

AUG 12 2013

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. NC-12-1425-JuTaPa
	)	
ADALBERTO PEREZ JIMENEZ,	)	Bk. No. 12-42231-WJL
	)	
Debtor.	)	
_____	)	
OLIVIA PEREZ,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM*</b>
	)	
ADALBERTO PEREZ JIMENEZ,	)	
	)	
Appellee.	)	
	)	
_____	)	

Submitted Without Oral Argument on July 25, 2013

Filed - August 12, 2013

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

Honorable William J. Lafferty, Bankruptcy Judge, Presiding

Appearances: Appellant Olivia Perez pro se on brief; Peter  
Christopher Pappas, Esq., on brief for appellee  
Adalberto Perez Jimenez.

Before: JURY, TAYLOR, and PAPPAS, Bankruptcy Judges.

\* This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Appellant, Olivia Perez, filed a proof of claim (POC) in  
2 the chapter 13<sup>1</sup> case of her former husband, Adalberto Perez  
3 Jimenez (Adalberto or debtor). Olivia's POC asserted a domestic  
4 support obligation for \$245,000 entitled to priority under  
5 § 507(a)(1)(A). Debtor objected to her claim on the ground that  
6 it represented an equalizing payment rather than a claim for  
7 support. The bankruptcy court sustained debtor's objection,  
8 finding that Olivia's claim was a general unsecured claim. This  
9 appeal followed. We AFFIRM.

#### 10 I. FACTS

11 Adalberto was married to Olivia for approximately ten  
12 years. In December 2012, they divorced and entered into a  
13 marital settlement agreement (MSA). Both parties were  
14 represented by counsel. Under the MSA, each party gave up the  
15 right to receive spousal support from the other. The MSA also  
16 contained an equalizing payment of \$245,000 whereby Adalberto  
17 would pay Olivia that amount by making monthly payments ranging  
18 from \$750 to \$1,300 until the amount was paid. Adalberto made  
19 some payments under the agreement.

20 On March 12, 2012, Adalberto filed his chapter 13 petition.  
21 He listed Olivia on Schedule E as a creditor holding a domestic  
22 support obligation and asserted that he was current on the  
23 payments.

24 Debtor's chapter 13 plan was a stepped-up five-year plan  
25

---

26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure.

1 with a 4% dividend to general unsecured claims. It also paid  
2 priority claimants under § 507 in full. The chapter 13 trustee  
3 objected to debtor's plan because he could not complete it  
4 within sixty months if Olivia's \$245,000 claim was entitled to  
5 priority.<sup>2</sup>

6 Debtor then objected to Olivia's POC on the grounds that it  
7 failed to take into consideration the amounts he had paid and  
8 that the MSA made clear that (1) no spousal support payments  
9 were due and (2) the \$245,000 amount was an equalizing payment.  
10 In response, Olivia argued that although the MSA indicated there  
11 were no further spousal obligations, that provision was not  
12 determinative on the issue under the holding in Friedkin v.  
13 Sternberg (In re Sternberg), 85 F.3d 1400 (9th Cir. 1996),  
14 overruled on other grounds by Murray v. Bammer (In re Bammer),  
15 131 F.3d 788, 792 (9th Cir. 1997) (en banc). Olivia also  
16 submitted a declaration stating that at the time of her  
17 separation from debtor, she had not worked for three years and  
18 that debtor's payments to her pursuant to the MSA were intended  
19 to assist her in getting back on her feet.

20 On July 18, 2012, the bankruptcy court heard the matter  
21 and sustained debtor's objection. Olivia filed her notice of  
22 appeal on August 14, 2012. On November 29, 2012, the bankruptcy  
23 court entered the order sustaining debtor's objection to

---

24  
25 <sup>2</sup> Section 1322(a)(2) requires that the plan "provide for the  
26 full payment . . . of all claims entitled to priority under  
27 section 507 of [title 11]. . . ." Thus, if an equalizing payment  
28 is a "domestic support obligation," it must be paid in full  
through the debtor's chapter 13 plan, unless the former spouse  
agrees otherwise.

