

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
SUSAN MARIE CUMMING,)	Case No. 03-41547
)	Chapter 7
Debtor.)	
_____)	
)	
MARY J. HATZENBELER,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-7086
)	
SUSAN CUMMING,)	
)	
Defendant,)	
_____)	

**MEMORANDUM AND ORDER DENYING
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Plaintiff Mary Hatzenbeler’s Motion for Summary Judgment (Doc. 15). Plaintiff and Defendant, the Debtor, have stipulated to the relevant facts and submitted briefs supporting their positions. The Court has jurisdiction to decide this matter under 28 U.S.C. § 1334, and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

I. FINDINGS OF FACT

The Court adopts the stipulations set forth by the parties in the Pretrial Order (Doc. 12) and, based on the stipulations, makes the following findings of fact:

1. Debtor, Susan Cumming, is the grandmother of M.A.C. Jr. and M.C. (hereinafter the “Children”).

2. Michael Adam Cumming Sr. (hereinafter “Michael”) and Julie Catherine Cumming (hereinafter “Julie”) are the parents of the Children, and were husband and wife in divorce proceedings during all relevant times.
3. In early 1998, the Children began living with Debtor, and she cared for and provided support to them.
4. Debtor filed a custody petition and moved to intervene in Michael and Julie’s divorce proceedings in Washington State Court. The Court granted Debtor’s motion and allowed her to participate in the child custody proceedings.
5. In the custody proceedings, Debtor moved for the appointment of a guardian ad litem to represent the interests of the Children during the divorce proceedings. Plaintiff, Mary Hatzenbeler, was appointed as the guardian ad litem.
6. The order appointing Plaintiff to represent the Children allocated fees and expenses incurred by her among Debtor, Michael and Julie – each paying one-third.
7. Plaintiff supplied legal services to the Children, incurring fees and costs, of which Debtor was obligated to pay \$1,611.45 as of December 20, 2002.
8. The Washington Court approved Plaintiff’s recommendation to place the Children with Michael and to deny Debtor’s request for custody of the Children.
9. Debtor filed her Voluntary Petition under 11 U.S.C. Chapter 7 on June 3, 2003 and is seeking, *inter alia*, the discharge of the debt to Plaintiff for the services she rendered as a guardian ad litem in the custody proceedings.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the moving party demonstrates that there is “no genuine issue as to any material fact” and that the moving party is “entitled to a judgment as a matter of law.”¹ The rule provides that “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.”² The substantive law identifies which facts are material.³ A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant.⁴ “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”⁵

The movant has the initial burden of showing the absence of a genuine issue of material fact.⁶ The movant may discharge its burden “by ‘showing’ – that is, pointing out to the ... court – that there is an absence of evidence to support the nonmoving party’s case.”⁷ The movant need not negate the nonmovant's claim.⁸ Once the movant makes a properly supported motion, the nonmovant must do more

¹ Fed. R. Civ. P. 56(c), made applicable to adversary proceedings by Fed. R. Bankruptcy Proc. 7056(c).

² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

³ *Id.* at 248.

⁴ *Id.*

⁵ *Id.*

⁶ *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993).

⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

⁸ *Id.* at 323.

than merely show there is some metaphysical doubt as to the material facts.⁹ The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial.¹⁰ Rule 7056(c) requires the Court enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof.¹¹

III. CONCLUSIONS OF LAW

A. Debtor's defense was properly raised in the Final Pretrial Order

Debtor's main defense in response to the Motion for Summary Judgment is that because the Children are not her children, but rather her grandchildren, 11 U.S.C. § 523(a)(5)¹² is inapplicable and the debt is dischargeable. Plaintiff claims that this issue was not clearly raised as a defense in the Pretrial Order, and, therefore, Debtor cannot rely on it pursuant to Fed. R. Civ. P. 16(a) and D. Kan. Rule 16.2(c).

