Enforcing Child Support when the Obligor is in Bankruptcy

PIQ-07-04

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POLICY INTERPRETATION QUESTIONS

PIQ-07-04

DATE: July 23, 2007

TO: State and Tribal IV-D Directors

FROM: Margot Bean
Commissioner
Office of Child Support Enforcement

SUBJECT: Additional Information Regarding Enforcing Child Support when the Obligor is in Bankruptcy.

BACKGROUND: On September 22, 2006, the Federal Office of Child Support Enforcement (OCSE) issued Action Transmittal OCSE-AT-06-05. The AT contained an attachment with policy questions and responses to miscellaneous issues regarding child support provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Public Law 109-8, April 20, 2005). OCSE has received inquiries from States seeking additional clarification regarding some of OCSE's responses.

Bankruptcy actions filed before October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), are not subject to BAPCPA's provisions and OCSE responses regarding BAPCPA's new child support related provisions were written regarding new cases. In any case, States should consult with their attorneys and their local bankruptcy courts regarding local court interpretations and procedures.

OCSE also wants to remind States to inform their ACF OCSE Regional Program Manager regarding any changes in the addresses for notices of domestic support obligations so that OCSE may provide updated information to the Department of Justice for posting on its U.S.

Trustee Program's website (**http://www.justice.gov/ust/eo/private_trustee/ds/ (http://www.justice.gov/ust/eo/private_trustee/ds/)**).

This PIQ provides additional information to address State inquires regarding two specific questions and responses in AT-06-05.

AT-06-05 Q&A 15 regarding Automatic Stay:

> Question 15: Will state child support agencies be prohibited by the automatic stay from filing executions/liens, contempt actions, motions for judgments, and other actions not enumerated in section 214 during a bankruptcy proceeding?
>
> Answer: State child support agencies should continue to file enforcement actions that were allowed prior to the new legislation.

States asked OCSE whether they were correct that State child support agencies are only permitted to continue with such actions as would have been permitted under the former version of the Bankruptcy Code (with the exception of those specifically enumerated in section 214) and thus filing executions/liens and contempt actions would be prohibited.

OCSE's answer is yes; IV-D agencies are permitted those actions allowed under the former code and those added to 11 U.S.C. 362(b) by section 214. BAPCPA did not modify the items covered by a stay that were set forth in 11 U.S.C. 362(a); it merely added new exceptions in subsection (b) of section 362. Filing new executions/liens against property of the estate [11 U.S.C. 362(a)(4)] was prohibited under the former version and remains prohibited. However, there is no explicit bankruptcy law requirement that a IV-D agency remove an existing lien. The agency must not "create, perfect, or enforce" on either property of the estate or property of the debtor regarding "a claim that arose before the commencement" of the bankruptcy case [11 U.S.C. 362(a)(4)&(5)]. A civil contempt action [11 U.S.C. 362(a)(1)] is stayed, but "criminal action" against the debtor is not stayed [11 U.S.C. 362(b)(1)]. Tax refund offset was prohibited under the former version, but is now permitted [11 U.S.C. 362(b)(2)(F)].

AT-06-05 Q&A 17 regarding Passport Restriction:

> Question 17: Can a state child support agency submit a passport denial request to the Department of State after a bankruptcy case has been filed?
>
> Answer: Yes, passport denial requests may continue to be electronically submitted to OCSE for forwarding to the Department of State even after a bankruptcy filing.

States asked OCSE to provide a specific citation authorizing States to continue to submit passport restriction requests, or otherwise to provide guidance as to how OCSE arrived at such answer, since passport restriction is not mentioned in the list of statutory exclusions from the automatic stay provisions in bankruptcy law.

OCSE's answer is that a U.S. passport is not property of the debtor and, therefore, is not "property of the estate" which would be subject to bankruptcy automatic stay provisions [11 U.S.C. 362]. Department of State regulations provide that "A passport shall at all times remain the property of the United States and shall be returned to the Government upon demand"

[22 C.F.R 51.9] and a passport "shall not be issued in any case in which the Secretary of State determines or is informed by competent authority that: ... (8) The applicant has been certified by the Secretary of Health and Human Services as notified by a State agency under 42 U.S.C. 652(k) to be in arrears of child support ..." [22 C.F.R 51.70]

Inquiries should be directed to the appropriate ACF OCSE Regional Program Manager.

REFERENCES: *OCSE AT-06-05, Policy Questions and Responses to Miscellaneous Issues regarding Child Support Provisions of the New Federal Bankruptcy Law, P.L. 109-8,* dated September 22, 2006, and *OCSE IM-05-05, New Federal Bankruptcy Law Contains Child Support Provisions,* dated May 4, 2005.

cc: ACF/OCSE Regional Program Managers

Attachment 1

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Identification of Child Support Obligation:

Question 1: How will bankruptcy trustees determine the existence of family support obligations and the addresses of obligees?

Answer 1: A person filing for bankruptcy must declare to the court, under penalty of perjury, information on the existence of family support and all other financial obligations in the bankruptcy petition. Current bankruptcy forms [http://www.usdoj.gov/ust/eo/bapcpa/defs/index.htm] are structured to identify the existence of support obligations. Form B6E (10/05) "Schedule E – Creditors Holding Unsecured Priority Claims" includes a category for "Domestic Support Obligations" for which a debtor must provide a creditor's/obligee's name and mailing address. DOJ guidance for the Chapter 7 and Chapter 13 Section 341 meeting of creditors requires that bankruptcy trustees ensure that debtors answer specific questions for the record at the meeting, including "Do you have a domestic support obligation? To whom? Please provide to me the claimant's address and telephone number, but do not state it on the record." Guidance for Chapter 13 also specifies soliciting information on "Are you current on your post-petition domestic support obligations." On this basis, bankruptcy trustees would be able to identify to which state child support agency to provide notices and to provide notices to the child support obligees.

State Agency Addresses for Notices:

Question 2: Must a county-operated state child support program provide a single state level address to which bankruptcy trustees will send notices?

Answer 2: Yes, each state child support agency must identify a single bankruptcy reporting contact to which bankruptcy trustees will send notices. Bankruptcy law requires notices to be sent to the "child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder [obligee] resides."

Question 3: What automated method of providing updates (or more specific contact information) might be developed, such as adding a "Bankruptcy Contact" to the state level contact lists in the Office of Child Support Enforcement's (OCSE) online Intergovernmental Referral Guide?

