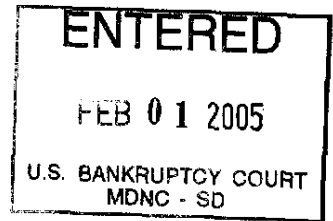


**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION**



IN RE: )  
 )  
JEFFREY ALLEN LINVILLE, ) CASE NO. 04-52886C-7W  
 )  
Debtor. )  
 )

**MEMORANDUM OPINION**

Jennifer Linville ("Ms. Linville") seeks relief from the automatic stay of the Bankruptcy Code to liquidate her right to an equitable distribution against her debtor-husband, Jeffrey Allen Linville ("Mr. Linville"), and to obtain a divorce. While Mr. Linville does not contest Ms. Linville's right to obtain a divorce, he argues that his bankruptcy filing terminated Ms. Linville's latent right to an equitable distribution of their marital property.

The Court held a hearing in this matter on December 1, 2004, in Winston-Salem, North Carolina, at which time the Court took the matter under advisement and allowed post-hearing briefs. After considering the arguments and briefs of the parties, the stipulated evidence, and the relevant law, the Court will grant Ms. Linville relief from the automatic stay to liquidate her equitable distribution claim.<sup>1</sup> The Court will not grant Ms. Linville relief from the automatic stay to obtain a divorce because the automatic stay is not applicable.

**I. BACKGROUND**

The facts of this matter are uncontested by the parties and may be briefly stated. About three years ago, Mr. Linville and Ms. Linville separated but did not file for divorce. The couple has one child and relatively few joint debts. They own a mobile home but no real property. Before filing bankruptcy, Mr. Linville had accumulated about \$19,000.00 in two different 401-K retirement plans in which Ms. Linville might have an interest pursuant to her right to an equitable distribution. On October 4, 2004 – before Ms. Linville ever filed for divorce in State court or filed a claim for an equitable distribution – Mr. Linville filed bankruptcy. Ms. Linville is listed as a creditor on Mr. Linville's bankruptcy schedules as only having a priority claim for past-due child support.

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<sup>1</sup> Whether or not Ms. Linville's claim against Mr. Linville is excepted from discharge pursuant to Sections 523(a)(5) or (15) is not presently before the Court.

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On October 26, 2004, Ms. Linville filed a motion for relief from stay to obtain a divorce, to assert her rights to equitable distribution of the former marital estate, and to pursue any other claim arising from the marital relationship. On December 1, 2004, Ms. Linville also filed an adversary proceeding against Mr. Linville on the grounds that his marital debts to her were excepted from discharge pursuant to Sections 523(a)(5) and (15).

## II. DISCUSSION

Mr. Linville does not contest Ms. Linville's right to obtain a divorce. Mr. Linville does argue, however, that his petition in bankruptcy terminated Ms. Linville's right to an equitable distribution of the former marital assets because Ms. Linville failed to assert that right pre-petition. Ms. Linville argues that her right to an equitable distribution survived Mr. Linville's bankruptcy filing and that Mr. Linville's right to discharge that claim should be determined in the context of the pending adversary proceeding.

### A. Equitable Distribution

The fact that Ms. Linville had a pre-petition right to assert an equitable distribution claim is unquestioned by the parties. Mr. Linville only objects to the assertion of that right post-petition on the basis that her pre-petition right to assert a claim was extinguished by his bankruptcy filing and that Ms. Linville does not have any right or claim against specific property of his bankruptcy estate. While the Court agrees that Ms. Linville does not have a specific right to any particular property in Mr. Linville's bankruptcy estate, nothing about Mr. Linville's bankruptcy alters the fact that Ms. Linville's right to an equitable distribution is in itself an existing pre-petition claim assertable against his bankruptcy estate.

"Equitable distribution" is the right of a spouse, on application, to have a court determine what is marital property, what is divisible property, and to obtain a division of that property between the parties. N.C. Gen. Stat. § 50-20(a). "Marital property" consists of "all real and personal property acquired by either spouse or both spouses during the course of the marriage . . . [including] all vested and nonvested pension, retirement, and other deferred compensation rights." N.C. Gen. Stat. § 50-20(b)(1). A spouse cannot apply to a court for an equitable distribution until the spouses begin to live separate and apart from each other. N.C. Gen. Stat. § 50-21(a). See also Hagler v. Hagler, 354 S.E.2d 228, 232 (N.C. 1987)(equitable distribution is not automatic and a party seeking to enforce

equitable distribution rights must make a specific application for it as a separate action or as part of an action for an absolute divorce).

