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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-16-1086-TaFMc
)	
JOSEPH M. GATELY,)	Bk. No. 9:11-bk-12041-PC
)	
Debtor.)	
_____)	
JOSEPH M. GATELY,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
BRIAN MOORE; ELIZABETH F.)	
ROJAS, Chapter 13 Trustee;)	
JONI JENEA GATELY,)	
)	
Appellees.**)	
_____)	

Submitted Without Oral Argument***
on October 21, 2016

Filed - November 15, 2016

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

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

* 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(c)(2).

** Neither Brian Moore nor Elizabeth Rojas filed a brief on appeal. As a result, they waived the opportunity to appear in this case.

*** The Panel unanimously determined that the appeal was suitable for submission on the briefs and record pursuant to Rule 8019(b)(3).

1 spousal support, but not on any other matters." Bk. Dkt.
2 No. 130 at p. 10. The family court then awarded Joni support
3 arrearages, established the duration of the Debtor's support
4 obligation, and reduced the amount of Debtor's monthly support
5 obligation at the halfway point. The Ruling's concluding
6 paragraphs included an acknowledgment that: "[a]s a result of
7 [Joni's] pending bankruptcy, there are certain issues which the
8 family court cannot address." Id. at p. 15.

9 As relevant to this appeal, the Ruling also awarded
10 attorney's fees and costs to Joni and required payment of
11 \$3,500 directly to Joni's divorce attorney, Brian Moore. The
12 Ruling acknowledged that, when considering a fee award, the
13 family court was required by California Family Code § 2032 to
14 determine what was just and reasonable given the relative
15 circumstances of the parties. It then outlined the information
16 relied upon to reach a conclusion in that case; the information
17 expressly included "Income & Expense documentation submitted on
18 behalf of [Joni and the Debtor]." Bk. Dkt. No. 130 at p. 14.
19 The Ruling awarded fees to Joni, concluding that: "[t]o
20 equitably apportion the cost of the pending litigation the court
21 does find that it is just and reasonable to order that [the
22 Debtor] pay for a portion of the fees incurred by [Joni]." Id.

23 The Debtor did not pay the attorney's fees, a writ of
24 execution issued, and the Ventura County Sheriff's Office levied
25 on the Debtor's wages in the amount of \$3,777.90. Unhappy with
26 this development, the Debtor filed a chapter 13 petition and
27 claimed a wildcard exemption on the funds held by the Sheriff.

28 The Debtor later moved under § 522(f) to avoid what he

1 characterized as the lien held by Joni's counsel.³ Although
2 Joni's family court counsel did not oppose the motion, Joni
3 did.⁴ Among other things, she argued that the lien was not
4 subject to avoidance because it secured a claim that was in the
5 nature of spousal support pursuant to § 523(a)(5) and, thus,
6 excluded from avoidance by § 522(f)(1)(A).

7 At the hearing on the matter, the bankruptcy court denied
8 the Debtor's motion. Although the Debtor argued that the
9 attorney's fee award was separate and distinct from the spousal
10 support award, the bankruptcy court found that the fee award was
11 a domestic support obligation within the meaning of §§ 523(a)(5)
12 and 101(14A). It pointed out, in particular, that case law
13 established that an award of attorney's fees made as part of the
14 Ruling was "entitled to the same priority and
15 non-dischargeability as the spousal support itself." Hr'g Tr.
16 (Mar. 24, 2016) at 4:21-25.

17 Following the bankruptcy court's entry of an order denying
18 the Debtor's motion to avoid lien, the Debtor timely appealed.

19
20 ³ The record does not describe the judicial lien at issue.
21 Perhaps, the judicial lien is an execution lien under California
22 Code of Civil Procedure § 697.710 or a lien created by an
23 earnings withholding order under California Code of Civil
24 Procedure § 706.029. Joni argued before the bankruptcy court
25 that no lien existed. She also argued that the Debtor lost
26 title to the funds at issue after levy. Because Joni does not
27 reassert these arguments on appeal, she has abandoned them and
28 we do not address them.

26 ⁴ A few documents were not included in the excerpts of
27 record. Thus, we exercise our discretion to take judicial
28 notice of documents electronically filed in the bankruptcy case.
See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 **JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
3 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.
4 § 158.

