84 B.R. 487, 490 (Bankr. N.D. Ohio 1988); Deichert v. Deichert, 587 A.2d 319, 324 (Pa. Super. Ct. 1991)(finding that vehicle was necessary means of transportation so as to constitute support).

Accordingly, the court concludes that the bankruptcy court committed clear error in finding that the counsel fee for preparation of the Petition for Return of the Motor Vehicle is potentially dischargeable. Because the master's report does not allocate a particular portion of the \$7,500.00 counsel fee award to that service, the court will remand this issue to the bankruptcy court for a determination of what portion of the \$7,500.00 fee award relates to the return of the motor vehicle. That portion is nondischargeable under § 523(a)(5).

With regard to the Motion to Compel Discovery, the two Petitions to Prevent Dissipation of Marital Assets, and the Petition for Sanctions, the record does not provide a basis for determining whether they relate to the acquisition of support, maintenance or alimony. Ms. Shirey, as the party objecting to discharge, bore the burden of proving that the fees for these services were not dischargeable. In re Gianakis, 917 F.2d at 762. She failed to present evidence sufficient to prove that point. Consequently, the bankruptcy court's judgment as to the Motion to Compel Discovery, the two Petitions to Prevent Dissipation of Marital Assets, and the Petition for Sanctions is affirmed.

III. Conclusion

The bankruptcy court committed clear error in finding that the portion of the counsel fee award arising from preparation of the Petition for Return of the Motor Vehicle was in the nature of equitable distribution and dischargeable. The court therefore reverses that finding and remands to the bankruptcy court for a determination of what portion of the \$7,500.00 fee award relates to preparation of that petition. That amount may not be discharged under 11 U.S.C. § 523(a)(5). In all other respects, the bankruptcy court's judgment is affirmed.

An appropriate order follows.