

AUG 17 2006

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	AZ-05-1395-AMoS
7	WILLIAM ANDREW REHKOW,)	Bk. No.	04-11697
8	Debtor.)	Adv. No.	04-00936
9	_____)		
10	WILLIAM ANDREW REHKOW,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	KIMBERLY LEWIS,)		
14	Appellee.)		
15	_____)		

Argued and Submitted on June 22, 2006
at Phoenix, Arizona

Filed - August 17, 2006

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

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding.

Before: AHART,² MONTALI and SMITH, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. 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 Debtor and Defendant William Andrew Rehkow ("Debtor")
2 appeals from an order granting summary judgment to Plaintiff and
3 creditor Kimberly Lewis ("Lewis") determining that the debt owed
4 by Debtor to Lewis, in the amount of \$12,482.37, is non-
5 dischargeable pursuant to 11 U.S.C. § 523(a)(5)³. The bankruptcy
6 court found that the debt consisted of attorneys' fees and
7 expert's fees incurred in the course of the dissolution of the
8 marriage of the parties and, thus, the debt is non-dischargeable
9 in bankruptcy. We AFFIRM.

10 I. FACTS

11 On October 3, 2003, the Superior Court of Arizona for
12 Maricopa County entered an order dissolving the marriage of
13 Debtor and Lewis and providing for the division of property and
14 debt and child custody/child support. The parties had entered
15 into a premarital agreement and, as a result, the court found
16 that no community, joint, or marital assets or property, and no
17 community obligations, existed. In addition, each party waived
18 the right to spousal maintenance. The couple had a child
19 together, and during the dissolution action an acrimonious
20 dispute arose between Debtor and Lewis over the issues of
21 visitation and custody of the child.

22 Within that context, and pursuant to a stipulation between
23 the parties, on July 17, 2002 the Arizona Superior Court
24

25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the generally effective date
(October 17, 2005) of The Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23
(2005).

1 appointed Dr. Paulette Selmi ("Dr. Selmi") as a mental health
2 expert for the purpose of providing an opinion to the court
3 relating to the issues of custody and visitation. The
4 appointment order provided that Dr. Selmi's fees were to be paid
5 one-half by each spouse, subject to further order of the court.

6 After Debtor filed a complaint against Dr. Selmi with the
7 agency that licensed her, Dr. Selmi recused herself from the
8 dissolution case in August 2003. Despite the court's order and
9 the parties' stipulation, Debtor failed to pay his portion of Dr.
10 Selmi's fees for her services. According to the evidence and
11 arguments presented, Lewis made two payments to Dr. Selmi to
12 satisfy the Debtor's unpaid amount of the fees, totaling
13 \$3,587.87. Separately, Lewis also satisfied her one-half of
14 Selmi's fees.

15 In the decree of dissolution the court mandated that the
16 parties submit affidavits detailing each party's proposed
17 allocation of the fees incurred during the proceeding, including
18 a specific dollar amount request. Upon consideration of the
19 submitted documents, on November 13, 2003 the Arizona Superior
20 Court granted an award of \$12,482.37 to Lewis and against Debtor
21 for attorneys' fees Lewis incurred in connection with disputes
22 regarding Dr. Selmi's services and the fees paid to Dr. Selmi on
23 behalf of the Debtor, for which Lewis is entitled to
24 reimbursement pursuant to the appointment order. Debtor has not
25 paid any portion of this award.

26 On July 2, 2004, Debtor filed for relief under Chapter 7 of
27 the Bankruptcy Code. Shortly thereafter, on July 30, 2004, Lewis
28 filed a Complaint Objecting to Discharge under various provisions

1 of 11 U.S.C. § 523(a), including 11 U.S.C. § 523(a)(5).⁴ On June
2 13, 2005, Lewis filed a Motion for Judgment on the Pleadings:
3 Motion for Summary Judgment. On July 28, 2005, Debtor filed his
4 own Motion to Dismiss and Motion for Summary Judgment. After a
5 consolidated hearing during which the court considered the
6 motions of both Lewis and the Debtor, the bankruptcy court
7 granted summary judgment in favor of Lewis and against the Debtor
8 on Lewis's non-dischargeability claim under 11 U.S.C.
9 § 523(a)(5).⁵

10 In granting judgment for Lewis under 11 U.S.C. § 523(a)(5),
11 the bankruptcy court stated that, under Ninth Circuit law,
12 "expert's and attorneys' fees incurred during the course of a
13 dissolution, or in connection with a dissolution, which were
14 incurred in connection with custody, visitation and/or child
15 support issues, are non-dischargeable debts." The bankruptcy
16 court found that the fees at issue in the case were incurred "in
17 the course of the parties' dissolution," and were accordingly
18 non-dischargeable pursuant to 11 U.S.C. § 523(a)(5).

