SO ORDERED.

SIGNED this 21 day of March,2016.

Stephani W. Humrickhouse

Stephani W. Humrickhouse
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

IN RE:	**CASE NO.**
SEAN DEMETRIUS JONES,	**15-02044-5-SWH**
DEBTOR	

ORDER REGARDING MOTION TO DETERMINE NATURE OF DEBTOR'S 401(k) AND RETIREMENT ACCOUNT OBLIGATIONS AND MOTION TO LIFT STAY

Pending before the court is a matter taken under advisement after a hearing on January 13, 2016, which is whether the debtor's obligations with respect to a 401(k) account and a retirement account constitute domestic support obligations within the meaning of 11 U.S.C. § 523(a)(5). The issue arose in connection with two motions filed by Cheryl Jones, former spouse of debtor Sean Demetrious Jones: the Motion for Relief from Stay ("Stay Motion") filed on July 23, 2015, and her Motion to Determine Domestic Support Obligations ("DSO Motion") filed on November 25, 2015. As previously recounted in this court's order of January 19, 2016, Ms. Jones sought authority in the Stay Motion to proceed with enforcement of three obligations regarding a 401(k), a retirement account, and a vehicle included in an Equitable Distribution Order entered by the Hanover County District Court ("family court"). The three obligations were among those with respect to which she

sought a judicial determination that they were DSOs, so to that extent, the motions were related. A hearing on the DSO Motion was held on January 13, 2016, in Wilmington, North Carolina.

At that hearing, the court ruled from the bench with respect to most of the obligations at issue in the motions. Orders reciting those conclusions were entered on January 19, 2016 ("Order Partially Allowing Motion for Relief from Stay and Regarding Motion to Determine Domestic Support Obligations"), and on January 20, 2016 ("Order Determining Domestic Support Obligations"). The court took under advisement the more complicated question of whether two awards made to Ms. Jones in the family court's Equitable Distribution Order (specifically, an award of $116,182 of the debtor's 401(k) plan, and $63,736 of the debtor's retirement account) were in the nature of support or, as argued by the debtor, were property distributions within the scope of § 523(a)(15). Both parties filed memoranda focusing on that question, the resolution of which will necessarily also determine whether the stay should be lifted. If the awards are determined to be in the nature of support, they are nondischargeable and it would be appropriate to lift the stay to allow enforcement; if the awards are determined to be in the nature of a property settlement, they are dischargeable and stay relief would not be appropriate.

In support of her motion, Ms. Jones argues that her interests in those assets are "akin to property interests rather than claims on debts" and that the two accounts are not property of the debtor's bankruptcy estate; alternatively, she contends that if her interests do constitute claims on debts, then those debts are "in the nature of support and are thus nondischargeable pursuant to § 523(a)(5)." In response, the debtor contends that both of these awards are in the nature of property distribution and, as such, fall within § 523(a)(15), which permits them to be discharged under § 1328(a).

Background and State Court Orders

The Equitable Distribution Order entered by the family court refers to the 401(k) and retirement accounts multiple times in the findings of fact:

5. That the court has considered the factors in NCGS Section 50-20(c) which were asserted by the Plaintiff in support of her request for an unequal distribution:

* * *

> (5) The expectation of non-vested pension, retirement, or other deferred compensation rights, which is separate property: **The Defendant has a separate property component to his pension and 401(k), which he expects to receive upon his retirement.**
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> * * *
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> (9) The liquid or non-liquid character of all marital property and divisible property: **Most of the value of the marital estate is relatively non-liquid: the Defendant's local government employee's pension and NC 401(k); there were a few "liquid" bank accounts which existed at the date of separation, but none of them were extremely large accounts.**
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> * * *
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> (11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor: **Liquidation of 401(k) by either party will have tax consequences; Transfers of property between the parties pursuant to this equitable distribution order are nontaxable.**

* * *

6. After considering all of the above factors in paragraph 5, the Court finds that an equal (50/50) distribution is equitable.