5 **ISSUE**

6 Whether the bankruptcy court erred in denying the Debtor's
7 motion to avoid a lien pursuant to § 522(f) (1).

8 **STANDARDS OF REVIEW**

9 Whether a creditor's judicial lien is avoidable under
10 § 522(f) (1) is a question of law, which we review de novo.
11 McCoy v. Kuiken (In re Kuiken), 484 B.R. 766, 769 (9th Cir. BAP
12 2013). Whether a debt constitutes a domestic support obligation
13 under the Code is a factual finding, which we review for clear
14 error. See Beaupied v. Chang (In re Chang), 163 F.3d 1138, 1140
15 (9th Cir. 1998). A factual finding is clearly erroneous if it
16 is illogical, implausible, or without support in inferences that
17 may be drawn from the facts in the record. See
18 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
19 (9th Cir. 2011).

20 **DISCUSSION**

21 Section 522(f) (1) permits a debtor to avoid the lien of a
22 judgment creditor on exempted property. It states in relevant
23 part that "the debtor may avoid the fixing of a [judicial] lien
24 on an interest of the debtor in property to the extent that such
25 lien impairs an exemption to which the debtor would have been
26 entitled under [§ 522(b)]"

27 To avoid the lien, the debtor must satisfy three
28 conditions: (1) that there was a fixing of a lien on an interest

1 of the debtor in property; (2) that the lien impairs an
2 exemption to which the debtor would have been entitled; and
3 (3) that the lien is a judicial lien. Culver, LLC v. Chiu
4 (In re Chiu), 304 F.3d 905, 908 (9th Cir. 2002). But
5 § 522(f)(1) specifically excludes some liens including: "a
6 judicial lien that secures a debt of a kind that is specified in
7 [§] 523(a)(5)." See 11 U.S.C. § 522(f)(1)(A).

8 Section 523(a)(5) excepts from discharge a debt for a
9 "domestic support obligation." In relevant part, that term is
10 defined by the Code as a debt "owed to or recoverable by . . .
11 [a] former spouse . . . in the nature of alimony, maintenance,
12 or support . . ." of the former spouse, by "reason of . . . a
13 separation agreement, divorce decree, or property settlement
14 agreement," and "without regard to whether such debt is
15 expressly so designated" 11 U.S.C. § 101(14A)(A)-
16 (C)(i). The debt cannot be "assigned to a nongovernmental
17 entity," unless voluntarily assigned by a statutorily designated
18 person. Id. § 101(14A)(D).

19 Here, the Debtor argues that the bankruptcy court erred in
20 determining that the attorney's fees awarded to Joni in the
21 Ruling were in the nature of spousal support. He contends that
22 the fees constituted "an equalization payment subject to
23 discharge under § 523(a)(15)" In support of his
24 position, the Debtor asserts that the family court awarded
25 support to Joni under one section of the California Family Code
26 and awarded attorney's fees to her attorney under a different
27 section of the statutory scheme. We disagree with the Debtor's
28 assertions.

1 An award of attorney's fees in a marital dissolution
2 proceeding may be in the nature of a domestic support obligation
3 for the purposes of §§ 523(a)(5) and 101(14A).⁵ See Gionis v.
4 Wayne (In re Gionis), 170 B.R. 675, 682-84 (9th Cir. BAP 1994),
5 aff'd, 92 F.3d 1192 (9th Cir. 1996); see also Rehkov v. Lewis
6 (In re Rehkov), 2006 WL 6811011, at *3 (9th Cir. BAP Aug. 17,
7 2006) ("Cases in the Ninth Circuit and in other circuits
8 customarily have held that attorneys' fees awarded in connection
9 with a dissolution proceeding are non-dischargeable in
10 bankruptcy under § 523(a)(5) as alimony, maintenance, or
11 support."), aff'd, 239 F. App'x 341, 342 (9th Cir. 2007)
12 ("Attorneys' fees . . . fall within the exception for discharge
13 for support obligations.").

14 Labels in a divorce decree do not control the question of
15 whether a fee award constitutes a domestic support obligation.
16 See In re Gionis, 170 B.R. at 682. Instead, the bankruptcy
17 court "must look behind the state court's award and make a
18 factual inquiry to determine whether the award is actually in
19 the nature of support." Id. at 681.

