

AUG 26 2015

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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-14-1316-KiTaPa
)		
DAVID W. CANTARELLA,)	Bk. No.	8:12-23516-CB
)		
Debtor.)	Adv. No.	8:13-01082-CB
)		
_____)		
DAVID W. CANTARELLA,)		
)		
Appellant,)		
)		
v.)		
)		
RUTH HERRERA,)		
)		
Appellee.)		
_____)		

MEMORANDUM¹

Submitted Without Oral Argument
on March 19, 2015

Filed - August 26, 2015

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Appellant David W. Cantarella pro se on brief;
Karen J. Geiss on brief for appellee Ruth Herrera.

Before: KIRSCHER, PAPPAS and TAYLOR, 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 8024-1.

1 Appellant, chapter 7 debtor David W. Cantarella, appeals a
2 § 523(a)(15) nondischargeability judgment involving debts owed by
3 Cantarella to appellee Ruth G. Herrera.² We REVERSE.

4 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY³**

5 Herrera declared in a Declaration filed with the bankruptcy
6 court that she shared a relationship with Cantarella, became
7 pregnant and gave birth to a baby boy in May of 2006. On July 11,
8 2006, Cantarella filed an action against Herrera in the Family Law
9 Division of the Superior Court of the State of California for the
10 County of Orange ("Family Law Division"). On October 1, 2008,
11 Herrera filed in the Family Law Division a stipulation for
12 judgment which included, among other things, a detailed visitation
13 schedule for the parties' child. The parties further stipulated:
14 (1) to an invalid marriage in Mexico, which is null and void in
15 California; (2) to Cantarella's paternity of the child; (3) to the
16 nonexistence of any community or quasi-community debts; (4) to the
17 payment of certain child birth expenses; and (5) to the resolution
18 of all issues involving property. The Family Law Division's

20
21 ² Unless otherwise indicated, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
"Rule" references are to the Federal Rules of Bankruptcy
Procedure.

23 ³ The parties failed to include in the record on appeal many
24 of the relevant documents; we have exercised our discretion to
25 reach the merits of the appeal by independently reviewing the
26 bankruptcy court's electronic docket and the imaged documents
27 attached thereto. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
28 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003). The parties also failed to include in the
record the Family Law Division documents that may be pertinent:
the Petition-Dissolution; and the stipulation for judgment and
judgment.

1 docket submitted in the record reflects the approval of the
2 stipulation of judgment.

3 Thereafter, the Family Law Division entered an Order on
4 July 28, 2008, denying Herrera's request to declare Cantarella a
5 vexatious litigant, but ordering Cantarella to pay Herrera a
6 sanction of \$4,000 and further providing that if Cantarella missed
7 two payments, the entire balance would become due, together with
8 interest at the legal rate of 10% per annum.

9 Subsequently, the Family Law Division entered a minute order
10 on December 28, 2009, requiring Cantarella and Herrera to pay
11 their own child care costs and to share equally all uninsured
12 medical expenses. This minute order also established that Herrera
13 owed a monthly child support obligation to Cantarella of
14 \$371 based on the dissomaster figures stated in the record. The
15 Family Law Division entered another minute order on March 26,
16 2010, awarding sanctions payable by Cantarella to Herrera in the
17 amount of \$700 and providing the acceleration of the entire amount
18 together with interest at the legal rate from the date of default
19 if any payment occurred beyond ten days of the due date.

20 According to another minute entry dated July 23, 2010, the
21 Family Law Division found Cantarella to be a vexatious litigant
22 and awarded Herrera attorney's fees in the amount of \$4,500, with
23 payments due directly to Herrera's attorney, Michael Carver.

24 Cantarella filed a chapter 7 bankruptcy case on November 28,
25 2012. He named both Herrera and her former attorney, Michael
26 Carver, in his Schedule F as "charge account" creditors with
27 "unknown" debt amounts. Cantarella did not list Herrera in his
28 Schedule E.

