



SO ORDERED.

SIGNED this 04 day of December, 2006.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

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

In Re:

THOMAS J. MARSH,

DEBTOR.

BARTON S. BLOND,

PLAINTIFF,

v.

THOMAS J. MARSH,

DEFENDANT.

**CASE NO. 04-23844
CHAPTER 7**

ADV. NO. 04-6169

**MEMORANDUM AND ORDER GRANTING
OBJECTION TO DISCHARGEABILITY UNDER 11 U.S.C. § 523(a)(5)**

The matter before the Court is the objection of creditor Barton S. Blond pursuant to 11 U.S.C. § 523(a)(5)¹ to the discharge of a \$15,000 judgment against Debtor entered in a post divorce custody proceeding for attorneys fees. Plaintiff, Barton S. Blond, appears by Judith L. Berry. Defendant, Thomas J. Marsh (hereafter Debtor), appears by Teresa M. Kidd. There are no other appearances. The Court has jurisdiction.²

Debtor filed for relief under Chapter 7 on September 3, 2004. Debtor's Schedule F includes a claim owed to Barton Blond of \$15,000 for attorney fees. On November 1, 2004, Plaintiff filed the complaint asserting that the debt is nondischargeable under §§ 523(a)(5) and (a)(15) because it arises from a judgment in a post divorce custody matter entered to pay a portion of Debtor's ex-spouse's attorney fees. With the agreement of the parties and after the filing of a stipulation of facts and briefs, the Court took the matter under advisement with respect to the § 523(a)(5) allegation.³ The Court is now ready to rule, and, for the reasons stated below, finds the judgment nondischargeable under § 523(a)(5).

¹ This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

² This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. A complaint to determine the dischargeability of particular debts are core proceedings which this Court may hear and determine as provided in 28 U.S.C. § 157(b)(2)(I). There is no objection to venue or jurisdiction over the parties.

³ At a status conference the Court granted the parties' request that the matter be bifurcated with the initial submission of the § 523(a)(5) issue based upon a stipulation of facts and briefs.

Based upon the stipulation, the Court finds the following facts. Debtor was previously married to Sabrina K. Marsh. A judgment of dissolution of marriage was entered in Jackson County, Missouri Circuit Court on December 28, 2000, awarding joint legal and physical custody of a minor child to both mother and father, with the father to pay child support to the mother. On October 15, 2001, the Debtor filed a motion to modify custody, to terminate his child support obligation, to require the Sabrina to pay child support to him, and to require her to pay his attorney fees. Debtor alleged that Sabrina had physically abused the child and engaged in other wrongful conduct. Debtor filed a motion for a temporary restraining order. Sabrina retained Plaintiff Blond to represent her. She denied the Debtor's allegations and opposed the relief Debtor sought. Trial was held on all or part of six days during the fall of 2003 and winter of 2004. Judgment was entered on May 26, 2004. It found that a change of the custody arrangement would not be in the best interests of the child and found no credible evidence to support the allegation of physical abuse or other wrong doing by Sabrina. The judgment modified the father's child support obligations. As to the mother's attorney fees, the court found that "Father is capable of paying his own attorney fees and of contributing to Mother's reasonable and necessary attorney fees."⁴ The court ordered Debtor "to pay a portion of Mother's attorney, entering judgment for Barton Blond against Father for \$15,000."⁵ Debtor appealed, and the portion of the judgment relating to the attorney fees payable to Plaintiff was affirmed. The judgment provides: "Barton Blond shall have judgment against Thomas Marsh for \$15,000. In default let execution issue."

⁴ Doc. 24.

⁵ *Id.*

The question presented is whether a judgment against the Debtor in favor of an attorney entered by a family court for payment of the Debtor's ex-spouse's attorney fees in the amount of \$15,000, which fees were incurred by the ex-spouse in defense of a post dissolution motion to modify custody that was filed by the Debtor, is nondischargeable pursuant to § 523(a)(5) as being in the nature of child support. Subsection 523(a)(5) provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt -

* * *

(5) 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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that -

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

“The terms ‘alimony’ and ‘support’ are given a broad construction to promote the congressional policy that favors enforcement of obligations for spousal and child support.”⁶ The general rule of narrow construction of exceptions to discharge is overridden to promote that policy.⁷ In a case very similar to the matter presented here, the Tenth Circuit Court of Appeals in *In re Jones*⁸ held a judgment for

⁶ 4 *Collier on Bankruptcy* ¶523.11[2] (Alan N. Resnick & Henry J. Sommer, eds-in-chief 15th ed. Rev. 2006).