20 "What constitutes support within the meaning of
21 [§] 523(a)(5) implicates a number of factors that are
22 potentially relevant on a case-by-case basis to this federal
23 question." Id. at 682. For example, financial need is
24 indicative of support and "[t]he bankruptcy court may look to

25
26 ⁵ In 2005, Congress amended § 523(a)(5) and (a)(15) and
27 added § 101(14A). The definition contained in § 101(14A)
28 substantively tracks the prior language in § 523(a)(5). See
Rivera v. Orange Cty. Prob. Dep't, 832 F.3d 1103, 1106 (9th Cir.
2016).

1 state law in determining whether the family court intended to
2 base the award on need." Id. Another relevant factor is how
3 the debt is characterized under state law. In re Chang,
4 163 F.3d at 1140.

5 Here, the bankruptcy court relied on the Ruling in finding
6 that the family court awarded attorney's fees as spousal
7 support. On this record, its finding was not illogical,
8 implausible, or without support in the record.

9 First, the family court recognized that, as a result of
10 Joni's bankruptcy, it could decide only issues related to status
11 and spousal support. Given this express recognition in the
12 Ruling, it is implausible that the family court then engaged in
13 a division of assets or took any action with regard to awarding
14 fees that was not correctly characterized as support. Nothing
15 in the record establishes to the contrary.

16 Second, the Ruling reflects that there was a claim for
17 attorney's fees made by one or both of the parties. Consistent
18 with its duties under California Family Code § 2030(b)(2),⁶ the
19 family court considered what was "'just and reasonable under the
20 relative circumstances' of the parties in connection with

21
22 ⁶ California Family Code § 2030(b)(2) provides that:

23 When a request for attorney's fees and costs is made,
24 the court shall make findings on whether an award of
25 attorney's fees and costs under this section is
26 appropriate, whether there is a disparity in access to
27 funds to retain counsel, and whether one party is able
28 to pay for legal representation of both parties. If
the findings demonstrate disparity in access and
ability to pay, the court shall make an order awarding
attorney's fees and costs.

1 'determining how to apportion the overall cost of the litigation
2 equitably between the parties.'" Bk. Dkt. No. 130 at p. 14. As
3 part of its analysis, the family court considered, among other
4 things, income and expense documentation submitted by both of
5 the parties. It then ordered that the Debtor pay a portion of
6 Joni's fees incurred in the marital dissolution proceeding and
7 directed that the Debtor "pay attorney's fees incurred by [Joni]
8 directly to counsel for [Joni], Mr. Brian Moore, in the amount
9 of \$3,500.00." Id.

10 The plain text of the Ruling makes clear that the fee award
11 was directly related to the fees incurred by Joni during the
12 course of the marital dissolution proceeding and her ability to
13 pay these fees. In awarding fees, the family court considered
14 the disparity in income between the parties and awarded the fees
15 to Joni based on her financial need. This, in turn, constituted
16 an award in the nature of spousal support for the purposes of
17 §§ 523(a)(5) and 101(14A).

18 Contrary to the Debtor's argument, it is irrelevant that
19 the fee award was payable directly to Brian Moore, Joni's family
20 court counsel. The operative inquiry is whether the obligation
21 was based on the need of the Debtor's ex-spouse. See Bendetti
22 v. Gunness (In re Gunness), 505 B.R. 1, 2, 7 (9th Cir. BAP
23 2014); In re Gionis, 170 B.R. at 679, 682-684; see also
24 In re Chang, 163 F.3d at 1141. And Joni had standing to object
25 to the exemption; if the Debtor does not pay Mr. Moore, Joni
26 will lose this element of support and will be required to pay
27 herself. The fees are owed to or recoverable by Joni even
28 though they are payable to her attorney because they are

1 reimbursement for her debt to her attorney.

2 Nor does it matter that the fee award was set forth in a
3 section of the Ruling separate from the determination of ongoing
4 spousal support. The form of the Ruling reflects a common
5 practice in any order or judgment awarding fees and costs.

6 It is also irrelevant that the family court referred to
7 California Family Code § 2030, et seq. within the fee award
8 section of the Ruling. Sections 4320 and 2030 are not mutually
9 exclusive provisions of the California Family Code.