The Court has reviewed the Pretrial Order in this case and finds that Debtor did raise this issue – admittedly not in a very clear manner. In Section 9.2 of the Pretrial Order, Debtor set forth her defense of the case, which does not expressly contain the defense that § 523(a)(5) is inapplicable because the Children are not her children, although she cites to § 523(a)(5). However, Debtor did provide a citation

⁹ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

¹⁰ *Celotex*, 477 U.S. at 324.

¹¹ *Id.* at 322.

¹² All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

to *In re Uriarte*,¹³ expressly noting in a parenthetical adjacent to the case citation that it stood for the proposition that “guardian who has no obligation to provide for ward has no support obligation as a parent and Guardian ad Litem fees are dischargeable.” A review of *Uriarte*, coupled with the description of its holding inserted by Debtor into the Pretrial Order, show that Debtor was relying on this defense. Therefore, Plaintiff was put on notice of this defense by Debtor’s citation to *Uriarte*, even if Debtor failed to more clearly identify the issue elsewhere in the Pretrial Order.

In finding that Plaintiff received proper notice of this defense, the Court is also mindful that there appears to be no prejudice to Plaintiff by any misunderstanding caused by the Pretrial Order. The issue of whether § 523(a)(5) can apply to a grandparent-grandchild relationship is purely a legal matter, which would have required no additional factual discovery by Plaintiff had she realized Debtor was raising such a defense. No discovery would have been necessary because there is no factual dispute that the Children are Debtor’s grandchildren, and not her biological or adopted children. Furthermore, Plaintiff had adequate opportunity, of which she took advantage in her reply brief, to respond to this legal argument raised by Debtor.

The Court thus finds that Debtor’s citation to *Uriarte* in support of her defense in this case was sufficient to preserve the defense that § 523(a)(5) is inapplicable – especially where Plaintiff was not prejudiced by any misunderstanding about her intentions. Therefore, the Court will consider the issue of whether the non-dischargeability provisions in § 523(a)(5) are broad enough to cover a debt incurred by a grandparent in support of her grandchildren.

¹³215 B.R. 669 (Bankr. D. N.J. 1997).

B. Section 523(a)(5) is not applicable in this case.

Plaintiff filed this adversary proceeding to except from discharge the obligation owed by Debtor, pursuant to § 523(a)(5). Plaintiff asserts that Debtor cannot discharge the debt because it was incurred in support of the Children. Debtor asserts that because the Children are her grandchildren, rather than her children, § 523(a)(5) is inapplicable. For the reasons set forth below, the Court finds that § 523(a)(5) does not bar discharge of the guardian ad litem debt incurred in support of Debtor's grandchildren.

Pursuant to § 523(a)(5), “[a] discharge under section 727... of this title does not discharge an individual debtor from any debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child”¹⁴ Accordingly, for a debt to be nondischargeable under the child support section, it must be 1) to the child of the debtor, 2) incurred for “support” of the child, and 3) incurred in connection with a separation agreement, divorce decree, or other order of the court.¹⁵ Plaintiff, as the creditor in opposition to discharge, has the burden of proving by a preponderance of the evidence that the debt owed is not dischargeable.¹⁶ Debtor has essentially admitted that Plaintiff has met her burden as to the last two elements of proof, but disputes Plaintiff has met her burden of proof on the first element.

The plain language of § 523(a)(5) clearly bars discharge of debts incurred for the support of a child of the debtor, but the statute makes no mention of a grandchild of the debtor or any other relationship for

¹⁴ 11 U.S.C. § 523(a)(5) (2004).