Answer 3: OCSE will explore this idea. At present, state child support agencies should email OCSE with changes in bankruptcy reporting contacts. OCSE will provide the information to the Department of Justice (DOJ) to update its website that provides addresses for bankruptcy trustees [http://www.usdoj.gov/ust/eo/bapcpa/ds/index.htm].

Question 4: Does DOJ's Executive Office for United States Trustees have an automatic reporting system that might be used to transmit electronic notices over a secure CSE network to the appropriate IV-D agency?

Answer 4: DoJ has no such system at this time.

Question 5: Could trustees send notices to the Federal level OCSE for matching with the Federal Case Registry? If not, would legislation be required?

Answer 5: Reporting to the Federal level is not appropriate at this time. Legislative changes might be required to both Federal bankruptcy and child support statutes to enable reporting to the OCSE rather than direct reporting to state child support agencies.

Content of Notices to State Child Support Agencies:

Question 6: In what form will notice from bankruptcy trustees to state child support agencies be and how will that notice be transmitted?

Answer 6: New bankruptcy law provisions [11 U.S.C. sections 704, 1106, 1202, and 1302] require trustees to provide "written notice" to state child support agencies in custodial parents' states of residence regarding a debtor's child support obligations. DOJ's U.S. Trustee Program appoints and supervises the network of bankruptcy trustees (except in Alabama and North Carolina where bankruptcy courts appoint and supervise) and has issued to trustees the guidelines and sample notices attached to this action transmittal.

Question 7: What information will notices include? Will SSN and date of birth be required on notices sent to state child support agencies?

Answer 7: Bankruptcy law for initial notices specifies inclusion only of the name, address, and telephone number of debtor. However, DOJ's sample notices to state child support agencies include the name, address, and telephone number of the child support obligee; the name and Social Security Number (SSN) of the obligor, and the bankruptcy case number. DOJ requested that bankruptcy trustees include SSNs on notices specifically to assist in identification of IV-D cases.

State Child Support Agency Actions in Response to Notices:

Question 8: What should a state child support agency do if it receives a report for which there is no IV-D case?

Answer 8: A state child support agency need take no action on a report for which it has no associated IV-D case, but must treat any information received as confidential according to state agency security procedures.

Question 9: Must a state child support agency send its own notice to each obligee in case a trustee fails to attempt or succeed in directly notifying an obligee?

Answer 9: There is no requirement for a state child support agency to notify each obligee regarding bankruptcy notices received.

Enforcement Actions during Bankruptcy:

Question 10: Are there special rules to be followed if a state child support agency undertakes to establish or enforce a child support obligation during a bankruptcy proceeding?

Answer 10: State child support agencies should follow the same procedures as had been working previously with their local bankruptcy courts. Procedures for various types of bankruptcy in place prior to the recent amendments remain. The U.S. courts' website provides general guidance on various types of bankruptcy [http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html].

Question 11: Will state child support agencies be prohibited from sending out billing statements and requests for payment during the bankruptcy period and what procedures should be followed?

Answer 11: State child support agencies should continue to send out billing statements and requests for payment as was done prior to the new legislation. If a debtor in bankruptcy has a child support obligation, a proof of claim should be filed to make sure that the bankruptcy trustee is aware of the claim regarding any available asset. A failure to file a proof of claim does not discharge debt, but makes it less likely that assets will be secured to satisfy a support obligation.

Question 12: How should proofs of claim be filed if the state child support agency has two types of "priority" claims, i.e., domestic support claims where money is owed to the spouse or custodial parent and money owed directly to the state as reimbursement for public assistance received?

Answer 12: The state child support agency should file proofs of claim consistent with guidance from the relevant local bankruptcy court. "Proof of Claim" forms used by some local bankruptcy courts require that claims for domestic support obligations be broken down into the unassigned and assigned support categories specified in 11 U.S.C. 507(a)(1)(A) & (B).

Question 13: What happens if the state child support agency receives collections in excess of the obligor's debt in a bankruptcy in which it has filed a proof of claim? Will the state child support agency be penalized?

Answer 13: Excess funds from a bankruptcy estate should be treated as would overpayments from any other payment source. There is no provision to penalize a state child support agency for receiving an overpayment.

Question 14: Should proofs of claim be filed if the state child support agency has a lien against the debtor's property, since the new law only grants priority for "unsecured" domestic support obligations?

Answer 14: Yes, it is appropriate for the IV-D agency to file a proof of claim with the relevant local bankruptcy court regarding any claim, including existing liens against the debtor's property, in attempting to satisfy a domestic support obligation. If the child support agency has already secured a lien against an obligor's property when the obligor enters into bankruptcy proceedings, that lien remains in effect. A 'proof of claim' is a written statement and verifying documentation filed by a creditor that describes the reason that the bankruptcy debtor owes the creditor money. IV-D agencies may include information regarding all legal or equitable interests of the debtor, including debtor's property upon which the IV-D agency has secured a lien, which might be available to satisfy the child support obligation.

Question 15: Will state child support agencies be prohibited by the automatic stay from filing executions/liens, contempt actions, motions for judgment, and other actions not enumerated in section 214 during a bankruptcy proceeding?

Answer 15: State child support agencies should continue to file enforcement actions that were allowed prior to the new legislation.

Question 16: Is there any information available on the impact on current tax intercept procedures?

Answer 16: Cases certified on the Federal offset system are no longer required to be excluded from Federal Income Tax Refund Offset during the bankruptcy period. See Federal Offset EFlash #05-55 (12-29-05) or contact Margaret Carter (202-260-7861, mcarter@acf.hhs.gov) for further information.

Question 17: Can a state child support agency submit a passport denial request to the Department of State after a bankruptcy has been filed?

Answer 17: Yes; passport denial requests may continue to be electronically submitted to OCSE for forwarding to the Department of State even after a bankruptcy filing.

Chapter 13 Discharge:

Question 18: Are there any special procedures in relation to Chapter 13 plans of which state child support agencies should be aware?

Answer 18: A child support obligor will not be eligible for Chapter 13 discharge until "in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid." [11 U.S.C. 1328(a)]

Question 19: If the state child support agency is a primary creditor, does that mean child support will be paid off before the Chapter 13 bankruptcy period expires or will the payments for back child support be stretched out for the established period of the bankruptcy?

Answer 19: All disposable income from property of the estate will be applied as a first priority to child support debt during bankruptcy supervision. However, the Chapter 13 repayment plan may have specified that discharge may occur as long as the debtor is current on ongoing support and payments on arrears, as specified under the bankruptcy plan. All arrears will not necessarily have been completely paid before bankruptcy discharge.