19 Debtor appeals the judgment granted under 11 U.S.C.
20 § 523(a)(5), arguing that the bankruptcy court erred in finding
21 the debt to be non-dischargeable. Debtor essentially contends
22 that the fee award granted by the Arizona Superior Court was not
23 in the nature of support or maintenance, but rather constituted a

24 ⁴ The Complaint was later amended, and certain causes of
25 action were added and withdrawn. The claim under 11 U.S.C.
26 § 523(a)(5) remained.

27 ⁵ The Amended Complaint also asserted a non-dischargeability
28 cause of action under 11 U.S.C. § 523(a)(6). As to this claim,
the bankruptcy court granted summary judgment in favor of Debtor.
Lewis did not appeal that judgment.

1 form of punishment or sanctions in response to Debtor's
2 unreasonable conduct during the course of the dissolution
3 proceedings. Lewis argues that the bankruptcy court properly
4 determined that the debt was non-dischargeable in bankruptcy, as
5 the debt was in the nature of support and incurred during a
6 dissolution of marriage and custody proceeding.

7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
9 and §§ 157(b)(1) and (b)(2)(G). We have jurisdiction under 28
10 U.S.C. §§ 158(b)(1) and (c)(1).

11 **III. ISSUE**

12 Whether the debt owed by Debtor to Lewis, in the amount of
13 \$12,482.37, is non-dischargeable pursuant to 11 U.S.C.
14 § 523(a)(5).

15 **IV. STANDARD OF REVIEW**

16 The standard of review for legal questions is de novo and
17 clearly erroneous for factual questions. Beaupied v. Chang (In
18 re Chang), 163 F.3d 1138, 1140 (9th Cir. 1998). The issue in
19 this case, i.e., whether a debt is in the nature of maintenance,
20 alimony, or support, is a factual determination, id., (citing In
21 re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996), rev'd on other
22 grounds, In re Bammer, 131 F.3d 788 (9th Cir. 1997) (en banc)),
23 which cannot be set aside unless clearly erroneous. In re
24 Gibson, 103 B.R. 218, 220 (9th Cir. B.A.P. 1989). Summary
25 judgment determinations are reviewed de novo. In re Marvin
26 Properties, Inc., 854 F.2d 1183, 1185 (9th Cir. 1988).

1 **V. DISCUSSION**

2 Section 523(a) (5)⁶ excepts from discharge any debts owing
3 "to a spouse, former spouse, or child of the debtor, for alimony
4 to, maintenance for, or support of such spouse or child, in
5 connection with a separation agreement, divorce decree or other
6 order of a court of record" This provision balances
7 dueling policies in that, on the one hand, allowing a debtor a
8 "fresh start" requires that the court limit the exceptions to
9 discharge to those expressly provided in the Bankruptcy Code. In
10 re Klapp, 706 F.2d 998, 999 (9th Cir. 1983). On the other hand,
11 the Ninth Circuit Court of Appeals recognizes "an overriding
12 public policy favoring the enforcement of familial obligations."
13 Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984).

14 To determine whether a state court award of fees is
15 dischargeable, a bankruptcy court must look to federal law as
16 embodied by the Bankruptcy Code. As the Ninth Circuit Court of
17 Appeals has remarked, "in enacting the [Bankruptcy] Code,
18 Congress dictated that [the] . . . determination [of whether an
19 obligation is in the nature of alimony, maintenance or support]
20 should be made by application of federal rather than state law."
21 Stout v. Prussel, 691 F.2d 860, 861 (9th Cir. 1982) (citing H.R.
22 Rep. No. 95-595, at 364 (1977), as reprinted in 1978 U.S.C.C.A.N.
23 5787, 6320). "Because of the federal interests reflected in the
24 Bankruptcy Act, the courts look to federal law to determine
25 whether an obligation is 'actually in the nature of . . .