1 On February 20, 2013, Herrera, appearing pro se, filed an
2 adversary complaint against Cantarella seeking to except \$11,800
3 from Cantarella's discharge under § 523(a)(15). She failed to
4 include any allegations for an exception to the discharge of
5 certain debts under § 523(a)(5). She attached to her adversary
6 complaint a copy of a letter signed by Cantarella and dated
7 January 27, 2012, wherein Cantarella agreed to pay Herrera, within
8 one year, the following court ordered sanctions and uncovered
9 medical costs:

- 10 1. Sanctions of 07/28/08 \$4,000.00 minus \$300.00 \$4,930.00
- 11 2. Discovery Sanctions of 03/26/10 \$700.00 minus \$150.00.. \$ 631.00
- 12 3. Remaining child birth costs of 10/18/07 \$ 940.59
- 13 4. Uninsured medical cost \$1,000.00
- 14 5. Attorney Sanctions of 07/23/10 minus 1,200.00..... \$3,300.00
- 15 6. I agree to handle the current dental cost..... \$ 400.00
- 16 7. I agree to pay your time for looking for a door.... \$ 400.00

17 Cantarella indicates in his letter that the above amounts total
18 \$11,800, but they add to only \$11,601.59. Neither party raised
19 any issue on appeal about any discrepancy in the amount. The
20 bankruptcy court used the aggregate amount of \$11,800 for its
21 calculations. We deem the parties to have waived any issue
22 concerning any discrepancy in the amount.

23 On November 19, 2013, Cantarella moved to dismiss Herrera's
24 complaint for failure to state a claim under § 523(a)(15), arguing
25 that "the sanctions in question have absolutely nothing to do with
26 'Child Support[,] 'Domestic Support[,] 'Alimony' or maintenance
27 of 'Child Support' or 'Attorney Fees'." Herrera opposed the
28 motion to dismiss, contending that: Cantarella had failed to cite

1 the correct Code provision; and she had established a claim under
2 § 523(a)(15). The bankruptcy court orally denied Cantarella's
3 motion to dismiss at a hearing held on December 17, 2013, but no
4 tentative ruling or order followed the oral ruling. The court set
5 a trial for May 28, 2014. Cantarella generally denied all
6 allegations in his answer.

7 Prior to trial, attorney Karen Geiss appeared on behalf of
8 Herrera. Herrera filed a Declaration on April 28, 2014;
9 Cantarella filed a Responsive Declaration on May 5, 2014. Neither
10 party filed a pretrial order or pretrial memoranda.

11 Herrera's Declaration, Dkt. no. 18, provides, in part:

12 10. That on July 28, 2008 a court order was
13 filed in the family case ordering Defendant/Petitioner
14 to pay sanctions to Plaintiff/Respondent the sum if
15 [sic] \$4,000.00 payable at the rate of \$100.00 per month
16 commencing August 15, 2008. The court advised that if
17 the Defendant/Petitioner misses two payments, the entire
18 balance becomes due together with interest at the legal
19 rate of 10% per annum. As of January 27, 2010,
20 Defendant/Petitioner only paid \$300.00 of these court
21 ordered sanctions with a balance due in the amount of
22 \$3,700.00 plus interest. **A certified copy of the order
23 will be presented as Exhibit 3.**

24 11. That on October 1, 2008 a Stipulation for
25 Judgment was filed in the family case ordering as
26 follows:

- 27 a. Defendant/Petitioner shall pay to
28 Plaintiff/Respondent court order medical
reimbursements as to one-half of
uninsured prenatal and post natal
expenses Plaintiff/Respondent paid in the
total amount of two times \$2,480.78.
\$2,480.78 is the amount
Defendant/Petitioner is to pay
Plaintiff/Petitioner forthwith, payable
\$100.00 per month commencing November 1,
2007. As of January 27, 2012,
Defendant/Respondent only paid \$1503.19
of the child birth costs with a balance
due of \$940.59 plus interest.
- b. The Plaintiff/Respondent and

1 Defendant/Petitioner shall each pay one-
2 half of costs/fees of the Special Master
3 totaling \$5000.00. Plaintiff/Respondent
4 paid her share of \$2,500.00 however she
has no direct knowledge whether or not
Respondent/Petitioner submitted his
share.

