

AUG 06 2007

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | |
|----------------------|---|-------------------------|
| In re: |) | BAP No. AZ-07-1063-PaAK |
| |) | |
| MICHAEL G. ACKERMAN, |) | Bk. No. 05-23358 |
| |) | |
| Debtor. |) | |
| <hr/> | | |
| REBECCA J. ACKERMAN, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | |
| MICHAEL G. ACKERMAN, |) | |
| |) | |
| Appellee. |) | |
| <hr/> | | |

MEMORANDUM¹

Submitted Without Oral Argument on July 26, 2007

Filed - August 6, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding.

Before: PAPPAS, AHART² and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Alan M. Ahart, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal presents a fairly routine issue in an odd
2 procedural context. In connection with her ex-husband's chapter
3 13³ case, Appellant Rebecca Ackerman challenges the bankruptcy
4 court's jurisdiction to determine whether a debt she owed to him
5 had been discharged in Appellant's prior chapter 7 bankruptcy
6 case. We AFFIRM.

7
8 **FACTS**

9 Appellant and Appellee, Michael G. Ackerman, were divorced
10 in 1995. In 2003, the parties engaged in litigation in Arizona
11 state court concerning child support and custody. Ultimately,
12 the state court concluded that Appellee had overpaid child
13 support to Appellant in the amount of \$7,885.57; a money judgment
14 was entered in Appellee's favor against Appellant for this
15 overpayment. In addition, applying Arizona law, the state court
16 ordered Appellant to pay Appellee's attorney fees incurred in the
17 litigation amounting to \$9,936.27, based on the reasonableness of
18 the positions taken by the parties and their respective financial
19 resources.

20 On April 19, 2004, Appellant filed a chapter 7 petition.
21 Both Appellee and his family law attorney were listed on the
22 mailing matrix used in Appellant's case and presumably received
23 notice of her bankruptcy filing. On August 18, 2004, Appellant
24 received a discharge. The case was closed on December 12, 2004.

25 _____
26 ³ Unless otherwise indicated, all chapter, section, and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1330 and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9036, prior to the effective date of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.
L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

1 On October 12, 2005, Appellee filed a chapter 13 petition;
2 he filed his proposed plan on October 28, 2005. In his amended
3 schedules, Appellee listed his claims against Appellant for the
4 overpayment of support and attorney fees based on the state
5 court's judgments as assets. Appellee took the value of these
6 assets into account in determining the amount of payments to be
7 made to creditors under his plan. See § 1325(a)(4) (providing,
8 that to be confirmed, a chapter 13 plan must pay "each allowed
9 unsecured claim [an amount that] is not less than the amount that
10 would be paid on such claim if the estate of the debtor were
11 liquidated under chapter 7")

12 While her purpose in doing so remains unclear, Appellant
13 (who was not a creditor of Appellee) objected to confirmation of
14 Appellee's chapter 13 plan, contending the debts she owed to
15 Appellee should not have been included in the calculation of his
16 plan payments.⁴ Appellant's position was that her obligations to
17 Appellee had been discharged in her chapter 7 case and,
18 therefore, it was not appropriate for Appellee to represent that
19 Appellant owed him money.⁵

20 The parties agreed to present the issues raised by
21

22 ⁴ It is difficult to understand how Appellant would have
23 been adversely impacted by the confirmation by the bankruptcy
24 court of Appellee's chapter 13 plan. However, because of our
25 disposition, we need not speculate about Appellant's motives in
26 challenging the plan.

27 ⁵ In arguments to the bankruptcy court, Appellant suggested
28 that Appellee had recorded his judgment for overpayment of child
support as a lien against Appellant's real property. But
Appellee's counsel conceded that the judgment was not recorded
and no lien existed. No issue regarding the validity of any
judgment lien is raised in this appeal, nor do we express any
opinion on that topic.

1 Appellant's objection to confirmation to the bankruptcy court by
2 way of stipulated facts and written argument, followed by oral
3 argument at a January 30, 2007 hearing. At that hearing,
4 Appellee conceded that the debt for the child support overpayment
5 had been discharged in Appellant's chapter 7 bankruptcy case. He
6 acknowledged this debt was the type specified in § 523(a)(15),
7 and that he failed to timely commence the required adversary
8 proceeding under § 523(c) and Rule 4007(c) in Appellant's
9 bankruptcy case to except the debt from her discharge.