Equitable Distribution Order, *Jones v. Jones*, File No. 13 CVD 3564 (New Hanover Co., N.C., July 23, 2015) ("Order"), at pp. 2-4. The family court's factual findings also addressed the parties' comparative educations, employment history and earning potential. *Id.* Ultimately, the court determined that a 50/50 division of the marital estate required allocation of assets valued at $190,388 to each party. *Id.* p. 9, ¶ 16.

The family court listed all assets and debts of the parties, denominating them either as marital, mixed, or separate. Both the 401(k) account and the debtor's retirement account were "mixed assets," because the debtor had made contributions and had benefits accrue with respect to those accounts prior to marriage and after separation, as well as during the course of the parties' marriage. *Id.* pp. 5-6, ¶¶ 8-9. For the 401(k) account, the parties stipulated that $116,182 was the martial portion of the 401(k)'s value of $145,930.00 as of December 10, 2014. *Id.* pp. 6-7, ¶ 11.a. The Order required that this entire marital portion be distributed to Ms. Jones pursuant to a Qualified Domestic Relations Order. *Id.* p. 12, ¶ 1.a.

Regarding the debtor's local government employee's retirement ("LGER") account, which had a value of $246,678 at the time of separation, the family court awarded the sum of $63,736 from that account to Ms. Jones not as a specific award in that account, but rather in order to facilitate the 50-50 distribution. *Id.* p. 9, ¶16. Explaining that distribution of the assets and liabilities then held by the parties left a shortfall to Ms. Jones in the amount of $63,736, the family court determined that the debtor "should transfer to Plaintiff an asset having the value of the shortfall," which, the court wrote, could be accomplished only through a transfer from the LGER account: "[T]here are no other assets other than the Defendant's retirement from which to equalize the shortfall to Plaintiff of $63,736." *Id.* p. 9, ¶¶ 16-17. Accordingly, the court ordered the debtor to transfer, "by qualified Domestic Relations Order, ... 20.71% of Defendant's total pension to the Plaintiff ($63,736 divided by $307,754 = 20.71%) for an equal division of the marital estate." *Id.* p. 9, ¶17.

In a separate companion order captioned "Order Re: Alimony" (the "Alimony Order"), which also was entered on July 23, 2015, the court set forth its findings with respect to the bases for and the amount and duration of alimony payments and child support due from the debtor to Ms.

Jones. These included, as a domestic support obligation ("DSO"), the debtor's obligation to pay attorney's fees in connection with the alimony proceedings. The Alimony Order specified the amounts the court deemed necessary to meet Ms. Jones monthly reasonable expenses, and provided further that the debtor was to make the payments to Ms. Jones for a total of nine and one-half (9 ½) years, or until the death of either party, or remarriage/cohabitation on the part of Ms. Jones.

While the Equitable Distribution Order obviously pertains to property distribution, it also includes awards that have more of a dual nature, such as the Kia automobile, joint mortgage account, and marital residence. These were awarded to Ms. Jones in the Order, and constitute DSOs in this matter. The parties do not agree as to whether the awards to Ms. Jones from the debtor's 401(k) and LGER accounts also are DSOs, so the court turns now to those.

DISCUSSION

At issue is whether either or both of those debts constitute a "domestic support obligation" as defined in 11 U.S.C. § 101(14A) and used in 11 U.S.C. § 523(a)(5), which require that the debt be "in the nature of alimony, maintenance or support ... 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." § 101(14A)(B). The "characterization of marital debt is critical to the determination of discharge: 'If the subject debt is a § 523(a)(15) debt, the debt is dischargeable in the Defendant's Chapter 13 bankruptcy proceeding under § 1328(a). If the subject debt is a § 523(a)(5) debt, the debt is nondischargeable in the Defendant's Chapter 13 bankruptcy proceeding pursuant to§ 523(a)(5) and § 1328(a).'" *In re Combs*, 543 B.R. 780, 793 (Bankr. E.D. Va. 2016) (internal citation omitted); *see also In re Baker*, 2012 WL 6186683, at *4 (Bankr. E.D.N.C. 2012); *In re Johnson*, 397 B.R. 289 (Bankr. M.D.N.C. 2008) (surveying Fourth Circuit law).

