

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA**

In re  
RICKEY Z. GRACE,  
  
Debtor.

Case No. 99-2316-WRS  
Chapter 7

**MEMORANDUM DECISION**

**I. Procedural Setting**

This Chapter 7 bankruptcy case is before the Court upon the application of the attorney for the Trustee for compensation pursuant to 11 U.S.C. § 330. (Doc. 25). The Application was filed on May 1, 2002, and first heard on June 25, 2002. The Application was continued several times at the Bankruptcy Administrator's and the Trustee's request. At the time the application was first set for hearing, it was not clear that there would be a recovery for the estate and therefore there was no practical reason to pursue the matter. The matter was last heard on October 21, 2003. By that time it was apparent that the estate would recover property and for that reason the application was of more than academic interest.<sup>1</sup> For the reasons set forth below, the Application of the attorney for the Trustee for compensation is DENIED.

In addition, Von Memory, the attorney for Defendant Tammy Grace, filed a Motion to Allow Administrative Expenses. (Doc. 43). The Bankruptcy Administrator has filed a response which opposes the motion. (Doc. 44). For the reasons set forth below, that motion is DENIED.

The Trustee's attorney seeks compensation for services rendered in an adversary proceeding styled Tom McGregor, Trustee v. Tammy L. Grace, Adv. Pro. No. 99-132, in the United States

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<sup>1</sup> On July 3, 2003, the Trustee filed a Notice of Assets, reporting that \$21,644.73 had been received. (Doc. 37).

Bankruptcy Court for the Middle District of Alabama. The Trustee sought, in that adversary proceeding, to set aside a divorce decree as a fraudulent conveyance. On June 22, 2000, this Court entered summary judgment in favor of Tammy Grace and against the Trustee. (Adv. Pro. No. 99-132, Docs. 21-22). The Court rejected the Trustee's contention, that an unequal division of property was necessarily constructively fraudulent and therefore should be set aside. The Trustee appealed this Court's June 22, 2000 judgment to the District Court. While the matter was pending in District Court, Tammy Grace filed a petition in bankruptcy in the Southern District of Alabama and her Trustee in bankruptcy was substituted as the Defendant in this adversary proceeding. Rather than contest the matter on appeal, Tammy Grace's Trustee settled the matter for 1/3 of the value of the subject property. That settlement eventually resulted in a payment of \$21,644.73 to the Trustee in this case. (Doc. 37).

## **II. Facts**

Rickey Grace, the Debtor, and Tammy Grace, his former spouse, were divorced pursuant to a Final Judgement of Divorce entered by the Circuit Court of Baldwin County, Alabama, in Case No. DR 96-304 on January 7, 1997.<sup>2</sup> The Judgement of Divorce divided the property, awarding Tammy Grace the residence, its furnishings and her vehicle. Rickey Grace received his vehicle and his personal effects. As the divorce was a contested proceeding, the Circuit Court heard testimony.

Apparently, Rickey Grace was dissatisfied with his share of the marital property as he broke

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<sup>2</sup> The facts may be gleaned from pleadings and papers filed in two Adversary Proceedings. Tom McGregor, Trustee v. Tammy L. Grace, Adv. Pro. No. 99-132, and Tammy L. Grace v. Ricky Z. Grace, Adv. Pro. No. 99-160, both of which were filed in this Court.

into Tammy Grace's home and removed some property and destroyed other property. The Circuit Court ordered that Rickey Grace be sent to jail and awarded damages to Tammy Grace in the amount of \$11,520.00<sup>3</sup> The jailing of Rickey Grace and the imposition of an award of damages are facts which eliminate any inference that the property distribution was in any way collusive. Nor did the Trustee even make any allegations that the property settlement was collusive.

On May 10, 1999, Rickey Grace filed a petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Code in this Court. Tammy Grace is listed as a creditor in the schedules. The Trustee brought an adversary proceeding seeking to set aside the transfer of an interest in the marital residence as a fraudulent conveyance. The services rendered in connection with that litigation are the subject of the pending application for attorney's fees. In addition, Tammy Grace brought a separate adversary proceeding seeking a determination that the \$11,520.00 judgment entered against Rickey Grace be excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). See Tammy L. Grace v. Rickey Z. Grace, Adv. Pro. No. 99-160, in the United States Bankruptcy Court for the Middle District of Alabama.