⁷ *Id.*

⁸ *Jones v. Jones (In re Jones)*, 9 F.3d 878 (10th Cir. 1993). *In re Jones* was held to be controlling by Chief Judge Nugent in *Tulumello v. Tyler (In re Tyler)*, case no. 03-16317, adv. no. 03-5396 (Bankr. D. Kan. Nov. 15, 2004).

attorney fees entered in post divorce custody matters to be in the nature of support of the child and nondischargeable under § 523(a)(5).

In *In re Jones*, the nondebtor spouse (the father) successfully defended a post divorce motion to modify custody, and the court ordered the mother to pay all court costs and attorney fees incurred by the father in defending the action in the amount of \$6,000. The mother filed for bankruptcy relief, and the bankruptcy court denied an objection to discharge of the fee award under § 523(a)(5), finding a custody action is different from a support action and outside the scope of the discharge exception. On appeal, the district court reversed, holding that “the determination of child custody is essential to the children’s proper ‘support’ and that attorney’s fees incurred in custody modification proceedings should likewise be considered as obligations of support.”⁹ The Tenth Circuit affirmed. In doing so, the court rejected the rule followed in the Eighth Circuit “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 interest of the child.”¹⁰ In the view of the Tenth Circuit, “in all custody actions, the court’s ultimate goal is the welfare of the child.”¹¹ Therefore to assure that “genuine support obligations are not improperly discharged,” the court held that the term “support” as used in § 523(a)(2) “encompasses the issue of custody absent unusual circumstances.”¹² “Consequently, court-ordered attorney’s fees arising

⁹ *Jones v. Jones (In re Jones)*, 161 B.R. 523, 524 (D. W.D. Ok. 1992).

¹⁰ *In re Jones*, 9 F.3d at 881.

¹¹ *Id.*

¹² *Id.*, 9 F.3d at 882.

from post-divorce custody actions are deemed in the nature of support under § 523(a)(5) as being incurred on behalf of the child”¹³ and are nondischargeable.

The facts in this case establish that the \$15,000 judgment, like the judgment in *In re Jones*, was entered against the Debtor in a post divorce custody dispute initiated by the Debtor to pay attorney’s fees of the ex-spouse incurred in successfully defending the motion for change in custody. In this case, as in *Jones*, there is no allegation of unusual circumstances surrounding the custody dispute, and Debtor does not defend the motion on this basis. The Court will therefore not look behind the judgment and holds that the judgment is for “support” under § 523(a)(5) incurred on behalf of the child.

Debtor attempts to remove this case from the *Jones* rule by arguing the judgment is not excepted from discharge because it is payable to plaintiff, Barton Blond, the attorney for the Debtor’s ex-wife.¹⁴ The Court finds that the payee of the judgment is not material and holds the judgment is nondischargeable under the rule of *In re Jones*.

The parties have not cited and the Court’s research has not located a case in the Tenth Circuit opinion addressing the issue of the payee. However, “[u]nder section 523(a)(5), prior to the 2005 Act, most courts held that the determination whether a particular obligation is owed to a spouse, former

¹³ *Id.*

¹⁴ In conjunction with this position, Debtor argues there is nothing designating the judgment as payment of “mother’s attorneys fees” and no showing that Sabrina would benefit if the judgment is paid. Contrary to Debtor’s argument, the stipulated facts establish that the judgment is to satisfy, at least in part, Sabrina’s obligation for attorney’s fees incurred in the custody proceeding. The stipulation states, in the judgment Debtor “was ordered to pay a portion of Mother’s attorney [fees], entering a judgment for Barton Blond against Father for \$15,000.00.” (Doc. 24). This stipulation establishes that the judgment is designated as partial payment of the mother’s attorney fees and that she would benefit from payment of the judgment.

