



IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: November 15, 2004

**ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE**

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

IN RE:)	
)	
ROBERT S. TYLER,)	Case No. 03-16317
)	Chapter 7
Debtor.)	
_____)	
)	
PAMELA TULUMELLO,)	
)	
Plaintiff,)	
v.)	Adversary No. 03-5396
)	
ROBERT S. TYLER,)	
)	
Defendant.)	
_____)	

MEMORANDUM OPINION

Plaintiff Pamela Tulumello filed this adversary proceeding to determine the dischargeability of certain attorneys fees assessed against debtor Robert S. Tyler in a post-divorce proceeding in Arizona state court. Plaintiff contends the fee award is nondischargeable support under 11 U.S.C. §

523(a)(5).¹ Plaintiff moved for summary judgment and the debtor objects. The Court heard oral argument on November 9, 2004 and, having carefully considered the parties' papers and the applicable legal authority, rules as follows.

Jurisdiction

This is a core proceeding over which the Court has jurisdiction.²

Findings of Fact

Based upon the uncontroverted facts as presented by the plaintiff, the Court makes the following findings.

Pamela Tulumello ("Pamela") and Robert S. Tyler ("debtor") were formerly married and have three minor children. They were divorced in 1998 in Missouri. After their divorce, Pamela moved to Arizona with their three children and debtor moved to Kansas.³ Their post-divorce relations appear to be dismal at best.

In 2001, Pamela filed proceedings in the domestic division of the Superior Court of Maricopa County, Arizona, for sole custody of the couple's children.⁴ The debtor countered with his own petition for sole custody of the children. In January of 2003, the state court judge found it was in the children's best interest that Pamela be awarded sole custody, denied debtor's request for sole custody, and ordered that debtor pay some portion of Pamela's attorneys fees incurred in the proceedings.

¹ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, unless otherwise denominated.

² 28 U.S.C. § 157(b)(2)(I) and § 1334(b).

³ Pamela was designated as the primary residential custodian of the children.

⁴ In addition to sole custody, Pamela petitioned the Arizona court for a visitation schedule with the debtor, a modification of debtor's child support, a division of the children's health and dental expenses, and assessment of one-half of her attorney fees against debtor.

After Pamela submitted an affidavit regarding the amount of her attorney fees, the state court judge issued a ruling in May of 2003. In making his May ruling, the state court judge held that “having considered Father’s income, his response, his conduct during the proceedings, as well as Mother’s income,” debtor would be responsible for \$7,750 of the over \$27,000 in attorney fees incurred by Pamela. This is substantially less than the \$13,500 Pamela sought in her application. The state court also reduced debtor’s child support obligation from \$400 per month to \$206 per month. The orders which are attached to the uncontroverted facts contain various references to the need for counseling for the children, the children’s refusal to visit the debtor, and, in general, point to continuing acrimony between the plaintiff and the debtor.

Debtor filed his bankruptcy case on December 17, 2003. Pamela filed this adversary proceeding to determine the dischargeability of the attorney fee award, contending it to be nondischargeable support. After the pleadings were joined, Pamela filed the current motion for summary judgment.

Debtor does not controvert Pamela’s statement of uncontroverted facts nor provide any additional material facts of his own; rather, he asserts that by virtue of the trial judge’s reference to “his [debtor’s] conduct during the proceedings,” the attorney fees were awarded more as punishment than as support. Debtor urges that his lack of income at the time of the award, combined with the punitive aspect of the attorney fees, constitute “unusual circumstances” which excuse him from having this debt excepted from his discharge.

The Court finds that the facts as set out by Pamela are uncontroverted. Debtor has supplied no additional facts from which the Court could draw reasonable inferences unfavorable to the plaintiff other than to assert in conclusory fashion that evidence of debtor’s financial disadvantage and conduct in the Arizona proceedings would be presented in detail at trial.