26 _____
27 ⁶ This bankruptcy case was filed on July 2, 2004 and is
28 therefore governed by the provisions of § 523(a) (5) as written
prior to the enactment of the Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005.

1 support' and is therefore nondischargeable '[R]egardless
2 of how a state may choose to define [support], a federal court,
3 for purposes of applying the federal bankruptcy laws, is not
4 bound to a label that a state affixes to an award, and that,
5 consistent with the objectives of federal bankruptcy policy, the
6 substance of the award must govern.'" Shaver, 736 F.2d at 1316
7 (quoting Ersparan v. Badgett, 647 F.2d 550, 555 (5th Cir. 1981))
8 (internal citations omitted).

9
10 A. Attorneys' Fees

11 The debt at issue includes an award to Lewis for a portion
12 of her attorneys' fees and costs in the amount of \$8,894.50.⁷
13 These attorneys' fees and costs were incurred solely in
14 connection with disputes over Dr. Selmi's services, as these
15 services pertained to the custody and visitation issues before
16 the Arizona Superior Court. The Arizona Superior Court made the
17 award against Debtor pursuant to Ariz. Rev. Stat. Ann. § 25-324
18 (1996).⁸ In its order, the court stated that it "considered the
19 provisions of ARS 25-324 and the relative financial resources of
20 the parties." The court also said that "both parties have been
21 unreasonable throughout these proceedings in some respects [but]

22 ⁷ Lewis filed an Application and Affidavit for Attorneys'
23 Fees and Costs with the Superior Court, in which she requested an
24 award of attorneys' fees and costs in the total amount of
\$18,901.70.

25 ⁸ The relevant portion of the statute provides, "The court
26 from time to time, after considering the financial resources of
27 both parties and the reasonableness of the positions each party
28 has taken 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 . .
. . ."

1 . . . [t]he court finds that [Debtor's] positions taken on the
2 overall have been more unreasonable than [Lewis's]."

3 Cases in the Ninth Circuit and in other circuits customarily
4 have held that attorneys' fees awarded in connection with a
5 dissolution proceeding are non-dischargeable in bankruptcy under
6 § 523(a) (5) as alimony, maintenance, or support. See, e.g., In
7 re Spong, 661 F.2d 6, 11 (2nd Cir. 1981); In re Gwinn, 20 B.R.
8 233, 235 (9th Cir. B.A.P. 1982). More importantly, the vast
9 majority of reported decisions dealing with an award of
10 attorneys' fees in a child custody proceeding have concluded that
11 the fees were in the nature of the child's support within the
12 meaning of § 523(a) (5).⁹ See, e.g., Miller v. Gentry (In re
13 Miller), 55 F.3d 1487, 1490 (10th Cir. 1995); Jones v. Jones (In
14 re Jones), 9 F.3d 878, 882 (10th Cir. 1993); Dvorak v. Carlson
15 (In re Dvorak), 986 F.2d 940, 941 (5th Cir. 1993); Peters v.
16 Hennenhoeffer (In re Peters), 964 F.2d 166, 167 (2nd Cir. 1992);
17 Marks v. Catlow (In re Catlow), 663 F.2d 960, 963 (9th Cir. 1981)
18 (construing former law); James C. Booth, Inc. v. Ratcliff (In re
19 Ratcliff), 195 B.R. 466, 468 (Bankr. C.D. Cal. 1996). See also
20 Gionis v. Wayne (In re Gionis), 170 B.R. 675, 683 n. 11 (9th Cir.

21 _____
22 ⁹ The only reported circuit level decision dealing with a
23 custody/visitation dispute that held that attorneys' fees awarded
24 in connection therewith should not be excepted from discharge
25 under § 523(a) (5) is Adams v. Zentz, 963 F.2d 197 (8th Cir.
26 1992). In Adams, the bankruptcy court held that the attorney's
27 fees were not in the nature of support, as the custody dispute
28 focused primarily on the debtor's conduct with respect to the
custody and visitation agreement, and not on the child's health
and welfare. Id. at 200. The Eighth Circuit found that the
bankruptcy court's decision was not clearly erroneous. Id. at
200-01. However, the Eighth Circuit "acknowledge[d] that the
record might plausibly be read to support a finding [that the
fees were nondischargeable]." Id. at 201.

