

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>IN RE: EDWARD F. COUVRETTE,</b>	)	
	)	<b>CASE NO. 05-72872</b>
<b>Debtor.</b>	)	
	)	<b>CHAPTER 11</b>
	)	
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	)	
<b>JOANNE COUVRETTE,</b>	)	
<b>Movant</b>	)	
	)	
<b>v.</b>	)	<b>MOTION FOR RELIEF FROM</b>
	)	<b>AUTOMATIC STAY</b>
<b>EDWARD F. COUVRETTE,</b>	)	
<b>Respondent.</b>	)	

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**MEMORANDUM DECISION**

The matter before the Court is the Motion for Relief from Automatic Stay (“Motion for Relief”) filed by Joanne Couvrette (the “Movant”), the former spouse of Edward F. Couvrette (the “Debtor”), so that she might be permitted to enforce the July 29, 2005 Qualified Domestic Relations Order of the Superior Court of California, County of San Diego, El Cajon Branch (“July 29, 2005 order”) against the Debtor. The particular questions raised by the Motion for Relief are whether an award of attorney’s fees to counsel for the Debtor’s former spouse constitutes alimony, maintenance or support, the collection of which is not subject to the automatic stay, and if not, whether relief from the automatic stay should be granted to permit the Movant to enforce her entire judgment without regard to this bankruptcy case. For the reasons

noted below, the Court concludes that a portion of the award is in the nature of support and its collection is not affected by the automatic stay, but that the remainder is not in the nature of support and that Ms. Couvrette has not demonstrated good cause for the automatic stay to be modified to permit her at this time to pursue collection of such amount, or of an additional “property equalization payment” included in the award, by liquidation of the Debtor’s 401(k) account.

#### FINDINGS OF FACT

The Debtor filed a voluntary Chapter 11 petition on July 29, 2005. On the same day, the Superior Court of California, County of San Diego, El Cajon Branch entered an order finding that the Debtor owed the Movant \$112,110.00 and ordering the liquidation of the Debtor’s 401(k) plan. The \$112,110.00 is comprised of \$1,396.00 for unpaid child and spousal support pursuant to an order dated July 11, 2002, \$1,628.00 for interest due pursuant to an order dated September 17, 2003, \$35,578.00<sup>1</sup> for unpaid principal and interest for a property equalization payment pursuant to an order dated September 25, 2003, \$74,708.00 for attorney’s fees, court costs and additional child support pursuant to an order dated May 7, 2004 (“May 27, 2004 order”) and a \$1,200.00 credit for payments made by the Debtor to the Movant. The May 7, 2004 order includes a finding that the Movant’s gross monthly income is \$3,229.00, which includes \$2,500.00 of actual income and \$729.00 of imputed income based upon \$350,000.00 of assets at an assumed yearly rate of return of 2.50%. Furthermore, the order states the Debtor’s gross

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<sup>1</sup> The order incorrectly states the amount due under September 25, 2003 order is \$35,378.00. Exhibit A of the Order Re Release to Los Angeles County Sheriff of Funds in 401(k) Account Held at Principal Financial Group for the Benefit of Petitioner Ed Couvrette (the “Release order”) accurately states this amount as \$35,578.00.

monthly income as \$14,104.00. On August 24, 2005, the Movant filed her Motion for Relief requesting the Court to terminate the automatic stay as to enforcement of the July 29, 2005 order against the 401(k) account and permit the account's liquidation. The Debtor responded to the Motion for Relief and requested the automatic stay be modified to allow the Debtor to appeal the July 29, 2005 order and the 401(k) Plan Administrator to determine whether the July 29, 2005 order is a qualified domestic relation order within the meaning of the ERISA laws and U.S. Department of Labor regulations. The Debtor also requested that the automatic stay remain in full force until the Debtor has proposed a reorganization plan. On September 8, 2005, the Court held a preliminary hearing on the Motion for Relief and directed the parties to prepare an agreed order resolving the uncontested matters. On October 3, 2005, the Court entered an order allowing the parties to continue litigation of all matters before the California court relating to alimony, maintenance and support and permitting Ms. Couvrette to proceed with liquidation of the 401(k) account for all amounts constituting alimony, support and maintenance subject to further hearing by this Court as to those sums for which the evidence then before the Court was inadequate to permit a determination of the factual and legal basis utilized by the California court to award them. On the same day, the Court received evidence and heard arguments relating to the proper classification of those amounts awarded to Ms. Couvrette pursuant to the California court's May 27, 2004 order which remained in dispute between the parties.

The Debtor conceded at the October 3, 2005 hearing that the \$1,396.00 awarded pursuant to a July 11, 2002 order and the \$1,628.00 due under a September 17, 2003 order were support. Furthermore, the Movant conceded the \$35,578.00 per order of September 25, 2003 was a property equalization payment and thus subject to the automatic stay imposed by 11 U.S.C.