### **III. Issues**

#### **A. Alabama Divorce Law**

Alabama law provides that the divorce court is to make an "equitable" division of property. Case law makes clear that an equitable distribution is not necessarily an equal distribution. In fact, in

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<sup>3</sup> See Order dated April 21, 1997, Tammy L. Grace v. Rickey Z. Grace, Case No. DR-96-304, in the Circuit Court for Baldwin County. A copy of this order is attached to the complaint in Adv. Pro. No. 99-160.

Crenshaw v. Crenshaw, 717 So.2d 422, 424 (Ala. Civ. App. 1998), the Alabama Court of Appeals reversed a divorce court which had made an equal division of property, finding that under the facts of that case, equal was not equitable. See also Mullins v. Mullins 643 So.2d 1000, 1000 (Ala. Civ. App. 1994) (“It is well settled that the division of property is not required to be equal, but it must be equitable”); Bates v. Bates, 678 So.2d 1160, 1163 (Ala. Civ. App. 1996); Treusdell v. Treusdell, 671 So.2d 699, 701 (Ala. Civ. App. 1995); Jackson v. Jackson, 656 So.2d 875, 876 (Ala. Civ. App. 1995); Hutchins v. Hutchins, 637 So.2d 1371, 1373 (Ala. Civ. App. 1994); Dees v. Dees, 628 So.2d 945, 946 (Ala. Civ. App. 1993); Bunn v. Bunn, 628 So.2d 695, 697 (Ala. Civ. App. 1993); Russell v. Russell, 610 So.2d 391, 393 (Ala. Civ. App. 1992); Ross v. Ross, 447 So.2d 812, 813 (Ala. Civ. App. 1984); Miller v. Miller, 361 So.2d 577, 579 (Ala. Civ. App. 1978). The position of the Trustee in this instance is flatly contradictory to Alabama law as determined by the Alabama Court of Appeals in Crenshaw. It cannot reasonably be disputed that Alabama law provides that when married persons are divorced in Alabama, the divorce court, among other things, effects an equitable distribution of the marital property. It is also beyond dispute that an equitable division is not necessarily an equal division.

### **B. Fraudulent Conveyance law**

The Trustee contended that the transfer of the residence to Tammy Grace pursuant to the divorce decree was a fraudulent conveyance and that it should be set aside. (Adv. Pro. No. 99-132, Doc. 18 [Trustee’s Memorandum in support of his motion for summary judgment]). The pertinent statutory provision is Alabama Code Section 8-9A-5, which provides, in part, as follows:

A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the

transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer.

ALA. CODE § 8-9A-5(a).

The issue in the Adversary Proceeding was whether the transfer of the residence pursuant to the divorce decree should be set aside as a fraudulent conveyance.

### **C. Application of law to the facts**

The division of property between Tammy and Rickey Grace is set forth on Page 2 of this Court's Memorandum Decision in the Adversary Proceeding. (Adv. Pro. No. 99-132, Doc. 21).<sup>4</sup> It is unquestionably not equal. However, the fact that the division of property was not equal does not, without more, make the transfer fraudulent and subject to being set aside. See Webster v. Hope (In re Hope), 231 B.R. 403, 415 (Bankr. D.D.C. 1999) (property division in divorce decree not to be set aside absent fraud or collusion); see also Hoyt v. Hoyt (In re Hoyt), 97 B.R. 730 (Bankr. D. Conn. 1989); Falk v. Hecker (In re Falk), 88 B.R. 957 (Bankr. D. Minn. 1988); Harman v. Sorlucco (In re Sorlucco), 68 B.R. 748 (Bankr. D.N.H. 1986).

The problem posed when applying the law of fraudulent transfers to divorce decrees was discussed by the Bankruptcy Court in the District of Columbia at length in Hope. The Court in Hope

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<sup>4</sup> As set forth in the Divorce Judgement, Tammy Grace received the home and the furniture and furnishings in the home. Each party retained their own vehicle. As Rickey Grace had vacated the marital residence prior to the time the divorce became final, the Court infers that Rickey Grace retained any personal property which he had taken with him when he left the marital residence. It is clear that the value of the share of the marital property received by Rickey Grace was considerably less than the value of the property given to Tammy Grace. The Trustee repeatedly states that Rickey Grace got nothing, which is factually incorrect. As the division of property is set forth in the divorce decree there was no need for the Court to conduct an evidentiary hearing to determine this fact.

stated as follows:

[A] fraudulent conveyance may exist if the debtor agreed to the nondebtor spouse's receiving more than any rational application of the factors [concerning distribution of property in a divorce] would have yielded had the matter been litigated. In Sorlucco, 68 B.R. at 755, the court announced the following test:

“It must be shown that the property division was the result of arms-length bargaining in the light of the likely range of distribution that the divorce court might order if the matter went to a contested trial. Settlements reached in the shadow of an imminent bankruptcy filing would raise a clear factual question as to the bona fides of such bargaining.”