¹⁵ *In re Constantine*, 183 B.R. 335, 336 (Bankr. D. Mass. 1995)

¹⁶ *See Jones v. Jones (In re Jones)*, 9 F.3d 878, 880 (10th Cir. 1993) (citing *Grogan v. Gardner*, 498 U.S. 279, 291 (1991)).

which debts owed cannot be discharged. “It is well-established that when the statute’s language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.”¹⁷ The words “child of the debtor” refer to a parent-child relationship, and the absence of any language regarding other relationships renders § 523(a)(5) inapplicable to other relationships.¹⁸

At least two other courts have addressed the applicability of § 523(a)(5) to relationships that do not involve a spouse or child of the debtor. In *Ceconi v. Uriarte (In re Uriarte)*, a guardian owed a debt to a guardian ad litem incurred in support of his wards. Relying upon the language of the statute and the lack of any mention of a guardian-ward relationship, the court found that § 523(a)(5) did not apply to the guardian-ward relationship.¹⁹ Similarly, in *Eliason v. Sullivan (In re Sullivan)*,²⁰ a grandparent incurred debts by a guardian ad litem in support of her grandchildren. The court, following *Uriarte*, found no state

¹⁷ *Lamie v. United States Trustee*, 124 S. Ct. 1023, 1030 (2004) (internal quotation marks and citations omitted).

¹⁸ *Ceconi v. Uriarte (In re Uriarte)*, 215 B.R. at 673-74.

¹⁹ *Id.*

²⁰ 234 B.R. 244, 246 (Bankr. D. Conn. 1999) (stating “a guardian has no greater legal obligation to support his or her ward than a stranger has. The policy behind these long-standing precepts is to protect the interests of minor children who are in need of guardianship protection. If a person, by accepting the obligations of the guardian of a minor child were also held to have the legal responsibility to support the child, the law would discourage the acceptance of such appointment. Such a result would, in the long run, undermine rather than further the interests of minor children.... To conclude otherwise would discourage family members from voluntarily undertaking such [guardianship] obligations and from coming forward to serve as guardians.... It is true, of course, that a guardian of a minor child acts in loco parentis. One of the essential purposes of establishing such a guardianship is that a responsible adult act in that fashion. That does not mean, however, that acting in loco parentis, which is the essence of a guardianship, imposes on the guardian the legal obligations of support.”) .

law or bankruptcy law suggesting that “child of the debtor” refers to a grandparent-grandchild, guardian-ward, or any other relationship except that between a parent and child.²¹

Plaintiff urges the Court to look beyond the literal wording of the Code and find that § 523(a)(5) should apply in this case based upon the policy considerations behind § 523(a)(5). In other words, she asks the court to find that Debtor was the party responsible for the appointment of Plaintiff as a guardian ad litem for the Children, and that the Debtor became “a *defacto* parent and stood *in loco parentis*.”

Despite Plaintiff’s assertions, the Court is not convinced that the policy behind § 523(a)(5), at least as it relates to debts incurred in support of a child of the debtor, extend to the facts of this case. Unlike the parents of a child, Debtor voluntarily agreed to assume the responsibility of caring for the children and the costs associated with doing so. Debtor is not seeking to discharge debts for her children that were required by law based upon the long-standing principle that parents must bear the responsibility for providing support for their children. Thus, the fact of this case distinguish it from a situation where a parent is attempting to discharge debts incurred for the support of his or her own child.

The Court finds that Debtor’s role in requiring Plaintiff to be appointed as a guardian ad litem is not relevant to the inquiry as to whether the debt is non-dischargeable under § 523(a)(5). Here Debtor voluntarily sought an active role in the custody dispute and likely was the reason the debt relating to the guardianad litem services were incurred. However, Plaintiff provides no legal basis for the proposition that Debtor’s actions in causing the debt to be incurred render it non-dischargeable, and this fact does not change the plain meaning of the language found in § 523(a)(5). Although equity may favor Plaintiff’s

²¹ *Id.*

position based upon the actions of Debtor, the Court cannot utilize its equitable powers to circumvent the plain language of the Code.²² Therefore, Debtor's actions in causing the debt in question to be incurred are irrelevant as to the issue of whether that debt is dischargeable in bankruptcy.