1 Olivia's POC. Accordingly, Olivia's appeal was timely. See  
2 Rule 8002(a) (providing that a notice of appeal filed after  
3 announcement of bankruptcy court's decision, but before entry of  
4 an order, is to be treated as filed after such entry).

## 5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction over this proceeding  
7 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (B). We have  
8 jurisdiction under 28 U.S.C. § 158.

## 9 **III. ISSUE**

10 Whether the bankruptcy court erred when it determined that  
11 the equalizing payment was not a domestic support obligation  
12 entitled to priority status under § 507(a)(1)(A).<sup>3</sup>

## 13 **IV. STANDARDS OF REVIEW**

14 We review mixed questions of law and fact de novo.  
15 Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade,  
16 Inc.), 370 B.R. 236, 245 (9th Cir. BAP 2007). A mixed question  
17 exists when the facts are established, the rule of law is  
18 undisputed, and the issue is whether the facts satisfy the legal  
19 standard. In re Bammer, 131 F.3d at 792. Thus, whether a claim  
20 is entitled to priority status is a mixed question of law and  
21

---

22 <sup>3</sup> Olivia has framed the issue on appeal as whether  
23 equalization payments between spouses are dischargeable. While a  
24 debt of the kind described in § 523(a)(15) is nondischargeable in  
25 chapters 7, 11 and 12, the expanded discharge provided for in  
26 chapter 13 cases covers debts such as this. Therefore, if the  
27 equalization payment is not a domestic support obligation, it  
28 would constitute a debt under § 523(a)(15), and could be  
discharged in debtor's chapter 13, even if not paid. However, to  
obtain a discharge, a chapter 13 debtor must complete all  
payments under the plan unless certain exceptions are found to  
apply. See § 1328.

1 fact that we review de novo.

2 Our review of a mixed question begins by ascertaining  
3 whether the bankruptcy court committed clear error in its  
4 findings of fact. In the context of this appeal, we review the  
5 bankruptcy court's factual determination that the debt was not  
6 based on spousal support for clear error. Beaupied v. Chang  
7 (In re Chang), 163 F.3d 1138, 1140 (9th Cir. 2000) (Whether a  
8 debt is actually in the nature of support is a "factual  
9 determination made by the bankruptcy court as a matter of  
10 federal bankruptcy law."). "A finding is 'clearly erroneous'  
11 when although there is evidence to support it, the reviewing  
12 court on the entire evidence is left with the definite and firm  
13 conviction that a mistake has been committed." United States v.  
14 U.S. Gypsum Co., 333 U.S. 364, 395 (1948). "A court's factual  
15 determination is clearly erroneous if it is illogical,  
16 implausible, or without support in the record." Retz v. Samson  
17 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010) (citing United  
18 States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)  
19 (en banc)).

20 The next step in our review of a mixed question is  
21 determining whether the facts satisfy a legal rule. This is a  
22 matter of statutory construction. We review a bankruptcy  
23 court's statutory construction and conclusions of law, including  
24 interpretation of provisions of the Bankruptcy Code, de novo.  
25 Einstein/Noah Bagel Corp. v. Smith (In re BCE W., L.P.),  
26 319 F.3d 1166, 1170 (9th Cir. 2003). We therefore review de  
27 novo the bankruptcy court's determination that a debt does not  
28 constitute a domestic support obligation within the meaning of

1 § 507(a)(1)(A). De novo means review is independent, with no  
2 deference given to the trial court's conclusion. See Rule 8013.

3 **V. DISCUSSION**

4 Section 507(a)(1), enacted as part of the Bankruptcy Abuse  
5 Prevention and Consumer Protection Act of 2005 ("BAPCPA"),  
6 provides first priority status for a debt which is a domestic  
7 support obligation. Section 507(a)(1)(A) provides: "The  
8 following expenses and claims have priority in the following  
9 order: (1) First: (A) Allowed unsecured claims for domestic  
10 support obligations that, as of the date of the filing of the  
11 petition in a case under this title, are owed to or recoverable  
12 by a . . . former spouse. . . ."