The burden is on Ms. Jones as the non-debtor spouse to demonstrate, by a preponderance of the evidence, that the asserted interests are in the nature of alimony, maintenance or support. *E.g.*, *Combs*, 543 B.R. at 793, *citing Grogan v. Garner*, 498 U.S. 279, 287 (1991). Where, as here, the claims arose from a court order rather than an agreement between the parties, "the issue is whether the court issuing the order intended for the obligation to be in the nature of support." *Baker*, 2012 WL 6186683, at *4, *citing In re Bowen*, 2010 WL 1855871, *2 (Bankr. E.D.N.C. 2010). In making that determination, which necessarily is fact-specific in that it requires close review of the findings and objectives set forth in the family court order, a bankruptcy court is not bound by labels given to the obligations. *Combs*, 543 B.R. at 794. Instead, the court considers an extensive and nonexclusive list of factors, which can include

> the nature of the obligation, whether there are dependent children, the relative earning power of the spouses and an indication that the obligation was an attempt to balance it, the adequacy of the dependent spouse's support without the assumption of the obligation, [the] dependent spouse's receipt of inadequate assets in settlement, status of the obligation upon death or remarriage, timing of payments (lump sum or periodic), the payee (direct vs. indirect), waivers of maintenance, whether the obligation is modifiable, location of the paragraph containing the obligation within the agreement (whether or not it is located within the property distribution section), and the tax treatment of the obligation.

Baker, 2012 WL 6186683, at *4 (citing multiple EDNC cases considering these factors); *see also Combs*, 543 B.R. at 793 (listing comparable factors frequently cited within the Fourth Circuit and citing *In re Catron*, 164 B.R. 912 (E.D. Va.), *aff'd*, 43 F. 3d 1465 (4th Cir. 1994)). At the prior hearing on Ms. Jones' motions the parties discussed the factors they deemed relevant, and it is not necessary to undertake a wholesale review of them here; instead, the court turns to the particulars of the 401(k) and LGER obligations.

In its Order, the family court assessed the "liquid or non-liquid character of all marital property and divisible property," and concluded that "most of the value of the marital estate is relatively non-liquid." Order, p. 4 ¶ 5(9). The court described both the retirement and the 401(k) accounts as being among the "few 'liquid' bank accounts which existed at the date of separation." *Id.* In ordering that the marital estate be divided equally, the court held:

> That Defendant (the debtor) currently has *items worth $254,124 distributed to him* (in his possession or which he is to retrieve from the marital residence). That Plaintiff currently has *$126,652 of items distributed to her* (in her possession or to be transferred to her by Qualified Domestic Relations Order). That a 50/50 split of the marital estate would equal $190,388 to each. To equalize the shortfall to Plaintiff, the Defendant should transfer to Plaintiff *an asset having the value of the shortfall of $63,736.*

Id. at p. 9 ¶ 16 (emphasis added). The court ordered that "all tangible personal property assigned to each party which is not currently in their possession shall be exchanged within twenty (20) days of the entry of this Order." *Id.* at p. 12 ¶ 2. Otherwise, the parties were advised in general terms to cooperate in effectuating the transfers required by the order, with Ms. Jones' attorney being directed to prepare a Qualified Domestic Relations Order to transfer to her the marital portion of the 401(k) and the "even-up" amount from the LGER account. *Id.* at p. 13 ¶ 3.

Family court's 401(k) account award

The family court noted that there would be tax consequences in connection with liquidation of the 401(k) account by either party, but that transfers of property as between the parties subject to the Order would be nontaxable. *Id.* at p. 4 ¶ 5(11). It held that the 401(k) account was a mixed asset, calculated the portions of the 401(k) that constituted the debtor's "separate property" by reason of preceding the marriage or post-dating the separation, calculated active and passive gains to determine the amount of "divisible property," and ultimately awarded a specific portion of the

401(k) account to Ms. Jones. *Id.* at pp. 5-7, ¶¶ 8-11. The plain language of the Order, and the approach taken by the family court, indicates that the family court considered the 401(k) account to be an asset capable of being divided between the parties.

