UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

In re:

ESTHER AQUINO LEVINE, Case No. 14-72954-FJS
Chapter 7

Debtor.

MOTION TO COMPEL TURNOVER OF PROPERTY OF ESTATE

Lawrence H. Glanzer, Trustee (the "Trustee") of the estate of Esther Aquino Levine (the "Debtor"), hereby moves the Court as follows:

1. On August 13, 2014 (the "Petition Date"), the Debtor filed her voluntary petition under chapter 7 of title 11, United States Code, in this Honorable Court. Relief was ordered.

2. The Trustee was appointed interim trustee of the estate of the Debtor, and continues to serve as trustee.

3. This is a motion to compel the surrender and delivery of property by the Debtor, in which the Trustee seeks to recover money or property owned by the Debtor on the date of the filing of his petition that was not exempted and that is being withheld from the Trustee by the Debtor.

4. Jurisdiction over this contested matter exists in this Court pursuant to 28 U.S.C. §§157 and 1334 and 11 U.S.C. §§521(a)(4) and 541(a). It is a core proceeding, pursuant to 28 U.S.C. §157(b)(2)(A) and (E).

5. Schedule I, filed by the Debtor (Docket Entry 1, p. 32 of 59), shows that she is receiving family support payments at the rate of $3,600 per month. Documents provided by the Debtor to the Trustee, incident to the Debtor's meeting of creditors, shows that, of this sum,

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$2,200 per month is in the form of spousal support, pursuant to a Marital and Separation Stipulation and Agreement in Accordance with §§20-155, 20-109 and 20-109.1 of the 1959 Code of Virginia, as Amended (the "Marital Stipulation"), dated October 12, 2012.[1]

6. The other party to the Marital Stipulation was Scott M. Levine ("Mr. Levine"), now the Debtor's former spouse. A final decree of divorce (the "Final Decree") was entered in Case No. CL12-3447 by the Circuit Court for the City of Virginia Beach on September 11, 2013.

7. The Marital Stipulation provides, in Section 5.2, that Mr. Levine is to pay spousal support in the amount of $2,200 per month, in installments of $1,100 each, on the 1st and 15th day of each month, through and including August 31, 2015, then in the amount of $2,000 per month, in installments of $1,000 each, on the 1st and 15th day of each month thereafter until the first to occur of the following: (a) the death of the Debtor or Mr. Levine, (b) the remarriage of the Debtor, (c) the Debtor's cohabitation with another person in a relationship analogous to a marriage for a period of more than one year, or the expiration of 57 months from the commencement of the obligation to pay spousal support (which translates to May 15, 2017) (the "Terminating Events").

8. The Final Decree includes the following provision:

> It is further ADJUDGED, ORDERED AND DECREED that the Agreement dated October 12, 2012 [*i.e.*, the Marital Stipulation], be and is hereby affirmed, ratified and incorporated, but not merged, into the Final Decree of Divorce, and that the parties are ordered to comply with the terms of the same;

9. Although the Debtor did not list her right to receive spousal support as an asset in Schedule B.17, that right clearly was established by the Marital Stipulation and the Final Decree.

[1] The balance of the Debtor's family support payments is for child support. Section 20-108.1(G) of the Code of Virginia states, in pertinent part, as follows: "Child support payments, whether current or in arrears, received by a parent for the benefit of and owed to a child in the parent's custody . . . shall not be subject to garnishment." Arguably, this is an exemption for child support and, in any case, the Trustee makes no claim to the child support portion of the family support income of the Debtor.

10. The Debtor claimed no exemption with respect to her right to receive spousal support under the Marital Stipulation and the Final Decree.

11. Since the filing of her petition, the Debtor will have received payments, in the amount of $1,100 each, on or about August 15, September 1, September 15 and October 1, 2014, and will continue to receive such payments until the occurrence of one of the Terminating Events.

12. The Debtor's right to receive spousal support payments is an asset of her bankruptcy estate.

13. Owing to the nature of the issues presented by this motion, the Trustee has not instructed Mr. Levine to make his support payments to the estate, but has advised the Debtor of his position.

