

July 31, 2001

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

IN RE DAVID BRUCE IVERSON,
Debtor.

BAP No. NM-01-018

DAVID BRUCE IVERSON,
Appellant,

Bankr. No. 00-12058
Chapter 13

v.

RITA JAWORT and KELLEY L.
SKEHEN, Trustee,
Appellees.

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before BOULDEN, CORNISH, and MICHAEL, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

David Bruce Iverson ("Debtor") appeals from an order of the United States Bankruptcy Court for the District of New Mexico (the "bankruptcy court") sustaining as a priority claim the proof of claim filed by Rita Jawort ("Jawort").

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, *res judicata*, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

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Iverson asks this Court to reverse the bankruptcy court's ruling that his debt to Jawort arises from an agreement to pay support to a former spouse and is entitled to priority status under 11 U.S.C. § 507(a)(7).¹ For the reasons stated herein, we affirm.

I. Background

The Debtor and Jawort were married in 1989 and took up residence in Chicago, Illinois, where Debtor was employed selling life insurance. The couple later resettled in Riudoso, New Mexico, and the Debtor's insurance business flourished with Jawort's assistance. By 1996, the relationship had soured, and the couple resolved to divorce. On May 9, 1996, the district court for Lincoln County, New Mexico entered its Final Decree of Dissolution of Marriage and Property Settlement Agreement (the "Agreement") ending the union.

The Agreement, which was drafted by Don Dutton ("Dutton"), counsel for Jawort, and approved by both parties, states in relevant part:

3. The community property of the parties shall be divided as follows:

To the Petitioner:

....

c. As part of the Property Settlement Agreement, and not by way of support, the Respondent shall pay to Petitioner the sum of \$1,500.00 per month for a period of twelve (12) years. It is specifically agreed between the parties that this sum is to equalize the division of the parties' assets and not for the purpose of maintenance or support. Thus, it is the intention of the parties that the payment by Respondent to Petitioner shall not be a taxable transaction.

Agreement at 2, Appendix of Appellant at 000118. Debtor subsequently defaulted on the obligation, and his financial condition deteriorated. On April 12, 2000, Debtor filed for protection under chapter 13 of the Bankruptcy Code. On May 11,

¹ Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (West 2001).

2000, Jawort filed an unsecured priority claim (the "Claim") for unpaid support in the amount of \$150,000.² Debtor subsequently filed two chapter 13 plans, both of which drew objections from Jawort. On July 20, 2000, Debtor filed his Objection to Claim and Notice Thereon (the "Objection to Claim") on the ground that Jawort's Claim was not entitled to priority status under § 507. On August 21, 2000, Jawort filed her Response to Objection to Claim. Jawort filed an Amended Response to Objection to Claim the following day.

The bankruptcy court conducted a hearing in the matter on November 21, 2000. Debtor, Jawort, and Dutton testified extensively. Dutton testified that he crafted the Agreement to provide Jawort with a monthly income while avoiding the tax consequences normally associated with support payments. Dutton further testified that in his opinion, both parties intended that the \$1,500.00 monthly payments were to be used for support and were not to be dischargeable in bankruptcy. Jawort generally corroborated Dutton's testimony and stated that she was particularly concerned with shielding the payments from being discharged in bankruptcy.

Debtor testified that the payments, which were to come from renewal commissions on life insurance policies he had previously sold, were intended to be part of a property division. Debtor also testified that although he was not concerned with how Jawort used the money, he was aware that the funds were likely to be used to help fund her educational expenses. In addition to testimony, the bankruptcy court received documentary evidence that included Debtor's income tax returns for the years 1996 through 1999, inclusive, and Jawort's income tax returns for the years 1996 through 1998, inclusive. Neither party listed the payments as support or alimony on any of the tax returns admitted into

² On December 6, 2000, Jawort amended her proof of claim, increasing the amount owed to \$184,300.00.

evidence.