A post-separation statutory right to an equitable distribution does not create any vested rights in particular marital property; rather, all that exists is "a right to the equitable distribution of that property, whatever a court should determine that property is." Wilson v. Wilson, 325 S.E.2d 668 (N.C. Ct. App.)(explaining that "[t]he legislature's intent . . . was to create a right to equitable distribution of the marital property.")(emphasis in original), cert. denied, 332 S.E.2d 490 (N.C. 1985). See also N.C. Gen. Stat. § 50-20(k) ("The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation.")(emphasis added); Kroh v. Kroh, 571 S.E.2d 643, 645 (N.C. Ct. App. 2002)(explaining that the vested equitable distribution claim does not create a property right or a lien on specific property – vesting only relates to the right to have an equitable distribution), cert. denied, 577 S.E.2d 120 (N.C. 2003); Perlow v. Perlow, 128 B.R. 412, 415 (Bankr. E.D.N.C. 1991)(same). Thus, at separation neither spouse has a lien on specific marital property although each spouse does have a claim against that property. 11 U.S.C. § 101(5)(stating that a claim means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable secured, or unsecured"); Justice v. Justice, 475 S.E.2d 225, 229 (N.C. Ct. App. 1996) ("[F]ollowing the parties' separation, a spouse's right to equitable distribution . . . creates in each spouse an unliquidated, unsecured, contingent claim as defined by federal law"), aff'd, 484 S.E.2d 551 (N.C. 1997). A party that has not asserted an equitable distribution claim at the time that the debtor-spouse files for bankruptcy merely holds an unsecured claim against the bankruptcy estate.<sup>2</sup> Id. (explaining that having a "claim" in bankruptcy is not dependent on whether an action for equitable distribution was actually pending). Accordingly, at the time that Mr. Linville filed bankruptcy, Ms. Linville's equitable distribution interest was not affixed to any specific property,

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<sup>2</sup> Even without a right in specific marital property, the non-debtor spouse might be entitled to a constructive lien against that property once a pending action for equitable distribution is filed. In re Walston, 190 B.R. 66, 67 (E.D.N.C. 1995). Because there was no pending equitable distribution claim in this matter when Mr. Linville filed bankruptcy, the Court need not address this issue.

and she held an unsecured claim against Mr. Linville's bankruptcy estate.

Having classified the nature of Ms. Linville's right to an equitable distribution as an unsecured claim against Mr. Linville's estate, the Court must determine if it should grant Ms. Linville relief from the automatic stay to liquidate that claim.

Divorce, alimony, equitable distribution of marital property, child custody, and child support are matters that are controlled by state law. The state matrimonial court is the appropriate forum to adjudicate the respective responsibilities, obligations, and property entitlement of parties with claims involving such matters, even if one of those parties is a debtor in a pending bankruptcy.<sup>3</sup> In such matters of domestic law, "cause" exists to grant relief from stay to pursue litigation in another forum because federal courts do not traditionally delve into matters of family law. See, e.g., In re Roberge, No. 95-3133, 1996 U.S. App. LEXIS 22038 at \*5 (4<sup>th</sup> Cir. 1996)(holding that a state court is the proper forum for establishing the percentage of ownership in an equitable distribution claim); In re Robbins, 964 F.2d 342, 346 (4<sup>th</sup> Cir. 1992)(holding that the state courts should determine "the amount of the parties' claims to the marital property in question, while the bankruptcy court would retain jurisdiction subsequently to determine the allowance of claims against the estate."); In re Tedesco, No. 00-10637, slip op. at \*3 (Bankr. M.D.N.C. April 24, 2000)(holding that state court is the appropriate forum to adjudicate domestic responsibilities and obligations, regardless of whether a party is a debtor in a pending bankruptcy).

A holder of an unliquidated and contingent claim is entitled to have that claim be estimated if the fixing or liquidation of that claim would unduly delay the administration of the bankruptcy case. 11 U.S.C. § 502(c). A right to equitable distribution is an unliquidated, unsecured, and contingent claim. Justice, 475 S.E.2d at 229. Here, cause exists to grant relief from the automatic stay to allow Ms. Linville to liquidate her equitable distribution claim in State court. Because the trustee in Mr. Linville's case has already filed a report of no distribution, State court litigation will not unduly delay the administration of Mr. Linville's estate. Ordinarily, in a "no asset" Chapter 7 case, it would be futile to liquidate a contingent, unsecured claim; however, in this case, Ms. Linville

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<sup>3</sup> In fact, the automatic stay does not even apply to the commencement or continuation of an action or proceeding for the establishment or modification of an order for alimony or child support. 11 U.S.C. § 362(b)(2)(A).

has filed an adversary complaint to except Mr. Linville's marital debts to her from discharge pursuant to 11 U.S.C. § 523(a)(5) and (15). Should Ms. Linville be successful on her adversary complaint, Mr. Linville would not be entitled to discharge those obligations as part of his bankruptcy proceeding, and Ms. Linville would be free to assert her pre-petition claim against Mr. Linville.

