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NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	CC-05-1039-MoHB
	)		
GERALD MAUDSLEY and WHITNEY	)	Bk. No.	ND 93-10581-RR
MAUDSLEY,	)		
	)	Adv. No.	ND 04-01013-RR
Debtors.	)		
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GERALD MAUDSLEY, a/k/a Jere	)		
Maudsley,	)		
	)		
Appellant,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
SANDRA MAUDSLEY,	)		
	)		
Appellee.	)		
<hr/>			

Argued and Submitted on October 19, 2005  
at Los Angeles, California

Filed - January 20, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding.

\_\_\_\_\_

Before: MONTALI, HAINES<sup>2</sup> and BRANDT, Bankruptcy Judges.

\_\_\_\_\_

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Randolph J. Haines, Bankruptcy Judge for the District of Arizona, sitting by designation.

1 Sandra Maudsley ("Sandra") is the former wife of debtor  
2 Gerald Maudsley, a/k/a Jere Maudsley ("Debtor"). Sandra had the  
3 prima facie burden to show that Debtor's obligations to her were  
4 for support and thus nondischargeable under Section 523(a)(5).<sup>3</sup>  
5 The burden then shifted to Debtor to rebut this evidence. The  
6 bankruptcy court was not persuaded that he met this burden and  
7 held the debt to Sandra nondischargeable. We AFFIRM.

### 8 I. FACTS

9 Debtor and Sandra filed for divorce in different Florida  
10 counties on the same day in December, 1985. Sandra obtained  
11 various awards against Debtor in In re The Marriage of Sandra  
12 Maudsley and Jere Maudsley (Fla. 17th Judicial Cir., Broward Co.,  
13 Case No. 85-28097) (the "Florida Proceeding").

14 Debtor and his current wife Whitney Maudsley (collectively,  
15 "Debtors") filed their voluntary Chapter 7 petition on February  
16 18, 1993 (the "Petition Date"). Their bankruptcy schedule F lists  
17 "Alimony" of \$168,000.00 owing to Sandra and \$350,000.00 owing to  
18 her Florida attorneys. Neither debt is listed as disputed and  
19 both are listed as "Fixed and liquidated."

20 Debtor received his discharge on June 9, 1993. Sandra later  
21 obtained at least one judgment in the Florida Proceeding for  
22 arrears. Debtors brought an adversary proceeding against Sandra  
23 to determine the dischargeability of all amounts owed in the  
24 Florida Proceeding and for damages "in an amount not less than

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25  
26 <sup>3</sup> Unless otherwise indicated, all chapter, section and  
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,  
28 as enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 \$1,000,000,000 [sic]" for alleged violation of the discharge  
2 injunction of Section 524(a)(2). Sandra alleged in documents  
3 attached to her Answer that the total amount owed by Debtor, with  
4 interest, exceeded \$1.24 million as of April 1, 2003.

5 Debtor put on his evidence first, testifying on his own  
6 behalf and introducing a Nevada divorce decree that he obtained in  
7 1988 and some tax returns. Sandra did not testify and was not  
8 present at trial. Her evidence consisted of some of the orders  
9 and judgments in the Florida Proceeding and testimony from one of  
10 her Florida attorneys.

11 Debtor testified: that he and Sandra had no children  
12 together and had been separated or only roommates before their  
13 divorce (Transcript Dec. 17, 2004, pp. 4:15-6:10, 48:9-10); that  
14 around 1983 he had started a business involving extended car  
15 warranties with his then-attorney Robert G. Lubbers, Esq., called  
16 the Service Contract Corporation of America ("SCCA") (id. at  
17 17:20-19:25); that in July of 1987 Sandra discovered in SCCA's  
18 files some materials about off-shore accounts (id. pp. 33:18-  
19 34:18, 36:9-12, 58:12-18); that according to Mr. Lubbers, who was  
20 in a relationship with Sandra and later had a child with her,  
21 Debtor had said he "was going to [divert millions of dollars off  
22 shore]" and "then leave the country" (id. pp. 38:12-15, 58:12-18);  
23 that Sandra used these allegations to obtain a "writ of ne exeat"  
24 which is "like civil bail," and because he could not afford a cash  
25 bond of \$400,000 he was sent to jail for 93 days (id. pp. 33:18-  
26 39:14, 58:12-18); that as a result of being jailed he had to  
27 relinquish his insurance license, SCCA lost its income stream, he  
28 could not find employment in Florida when he got out of jail, and

1 he moved to Nevada in December of 1987 with a much lower income  
2 (id. pp. 23:19-26:11); that in succeeding years he continued to  
3 have much lower income, as reflected by federal income tax returns  
4 for some of those years (1988-1992) (id. pp. 27:1-32:10); and  
5 that he retired in his early 60s, about three or four years prior  
6 to trial, after which his only income has been about \$1100 per  
7 month of Social Security (id. p. 32:11-22). Debtor added that he  
8 had returned to Florida in 1999 but was incarcerated again for 14  
9 days in May of 2003 pursuant to another writ of habeas corpus on a bond  
10 of \$660,000, as a result of which he suffered physical injuries  
11 and post-traumatic stress and was suicidal. Id. pp. 45:22-47:25.  
12 He also testified that he had characterized his obligations to  
13 Sandra as alimony on his bankruptcy Schedule F because his  
14 attorney "said if it was possible that it was alimony, I should  
15 put that in as alimony in order to make sure that there was no  
16 question about the legality of the bankruptcy." Id. p. 45:16-21.