§362(a). The May 7, 2004 order awards Ms. Couvrette \$2,400.00 monthly spousal support and \$1,614.00 monthly child support<sup>2</sup>. The parties agree that these amounts constitute support and are not subject to the automatic stay. However, the May 7, 2004 judgment also orders the Debtor to pay \$65,000.00 in attorney's fees incurred by Ms. Couvrette. It orders the Debtor to pay \$40,000.00 "as a contribution to [the Movant's] attorney fees and costs under Family Code section 2030." The order also provides "[t]he Court finds under Family Code section 271 that [the debtor] has 'frustrat[ed] the policy of new law to promote settlement of litigation.' Accordingly, [the debtor] is ordered to pay to [the Movant's attorney] an additional \$25,000 as a contribution to [her] attorney fees and costs."

#### CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. A motion for relief from the automatic stay is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

The automatic stay does not apply to "the collection of alimony, maintenance, or support from property that is not property of the estate." 11 U.S.C. §362(b)(2)(B). The parties agree that the Debtor's 401(k) plan is not property of the estate pursuant to 11 U.S.C. §541(c)(2). Consequently, the automatic stay does not prevent liquidation of the Debtor's 401(k) plan to the extent that the funds comprising the \$112,100.00 award to the Movant constitute alimony,

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<sup>2</sup> The parties are the parents of a young daughter, whom Ms. Couvrette has principal custody.

maintenance or support. The only remaining amount in dispute is the \$65,000.00 of attorney's fees awarded to the Movant in the May 7, 2004 order.

Bankruptcy courts are required to look to federal law, not state law to determine whether an obligation is actually in the nature of alimony, maintenance or support. *D'Agostino v. Genovese (In re Genovese)*, No. 95-1984, 1996 U.S. App. LEXIS 24046, at \*3 (4th Cir. Sept. 12, 1996) (unpublished opinion) (*citing Sylvester v. Sylvester*, 865 F.2d 1164, 1166 (10th Cir. 1989)). "Under federal law, when an award of attorney's fees . . . is at issue, the dispositive question is whether the court making the award intended it to be in the nature of support." *Id.* at \*3-4. This requires the bankruptcy court to "examine the substance of the finding and the intent behind the court making the award." *Id.* at \*8. Relevant factors in determining the state court's intent are the need of the recipient spouse, the presence of minor children, an imbalance in the relative income of the parties, and whether the obligation terminates on the death or remarriage of the recipient spouse. *See Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984); *see also French v. Prante (In re French)*, 9 B.R. 464, 468 (Bankr. S.D. Cal. 1981) (stating the state court's judgment was "persuasive evidence of the intent behind the court's decree, but it is not controlling, the Court must weigh other factors too, such as the record in the state court proceeding, or any new evidence regarding the relative financial status of the parties"). However, the doctrine of collateral estoppel prevents a judgment debtor in bankruptcy proceedings from relitigating an issue of fact previously decided in a state court; thus, the bankruptcy court is bound by identical sets of facts previously litigated in state court. *See In re Genovese*, 1996 U.S. App. LEXIS 24046 at \*6, \*8.

Forty thousand dollars (\$40,000.00) of the attorney's fees in dispute were awarded to the Movant pursuant to California Family Code section 2030.<sup>3</sup> Section 2030(a)(1)

ensure[s] that each party has access to legal representations to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.

Cal. Fam. Code §2030(a)(1)(West 2005) . The statute also sets forth two factors for the state court to consider when determining if and in what amount an award of attorney's fees is appropriate: "the respective incomes and needs of the parties, and . . . any factors affecting the parties' respective abilities to pay." Cal. Fam. Code §2030(a)(2).

Language similar to that contained in the May 7, 2004 order was found to constitute support in *French v. Prante (In re French)*, 9 B.R. 464, 468 (Bankr. S.D. Cal. 1981). The *French* order read "[a]s and for contribution to [former spouse's] attorneys fees, [the debtor] shall pay the sum of \$400 . . . ." *Id.* at 465-66. The court reasoned the debtor's "contribution" towards his former spouse's legal fee liability was "ordered simply as another facet of the support award, as it reduced the payments the debtor's ex-wife would otherwise have had to make." *Id.* at 468. "The assumption of the [ex-wife's] obligation by the debtor provided his former spouse with added economic security and aided her in supporting herself and the children. It must therefore be considered in the nature of a support payment." *Id.* As her share of the parties' community

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<sup>3</sup> Section 2030, formerly Cal. Civ. Code §4370, was added by 1993 Cal. Legis. Serv. Ch. 219 (West) and amended by 2004 Cal. Legis. Serv. Ch. 472 (West). *See* Cal. Fam. Code §2030 (West 2005).

property, Ms. Couvrette was entitled to receive \$1,297,602.00. Based on this amount it would appear that the Movant has the financial resources to litigate. However, the partial use of such resources for litigation purposes would diminish her income and potentially the amount available for the support of her and her daughter. Furthermore, the May 7, 2004 order expressly awarded Ms. Couvrette child and spousal support.