10 The parties and bankruptcy court next turned their attention
11 to whether the debt owed by Appellant to Appellee for attorney
12 fees had been discharged. Appellant maintained that debt was
13 also discharged. Appellee countered that because the debt was
14 incurred in connection with litigation regarding custody and
15 support of the parties' children, and the fees award by the state
16 court were based on his financial need, the debt was excepted
17 from discharge without the need of any order from the bankruptcy
18 court under § 523(a)(5). However, in order to avoid further
19 litigation, Appellee offered to stipulate that only half of the
20 fees incurred were directly related to child support issues, and
21 to agree that the remainder was discharged in Appellant's chapter
22 7 bankruptcy. Appellant's counsel agreed to accept Appellee's
23 position that one-half of the fee award had been incurred in
24 dealing with child support issues. However, Appellant disagreed
25 that this debt was excepted from discharge.

26 The bankruptcy court announced its ruling, accepting
27 Appellee's position:

28 So as I take a look at the positions of the parties, I
believe at this point and so conclude as a matter of

1 fact in law that debtor has set forth a sufficient
2 basis on this record with the stipulated facts and Mr.
3 Smith's [Appellee's counsel] concession on the record
4 today that at least one half of the attorney's fees of
5 Mr. Delgado [Appellee's family law counsel] would be in
6 the nature [of] support. They would be and the nature
of a custody or other child-support issues and should
be nondischargeable under the analysis under Section
523 A5. I don't require a separate proceeding, but
come to those findings based upon what the parties
previously agreed to do on the record.

7 Tr. Hr'g 18:13-23 (January 30, 2007).

8 Following the court's oral decision, Appellant questioned
9 the procedure the bankruptcy court utilized to reach the
10 dischargeability issue. The bankruptcy court reminded the
11 parties that this was the procedure they had requested be
12 employed to resolve the issues raised by Appellant's objection.

13 On February 6, 2007, the bankruptcy court entered its Order
14 Re: Dischargeability of Claim Re: Rebecca Ackerman. Appellant
15 timely filed a notice of appeal from this order on February 12,
16 2007, contesting that portion of the order determining that one-
17 half of the attorney fee debt was not discharged in her earlier
18 bankruptcy pursuant to § 523(a)(5).

19 20 **JURISDICTION**

21 Appellant challenges the jurisdiction of the bankruptcy
22 court to decide the issues. As discussed below, we find that the
23 bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and
24 157(b)(2). We have jurisdiction pursuant to 28 U.S.C. § 158(b).

25 26 **ISSUES**

27 Whether the bankruptcy court had jurisdiction to determine,
28 in Appellee's chapter 13 case, if the debts owed by Appellant to

1 Appellee had been discharged in Appellant's previous chapter 7
2 bankruptcy.

3 Whether the bankruptcy court correctly determined that a
4 portion of the debt was nondischargeable pursuant to
5 § 523(a)(5).

7 **STANDARDS OF REVIEW**

8 In general, "[t]he standard of review is de novo for legal
9 questions and clearly erroneous for factual questions." Beaupied
10 v. Chang (In re Chang), 163 F.3d 1138, 1140 (9th Cir. 1998)
11 (citing In re Bammer, 131 F.3d 788, 792 (9th Cir. 1992) (en
12 banc)). "Questions of subject matter jurisdiction are reviewed
13 de novo[.]" Montana v. Goldin (In re Pegasus Gold Corp.), 394
14 F.3d 1189, 1193 (9th Cir. 2005) (citing In re McGhan, 288 F.3d
15 1172, 1178 (9th Cir. 2002)). "We review the bankruptcy court's
16 factual determination that a debt was for alimony, maintenance,
17 or support for clear error." Seixas v. Booth (In re Seixas), 239
18 B.R. 398, 401(9th Cir. BAP 1999). Whether the bankruptcy court
19 correctly interpreted § 523(a)(5) is a question of law we review
20 de novo. County of El Dorado v. Crouch (In re Crouch), 199 B.R.
21 690, 691 (9th Cir. BAP 1996).