This obligation is similar in many respects to the award at issue in *Combs*, where the state court order awarded to the debtor's ex-spouse a specific sum "as her equitable 50% marital share of the Defendant's Retirement Account with Anheuser-Busch and the three IRA's." *Combs,* 543 B.R. at 801. In that case, the plaintiff ex-spouse argued that the award was in the nature of support and testified that she required those funds to maintain her lifestyle. The bankruptcy court disagreed, concluding that "this specific obligation, being described plainly by the state court as [plaintiff's] 'equitable 50% marital share' of the retirement accounts, certainly appears to be a property division." *Combs,* 543 B.R. at 801. Emphasizing that the state court order "fails to provide a deadline for payment of this sum, whether it must be paid in a lump sum, or whether any tax ramifications may befall [plaintiff] as a result of the payment,"[1] the bankruptcy court ruled that the obligation "plainly appears to be in the nature of a property division and not in the nature of alimony, maintenance or support." *Id.; see also In re Rodriguez*, 465 B.R. 882 (Bankr. D.N.M. 2012) (non-debtor spouse failed to establish by preponderance of evidence that award of one-half of proceeds from debtor's retirement account was intended as support).

Here, the cases cited by Ms. Jones to advance her argument are distinguishable. In *Drennan v. Drennan*, 161 B.R. 661, 666 (Bankr. E.D. Ark. 1993), the bankruptcy court did conclude that the debtor's obligation to pay half of his retirement benefits to the non-debtor spouse was in nature of

[1] The family court noted that liquidation of the 401(k) would have tax consequences for "either party," which suggests that tax consequences were essentially a non-factor.

support, based in large part on the "disparity of employment and earning capacities" as between the two parties; however, the context in that case differs markedly from this one. In *Drennan*, the obligation arose from an agreement between the parties, not a court order. In seeking to determine the intent of the parties at the time the agreement was made, the court considered the extent to which the debtor's ex-spouse was demonstrably unable to meet even her most basic monthly expenditures without the agreed-upon awards (the parties had "few possessions when they divorced" beyond furniture, clothing and vehicles). The court emphasized that the agreement was drafted by the debtor's attorney, that the ex-spouse was unrepresented by counsel, and that the debtor's testimony to the bankruptcy court that the retirement benefits obligation was not a DSO was "coached" and very obviously untruthful. Ultimately, the court found, the parties expected and intended that the monetary awards would be in the nature of support. *Id*. at 665-67. And in *Elder v. Elder*, 48 B.R. 414, 417 (Bankr. W.D. Ky. 1984), the court had little difficulty determining that a $100 per month obligation payable to the plaintiff non-debtor spouse from the debtor's retirement account was "in the nature of support vital to her survival" where, at the time of the divorce, this income was her *only* income.

In this district, in *Bowen v. Bowen*, 2010 WL 1855871 (Bankr. E.D.N.C. 2010), Judge Doub likewise was able to readily conclude that monthly payments made from the debtor's retirement pension award to his ex-spouse were intended to be support. "Considering the specific findings by [the family court judge] Judge Paul," the court wrote, "it is clear that he intended that the award of a percentage of the Weyerhaeuser retirement pension benefit was to be in the nature of support," in part because the payments were to be made "on a monthly basis as opposed to a lump sum" and were "intended to assist Mrs. Bowen with her basic living expenses." *Id.* at * 5. The court

recognized that (as in the instant case) Mrs. Bowen also received a separate monthly alimony payment, and the retirement award was a component of the Equitable Distribution Order, which could suggest that the award was more in the nature of property. "The labels used in a dissolution judgment may offer some probative value," the court wrote, "but a court is not bound by them"; ultimately, the court was persuaded that "Judge Paul clearly intended to equalize the property distribution *and the monthly income to be received by each spouse*." *Id.* (emphasis added). Finally, the court noted that in the bankruptcy case, the debtor included the obligation as a DSO on his Schedule E. This indicated to the court that "Mr. Bowen understood that the pension award by Judge Paul was a domestic support obligation in the nature of support, as opposed to a property settlement." *Id.* at *6.