Analysis and Conclusions of Law

The standards on summary judgment are well-known. Fed. R. Civ. P. 56 provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁵ In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment.⁶ An issue is “genuine” *if sufficient evidence exists on each side* “so that a rational trier of fact could resolve the issue either way” and “[a]n issue is ‘material’ if under the substantive law it is essential to the proper disposition of the claim.”⁷

The core legal issue here is whether this Court should look behind the Arizona court’s judgment concerning the attorney fee award to determine whether the award qualifies as nondischargeable support. If the answer to this question is yes, then the factual issue of debtor’s and Pamela’s relative financial standing as of May, 2003, becomes a material issue that is essential to the proper disposition of the case.

Section 523(a)(5) excepts from a debtor’s discharge, child or spousal support imposed or agreed to in a domestic relations case. In a case very similar to this one, the Tenth Circuit Court of Appeals held that attorney fees awarded in a post-divorce custody dispute are nondischargeable support within the meaning of § 523(a)(5). In *Jones v. Jones (In re Jones)*,⁸ the non-debtor spouse

⁵ Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056.

⁶ *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

⁷ *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

⁸ 9 F.3d 878 (10th Cir. 1993).

(Mr. Jones) successfully defended a motion by the debtor (Mrs. Jones) to change custody. The trial court ordered Mrs. Jones to pay Mr. Jones' attorneys fees incurred in defending her motion. Thereafter, Mrs. Jones filed her bankruptcy case and Mr. Jones challenged the dischargeability of the attorney fee award. Reversing the bankruptcy court, the district court held that the determination of custody is "essential to the children's proper support" and, as such, attorneys fees incurred in post-divorce custody proceedings should be considered as obligations of support.⁹ The Tenth Circuit Court of Appeals affirmed the district court.¹⁰

The Tenth Circuit sided with the precedents of two sister Circuits, the Fifth and Second, in holding that the custody hearing was for the children's benefit and should be deemed nondischargeable. As the Second Circuit concluded, "fees incurred on behalf of a child are nondischargeable because they are deemed to be support when those fees are *inextricably intertwined with proceedings affecting the welfare of a child.*"¹¹ In the same breath, the Tenth Circuit rejected the Eighth Circuit's approach in *Adams v. Zentz*,¹² in which that Court articulated a "functional analysis" of the fees, stating that the "crucial issue is the function the award was intended to serve."¹³

The Tenth Circuit minced no words:

We reject the Eighth Circuit's directive that the bankruptcy court must look at the purpose behind the custody action and examine whether that action was held in order to determine the best interests of the child. In our view, in all custody actions,

⁹ *Id.* at 880.

¹⁰ *Id.* at 882.

¹¹ *Id.* at 881, quoting *Peters v. Hennenhoefter (In re Peters)*, 133 B.R. 291, 295 (S.D.N.Y. 1991), *aff'd* 964 F.2d 166 (2nd Cir. 1992).

¹² 963 F.2d 197, 200 (8th Cir. 1992).

¹³ 9 F.3d at 881.

the court's ultimate goal is the welfare of the child.¹⁴

It also held that requiring a bankruptcy judge to make this functional analysis essentially requires him or her to conduct extensive hearings and fact finding into the parties' respective intent and subjective motivation in pursuing the change of custody, an inquiry better suited to the state courts.¹⁵ Stating the term "support" "is entitled to broad application and "encompasses the issue of custody absent unusual circumstances not present here," the court held that court-ordered attorneys fees arising from post-divorce custody proceedings are *deemed* to be support and therefore nondischargeable under §523(a)(5).¹⁶

In this Court's view, this Tenth Circuit precedent all but forestalls the factual presentation that debtor seeks to make. Here, as in *Jones*, the Arizona state court proceedings clearly were post-divorce custody proceedings. The Arizona state court compared the parties' incomes and considered their conduct in the litigation and concluded that debtor should be required to pay a portion of the attorney fees. That is all there is in the record before this Court. Debtor argues that the state court's reference to his conduct, combined with his straitened financial circumstances, somehow forms the basis for this court to find the existence of the "unusual circumstances" described in *Jones*. Unfortunately, apart from the Arizona trial court's statements, very little concerning those circumstances is in the record on summary judgment.