ARGUMENT

Section 541 of the Bankruptcy Code states that the commencement of a case creates an estate, composed of "all legal or equitable interests of the debtor in property as of the commencement of the case." The issue, in this case, is whether the Debtor's right to receive spousal support, expressly designated as such, created in a marital stipulation and agreement incident to the dissolution of the marriage, ratified and approved by, and incorporated but not merged into, a divorce decree, is a legal or equitable interest of a debtor in property.

Although §541 does not expressly address an entitlement to spousal support, the Bankruptcy Code does speak to the question. Section 522(d)(10)(D) provides an exemption for "alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." The purpose of an exemption, of course, is to allow a debtor to protect what would otherwise be property of an estate from administration as part of

that estate. It may be fairly understood, from this, that Congress, in writing §522(d)(10)(D), believed that it was creating the statutory basis for allowing a debtor eligible for federal exemptions to protect spousal support from administration as part of that debtor's bankruptcy estate. There is no other reason for writing the provision into law.

Virginia, however, has "opted out" of federal exemptions and no Virginia domiciliary is permitted to take the exemptions set forth in §522(d). Va. Code Annot. §34-3.1. ("No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of § 522 of the Bankruptcy Reform Act (Public Law 95-598), except as may otherwise be expressly permitted under this title.") Other than the "wild-card" exemption created in Va. Code Annot. §34-4, there are no Virginia Code exemptions available to protect spousal support from administration in a bankruptcy case.

In the case of *Phillips v. Rinehart (In re Rinehart)*, 352 B.R. 427 (Bkrtcy. E.D.Va. 2005), then-Chief Judge Tice examined the question of whether post-petition support payments should be included in a bankruptcy estate, pursuant to §541(a)(5)(B) [property that the debtor acquires or would be entitled to acquire within 180 days of the filing of a petition, as a result of "a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree"]. Drawing from the decision in *Peters v. Wise (In re Wise)*, 346 F.3d 1239 (10th Cir. 2004), Chief Judge Tice concluded that an inquiry into Virginia law regarding the nature of alimony or support was not necessary because, "if the legislature had meant the provisions of §541(a)(5)(B) to apply to awards of alimony and support, it would have said so clearly." 352 B.R. at 432-33. As that part of the statute did not do so, he found that "post-petition spousal support payments unmatured on the date of the filing of the petition are not property of the estate and are not recoverable under §541(a)(5)(B)." 352 B.R. at 433. He found that the payments

were "in the nature of income earned after the filing of the petition" and, therefore, not property of a chapter 7 estate.

The major flaw in the reasoning of the decision in *Rinehart* is the conclusion that it is not necessary to consider Virginia law in determining whether or not a debtor's right to receive spousal support payments under a divorce decree and marital dissolution agreement are property of an estate. 352 B.R. at 432 ("the outcome of the inquiry into Virginia law on the nature of property interests in alimony or support is not critical"). Simply put, the analysis cannot be completed without considering Virginia law. The Supreme Court's decision in *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed. 2d 136 (1979), established, as black-letter law, that property interests in bankruptcy must be determined by reference to the law of the state in which the property is located or the property rights arose: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." 440 U.S. at 54.

From this flawed starting point, Chief Judge Tice went on to conclude that post-petition payments of spousal support "are in the nature of income earned after the filing of the petition, which is not properly included in a chapter 7 bankruptcy estate." 352 B.R. at 433. This actually compounds the error found in the predicate to the conclusion. Section 541(a)(6) states that property of the estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, *except such as are earnings from services performed by an individual debtor after the commencement of the case*." This is the language that keeps post-petition earned income from being included in a chapter 7 estate, but it is unimaginable to assert that payments of post-petition spousal support are connected, in any way, shape, manner or form to services performed by the recipient of those payments after the commencement of the case. Moreover, as hard as it would be to make the assertion, it is even more difficult to conceive what the proof of

that assertion would be at trial. In fact, as will be demonstrated, below, the payments are made, not as earnings for personal services, but in satisfaction of a contractual obligation that vests in the Debtor upon the entry of the divorce decree that approves, ratifies and incorporates the marital stipulation, but does not merge the stipulation into the decree.