Question 20: Will state child support agencies be given an opportunity to object to a bankruptcy discharge if child support obligations are not met?

Answer 20: Standards of good practice require bankruptcy trustees to ask the debtor about his or her child support situation; however, most courts do not require a separate certification regarding satisfaction of child support obligations. The bankruptcy court's focus is upon giving holders of claims notice that contest is available regarding the dischargeability of a specific claim and a child support debt is not dischargeable. Still, on motion of any party in interest after the hearing on notice, the bankruptcy court may for cause extend the time fixed before bankruptcy discharge.

665 Fed.Appx. 372
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

IN the MATTER OF: Lisa Ann GALAZ Debtor
Raul Galaz, Appellant
v.
Lisa Ann Galaz, Appellee

No. 15-51151
|
Date Filed: 12/12/2016

Synopsis

Background: Former husband moved in state court to enforce 2009 and 2011 child support orders. Former wife filed motion to enforce stay in bankruptcy court. The Bankruptcy Court entered order preliminarily enjoining former husband from collecting child support obligations in state court proceeding, and the United States District Court for the Western District of Texas affirmed bankruptcy court's order. Former husband appealed.

Holdings: The Court of Appeals held that:

[1] even though the estate had been fully administered, the bankruptcy court had subject matter jurisdiction to enjoin enforcement of 2009 child support claims in state court, where it needed to enforce previous order; and

[2] bankruptcy court lacked jurisdiction to enjoin 2011 order, where nearly all of these child support obligations arose after former wife's bankruptcy case was closed.

Affirmed in part, reversed in part and remanded.

West Headnotes (2)

[1] **Bankruptcy**
Domestic relations issues

Even though former wife's Chapter 13 estate had been fully administered, the bankruptcy court had subject matter jurisdiction to enjoin enforcement of 2009 child support claims by former husband in state court, where court needed to enforce previous order concerning these claims. 28 U.S.C.A. § 1334.

Cases that cite this headnote

[2] **Bankruptcy**
Domestic relations issues

Bankruptcy court lacked jurisdiction to enjoin enforcement by former husband in state court of 2011 child support order, where outcome of state court proceedings would have no conceivable effect on bankruptcy plan, bankruptcy court had no prior order concerning these obligations to enforce, and nearly all of these obligations arose after former wife's Chapter 13 case was closed. 28 U.S.C.A. § 1334.

Cases that cite this headnote

Appeal from the United States District Court for the Western District of Texas. USDC No. 5:15-CV-349

Attorneys and Law Firms

David Clay Snell, Bayne, Snell & Krause, San Antonio, TX, for Appellant

Royal B. Lea, III, Bingham & Lea, P.C., San Antonio, TX, for Appellee

Before WIENER, CLEMENT, and COSTA, Circuit Judges.

Opinion

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Raul and Lisa Ann Galaz divorced in 2002. The divorce decree required Lisa to maintain health insurance for her and Raul's children, pay the premiums required to maintain that insurance, and pay certain medical expenses not covered by insurance. Initially, Lisa complied with the divorce decree. In December 2007, however, she filed for Chapter 13 bankruptcy. And in January 2008, she ceased making payments for the children's health insurance and other medical expenses.

In 2009, Raul brought an action against Lisa in state court seeking unpaid child ***374** support expenses. The parties submitted to binding arbitration. Raul was ultimately awarded $6,727.00 "for child support arrearage" plus $3,000.00 for attorney's fees, amounting to a total award of $9,727.00. The state court entered this order (the "2009 Order") on November 17, 2009. Raul then moved for the bankruptcy court to direct payment to him from the bankruptcy estate under the 2009 Order. Lisa responded that this amount should be offset against any judgment that she might obtain in her pending adversarial proceeding against Raul. *See Galaz v. Galaz* (*In re Galaz I*), 480 Fed.Appx. 790, 792 (5th Cir. 2012). The adversarial proceeding concerned Raul's fraudulent transfer of assets from a company—that Lisa partially owned—to Segundo Suenos, LLC, a company controlled by Raul and his father (the "Segundo proceeding"). *See Galaz v. Galaz* (*In re Galaz II*), 765 F.3d 426, 428–29 (5th Cir. 2014). The district court took the matter under advisement, and Raul later renewed his motion to direct payment. *Id.* The bankruptcy court denied the renewed motion, explaining that if Lisa was successful in her adversary claim, Raul's claim could be offset against the damages that she might recover. Raul appealed that decision to the district court and this court, both of which affirmed. *See In re Galaz I*, 480 Fed.Appx. at 791.

On November 17, 2011, the state court entered a second order (the "2011 Order") requiring, among other things, that Lisa pay half of her daughter's future medical premiums and unreimbursed medical costs until she reached the age of majority.

Ultimately, Lisa was successful in the Segundo proceeding. The bankruptcy court awarded her $241,309.10 in actual damages and $250,000.00 in exemplary damages. *See In re Galaz II*, 765 F.3d at 429. Raul appealed. While the Segundo proceeding was being appealed, Lisa completed the terms of her Chapter 13 plan and was granted a discharge in January 2012. The district court affirmed Lisa's judgment in the Segundo proceeding. But this court vacated the bankruptcy court's judgment because the bankruptcy court did not have authority to enter a final judgment on a "non-core" bankruptcy proceeding. *In re Galaz II*, 765 F.3d at 432–34. Thus, this court remanded the Segundo proceeding so that the district court could refer the case to the bankruptcy court for proposed findings of fact and conclusions of law. *Id.* at 434. On January 23, 2015, the bankruptcy court issued its proposed findings of fact and conclusions of law in the Segundo proceeding, recommending that judgment be entered in favor of Lisa for $491,309.10. The district court adopted the bankruptcy court's proposed findings of fact and conclusions of law and entered judgment in Lisa's favor. Raul again appealed to this court. *Galaz v. Galaz* (*In re Galaz III*), No. 15-51194.[1]

1 As of 7/20/16, briefing is still ongoing in this appeal.

On February 24, 2015, Raul moved in state court to enforce the 2009 and 2011 Orders, seeking $9,727.00 and $1,429.00, respectively. Raul alleged, among other things, that Lisa failed to make the regular medical premium payments and expense reimbursements required by the 2011 Order, which as of filing amounted to $1,429.00. In response, Lisa filed a Motion to Enforce Stay or Prior Order in the bankruptcy court. The bankruptcy court entered an order preliminarily enjoining Raul from collecting the child support obligations in the state court proceeding, finding that Lisa had a right to offset the amount owed under the 2009 and 2011 Orders against any potential judgment in Lisa's favor in the Segundo proceeding. The preliminary injunction would automatically ***375** dissolve if the Segundo proceeding did not result in an award to Lisa exceeding $11,156.00, so that Raul could pursue enforcement and collection in state court. The district court affirmed the bankruptcy court's order, noting that the district court had entered judgment in favor of Lisa for $491,309.10, and therefore "Raul's judgment against Lisa in the amount of $11,156.00 may now operate as a setoff against the damages awarded to Lisa in that judgment." Raul filed this appeal, arguing that the bankruptcy court lacked subject matter jurisdiction to enjoin him from enforcing his orders and, alternatively, that the child support obligations arising from the 2009 and 2011 Orders are ineligible for setoff against the Segundo judgment.