1 B.A.P. 1994), aff'd 92 F.3d 1192 (9th Cir. 1996) (noting that an
2 attorney's fees award in a marital dissolution proceeding "based
3 upon custody battles in which an important issue is ordinarily
4 the welfare of the child . . . would not be difficult to
5 characterize . . . as child support.").

6 In holding that attorneys' fees incurred during a child
7 custody proceeding are in the nature of support, the courts have
8 primarily focused on the fact that the issues involved in custody
9 disputes are generally decided by consideration of the child's
10 best interests. As an example, in the Jones case the Tenth
11 Circuit observed that, "[g]enerally, custody actions are directed
12 toward determining which party can provide the best home for the
13 child's benefit and support. Therefore, in order that genuine
14 support obligations are not improperly discharged, we hold that
15 the term 'support' encompasses the issue of custody absent
16 unusual circumstances" Jones, 9 F.3d at 882. See also
17 Falk & Streiner, LLP v. Maddigan (In re Maddigan), 312 F.3d 589,
18 597 (2nd Cir. 2002) (concluding that attorneys' fees imposed by a
19 state court during a child custody proceeding are in the nature
20 of support for the child); Dvorak, 986 F.3d at 941 (finding that
21 attorney's fees arising from a custody hearing are for the
22 child's benefit and support); Ratcliff, 195 B.R. at 467 (stating
23 that "a child custody proceeding is always in the nature of child
24 support" and that "the purpose of the custody proceeding . . .
25 was to determine who could provide the best home for [the
26 child]"); Holtz v. Poe (In re Poe), 118 B.R. 809, 812 (Bankr.
27 N.D. Okla. 1990) ("Since determination of child custody is
28 essential to the child's proper 'support,' attorney fees incurred

1 and awarded in child custody litigation should likewise be
2 considered as obligations for 'support,' at least in the absence
3 of clear indication of special circumstances to the contrary.").

4 In the instant case, all of the attorneys' fees awarded to
5 Lewis arose from the proceedings to determine custody of and
6 visits to the former couple's minor child. Under Arizona law,
7 the Arizona Superior Court must determine custody of a minor
8 child in accordance with the best interests of the child. Ariz.
9 Rev. Stat. Ann. § 25-403 (2005).¹⁰

10 The Arizona court's award of attorneys' fees against Debtor
11 was predicated upon, *inter alia*, a finding that Debtor's
12 positions were more unreasonable than Lewis's. Debtor relies
13 upon this finding as the basis of his contention that the Arizona
14 court granted the award as a form of sanctions against him.
15 However, this finding does not in any way alter the conclusion
16 that, under federal bankruptcy law, these fees were incurred in
17 the best interests of and to support the minor child.¹¹

18 We follow the cases discussed above and hold that attorneys'
19 fees incurred in child custody proceedings in which issues
20 involving the best interests of the child are in dispute are in
21 the nature of support and, thus, non-dischargeable in bankruptcy.
22 Consequently, the debt owing to Lewis for her attorneys' fees

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24 ¹⁰ The statute provides that, "The court shall determine
25 custody . . . in accordance with the best interests of the
26 child."

26 ¹¹ See In re Leibowitz, 217 F.3d 799, 803 (9th Cir. 2000)
27 ("The legal question is not whether repayment of the debt will
28 benefit the children, but whether the basis of the debt
benefitted the children.").

1 incurred in connection with the dispute over Dr. Selmi's services
2 are non-dischargeable under § 523(a)(5).¹²

3

4 B. Dr. Selmi's Fees

5 As noted above, the Arizona Superior Court directed Debtor
6 to pay one-half of Dr. Selmi's fees, subject to further court
7 order. Lewis paid both her share and at least part of Debtor's
8 share, and the Arizona Superior Court ultimately ordered Debtor
9 to reimburse Lewis for the Debtor's portion of these fees. As
10 part of its ruling on the summary judgment motions, the
11 bankruptcy court ordered that Dr. Selmi's fees also were not
12 discharged pursuant to § 523(a)(5).