spouse or child of the debtor was not dependent on the identity of the payee of the obligation.”¹⁵ For example attorney fees owed to a guardian ad litem who was appointed to represent the Chapter 7 debtor’s minor children in a divorce proceeding were held within the exception for child support.¹⁶ The court reasoned that “if the obligation is in the nature of support, payment does not have to be made directly to the child to be non-dischargeable under 11 U.S.C. § 523(a)(5), and it may be paid to a third party on behalf of the child.”¹⁷ A judgment against a debtor for his former wife’s attorney fees in a divorce action, found to be in the nature of support, were held nondischargeable even though payable directly to the attorney.¹⁸ Likewise, fees owed to an attorney appointed to represent the debtor’s children in a postdissolution custody dispute have been held nondischargeable.¹⁹ “Dischargeability must be determined by the substance of the liability rather than its form.”²⁰ Even a debtor’s employer may benefit from the exception to discharge when it holds a judgment against the debtor arising from the employer’s right to compensation from the debtor resulting from improper payment of workers’ disability benefits to the debtor rather than to the receiver appointed to collect past-due support

¹⁵ 4 *Collier on Bankruptcy* ¶523.11[4] (Alan N. Resnick & Henry J. Sommer, eds-in-chief 15th ed. Rev. 2006).

¹⁶ *Heintz v. Tremblay (In re Tremblay)*, 162 B.R. 60 (Bankr. D. Me. 1993).

¹⁷ *Id.*, 162 B.R. at 62.

¹⁸ *Holliday v. Kline (In re Kline)*, 65 F.3d 749 (8th Cir. 1995). *In re Kline* was followed in *Williams v. Kemp (In re Kemp)*, 242 B.R. 178 (8th Cir BAP 1999), aff’d 232 F.3d 652 (8th Cir. 2000), which held that judgment payable to the child’s mother, who was not a spouse or former spouse, for costs of post-birth necessities entered in a paternity action was in the nature of support and nondischargeable. “In the support context, the nature of the debt is more important than the identity of the payee.” *Id.*, 242 B.R. at 181, citing *In re Kline*, 65 F.3d at 751.

¹⁹ *Jenkins v. Glynn (In re Glynn)*, 138 B.R. 360 (Bankr. D. Conn. 1992).

²⁰ *Id.*, 138 B.R. at 362, quoting *In re Spong*, 661 F.2d 6, 9 (2nd Cir. 1981).

payments from the debtor.²¹ “The nature of the debt which [debtor] owed to his children did not change simply because it became payable to [his employer] rather than to the children.”²²

In re Jones indicates the Tenth Circuit would follow the foregoing rule that it is the nature of the obligation, not the identity of the payee, that determines nondischargeability. The court’s holding that attorney fees awarded in post dissolution custody disputes are in the nature of support of the child was premised upon the congressional policy to ensure that “genuine support obligations would not be discharged.”²³ This policy is also promoted by the foregoing decisions holding that support obligations are nondischargeable even if payable to a guardian at litem, an attorney, or an employer. In addition, the debtor’s wife and her attorney were both plaintiffs in *In re Jones*, and the court made no distinction between the two plaintiffs when finding nondischargeability. Further, a rule that only the supported person may be the payee would result in an absurd rule that fees in the nature of support of a child are excepted from discharge only if awarded to the child.

For the foregoing reasons, the Court grants the complaint of Barton S. Blond on his claim that the fees awarded to him by judgment against the Debtor for services provided in the custody dispute are in the nature of support and nondischargeable pursuant to § 523(a)(5).

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. In addition to the claim resolved in this memorandum and order, Plaintiff in the complaint also alleged the

²¹ *Monsanto Industrial Chem. v. Harris*, 161 B.R. 385 (D.E.D. Mi. 1993).

²² *Id.*, 161 B.R. at 388.

²³ *In re Jones*, 9 F.3d at 880.

attorney fees are excepted from discharge pursuant to § 523(a)(15), and that matter remains pending before the Court. Therefore, no judgment will be entered and a status conference will be scheduled.

IT IS SO ORDERED.

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