17 On cross examination Debtor conceded that in 1985 and 1986 he  
18 had a salary of \$100,000 per year from SCCA; that SCCA had an  
19 approximate net income above salaries and other expenses of about  
20 \$180,000 to \$240,000 per year; and that he was its 60%  
21 shareholder. Transcript Dec. 17, 2004, pp. 61:19-63:3. When  
22 asked about "spousal support payments" he admitted that from about  
23 June of 1986 to June of 1987 he had made payments of about "\$6,000  
24 [per month] plus expenses for her car and expenses." Id.  
25 pp. 58:4-9, 63:24-64:1.

26 Sandra's witness, as noted above, was one of her Florida  
27 attorneys, Michael E. O'Connor, Esq. He had an undergraduate  
28 degree in accounting, he reviewed financial records from Debtor's

1 businesses, and he attended "at least 10 hearings" at which the  
2 topic was Debtor's non-payment of support and at which Debtor  
3 "testified that he no longer had any money." Id. p. 77:10-20,  
4 79:17-22, 83:12-16, 84:22-23.

5 Debtor's attorney objected to most of Mr. O'Connor's  
6 testimony, primarily on grounds of hearsay and the best evidence  
7 rule. The bankruptcy court sustained most of these objections but  
8 permitted him to testify about the "topics" of the hearings in the  
9 Florida Proceeding, ruling that "[t]he topics discussed are not  
10 hearsay . . . or at least it's not inadmissible." Transcript,  
11 Dec. 17, 2004, p.94:8-11.<sup>4</sup>

12 In response to Debtor's objections the bankruptcy court also  
13 excluded a number of documents from the Florida Proceeding that  
14 had not been produced in discovery (id. pp. 51:5-52:13, 113:2-4),  
15 but admitted certified copies of the following documents which had  
16 been produced (identified by their trial exhibit letters):

17 Exh. Description

18 B. Judgment For Attorneys Fees and Costs, awarding Sandra  
19 \$74,717.50 in attorneys' fees in October of 1987.

20  
21 <sup>4</sup> We agree. Mr. O'Connor's testimony was not offered for  
22 the truth of the matters asserted in the Florida Proceeding but  
23 rather to show the topic of those hearings, which is relevant to  
24 whether the resulting awards against Debtor were "actually in the  
25 nature of alimony, maintenance, or support" within the meaning of  
26 Section 523(a)(5). See Fed. R. Evid. 801(c) (definition of  
27 hearsay).

28 Alternatively, we are persuaded that the residual exception  
in Fed. R. Evid. 807 applies: the testimony is material because  
it is relevant to the inquiry mandated by Section 523(a)(5), the  
general purposes of the evidentiary rules and interests of justice  
would be served by its admission, and it is more probative than  
other evidence that could be procured through reasonable efforts  
-- there is no reasonable means to procure a transcript of the  
hearings because it is undisputed that many of the hearings in the  
Florida Proceeding were conducted without a reporter present.

- 1 I. "Final Judgment," issued on April 3, 1990, for \$168,000.00  
2 pursuant to an earlier order (not in the excerpts of record)  
3 dated March 30, 1990. Despite the title of this document,  
4 Debtor admitted on cross-examination that there has not been  
5 a final judgment in the Florida Proceeding. Transcript Dec.  
6 17, 2004, p. 67:14-16.
- 7 J. Judgment For Arrears in the sum of \$217,000.00 with interest  
8 at 12 percent per year, dated November 2, 1992.
- 9 H. Order Granting Wife's Motion for Emergency Relief (the  
10 "Emergency Order"), issued earlier on April 19, 1988, and  
11 stating:

12 This matter came on for hearing on April 18, 1988,  
13 after notice, on "Wife's Emergency Motion for  
14 Immediate Relief", and ["Wife's Emergency Motion for  
15 the Imposition of Sanctions", served April 14, 1988.  
16 [Sandra] appeared, together with her Counsel, but  
17 neither [Debtor] nor any of his attorneys appeared.

18 Mr. Bernard Berman, Esquire, Counsel for [Debtor],  
19 filed his "Response" to [Sandra's] Motion, and  
20 retained Salenger Reporting Service to report this  
21 hearing.

22 It was represented to the Court:

23 a.) [Debtor] has failed to contribute to  
24 [Sandra's] support, despite numerous orders that he  
25 do so;

26 b.) [Debtor] has obtained orders dismissing his  
27 bankruptcy petitions, both personal and corporate;<sup>5</sup>

28 c.) Vernon Leverty, Esquire, Counsel for [Debtor],  
in his Nevada divorce proceeding and bankruptcy  
petition (filed in Nevada and transferred to Florida)  
has withdrawn[;]

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<sup>5</sup> Debtor apparently filed earlier bankruptcy petitions in Nevada that were transferred to Florida. He testified that after he had been incarcerated again in Florida his attorney "felt that the only way to get me out of jail under the writ of ne exeat was to file bankruptcy." Transcript Dec. 17, 2004, p. 55:11-12.

1 d.) [Debtor] is filing pleadings in "proper  
2 person" in Florida (submission of appellate brief),  
and in Nevada (notice of intent to take default);

3 e.) Mr. Berman has executed and delivered to Mr.  
4 Leverty, pursuant to instructions from [Debtor], the  
title to an office condominium building previously  
5 titled in Mr. Berman's name, in which [Sandra] claims  
an interest;

6 f.) Said office condominium was not included in  
7 the schedules of assets filed in either [Debtor's]  
personal or corporate bankruptcies;

8 g.) Mr. Leverty and Mr. Berman were Counsel of  
9 Record in both bankruptcies, and actively  
participated and appeared at hearings in said  
10 bankruptcies.