I.

"Subject-matter jurisdiction is a question of law which we review *de novo*." *In re OCA, Inc.*, 551 F.3d 359, 366 (5th Cir. 2008). "In reviewing the rulings of the bankruptcy court, this court applies the same standards of review as applied by the district court." *In re ASARCO, LLC.*, 702 F.3d 250, 257 (5th Cir. 2012). "In conducting this review, we analyze the legal conclusions that guided the awarding court's determinations *de novo* and that court's findings of fact for clear error." *Id.* (emphasis added).

II.

Raul argues that the bankruptcy court lacked subject matter jurisdiction to enjoin him from taking action in state court on the 2009 and 2011 Orders because Lisa's bankruptcy estate had been closed for nearly three years when he filed his state court action in 2015. Alternatively, Raul argues that if the bankruptcy court had jurisdiction, offsetting the child support award is improper because Texas law does not allow offset against child support obligations and because the obligations lack mutuality. Lisa counters that the district court had either arising under, arising in, or related to jurisdiction, and that Raul waived his offset arguments.

"Bankruptcy courts find their source of jurisdiction in 28 U.S.C. §§ 157 and 1334." *In re Baker*, 593 Fed.Appx. 416, 417 (5th Cir. 2015) (unpublished). Section 1334(a)-(b) confers to district courts "original and exclusive jurisdiction" over "all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Section 157 provides for the referral of certain cases from district courts to bankruptcy courts. *In re Baker*, 593 Fed.Appx. at 417 n.2.

Proceedings " 'arising under title 11' ... describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11." *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987). " '[A]rising in' proceedings ... [refer] to those 'administrative' matters that arise *only* in bankruptcy cases. In other words, 'arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *Id.* at 97. A matter is related to a bankruptcy proceeding if "the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *Id.* at 93 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

To decide whether the district court had jurisdiction to enjoin Raul from enforcing his 2009 and 2011 Orders, we must decide if this dispute arises under, arises in, or relates to Lisa's bankruptcy proceeding. We address the 2009 and 2011 Orders in turn.

***376 A. 2009 Order**

[1]Raul's arguments that the bankruptcy court had no subject matter jurisdiction to enjoin him from seeking to enforce his 2009 Order in state court are meritless. He contends that the bankruptcy court lacked jurisdiction because Lisa's plan had been confirmed, fully implemented, and executed by 2012. Raul maintains that "[a]fter a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan." *In re Baker*, 593 Fed.Appx. at 417 (alteration in original) (quoting *Craig's Stores of Tex., Inc. v. Bank of La.*, 266 F.3d 388, 390 (5th Cir. 2001)). According to Raul, because the estate was fully administered when he filed his state court action in 2015, this matter does not pertain to the implementation or execution of Lisa's plan, and thus the district court lacked jurisdiction to issue the injunction.

But Raul's argument ignores the fact that "a bankruptcy court plainly ha [s] jurisdiction to interpret and enforce its own prior orders." *Id.* (alteration in original) (quoting *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009)). Here, Raul previously moved for the bankruptcy court to direct payment to him for the amount owed under the 2009 Order. The bankruptcy court denied this motion, acknowledging that Raul could offset this amount against any judgment that Lisa obtained in the Segundo proceeding. The district court and this court affirmed. *See In re Galaz I*, 480 Fed.Appx. at 791. To allow Raul to enforce his 2009 Order in state court now, outside of the proceeding where he was ordered to pursue such enforcement (*i.e.*, the Segundo proceeding), would create an end run around the bankruptcy court's previous ruling.[2] The bankruptcy court's injunction was necessary to enforce its previous order. *See In re Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ)*, 333 Fed.Appx. 822, 827 (5th Cir. 2009) (unpublished) ("A final decree closing the case after the estate is fully administered does not deprive the court of jurisdiction to enforce or interpret its own orders." (quoting *In re 350 Encinitas Invs., LLC*, 313 Fed.Appx. 70, 72 (9th Cir. 2009))). Even though the estate had been fully administered, the bankruptcy court had subject matter

jurisdiction regarding the child support claims from the 2009 Order because it needed to enforce its previous order.[3]

2 Raul's contention that the original bankruptcy court order did not prevent him from enforcing the child-support obligations against non-bankruptcy assets or collecting the child support outside of the bankruptcy process is misguided. Raul is merely attempting to collaterally attack the bankruptcy court's previous order.

3 Cabining this exercise of jurisdiction under § 1334(b)'s arising under, arising in, or related to framework is not without its challenges. Nevertheless, this exercise of jurisdiction falls within the "arising in" framework because this issue would not have arisen absent Lisa's bankruptcy case. *See Lothian Cassidy, LLC v. Lothian Expl. & Dev. II, L.P.*, 487 B.R. 158, 162 (S.D.N.Y. 2013) (" 'Arising in' claims may include [m]atters involving the enforcement or construction of a bankruptcy court order...." (internal quotation marks omitted)).

Raul's arguments that Texas law does not allow offset against child support obligations and that the obligations here lack mutuality also fail. Raul did not timely raise these arguments before the bankruptcy court. *See Galaz I*, 480 Fed.Appx. 790 at 792–94 (holding that Raul had waived his mutuality argument by failing to raise it in the bankruptcy court); *see also In re OCA, Inc.*, 552 F.3d 413, 424 (5th Cir. 2008) ("Since this issue was not ***377** properly presented to the bankruptcy court, it cannot be raised now for the first time on appeal."). Thus, the bankruptcy court did not err in enjoining Raul from enforcing his 2009 Order in state court.[4]

4 Raul contends that both the bankruptcy court and the district court failed to apply the $9,727.00 offset to the judgment obtained by Lisa against him in the Segundo proceeding. He contends that this obligation still exists. Lisa counters that Raul chose not to assert his claim to offset. Because this panel will not decide the merits of *In re Galaz III*, No. 15-51194, we defer to that panel to decide the issue.

