NOT DESIGNATED FOR PUBLICATION

BLANDON DOCKENS CUROLE	*	**NO. 2015-CA-0126**
VERSUS	*	
		COURT OF APPEAL
TEDDY JOSEPH CUROLE	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 55-478, DIVISION "B"
Honorable Michael D. Clement,
* * * * * *

PER CURIAM
* * * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Max N. Tobias, Jr., Judge Madeleine M. Landrieu)

TOBIAS, J., CONCURS AND ASSIGNS REASONS.

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APPEAL DISMISSED.

AUGUST 12, 2015

Teddy Joseph Curole appeals from a May 20, 2014 judgment that purports to partition the community of acquets and gains existing between him and his former spouse, Blandon Dockens Curole Glorioso, alleging the trial court erred in denying his claim for reimbursement totaling $180,887.93 (consisting of community debts he paid using his separate property), based upon the erroneous conclusion that his claim was a "debt" that had been discharged in Mrs. Glorioso's 2013 bankruptcy proceedings.

Mrs. Glorioso answered the appeal asserting the trial court erred in (a) awarding Mr. Curole reimbursement for an amount equal to one-half of the attorney's fees he incurred through the date of divorce on the basis that she was discharged from this debt in bankruptcy, and (b) failing to partition Mr. Curole's retirement accounts.

Even though the record on appeal contains a minute entry dated May 5, 2014, the date the trial of the community property partition was held, which contains the stipulations that "[t]he parties shall split Ms. Curole's teacher retirement by SIMS Formula" and "[t]he parties shall split Mr. Curole's retirement accounts in the amount of $473,185.21," these stipulations were not included in the

May 20, 2014 judgment from which Mr. Curole appeals. The May 20, 2014 judgment and reasons therefor are silent as to the retirement accounts of Mr. Curole and Mrs. Glorioso's teacher's retirement. And while the transcript of the proceedings references Mr. Curole's retirement accounts, it merely provides the value of those accounts as of the date of trial, but offers no guidance as to how the parties intended these accounts to be "split." Additionally, a consent judgment rendered on May 28, 2014 orders the parties to divide Mrs. Glorioso's teacher's retirement in accordance with *Sims v. Sims*,[1] and memorializes the community property value of Mr. Curole's retirement accounts, but it, too, is silent as to how his accounts are to be "split" between the parties.[2] As such, not all assets of the community property regime existing between Mr. Curole and Mrs. Glorioso have been partitioned. Mr. Curole's retirement accounts remain unpartitioned. Accordingly, the May 20, 2014 judgment constitutes only a partial partition of the community property regime.[3]

La. C.C.P. art. 1915 B(1) and (2) provide, in pertinent part:

> (1) When a court renders a partial judgment . . . as to one or more but less than all of the claims . . . the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.
>
> (2) In the absence of such a determination and designation, *any order or decision which adjudicates fewer than all claims* . . . shall not terminate the action

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1 *Sims v. Sims*, 358 So.2d 919 (La. 1978).

2 Neither Mrs. Glorioso nor Mr. Curole has appealed - or even mentioned - the May 28, 2014 judgment, although it is part of the record on appeal.

3 Louisiana has a longstanding prohibition against piecemeal partition of community property and settlement of claims arising from matrimonial regimes after termination of the community. *See Daigre v. Daigre*, 230 La. 472, 481-482, 89 So.2d 41, 44-45 (1956); *Durden v. Durden*, 14-1154, p. 18 (La. App. 4 Cir. 4/29/15), 165 So.3d 1131; *Sciortino v. Sciortino*, 188 So.2d 221, 223 (La. App. 4th Cir. 1966); *Nunez v. Nunez*, 552 So.2d 472, 473 n. 2 (La. App. 4th Cir. 1989).

> as to any of the claims or the parties and *shall not constitute a final judgment for the purpose of an immediate appeal*. . . . [Emphasis supplied.]

A grants of a partial judgment as to one or more but less than all of the claims does not constitute a final judgment for purposes of an immediate appeal unless the trial judge designates the judgment as a final judgment after an express determination that there is no just reason for delay. *R.J. Messinger, Inc. v. Rosenblum*, 04-1664, p. 4 (La. 3/2/05), 894 So.2d 1113, 1116. In the instant case, the trial judge did not certify the partial judgment as final nor did he express a determination that no just reason for delay of an immediate appeal existed. Consequently, this court issued an order requiring both parties to supplement their briefs addressing how, under La. C.C.P. art. 1915, the May 20, 2014 judgment is currently appealable and how this court can address the issue of Mr. Curole's retirement accounts when the judgment appealed is silent in this regard.