10 Section 4320 relates to factors the family court must consider
11 in ordering spousal support; section 2030 supplies a basis for
12 an award of fees “[i]n a proceeding for dissolution of marriage
13 . . . and in any proceeding subsequent to entry of a related
14 judgment.” Cal. Fam. Code § 2030(a)(1). The need versus
15 ability to pay analysis of § 2030 reflects the analysis required
16 in § 4320 when considering a broader award of spousal support.

17 Further, the reference to California Family Code § 2030 in
18 the Ruling does not evidence an equalization payment with
19 respect to property division; instead, it relates to the family
20 court’s attempt to ensure parity between the former spouses and
21 equal access to legal representation in the marital dissolution
22 proceeding. See Mooney v. Super. Ct. of Santa Cruz Cty.,
23 245 Cal. App. 4th 523, 535–36 (2016) (“The purpose of [a Cal.
24 Family Code § 2030] award is to provide one of the parties, if
25 necessary, with an amount adequate to properly litigate the
26 controversy.”); In re Marriage of Cryer, 198 Cal. App. 4th 1039,
27 1056 (2011) (“The purpose of [California Family Code §] 2030 is
28 to ensure parity. The idea is that both sides should have the

1 opportunity to retain counsel, not just (as is usually the case)
2 only the party with greater financial strength.”) (internal
3 quotation marks and citation omitted).

4 The Debtor’s references to In re Lopez, 405 B.R. 382, 384
5 (Bankr. S.D. Fla. 2009), and In re Spence, 2009 WL 3483741
6 (Bankr. S.D. Fla. Oct. 26, 2009),⁷ are also unavailing. First,
7 neither case is controlling or even particularly helpful as the
8 decisions discuss fee awards under Florida law. Second, in both
9 cases, the fee award involved a sanction based on the debtor’s
10 “bad-faith litigation misconduct” during the dissolution
11 proceeding. There is a difference between a typical sanction
12 award, which is not based on financial need, and a fee award,
13 where financial need is central to the analysis. The Ruling did
14 not award fees based on sanctionable conduct.⁸

15 The Debtor also alleges error in the bankruptcy court’s
16 failure to consider two letters from Joni’s family court
17 counsel. The bankruptcy court at the hearing told the Debtor
18 that one or both of the letters were not in the evidentiary
19 record before it. This was partially untrue; the Debtor
20 attached one of the letters (dated February 19, 2010) to his
21 reply to Joni’s opposition. That error, however, was harmless.

22 In the February 2010 letter, counsel instructs the Debtor
23

24 ⁷ We assume that the Debtor’s references in his opening
25 brief are to these two particular cases. He did not provide a
26 citation or other identifying information for either case, other
27 than the singular case name.

28 ⁸ Sanctions in a marital dissolution proceeding are
imposed under California Family Code § 271.

1 that he should indicate in the memo line of the check that a
2 payment under the Ruling was for "attorney's fees," rather than
3 "alimony." The Debtor previously made this error. This
4 instruction is not inconsistent with our conclusion that the
5 attorney's fees were in the nature of support under §§ 523(a)(5)
6 and 101(14A).

7 As far as we can tell, the second letter - dated June 2010
8 - is not part of the record on appeal. It does not appear that
9 the Debtor presented this letter to the bankruptcy court in
10 connection with his motion to avoid lien. Thus, we do not
11 consider it on appeal. See Graves v. Myrvang (In re Myrvang),
12 232 F.3d 1116, 1119 n.1 (9th Cir. 2000) ("Absent that rare case
13 where the interests of justice demand it, an appellate court
14 will not consider evidence not presented to the trial court[.]")
15 (citations and internal quotation marks omitted).

16 Finally, to the extent the Debtor argues that the
17 attorney's fee claim should be disallowed, we reject his
18 argument. The only issue before the Panel for review on this
19 appeal is whether the bankruptcy court erred in denying the
20 Debtor's motion to avoid lien - not whether the claim for
21 attorney's fees should have been disallowed. That implicates an
22 entirely different section of the Bankruptcy Code and is not
23 within the appropriate scope of this appeal.

24 **CONCLUSION**

25 Based on the foregoing, we AFFIRM.
26
27
28