B. 2011 Order

[2]Conversely, Raul's arguments that the bankruptcy court had no subject matter jurisdiction to enjoin him from seeking to enforce his 2011 Order in state court have merit. Raul again points out that Lisa's bankruptcy case closed when she was granted a discharge in January 2012. But here, he argues that because the bankruptcy court never previously considered the 2011 Order, it had no jurisdiction to enjoin him from enforcing this order in state court.

Again, we must determine whether the bankruptcy court's action falls within arising under, arising in, or related to jurisdiction. Because this action by the bankruptcy court was not "created or determined by a statutory provision of title 11," it does not fall within arising under jurisdiction. *In re Wood*, 825 F.2d at 96. Likewise, arising in jurisdiction is inapplicable here because, unlike the 2009 Order, the bankruptcy court has no prior order to enforce with respect to the 2011 Order. Thus, the bankruptcy court cannot rely on its authority to enforce its prior order to exercise jurisdiction. Similarly, related to jurisdiction is inapplicable.

As explained above, a matter is related to a bankruptcy proceeding when "the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *Id.* (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). After confirmation of the bankruptcy plan, however, this circuit has adopted a "more exacting theory of post-confirmation bankruptcy jurisdiction." *In re Craig's Stores of Tex., Inc.*, 266 F.3d 388, 391 (5th Cir. 2001). "After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, cease to exist, other than for matters pertaining to the implementation or execution of the plan." *Id.* at 390. Here, the child support obligations under the 2011 Order began to accrue in December 2011 and each month thereafter. Lisa's bankruptcy plan was confirmed in 2008, and the bankruptcy case was closed in 2012. Clearly, the obligations under the 2011 Order, nearly all of which arose after her bankruptcy case was closed, did not pertain to the implementation or execution of her bankruptcy plan. Even if we applied the less exacting pre-conformation approach to related to jurisdiction, whether Raul is successful in proving that Lisa owes him money under the 2011 Order would have no conceivable effect on Lisa's bankruptcy estate.

Thus, the district court lacked jurisdiction to enjoin Raul from seeking to enforce Lisa's obligations under the 2011 Order.

III.

For the foregoing reasons, we AFFIRM in part, REVERSE in part, and REMAND to the district court.

All Citations

665 Fed.Appx. 372

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659 Fed.Appx. 196
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

In the Matter of: Christopher J. McCloskey, Debtor.
Christopher J. McCloskey, Appellant,
v.
Anne Miriam McCloskey; Michael A. Craig, Appellees.

No. 16-20079
|
Date Filed: 10/31/2016

Synopsis

Background: Debtor's former wife and attorney who represented her in state divorce action sought determination as to nondischargeability of attorney fee obligation imposed on debtor. The Bankruptcy Court, Karen K. Brown, J., 2015 WL 1062102, entered judgment in plaintiffs' favor, and debtor appealed. The District Court affirmed, and debtor appealed.

[Holding:] The Court of Appeals held that attorney fee obligation imposed on debtor for legal expenses that his ex-wife incurred in post-divorce state court proceeding for conservatorship of his children was nondischargeable support debt.

Affirmed.

West Headnotes (5)

[1] **Bankruptcy**
Informal proof
Bankruptcy
Parties; standing

Written demands on debtor for payment of attorney fee obligation arising out of his divorce from wife evidenced an intent to hold him liable for these fees, and qualified as informal proofs of claim, of kind sufficient to establish "creditor" status of parties making these demands and their standing to commence nondischargeability proceeding. 11 U.S.C.A. § 523(a).

Cases that cite this headnote

[2] **Bankruptcy**
Legal expenses
Bankruptcy
Effect of state law

Attorney fee obligation imposed on debtor for legal expenses that his ex-wife incurred in post-divorce state court proceeding for conservatorship of his children was nondischargeable in bankruptcy, as being in nature of domestic support obligation, regardless of how this obligation would have been characterized under state law. 11 U.S.C.A. § 523(a)(5).

Cases that cite this headnote

[3] **Bankruptcy**
Domestic relations claims and proceedings

State court orders enforcing debtor's obligation for child support did not violate automatic stay, especially where stay had previously been lifted to permit entry of orders. 11 U.S.C.A. § 362(b)(2).

Cases that cite this headnote

[4] **Courts**
Debtor and creditor; bankruptcy; mortgages,

liens, and security interests
Judgment
Bankruptcy

Any argument by debtor, in bankruptcy court proceeding for enforcement of automatic stay, as to propriety of support orders previously entered by state divorce court, was foreclosed by *Rooker-Feldman* and res judicata doctrines.

Cases that cite this headnote

[5] **Estoppel**
Claim inconsistent with previous claim or position in general

Creditor was not judicially estopped, by manner in which creditor characterized obligation in post-divorce proceedings in state court, from arguing that fee obligation imposed on debtor by divorce court was support obligation for bankruptcy dischargeability purposes. 11 U.S.C.A. § 523(a)(5).

Cases that cite this headnote

***197** Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:15–CV–742

Attorneys and Law Firms

Leonard Harvey Simon, Esq., Pendergraft & Simon, L.L.P., Houston, TX, William Pimlott Haddock, Houston, TX, for Appellant

Joelle Grace Nelson, Lewis, Brisbois, Bisgaard & Smith, L.L.P., Houston, TX, Branch Masterson Sheppard, Galloway, Johnson, Tompkins, Burr & Smith, Houston, TX, for Appellee Anne Miriam McCloskey

Larry A. Vick, Esq., Houston, TX, for Appellee Michael A. Craig

Before STEWART, Chief Judge, SMITH and DENNIS, Circuit Judges.

Opinion

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

A divorce proceeding began in 1998, and the parties continue a fight over attorneys' fees awarded in 2001. Appellant claims that he should have been able to discharge the award after he filed for bankruptcy in 2005. Appellees respond that the debt is a non-dischargeable support obligation under 11 U.S.C. § 523(a)(5). The bankruptcy court granted appellees' motion for summary judgment and denied appellant's motion for summary judgment and his motion for contempt, sanctions, and damages. The district court affirmed. Finding no error, we also affirm.

I.