Rule 56(e) explicitly states that a party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts

¹⁴ 9 F.3d at 881.

¹⁵ *Id.*

¹⁶ *Id.* at 881-82.

showing that there is a genuine issue for trial.”¹⁷ Absent such a response, and if entry of summary judgment is appropriate, the Court must do so. In order for this Court to even reach the possible “unusual circumstances” relied upon by debtor, some evidence of them must be presented. In argument, debtor’s counsel suggested that the mere reference by the state court judge to debtor’s conduct in the custody case constitutes an unusual circumstance. Yet, in this Court’s view, it is not at all unusual for a court assessing attorneys fees to consider the conduct of the party against whom they are sought in shifting the burden of the fees between the parties.

Debtor also argues that he cannot afford to pay these fees. In *Lowther v. Lowther (In re Lowther)*,¹⁸ the Tenth Circuit allowed a debtor charged with custody-related attorney fees to discharge them because requiring her to pay them would adversely affect her ability to support the children. *Lowther* presents a different set of facts, though, in that the debtor Ms. Lowther was awarded custody of the children *and* was assessed attorney fees. Her ex-husband was ordered to pay her \$167 per month in child support to supplement her monthly income of \$893 and she was ordered to pay him \$9,000 in attorney fees. The Tenth Circuit concluded that Ms. Lowther’s payment of the attorney fees effectively negated the benefit of the child support and would “clearly affect her ability to financially support the child.”¹⁹ The Circuit held that these were sufficiently “unusual circumstances” to warrant discharge of the custodial mother’s obligation to pay the fees. Here, the debtor is the non-custodial parent. Under the Arizona court’s order, he is required to pay \$206 in monthly support. There is no

¹⁷ Fed. R. Civ. P. 56(e); Fed. R. Bankr. P. 7056. *See also*, D. Kan. Rule 56.1(b)(2) requiring the non-moving party [debtor] who relies upon additional facts not contained in the movant’s motion to “set forth each additional fact in a separately numbered paragraph, supported by references to the record”

¹⁸ 321 F.3d 946 (10th Cir. 2002).

¹⁹ *Id.* at 949.

evidence of his income other than that contained in Schedule I, filed with his petition, which suggests his disposable income is \$540.80 per month.²⁰

The Court is very concerned that debtor's inability to discharge this debt severely hazards his fresh start. Payment of these fees over 60 months at a nominal interest rate of 5 per cent would require him to pay some \$146.25 per month to Pamela. This, combined with his support obligation of \$206, leaves him with \$188.55 a month to cover *all* of his other living expenses. If this is in fact the case, debtor's ability to pay child support, albeit nominal for three school-aged boys, would be significantly impaired. This does not, however, alter the Court's duty to construe the facts as mandated by Rule 56 or to follow the law as handed down by the Tenth Circuit Court of Appeals.

There is no factual issue that could be resolved adverse to Pamela such that her motion would be denied. The plain import of *Jones* is that attorney fees awarded in post-divorce custody proceedings *are* support and, as such, they are excepted from discharge under §523(a)(5). Mr. Tyler is in a difficult position, but one no different from any other impoverished support debtor. Indeed, it appears that the Arizona judge took pains to minimize Mr. Tyler's exposure by reducing by nearly one-half his previous child support obligation and by reducing by some \$6,000 the attorney fees sought by Pamela, notwithstanding that he apparently contributed to their complexity by his conduct, and ultimately did not prevail on his own request for sole custody.

Under the binding precedent of *Jones*, debtor's attorney fee obligation is nondischargeable support. The Court grants summary judgment in favor of plaintiff and a Judgment on Decision on the Complaint will issue this day.

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²⁰ Strictly speaking, Schedule I is not a part of the record on summary judgment, but this Court may take judicial notice of papers in its file. Fed. R. Evid. 201(b).