11 The Court is very familiar with this file, and the  
behavior of [Debtor], and is convinced:

12 I) that [Debtor] filed both bankruptcies for the  
13 sole purpose of obtaining his release from  
incarceration, pursuant to this Court's Order of Ne  
14 Exeat, dated July 20, 1987, and, immediately  
thereafter, fleeing the State of Florida.

15 II) that [Debtor] has deliberately and repeatedly  
16 violated Court Orders;

17 III) that he has professed poverty and inability  
to support [Sandra], at the same time as he has hired  
18 a succession of highly competent (and presumably  
expensive) attorneys, both in and out of Florida (at  
19 least seven, at last count);

20 IV) that he has been able to manipulate, control,  
transfer and otherwise enjoy and derive benefit from,  
21 assets which are and have been under the jurisdiction  
of this court, and in which [Sandra] has always  
22 claimed an interest, including assets titled in joint  
names.

23 V) that despite his protestations, [Debtor] is  
24 obviously well able to support himself; to expend the  
funds necessary to resurrect the business he stated  
25 was completely destroyed; to hire numerous counsel,  
both personal and corporate; and to evade his  
26 responsibility to this Court and [Sandra];

27 VI) that he has made a mockery of our Judicial  
system;

28 VII) that he has been guilty of deliberate and  
flagrant fraud on this Court, the Bankruptcy Court,  
and the Nevada Court; and

1 VIII) that severe sanctions should be imposed  
2 against him.

3 Accordingly, it is

4 ADJUDGED:

5 1. [Sandra's] Motion for Emergency Relief is  
6 granted.

7 2. As temporary support, [Debtor's] interest in  
8 the following-described joint assets of the parties,  
9 as reflected on their financial affidavits included  
10 in the court file, is transferred to [Sandra]:

11 a.) The marital home . . .

12 b.) A rental condominium . . .

13 c.) Five (5) acres of unimproved land . . .

14 3. The Court defers ruling on [Sandra's] request  
15 to cancel and declare void the deed from Mr. Berman  
16 to Mr. Leverty, or [sic] the office condominium  
17 building . . . .

18 [4]. A copy of this order is to be forwarded  
19 directly to [a judge in Reno, Nevada].

20 [5]. The Court will entertain such other  
21 suggestions for relief as appear appropriate.

22 Debtor testified on redirect that this Emergency Order was  
23 based on his previous income, before what his lawyer described as  
24 "SCCA's being destroyed" by Sandra. Transcript Dec. 17, 2004,  
25 p. 67:4-5.

26 Mr. O'Connor testified on cross examination that he does not  
27 know of any "property of the marriage" other than what was  
28 assigned to Sandra in the Emergency Order (id. p. 118:7-10) and he  
has never sought a permanent support order or a final judgment of  
divorce in the Florida Proceeding. Id. p. 118:11-15. On redirect  
he testified that "the financial affidavits that were on file from  
1985" were "the disclosures that were used for purposes of  
determining the temporary support award" in the Emergency Order,



1 and he has not sought a permanent support order because it is  
2 "kind of difficult" without having other financial affidavits on  
3 file. Id. p. 123:16-22.

4 After closing arguments the bankruptcy court ruled that  
5 Debtor's entire obligation to Sandra is nondischargeable support  
6 rather than a dischargeable debt arising from property division,  
7 as Debtor argued. The bankruptcy court asked rhetorically why  
8 Debtor has "been ignoring the Florida Court for all these years,"  
9 then verified that he had not sought a modification of the Florida  
10 orders, and reviewed the following trial exhibits and testimony.  
11 Transcript Dec. 17, 2004, pp. 135:19-136:5.

12 \* Exhibit H, the Emergency Order, "says [that Debtor] has  
13 failed to contribute to [Sandra's] support despite numerous  
14 orders [] that he do so." The bankruptcy court noted  
15 Debtor's admission that he had been ordered to pay over  
16 \$6,000 per month; it observed that "back support" could have  
17 accrued "in some significant amount" between the time that  
18 Debtor stopped paying support and May of 1988 when the  
19 Emergency Order directed that Debtor's interest in jointly  
20 owned properties be transferred to Sandra; and it noted that  
21 the Emergency Order described those transfers "as temporary  
22 support." Transcript Dec. 17, 2004, p. 136:8-25.

23 \* Exhibit B, the Judgment For Attorneys Fees and Costs, "is  
24 of no particular use to me," the bankruptcy court stated,  
25 "because it doesn't say anything about what it was for." Id.  
26 p. 137:1-2.

27 \* Exhibit I, the so-called Final Judgment for \$168,000, is  
28 "[s]imilarly . . . of no particular use for me." Id.

1 p. 137:2-4.

2 \* Exhibit J, the Judgment For Arrears, refers to arrears in  
3 its text and title, and "the only kind of arrears I know of  
4 are support arrears, not division of property arrears when  
5 there is no preexisting order saying we have property  
6 division and it will be paid in monthly installments and  
7 there is an arrearage in [such installments]." Id. p. 137:4-  
8 17.

9 And last but not least, I think there were a lot of  
10 holes in [Debtor's] testimony. It didn't ring  
11 particularly true, and I have some credibility  
12 problems with [him] as to a number of issues, why he  
13 left Florida when he did, when he quit paying  
14 support. He has painted himself as the aggrieved  
15 party in this case. That is at odds with an  
16 aggrieved party who would go into the State Court and  
17 say, "Judge, I don't have any money. Please change  
18 this award. I can't pay it because I no longer have  
19 any income or my income is bumpkus [sic]. Look at my  
20 tax returns."

21 \* \* \*

22 Now, go back to Florida. Get the judge to amend  
23 the order. If this man has no real income and he's  
24 living on social security, what -- what horrible  
25 person is going to say, "Well, you've got -- I don't  
26 care that you only make \$1200 or \$1100 a month in  
27 social security. You still have to pay \$1.6 million  
28 in past spousal support?"