Appellant Christopher McCloskey is the ex-husband of appellee Anne McCloskey. The second appellee, Michael Craig, is Anne's lawyer. In 1998, Anne filed for divorce. In January 2001, a Texas state trial court awarded Anne $50,398 in attorneys' fees plus interest for conservatorship, support, and property-division proceedings arising from the divorce. Christopher appealed. In June 2003, a state appellate court remanded because Texas law does not allow parties to be reimbursed for fees relating to property division.

Things got complicated after Christopher filed for bankruptcy in January 2005 and appellees took steps to prevent him from discharging his debt. In January 2006, a federal bankruptcy court granted appellees' motion for relief from the automatic ***198** stay so that the trial court could reconsider the fee award. In April 2006, the trial court issued a reformed final judgment, again awarding Anne $50,398 in fees plus interest, but this time only for conservatorship and child support. Christopher appealed and moved for limited relief from the automatic stay so that the state appellate court could consider his appeal. In April 2009, the state appellate court upheld the award of attorneys' fees but struck the reference to "child support"; the final judgment deemed the attorneys' fees as necessary solely for the "conservatorship of the children."

In the meantime, appellees sought to garnish Christopher's Fidelity IRA investment account. In

December 2007, a state trial court authorized the garnishment. Christopher appealed, and in March 2010, a state appellate court affirmed.

In July 2007, the bankruptcy court granted appellees' motion for summary judgment, denying the dischargeability of the attorneys' fees. Christopher appealed to the federal district court, which affirmed. He then appealed to this court, which, in September 2009, vacated the district court's judgment affirming the summary judgment. We remanded for the bankruptcy court to reconsider in light of the April 2009 state appellate court decision finding that appellees' attorneys' fees are not "child support" under Texas law.

Both sides moved for summary judgment. The bankruptcy court issued a detailed opinion in March 2015 granting appellees' motion for summary judgment, finding that, although the attorneys' fees were not incurred for child-support enforcement, they nevertheless qualify as a non-dischargeable support obligation under 11 U.S.C. § 523(a)(5). Christopher appealed that decision, and the district court affirmed, whereupon Christopher appealed to this court.

II.

Christopher urges that the bankruptcy court's decision is mistaken because (1) appellees lack standing, (2) the attorneys' fees are not a "support" obligation, (3) appellees' state-court actions violated the automatic stay, and (4) appellees are judicially estopped from asserting that the attorneys' fees are related to child support. We address each argument in turn.

A.

[1]Regarding Christopher's contention that appellees do not have standing to challenge the dischargeability of the debt, creditors can establish standing in a bankruptcy case through an informal proof of claim. *See Nikoloutsos v. Nikoloutsos (In re Nikoloutsos)*, 199 F.3d 233, 236 (5th Cir. 2000). They must show that (1) the claim is in writing; (2) the writing contains a demand on the debtor's estate; (3) the writing evidences an intent to hold the debtor liable; (4) the writing is filed with the bankruptcy court; and (5) allowance of the claim is equitable under the circumstances. *Id.*

Appellees met each of these requirements. They objected to Christopher's proposed bankruptcy plan shortly after it was filed in June 2005. In August 2005, they filed their Creditor's Response to Debtor's Proof of Claim, explaining that "the previously filed proof of claim is urged by Michael A. Craig and Craig & Heallen, LLP on behalf of Anne Miriam McCloskey." In December 2005, appellees filed a Motion for Relief from Stay. And, in January 2006, they brought an adversarial case against Christopher in bankruptcy court. Those written demands on Christopher, filed with the bankruptcy court, evidenced appellees' intent to hold him liable for his debt. The ***199** claim was equitable under the circumstances.

B.

[2]The Bankruptcy Code prevents debtors from discharging marital or child-support obligations in bankruptcy.[1] The bankruptcy court found that the attorneys' fees at issue qualify as support and are therefore non-dischargeable. Christopher points to a state-court decision finding that appellees' attorneys' fees were not in the nature of support,[2] as well as two recent Texas Supreme Court opinions that limit the circumstances under which Texas state courts can award attorneys' fees for child support.[3] The bankruptcy court, however, was not constrained by those state-court rulings.

1 11 U.S.C. § 523(a)(5) (2000), *amended by* 11 U.S.C. § 523(a)(5) (Supp. V 2005) ("[D]ischarge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt ... for alimony to, maintenance for, or support of such spouse or child, in connection with a separate agreement, divorce decree or other order of a court of record....").

2 *See McCloskey v. McCloskey*, No. 14–06–00470–CV, 2009 WL 3335868, at *2 (Tex. App.–Houston [14th Dist.] Apr. 2, 2009).

3 *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 655–56 (Tex. 2013) (finding that a person can be held liable for a spouse's attorneys' fees only if he either acts as an agent for the spouse or the fees are for "necessaries" such as "food, clothing, and habitation"); *Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013) (stating that "in the absence of express statutory authority, a trial court may not award attorney's fees recoverable by a party in a non-enforcement

modification suit as necessaries or additional child support").

"Whether a particular debt is a support obligation, excepted from discharge under 11 U.S.C. § 523(a)(5), is a question of federal bankruptcy law, not state law." *Hudson v. Raggio & Raggio, Inc.* (*In re Hudson)*, 107 F.3d 355, 356 (5th Cir. 1997). The text of section 523(a)(5), as it existed when the bankruptcy case was filed, is broadly worded: Any debt that is owed to a former spouse "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" is non-dischargeable (emphasis added).[4] Courts in this circuit have consistently read that text to mean that attorneys' fees incurred for the conservatorship of children are not dischargeable.[5]

4 *See also Biggs v. Biggs (In re Biggs)*, 907 F.2d 503, 505 (5th Cir. 1990) ("[N]othing in the language of section 523(a)(5) indicates that the dischargeability of an obligation turns on state laws regulating alimony and support."); *Browning v. Navarro*, 887 F.2d 553, 561 (5th Cir. 1989) ("[B]ankruptcy courts have a job to do and sometimes they must ignore res judicata in order to carry out Congress' mandate.").

5 *See, e.g., Sonntag v. Prax (In re Sonntag)*, 115 Fed.Appx. 680, 681–82 (5th Cir. 2004) (per curiam); *In re Hudson*, 107 F.3d at 357; *Dvorak v. Carlson* (*In re Dvorak)*, 986 F.2d 940, 941 (5th Cir. 1993); *Hill v. Snider (In re Snider)*, 62 B.R. 382, 387 (Bankr. S.D. Tex. 1986); *Hack v. Laney (In re Laney)*, 53 B.R. 231, 235 (Bankr. N.D. Tex. 1985).