That is the appropriate test in the court's view.

The court declines to view § 548(a)(2)'s definition of “reasonably equivalent value” as overriding District of Columbia law's list of factors for dividing up entireties property upon a divorce. Instead, District of Columbia law defines the extent, if any, of the debtor's entitlement to the property. The “reasonably equivalent value” of the debtor's treatment under any property settlement must be viewed against that entitlement.

In re Hope, 231 B.R. at 416 (parenthetical not in original).

The Trustee's contention in this case was that the transfer of the marital residence to Tammy Grace was fraudulent because Rickey Grace did not get anything in return. That contention is not factually correct. Rather, the divorce court made a division of property pursuant to a judgment of divorce. Tammy Grace received the residence as well as the furniture. Each party retained their own vehicle. While Rickey Grace unquestionably received less of the marital property than did Tammy Grace, it is not factually correct to state that he received nothing.

The Bankruptcy Code gives a trustee in bankruptcy considerable powers to set aside transfers

made by debtors. See 11 U.S.C. §§ 544–550. With this considerable power comes the responsibility to use it fairly. Moreover, the Court has the responsibility to supervise its trustees. See 11 U.S.C. § 324 (power to remove trustee), 11 U.S.C. § 326 (power to set trustee’s compensation), 11 U.S.C. § 327 (power to approve trustee’s employment of professionals), 11 U.S.C. §§ 328, 330 (power to set compensation of professional persons employed by the trustee) The Court is of the view that the Trustee and his lawyer abused the Trustee’s powers and for this reason the Court will deny compensation.

The Court set out in detail its reasons for dismissal of the Trustee’s Adversary Proceeding to set aside the divorce decree. (Adv. Pro. No. 99-132, Doc. 21). The Trustee filed a post judgment motion and when that was denied, he appealed to the District Court. These actions appear to have been calculated to cause, and in any event subsequently caused, Tammy Grace to file bankruptcy.<sup>5</sup>

One should next consider the posture of these proceedings at the time the Trustee brought his appeal. The Trustee’s attorney seeks \$12,000.00 in attorney’s fees for a case in its relatively early stages.<sup>6</sup> The Adversary Proceeding was disposed of in the Bankruptcy Court on cross motions for summary judgment. No trial was conducted. The appeal before the District Court was likewise in the

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<sup>5</sup> The Court is aware of Tammy Grace’s financial condition from the documents filed in Adv. Pro. No. 99-132, and information from her bankruptcy proceeding which was filed in the Southern District of Alabama, under Case No. 00-12628. There were no other large creditors and no other apparent cause for the bankruptcy filing.

<sup>6</sup>Because the Court is denying all compensation to the attorney for the Trustee on other grounds, it does not reach the question of whether the \$12,000.00 fee requested is reasonable. However, the Court notes that the attorney for Tammy Grace filed an application for fees in the amount of \$5,000.00, less than half the amount sought by the Trustee’s lawyer. See Doc. 41. The Court is of the view that \$5,000.00 is a more appropriate fee for the work done in this case.

early stages. Briefs had not been filed. In order to ultimately prevail, the Trustee would have had to prevail on his appeal and then actually try the case on its merits and prevail at that stage as well. The costs of all of this litigation, from Tammy Grace's point of view, would have been staggering. Her Chapter 7 Trustee was faced with the same problem, to pay potentially staggering attorney's fees with no liquid assets.

After this Court entered summary judgment in favor of Tammy Grace, the Trustee moved the Bankruptcy Court to make additional findings of fact and to reconsider its ruling. (Adv. Pro. No. 99-132, Doc. 23). In that filing, the Trustee mischaracterizes the Court's holding in the Adversary Proceeding, as having created a "divorce exception" to the fraudulent conveyance act. This Court did not create any such exception. Rather, this Court has followed other Courts which have found that an equitable division of property pursuant to a judgment of divorce is not fraudulent, even if the resulting division of property is not equal. The Court does not agree that any unequal distribution of property pursuant to a divorce is necessarily fraudulent and therefore must be set aside. To hold for the Trustee in this instance would be to eviscerate Alabama law which provides that a divorce court is to make an equitable distribution of marital property. The Trustee would have the Bankruptcy Court eliminate the concept of *equitable* distribution under Alabama law and replace it with *equal* distribution.