In response the parties filed a joint brief in which they asserted that it was "always" their "intent" to allocate Mr. Curole's retirement accounts "after the court considered the reimbursement claims of the parties and any offsets the court determined." Further, they aver that it was their intent "for the District Court to issue a final judgment partitioning all community assets including the partition of the retirement funds." The parties have suggested that we convert and treat the appeal and answer thereto as an application for supervisory writs, citing *Baxter v. Baxter*, 15-0085 (La. App. 4 Cir. 6/24/15), __ So.3d __, 2015 WL 3894291, and *Stelluto v. Stelluto*, 05-0074 (La. 6/29/05), 914 So.2d 34.

We cannot and do not consider an "intent" of the parties not specifically expressed or addressed in a judgment. An appellate court on appeal reviews only final judgments. We do not review wishes and hopes of parties. To do so causes

confusion and the potential to violate the rule that courts do not give advisory opinions.

Under the facts of this case, we are unable to convert Mr. Curole's appeal into an application for a supervisory writ of review. On May 20, 2014, the trial judge signed the judgment partially partitioning the community of acquets and gains and denying Mr. Curole's claim for reimbursement. A notice of judgment was issued to the parties on May 22, 2014, and sixty-one days later on July 22, 2014, Mr. Curole filed a motion and order for appeal from the judgment denying his claim for reimbursement. The trial court granted Mr. Curole's motion for appeal on July 29, 2015.

The Uniform Rules - Courts of Appeal, Rule 4-3, states that parties have thirty days from the date of a ruling to file a writ application with this court. In the interest of justice, an appellate court may, when one improperly appeals a partial final judgment instead of filing an application for supervisory review, convert the appeal to a writ application when the motion for appeal has been filed within thirty days of the trial court's ruling. In such instances, we construe the motion for appeal as a notice of intent to seek a supervisory writ of review. *See Ramirez v. Evonir*, 14-1095, pp. 4-5 (La. App. 4/19/15), 165 So.3d 260, 263; *Rain CII Carbon, LLC v. Turner Industries Group, LLC*, 14-121 (La. App. 3 Cir. 3/19/14), 161 So.3d 688, 689; *Delahoussaye v. Tulane Univ. Hosp. and Clinic*, 12-0906, pp. 4-5 (La. App. 4 Cir. 2/20/13), 155 So.3d 560, 562-63; *Jones v. Next Generation Homes, LLC*, 11-0407, p. 2 (La. App. 4 Cir. 10/5/11), 76 So.3d 1238, 1240; *Francois v. Gibeault*, 10-0180, p.2 (La. App. 4 Cir. 8/25/10), 47 So.3d 998, 100; *Barham, Warner & Bellamy, L.L.C. v. Strategic Alliance Partners, L.L.C.*, 09-1528, pp. 4-5 (La. App. 4 Cir. 5/26/10), 40 So.3d 1149, 1152.

Here, Mr. Curole filed the motion for appeal more than thirty days after the trial court's ruling.[4] Accordingly, while Mr. Curole's motion for appeal could be construed to be a notice of intent to seek supervisory writs, it cannot be construed as a timely one. Thus, even if we were to allow Mr. Curole to perfect a proper writ application, that writ application would ultimately be dismissed on the ground that it was untimely.

Based on the foregoing considerations, finding this court lacks jurisdiction under La. C.C.P. art. 1915 B(2) to consider this appeal because the May 20, 2015 judgment from which Mr. Curole appeals is not a final, appealable judgment, but rather a partial partition of the community assets, and finding his motion for appeal cannot be construed as a timely notice of intent to seek supervisory writs, we are mandated to dismiss this appeal.

For the foregoing reasons, the appeal of Mr. Curole, and the answer thereto of Mrs. Glorioso, are dismissed without prejudice.

APPEAL DISMISSED.

[4] Obviously, Ms. Glorioso's answer to the appeal was filed more than thirty days after any trial court ruling.

BLANDON DOCKENS CUROLE	*	**NO. 2015-CA-0126**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
TEDDY JOSEPH CUROLE		
	*	**STATE OF LOUISIANA**
	*	
	*	

* * * * * * *

TOBIAS, J., CONCURS AND ASSIGNS REASONS.