23 **DISCUSSION**

24 I.

25 The bankruptcy court had jurisdiction to
26 determine the dischargeability of the debts.

27 Appellant contends that the bankruptcy court in Appellee's
28 chapter 13 case lacked jurisdiction to determine whether the debt
she owed Appellee under the state court's attorney fee order was

1 excepted from discharge in her prior chapter 7 case. Appellee
2 argues that Appellant agreed to have the dischargeability issues
3 resolved in the confirmation proceedings in his chapter 13 case.

4 The bankruptcy court's jurisdiction is established in 28
5 U.S.C. § 1334 and 28 U.S.C. § 157. Under these statutes, "[a]
6 bankruptcy court has jurisdiction over 'all civil proceedings
7 arising under title 11, or arising in or related to cases under
8 title 11.'" Pegasus Gold Corp., 394 F.3d at 1193 (quoting 28
9 U.S.C. § 1334(b)). The statute implementing this jurisdictional
10 grant provides that:

11 [b]ankruptcy judges may hear and determine all cases
12 under title 11, and any or all proceedings arising
13 under title 11, or arising in a case under title 11,
14 referred under subsection (a) of this section, and may
15 enter appropriate orders and judgments, subject to
16 review under section 158 of this title.

17 (2) Core proceedings include, but are not limited
18 to - . . .

19 (I) determinations as to the dischargeability of
20 particular debts; . . .

21 (K) determinations of the validity, extent, or
22 priority of liens;

23 (L) confirmations of plans[.]

24 28 U.S.C. § 157(b).

25 In addition to hearing and adjudicating core proceedings, "a
26 bankruptcy judge may hear a proceeding that is not a core
27 proceeding but that is otherwise related to a case under title
28 11." 28 U.S.C. § 157(c) (1). "A bankruptcy court's 'related to'
jurisdiction is very broad, 'including nearly every matter
directly or indirectly related to the bankruptcy.'" Sasson v.
Sokoloff (In re Sasson), 424 F.3d 864, 868-69 (9th Cir. 2005)
(quoting Mann v. Alexander Dawson (In re Mann), 907 F.2d 923, 926

1 n. 4 (9th Cir. 1990)).

2 If the parties consent, the bankruptcy court may enter
3 appropriate final orders and judgments in non-core proceedings
4 rather than providing proposed findings of fact and conclusions
5 of law to the district court for entry. 28 U.S.C. § 157(c)(1)-
6 (2). The Ninth Circuit Court of Appeals has held that a party's
7 failure to object to the bankruptcy court's exercise of
8 jurisdiction over a non-core matter

9 indicates a willingness to have the bankruptcy court
10 adjudicate its state law claims. Moreover, appellant
11 should not now, after fully litigating its case in
12 bankruptcy court, be permitted to object to that
13 court's jurisdiction. We hold that appellant's failure
14 to object to the bankruptcy court's jurisdiction
15 constitutes consent to that jurisdiction.

16 Daniels-Head & Assoc. v. William M. Mercer, Inc. (In re Daniels-
17 Head & Assoc.), 819 F.2d 914, 919 (9th Cir. 1987). Thus, consent
18 to the bankruptcy court's jurisdiction need not be express.

19 In this case, the issues arose in proceedings in the
20 bankruptcy court to consider whether Appellee's proposed chapter
21 13 plan should be confirmed. § 1324(a) (providing that "the
22 court shall hold a hearing on confirmation of the plan. A party
23 in interest may object to confirmation of the plan.") In
24 connection with confirmation, the parties sought a ruling from
25 the bankruptcy court determining whether Appellant's obligation
26 to Appellee for attorneys fees had been discharged in Appellant's
27 prior chapter 7 case. The proceeding before the bankruptcy court
28 was one "arising in" Appellee's chapter 13 case and "arising
under" the Bankruptcy Code. However, even characterizing the
bankruptcy court's role most favorably to Appellant's position,
the bankruptcy court was determining an issue that was clearly

1 "related to" both Appellant's and Appellee's bankruptcy cases.