The Debtor has argued that the \$40,000.00 in attorney's fees were awarded in connection with the his effort to set aside the property settlement agreement; thus the award is not in the nature of the support. The Debtor's argument fails to take into account the express language of the California statute that relates to assuring access to legal help in situations of disparate resources and/or income. The May 7, 2004 order provides that the Movant's gross monthly income is \$3,229.00, which includes \$2,500.00 of actual income and \$729.00 of imputed income based upon \$350,000.00 of assets at an assumed yearly rate of return of 2.50%. The order states the Debtor's gross monthly income as \$14,104.00. Unfortunately, it appears further litigation in California state court is likely between the Debtor and the Movant; thus Ms. Couvrette's continued access to legal assistance seems important to ensure. Based on the disparity of the parties' monthly incomes expressly considered by the California court in reaching its determination and the statutory language, the Court concludes that the \$40,000.00 award is in the nature of support and therefore its collection from property other than property of the estate is not subject to the automatic stay.

The Movant, Ms. Couvrette, was also awarded \$25,000.00 pursuant to Cal. Fam.

Code § 271, which provides

the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation, and where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. . . . In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award.

Cal. Fam. Code §271(a) (West 2005). The May 7, 2004 order states “[t]he Court finds under Family Code section 271 that [the debtor] has ‘frustrat[ed] the policy of law to promote settlement of litigation.’ Accordingly, [the debtor] is ordered to pay to [the debtor’s former spouse’s attorney] an additional \$25,000 as a contribution to [her] attorney fees and costs.” The Court concludes this award is not support, as it was in the nature of a sanction and will deny relief from the automatic stay to pursue collection of such amount at this time.

In *Burch v. McKeever (In re Burch)*, No. G030858, 2004 Cal. App. Unpub. LEXIS 10869, \*18, \*26-27 (Cal. Ct. App. Nov. 30, 2004), the California appellate court found an award of attorney fees pursuant to Cal. Fam. Code §§ 271, 272, 2030-32, 3557 not to be support. The court reasoned an award of attorney's fees will be characterized as a support function if based on the recipient's need. See *In re Burch*, 2004 Cal. App. Unpub. LEXIS 10869, at \*25-26 (citing *Gard v. Gibson (In re Gibson)*, 103 B.R. 218, 221 (B.A.P. 9th Cir. 1989)) . The court determined if the action is contested, “the intent of the state court in making the award is an important factor in determining whether the award is based on need.” *Id.* at \*26. The state court order granting the award stated “[t]he behavior and delay tactics of [the debtor] have resulted in the Court’s



consideration of a serious attorney fee award as requested by counsel for [the debtor's former spouse]. The behavior of [the debtor] which caused the Court to consider a serious attorney fee award is too numerous and voluminous to mention here.” *Id.* at \*18 (citation omitted). The state appellate court relied on the state court's citation to Cal. Fam. Code §271 to conclude that the award of attorney's fees was not support. *Id.* at \*26.

Relief from the automatic stay is granted upon a showing of cause for relief. *See* 11 U.S.C. §362(d)(1). When determining if cause has been shown, “the court must balance potential prejudice to the bankruptcy debtor's estate against the hardships that will be incurred by the person seeking relief from the automatic stay if relief is denied.” *Robbins v. Robbins*, 964 F.2d 342, 345 (4th Cir. 1992).

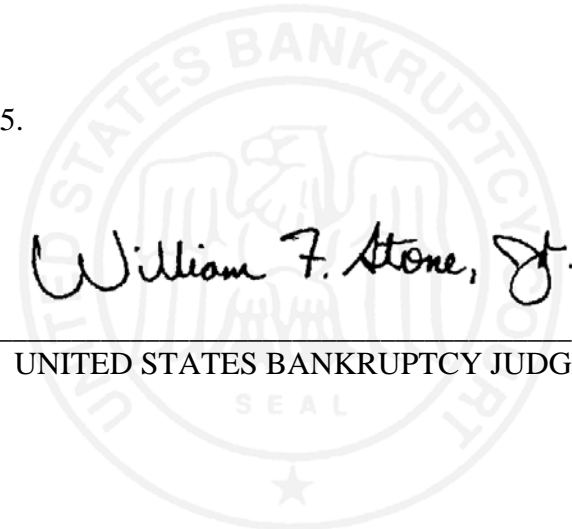
The factors that courts consider in deciding whether to lift the automatic stay include (1) whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court.

*Id.* The automatic stay provides the bankruptcy court an opportunity “to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment and reorganization of his or her obligations.” *Id.* The Court concludes the Movant has not demonstrated at this time cause for relief from the automatic stay. At this early stage in the Debtor's efforts to reorganize his affairs, the Debtor should have a reasonable opportunity to do so without having his 401(k) account liquidated with significant adverse tax consequences to satisfy the Movant's desire to have her money immediately. There has been no showing that the Movant would suffer actual prejudice if the Debtor were granted a reasonable period of time to deal with his property

obligations to her in the context of his present financial circumstances and obligations to his other creditors.

An order in accordance with the provisions of this Memorandum Decision shall be entered contemporaneously herewith.

This 25th day of October, 2005.

The seal of the United States Bankruptcy Court is visible in the background, featuring a central figure holding a scale and a sword, surrounded by the text "UNITED STATES BANKRUPTCY COURT" and "SEAL" with a star below.

*William F. Stone, Jr.*

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UNITED STATES BANKRUPTCY JUDGE