NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-05-1039-MoHB
GERALD MAUDSLEY and WHITNEY MAUDSLEY,	Bk. No. ND 93-10581-RR
Debtors.	Adv. No. ND 04-01013-RR
GERALD MAUDSLEY, a/k/a Jere Maudsley,	
Appellant,	
v.	**M E M O R A N D U M**[1]
SANDRA MAUDSLEY,	
Appellee.	

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[2] and BRANDT, Bankruptcy Judges.

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[1] 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.

[2] Hon. Randolph J. Haines, Bankruptcy Judge for the District of Arizona, sitting by designation.

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

I. FACTS

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

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

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

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, 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.

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

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

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

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

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

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

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

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

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

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

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

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.

I. "Final Judgment," issued on April 3, 1990, for $168,000.00 pursuant to an earlier order (not in the excerpts of record) dated March 30, 1990. Despite the title of this document, Debtor admitted on cross-examination that there has not been a final judgment in the Florida Proceeding. Transcript Dec. 17, 2004, p. 67:14-16.

J. Judgment For Arrears in the sum of $217,000.00 with interest at 12 percent per year, dated November 2, 1992.

H. Order Granting Wife's Motion for Emergency Relief (the "Emergency Order"), issued earlier on April 19, 1988, and stating:

> This matter came on for hearing on April 18, 1988, after notice, on "Wife's Emergency Motion for Immediate Relief", and ["]Wife's Emergency Motion for the Imposition of Sanctions", served April 14, 1988. [Sandra] appeared, together with her Counsel, but neither [Debtor] nor any of his attorneys appeared.
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> Mr. Bernard Berman, Esquire, Counsel for [Debtor], filed his "Response" to [Sandra's] Motion, and retained Salenger Reporting Service to report this hearing.
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> It was represented to the Court:
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> a.) [Debtor] has failed to contribute to [Sandra's] support, despite numerous orders that he do so;
>
> b.) [Debtor] has obtained orders dismissing his bankruptcy petitions, both personal and corporate;[5]
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> 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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[5] 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.

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

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

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

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

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

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

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

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

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

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

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

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

> VIII) that severe sanctions should be imposed against him.
>
> Accordingly, it is
>
> ADJUDGED:
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> 1. [Sandra's] Motion for Emergency Relief is granted.
>
> 2. As temporary support, [Debtor's] interest in the following-described joint assets of the parties, as reflected on their financial affidavits included in the court file, is transferred to [Sandra]:
>
> a.) The marital home . . .
>
> b.) A rental condominium . . .
>
> c.) Five (5) acres of unimproved land . . .
>
> 3. The Court defers ruling on [Sandra's] request to cancel and declare void the deed from Mr. Berman to Mr. Leverty, or [sic] the office condominium building . . . .
>
> [4]. A copy of this order is to be forwarded directly to [a judge in Reno, Nevada].
>
> [5]. The Court will entertain such other suggestions for relief as appear appropriate.

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

Mr. O'Connor testified on cross examination that he does not know of any "property of the marriage" other than what was 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,

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

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

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

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

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

p. 137:2-4.

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

> And last but not least, I think there were a lot of holes in [Debtor's] testimony. It didn't ring particularly true, and I have some credibility problems with [him] as to a number of issues, why he left Florida when he did, when he quit paying support. He has painted himself as the aggrieved party in this case. That is at odds with an aggrieved party who would go into the State Court and say, "Judge, I don't have any money. Please change this award. I can't pay it because I no longer have any income or my income is bumpkus [sic]. Look at my tax returns."
>
> * * *
>
> Now, go back to Florida. Get the judge to amend the order. If this man has no real income and he's living on social security, what -- what horrible person is going to say, "Well, you've got -- I don't care that you only make $1200 or $1100 a month in social security. You still have to pay $1.6 million in past spousal support?"

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

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

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

II. ISSUE

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

III. STANDARDS OF REVIEW

> We review the bankruptcy court's findings of fact for clear error and the court's conclusions of law de novo. To the extent that questions of fact cannot be separated from questions of law, we review these questions as mixed questions of law and fact applying a de novo standard.
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> * * *
>
> A specific determination under § 523(a)(5) that the debt in question was for maintenance, alimony, or support is considered a factual one which is reviewed under the clearly erroneous standard.[6]
>
> Issues of statutory interpretation are questions of law which we review de novo.

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

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

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[6] 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).

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

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

IV. DISCUSSION

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

A. Section 523(a)(5) generally

Section 523(a)(5) provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> > (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or 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 --

> * * *
>
> (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

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

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

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

2. No cumulative awards

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

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

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

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

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

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

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.

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

4. Effect of the Nevada divorce

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

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

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

5. Issue preclusion

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

6. Burdens of persuasion and production

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

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

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

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

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

[8] We have found one bankruptcy decision that put the burden on a debtor to establish dischargeability because he was the plaintiff and was attempting to use issue preclusion from state court proceedings to establish dischargeability. See In re Burch, 100 B.R. 585, 588 (Bankr. M.D. Fla. 1989) (stating that although generally "the party challenging the dischargeability of 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.

asserting nondischargeability.[9]

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

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

1. In general

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

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[9] The facts in Sorah are unique, and it is unclear whether the Ninth Circuit might reach the same result applying different standards. The bankruptcy court in Sorah concluded that payments ordered by the divorce court were not for maintenance, as designated, but were intended to punish the husband for his alleged infidelity, based on the divorce decree's statement that the spouses' separation and breakup of the marriage "involved infidelity [by debtor] while he 'frivolates', 'cajoles', 'Bevis and Buttheads' around in financial freedom as a result of his bankruptcy, searching for another victim . . . ." Sorah, 163 F.3d 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.

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

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

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

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

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

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

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

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

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

2. Attorneys' fees and the burden of proof

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

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

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

> THE COURT: I do not know whether the attorneys' fees are for support or for property division.
>
> [DEBTOR'S ATTORNEY:] And they have the burden of proof, your Honor.
>
> THE COURT: And you have the burden of proof . . . with respect to property settlement.
>
> [DEBTOR'S COUNSEL:] No, I don't.
>
> THE COURT: . . . If you want to appeal it, be my guest . . . .

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

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

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

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

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

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

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

V. CONCLUSION

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