5 **A certified copy of the Stipulation for Judgment**
6 **will be presented as Exhibit 4.**

7 12. That on December 28, 2009, a Minute Order
8 was filed in the family case ordering all uninsured
9 medical expenses to be shared equally. As of January
10 27, 2012, Defendant/Petitioner owes \$1,400.00 incurred
11 prior to 01/27/2012, Defendant/Petitioner has paid
\$400.00 of these expenses leaving a balance in the
amount of \$1,000.00 reimbursedment [sic] for his share
of out of pocket medical costs plus interest. **A**
certified copy of the Minute Order will be presented as
Exhibit 5.

12 13. That on March 26, 2010, a Minute Order was
13 filed in the family case ordering Defendant/Petitioner
14 to pay sanctions to Plaintiff/Respondent the sum if
[sic] \$700.00 payable at the rate of \$70.00 per month
15 commencing April 1, 2010. The court advised that if one
16 shall become due and payable in full bearing a legal
17 rate of interest from the date of the default. As of
January 27, 2012, Defendant/Petitioner paid on \$150.00
of the court ordered sanctions with a balance due of
\$631.00 plus interest. **A certified copy of the Minute**
Order will be presented as Exhibit 6.

18 14. That on July 23, 2010, A Minute Order was
19 filed in the family case ordering Defendant/Petitioner
20 to pay to Plaintiff Respondent attorney fees in the
amount of \$4500.00 payable at the rate of \$100.00 per
21 month commencing August 1, 2010. Payments shall be made
22 payable directly to Plaintiff/Respondent's attorney,
Michael Carver. Defendant/Petitioner listed Michael
23 Carver on his Schedule F as a charge account with an
unknown amount. The amount due to attorney, Michael
24 Carver, is unpaid and Carver is proceeding against
Plaintiff/Respondent to collect the debt.
25 Plaintiff/Respondent is awaiting the decision of the
mediator as to her responsibility in this matter. As of
26 January 27, 2012, Defendant/Petitioner paid only
\$1200.00 of the fees with a balance due in the amount of
\$3,300.00. plus interest. **A Certified copy of the**
Minute Order will be presented as Exhibit 7.

27 15. That on January 27, 2012,
28 Defendant/Petitioner signed a notarized statement of all

1 amounts owed to Plaintiff/Respondent indicating his
2 agreement that all amounts would be submitted within one
3 year. **A copy of the Notarized Statement will be
4 presented as Exhibit 8.**

5 * * *

6 17. As of January 27, 2012,
7 Defendant/Petitioner owed me \$11,800.00 plus interest
8 per his own notarized statement. Subsequent to signing
9 the notarized statement, Defendant/Petitioner still owes
10 \$11,000.00 plus interest.

11 (Emphasis in original). The record establishes that Herrera never
12 filed or offered any exhibits at trial.

13 The following is an excerpt from Cantarella's Responsive
14 Declaration, Dkt. no. 19:

15 3. The plaintiff has been ordered by the court
16 to pay the defendant child support and to date the
17 plaintiff is delinquent with her child support
18 obligation, in addition I have had to request from the
19 presiding judge to file an OSC contempt to force the
20 plaintiff to pay her child support obligation. A true
21 and correct copy of the order from the presiding
22 judgment granting the filing of the contempt will be
23 presented as Exhibit C.

24 Although the Family Law Division's minute order from
25 December 28, 2009, directed Herrera to pay monthly child support
26 of \$371 and, although Cantarella argues in his responsive
27 declaration, as quoted above, that Herrera is delinquent with her
28 child support obligation, Cantarella does not disclose any support
to which he is or may be entitled on his schedule of personal
property.