2 The bankruptcy court had the power to enter a final order in
3 this case. Its ruling came in a proceeding dealing with
4 confirmation of Appellee's plan, and implicated a determination
5 about the dischargeability of Appellant's debts to Appellee and
6 the validity of any lien that may exist to secure such debts.
7 The proceeding was "core" as provided by the several paragraphs
8 of 28 U.S.C. § 157(b) set forth above.

9 Finally, contrary to Appellant's position, the bankruptcy
10 court's jurisdiction to determine the dischargeability of debts
11 is not contingent upon Appellant's chapter 7 bankruptcy case
12 being open and pending at the time:

13 Thus, while principles of ripeness require that a
14 bankruptcy case have been commenced before [the
15 bankruptcy court] can exercise § 1334(b) "arising
16 under" jurisdiction to determine if a debt is excepted
from discharge, the status of the case as open or
closed makes no difference so long as nothing has
mooted the controversy.

17 Menk v. LaPaglia (In re Menk), 241 B.R. 896, 905-906 (9th Cir.
18 BAP 1999). Here, Appellant brought the dischargeability issue to
19 the bankruptcy court by way of her objection to confirmation of
20 Appellee's chapter 13 plan. It was not a necessary condition to
21 reopen Appellant's bankruptcy case in order for the bankruptcy
22 court to exercise its jurisdiction to determine the
23 dischargeability issue.

24 Moreover, the Ninth Circuit has recognized that the
25 bankruptcy court presiding over a debtor's case does not exercise
26 exclusive jurisdiction over determinations of whether debts are
27 excepted from discharge under § 523(a)(5). Rein v. Providian
28 Fin. Corp., 270 F.3d 895, 904 n. 15 (9th Cir. 2001) (citing In re

1 Siragusa, 27 F.3d 406, 408 (9th Cir. 1994)). For example, a
2 state domestic relations court may make a dischargeability
3 determination under § 523(a)(5) after entry of a bankruptcy
4 discharge. Aldrich v. Imbrogno (In re Aldrich), 34 B.R. 776, 781
5 (9th Cir. BAP 1983). Only exceptions to discharge based on
6 §§ 523(a)(2) (debts for fraud), (a)(4) (embezzlement or fraud by
7 a fiduciary), (a)(6) (debts for willful and malicious injuries),
8 or (a)(15) (nonsupport debts arising from a divorce) must be
9 decided by the bankruptcy court within the time constraints
10 imposed by Rule 4007(c). Under the facts presented here, either
11 the state court or the bankruptcy court in Appellee's chapter 13
12 case would have jurisdiction to decide whether Appellant's
13 obligation to pay Appellee's attorneys fees incurred in the
14 custody and support litigation was excepted from discharge under
15 § 523(a)(5).

16 Finally, the record demonstrates that Appellant effectively
17 and expressly consented that the determination regarding the
18 dischargeability of her debts to Appellee could be made by the
19 bankruptcy court in Appellee's chapter 13 case. It was not until
20 the bankruptcy court ruled against Appellant that she objected to
21 the procedure employed, contending that the dischargeability
22 determination should have been made by way of an adversary
23 proceeding filed and decided by the bankruptcy court in her
24 chapter 7 bankruptcy case. The bankruptcy court, in response to
25 Appellant's complaint, explained:

26 We get to the bigger issue as to Mr. Fatta's [Ms.
27 Ackerman's attorney] concerns, how do we present as to
28 the Court? Well, back in December the parties
basically said they wanted to submit a number of issues
to me through the statement of facts and memoranda of
law.

1 Now, I could've set it up where there would have been a
2 separate adversary proceeding under Section 523 A5 I
3 suppose, but that wasn't how the parties presented it
4 to me. In other words, they said that basically this
5 is how they wanted to submit the issues; they thought
6 that there were some remain [sic] issues; and that they
7 would present again a stipulated statement of facts,
8 memorandum of law, and that ultimately I was going to
9 decide the matter. So I don't see Mr. Fatta, a basis
10 at least on this record, to go back now and say, all
11 right. I want an underlying complaint and I want to
12 get into the Section 523 A15 issues. I don't think
13 that's appropriate given the consent of the parties as
14 to how they wanted to proceed.