13 In the Miller case, *supra*, the Tenth Circuit held that
14 psychologist and guardian ad litem fees incurred in
15 divorce/custody proceedings were non-dischargeable under
16 § 523(a)(5). The Tenth Circuit stated that, "[d]ebts to a . . .
17 psychologist hired to evaluate the family in child custody
18 proceedings, can be said to relate just as directly to the

19

20 ¹² Lewis also argues that the debt owing for her attorneys'
21 fees should be deemed non-dischargeable as ancillary to a clearly
22 non-dischargeable debt, i.e., Dr. Selmi's fees. In support of
23 this contention, Lewis cites to the Supreme Court case of Cohen
24 v. de la Cruz, 523 U.S. 213 (1998), for the notion that
25 subsequent debt is also non-dischargeable when the underlying
26 debt giving rise to such secondary debt is determined to be non-
27 dischargeable. While the record demonstrates that the attorneys'
28 fees were incurred solely as a result of the dispute over Dr.
Selmi's services, Cohen construed the exception from discharge
for fraud under section 523(a)(2)(A), which is not at issue in
this appeal. Cohen, 523 U.S. at 223 (Non-dischargeable debt
obtained by fraud "encompasses any liability arising from money,
property, etc., that is fraudulently obtained, including . . .
attorney's fees . . .").

1 support of the child as attorney's fees incurred by the parents
2 in a custody proceeding." Miller, 55 F.3d at 1490. Similarly,
3 in Chang the Ninth Circuit reversed and remanded a decision of
4 the Bankruptcy Appellate Panel, which had reversed a judgment of
5 the bankruptcy court, which held the fees of a guardian ad litem
6 appointed in a bitter child custody dispute were non-
7 dischargeable pursuant to § 532(a)(5). Chang, 163 F.3d at 1140-
8 41.

9 Other courts have followed the lead of the Ninth and Tenth
10 Circuits in holding the fees of a guardian ad litem to be a
11 § 523(a)(5) non-dischargeable debt. See Stark v. Bishop, No. 97-
12 2151, 1998 WL 325950, at *3 (4th Cir. June 18, 1998) (unpublished
13 opinion); Cloyd v. Alaruri (In re Alaruri), 227 B.R. 824, 826
14 (Bankr. S.D. Ind. 1997); Walter v. Neville (In re Neville), Nos.
15 96-32004, 97-0254, 1997 WL 419386, at *3, (Bankr. W.D. Tenn. July
16 22, 1997).

17 Here, Dr. Selmi was appointed by the Arizona Superior Court
18 to examine Debtor, Lewis and their minor child in order to assist
19 the court in resolving the custody and visitation issues in
20 dispute between Debtor and Lewis. Therefore, Dr. Selmi's fees
21 were incurred on behalf of the child and were clearly in the
22 nature of support. In light of the foregoing authorities, these
23 fees are non-dischargeable pursuant to § 523(a)(5).

24 **VI. CONCLUSION**

25 The bankruptcy court did not clearly err in determining that
26 the award for attorneys' fees was in the nature of support and
27 therefore non-dischargeable under § 523(a)(5). Nor did the
28 bankruptcy court clearly err when it held that Dr. Selmi's fees

1 were non-dischargeable. Thus, the bankruptcy court's order
2 granting summary judgment is **AFFIRMED**.

3 Lewis has requested that this Court grant her attorneys'
4 fees against Debtor for this appeal, arguing that the appeal was
5 without merit and another example of Debtor's penchant for
6 pursuing frivolous litigation. However, we deny this request for
7 being procedurally improper because it was not brought by
8 separate motion, as required by Federal Rule of Bankruptcy
9 Procedure 8020.¹³

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¹³ Moreover, although Debtor lost this appeal, we do not believe that the result of the appeal was "obvious" or that Debtor's arguments were "wholly without merit." Mackey v. Pioneer National Bank, 867 F.2d 520, 527 (9th Cir. 1989). Therefore, we would likely deny Lewis's request on that basis as well.