At the trial held May 28, 2014, the bankruptcy court
indicated to the parties that it could take the matter under
submission based upon the parties' declarations, to which no
opposition occurred. The bankruptcy court also gave the parties
the opportunity to make any additional arguments. Herrera's

1 counsel presented argument, clarifying that Cantarella owed
2 nonsupport amounts to Herrera and that no marriage occurred
3 between Herrera and Cantarella, so their relationship did not
4 warrant a divorce. Hr'g Tr. (May 28, 2015) 3:12-16. Herrera's
5 counsel referenced two cases, without citation, namely: Holiday
6 v. Kline (In re Kline), 65 F.3d 749, 751-52 (8th Cir. 1995); and
7 Williams v. Kemp (In re Kemp), 242 B.R. 178, 181-82 (8th Cir. BAP
8 1999), for the proposition that the nonspouse mother of debtor's
9 child could recover birthing expenses, dental expense and
10 attorney's fees as nondischargeable debts owing to the child.
11 Herrera's counsel concluded by arguing that the benefit to
12 Cantarella of discharging the debts did not outweigh the
13 detrimental consequences such a discharge would have on Herrera.⁴

14 On June 6, 2014, the bankruptcy court entered a Statement of
15 Decision After Trial ("Decision"), summarily concluding that all
16 but \$400 (the amount associated with looking for a door) of the
17 \$11,800 related to Cantarella's child and, thus, \$11,400 should be
18 excepted from Cantarella's discharge under § 523(a)(15).
19 Cantarella filed his notice of appeal on June 19, 2014, and on
20 July 1, 2014, the bankruptcy court entered a one page judgment
21 after trial concluding "[t]he debt owed to Plaintiff in the amount
22 of \$11,400.00 is determined to be nondischargeable." Dkt. no. 31.
23 The notice of appeal is timely.

24 II. JURISDICTION

25 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334

26
27 ⁴ Congress deleted the balancing test imposed under
28 § 523(a)(15) when it adopted the Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005 (Pub. L. 109-8) ("BAPCPA"),
effective October 17, 2005.

1 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C. § 158.

2 **III. ISSUES**

3 Did the bankruptcy court err in determining the
4 nondischargeability of the debts at issue under § 523(a) (15)?

5 **IV. STANDARD OF REVIEW**

6 The standard of review for legal questions is de novo and
7 clearly erroneous for factual questions. Beaupied v. Chang
8 (In re Chang), 163 F.3d 1138, 1140 (9th Cir.1998). Whether a debt
9 is dischargeable is a mixed question of fact and law that is
10 reviewed de novo. Miller v. United States, 363 F.3d 999, 1004
11 (9th Cir. 2004). We apply a two-part test to determine
12 objectively whether the bankruptcy court abused its discretion.
13 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir.
14 2009) (en banc). First, we determine de novo whether the
15 bankruptcy court identified the correct legal rule to apply to the
16 relief requested." Id. Second, we examine the bankruptcy court's
17 factual findings under the clearly erroneous standard. Id. at
18 1262 n.20. A bankruptcy court abuses its discretion if it applied
19 the wrong legal standard or misapplied the correct legal standard
20 or its factual findings were illogical, implausible or without
21 support in the record. Trafficschool.com, Inc. v. Edriver Inc.,
22 653 F.3d 820, 832 (9th Cir. 2011).

23 **V. DISCUSSION**

24 Cantarella contends that nine issues exist on appeal, but
25 virtually none has been properly briefed; he waived many issues
26 prior to the appeal. Construing his pro se brief liberally as
27 required, Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
28 698-99 (9th Cir. 1990), we conclude that the two primary issues

1 before us are: (1) whether the bankruptcy court erred in
2 excepting \$11,400 from Cantarella's discharge under § 523(a)(15);
3 and (2) whether the bankruptcy court denied Cantarella due process
4 when the bankruptcy court took the matter under submission. We
5 will address the first issue, but given our disposition on the
6 first issue, the second issue involving due process becomes moot
7 as we are reversing the bankruptcy court' decision.⁵

8 The remainder of Cantarella's arguments on appeal all relate
9 to his argument that the bankruptcy court erred in excepting
10 \$11,400 from Cantarella's discharge under § 523(a)(15).

