SO ORDERED.

SIGNED this 16th day of May, 2013.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:
Brandon Wade Sanders,

Debtor.

Case No. 12-41776
Chapter 13

Order Overruling Objection to Plan Confirmation and Sustaining Debtor's Objection to Claim No. 6

In this chapter 13 bankruptcy proceeding, Debtor has proposed a plan that seeks to discharge a $14,918.06 debt he owes to his ex-wife. Of course, the ex-wife (Reem Cruse)—and the state court trustee enforcing that award (the Douglas County Court Trustee)—object to this treatment.[1] In addition to the plan objection, the Court must also determine Debtor's objection to the claim of the Douglas County Court Trustee.[2]

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[1] Doc. 8 (Plan); Doc. 19 (Douglas County Court Trustee's Objection to Confirmation of Debtor's Chapter 13 Plan).

[2] Doc. 21 (Debtor's Objection to Claim No. 6 filed by Douglas County Court Trustee); Doc. 28 (Creditor Cruse's Reply to Objection to Proof of Claim No. 6); Doc. 29 (Reply of the Douglas County Court Trustee to Debtor's Objection to Proof of Claim No. 6).

Because Reem Cruse and the Douglas County Court Trustee fail to carry their burden of showing that the "maintenance" award was, in substance, in the nature of support at the time either the original divorce decree or the Agreed Order was entered, the Court overrules the objection to confirmation of Debtor's plan and sustains Debtor's objection to claim.

I. Factual and Procedural History

The parties stipulated to the relevant facts, and waived their right to present additional evidence.[3] The following is a summary of those facts. Debtor and Reem Cruse, formerly known as Reem Sanders, were divorced in Franklin County, Kansas in January 2009. The Franklin County divorce decree contained separate sections entitled "MAINTENANCE" and "DIVISION OF DEBTS." The "maintenance" section expressly provided that Debtor would pay Cruse $1350 per month for eighteen months "as maintenance," commencing in February 2009. This maintenance obligation has not been fully paid, and as of September 2011, there was a balance due of $11,100. Debtor agrees this past-due maintenance obligation is a non-dischargeable domestic support obligation in this bankruptcy, pursuant to 11 U.S.C. § 101(14A) and § 523(a)(5).

The Franklin County divorce decree also provided for a division of debt; this section required Debtor to pay a Citi credit card held in Cruse's name in the amount of $3000. Debtor did not pay off the Citi credit card as he agreed to do, and that debt has now somehow grown to almost $15,000.

[3] Doc. 43 (Stipulation); Doc. 44 (Order Approving Parties' Stipulation).

The Franklin County divorce case was transferred to the Douglas County, Kansas District Court by agreement of the parties in September 2011. In October 2011, the Douglas County District Court entered an Agreed Order both parties approved; it dealt only with the Citi credit card debt. Debtor was not represented by counsel when he approved either the original divorce decree or the Agreed Order; Cruse was represented each time.[4]

In the Agreed Order, Debtor acknowledged his failure to pay the Citi credit card debt and agreed, in exchange for the discharge of the obligation and low monthly payments, to pay Cruse $14,918.06, inclusive of late fees and interest. But this time, and for the first time, the parties changed the Citi credit card debt's characterization from a "property division" to "maintenance payments." The Agreed Order called this amount "lump sum maintenance," and Debtor agreed to repay this debt at the rate of $25 per week.

The Agreed Order specifically states:

> 1. [Debtor] was ordered to pay [Cruse]'s Credit Card balance as of the 12th day of January, 2009, in full. . . .
> 2. [Debtor] has not paid the balance or removed the debt from [Cruse]'s name and as a result [Cruse] is responsible for the debt.
> 3. [Cruse] has agreed to discharge the obligation of the [Debtor] as to the credit card in exchange for a promise that [Debtor] will reimburse her through maintenance payments.
> . . .
> 6. [Cruse] receiving reimbursement from [Debtor] in the form of maintenance payments will be taxable income as to her and tax deductible to [Debtor]. The payoff balance should be increased accordingly

[4] *See* Doc. 43 at ¶ 17; Doc. 43 Exh. 2 at ¶7 ("Petitioner [Cruse] has incurred attorney's fees in the creation of this agreement").

to make [Cruse] whole.

. . .