29 Id. pp. 138:24-140:3.

30 On January 11, 2005, the bankruptcy court entered an Order  
31 Determining Debt Nondischargeable which ruled that "the  
32 obligations of [Debtor] arising out of the [Florida Proceeding] to  
33 [Sandra] are nondischargeable" (the "Nondischargeability Order").  
34 Debtor filed a timely notice of appeal. Only Section 523(a)(5) is  
35 at issue. Another nondischargeability provision involving  
36 divorce, Section 523(a)(15), is inapplicable because it was

1 enacted after the Petition Date. See In re Sternberg, 85 F.3d  
2 1400, 1403 n. 1 (9th Cir. 1996) (noting that Section 523(a)(15) is  
3 applicable to bankruptcy cases filed on or after October 22,  
4 1994), overruled on other issues by In re Bammer, 131 F.3d 788,  
5 792 (9th Cir. 1997).

## 6 **II. ISSUE**

7 Did the bankruptcy court correctly allocate the burdens of  
8 persuasion and production to find, on the admissible evidence,  
9 that Debtor's obligations to Sandra are nondischargeable?

## 10 **III. STANDARDS OF REVIEW**

11 We review the bankruptcy court's findings of fact  
12 for clear error and the court's conclusions of law de  
13 novo. To the extent that questions of fact cannot be  
14 separated from questions of law, we review these  
15 questions as mixed questions of law and fact applying  
16 a de novo standard.

17 \* \* \*

18 A specific determination under § 523(a)(5) that  
19 the debt in question was for maintenance, alimony, or  
20 support is considered a factual one which is reviewed  
21 under the clearly erroneous standard.<sup>[6]</sup>

22 Issues of statutory interpretation are questions  
23 of law which we review de novo.

24 In re Jodoin, 209 B.R. 132, 135 (9th Cir. BAP 1997) (citations  
25 omitted).

26 "When there are two permissible views of the evidence, the  
27 trial judge's choice between them cannot be clearly erroneous."

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28 <sup>6</sup> There was previously some confusion whether  
determinations under Section 523(a)(5) are reviewed for clear  
error or for a gross abuse of discretion. See In re Gibson, 103  
B.R. 218, 220 (9th Cir. BAP 1989) (noting apparently inconsistent  
authority); Sternberg, 85 F.3d at 1404 & n. 3. A later Ninth  
Circuit panel clarified that "these two standards are one and the  
same." In re Roosevelt, 87 F.3d 311, 314 n. 2 (9th Cir. 1996).  
See also Bammer, 131 F.3d at 792 (overruling both Sternberg and  
Roosevelt insofar as they presume a standard of review other than  
de novo for mixed questions of fact and law).

1 In re Baldwin Builders, 232 B.R. 406, 410 (9th Cir. BAP 1999)  
2 (citations omitted).

3 "[W]e review the bankruptcy court's evidentiary rulings for  
4 abuse of discretion" (In re Smith's Home Furnishings, Inc., 265  
5 F.3d 959, 963 (9th Cir. 2001)) but we find an abuse of discretion  
6 if the bankruptcy court based its ruling on an erroneous view of  
7 the law such as mis-allocating the burden of proof or a clearly  
8 erroneous assessment of the evidence, or if we have a definite and  
9 firm conviction that the bankruptcy court committed a clear error  
10 of judgment in the conclusion it reached. In re Beatty, 162 B.R.  
11 853, 855 (9th Cir. BAP 1994).

#### 12 IV. DISCUSSION

13 Debtor's principal argument on this appeal is that the  
14 bankruptcy court misapplied the parties' burden of proof. Debtor  
15 relies on the bankruptcy court's comments about attorneys' fees at  
16 the very end of trial -- after the bankruptcy court had said that  
17 court was "adjourned" -- and likewise we will not address the  
18 bankruptcy court's comments until the end of our discussion  
19 because otherwise they would be out of context. We begin with the  
20 statute and the parties' other disputes.

##### 21 A. Section 523(a)(5) generally

22 Section 523(a)(5) provides:

23 (a) A discharge under section 727, 1141, 1228(a),  
24 1228(b), or 1328(b) of this title does not discharge  
an individual debtor from any debt --

25 (5) to a spouse, former spouse, or child of the  
26 debtor, for alimony to, maintenance for, or  
27 support of such spouse or child, in connection  
with a separation agreement, divorce decree or  
28 other order of a court of record, determination  
made in accordance with State or territorial law  
by a governmental unit, or property settlement  
agreement, but not to the extent that --

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\* \* \*

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support[.]

11 U.S.C. § 523(a) (5) .

Interpreting this language we have stated:

Like all other exceptions to discharge, analysis under section 523(a) (5) begins with the principle that discharge is favored under the Bankruptcy Code and the party asserting nondischargeability has the burden of demonstrating that the obligation at issue is actually in the nature of alimony, maintenance or support.[ ] Bankruptcy courts look to federal law, not state law[, ] to determine whether an obligation is actually in the nature of alimony, maintenance or support. Although not bound by state law, courts can, however, look to state law for guidance.

In re Gibson, 103 B.R. 218, 220 (9th Cir. BAP 1989) (citations and footnote omitted). Contra In re Portwood, 308 B.R. 351, 354-355 (8th Cir. BAP 2004) (applying "presumption of nondischargeability" to awards "labeled as alimony").

The Ninth Circuit applies a two part test, looking to the "intent" of the award and to the actual "substance" of the obligation. Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir.1984).