I respectfully concur in the per curiam that the appeal of the 20 May 2015 judgment must be dismissed because the judgment is a partial final judgment that must be certified as a final judgment for which no just delay of the appeal is warranted. And as stated in the per curiam, we cannot convert the appeal to an application for supervisory review because the motion for appeal was filed more than thirty days after the 22 May 2015 notice of judgment. Obviously, *if* the 20 May 2014 judgment was certified as immediately appealable in conformity with La. C.C.P. art. 1915, we would have jurisdiction to consider some, but not all, of the issues raised by the parties. I write separately only because I think the parties should consider other things should they elect to seek certification of the 20 May 2015 as final judgment for which no just reason for delay of the appeal is warranted.

The facts of this case are undisputed. Teddy Curole and Blandon Curole Glorioso were married on 14 December 1968[1] and a judgment of divorce pursuant to La. C.C. art. 102 was granted on 8 December 2008, wherein the rights of the parties to partition the community property at a later date were reserved. On the date the judgment of divorce was granted, the parties' community property regime was terminated by operation of law retroactive to 10 January 2008, the date upon which Mrs. Glorioso filed the petition for divorce. La. C.C. art. 2356, comment (c).

Following their divorce in 2008, but prior to partitioning the community property, Mr. Curole and Mrs. Glorioso separately filed Chapter 7 bankruptcy proceedings in the United States Bankruptcy Court for the Eastern District of Louisiana.[2] In their individual bankruptcy petitions, each party listed the other as an unsecured, non-priority creditor. Specifically, Mr. Curole listed Mrs. Glorioso as a creditor *without* referencing the nature of the indebtedness he sought to discharge. Similarly, Mrs. Glorioso listed in her bankruptcy petition Mr. Curole as a creditor with a corresponding reference to "reimbursement claims." Mr. Curole and Mrs. Glorioso were both personally discharged as debtors in their respective bankruptcy proceedings.

Trial of the community partition was held on 5 May 2014. According to Mrs. Glorioso, due to the parties' previous discharges in bankruptcy, no liabilities remained to be divided between the parties, and the only remaining assets to be

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[1] Three children were born of the marriage, all of whom were majors at the time of these proceedings.

[2] Mr. Curole filed a Chapter 7 case on 20 May 2011 and, in due course, was granted a discharge on 16 August 2011. Mrs. Glorioso filed for bankruptcy on 13 March 2013 and was granted a discharge on 26 June 2013.

partitioned consisted of a vehicle, several other movables, and the community interest in Mr. Curole's retirement.[3] Nonetheless, during the trial, over a relevancy objection made by counsel for Mrs. Glorioso on the ground that the "debt" was purportedly discharged in her bankruptcy, Mr. Curole asserted a reimbursement claim totaling $180,887.93. Mr. Curole's reimbursement claim was for community debts he paid using his separate funds that were incurred after the petition for divorce was filed in January 2008, but predated the parties separately seeking Chapter 7 debtor relief.[4] It is undisputed that no portion of the reimbursement claim asserted by Mr. Curole consisted of the payment of community debts incurred *after* Mrs. Glorioso's filing for bankruptcy protection and her subsequent discharge in bankruptcy. It is further undisputed that Mr. Curole did not institute an adversary proceeding in Mrs. Glorioso's bankruptcy action to determine the dischargeability of his reimbursement claim. Consequently, at trial Mrs. Glorioso averred that, absent the filing of an adversary proceeding to determine its nondischargeability, Mr. Curole's claim for reimbursement was a debt from which she was discharged in bankruptcy.

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[3] According to the trial court's minutes and the transcript of the proceedings, both contained in the record on appeal, prior to the actual commencement of trial, the parties stipulated that "[t]he parties shall split Ms. [Glorioso's] teacher retirement by *SIMS* Formula," and "[t]he parties shall split Mr. Curole's retirement accounts in the amount of $473,185.21." These stipulations were not incorporated into or made a part of the 20 May 2014 judgment. A second judgment rendered on 28 May 2014 addressed the retirement accounts and, while that judgment specifically orders Mrs. Glorioso's teacher's retirement to be divided in accordance with *Sims v. Sims*, 358 So.2d 919 (La. 1978), other than stating the value of Mr. Curole's retirement accounts, the judgment does not adjudicate whether or how his retirement accounts are to be divided. The parties have *not* appealed the 28 May 2014 judgment.