11 Cantarella questions whether the bankruptcy court had the
12 authority to declare Herrera a spouse or former spouse. We can
13 find nothing in the record to suggest that the bankruptcy court
14 made such a finding; instead the bankruptcy court made a finding
15 that all the stated debts "relate to [Cantarella's] child."

16 To give this issue context, a review of the statutory
17 provisions involving domestic relations in bankruptcy is
18 instructive.

19 Section 523(a)(5) excepts from discharge debts for a domestic
20 support obligation. The term "domestic support obligation" is
21 defined by section 101(14A) as:

22
23 ⁵ Even if we did consider the merits of Cantarella's second
24 issue, he received due process. As correctly noted by Herrera, a
25 reading of the transcript shows that the bankruptcy court gave
26 both parties an opportunity to speak and to present and cross-
27 examine witnesses. Cantarella declined to add to the record and
28 failed to speak up or object to submission of the matter on the
parties' declarations. Cantarella had an opportunity to present
his case, which he did by declaration. "Due process only requires
a meaningful hearing appropriate to the nature of the case."
Jordan v. City of Lake Oswego, 734 F.2d 1374, 1376 (9th Cir.
1984), citing Bell v. Burson, 402 U.S. 535, 540 (1971).

1 a debt that accrues before, on, or after the date of the
2 order for relief in a case under this title, including
3 interest that accrues on that debt as provided under
4 applicable nonbankruptcy law notwithstanding any other
5 provision of this title, that is-

6 (A) owed to or recoverable by-

7 (i) **a spouse, former spouse, or child of the
8 debtor or such child's parent, legal guardian, or
9 responsible relative;**

10

11 (B) in the nature of alimony, maintenance, or support
12 of **such spouse, former spouse, or child of the
13 debtor or such child's parent,** without regard to whether
14 such debt is expressly so designated;

15 (C) established or subject to establishment before,
16 on, or after the date of the order for relief in a case
17 under this title, by reason of applicable provisions of-

18 (i) a separation agreement, divorce decree, or
19 property settlement agreement;

20 (ii) an order of a court of record; or

21

22 (Emphasis added).

23 Section 523(a) (15) excepts from discharge debts owed
24 **to a spouse, former spouse, or child of the debtor** and
25 not of the kind described in paragraph (5) that is
26 incurred by the debtor in the course of a divorce or
27 separation or in connection with a separation agreement,
28 divorce decree or other order of a court of record, or a
determination made in accordance with State or
territorial law by a governmental unit[.]

(Emphasis added).

The identification of the payee in this appeal becomes
critical, given the applicable statutory provisions. The
individuals identified in § 523(a) (5) encompass a broader group
than those identified in § 523(a) (15). In 2005, BAPCPA added
"child's parent, legal guardian, or responsible relative" to the
identified group in § 523(a) (5) and not to the identified group in

1 § 523(a)(15), even though BAPCPA significantly broadened the scope
2 of debts covered by § 523(a)(15). Taylor v. Taylor
3 (In re Taylor), 478 B.R. 419, 428 (10th Cir. BAP 2012); Bendetti v
4 Gunness (In re Gunness), 505 B.R. 1, 5 (9th Cir. BAP 2014).

5 Second, the nature of the debt may be determinative.
6 Beaupied v. Chang (In re Chang), 163 F.3d 1138, 1141 (9th Cir.
7 1998) (court focused not on the status of the father as a spouse or
8 former spouse of the mother, but rather, on whether the debt
9 constituted a support obligation to the daughter, payable to the
10 unwed mother and guardian ad litem). A bankruptcy court must
11 factually determine the nature of a debt as a matter of federal
12 law and may consider how state law characterizes the debt. Id. at
13 1140.