In contrast, in the instant matter, it is apparent to the court that the family court intended the 401(k) award to be a component of its equitable property division rather than an award geared toward Ms. Jones' maintenance or support. This Order, like the order in *Rodriguez*, did not provide for alteration of the 401(k) award (or any other award in that Order) in the event of Ms. Jones' death or remarriage; instead, it simply allocated to each party their appropriate share of that asset. *Rodriguez*, 465 B.R. at 891-92 ("The fact that Plaintiff currently may need the retirement funds at issue to pay for the education expenses of her children and for living expenses and intends to use the funds for these types of expenses does not convert the debt into a domestic support obligation."). While it certainly is true that *any* amount of monies awarded in an equitable distribution *could* be used for support or maintenance, that does not mean that every award is intended for that purpose. This court concludes that the 401(k) obligation represents a component of the court's equitable property distribution, and is not in the nature of alimony, maintenance or support.

Family court's award from LGER retirement account

The family court determined that the debtor's LGER account also was a "mixed asset," with a portion being the debtor's "separate property" and another portion being "marital property." Order, p. 9 ¶ 17. Having awarded other assets and properties to Ms. Jones, including the portion of the 401(k) discussed above, the court held that the debtor was entitled to the remainder of his LGER account. However, the court excepted *from* that award the amount necessary to account for a shortfall in the Ms. Jones' share of the marital property; specifically, the court directed the debtor to pay over to Ms. Jones the amount of $63,736.00, which is the amount by which the property distributed to Ms. Jones fell short of her 50% share of the debts and assets of the marital estate. *Id.* at p. 9 ¶¶ 16-17. This obligation presents a more nuanced question.

On the one hand, a lump payment intended to equalize the estates has qualities in common with a distributive award of property. In *Combs*, the state court awarded one parcel of residential real estate to the plaintiff and a different parcel to the debtor (each parcel being that party's respective residence), and ordered the debtor pay to the plaintiff the sum of $58,000 "representing the difference in the equity between the two properties ... based upon the evidence and valuations presented during the court hearings." *Combs*, 543 B.R. at 803. Noting that there was nothing further in the state court's order to suggest that the award was intended to be in the nature of alimony, maintenance or support, the *Combs* court concluded that where the paragraph requiring payment of the "equity differential" appeared in the state court order just after the paragraphs awarding to each party their respective residence, "it clearly appears to have been the state court's intention to equalize the value of the divided property between the Debtor and [plaintiff]." *Id.* Given the similarities between the *Combs* facts and those at issue in this case, the same could be said

here, and under that reasoning, the LGER award would not be in the nature of alimony, maintenance or support. However, such a conclusion would disregard the family court's intent to provide timely and adequate support to Ms. Jones and her minor son.

If this court were to conclude that the LGER payment is not in the nature of maintenance or support and instead constitutes *purely* an award of property, then that finding would create a dramatic imbalance in both the property distribution and support abilities envisioned by the family court. That court calculated that "a 50/50 split of the marital estate would equal $190,388 to each." Order, p. 9 ¶ 16. The two challenged amounts ($63,736 + $116,182), added together, equal $179,918, and represent the vast majority of the family court's award to Ms. Jones. This court notes that the Kia automobile, which the family court awarded to Ms. Jones in the Order and has previously been determined by this court to be a DSO, has a value of $9,300. The Kia was included in Ms. Jones' 50% portion of the marital estate's assets and debts; so was the residence she shares with the parties' minor son, along with the corresponding mortgage.[2] There is no dispute that both the Kia and the residence also provide "support" to Ms. Jones and the minor son. So, the fact that an asset may be a component of a property settlement does not preclude its support character.