[4] The specific claims for reimbursement asserted by Mr. Curole during trial included mortgage payments to Greentree Mortgage, Bank of America, Countrywide, electricity between June 2008 through March 2009, payment of flood insurance premiums, household repairs, pool expenses, Orkin Termite Service, burglary alarm service, and his attorney's fees incurred though the date of divorce. Mr. Curole introduced documentary evidence into the record to support each claim.

The trial court rendered judgment with reasons on 20 May 2014 purportedly partitioning the remaining community movables and ordering Mrs. Glorioso to make an equalizing payment to Mr. Curole in the amount of $1,257.00. The court further awarded Mr. Curole $4,469.75, representing one-half of his attorney's fees incurred through the date of divorce. The remainder of Mr. Curole's reimbursement claim asserted at trial was denied. The 20 May 2014 judgment is silent regarding a partition of either party's respective retirement accounts.

Mr. Curole asserts only one assignment of error, claiming the trial court erroneously ruled that a spouse's reimbursement claim for separate funds used to satisfy community debts paid after termination of the community but prior to the bankruptcy filing constitutes a "debt" dischargeable in bankruptcy.

In her answer to the appeal, Mrs. Glorioso avers the trial court erred in (1) ruling that Mr. Curole was entitled to reimbursement of one-half of the attorney's fees he incurred through the date of divorce on the basis that she was discharged from this "debt" along with the remainder of Mr. Curole's claim for reimbursement in bankruptcy, and (2) failing to partition the community interest (100%) in Mr. Curole's retirement account administered by National Planning Corporation with a value on the date of trial stipulated at $473,185.21.

The gravamen of Mr. Curole's appeal concerns whether a claim for reimbursement is a "debt" or "claim" dischargeable in a former spouse's bankruptcy proceeding. According to Mrs. Glorioso, each and every expense Mr. Curole claimed for reimbursement, including his claim for attorney's fees, was automatically discharged in her bankruptcy action when Mr. Curole failed to initiate the requisite adversary proceeding.

The Bankruptcy Code defines a "debt" as "liability on a claim" (11 U.S.C. § 101(12)), and a "claim" as a

> (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; or
>
> (B) 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.

11 U.S.C. § 101(5).

The initial focus of any inquiry under these provisions is upon the concept of a "right to payment." In *Cohen v. De La Cruz*, 523 U.S. 213 (1998), the Supreme Court discussed these definitions:

> A "debt" is defined in the Code as "liability on a claim," § 101(12), a "claim" is defined in turn as a "right" to payment," § 101(5)(A), and a "right to payment," as we have said, "is nothing more nor less than an enforceable obligation." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 553, 559, 110 S.Ct. 2126, 2131, 109 L.Ed.2d 588 (1990). Those definitions "reflec[t] Congress' broad . . . view of the class of obligations that qualify as a 'claim' giving rise to a 'debt. . .'"

Cohen, 523 U.S. at 218. Thus, while the bankruptcy concept of a "claim" may be broad, it is not so broad as to encompass rights that do not constitute "enforceable obligation[s]." Consequently, if, at the time the debtor spouse files a petition for bankruptcy, the right of a non-debtor spouse to reimbursement does not give rise to an "enforceable obligation" conferring thereby a "right to payment" against the debtor spouse, the non-debtor spouse's right to reimbursement does not give rise to a "claim" or a "debt" that is potentially dischargeable in the debtor spouse's bankruptcy case.

While the Bankruptcy Code defines the term "claim" as, *inter alia*, a right to payment, it does not give any guidance as to when a right to payment arises or accrues. Rather, that issue is resolved by reference to state law. *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332, 337 (3rd Cir. 1984); *cert. denied*, 469 U.S. 1160 (1985)(*citing Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161(1946)). Accordingly, I turn to Louisiana law to ascertain what it provides regarding a spouse's right to reimbursement.

La. C.C. art. 2358 provides for reimbursement claims between spouses:

> A spouse may have a claim against the other spouse for reimbursement in accordance with the following Articles.
>
> A claim for reimbursement may be asserted only after termination of the community property regime, unless otherwise provided by law.