1. Debtor's alleged loss of income since the Emergency Order

The bankruptcy court's inquiry is as of the date of the divorce court's award, not as of any later time such as the petition date. Jodoin, 209 B.R. at 142 (referring to Section 523(a) (5)'s "'rear view mirror' analysis") (citation omitted); Sternberg, 85 F.3d at 1405; In re Seixas, 239 B.R. 398, 403 (9th Cir. BAP 1999). Contra In re Calhoun, 715 F.2d 1103 (6th Cir. 1983) (looking to recipient's present needs if award was intended

1 as support), but see 3 Norton Bankr. Law & Pract. 2d § 47:31 n. 75  
2 (“courts outside the Sixth Circuit overwhelmingly reject Calhoun’s  
3 consideration of changed circumstances”).

4 Any changed circumstances, such as a loss of income  
5 warranting a reduction in support payments, are not at issue  
6 before the bankruptcy court and should be brought to the attention  
7 of the state court. In re Comer, 27 B.R. 1018, 1020-22 (9th Cir.  
8 BAP 1983), aff’d, 723 F.2d 737 (9th Cir. 1984).

9 Before us Debtor’s attorney argued that it would be difficult  
10 for Debtor to return to Florida because he might be incarcerated  
11 again. First, Debtor can attempt to appear in the Florida  
12 Proceeding through counsel, so it is not clear that he would have  
13 to return to Florida in person. Second, even if Debtor would be  
14 subject to incarceration, that is a matter for him to challenge in  
15 the Florida courts. We cannot second guess the Florida courts’  
16 management of their own proceedings or exercise appellate review  
17 over them. Comer, 723 F.2d at 740.

18 2. No cumulative awards

19 A bankruptcy court generally does not enter a new money  
20 judgment but simply declares that the state court awards, or some  
21 portion of them, are nondischargeable. Comer, 27 B.R. at 1020-22,  
22 aff’d, 723 F.2d 737. Compare In re Sasson, 424 F.3d 864, 870-71  
23 (9th Cir. 2005) (affirming new money judgment in unique  
24 circumstances).

25 In this case there were four awards in evidence -- trial  
26 exhibits B, H, I and J -- and based on two of them and the other  
27 evidence before it the bankruptcy court ruled that all of Debtor’s  
28 obligations arising out of the Florida Proceeding are

1 nondischargeable. We questioned Sandra's counsel at oral argument  
2 whether there might be some double-counting. He conceded that the  
3 awards in trial exhibits B and I are cumulative of the ones in  
4 trial exhibits H and J (the Emergency Order and the Judgment for  
5 Arrears) and that Debtor will be entitled to a credit in the  
6 Florida Proceeding for whatever amounts he has paid. The  
7 Nondischargeability Order is consistent with this approach: it  
8 simply states that "the obligations of [Debtor] arising out of the  
9 [Florida Proceeding] to [Sandra] are nondischargeable."  
10 Therefore, we are satisfied that there will be no double-  
11 counting.<sup>7</sup>

12 3. Debtor's non-participation in the Florida Proceeding

13 There was conflicting testimony about whether Debtor was  
14 served with papers from the Florida Proceeding after he moved to  
15 Nevada, but a debtor need not participate in divorce proceedings  
16

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17 <sup>7</sup> We note that the Nondischargeability Order, by including  
18 "all" obligations arising out of the Florida Proceeding,  
19 encompasses some awards that were excluded from evidence at trial.  
20 For example, the exhibits to Sandra's Answer include a \$54,000.00  
21 Judgment for Arrears dated September 7, 1994 (excluded trial  
22 exhibit K). This award post-dates the Emergency Order (April 19,  
23 1988) and the Judgment for Arrears (November 2, 1992), so it  
24 cannot be included within those earlier orders and appears to be a  
25 separate and additional liability that is nondischargeable under  
26 the plain meaning of the bankruptcy court's Nondischargeability  
27 Order. That is consistent with the proceedings in this case.

28 The parties and the bankruptcy court tried the  
nondischargeability issues by looking at the Florida Proceeding as  
a whole. As we interpret the bankruptcy court's comments about  
trial exhibits B and I, those awards were of "no particular use"  
because they did not include within their four corners enough  
information to determine the nondischargeability issues one way or  
the other; but the bankruptcy court then determined, based on two  
other awards (the Emergency Order and the Judgment for Arrears)  
and based on testimony from Debtor and Mr. O'Connor, that "all"  
obligations arising from the Florida Proceeding are  
nondischargeable. Debtor has not challenged this approach on  
appeal and we are not aware of any authority that it is  
impermissible.

1 to be bound by them. Comer, 27 B.R. at 1019-22 (affirming  
2 nondischargeability of default judgment under Section 523(a)(5)).  
3 Debtor has not argued any violation of due process. To the  
4 contrary, he admitted that he knew of the Florida Proceeding and  
5 did not contact the Florida court to find out why he was not  
6 receiving papers because he was "broke" and "[a]ll I wanted to do  
7 was start a new life." Transcript, Dec. 17, 2004, p. 60:19-24.

8           4. Effect of the Nevada divorce

9           The parties disagree about the effect of Debtor's purported  
10 divorce in Nevada on bankruptcy dischargeability issues under  
11 Section 523(a)(5). The bankruptcy court stated during trial, "now  
12 I think there are three divorce actions [Sandra's and Debtor's  
13 proceedings in Florida, and Debtor's in Nevada], and I don't know  
14 who trumps who." Transcript, Dec. 17, 2004, p. 59:24-25. That  
15 issue was not addressed by the parties, and on this appeal no  
16 party has challenged the bankruptcy court's treatment of Florida  
17 law as controlling. Rather, Debtor argues that under Florida law  
18 any support order was "terminated by the final decree in 1988,"  
19 citing Skinner v. Skinner, 579 So.2d 358 (Fla. App. 4th Dist.  
20 1991). Debtor appears to mean that the Nevada divorce decree  
21 serves as the final decree, because that was the only final decree  
22 in 1988 in the excerpts of record (trial exhibit I, entitled  
23 "Final Judgment," was issued in the Florida Proceeding in 1990).