8. [Cruse] shall be awarded a lump sum maintenance award of $14,918.06 due immediately, and to be paid off by [Debtor] at a minimum rate of $25.00 per week. Judgment interest will accrue until paid in full.[5]

The $14,918.06 "lump sum maintenance" was then added to the ledger created by the Douglas County Court Trustee in October 2011, allowing both the original maintenance and this new "maintenance" to be collected through the Court Trustee's office. Debtor has made only limited and sporadic payments since the October 2011 order was entered, and has not claimed any payments made under the Agreed Order as a deduction on any relevant tax return.[6]

Debtor filed his chapter 13 bankruptcy petition in November 2012.[7] His chapter 13 plan[8] provides for full payment through the plan of the debt still remaining on the $1350 per month maintenance award entered in the original Franklin County divorce decree. In the non-standard provision accompanying paragraph 6 of Debtor's plan, however, Debtor proposes to treat the $14,918.06 indebtedness owed to Cruse from the October 2011 Douglas County Agreed Order as a dischargeable obligation.

The Douglas County Court Trustee, who has the statutory duty to enforce and

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[5] Doc. 43, Exh. 2.

[6] The parties agree that Debtor could still amend his 2010 through 2012 tax returns until approximately March 6, 2015.

[7] Doc. 1.

[8] Doc. 8.

administer collection activities,[9] filed proof of claim number 6 on December 11, 2012. It claimed $24,888.30 as a domestic support obligation entitled to priority in the Debtor's chapter 13 bankruptcy case. Debtor objected to that proof of claim, arguing that the portion of the claim derived from the October 2011 Agreed Order, although labeled as "maintenance," was not a domestic support obligation as defined by the Bankruptcy Code.[10] The Douglas County Court Trustee also filed an objection to confirmation of Debtor's plan.[11]

Although Cruse did not object to Debtor's plan, she did file a response to the Debtor's Objection to the Douglas County Court Trustee's proof of claim, arguing that the $14,918.06 maintenance judgment was, in fact, true maintenance.[12] The Douglas County Court Trustee similarly responded to the Debtor's objection to its proof of claim, contending that the October 2011 Agreed Order meets the definition of a domestic support obligation under the Code, with "clear and unambiguous language that the order was intended by the parties to be a maintenance judgment against Debtor."[13]

The parties elected to submit stipulated facts rather than submit evidence at an

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[9] *See* K.S.A. § 20-378 (giving the court trustee the responsibility for collection of support); K.S.A. § 20-379 (delineating the court trustee's powers).

[10] Doc. 21.

[11] Doc. 19.

[12] Doc. 28.

[13] Doc. 29.

evidentiary hearing.[14] The parties' stipulation contains the following proffers: Debtor would testify that there was no evidence presented in support of the Douglas County Agreed Order to show Debtor's ability to pay the debt described in the Agreed Order. Debtor would also testify that there was no evidence presented in support of the Agreed Order as to Cruse's need for the payment of the debt as spousal support. Contrarily, Cruse would testify that there was no need for any evidence in support of the Agreed Order because Debtor agreed to the Order, thus obviating the need for any hearing on these issues.

The Court has fully considered the parties' briefs,[15] and, as a preliminary matter, finds it has jurisdiction to decide this matter,[16] as it is a core proceeding.[17]

II. Analysis

Section 1328(a) of Title 11 provides that a debtor will generally be entitled to a discharge after completion of a chapter 13 payment plan, but then specifies certain debts that cannot be discharged. One of those debts is the kind specified in 11 U.S.C.

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[14] Doc. 43 (Stipulation); Doc. 44 (Order Approving Parties' Stipulation).

[15] Doc. 43 (Brief of Debtor, Brandon Sanders, in Support of his Objection to the Claim of Cruse); Doc. 47 (Joint Reply Brief of Creditor Cruse and the Douglas County District Court Trustee).

[16] This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and 11 U.S.C. § 1334(a) and (b) and by operation of a Standing Order dated August 1, 1984, effective July 10, 1984, referenced in D. Kan. Rule 83.8.5, wherein the District Court for the District of Kansas referred all cases and proceedings in, under, or related to Title 11 to the Districts' bankruptcy judges.

[17] *See* 28 U.S.C. § 157(b)(2)(B) (stating that the "allowance or disallowance of claims against the estate" and the "estimation of claims or interest for the purposes of confirming a plan" are core proceedings that a bankruptcy judge has jurisdiction to hear and determine).