In the absence of a voluntary partition agreement executed between the parties dividing the community property, "reimbursement claims will typically be heard as part of the judicial partition proceeding conducted under [La.] R.S. 9:2801." La. C.C. art. 2358, Revision Comments - 2009 (b). Thus, reimbursement claims differ from a judicial partition of the community's assets and liabilities, which is governed by La. R.S. 9:2801. Additionally, the articles governing reimbursement claims are applicable only between the spouses and their universal successors. La. C.C. art. 2358, Revision Comment - 1979.[5]

La. C.C. art. 2365 provides, in pertinent part:

> If separate property of a spouse has been used . . . to satisfy a community obligation, that spouse is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used.

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[5] The obligation of reimbursement is heritable. *See* La. C.C. art. 2365, Revision Comments - 1979 (b).

* * *

> The liability of a spouse who owes reimbursement is limited to the value of his share of all community property after deduction of all community obligations. . . .

A spouse's right to reimbursement includes reimbursement for post-termination, pre-partition use of separate property to satisfy community debts. La. C.C. art. 2365, Revision Comments - 2009 (a). At trial, Mr. Curole established that he paid and satisfied community obligations using his separate funds post-termination, pre-partition, thus providing the basis for a reimbursement claim against Mrs. Glorioso based on La. C.C. art. 2365. By the article's express terms, a spouse's right to reimbursement is limited to the owing spouse's net share of the remaining community property, *if any*, once all community obligations have been deducted. "In principle, reimbursement may be made *only* if there are sufficient community assets; there is no obligation for reimbursement from the separate property of the other spouse.[6] (Emphasis supplied.) *See* La. C.C. art. 2365, Revision Comments - 1979 (a). Implicit in these Civil Code articles, especially when La. C.C. arts. 2358 and 2365 are read *in pari materia*, is that a judgment of partition of community property is what gives rise to a spouse's right to enforce his or her claim for reimbursement. In short, while a spouse's right to reimbursement may be asserted once the community property regime has been terminated, the liability, if any, of the spouse who owes reimbursement is not determined until

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[6] La. C.C. art. 2365 provides an exception to the limitation of a spouse's liability when it is established that "the community obligation [satisfied with separate funds] was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, or education of children of either spouse in keeping with the economic condition of the spouses…." As to these claims, "the spouse is entitled to reimbursement from the other spouse regardless of the value of that spouse's share of all community property." *Id.*

such time as the community property regime is partitioned and only if sufficient community assets remain. It is at that time that the non-debtor spouse's right to payment arises.

Further support for this conclusion is derived from an analogy made between a reimbursement claim and the Civil Code's handling of a "future thing." *See* La. C.C. arts. 2450. For example, a "future thing" may be the object of a contract for sale, however, the "coming into existence of the thing is a condition that suspends the effects of the sale," such that if the thing does not come into existence, the sale cannot and, therefore, does not occur. Similarly, until such time as a partition of the community property regime is adjudicated, wherein all community liabilities have been deducted from the existing community property and there remains sufficient community assets, does the debt of a spouse who owes reimbursement come into existence. Put simply, prior to an adjudication of the community property partition, a spouse's right to demand reimbursement from the other spouse is not an enforceable obligation.

In the instant case, the community property regime existing between the parties had not yet been partitioned at the time Mrs. Glorioso filed her petition for bankruptcy or at the time of her subsequent discharge. Consequently, under 11 U.S.C. §§ 101(5) and (12), respectively, no enforceable obligation or right to payment on the part of Mr. Curole existed against Mrs. Glorioso for which the bankruptcy court could grant a discharge. As such, Mr. Curole's claim for reimbursement survived the bankruptcy court's discharge of Mrs. Glorioso's debts in bankruptcy.

One of the principal purposes of the Bankruptcy Code is to grant an insolvent debtor a "fresh start" by providing for the discharge of most pre-petition

debt. However, Congress excepted certain categories of debt, which for overriding public policy reasons, are not dischargeable in bankruptcy. Particularly, in 1994, Congress amended the bankruptcy law by adding § 523(a)(15), which permitted a bankruptcy court to deny a debtor discharge for debts

> not of the kind described in paragraph (5)[7] that [are] incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—
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> > (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

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[7] Section 523(a)(5) allows a bankruptcy court to deny a debtor discharge "for a domestic support obligation." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109-8, Title II, §§ 215, 119 Stat. 23. BAPCPA defined "domestic support obligation" as a debt

> (A) owed to or recoverable by—
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> (ii) a governmental unit;
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
> (i) a separation agreement, divorce decree, or property settlement agreement;
> (ii) an order of a court of record; or
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

See 11 U.S.C. § 101(14A).

> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

Bankruptcy Reform Act of 1994 ("BPA"), Pub.L. No. 103-394, § 304(e).

Additionally in the BPA, Congress also amended § 523(c)(1) to add paragraph (15) such that

> the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

Thus, under the BPA, in order for debts that fell under § 523(a)(15) to be excluded from discharge, the creditor to whom these debts were owed was required to bring a complaint in the bankruptcy court for purposes of seeking a court determination that the debts were, in fact, nondischargeable. *See* 11 U.S.C. § 523(c)(1). Under 11 U.S.C. § 341(a), such a complaint had to be brought no later than 60 days after the first date set for the meeting of creditors. *See* Fed. R. Bankr. P. 4007 (c). If the complaint was not brought within the requisite time period, the debt was discharged. *See* 11 U.S.C. § 523(c)(1).

In 2005, however, Congress again amended § 523(a)(15) by removing the two "defenses" to § 523(a)(15) dischargeability (subparts (A) and (B)), so that a bankruptcy court may deny a debtor a discharge for

> [debts] to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that [are] incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

11 U.S.C. § 523(a)(15). Accordingly, pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),[8] which took effect on 17 October 2005, if a debt is not a "domestic support obligation" as defined in 11 U.S.C. § 101(14A), but was incurred by the debtor in the course of or in connection with a divorce or separation, or in connection with a separation agreement, *i.e.*, a non-support domestic obligation, it is excepted from discharge. Additionally, with respect to nonsupport debts owed to a spouse, former spouse, or child of a debtor, the BAPCPA specifically dispensed with the requirement for an adversary proceeding to determine its dischargeability. Consequently, for bankruptcy cases commenced after the effective date of the BAPCPA - *which would include Mrs. Glorioso's 2013 bankruptcy* - if a debt is not a domestic support obligation, but was incurred by the debtor in the course of or in connection with a divorce, 11 U.S.C. § 523(a)(15) is self-executing and operates automatically to except the debt from discharge and no affirmative action on the part of the creditor to commence an adversary proceeding to determine its dischargeability is required. *See In re Dumontier*, 389 B.R. 890, 896 (Bankr. D.Mont. 2008).[9]

The issue of whether 11 U.S.C. § 523(a)(15) applies to a spouse's claim for reimbursement against a former spouse and, thus, constitutes a debt excepted from discharge in bankruptcy, was specifically addressed by *In re Kinkade*, 707 F.3d 546, 548 (5th Cir. 2013), a case relied upon herein by the trial court below. In *In re*

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[8] *See* Footnote 7, *supra*.

[9] For bankruptcy cases filed after the effective date of the BAPCPA, all exceptions to discharge under § 523(a) are self-executing except those debts under paragraphs (2), (4), or (6) (*i.e.*, false statements, defalcation or larceny misappropriation, or willful and malicious injury). *See* 11 U.S.C. § 523(c)(1). A creditor who is owed a debt that may be excepted from discharge under paragraphs (2), (4), or (6) *only* is required to initiate proceedings in the bankruptcy court for an exception to discharge. If the creditor does not act, the debt is discharged.

Kinkade, the debtor's ex-wife had loaned him money from her separate property both prior to and during the marriage. At the trial of the community property partition in the state court proceeding, the Louisiana court ruled that one-half of the funds from the sale of community property would be credited to the debtor spouse's obligation to his ex-wife. Thereafter, the debtor spouse filed Chapter 7 bankruptcy proceedings, wherein the ex-wife initiated an adversary proceeding to contest the discharge of her claim for reimbursement.[10] The bankruptcy court ruled in favor of the ex-wife, finding that her claim for reimbursement fit squarely within the language of 11 U.S.C. § 523(a)(15), thus making it exempt from discharge in her former spouse's bankruptcy action, a ruling which was later affirmed on appeal.[11] *In re Kinkade*, 707 F.3d at 548-549.

In the instant case, the trial court below, relying on *In re Kinkade*, held that because Mr. Curole had failed to timely initiate an adversary proceeding in Mrs. Glorioso's bankruptcy action for purposes of contesting the discharge of his reimbursement claim, her discharge included Mr. Curole's claim for reimbursement. While I acknowledge that *In re Kinkade* involved an adversary proceeding, I note that the self-executing nature of the debt's nondischargeability was not addressed by the trial or appellate courts; instead, in dispute was whether

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[10] Unlike the facts presented by the instant case, in *In re Kinkade*, a judgment partitioning the community property between the spouses had already been issued, and reimbursement by the debtor spouse to the non-debtor spouse ordered, at the time the debtor spouse filed his petition for bankruptcy.