24           We reject Debtor's argument. Assuming without deciding that  
25 Florida law would recognize another state's final divorce decree  
26 as terminating a Florida support obligation, nothing in the Nevada  
27 decree purports to eliminate any Florida obligations. It simply  
28 recites that Debtor resided in Nevada for at least six weeks,



1 states that there "is no community property of the parties located  
2 in the State of Nevada," and then grants Debtor a decree of  
3 divorce from Sandra on grounds of incompatibility.

4           5. Issue preclusion

5           Sandra argues that Debtor is barred by collateral estoppel,  
6 also known as issue preclusion, from relitigating issues involved  
7 in the orders in the Florida Proceeding. Sandra may place too  
8 much reliance on this argument. As the Ninth Circuit has  
9 explained, the extent of an obligation cannot be collaterally  
10 attacked in the bankruptcy dischargeability proceeding but Debtor  
11 can litigate the nature of the debt. Comer, 723 F.2d at 740  
12 (discussing Brown v. Felsen, 442 U.S. 127 (1979)). See also  
13 Sasson, 424 F.3d 864 (discussing Rooker-Feldman doctrine, res  
14 judicata, and collateral estoppel).

15           6. Burdens of persuasion and production

16           The term "burden of proof" generally encompasses both the  
17 burden of persuasion and the burden of production. The burden of  
18 persuasion rests at all times on the party asserting  
19 nondischargeability, Gibson, 103 B.R. at 220, and such party must  
20 prove its case under a preponderance of the evidence standard.  
21 Grogan v. Garner, 498 U.S. 279 (1991) (decided under Section  
22 523(a)(2)); In re Sampson, 997 F.2d 717, 723 (10th Cir. 1993)  
23 (applying Grogan v. Garner to Section 523(a)(5)).

24           Once that party establishes a prima facie case that the debt  
25 is nondischargeable then the burden shifts to the debtor to come  
26 forward with rebuttal evidence. In re Fussell, 303 B.R. 539  
27 (Bankr. S.D. Ga. 2003); In re Cirilli, 278 B.R. 245 (Bankr. M.D.  
28 Ga. 2001); In re Scigo, 208 B.R. 470 (Bankr. D. Neb. 1997); In re

1 Catron, 164 B.R. 912, 916 n. 2 (E.D. Va. 1994); In re Davidson,  
2 104 B.R. 788 (Bankr. N.D. Tex. 1989), aff'd, 133 B.R. 795 (N.D.  
3 Tex. 1990), rev'd on other grounds, 947 F.2d 1294 (5th Cir. 1991).

4 The cases cited by Debtor are not to the contrary. See In re  
5 Werthen, 329 F.3d 269, 271-272 (1st Cir. 2003) (no mention of  
6 shifting burden issue, only broad statement that party seeking  
7 nondischargeability bore burden of proof); Cummings v. Cummings,  
8 244 F.3d 1263, 1265 (11th Cir. 2001) (same); In re Van Aken, 320  
9 B.R. 620, 626 (6th Cir. BAP 2005) (same).<sup>8</sup>

10 Sandra asks us to go further and follow a Sixth Circuit case  
11 holding that “[o]nce the non-debtor spouse has established that  
12 the obligation in question has all of the indicia of support, the  
13 debtor spouse may not introduce evidence to the contrary” and it  
14 is “conclusively” established that those obligations were actually  
15 in the nature of support. Sorah, 163 F.3d at 400-402 (emphasis  
16 added). This approach is contrary to the numerous cases cited  
17 above recognizing that the burden of production can shift back and  
18 forth, and that the ultimate burden of persuasion is on the party

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21  
22 <sup>8</sup> We have found one bankruptcy decision that put the  
23 burden on a debtor to establish dischargeability because he was  
24 the plaintiff and was attempting to use issue preclusion from  
25 state court proceedings to establish dischargeability. See In re  
26 Burch, 100 B.R. 585, 588 (Bankr. M.D. Fla. 1989) (stating that  
27 although generally “the party challenging the dischargeability of  
28 a debt has the burden of proof,” the debtor therein had “the  
burden of persuasion to establish a prima facie case of the state  
court’s intent, at which point the burden shifts to the nondebtor  
spouse”) (citations omitted). At the opposite pole, the Portwood  
case holds that “there is a presumption of nondischargeability for  
an award labeled as alimony.” See Portwood, 308 B.R. at 354-355.  
We are not persuaded by either of these decisions that the burdens  
of persuasion and production as discussed in the text ought to be  
changed.

1 asserting nondischargeability.<sup>9</sup>

2 We nevertheless agree with Sandra that the evidence cited by  
3 the bankruptcy court was sufficient to establish  
4 nondischargeability. We now review that evidence.