On February 22, 2001, the bankruptcy court issued oral findings of fact and conclusions of law and ruled that Jawort's Claim for the pre-petition unpaid \$1,500.00 monthly payments was entitled to priority treatment. The bankruptcy court memorialized the oral ruling by order entered March 6, 2001.³ Debtor timely filed his notice of appeal on March 7, 2001.

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, order, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1(a), (d). Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico, thus consenting to review by this Court.

Jawort argues that the bankruptcy court's order sustaining her proof of claim is not a final order and that we therefore lack jurisdiction over this appeal. We disagree. A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). An order disposing of an objection to a claim is a final order for purposes of 28 U.S.C. § 158(a)(1). See *In re Geneva Steel Co.*, 260 B.R. 517, 520 (10th Cir. BAP 2001) (citing *In re Garner*, 246 B.R. 617, 619 (9th Cir. BAP 2000)). Similarly, an order fixing the priority of a creditor's claim is a final order for appeal purposes. See *Geneva Steel*, 260 B.R.

³ We note that while the bankruptcy court's oral ruling is limited in scope to the unpaid pre-petition payments, the written order makes no such distinction. See Appendix of Appellant at 114, 307. We attribute this to an error in draftsmanship and limit our decision to payments matured but unpaid at the time of the bankruptcy filing.

at 520 (citing *In re Kids Creek Partners, L.P.*, 200 F.3d 1070, 1074 (7th Cir. 2000)). Here, the bankruptcy court's order terminated the contested matter and established Jawort's claim as a priority claim under § 507(a)(7). Thus, the order is "final" for purposes of 28 U.S.C. § 158.

III. Standard of Review

The opening brief submitted by the Debtor lists an astonishing twenty issues on appeal. A substantial number of these would require this Court to perform a plenary review of the bankruptcy court's decision, essentially conducting a second hearing on the Debtor's Objection to Claim. We are disinclined to undertake such a task. Furthermore, the Debtor has declined to argue many of the issues listed. Issues that are not briefed are deemed waived. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998); *see also O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1257 n.1 (10th Cir. 2001) (reviewing court will not make arguments for appellant that appellant did not make in its brief). We focus our attention therefore on the four issues the Debtor has chosen to brief: (1) whether the bankruptcy court erred in finding that Jawort's claim should receive priority treatment under § 507(a)(7); (2) whether Jawort should be estopped from arguing the Debtor's obligation constitutes support; (3) whether the bankruptcy court erred in admitting parol evidence; and (4) whether New Mexico law compels a ruling in Debtor's favor.

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion")." *Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.)*, 220 B.R. 1005, 1012 (10th Cir. BAP 1998) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)), *aff'd*, 195 F.3d 568 (10th Cir. 1999). "It is well-settled that the issue of whether an obligation is support is a factual

question subject to the clearly erroneous standard of review.” *Dewey v. Dewey (In re Dewey)*, 223 B.R. 559, 564 (10th Cir. BAP 1998). *aff’d*, 202 F.3d 281 (10th Cir. 1999). “A factual finding is ‘clearly erroneous’ when ‘it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.’” *Sunset Sales*, 220 B.R. at 1012 (quoting *Las Vegas Ice & Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)) (internal quotes omitted). In reviewing findings of fact, we must give “due regard . . . to the opportunity of the bankruptcy court to judge the credibility of the witnesses.” Fed. R. Bankr. P. 8013.

We review the bankruptcy court’s rulings on the admission of evidence for abuse of discretion, if an objection has been timely made, and otherwise for plain error. *See United States v. Magleby*, 241 F.3d 1306, 1315 (10th Cir. 2001). “Under the abuse of discretion standard[,] ‘a trial court’s decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.’” *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)). In applying this standard, we “‘defer to the trial court’s judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.’” *Id.* (quoting *McEwen*, 926 F.2d at 1553-54). “An abuse of discretion occurs when the trial court’s decision is ‘arbitrary, capricious or whimsical’ or results in a ‘manifestly unreasonable judgment.’” *Id.* at 1504-05 (quoting *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987)). With these standards in mind we approach the Debtor’s arguments.

