UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP No. NH 98-074

IN RE: THOMAS K. CHRISTO,
Debtor.

DEIDRE O'LEARY,
Plaintiff/Appellee,

v.

THOMAS K. CHRISTO,
Defendant/Appellant.

Appeal from the United States Bankruptcy Court
for the District of New Hampshire
[Hon. Mark W. Vaughn, U.S. Bankruptcy Judge]

Before
Votolato, Hillman and Boroff, U.S. Bankruptcy Judges

John M. Sullivan and Sulloway & Hollis, P.L.L.C., on brief for the Appellant.
Peter V. Doyle and Shaines & McEachern, P.A., on brief for the Appellee.

August 20, 1999

Per Curiam.

Summary

Thomas Christo, the appellant/defendant debtor ("Debtor") appeals from an adverse final judgment in the case which his ex-wife Deirdre O'Leary ("O'Leary") brought against him under 11 U.S.C. §523(a)(5).[1] The Debtor argues that the Bankruptcy Court failed to apply a multi-factor test to determine whether the debts in question were "in the nature of alimony, maintenance or support" for purposes of the statute. Additionally, the Debtor contends that by this decision we should announce a test to be applied to these cases in this circuit. For the reasons set forth below, we affirm Judge Vaughn and decline the invitation to announce a circuit-wide standard for actions brought pursuant to 11 U.S.C.

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[1]Section 523(a)(5) provides, in part, as follows:

> (a) A discharge under section 727 ... 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; ....

§523(a)(5).

Jurisdiction

We have jurisdiction to review final decisions from the United States Bankruptcy Court pursuant to 28 U.S.C. §158(b)(1). *See also Sanford Institution for Savings v. Gallo*, 156 F.3d 71, 74 (1st Cir. 1998). The United States Bankruptcy Court's finding of facts may not be disturbed unless clearly erroneous, Fed. R. Bankr. P. 8013, and "[t]he bankruptcy court's legal conclusions, drawn from the facts so found, are reviewed *de novo*." *Palmacci v. Umpierrez*, 121 F.3d 781, 785 (1st Cir. 1997).

O'Leary argues that the legal conclusions in this case should be subject to a clearly erroneous standard citing *Prebor v. Collins (In re I Don't Trust)*, 143 F.3d 1 (1st Cir. 1998). In that case, the circuit court applied an abuse of discretion standard because the court was reviewing the appeal of a fee award "an area in which the court of first instance enjoys particularly great leeway." *Id.* at 3. O'Leary is correct that the issue on appeal here is subject to the clearly erroneous standard but not for the reasons set forth in *In re I Don't Trust*.

Judge Gorton in *Vaudreuil v. Busconi*, 182 B.R. 618 (D. Mass. 1995) noted that to determine whether an obligation is in the nature of support, courts generally consider a list of factors. *Id.* at 619. He further cited with approval a case which held that the factors "are not legal criteria, . . . but relevant evidentiary

factors that assist the bankruptcy court as trier of fact in determining the true nature of the debt created by the agreement." *Id.* at 620 (citing *Benich v. Benich (In re Benich)*, 811 F.2d 943, 945 (5th Cir. 1987)). Judge Gorton then stated that "[t]he determination of the true intent of the parties, therefore, is a question of fact. In general, this Court reviews findings of fact made by the Bankruptcy Court under the 'clearly erroneous' standard." *Id.* That standard requires this Court set aside factual determinations only if "after careful evaluation of the evidence, we are left with an abiding conviction that those determinations and findings are simply wrong." *State Police Ass'n v. Commissioner*, 125 F.3d 1, 5 (1st Cir. 1997).[2]

Facts

Neither party argues with the facts as the lower court found them. The parties married in 1985 and were granted a decree of divorce in 1996. The decree contained various provisions regarding the parties' assets and liabilities. At the time of their divorce, there were no children of the marriage and the Debtor earned significantly more income than O'Leary.

Subsequently, the Debtor filed for relief under Chapter 13 and O'Leary brought an action pursuant to 11 U.S.C. §523(a)(5)

[2]The First Circuit further stated that "[n]otwithstanding the clearly erroneous rule, however, the Tax Court's ultimate conclusions . . . are conclusions of law, and are therefore subject to *de novo* review." 125 F.3d at 5.

objecting to the dischargeability of three debts. After a trial, Judge Vaughn ruled that two of the three debts were in the nature of support and not subject to discharge. Specifically, he wrote as follows:

> I conclude there is no question that at the time of the divorce the Plaintiff did not have the ability to deal with the obligations of the IRS, the IRS lien or the debt owed Malden Savings Bank. The divorce court specifically found that the Defendant herein had the capacity to earn a substantial income (Decree ¶ 5(d)) and that the Plaintiff was not a primary income producer, though a talented artist; however, her capacity to earn income from her art was questionable and she did not have a back record of substantial earned income. (Decree ¶ 5.) The monthly mortgage payments, according to the arrearage sum paid by the Defendant herein on June 30, 1996, totaled $3,205 and the monthly alimony payments for the Plaintiff's support totaled only $3,500. The Plaintiff testified that were her ex-spouse not ordered to pay the obligations under paragraphs 5 and 10, she would not be able to maintain these obligations. . . . Further, the Defendant testified that at the time of the divorce, he believed the Plaintiff did not have the ability to pay the IRS debt. Given the great disparity in the parties' ability to produce income, this Court finds that the herein Defendant's obligations to the Plaintiff concerning Medford Savings Bank, the IRS and the IRS liens, although contained in paragraphs entitled "Debt Allocation" and "Marital Homestead" for purposes of federal bankruptcy law, are alimony or support and hereby excepted from discharge under section 523(a)(5) of the Bankruptcy Code.

Memorandum Opinion, p. 7. (footnotes omitted).

Discussion

In his appeal, the Debtor argues that the Judge Vaughn's decision should be reversed because Judge Vaughn failed to apply the prevailing standard for an action under 11 U.S.C. §523(a)(5) and failed to apply the standard he set forth in a prior case. Instead, argues the Debtor, Judge Vaughn applied no discernable legal standard. O'Leary contends that the Bankruptcy Court did apply the proper standard.

In his decision, Judge Vaughn referenced various decisions in his district which have explained that bankruptcy courts, in deciding actions brought under 11 U.S.C. §523(a)(5), are not bound by state characterizations of support and property settlements and must independently determine whether an obligation is in the nature of support by examining the state court's intent citing *Adie v. Adie (In re Adie)*, 197 B.R. 8 (Bankr. D. N.H. 1996); *Bourassa v. Bourassa (In re Bourassa)*, 168 B.R. 8 (Bankr. D. N.H. 1994); *Murphy v. Nowac (In re Nowac)*, 78 B.R. 638 (Bankr. D. N.H. 1987); *Rosell v. Gibson (In re Gibson)*, 61 B.R. 997 (Bankr. D. N.H. 1986).

Many courts in this circuit which have written on the issue of how to determine the parties' or the state court's intention have stated that intent must be determined by applying a multi-factor test. *See, e.g., Sofrenko v. Sofrenko (In re Sofrenko)*, 203 B.R. 853, 859 (Bankr. D. Mass. 1997) (Judge Boroff adopting the three factor test of *Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759

(3rd Cir. 1990)); *Wolfe v. McCartin (In re McCartin)*, 204 B.R. 647 (Bankr. D. Mass. 1996) (Judge Feeney applying a seven factor test); *Sweck v. Sweck (In re Sweck)*, 174 B.R. 532 (Bankr. D. R.I. 1994) (Judge Votolato applying a seven factor test); *Stitham v. Stitham (In re Stitham)*, 154 B.R. 1 (Bankr. D. Me. 1993) (Judge Haines applying a four factor test); *Peterson v. Fagan (In re Fagan)*, 144 B.R. 204 (Bankr. D. Mass. 1992) (Judge Hillman applying a seven factor test); *Altavilla v. Altavilla (In re Altavilla)*, 40 B.R. 938 (Bankr. D. Mass. 1984) (Judge Lawless applying an eight factor test). As Judge Gorton pointed out, however, these are not legal criteria but rather suggested guidelines to assist the trier in determining whether an obligation is in the nature of support. *Vaudreuil*, 182 B.R. at 620.

Although he acknowledged that he was required to determine intent, in neither *Bourassa* nor *Christo* did Judge Vaughn set forth a list of factors upon which he relied to determine intent. Although the facts upon which he relied in these cases could be plugged into assigned factors, it does not appear that Judge Vaughn subscribed to a multi-factor method of determining intent.

In the passage quoted above, Judge Vaughn concluded that the obligation was in the nature of support because O'Leary did not have the ability to pay the debts at issue and did not have the same capacity to earn a substantial income as did the Debtor. Income and ability to pay are generally very strong indicators of

intent. *See Soforenko*, 302 B.R. at 861. Subjecting this finding of fact to the clearly erroneous standard, we will not overturn this finding because we do not have, based upon a review of the evidence, an abiding conviction that the finding is wrong.[3] Although Judge Vaughn did not apply a list of factors, as Judge Gorton explains, such factors are not legal criteria but aids in determining intent.

Having found that the determination that the parties intended the obligations at issue to be in the nature of support was proper, we therefore find no fault with the conclusion that the debts are nondischargeable. Therefore, the bankruptcy court's Final Judgment is affirmed.

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[3]We agree with the Debtor that a large majority of courts apply a list of factors to determine whether an obligation is in the nature of support. We disagree, however, with his pronouncements that either the United States Bankruptcy Court for the District of New Hampshire or Judge Vaughn has issued precedential decisions on the matter. While such a decision perhaps would facilitate the trying of such cases, the lack thereof does not impede the ability to do so as the factors and what a court looks for when determining intent under §523(a)(5) are different variations on the same theme. For this reason, we decline the offer to announce a test for such cases.