[11] The bankruptcy court further held that the discharge exception for divorce-related debts not in the nature of support applies to both community debts and separate debts; "[t]he statutory language requires only that the debt be 'incurred by the debtor in the course of a divorce or separation. 11 U.S.C. § 523(a)(15)'" *In re Kinkade*, 707 F.3d at 549.

or not the spouse's claim for reimbursement against his debtor ex-spouse even *qualified* as a non-support domestic obligation falling within the discharge exception for divorce-related debts not in the nature of support under § 523(a)(15).

Unlike *In re Kinkade*, here Mrs. Glorioso does not dispute that Mr. Curole's claim for reimbursement, which consists solely of community debts he paid after the filing of the petition for divorce with his separate funds, arose in the course of or in connection with the parties' divorce. Accordingly, Mr. Curole's reimbursement claim fits squarely within the express language of § 523(a)(15) and, to the extent it qualifies as an enforceable obligation giving rise to a right to payment, it constitutes a "non-support domestic obligation" that is nondischargeable in bankruptcy. This being the case, under the BAPCPA, which dispensed with the requirement for an adversary proceeding to determine the dischargeability of a non-support domestic obligation, Mr. Curole's claim for reimbursement, including his claim for attorney's fees awarded by the trial court, was automatically excepted from discharge in Mrs. Glorioso's 2013 bankruptcy action.[12]

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[12] While I note the case of *LeJeune v. LeJeune*, 283 B.R. 398 (E.D. La. 2002), it has been superseded by the BAPCPA when the BAPCPA dispensed with the ability to pay and benefit/detriment defenses to 11 U.S.C. § 523(a)(15) and eliminated the requirement for an adversary proceeding to determine the dischargeability of a non-support domestic obligation. In *LeJeune*, the debtor spouse sought to discharge as a debt in her bankruptcy case her ex-spouse's claim for reimbursement of marital expenses he paid after the parties' separation but prior to their divorce. The spouses' divorce decree was entered before the debtor-spouse's bankruptcy filing, but the community property issues had not been settled or determined as of the time of her bankruptcy filing. The bankruptcy court, following an adversary proceeding initiated by the non-debtor spouse, held that the non-debtor's claim for reimbursement constituted a "prepetition debt of a kind *potentially* dischargeable in bankruptcy." (Emphasis supplied.) The court further held that whether the claim was excepted from discharge as a non-support domestic obligation was not yet ripe for decision because no determination as to the amount of the non-debtor's reimbursement claim had been made making it impossible to conduct the requisite balancing test then required under § 523(a)(15).

In her answer to Mr. Curole's appeal, Mrs. Glorioso avers the trial court erred in failing to partition the community's interest in Mr. Curole's retirement accounts maintained by the National Planning Corporation. Even though the record on appeal contains a minute entry dated 5 May 2014, the date the trial of the community property partition was held, which contains the stipulations that "[t]he parties shall split Ms. Curole's teacher retirement by SIMS Formula" and "[t]he parties shall split Mr. Curole's retirement accounts in the amount of $473,185.21," these stipulations were not included in the 20 May 2014 judgment from which Mr. Curole appeals. The 20 May 2014 judgment and reasons therefor are silent as to the retirement accounts of Mr. Curole and Mrs. Glorioso's teacher's retirement. And while the transcript of the proceedings references Mr. Curole's retirement accounts, it merely provides the value of those accounts as of the date of trial, but offers no guidance as to how the parties intended these accounts to be "split." Additionally, a consent judgment rendered on 28 May 2014 orders the parties to divide Mrs. Glorioso's teacher's retirement in accordance with *Sims v. Sims*,[13] and memorializes the community property value of Mr. Curole's retirement accounts, but it, too, is silent as to how his accounts are to be "split" between the parties.[14] As such, not all assets of the community property regime existing between Mr.

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[13] *See* Footnote 3, *supra*.

[14] Neither Mrs. Glorioso nor Mr. Curole has appealed - or even mentioned - the 28 May 2014 judgment, although it is part of the record on appeal.

Curole and Mrs. Glorioso have been partitioned. Mr. Curole's retirement accounts remain unpartitioned.

For these reasons, *inter alia*, we are required to dismiss Mr. Curole's appeal, being unable to grant appropriate relief to the parties.