IV. Discussion

1. Priority Status Under § 507(a)(7)

Debtor argues that the language in the Agreement and the testimony presented below contradict the bankruptcy court's finding that Jawort's Claim is entitled to priority under § 507(a)(7). Debtor also argues that the bankruptcy court should have construed the Agreement against Jawort because it was drafted by her attorney.

Section 507(a)(7) of the Bankruptcy Code provides in pertinent part:

- (a) The following expenses and claims have priority in the following order:

.....

(7) Seventh, allowed claims for debts 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 such debt –

.....

(B) 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. § 507(a)(7) (West 2001). The Tenth Circuit has established a two-part test to determine whether a debt is support:

First, the court must divine the spouses' shared intent as to the nature of the payment. This inquiry is not limited to the words of the settlement agreement, even if unambiguous. Indeed, the bankruptcy court is required to look behind the words and labels of the agreement in resolving this issue. Second, if the court decides that the payment was intended as support, it must then determine that the substance of the payment was in the nature of support at the time of the divorce – i.e., whether the surrounding facts and circumstances, especially financial, lend support to such a finding.

Young v. Young (In re Young), 35 F.3d 499, 500 (10th Cir. 1994) (internal citations omitted). The term "support" should be read broadly and in a realistic manner. See *Dewey*, 223 B.R. at 564.

The critical inquiry under the first prong of the two-part test is the shared intent of the parties at the time the obligation arose. *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 723 (10th Cir. 1993). Jawort testified that she wanted to ensure that the debt not be subject to discharge in bankruptcy. The bankruptcy court found that the Debtor, who had filed bankruptcy several years earlier, understood Jawort's concerns and declined to object to the proposed treatment of the debt. In addition, Dutton testified that he discussed with the Debtor the provisions contained in the Agreement, including the issues of nondischargeability and support. The Debtor testified that he knew Jawort did not plan to invest the money, knew she intended to relocate and to pursue her education, and knew that she had very little money of her own at the time of the divorce. Although the Debtor's testimony in some respects contradicted that of Jawort and Dutton, the bankruptcy court found that the Debtor was aware when he signed the Agreement that Jawort would use the funds to support herself. Finally, the bankruptcy court concluded that the parties characterized the payments as asset equalization solely for the purpose of easing the tax burden on Jawort. Consequently, the bankruptcy court found that the parties' shared intent was that the payments provide support for Jawort. This conclusion is not clearly erroneous.

Under the second prong of the test outlined in *Young*, the trial court must examine the surrounding circumstances to determine whether the payments are in the nature of support. "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.'" *Sampson*, 997 F.2d at 725 (quoting *In re Gianakas*, 917 F.2d 759, 763 (3d Cir. 1990)). "This may be determined by considering the relative financial circumstances of the parties at the time of the divorce." *Id.* at 726. An obligation that effectively functions as a former spouse's source of

income at the time of the divorce is a support obligation. *See id.*

The bankruptcy court found that at the time of the divorce Jawort was planning to relocate to another state to attend school for a substantial period of time. Jawort testified that she had just \$500.00 of her own money to take with her. Just prior to the divorce, she had been employed as a blackjack dealer at a local casino. Before that, Jawort had spent several years assisting the Debtor in his insurance business without compensation. Immediately before marrying the Debtor, she held a low-paying job in retail sales.⁴ Because she was relocating to continue her education, she had no stream of income to live on aside from the payments she expected to receive from the Debtor. Her 1996 federal income tax return shows an adjusted gross income of just \$8,881.00. The Debtor, meanwhile, was still operating his insurance business and anticipated receiving \$300,000.00 to \$400,000.00 in renewal commissions in the future. The bankruptcy court reviewed the relative financial circumstances of the parties and found that the debt was, in substance, a support obligation.