§ 523(a)(5).[18] Section 523(a)(5) debts are "domestic support obligations," as that term is defined in § 101(14A). A domestic support obligation is:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is– –
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> (A) owed to or recoverable by– –
> (i) a spouse, former spouse, or child of the debtor . . .
>
> (B) in the nature of alimony, maintenance, or support . . . of such spouse, former spouse, or child of the debtor . . ., without regard to whether such debt is expressly so designated;
>
> (C) established . . . 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 property settlement agreement;
> (ii) an order of a court of record . . .
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.[19]

As a result of § 523(a)(5), domestic support obligations are favored over a debtor's fresh start.[20] "The party seeking to hold the debt nondischargeable has the burden of proving

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[18] 11 U.S.C. § 1328(a)(2).

[19] 11 U.S.C. § 101(14A). A "domestic support obligation" under § 101(14A) is a first priority claim under 11 U.S.C. § 507(a)(1)(A).

[20] *See Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 721 (10th Cir. 1993) (stating that § 523(a) "departs from the general policy of absolution, or fresh start in order to enforce an overriding public policy favoring the enforcement of familial obligations" (internal quotations omitted)). The *Sampson* case is the Tenth Circuit's seminal case on the treatment of domestic support obligations in bankruptcy, and counsel for Cruse and the

by a preponderance of the evidence that the parties intended the obligation as support and that the obligation was, in substance, support."[21]

The parties' dispute centers on whether the payments characterized as "maintenance" in the Agreed Order are "in the nature of alimony, maintenance, or support" under § 101(14A)(B).[22] In the Tenth Circuit, for bankruptcy purposes, whether an obligation is support or merely a property division is a matter of federal bankruptcy law.[23] This Court "has the responsibility to make its own determination of the character of the obligation from the facts at hand, [and] not rely on the denomination of the obligation in the divorce decree."[24] A "dual inquiry" must be performed to determine "both the parties[] intent and the substance of the obligation."[25]

Although the Court is not bound by the label given the obligation by the parties' Agreed Order, the characterization given to the obligation by the parties in their

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Douglas County Court Trustee should thus have addressed the case in their brief.

[21] *Id.* at 723. No party suggests that as of the date of the actual divorce, the parties intended the Citi credit card debt to be "maintenance." In fact, it seems clear that at the time of the divorce, the parties agreed it was part of a simple division of the parties' debts, since it was listed in a completely different section of the divorce decree from the "maintenance" section, and did not contain the same cessation upon death condition that was expressly added to the "maintenance" payment.

[22] At one time, Debtor may have been arguing that the obligation from the Agreed Order had been assigned under § 101(14A)(D), but he has apparently abandoned that argument because he does not raise it in his brief.

[23] *In re Sampson*, 997 F.2d at 721 ("Whether a debt is nondischargeable under § 523(a)(5) is a question of federal law.").

[24] *Busch v. Hancock (In re Busch)*, 369 B.R. 614, 622 (10th Cir. BAP 2007) (citing *In re Sampson*, 997 F.2d at 725–26).

[25] *In re Sampson*, 997 F.2d at 723.

(second) written agreement "is persuasive evidence of intent."[26] Here, Debtor's obligation is referred to in the Agreed Order as "maintenance payments" and is consistently referred to as "maintenance" throughout that order, which was apparently drafted by Cruse's lawyer. Paragraph 3 of the Agreed Order states that Cruse "has agreed to discharge the obligation of [Debtor] as to the credit card in exchange for a promise that [he] will reimburse her through maintenance payments." Cruse also agreed to waive her attorney's fees in order to settle the matter. The Agreed Order expressly states that Cruse is "awarded a lump sum maintenance award . . . to be paid off by [Debtor] at a minimum rate of $25.00 per week." Thus, the Agreed Order indicates a shared intent that the weekly payments be reclassified as a domestic support obligation, even though the obligation began, in the original divorce decree, as a property division.

Although the parties' second written agreement is not determinative, it is a "clear expression of the parties' shared intent."[27] Despite there being no provisions in the Agreed Order for the termination of the "maintenance" upon Cruse's remarriage or death, nor a provision for the modification of the "maintenance" payments upon a change in financial circumstances (both of which are indicative of a property settlement versus a domestic support obligation),[28] neither factor controls when there is a "clear expression of the parties' intent exhibited in both the language and structure" of the

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[26] *Id.*

[27] *Id.*

[28] *Id.* at 724.

parties' agreement.[29] Debtor agreed to make regular, periodic maintenance payments in exchange for discharge of his prior obligation and Cruse's waiver of attorney's fees, which is some indication of the parties' shared intent.[30]