13 The term "domestic support obligation" is defined in  
14 § 101(14A):

15 a debt that accrues before, on, or after the date of  
16 the order for relief in a case under this title,  
17 including interest that accrues on that debt as  
18 provided under applicable nonbankruptcy law  
19 notwithstanding any other provision of this title,  
20 that is-

21 (A) owed to or recoverable by-

22 (i) a spouse, former spouse, or child of the debtor or  
23 such child's parent, legal guardian, or responsible  
24 relative; or

25 . . .

26 (B) in the nature of alimony, maintenance, or support  
27 (including assistance provided by a governmental unit)  
28 of such spouse, former spouse, or child of the debtor  
or such child's parent, without regard to whether such  
debt is expressly so designated;

(C) established or subject to establishment before,  
on, or after the date of the order for relief in a  
case under this title, by reason of applicable  
provisions of-

(i) a separation agreement, divorce decree, or

1 property settlement agreement; [or]  
2 (ii) an order of a court of record; or  
3 (iii) a determination made in accordance with  
4 applicable non-bankruptcy law by a governmental unit;  
5 and  
6 (D) not assigned to a nongovernmental entity, unless  
7 that obligation is assigned voluntarily by the spouse,  
8 former spouse, child of the debtor, or such child's  
9 parent, legal guardian, or responsible relative for  
10 the purpose of collecting the debt.

11 Our review of the MSA shows that the equalizing payment at  
12 issue here is a debt (1) that accrued before the order for  
13 relief in debtor's chapter 13 case, (2) that is owed to his  
14 former spouse, Olivia, (3) that was established prepetition by  
15 reason of applicable provisions of a "divorce decree . . . or  
16 property settlement agreement," and (4) that has not been  
17 assigned to a nongovernmental entity. The only issue in dispute  
18 is whether the equalizing payment is "in the nature of alimony,  
19 maintenance, or support."

20 Whether a debt is actually in the nature of support is a  
21 "factual determination made by the bankruptcy court as a matter  
22 of federal bankruptcy law." In re Chang, 163 F.3d at 1140. "In  
23 determining whether a debtor's obligation is in the nature of  
24 support, the intent of the parties at the time the settlement  
25 agreement is executed is dispositive." In re Sternberg, 85 F.3d  
26 at 1405.

27 A trial court should consider several factors in  
28 determining how the parties intended to characterize  
the obligation. Foremost, the trial court should  
consider whether the recipient spouse actually needed  
spousal support at the time of the divorce. In  
determining whether spousal support was necessary, the  
trial court should examine if there was an 'imbalance  
in the relative income of the parties' at the time of  
the divorce decree. The trial court should also

1 consider whether the obligation terminates upon the  
2 death or remarriage of the recipient spouse and  
3 whether the payments are 'made directly to the  
4 recipient spouse and are paid in installments over a  
substantial period of time.' Finally, the labels  
given to the payments by the parties may be looked at  
as evidence of the parties' intent.

5 Id.

6 Here, we can proceed no further with our review because  
7 Olivia failed to provide the transcript of the July 28, 2012  
8 hearing, where the bankruptcy court announced its oral findings  
9 and conclusions. Rule 8009(b) requires an appellant to file an  
10 appendix to her brief with excerpts of the record, including a  
11 transcript of the opinion, findings of fact, or conclusions of  
12 law delivered orally by the court. On November 23, 2012, the  
13 Panel issued an Order re Prosecution of Appeal which warned  
14 Olivia of the consequences of her failure to provide a  
15 transcript. Despite this notice, Olivia failed to respond.

16 Olivia had the burden of showing the bankruptcy court's  
17 findings of fact were clearly erroneous. See Massoud v. Ernie  
18 Goldberger & Co. (In re Massoud), 248 B.R. 160, 163 (9th Cir.  
19 BAP 2000). We may affirm where the record is inadequate to show  
20 clear error, see Friedman v. Sheila Plotsky Brokers, Inc.  
21 (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991), and we do  
22 so here.

## 23 VI. CONCLUSION

24 For the reasons stated, we AFFIRM.  
25  
26  
27  
28