9 Tr. Hr'g 15:25-16:17.

10 When Appellant again raised her contention that her
11 bankruptcy case would need to be reopened and an adversary
12 proceeding commenced to determine the amount, if any, of the debt
13 that was nondischargeable, the bankruptcy court responded

14 So where we are right now and this gets back to the
15 agreement of the parties, where we are right now is the
16 parties back in December said we're going to submit
17 these various issues.

18 We've got a number of issues obviously some of them
19 you've resolved, but some of them have not been
20 resolved. Your client has won on some of these issues,
21 Mr. Fatta. Mr. Smith's client has won on some of the
22 other issues. So that's kind of the nature of it, but
23 given the fact that you set it up to be resolved this
24 way I don't see a basis to now go back and say separate
25 and apart from the agreement of the parties I now want
26 to have a complaint filed and now I want to explore
27 Section 523 A5. I just don't think that's what the
28 parties agreed to.

23 Tr. Hr'g 20:9-21.

24 Appellant's counsel continued to question the bankruptcy
25 court as to how it reached the dischargeability issue until he
26 apparently understood the bankruptcy court's reasoning:

27 MR. FATTA: I guess - - I guess I'm looking for the
28 nexus to how do you get to the A5 [issue]? How do you
know it's an A5 issue without some sort of
determination? I mean - -

1 THE COURT: Because she presented it to me through
2 stipulated facts.

3 MR. FATTA: Okay. We've got - - we've got an affidavit
4 that's right. All right.

5 THE COURT: Yeah.

6 MR. FATTA: I guess I'm just having trouble with that
7 nexus determining how you get there, but I understand
8 what you're saying.

9 Tr. Hr'g 21:16-22:1.

10 The record is clear that Appellant raised both the question
11 of the discharged status of the debts she owed Appellee, and the
12 validity of any liens held by Appellee, in the chapter 13 case.
13 Under 28 U.S.C. § 1334(b), these issues are firmly within the
14 purview of the bankruptcy court's jurisdiction. Under 28 U.S.C.
15 § 157(b)(2), the matter before the bankruptcy court was a core
16 proceeding in which it was authorized to enter a final judgment.
17 But even if these issues are somehow considered non-core
18 proceedings, Appellant consented to the bankruptcy court's power
19 to enter a final decision when she agreed to present the issues
20 to the bankruptcy court by way of stipulated facts and oral
21 argument. See Daniels-Head & Assoc., 819 F.2d at 919.⁶

22 ⁶ We acknowledge that Rule 7001(6) prescribes that a
23 determination regarding the dischargability of a debt should
24 normally be sought via an adversary proceeding, and not in
25 connection with confirmation of a chapter 13 plan. We discussed
26 the legitimacy of the procedure when chapter 13 plan confirmation
27 proceedings are employed to resolve two-party disputes that
28 ordinarily require separate litigation in a recent decision,
Litton Loan Serv'g v. Garvida (In re Garvida), 347 B.R. 697(9th
Cir. BAP 2006). In Garvida, we noted that caution is required
when ersatz procedure is used, but that in some cases the
litigation choices of the parties may legitimize otherwise
incorrect procedure, and that any procedural error may be
rendered harmless by the manner in which the parties actually
conducted the litigation. Id. at 703-04. This is such a case.

1 We conclude that the bankruptcy court had jurisdiction to
2 adjudicate the issues raised in this case.⁷

3
4 II.

5 The bankruptcy court did not clearly err in determining
6 that one-half of the attorney fees awarded by the state
7 court to Appellee constituted a debt in the nature of
8 support and thus had not been discharged in Appellant's
9 chapter 7 bankruptcy case.

10 Presumably in the alternative, Appellant also argues that
11 the bankruptcy court erred in determining that even a portion of
12 the attorney fee debt was nondischargeable pursuant to
13 § 523(a)(5).⁸ She contends the entire debt should have been
14 discharged pursuant to § 523(a)(15).⁹ Appellee disagrees, and so

15 ⁷ Recall, Appellant prevailed on several issues: the lien
16 securing the overpaid child support was invalid because that debt
17 was discharged in Appellant's earlier bankruptcy, and Appellee
18 conceded that one-half of the attorney fees awarded by the state
19 court could also be discharged. To be sure, Appellant has not
20 argued that the bankruptcy court lacked jurisdiction to rule in
21 her favor.