The Court will deny the Trustee's attorney's fees in this case because his use of the avoidance powers was abusive. "[T]he court may award to a trustee, an examiner, a professional person employed under section 327 or 1103-(A) reasonable compensation for actual, necessary services rendered." 11 U.S.C. § 330(a). That his actions ultimately resulted in the receipt of funds by the estate does not mean that they were necessary or that the Trustee was proper in his actions. Rather, this

merely demonstrates that in this case he successfully manipulated the system to generate funds for this bankruptcy estate, in an effort to generate a fee for himself and his lawyer. By denying fees in cases such as this one, the Court will prevent such abuse in the future.

#### **D. The Trustee's Bad Faith**

The Court would like to make sure that sufficient emphasis is placed on its views of the conduct of the Trustee and his lawyer. The divorce court in Baldwin County made an unequal, but equitable, division of the marital property in the Grace divorce case. The Trustee made no argument that the division was not equitable. Rather, he repeatedly asserted that the transfer was fraudulent because Rickey Grace received no consideration, a contention which is demonstrably false. Unfortunately, the Trustee pressed his flawed argument relentlessly, ultimately causing Tammy Grace to file bankruptcy herself.

The following argument made by the Trustee provides clear evidence of his malice: "It is respectfully submitted that the Court's decision, if this Court fails to grant Plaintiff's Motion, will represent an aberration in the law and will emasculate the Trustee's avoidance powers in this one district of a whole class of cases in which the Trustee and the innocent unsecured creditors he represents are treated less equitably than divorced debtors who, as in this case, both **violated their vows to their God** and each other, as well as their duties to pay their just debts." (Doc. 23, p. 4) (emphasis added). This Court will not tolerate such a malicious and hateful argument on the part of the Court's Trustees. It is grossly inappropriate for a Chapter 7 Trustee, or his lawyer, to question the faith of another litigant. It should go without saying that in the context of civil litigation, one does not charge another party with violating their vows to their God. Such a statement exceeds all bounds of decency

and will not be condoned by this Court. To put the matter plainly, the Court will not pay lawyers from funds of the estate to make inappropriate ad hominem attacks on other litigants.

#### **E. Memory's Application for Attorneys Fees**

Also before the Court is the Motion to Allow Administrative Expenses which was filed by Von Memory, counsel for Tammy Grace. (Doc. 41). Memory cites provisions of 11 U.S.C. §§ 503 and 507 in support of his application. As Memory defended a fraudulent conveyance action, in an effort to prevent his client from paying money to the estate, it cannot be maintained that his efforts were to “preserve the estate.” 11 U.S.C. § 503(b)(1)(A). Moreover, as counsel for the Defendant, he does not fall within the class of attorney's who may be paid from property of the estate. See 11 U.S.C. § 327(a), (e) and § 330 (limiting compensation to attorneys who represent the trustee and others in limited cases not applicable here).

The Court is of the view that Memory may be entitled to recover his fees from the estate, on behalf of his client, pursuant to Bankruptcy Rule 9011. For the reasons set forth above, the Court is of the view that Memory, or Tammy Grace, may have an argument that the Trustee's conduct in this litigation fell below the threshold set under Bankruptcy Rule 9011. Therefore, the motion is DENIED, WITHOUT PREJUDICE to any right to file a motion pursuant to Bankruptcy Rule 9011.

#### **IV. Conclusion**

As the Trustee and his lawyer litigated the Adversary Proceeding against Tammy Grace in bad faith, the Court will deny the application for compensation. Adversary Proceedings such as this are not reasonable or necessary, notwithstanding the fact that money was extracted from Tammy Grace's Trustee in bankruptcy. The application submitted by counsel for Tammy Grace may have merit under

Bankruptcy Rule 9011; however, the Court is of the view that counsel is not entitled to a claim for administrative expenses.

Done this 9<sup>th</sup> day of January, 2004.

/s/ William R. Sawyer  
Chief U.S. Bankruptcy Judge

c: Thomas C. McGregor, Trustee  
E. Terry Brown and Daniel Feinstein, Attorneys for Trustee  
Teresa R. Jacobs, Bankruptcy Administrator  
Von G. Memory, Attorney for Tammy Grace  
H. Marie Thornton, Attorney for Rickey Grace