In *Savage v. Camardo (In re Savage)*, 2013 Bankr. LEXIS 2756 (Bkrtcy. E.D.Va. 2013), this Court had occasion to consider the property rights of a debtor who has been divorced and who entered into a marital stipulation that was approved, ratified and incorporated, *but not merged*, into a final decree of divorce. In that case, the debtor and her ex-husband had entered into a "Separation Agreement" that, among other things, required the non-debtor party to pay to the debtor a substantial sum following the sale of their marital residence, but did not impose a time limit for the sale of the property. *Supra* at *8-9.

The Court noted that §541(a)(1) makes "all legal and equitable interests of the debtor in property as of the commencement of the case" property of a debtor's estate and that it is the duty of the trustee, under §704(a)(1), "to collect and reduce to money the property of the estate." *Supra*, at *23. Noting that *Butner, supra*, requires that the scope of a property interest depends on applicable state law, the Court focused on how a divorce decree that ratified, affirmed and incorporated, but did not merge, a settlement agreement affected the debtor's rights under that agreement. Relying on the analysis and discussion of this point in *Hering v. Hering*, 33 Va. App. 368, 533 S.E.2d 631 (2000), this Court concluded that "where a property settlement agreement … is incorporated but not merged into the final decree, under Virginia jurisprudence, it is enforceable at law as though it were a contract." *Savage, supra* at *27. The Court found further support for this conclusion in *Southerland v. Estate of Southerland*, 249 Va. 584, 588, 457

S.E.2d 375, 378 (1995) ("property settlement agreements are contracts and are subject to the same rules of construction that apply to the interpretation of contracts, generally"). *Id.*

One of the significant consequences of not merging the provisions of a marital settlement agreement into the final decree of divorce is that the parties to it may enforce it by suing on the agreement, rather than seeking enforcement of the decree that ratified and approved it. "Where … the agreement was 'incorporated but not merged' into the final decree, the agreement remained enforceable under either contract law or through the court's contempt power." *Hering, supra*, 33 Va. App. at 373-74.

In *Savage*, the result of this analysis was that the debtor acquired a "vested, inchoate interest in" the stipulated amount of proceeds from the sale of the marital residence, "whenever that sale occurred." The Court went on:

> That vested inchoate interest to receive a payment upon a condition mandated by the Agreement is an intangible property right. The Debtor therefore had a chose in action at the time of the entry of the Decree. That chose in action was vested in Savage when she filed her bankruptcy petition. It vested in the bankruptcy estate by operation of §541. There is no exclusion to this vesting that would benefit Savage.

Supra at *31.

Here, the Debtor and her now ex-spouse entered into a contract that called for him to make certain specific payments to the Debtor for a specific period of time, subject to termination of the obligation upon the occurrence of certain conditions subsequent, none of which has occurred (see ¶ 7, above). The Debtor's right to those contractually-mandated payments is a chose in action that vested in the Debtor upon entry of the divorce decree and it became part of her bankruptcy estate upon the filing of her petition. There is no Virginia exemption other than that created by Va. Code Annot. §34-4 available to protect the chose in action. That exemption has not been asserted on behalf of the Debtor and federal exemptions are not available to her.

The decision of the court in *Mehlhaff v. Allred (In re Mehlhaff)*, 491 B.R. 898 (8th Cir. BAP 2013), is instructive in this context. The debtor in that case was entitled to support payments from her former spouse until her minor child turned 18, which was to occur approximately 18 months after she filed her bankruptcy petition. The right to receive the alimony was disclosed, but not exempted, and the trustee moved for turnover. The bankruptcy court found in favor of the trustee and the debtor appealed.

The BAP began its analysis with the provisions of §541(a), noting that "[t]he nature and extent of a debtor's interest in property are determined by state law. However, once the nature and extent of the debtor's interests is determined under state law, federal bankruptcy law dictates to what extent that interest is property of the estate." 491 B.R. at 900. It is, the court said, the trustee's burden, in the first instance, to prove a *prima facie* case that an asset is property of the estate, after which the burden shifts to the debtor to show that the asset is excluded, with the ultimate burden of proof always staying with the trustee. If the trustee carries his burden, the debtor may still protect the asset with applicable exemptions.