22 ⁸ The version of Section 523(a)(5)(B) applicable in
23 Appellee's case instructs that a debt will not be discharged if
24 it is a debt

25 to a spouse, former spouse, or child of the debtor, for
26 alimony to, maintenance for, or support of such spouse
27 or child in connection with a separation agreement,
28 divorce decree or other order of a court of record,
determination made in accordance with State or
territorial law by a governmental unit, or property
settlement agreement, but not to the extent that -
(B) such debt includes a liability designated as
alimony, maintenance, or support, unless such liability
is actually in the nature of alimony, maintenance, or
support.

⁹ The applicable version of § 523(a)(15), in effect at the
time both Appellant and Appellee filed their bankruptcy cases,
provided:

(continued...)

1 do we.

2 An award of attorney fees by a state court in custody
3 litigation involving the debtor may be in the nature of support
4 and, therefore, nondischargeable in the debtor's bankruptcy case
5 under § 523(a) (5). Marks v. Catlow (In re Catlow), 663 F.2d 960,
6 961 (9th Cir. 1981). Although federal law determines whether the
7 debt in question is in the nature of support, the bankruptcy
8 court may look to state law for guidance. Gard v. Gibson (In re
9 Gibson), 103 B.R. 218, 220 (9th Cir. BAP 1989). Whether a debt
10 is actually in the nature of support as contemplated by
11 § 523(a) (5) is a factual determination. Chang, 163 F.3d at 1146.
12 "A relevant factor for the bankruptcy court to consider when
13 making this determination is how the particular state law
14 characterizes the debt." Id. (citing Catlow, 663 F.2d 960, 962-
15 63 (9th Cir. 1981)). "Where the award was rendered in a
16 contested proceeding, another relevant fact is the intent of the

17
18 ⁹(...continued)

19 A discharge . . . does not discharge an individual
20 debtor from any debt - not of the kind described in
21 paragraph (5) that is incurred by the debtor in the
22 course of a divorce or separation or in connection with
23 a separation agreement, divorce decree or other order
24 of a court of record, a determination made in
25 accordance with State or territorial law by a
26 governmental unit unless-

27 (A) the debtor does not have the ability to pay such
28 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

(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.

1 state court." Gionis v. Wayne (In re Gionis), 170 B.R. 675, 682
2 (9th Cir. BAP 1994). Another "factor in characterizing an
3 obligation as one intended for support is the need of the
4 recipient spouse." Gibson, 103 B.R. at 221.

5 The only evidence submitted to the bankruptcy court
6 concerning the nature of the obligation as support was the state
7 court's order requiring Appellant to pay Appellee's attorney's
8 fees, included in the parties' Joint Statement of Facts. The
9 state court awarded the attorney fees pursuant to Ariz. Rev.
10 Stat. § 25-324, governing attorney fee awards in marital and
11 domestic relations litigation, which provides in pertinent part:

12 The court from time to time, after considering the
13 financial resources of both parties and the
14 reasonableness of the positions each party has taken
15 throughout the proceedings, may order a party to pay a
reasonable amount to the other party for the costs and
expenses of maintaining or defending any proceeding
under this chapter[.]

16 ARIZ. REV. STAT. ANN. § 25-324 (2004). The attorney's fee order in
17 this case specified, "[h]aving considered the reasonableness of
18 the positions taken by the parties and the financial resources,
19 the Court finds that Respondent [Appellee] shall be entitled to
20 attorney fees pursuant to ARS 25-324." Arizona case law is
21 explicit that attorney fees may be awarded any time there is a
22 financial disparity between the parties. Magee v. Magee, 81 P.3d
23 1048, 1051 (Ariz. App. 2004) ("Recognizing that payment of
24 attorneys' fees is an aspect of the support duty permits us to
25 make this point: every spouse regardless of wealth owes a duty of
26 support to his or her marital partner[.]") Given the state
27 statute upon which the fee award was based, and the case law
28 construing that statute, the bankruptcy court could find that the

1 attorney fees were awarded to Appellee, at least in part, based
2 upon the parties' relative financial needs.