The Debtor points us to provisions in the Agreement and other documents that describe the obligation as an asset equalization award and asserts that such provisions preclude a finding that the debt is in the nature of support. This argument misses the mark. While it is true that “[a] written agreement between the parties is persuasive evidence of intent,” *Yeates v. Yeates (In re Yeates)*, 807 F.2d 874, 878 (10th Cir. 1986), it is equally true that “a bankruptcy court must look beyond the language of the decree to the intent of the parties and to the substance of the obligation.” *Sampson*, 997 F.2d at 722 (quoting *In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987)). In this case the bankruptcy court considered the evidence before it, including the testimony of the Debtor, who knew that

⁴ Although there was testimony that Jawort at one time prior to the marriage had a lucrative position in the cosmetics industry, neither party presented evidence that she was likely to achieve similar earnings in the near future.

Jawort intended to use the funds to resume her education.

Debtor next challenges the credibility of Jawort and Dutton and argues that the testimony presented at the hearing supports his interpretation of the Agreement. When the bankruptcy court's findings of fact are based on determinations regarding the credibility of witnesses, we must give those findings even greater deference. *See Dalton v. Internal Revenue Serv.*, 77 F.3d 1297, 1302 (10th Cir. 1996) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)). The resolution of conflicting evidence and credibility determinations are for the trial judge who personally hears the evidence and observes the demeanor of the witnesses. *See Quezada v. County of Bernalillo*, 944 F.2d 710, 721 (10th Cir. 1991). If two permissible views of the evidence are present, "the factfinder's choice between them cannot be clearly erroneous." *See Manning v. United States*, 146 F.3d 808, 813 (10th Cir. 1998) (quoting *Bessemer City*, 470 U.S. at 574).

As noted above, both Jawort and the Debtor testified that Jawort planned to use the monthly payments to support herself when she resumed her education in another state. Furthermore, Dutton testified that when he drafted the Agreement he was certain the obligation was intended to provide Jawort with a monthly subsistence income. The bankruptcy court had ample opportunity to observe the demeanor of the witnesses, judge their credibility, and weigh their testimony. Under the clearly erroneous standard of review, if the bankruptcy court's account of the evidence is plausible in light of the record, we cannot reverse even if we are convinced that we would have weighed the evidence differently. *See Bessemer City*, 470 U.S. at 574. While there is conflicting evidence regarding the parties' intent, we do not believe the bankruptcy court's findings constitute clear error.

Debtor argues, without authority, that the bankruptcy court erred when it considered the financial circumstances of the parties. As we have previously

discussed, the relative financial condition of the parties at the time of the divorce is an important factor in determining whether an obligation is support. *See Sampson*, 997 F.2d at 726; *see also In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987) (court may presume property settlement is intended for support if it appears spouse needs support). Debtor's argument that the parties' financial condition is irrelevant is without merit.

Debtor next attacks the bankruptcy court's ruling on the ground that the court erred by failing to construe the Agreement against Jawort, the party responsible for its drafting. Under New Mexico law, ambiguities in a contract are construed against the party who drafted it. *See Smith v. Tinley*, 674 P.2d 1123, 1125 (N.M. 1984). The rule applies, however, only when the court is unable to determine the parties' intent. *See El Paso Natural Gas Co. v. Western Building Assocs.*, 675 F.2d 1135, 1141 (10th Cir. 1982); *Gardner-Zemke Co. v. State*, 790 P.2d 1010, 1014 (N.M. 1990). The bankruptcy court followed the law in the Tenth Circuit as articulated in *Sampson* by looking beyond the language of the Agreement and was able to discern the parties' intent. Thus it was not obligated to construe the Agreement against Jawort.

2. *Estoppel*

The Debtor expends a great deal of energy rearguing the facts of this case under the rubric of estoppel. A reviewing court oversteps its authority when it undertakes to duplicate the role of the trial court. *See Bessemer City*, 470 U.S. at 573. "In applying the clearly erroneous standard to the findings of a [bankruptcy] court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *See id.* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)). We concern ourselves only with whether the bankruptcy court reached a permissible decision in light of the evidence. *See Quezada*, 944 F.2d at 721.

