NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-05-1395-AMoS
WILLIAM ANDREW REHKOW,	Bk. No. 04-11697
Debtor.	Adv. No. 04-00936
WILLIAM ANDREW REHKOW,	
Appellant,	
v.	**MEMORANDUM**[1]
KIMBERLY LEWIS,	
Appellee.	

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.

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[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.

Debtor and Defendant William Andrew Rehkow ("Debtor") appeals from an order granting summary judgment to Plaintiff and creditor Kimberly Lewis ("Lewis") determining that the debt owed by Debtor to Lewis, in the amount of $12,482.37, is non-dischargeable pursuant to 11 U.S.C. § 523(a)(5)[3]. The bankruptcy court found that the debt consisted of attorneys' fees and expert's fees incurred in the course of the dissolution of the marriage of the parties and, thus, the debt is non-dischargeable in bankruptcy. We AFFIRM.

I. FACTS

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

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

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as 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).

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

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

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

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

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

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

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

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

[5] The Amended Complaint also asserted a non-dischargeability 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.

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

II. JURISDICTION

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

III. ISSUE

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

IV. STANDARD OF REVIEW

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

V. DISCUSSION

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

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

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[6] This bankruptcy case was filed on July 2, 2004 and is 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.

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

A. Attorneys' Fees

The debt at issue includes an award to Lewis for a portion of her attorneys' fees and costs in the amount of $8,894.50.[7] These attorneys' fees and costs were incurred solely in connection with disputes over Dr. Selmi's services, as these services pertained to the custody and visitation issues before the Arizona Superior Court. The Arizona Superior Court made the award against Debtor pursuant to Ariz. Rev. Stat. Ann. § 25-324 (1996).[8] In its order, the court stated that it "considered the provisions of ARS 25-324 and the relative financial resources of the parties." The court also said that "both parties have been unreasonable throughout these proceedings in some respects [but]

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

[8] The relevant portion of the statute provides, "The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party 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 . . . ."

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

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

[9] The only reported circuit level decision dealing with a custody/visitation dispute that held that attorneys' fees awarded in connection therewith should not be excepted from discharge under § 523(a)(5) is Adams v. Zentz, 963 F.2d 197 (8th Cir. 1992). In Adams, the bankruptcy court held that the attorney's fees were not in the nature of support, as the custody dispute 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.

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

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

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

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

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

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

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

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

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

B. Dr. Selmi's Fees

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

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

[12] Lewis also argues that the debt owing for her attorneys' fees should be deemed non-dischargeable as ancillary to a clearly non-dischargeable debt, i.e., Dr. Selmi's fees. In support of this contention, Lewis cites to the Supreme Court case of Cohen v. de la Cruz, 523 U.S. 213 (1998), for the notion that subsequent debt is also non-dischargeable when the underlying debt giving rise to such secondary debt is determined to be non-dischargeable. While the record demonstrates that the attorneys' 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 . . . .").

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

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

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

VI. CONCLUSION

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

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

Lewis has requested that this Court grant her attorneys' fees against Debtor for this appeal, arguing that the appeal was without merit and another example of Debtor's penchant for pursuing frivolous litigation. However, we deny this request for being procedurally improper because it was not brought by separate motion, as required by Federal Rule of Bankruptcy Procedure 8020.[13]

[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.