In the course of the opinion, the BAP dealt with an earlier case, *Kelly v. Jeter (In re Jeter)*, 257 B.R. 907 (8th Cir. BAP 2001), that held, as did *Rinehart*, *supra*, that post-petition payments of alimony were not property of the estate under §541(a)(5) (certain property acquired within 180 days after the date of the petition) because §541(a)(5)(B) does not, on its face, reach alimony awards. The BAP said, in *Mehlhaff*, that the response to the objection is that while subsection (a)(5)(B) of §541 may not be of any avail to the trustee, the more important question was whether the award came into the estate under subsection (a)(1), which encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case." The right to receive alimony vested in the debtor before the petition was filed, when the judgment

awarding it was entered, not post-petition, so *Jeter* and §541(a)(5)(B) had no bearing on the analysis. 491 B.R. at 901-02.

The BAP stated that any causes of action held by the debtor at the time of the filing of a petition were included in the debtor's bankruptcy estate, under §541(a), a point about which there can be little controversy. In *Mehlhaff*, the BAP found that the judgment awarding alimony to the debtor was the cause of action that passed into the estate. (In the case at bar, it is not necessary to go that far, because of the separate enforceability of the bilateral contract between the debtor and her former spouse, due to the exclusion of merger set forth in the final decree of divorce. A contract right is, indisputably, a property interest, under Virginia law and, therefore, §541(a)(1).) The right to enforce the judgment for alimony passed to the trustee upon the filing of the debtor's petition, just as would the right to enforce any other judgment. 491 B.R. at 902.

The BAP found its view of the matter reinforced by applicable state law that allowed an attorney for a party to a divorce to assert a lien against a right to receive alimony: "We agree with the Bankruptcy Court that, if alimony is the kind of property right to which a lien can attach, it is the kind of property right that becomes property of the estate when a bankruptcy is filed." 491 B.R. at 903. In Virginia, attorneys are also permitted to assert a lien against an award of spousal support in a case in which the attorney represented the recipient of that award. Va. Code Annot. §54.1-3932 (1950, as amended). Although the first part of the statute is not crystal clear on this question, subsection B resolves the issue beyond dispute, by negative implication, stating: "Notwithstanding the provisions in subsection A, a court in a case of annulment or divorce may, in its discretion, exclude spousal support and child support from the scope of the attorney's lien." Thus, unless the trial court specifically holds otherwise, spousal

support may be subjected to an attorney's lien for fees in Virginia, satisfying that part of the 8th Circuit BAP's analysis.

The BAP, in *Mehlhaff*, also rejected the argument that the award of spousal support was subject to modification, thereby rendering it too speculative to be part of an estate, stating that "the fact that the award is modifiable only affects the amount of alimony the bankruptcy estate might ultimately receive, not the estate's right to receive it." 491 B.R. at 903.

Similarly, the BAP rejected the debtor's appeal to public policy to protect the right to future payments of alimony. It found that §541(a)(1) was "unambiguously broad enough to include alimony awards, provided that such an award is considered to be 'an interest in property' under applicable state law," and public policy should not be used as a tool to construe statutes unless they are ambiguous. 491 B.R. at 903-04.

Finally, the BAP pointed out that applicable state law opted out of federal exemptions and that, while federal law provided an exemption for spousal support and alimony, the law of the state in question did not. Congress had, it said, provided the exemption for the right to receive future alimony payments "based no doubt on the presumption that such right would be treated as an asset of the estate." 491 B.R. at 904.

CONCLUSION

For the foregoing reasons, and upon the foregoing facts, the Trustee moves the Court for entry of an order compelling the debtor to turn over and surrender all post-petition payments of spousal support made pursuant to the Marital Stipulation that was ratified and approved by, and incorporated but not merged into, the final decree of divorce between the Debtor and her former spouse, and awarding to the trustee such other and further relief as to the Court may seem proper.

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PROOF OF SERVICE

I certify that on October 16, 2014, I will file the foregoing pleading via the Court's CM/ECF system, which will thereupon serve notice of electronic filing on all registered participants associated with the case, thereby completing service upon them and, in addition, will serve a copy upon Esther Aquino Levine, 866 Park Place Drive, Virginia Beach, VA 23451, by first-class mail, postage prepaid, on the same date.

/s/ *Lawrence H. Glanzer, Trustee*
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