C.

[3] [4]Filing for bankruptcy automatically stays "a wide array of collection and enforcement proceedings against the debtor and his property." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 560, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). Christopher filed for bankruptcy in January 2005. In the months and years that followed, the state courts issued a number of orders, including a garnishment judgment, which Christopher maintains violated the automatic stay.

There are three problems with that theory. First, the bankruptcy court granted three motions for relief from the stay so ***200** that the state proceedings could go forward. Those orders allowed the state courts to issue orders without violating the stay. Second, at the time Christopher filed for bankruptcy, the Bankruptcy Code included exceptions to the automatic stay for "the establishment or modification of an order for alimony, maintenance, or support"[6] and for "the collection of alimony, maintenance, or support from property that is not property of the estate."[7] Those two exceptions cover all of the relevant state-court orders.[8] Third, Christopher's arguments about the appropriateness of specific state-court orders are foreclosed by the *Rooker–Feldman* doctrine and res judicata. The *Rooker–Feldman* doctrine bars the lower federal courts from modifying or reversing state-court judgments. *See Ingalls v. Erlewine (In re Erlewine)*, 349 F.3d 205, 209 (5th Cir. 2003). Res judicata prevents parties from re-trying claims that they have already litigated where, as here, there was a final judgment on the merits. *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992).

6 *See* 11 U.S.C. § 362(b)(2)(A)(ii) (2000), *amended by* 11 U.S.C. § 362(b)(2)(A)(ii) (Supp. V 2005).

7 *See* 11 U.S.C. § 362(b)(2)(B) (2000), *amended by* 11 U.S.C. § 362(b)(2)(B) (Supp. V 2005).

8 Christopher voluntarily exempted his Fidelity IRA investment account (the subject of the garnishment proceedings) from his bankruptcy estate in early 2006, before the garnishment proceedings began.

D.

[5]In June 2003, a state appellate court reviewing Christopher's state-law claims decided that Texas law does not allow parties to be reimbursed for attorneys' fees relating to property division. The trial court had awarded fees to appellees for child-support-related and property-division-related costs, so the appellate court remanded with instruction to segregate the fees, stating that "Anne is willing to rectify the matter by classifying the fees as part of the division of property [rather than as child support]."[9]

9 *McCloskey v. McCloskey*, No. 14–00–01300–CV, 2003 WL 21354709, at *5 (Tex. App.–Houston [14th Dist.]

June 12, 2003).

"Judicial estoppel ... prevent[s] a litigant from contradicting its previous, inconsistent position when a court has adopted and relied on it." *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 303 (5th Cir. 1998). Christopher argues that appellees are judicially estopped from claiming that the attorneys' fees should qualify as support, given that Anne has already admitted in state court that the fees were not entirely support-related. Again, we disagree. Bankruptcy courts must "look beyond the labels which state courts—and even parties themselves—give obligations which debtors seek to discharge." *Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 277 (5th Cir. 1994).[10] A party may argue in bankruptcy court that an obligation constitutes support even if she has urged to the contrary in state court. *Id.* at 278. Therefore, appellees are not judicially estopped from bringing this claim.

[10] *See also Benich v. Benich (In re Benich)*, 811 F.2d 943, 945–46 (5th Cir. 1987) (finding that monthly payments to ex-spouse agreed to in a property-settlement agreement qualify as non-dischargeable support).

In sum, the award is non-dischargeable under 11 U.S.C. § 523(a)(5). The judgment of the district court, affirming the bankruptcy court, is AFFIRMED.

All Citations

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End of Document

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This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

In the Matter of Lisa Ann GALAZ, Debtor,
Raul Galaz, Appellant,
v.
Lisa Ann Galaz, Appellee.

No. 11–50761.
|
July 12, 2012.

Synopsis

Background: Chapter 13 debtor's former husband sought to collect past-due child support obligations, but debtor raised setoff as a defense based on unrelated adversary proceeding that debtor had pending against husband. The United States Bankruptcy Court for the Western District of Texas declared setoff applied, and after judgment was entered by the Bankruptcy Court in the adversary proceeding, 2010 WL 4702446, the United States District Court for the Western District of Texas affirmed. Husband appealed.

Holdings: The Court of Appeals held that:

[1] husband's argument that setoff of support obligations and adversary proceeding judgment lacked mutuality had not been preserved for appeal;

[2] fact that judgment had not been issued in adversary proceeding did not prohibit finding that judgment could be setoff and waiting to resolve husband's motion for award of support; and

[3] automatic stay's exemption of child support obligations did not mean that bankruptcy court could not delay in ordering debtor to pay child support pending resolution of setoff issue.

Affirmed.

West Headnotes (4)

[1] **Bankruptcy**
Presentation of grounds for review

Former husband's argument that setoff of Chapter 13 debtor's past-due child support obligations and judgment for debtor in unrelated adversary proceeding against husband was inappropriate because child support claim was of higher priority did not preserve for appeal argument that child support and adversary proceeding debts lacked mutuality and could not be set off; on appeal, husband argued that child support payments were only held by parent in fiduciary capacity and were treated differently from other debt under Texas law, and that was different argument raised on appeal for the first time. 11 U.S.C.A. § 558.

Cases that cite this headnote

[2] **Bankruptcy**
Presentation of grounds for review

Bankruptcy court's quoted comments did not demonstrate court addressed the lack of mutuality argument that Chapter 13 debtor's former husband pressed on appeal with respect to debtor's past-due child support obligations and judgment that debtor obtained against husband in adversary proceeding; the comments were equally applicable to describing setoff of any unrelated claims and resolving the argument made in bankruptcy court that the child support and adversary claims were of different priorities and so should not be set off. 11 U.S.C.A. § 558.

2 Cases that cite this headnote

[3] **Bankruptcy**
Set-off against claim

Fact that judgment had not been handed down in Chapter 13 debtor's adversary proceeding against former husband did not prohibit finding a judgment rendered in that proceeding could be set off against debtor's past-due child support obligations to husband; setoff was not prohibited because claim sought to be used for setoff was disputed, trial had been scheduled to resolve adversary proceeding, bankruptcy court had been dealing with adversary proceeding for some time, so presumably knew claim was not frivolous, and waiting to order money paid out of estate was appropriate if bankruptcy court did not believe undue delay would be involved.

