

## **Tips You Should Know About Equitable Distribution and the Bankruptcy Code**

By Camille J. Iurillo and Gina M. Pellegrino

Scenario: A husband and wife get divorced. The husband is obligated to pay the wife a lump sum equitable distribution award, stemming from the divorce, which is not in the nature of support or alimony. If the husband pays the wife the equitable distribution award and then files bankruptcy within one year, can the bankruptcy trustee avoid the equitable distribution payment as a preference, under 11 U.S.C. § 547?

Pursuant to section 547(c)(7) of the Bankruptcy Code, the payment of a debt for a domestic support obligation (“DSO”) may not be avoided by a bankruptcy trustee as a preference. *See*, 11 U.S.C. § 547(c)(7).

Therefore, in our scenario, in order to determine whether the debtor’s pre-petition equitable distribution payment to his ex-spouse may be avoided by the bankruptcy trustee as a preference, it is first necessary to determine whether equitable distribution is deemed a DSO under the Bankruptcy Code. If equitable distribution is deemed a DSO, then in accordance with section 547(c)(7) of the Bankruptcy Code, the bankruptcy trustee may not avoid the equitable distribution payment as a preference. A “domestic support obligation” or “DSO” is defined in section 101(14A) of the Bankruptcy Code and “equitable distribution” is not expressly mentioned in that definition, so it is necessary to refer to the applicable case law for an interpretation of the statute. *See*, 11 U.S.C. § 101(14A). Pursuant to the pertinent case law, following the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), equitable distribution awards are non-domestic support obligations and do not fall under the definition of DSO, as set forth in 11 U.S.C. § 101(14A). *See*, In re Golio, 393 B.R. 56, 61 (Bankr. E.D.N.Y. 2008). Thus, since equitable distribution is not deemed a DSO under the Bankruptcy Code, section 547(c)(7) is not applicable in our scenario.

In order to determine whether a bankruptcy trustee may avoid an equitable distribution payment as a preference under section 547 of the Bankruptcy Code, according to the applicable case law discussed further below, the bankruptcy court will evaluate whether the elements set forth in section 547(b) of the Bankruptcy Code have been satisfied.

Section 547(b) of the Bankruptcy Code states, in pertinent part: “the trustee may avoid any transfer of an interest of the debtor in property - (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made-- (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if-- (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.” 11 U.S.C. § 547(b).

This issue was addressed in In re Dirks, 2009 WL 103606, 5-6 (6<sup>th</sup> Cir. BAP 2009), wherein the Chapter 7 trustee in the debtor’s bankruptcy case filed an adversary proceeding against the debtor’s former spouse, asserting a preferential transfer claim. The Court in Dirks

held that the debtor's pre-petition conveyance of her interest in the marital residence to her former spouse, as part of an equitable property division in their divorce proceeding, could not be avoided by the Chapter 7 trustee as a preferential transfer because the elements of section 547(b) were not satisfied. The Court in Dirks explained that the transfer was not for or on account of an antecedent debt owed by the debtor since all of the divorce court orders indicated that the debtor sold her interest in the residence to her former spouse in lieu of them jointly selling the property and splitting the proceeds.

As a result, following the Court's reasoning in Dirks, if the elements of section 547(b) cannot be satisfied by the bankruptcy trustee, then the bankruptcy trustee may not avoid an equitable distribution payment as a preference.

**Iurillo & Associates, P.A.**, located in downtown St. Petersburg, is comprised of **Camille J. Iurillo**, Shareholder, **Gina M. Pellegrino**, Associate, and **Sabrina C. Beavens**, Associate. The primary areas of practice of **Iurillo & Associates, P.A.** are Commercial and Bankruptcy Litigation and Debtors' and Creditors' Rights.