3 Accepting Appellee's suggestion, the bankruptcy court also
4 found that at least one-half of the fees awarded were directly
5 attributable to the litigation in the state court of custody and
6 support issues:

7 I suspect I could probably find attorney's fees and
8 costs in excess of the one half amount as proposed by
9 Mr. Smith, but that's all his client is requesting at
10 this point in time. And I don't find that position
11 unreasonable to say that at least half of the
12 attorney's fees and costs requested by Mr. Delgado as
13 reflected in his affidavit would be in the nature of
14 custody or support.

15 Tr. Hr'g 15:18-24. The bankruptcy court considered the relevant
16 state law, noting that all decisions involving child custody and
17 support must be based upon the best interests of the child,
18 concluding, "therefore any attorney's fees that are awarded are
19 along the lines of what is in the best interest of the child and
20 also support this idea that [the attorney fee award] is in the
21 nature of child-support as a result." Tr. Hr'g 17:22-25.

22 This conclusion is supported by Ninth Circuit case law that
23 the bankruptcy court also considered. In Catlow, the court
24 addressed the dischargeability of attorney fees awarded under the
25 same Arizona statute.¹⁰ The court pointed out that "Arizona

26 ¹⁰ The version of the statute in effect at that time was
27 slightly different, not requiring the state court to consider the
28 reasonableness of the parties arguments:

The court from time to time, after considering the
financial resources of both parties, may order a party
(continued...)

1 courts have ruled consistently that this statutory obligation is
2 founded upon a spouse's duty of support to his or her spouse."
3 Catlow, 663 F.2d at 962. In addition, the statute "permits a fee
4 award upon a showing of financial necessity and requires a court
5 to consider the respective needs and incomes of both spouses
6 prior to making the award." Id. See also In re Marriage of
7 Zale, 972 P.2d 230, 235 (Ariz. 1999) ("The purpose of the statute
8 [A.R.S. § 25-324] is to provide a remedy for the party least able
9 to pay."). In Catlow, the Ninth Circuit concluded that the
10 attorney fees awarded under this statute during the custody
11 litigation were in the nature of support and were therefore
12 nondischargeable under the prior Bankruptcy Act.¹¹

13 Based upon the record, the bankruptcy court's factual
14 findings that a portion of the attorney fee debt was in the
15 nature of support for purposes of § 523(a)(5) was not clearly
16 erroneous, and its conclusion that the debt was not discharged in
17

18 ¹⁰ (...continued)

19 to pay a reasonable amount to the other party for the
20 costs and expenses of maintaining or defending any
proceeding under this chapter.

21 Catlow, 663 F.2d at 963 n.4 (quoting ARIZ. REV. STAT. ANN.
22 § 25-324 (1976)).

23 ¹¹ In Chang, the Ninth Circuit explained that Catlow,
24 although an Act case, remains good law under the Code because
25 both statutes except support obligations from discharge. 163
26 F.3d at 1141. In Chang, the Ninth Circuit affirmed a bankruptcy
27 court's decision that fees incurred for the appointment in a
28 custody dispute of a guardian ad litem, as well as other experts
to consider the child's best interests, constituted support
obligations and were nondischargeable under § 523(a)(5) even
though the expenses were payable to the third parties providing
the services. Id. at 1141-42.

1 Appellant's earlier bankruptcy was correct.¹²

2
3 **CONCLUSION**

4 The bankruptcy court had jurisdiction to decide the issues
5 presented by the parties. The bankruptcy court did not clearly
6 err when it found that one-half of the attorneys fees awarded by
7 the state court to Appellee from Appellant constituted a
8 nondischargeable debt in the nature of support under § 523(a)(5).
9 We AFFIRM the decision of the bankruptcy court.

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25 ¹² Appellee, in his brief, argues that this appeal was
26 frivolous, without a basis in law or fact, and should be
27 dismissed, and that Appellee should be awarded attorney's fees.
28 Although we find Appellant's arguments unpersuasive, they were
not so lacking in legal and factual foundation as to be
frivolous. We decline to dismiss or award attorney's fees to
Appellees.