14 Cantarella also argues that the bankruptcy court improperly
15 shifted the burden to him to prove either his inability to pay or
16 the benefit to Cantarella of discharging the debt would outweigh
17 any detriment to Herrera. As discussed earlier, Herrera's counsel
18 made that argument, but nothing in the record suggests that such
19 argument factored into the bankruptcy court's decision and, in
20 fact, that balancing test was deleted from the Bankruptcy Code in
21 2005. Since neither §§ 523(a)(5) nor (a)(15) are listed in
22 § 523(c)(1), the burden would normally fall on Cantarella to file
23 a complaint for a determination as to whether any debts are not
24 excepted from discharge under §§ 523(a)(5) and (a)(15). However,
25 in this instance, as Herrera initiated the nondischargeability
26 complaint, the bankruptcy court placed the burden of proof on
27 Herrera. Hr'g Tr. at 1:20-23.

28 Herrera's and Cantarella's Declarations state how they each

1 owe one another debts based on the Family Law Action; they have
2 provided Cantarella's letter specifying the debts he agreed to pay
3 prior to bankruptcy. The bankruptcy court used the debts
4 disclosed in Cantarella's letter and the Declarations to determine
5 the nondischargeable debts and amounts. Based on such evidence,
6 the bankruptcy court determined that the debts related "entirely"
7 to the parties' minor child under § 523(a)(15), except for \$400,
8 without analyzing the payee, the nature of the debts or
9 determining whether §§ 523(a)(5) or (a)(15) applies.

10 In applying § 523(a)(15), Herrera needed to establish three
11 elements: (1) that the debt in question is owed to Cantarella's
12 child;⁶ (2) that the debt is not a support obligation within the
13 meaning of § 523(a)(5); and (3) that the debt was incurred in the
14 course of a divorce or separation or in connection with a
15 separation agreement, divorce decree, or other order of a court of
16 record.

17 Only the third element has been satisfied as the debts were
18 incurred in connection with an order of a court of record. The
19 first element was generally stated as debts related to the
20 parties' child; however the Declarations only stated that debts
21 existed between the parties and not for a child. The bankruptcy
22 court did not analyze whether the stated debts constituted debts
23 under §§ 523(a)(5) or (a)(15). Given the respective elements, the
24 bankruptcy court needed to first determine if any of the debts
25

26 ⁶ In the parties stipulation for judgment they agreed that
27 their Mexican wedding was invalid and null and void in California.
28 They are not asserting that they were spouses or former spouses.
See Cal. Fam. Code § 2212; Norris v. Norris, 324 F.2d 826, 829
(9th Cir. 1963).

1 constituted support debts under § 523(a) (5) and Chang. Do
2 remaining child birth costs, uninsured medical costs and dental
3 costs constitute support for the child? If so, how may they be
4 excepted from discharge under §523(a) (15)? As to the sanction
5 awards, how do these nonsupport debts satisfy the payee element of
6 § 523(a) (15)? See In re Gunness, 505 B.R. at 7-8. Or do the
7 sanction awards constitute support, but if they do, how do they
8 satisfy the payee element of § 523(a) (5)?

9 This appeal is dissimilar from In re Jodoin, 209 B.R. 132,
10 137-38 (9th Cir. BAP 1997), where through arguments made and
11 evidence admitted, the parties provided the bankruptcy court the
12 opportunity to decide the § 523(a) (5) issues even though the
13 plaintiff in that proceeding only alleged § 523(a) (15). Here,
14 Herrera specifically stated during the hearing that the debts only
15 involved nonsupport debts. Neither party implicitly accepted
16 resolution of any issue other than one arising under § 523(a) (15).

17 We conclude the bankruptcy court applied the wrong legal
18 standard or misapplied the correct legal standard and what
19 findings the bankruptcy court did make are without support in the
20 record; thus, the bankruptcy court abused its discretion.

21 VI. CONCLUSION

22 For the reasons set forth above, we REVERSE the bankruptcy
23 court's order and judgment.⁷

24

25

26

27 ⁷ As debts excepted under § 523(a) (5) and (a) (15) may be
28 pursued post-discharge and case closure, Herrera may seek leave to
amend her pleadings or initiate new litigation asserting
appropriate allegations under the appropriate statute.