Here, the family court intended to provide some liquidity to both parties in its Order. Along with the 401(k) (entire marital portion of $116,182) and LGER (shortfall amount of $63,736) awards to Ms. Jones, it awarded to her a Self Help Credit Union checking account with a balance of $159.00 and a Self Help Credit Union savings account with a balance of $5, for a combined total of $161 in cash. Debts awarded to Ms. Jones consisted of $363 ($313 owing for Homeowners Association dues

[2] The Order states that the residence is valued at $130,000, and the mortgage/debt owing to Bank of America is ($130,131).

and $50 to the company Bug-N-A-Rug), in addition to the mortgage on the house ($130,131 mortgage on residence valued at $130,000).

To the debtor (aside from his separate portion of the 401(k) ($29,748) and his separate portion of the LGER ($61,072), as well as other separate assets and debts), the family court awarded the entire marital portion of the LGER in the amount of $182,942.[3] The court also awarded assets of a checking account with a value of $151: a share account with a value of $405; a CD with a value of $5,042; a checking account with a value of $1,750; and a savings account with a value of $4,980, for a combined total of $12,278 in cash. Debts awarded to the debtor consisted of $3,560 ($3,110 to a dental office and $45 in county auto tax), in addition to a $13,552 loan on the 401(k).

The family court took great pains to set out precise accountings with respect to the parties' regular monthly expenditures, as well as its expectations, and the bases for those expectations, as to the future earnings of both the debtor and Ms. Jones. With that in mind, this court finds these facts particularly telling: Almost half of Ms. Jones' reasonable monthly expenses of $2,265 are to be funded by *anticipated, imputed* income of $943 (not including the tax consequence of that income, which the family court anticipated to be "slight"). Ms. Jones' mortgage payment, due on the first of the month, is $962; in recognition of this, the family court directed that the debtor make his monthly payment of $661 in alimony on or before the first of the month. The date upon which the monthly child support payment of $661 is due, and the duration of those payments, is not set out in either the Order or the Alimony Order; however, the parties' minor child was born on January 23, 1999, meaning he will turn eighteen in the near future, on January 23, 2017.

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[3] The LGER account had a total value as of the date of separation of $307,750. The marital portion of the account as of separation was 80.15%, or $246,678, with the remaining 19.85% , or $61,076 being the debtor's separate property. Order, p. 9; Alimony Order, p. 8.

In this court's view, the family court fully understood that both parties required a certain amount of liquidity in order to securely and reasonably maintain their monthly expenditures as calculated by that court. The court presumes that the family court also expected, when it awarded the vast majority of the parties' shared, liquid marital assets – those being checking and savings accounts with a combined total value of $12,278 in cash – to the *debtor* (along with the entire marital portion of the LGER account), that Ms. Jones *also* would have sufficient liquidity in the assets awarded to her. Obviously, the award of checking and savings accounts with a combined total value of $161, even coupled with the admonition that the debtor be prompt in his alimony payments to help avoid a default in Ms. Jones' mortgage payments, could not possibly meet that expectation. This court finds that the shortfall payment of $63,736 was intended by the family court to serve as an integral component of Ms. Jones' demonstrated need for maintenance and support. Further, without that sum (given that Ms. Jones already is on a slim budget, lacks any unallocated reserves (indeed, she lacks any reserves *at all*), and has no equity in the marital residence), her current financial situation is precarious. Based on the expressed intent of the family court, with which this court completely agrees, the obligation qualifies as a DSO within the meaning of § 523(a)(5) and is not dischargeable in the debtor's bankruptcy case under § 523(a)(15).

CONCLUSION

For the foregoing reasons, the motion to determine domestic support obligations is **DENIED** with respect to the 401(k) obligation, and **ALLOWED** with respect to the LGER obligation. The motion to lift stay likewise is **DENIED** as to the 401(k) obligation, but **ALLOWED** as to the LGER obligation.

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