5 B. The bankruptcy court's determination of the nature of  
6 obligations arising in the Florida Proceeding

7 1. In general

8 There is no set formula for determining either the intent of  
9 a divorce court's award or the substance of the obligation. Two  
10 usually prominent factors are the former spouse's need for support  
11 and the "imbalance in the relative income of the parties" at the  
12 time of the divorce decree. Sternberg, 85 F.3d at 1405 (quoting  
13 Shaver, 736 F.2d at 1316). The bankruptcy court had only  
14 circumstantial evidence that the Florida court based its award on  
15 these factors, but the evidence shows that the Florida court  
16 itself had only circumstantial evidence after the parties' 1985

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17  
18 <sup>9</sup> The facts in Sorah are unique, and it is unclear whether  
19 the Ninth Circuit might reach the same result applying different  
20 standards. The bankruptcy court in Sorah concluded that payments  
21 ordered by the divorce court were not for maintenance, as  
22 designated, but were intended to punish the husband for his  
23 alleged infidelity, based on the divorce decree's statement that  
24 the spouses' separation and breakup of the marriage "involved  
25 infidelity [by debtor] while he 'frivolates', 'cajoles', 'Bevis  
26 and Buttheads' around in financial freedom as a result of his  
27 bankruptcy, searching for another victim . . . ." Sorah, 163 F.3d  
28 at 400. The quoted language does suggest that the state court  
disliked the bankruptcy discharge and wanted to punish the debtor,  
but the bankruptcy court apparently "failed to provide any backup  
for its own findings of fact" that the state court's award was not  
actually for maintenance. Id. If that is the true basis for the  
Sixth Circuit's reversal then it is consistent with Ninth Circuit  
precedent; but the Sixth Circuit went on to criticize the  
bankruptcy court for having "engaged in an independent inquiry  
into whether the award was actually in the nature of support."  
Id. at 401. An independent analysis is exactly what Section  
523(a)(5) appears to require, as set forth in our discussion  
above.

1 financial affidavits and that the lack of later information was  
2 attributable to Debtor's refusal to participate in the Florida  
3 Proceeding. As the bankruptcy court observed, Debtor has "been  
4 ignoring the Florida Court for all these years" and has not sought  
5 a modification of the Florida orders. Transcript Dec. 17, 2004,  
6 p. 135:19-136:5. The Emergency Order recites circumstances that  
7 reinforce this interpretation, and it specifically describes its  
8 award as "temporary support." The very fact that this award was  
9 temporary suggests that it is support rather than property  
10 division. The Judgment for Arrears reinforces this conclusion.  
11 Like the bankruptcy court, the only kind of arrears we know of in  
12 the domestic relations context are in support payments, not some  
13 sort of interim property division paid in installments.

14 Debtor's attorney objected to the admission of the Emergency  
15 Order and the Judgment for Arrears as hearsay, and on the basis  
16 that he had not received all of the underlying pleadings leading  
17 up to that order and judgment. Transcript, Dec. 17, 2004,  
18 p. 96:13-21. The bankruptcy court ruled that it would admit  
19 "certified copies of court orders from other courts" and overruled  
20 the objections. Admission of these documents was not error. See  
21 In re Boulware, 384 F.3d 794, 806 (9th Cir. 2004) (state court  
22 judgment is only hearsay "to the extent that it is offered to  
23 prove the truth of the matters asserted in the judgment" and is  
24 not hearsay "to the extent that it is offered as legally operative  
25 verbal conduct that determined the rights and duties of the  
26 parties") (citing United States v. Pang, 362 F.3d 1187, 1192 (9th  
27 Cir. 2004)).

28

1 Debtor also argues that the Emergency Order is a "plain case  
2 of a [state] court overstepping its bounds to try to make property  
3 division look like support," and that the purpose of Section  
4 523(a)(5) is to look beyond the label used by the state court and  
5 determine the true nature of the award. We agree that labels are  
6 not controlling, but there is substantial evidence that the awards  
7 were in fact for support. Not only are the awards temporary and  
8 for arrears, but Debtor's own testimony is that he was ordered to  
9 pay \$6,000 per month in support, that he stopped paying that  
10 support, and that the Florida court did not believe him and  
11 instead believed that he had hidden income-producing assets, if  
12 not income itself. Debtor also testified that he believed Sandra  
13 drew \$6,000 per month from SCCA (Transcript Dec. 17, 2004,  
14 p. 19:24-25), which was less than his own allegedly "small salary"  
15 (id. p. 19:22) of \$8,000 per month and far less than his potential  
16 monthly income, given his 60% ownership of SCCA with admitted net  
17 profits of \$15,000 to \$20,000 per month.

18 Debtor argues on this appeal that the single most important  
19 factor is his own income since 1987 and that the only evidence of  
20 that income is his own unrefuted testimony that it is drastically  
21 reduced. As stated in section A.1 of this discussion, any loss of  
22 income warranting a reduction in support payments is not at issue  
23 before the bankruptcy court and should be brought to the attention  
24 of the state court. Comer, 27 B.R. at 1020-21, aff'd, 723 F.2d  
25 737.

26 Another factor typically applied under Section 523(a)(5) is  
27 "whether the obligation terminates upon the death or remarriage of  
28 the recipient spouse." Sternberg, 85 F.3d at 1405 (citing Shaver,

1 736 F.2d at 1316-17). In this case it is impossible to know with  
2 certainty whether the obligations reflected in the Emergency Order  
3 or the Judgment for Arrears would have been terminated upon death  
4 or remarriage, but the very fact that they are described as  
5 "temporary support" and "arrears" suggests that they were  
6 adjustable based on the circumstances, such as death or  
7 remarriage.

8 Another factor is "whether the payments are 'made directly to  
9 the recipient spouse and are paid in installments over a  
10 substantial period of time.'" Sternberg, 85 F.3d at 1405 (quoting  
11 Shaver, 736 F.2d at 1316-17). All the payments and transfers in  
12 the Florida Proceeding were to be made directly to Sandra, and the  
13 Emergency Order and Judgment for Arrears both refer to unpaid  
14 installments.