In addition, the Agreed Order states that "[Cruse] receiving reimbursement from [Debtor] in the form of maintenance payments will be taxable income to her and tax deductible to [Debtor]." As detailed by the Tenth Circuit, the treatment of a payment as a tax benefit to the payor and a tax liability to the payee is a factor strengthening the position that "the parties intended the obligation as maintenance."[31] Although Debtor has not claimed any payments made under the Agreed Order as a deduction on relevant tax returns, his post-litigation behavior on this issue is not determinative. It is the intent of the parties at the time the Agreed Order was entered that is determinative.[32]

As argued by Debtor, there are no factual details for the Court to rely on

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[29] *Id.*

[30] *Id.* at 724 n.5.

[31] *Id.* at 724.

[32] *See In re Busch*, 369 B.R. at 622 ("The Tenth Circuit has indicated that the critical question in determining whether the obligation is, in substance, support is the function served by the obligation *at the time of* the divorce." (emphasis added) (internal quotations omitted)); *see also Comstock v. Rodriguez (In re Rodriguez)*, 456 B.R. 532, 539–40 (Bankr. D.N.M. 2011) (noting that "the relevant time period for determining whether a particular obligation constitutes a non-dischargeable domestic support obligation is the time that the obligation arose;" citing cases in support). Although it is certainly possible that this Court's analysis, under *Busch*, should have related only to the original divorce decree, where the parties clearly characterized the debt as a property settlement, the Court has opted to analyze the post-divorce order out of an abundance of caution due to Congressional deference in protecting true domestic support obligations from discharge.

regarding the surrounding circumstances at the time the parties entered into the Agreed Order to expressly show intent. Although no testimonial support exists for the Court regarding intent, the parties' written Agreed Order again provides detail—the maintenance payments were intended by the Agreed Order "to make [Cruse] whole." In addition, the Agreed Order expressly states that Cruse was willing to discharge the prior obligation of Debtor to pay the credit card only "in exchange for a promise that [Debtor] will reimburse her through maintenance payments," indicating that all parties to the agreement were fully aware and intended the weekly payments to be support for Cruse. Based on the clear expressions of the parties' intent as exhibited by the language used in the parties' Agreed Order, this Court finds that Cruse has carried her burden to show that the parties intended the "maintenance" payments to be a domestic support obligation.[33]

If this were the end of the matter, Cruse would find success in this Court. But in the Tenth Circuit, this is not the end. To the contrary, Cruse must also carry her dual "burden of proving that the obligation was *in substance* support."[34] "The critical question in determining whether the obligation is, in substance, support is the function served by the obligation at the time" of the parties' Agreed Order.[35] "This may be

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[33] *See Loper v. Loper (In re Loper)*, 329 B.R. 704, 708 (10th Cir. BAP 2005) (stating that parties' written agreement "is persuasive evidence of intent" and that an "unambiguous agreement creates a substantial obstacle for the party challenging its express terms to overcome" (internal quotations omitted)).

[34] *In re Sampson*, 997 F.2d at 725 (emphasis added).

[35] *Id.* (internal quotations omitted).

determined by considering the relative financial circumstances of the parties" at the time the Agreed Order was entered.[36] In other words, has Cruse carried her burden to show the actual effect of the weekly payments? Did the "maintenance" payments "effectively function[] as the former spouse's [Cruse's] source of income," and was Debtor "in a position to provide support"[37] to Cruse?

Cruse argues that the evidence—the parties' Agreed Order—itself shows that Cruse forfeited both attorney's fees and the power to enforce the original divorce decree terms in exchange for a support award, and that these facts, alone, are sufficient to show that the monthly payments functioned as income and that Debtor was in a position to provide this support to Cruse. Debtor argues, to the contrary, that there was no evidence presented at the time of the Agreed Order, or in this Court, regarding the relative financial circumstances of the parties at the time the Agreed Order was entered. Debtor contends that the parties clearly knew the difference between support and property division, and the Agreed Order was manufactured to give the appearance of support to what was, in fact, a property settlement. Debtor argues that the Agreed Order is silent both on the issue of whether Cruse was relying on Debtor's weekly $25 payment for her to meet her living expenses and pay her bills, and on Debtor's financial situation.

Under the totality of the evidence presented to the Court, it is difficult to

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[36] *Id.* at 726.