The Court also finds that the fact Debtor was acting in the role of a parent does not make § 523(a)(5) applicable to this case. If Congress had intended to make all debts incurred by someone acting in the role of a parent non-dischargeable, it could have easily done so. However, Congress was very clear in using the term "child of the debtor," and there does not appear to be any basis to expand those words beyond their normal meaning. The fact Debtor may have been acting as the Children's parent does not change the fact that, legally, she was never their parent and they are not her children. Had she adopted the Children, the result would be different, but "when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms."²³

Sec. 523(a)(5) clearly states that the debt in question must be incurred for support of a "child of the debtor." The fact that the Children lived with Debtor, and that she provided for them, does not create a parent-child relationship under Kansas law.²⁴ Plaintiff cited no federal law to this Court that would create

²² See *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (holding that the Court's equitable powers in bankruptcy "must and can only be exercised within the confines of the Bankruptcy Code").

²³ *Lamie*, 124 S. Ct. at 1030 (internal quotation marks and citations omitted).

²⁴ See Kan. Stat. Ann. 38-1111 (2003) ("Parent and child relationship defined. As used in this act, 'parent and child relationship' means the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship.").

a parent-child relationship under the facts of this case, and the Court is unaware of any such law. The Children are not Debtor's children, but rather her grandchildren. Because the debt owed was not incurred in support of a "child of the debtor," § 523(a)(5) does not apply and Plaintiff's Motion for Summary Judgment for the non-dischargeability of debt must be denied.

IV. CONCLUSION

The Court finds Plaintiff's Motion for Summary Judgment must be denied. Defendant preserved her defense that § 523(a)(5) was not applicable in this case in the Pretrial Order, and Plaintiff was not prejudiced by the lack of clarity in the Pretrial Order. Section 523(a)(5) is not applicable to the facts of this case because the debt was not incurred for the support of a child of the debtor. There is no basis for expanding § 523(a)(5) beyond the clear, unambiguous language contained therein and making it applicable to relationships beyond that of a former spouse or of a parent and child. Therefore, Plaintiff's Motion for Summary Judgment is denied.

The only dispositive motion before the Court is Plaintiff's Motion for Summary Judgment, and the denial of this motion will not have the effect of dismissing this adversary proceeding. However, based upon the Court's ruling that § 523(a)(5) does not apply to the debt owed by Debtor to Plaintiff, it appears that all issues in this case have been resolved, as Plaintiff does not appear to be seeking any other relief or raising any other grounds for the non-dischargeability of this debt. Therefore, the Court will require Plaintiff to show cause within ten (10) days of the date of this order why this adversary proceeding should not be dismissed. If no response to this order is filed by Plaintiff within ten (10) days, the Court will issue an order dismissing this case with prejudice, based upon the findings made in this order.

IT IS, THEREFORE, BY THIS COURT ORDERED that Plaintiff's Motion for Summary Judgment (Doc. 15) is denied.

IT IS FURTHER ORDERED that Plaintiff show cause within ten (10) days of the date of this order why this adversary proceeding should not be dismissed, with prejudice, based upon the Court's ruling that 11 U.S.C. § 523(a)(5) is not applicable to the facts of this case.

IT IS SO ORDERED this _____ day of June, 2004.

JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the was deposited in the United States mail, postage prepaid on this _____ day of June, 2004 to the following:

Jeffrey A. Peterson
Woner Glenn Reeder Girard
5611 SW Barrington Court South
P. O. Box 67689
Topeka, Kansas 66667-0689

M. Blake Cooper
302 Fleming Suite 5
Garden City, Kansas 67846

Dean K. Ryan
117 Grant Ave
Garden City, Kansas 67846-5412

Darcy D. Williamson
Trustee
700 Jackson, Suite 404
Topeka, Kansas 66603

DEBRA C. GOODRICH
Judicial Assistant to:
The Honorable Janice Miller Karlin
Bankruptcy Judge