## **B. Divorce**

Ms. Linville also moved for relief from stay to obtain a divorce from Mr. Linville. Mr. Linville did not contest Ms. Linville's right to obtain a divorce. Despite the uncontested nature of the request, the Court is compelled to deny Ms. Linville's motion on the grounds that the automatic stay is not applicable to a proceeding to obtain a divorce.

As an initial matter, the Court notes that a divorce is generally regarded an in rem action against the marriage. McLean v. McLean, 63 S.E.2d 138, 143 (N.C. 1951). An action "in rem" is one that determines "the status of a thing, and therefore the rights of persons generally with respect to that thing." Black's Law Dictionary 809 (8<sup>th</sup> ed. 2004). Thus, a simple divorce action concerns only the legal relationship between married persons. While ordinarily all legal and equitable interests of a debtor at the time that the bankruptcy commences are property of the estate under Section 541(a), it is contrary to public policy for the bankruptcy estate – which is an entity distinct from the debtor – to share in the marital relationship between a man and a woman. See, e.g., N.C. Gen. Stat. § 51-1 ("[M]arriage is created by the consent of a male and female person who may lawfully marry . . ."). Because the bankruptcy estate cannot have any rights in the marriage of Ms. Linville and Mr. Linville under North Carolina law, the automatic stay provisions applicable to property of the estate cannot apply. Regarding the application of the automatic stay in proceedings involving the debtor – not the estate – a judicial exception of the automatic stay exists based on plain logic and Congressional intent. House Report No. 95-595 ("[A] divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case."). See also In re Ujlaky, No. 01-CV-359, 2001 U.S. Dist. LEXIS 19268 at \*10 (W.D. Mich. 2001)(finding that the automatic stay did not preclude a divorce action against the debtor); In re Elrod, 91 B.R. 187, 189 (Bankr. M.D. Ga. 1988)("The Bankruptcy Code protects property of the bankruptcy estate and of the debtor; it does not protect the marital status of the debtor."); In re Ziets, 79 B.R. 222, 225 (Bankr. E.D. Pa. 1987)("We do acknowledge an exemption of domestic issues which do not bear on a debtor's

economic status from the scope of the stay, such as the marital status itself or child custody matters, as both logic and clear Congressional intent implies such an exemption."); In re Schock, 37 B.R. 399, 400 (Bankr. D.N.D. 1984) ("A divorce petition is clearly not within the meaning of section[] 362(a)(1) . . . . Since divorce proceedings are not stayed by section 362 of the Bankruptcy Code, it would be nonsensical for this Court to modify the stay to permit a divorce proceeding to continue.").


Accordingly, inasmuch as Ms. Linville's motion for relief from the automatic stay seeks relief to obtain a divorce, that motion is denied on the grounds that the automatic stay is not applicable to an in rem proceeding to obtain a divorce.

### III. CONCLUSION

Ms. Linville's pre-petition right to an equitable distribution is a claim within the meaning of the Bankruptcy Code. The claim is unliquidated and unsecured. Because a claim for equitable distribution relates to a domestic matter, cause exists to lift the automatic stay to liquidate the claim in State court. Also, because the claim is unsecured, it shares *pari passu* with the other unsecured claims against the bankruptcy estate, and the filing of a petition in bankruptcy terminates any right that might otherwise exist in specific property. Whether or not the unsecured claim survives, bankruptcy is dependent on whether the unsecured claim is excepted from discharge pursuant to Sections 523(a)(5) or (15) in Ms. Linville's pending adversary proceeding. Finally, the Court will not grant Ms. Linville relief from the automatic stay to obtain a divorce because the automatic stay is not applicable.

This memorandum opinion constitutes the Court's findings of fact and conclusions of law. A separate order shall be entered contemporaneously herewith pursuant to Fed. R. Bankr. P. 9021.

This 1 day of February, 2005.

  
THOMAS W. WALDREP, JR.  
United States Bankruptcy Judge

A copy of the foregoing was served  
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