[37] *Id.*

determine whether the "maintenance" payment obligation derived from the Agreed Order is truly, in substance, support. It is certainly true that receipt of $25 a week would have improved Cruse's ability to keep current on bills and maintain her standard of living. And it is also true that the Court can assume Debtor had the ability to make a $25 weekly payment, because he agreed to that condition in exchange for the forgiveness of his earlier failure to pay the debt. But beyond these assumptions, there is simply no evidence as to Ms. Cruse's income and need for support; nor is there any evidence of Debtor's income or ability to provide support in October 2011 when the Agreed Order was entered.[38]

The actual substance of the obligation from Debtor to Cruse is for payment at $25 a week until the lump sum maintenance award is paid in full—this low weekly amount does not suggest that Cruse was dependent on this "maintenance payment"for maintaining her standard of living or was a substantial source of her income. The payment schedule may have been established in this manner to be spread the obligation over time for convenience, which could just as easily indicate it was intended to be a property settlement meant to equalize property distribution, rather than

[38] Although a new evidentiary hearing may not be required, *see Young v. Young (In re Young)*, 35 F.3d 499, 500–01 (10th Cir. 1994) (concluding that it was not necessary to conduct an evidentiary hearing on the nature of the support from monthly payments when the bankruptcy court had ample undisputed facts to support its determination), there can be no dispute that under Tenth Circuit precedent, the Court must have *some* facts concerning the financial condition of the parties at the time of the Agreed Order in order to determine whether the substance of the "maintenance" payment was, in effect, support.

maintenance.[39]

Neither Cruse nor the Douglas Country Court Trustee elected to present sufficient evidence as to the second part of the Court's required inquiry—Cruse's need for support at the time the Agreed Order was entered. Unfortunately for Cruse, the Tenth Circuit's position is clear: even "an unambiguous agreement cannot end the inquiry,"[40] and the Court "must examine the surrounding circumstances to determine whether the payments are in the nature of support" and "look beyond the language of the decree."[41]

Cruse, as the party asserting that the obligation is nondischargeable as a domestic support obligation, "bears the burden of proof to establish the true nature of the debt by a preponderance of the evidence."[42] The Court simply cannot base a ruling solely on argument without factual support. Cruse may have actually needed the $25 per week to support herself at the time the Agreed Order was entered, but on the scant evidence presented, the Court cannot find by a preponderance of the evidence that the

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[39] *See Milligan v. Evert (In re Evert)*, 342 F.3d 358, 369 (5th Cir. 2003) (noting that although periodic payments over time rather than a lump sum would normally be indicative of alimony, the characteristic is not dispositive and may only indicate a property settlement that "was spread out over time for legitimate reasons, such as for convenience").

[40] *In re Sampson*, 997 F.2d at 722.

[41] *Iverson v. Jawort (In re Iverson)*, Case Nos. 01-018, 00-12058, 2001 WL 863444, at *5 (10th Cir. BAP 2001) (noting that under the second prong of the Tenth Circuit's test for determining domestic support obligations in bankruptcy, "the trial court must examine the surrounding circumstances to determine whether the payments are in the nature of support," and emphasizing that even when an agreement unambiguously describes an obligation one way, the court must continue to "look beyond the language of the decree").

[42] *Rodriguez v. Rodriguez (In re Rodriguez)*, 465 B.R. 882, 890 (Bankr. D.N.M. 2012).

"maintenance" payment functioned as support at the time of the Agreed Order. Accordingly, Cruse has failed to meet her burden under the second prong of the Tenth Circuit's test as to the actual nature and function the award was intended to serve at either the time of the divorce or when the Agreed Order was entered.

III. Conclusion

The Douglas County Court Trustee's objection to confirmation of Debtor's plan[43] is overruled. Debtor's objection to claim no. 6 filed by the Court Trustee[44] is sustained.

If the remaining objection to confirmation filed by the Internal Revenue Service is resolved,[45] the plan is otherwise confirmed, and Debtor completes the plan and makes all the payments required thereunder, his obligation under the Agreed Order will be discharged under § 1328(a). This case remains set for its final confirmation hearing on May 29, 2013, at 1:30 p.m., to address the remaining objection to confirmation.

It is so ordered.

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[43] Doc. 19 (Douglas County Court Trustee's Objection to Confirmation of Debtor's Chapter 13 Plan).

[44] Doc. 21 (Debtor's Objection to Claim No. 6 filed by Douglas County Court Trustee).

[45] Doc. 18 (Objection by IRS based on failure to file returns and lack of feasibility).