15 Other factors cited by some courts are either subsumed within  
16 the above discussion or are of little impact in this case, such as  
17 whether payments are needed to support minor children. See  
18 generally De Lapouyade v. De Lapouyade, 711 So.2d 1202 (Fla. App.  
19 2d Dist. 1988) (applying federal bankruptcy law using list of ten  
20 factors).

21 Considering all of these factors, there is ample support for  
22 the bankruptcy court's determination that Debtor's obligations to  
23 Sandra in the Florida Proceeding are nondischargeable support.

## 24 2. Attorneys' fees and the burden of proof

25 Finally we arrive at attorneys fees and the bankruptcy  
26 court's comments about the burden of proof at the end of trial.  
27 Attorneys' fees are nondischargeable if they were incurred in the  
28 course of pursuing alimony, maintenance, or support. See Gibson,

1 103 B.R. at 221; In re Jones, 9 F.3d 878 (10th Cir. 1993). Cf.  
2 Cohen v. de la Cruz, 118 S.Ct. 1212 (1998) (attorneys' fees  
3 nondischargeable under Section 523(a)(2)(A)).

4 Sandra's counsel brought up the issue of attorneys' fees in  
5 his closing argument. He stated that there "weren't any facts  
6 introduced by any side" regarding "what the attorneys' fees were  
7 spent on," but that they should be nondischargeable as part of the  
8 overall debt: "the question is simply whether the debt is  
9 dischargeable, period." Transcript Dec. 17, 2004, p. 134:7-13.  
10 Debtor's attorney responded that "if there's no evidence of  
11 something, then the party that bears the burden of proof is the  
12 party that did not prove its case." Id. pp. 134:24-135:2.  
13 Shortly afterwards the bankruptcy court had the following colloquy  
14 with Debtor's attorney:

15 THE COURT: I do not know whether the attorneys'  
16 fees are for support or for property division.

17 [DEBTOR'S ATTORNEY:] And they have the burden of  
18 proof, your Honor.

19 THE COURT: And you have the burden of proof . . .  
20 with respect to property settlement.

21 [DEBTOR'S COUNSEL:] No, I don't.

22 THE COURT: . . . If you want to appeal it, be my  
23 guest . . . .

24 Transcript Dec. 17, 2004, p. 140:8-17.

25 The bankruptcy court was making these comments after it had  
26 already made favorable interpretations of Sandra's evidence, after  
27 it had already discounted Debtor's testimony, after it had ruled  
28 in Sandra's favor as to all obligations arising out of the Florida  
29 Proceeding, and after it had already stated, "Court's adjourned."  
30 Id. p.139:13. Therefore, by the time Debtor's attorney questioned

1 whether attorneys' fees were nondischargeable, the burden of  
2 production had indeed shifted to Debtor.

3       The bankruptcy court did not dispute the statement by  
4 Debtor's attorney that Sandra had "the burden of proof" -- it  
5 simply added, "[a]nd you have the burden of proof . . . with  
6 respect to property settlement." (Emphasis added.) This is  
7 correct. Once Sandra met her prima facie burden to establish that  
8 all obligations arising out of the Florida Proceeding are  
9 nondischargeable, the burden of production shifted to Debtor to  
10 rebut that prima facie case. He attempted to do this by  
11 establishing that some or all of those obligations were actually  
12 property settlement, but the bankruptcy court was not persuaded.  
13 Therefore, as Debtor's other obligations to Sandra are  
14 nondischargeable, the bankruptcy court could properly conclude  
15 that absent contrary evidence the attorneys' fees incurred in  
16 establishing those obligations are also nondischargeable.

17       Debtor's own testimony was that "99 percent of the time"  
18 spent in the Florida Proceeding (and thus presumably the main  
19 reason for Sandra to incur attorneys' fees) was "what the  
20 corporation [SCCA] was doing and how much money and where it was  
21 going, et cetera." Transcript Dec. 17, 2004, p. 33:13-15. This  
22 supports Mr. O'Connor's testimony that the numerous hearings he  
23 attended in 1987 involved disputes about possible hidden income  
24 from SCCA and Debtor's ability to pay, which is consistent with  
25 establishing support payments. Debtor has pointed to no evidence  
26 that the attorneys' fees were incurred for some other reason.

27       We see no error in the bankruptcy court's application of the  
28 burdens of persuasion and production in this case. See Gibson,



1 103 B.R. 218; Fussell, 303 B.R. 539; Cirilli, 278 B.R. 245; Scigo,  
2 208 B.R. 470; Catron, 164 B.R. at 916 n. 2; Davidson, 104 B.R.  
3 788.

#### 4 **V. CONCLUSION**

5 The Florida court's Emergency Order states that it is  
6 awarding "support," it recites circumstances that reinforce this  
7 characterization, and it is temporary, which is a strong indicator  
8 or support rather than property division. The Judgment for  
9 Arrears by its very nature appears to be for support: support  
10 payments can be in arrears. If there is such a thing as property  
11 division arrears, there is no evidence of it in this case.  
12 Debtor's own testimony shows that he had substantial income at one  
13 time and that the Florida court did not believe his allegations  
14 about reduced income and assets and ordered him to make support  
15 payments of \$6,000 or more per month. Debtor attempted to rebut  
16 this evidence by establishing that the awards were actually a  
17 property division, but he did not meet his burden to rebut  
18 Sandra's evidence establishing her prima facie case of  
19 nondischargeability under Section 523(a)(5). Debtor also argued  
20 that his income has declined but that only suggests that his  
21 support payments should have been decreased at some point, which  
22 is a matter for him to raise in the Florida Proceeding. The  
23 bankruptcy court's Order Determining Debt Nondischargeable is  
24 AFFIRMED.