Disregarding those portions of Debtor's argument that would require us to conduct a *de novo* review, we find the Debtor has propounded just one argument remotely befitting an estoppel theory – he asserts Jawort should not be permitted to claim the obligation is support after failing to list the previous payments as income on her tax returns. We have searched the record and cannot find any indication that the Debtor raised this argument below.⁵ A federal appeals court need not address an issue that was not raised before the trial court. *See F.D.I.C. v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000). Accordingly, we need not pass on the merits of Debtor's estoppel argument.⁶

3. *Parol Evidence*

The Debtor next argues that the bankruptcy court erred by admitting parol evidence for the purpose of construing the Agreement. Because the Debtor did not object to the introduction of such evidence below, we review the bankruptcy court's ruling for plain error. *See Magleby*, 241 F.3d at 1315. As we have previously noted, a bankruptcy court must look behind a settlement agreement to determine whether an obligation is one for support, even where the agreement is

⁵ We note the Debtor introduced the parties' tax returns into evidence and drew them to the attention of the bankruptcy court on more than one occasion. However, in each instance the Debtor was attempting to show that the parties' intent was to create a property settlement rather than a support obligation. We found nowhere in the record where the Debtor specifically advanced an estoppel argument.

⁶ We would not be at a loss to find authority supporting a conclusion that estoppel or "quasi-estoppel" is inapplicable in the present circumstances. *See Kritt v. Kritt (In re Kritt)*, 190 B.R. 382, 388 (9th Cir. BAP 1995) (discussing various reasons why quasi-estoppel should not apply in such cases); *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 725 n.6 (10th Cir. 1993) (section 523(a)(5) requires federal courts to look beyond the labels, notwithstanding the parties' treatment of the obligation for income tax purposes); *Kelley v. Kelley (In re Kelley)*, 216 B.R. 806, 809 (Bankr. E.D. Tenn. 1998) (noting inconsistency between applying estoppel effect to tax returns while not applying it to the document creating the obligation); *but see Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1297 (5th Cir. 1991) (debtor who treated payments to ex-spouse as alimony on tax returns estopped from later discharging the payments as property settlement); *Cunningham v. Brown (In re Cunningham)*, 141 B.R. 671, 674-5 (Bankr. W.D. Mo. 1992) (same, citing *Davidson*).

unambiguous. *See Young*, 35 F.3d at 500. Moreover, the parol evidence rule does not apply in cases where the bankruptcy court is required to determine whether an obligation is support or a property division. *See Brody v. Brody (In re Brody)*, 3 F.3d 35, 39 (2d Cir. 1993); *see also Kritt v. Kritt (In re Kritt)*, 190 B.R. 382, 387 (9th Cir. BAP 1995) (parol evidence admissible to clarify the parties' intent); *Jacobsen v. Jacobsen (In re Jacobsen)*, 161 B.R. 239, 242 (Bankr. D. Neb. 1993) (same).

It is difficult to imagine how the bankruptcy court could have adhered to the directive issued by the Tenth Circuit in *Young* without receiving the challenged evidence. Additionally, limiting the inquiry to the text of the Agreement would bind the bankruptcy court to the label attached by the divorce court, contravening the established law within this circuit. *See Goin*, 808 F.2d at 1392 (bankruptcy courts not bound by state laws defining an item as maintenance or property settlement, nor are they bound to accept divorce decree's characterization of award). We find no error in the bankruptcy court's consideration of parol evidence under these circumstances.

4. *New Mexico Divorce Law*

Debtor rests his final argument on the proposition that the decision of the bankruptcy court conflicts with domestic relations law in the State of New Mexico. Based upon our review of the record, it appears that the Debtor did not raise this issue before the trial court. Accordingly, we need not address it here. *See Noel*, 177 F.3d at 915.

V. **Conclusion**

For the reasons stated above, the order of the bankruptcy court is affirmed.