

MEMORANDUM

TO: Lawyer
FROM: Lexadigm Solutions LLC
DATE: April 11, 2005

RE: Whether property transferred pursuant to a divorce decree is a preferential transfer.

I. ISSUE

Whether the title to the debtor's home which was transferred to his ex-spouse pursuant to a divorce decree is an avoidable preference under 11 U.S.C. § 547(b).

II. SHORT ANSWER

No. Transfer of debtor's home to his ex-spouse pursuant to a divorce decree may not be set aside as an avoidable preference because it is not a transfer for or on account of an antecedent debt.

III. FACTS

The Debtor ("Client") is a 72-year old gentleman with declining health who filed a Chapter 11 petition subsequent to an unfavorable divorce judgment. A property settlement, included in the divorce decree, granted the title to the client's house to his ex-wife. The ex-wife also obtained a large unsecured judgment. Furthermore, an arbitration award incorporated into the judgment requires the debtor to maintain a life insurance policy with a \$1,000,000 limit, naming the ex-wife as the beneficiary. The client is also required to pay \$5,000 monthly in alimony.

IV. ANALYSIS

Under 11 U.S.C. § 547(b), the bankruptcy trustee "may avoid any transfer' of the debtor's property to a creditor '*for or on account of an antecedent debt* owed by the debtor before such transfer was made' that diminishes the estate or creates an inequality among classes of creditors, if the debtor was insolvent, and the transfer was made within 90 days¹ of the filing of the petition." *Id.* (emphasis added.) *In re Pitman*, 843 F.2d 235, 238 (6th Cir. 1988), quoting 11 U.S.C. § 547(b) (emphasis added). The purpose behind this section is to accomplish proportionate distribution of debtor's assets amongst creditors and to avoid transfer to one creditor that would diminish debtor's estate that would otherwise be available for distribution to all creditors. *In re Shelton Harrison Chevrolet, Inc. v. Leisure Guide of Am., Inc.*, 202 F.3d 834,

¹ In case the creditor is determined to be an "insider" at the time of the transfer, the look-back period is "between ninety days and one year before the date of filing of the petition." 11 U.S.C. § 547(b)(4)(B).

837 (6th Cir. 2000). The Trustee has the burden of proof with respect to all the elements of § 547(b). 11 U.S.C. § 547(g).

Therefore, amongst other things enumerated in § 547(b), the trustee must prove that the transfer was “for or on an account of an antecedent debt.” “Antecedent debt” is not defined in the Code, but a debt is “antecedent” if it is incurred *before* the transfer. 11 U.S.C. § 547(b)(2). Furthermore, the Code defines a ‘debt’ as “liability on a claim.” 11 U.S.C. § 101(12). A “claim” is further divided into two types. The first type of claim is a monetary claim and is called a “right to payment.” 11 U.S.C. § 101(5)(A); *In re Parker*, 241 B.R. 722, 724 (Bankr. D. Or. 1999). The second type of a claim is a “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.” *In re Parker*, 241 B.R. at 725, *quoting* 11 U.S.C. § 101(5)(B).

In the present situation, a transfer of property title pursuant to the divorce decree fails to satisfy either of the categories of a “claim.” The first type of claim is not applicable in this case because the debtor is attempting to set aside a property title transfer, which is not a monetary claim. *In re Parker*, 241 B.R. at 724; *In re Haskell*, 1998 WL 809520, *10 (Bankr. N.D. Ill.). The ex-spouse’s right with respect to the property interest transferred would also fall outside the scope of the second type of claim because there is “no ‘breach of performance’ by the Debtor that would give rise to a right of payment.” *In re Haskell*, 1998 WL 809520, *11. Therefore, given that the ex-spouse does not have any “claim” against the Debtor, there would be no antecedent debt. *Id.* It further follows that a transfer of marital property pursuant to a divorce decree would not be an avoidable preference under § 547(b). *See, e.g., Busconi v. Vaudreuil*, 177 B.R. 153, (Bankr. D. Mass. 1995) (transfer of home to former spouse pursuant to antenuptial agreement and divorce judgment was not for or on account of an antecedent debt); *In re Haskell*, 1998 WL 809520 (property transferred pursuant to a divorce decree not for or on account of an antecedent debt); *In re Parker*, 241 B.R. 722 (transfer of marital property pursuant to a decree of dissolution not a transfer for or on account of an antecedent debt).

V. CONCLUSION

The debtor cannot set aside the transfer of his home to his ex-wife pursuant to a divorce decree as an avoidable preference because all the elements of § 547(b) cannot be met in this case. Particularly, the transfer of debtor’s home pursuant to a divorce decree is not a transfer “for or on account of an antecedent debt.”

Lexadigm Solutions LLC