Cases that cite this headnote

[4] **Bankruptcy**
Domestic relations claims and proceedings
Bankruptcy
Set-off against claim
Bankruptcy
Priorities

Automatic stay's exemption of child support obligations did not mean bankruptcy court could not delay in ordering Chapter 13 debtor to pay past-due child support obligations to former husband pending resolution of debtor's unrelated adversary proceeding against husband that debtor claimed should be set off; child-support claims received priority status and should not usually be delayed by bankruptcy, but defense of setoff was claimed based on soon-to-be-tried claim that bankruptcy court had managed long enough to know was not frivolous, and regardless of outcome after continuance, husband would be entitled to benefits of his claim by payment or setoff. 11 U.S.C.A. § 362.

Cases that cite this headnote

Attorneys and Law Firms

***791** Raul Galaz, San Antonio, TX, pro se.

Henry Anthony Hervol, Law Office of H, Anthony Hervol, San Antonio, TX, for Appellee.

Appeal from the United States District Court for the Western District of Texas, No. 5:10–CV–1031.

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

Opinion

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

****1** Raul Galaz appeals a decision granting Lisa Ann Galaz's setoff defense, allowing her to deduct her past-due child support obligations from the amount he owes her from an unrelated litigation instead of paying him the past-due amount. In affirming the bankruptcy court, the district court ruled that Raul waived arguments not presented to the bankruptcy court and that waiting to grant or deny setoff until after the unrelated litigation was not an abuse of discretion. Concluding that Raul waived some arguments, and the bankruptcy court correctly addressed the others, we affirm.

I.

Raul and Lisa Ann were divorced in 2002. In 2007, Lisa Ann filed for bankruptcy under Chapter 13. Although a 2002 state-court order required her to obtain and maintain health-insurance coverage and equally share with Raul the medical-care costs for their children, she failed to do so starting in January 2008. In ***792** March 2008, she also removed to bankruptcy court a lawsuit involving claims against Raul and others (the "Adversary Proceeding").

In July 2009, Raul moved for relief from the automatic stay to obtain back child support; in response, Lisa Ann sought permission to pursue claims for back child support against him. The issue went to arbitration, where Raul was ordered to make monthly support payments, but Lisa Ann was directed to pay $9,727 to Raul for previous

medical expenses and attorney's fees (all of which were deemed in the nature of child support).

Raul then began trying to collect that support payment. In December 2009, he filed in the bankruptcy court a motion to direct payment of child support obligations and to require the trustee to issue him the $9,727. Lisa Ann responded that the Adversary Proceeding against Raul was for far more than $9,727; she invoked setoff as a defense. A hearing was held in January 2010, but the bankruptcy court continued consideration of the motion until after the trial in the Adversary Proceeding. When the trial was over, the bankruptcy court said it was taking the matter under advisement, and it continued consideration indefinitely.[1]

[1] Although the court issued two orders shortly thereafter—one granting Raul's motion and the other vacating that grant—those orders were unexplained, and nothing suggests they are relevant.

In August 2010, Raul filed a renewed motion to direct payment, contending that the court could not delay awarding him the $9,727 merely because there was a possibility that Lisa Ann would obtain a judgment against him. The court held a hearing and declared that the defense of setoff applied, explaining that although the judgment had not yet been entered in the Adversary Proceeding, the specific amount would be known soon. In November 2010, the bankruptcy court issued a judgment in the Adversary Proceeding for $500,000 against Raul.

The district court affirmed. Though the court located Texas caselaw supporting Raul's argument that the Adversary Proceeding's judgment and the child support obligation payments lacked mutuality, the court found he had waived that argument by failing to raise mutuality in the bankruptcy court. It also declared that the bankruptcy court did not abuse its discretion by granting continuances rather than deciding to grant or deny the motion to direct payment of child-support obligations.

II.

**2 [1] In his *pro se* appeal, Raul argues that the district court erred in holding that he waived the argument that his child support claim could not be offset against the judgment for lack of mutuality. Neither this court nor a district court will review an issue presented for the first time on appeal of a bankruptcy court's decision. *Crosby v. Orthalliance New Image (In re OCA, Inc.)*, 552 F.3d 413, 424 (5th Cir.2008). Raul offers two arguments for reversing the finding of waiver: (1) He repeatedly maintained that the child support obligations could not be offset, which adequately raised the issue in the bankruptcy court, and (2) the bankruptcy court revealed that it recognized he was arguing a lack of mutuality when it noted that setoff would be for unrelated debts. Both of these arguments fail.

Setoff is a longstanding fixture in bankruptcy law having its roots in equity. Without setoff, where a debtor and creditor owe each other separate debts, the solvent party would pay the bankrupt party ***793** the amount owed, then stand in line with other creditors to try to recover the debt the bankrupt party owed it. That would often result in the solvent party's paying the full amount of its debt and getting back only a fraction of what it was owed from the bankrupt party. Offset, however, allows the solvent party to reduce the amount paid by the amount the bankrupt party owes him.

Under § 553, setoff has three requirements: (1) The creditor has both a claim against and owes a debt to the debtor, both of which arose pre-petition; (2) the claim and the debt are mutual, and (3) both claim and debt are valid and enforceable. 11 U.S.C. § 553(a). But here, the debtor—not the creditor—is seeking a setoff, so § 558 applies instead of § 553. *See* 11 U.S.C. § 558. Because § 558 "preserves to the Debtor the defenses it would have had pre-petition," some courts conclude that the court must examine the transaction as though the bankruptcy had not been filed, eliminating the requirement that both debts be pre-petition obligations.[2] In *In re Braniff Airways, Inc.*, 42 B.R. 443, 452–53 (N.D.Tex.Bankr.1984), and *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1036–37 (5th Cir.1987), it was held that even under § 558, pre-petition debt cannot be set off against post-petition debt, because then they would not be mutual.[3]

[2] *See Second Pa. Real Estate Corp. v. Papercraft Corp. (In re Papercraft Corp.)*, 127 B.R. 346, 350 (Bankr.W.D.Pa.1991).

[3] We explain this to clarify that the prepetition/postpetition distinction is still relevant in this circuit in § 558 cases, given that the district court cited *In re Circuit City Stores, Inc.*, No. 08–35653, 2009 WL 4755253, at *3 (Bankr.E.D.Va. Dec. 3, 2009), for the proposition that courts ignore the pre-petition/post-petition distinction in § 558 cases. That decision is not the law in this circuit. Because Raul waived his mutuality arguments by failing to raise

them in the bankruptcy court, the split over this issue is not determinative here.

Although Raul argued that setoff was improper, his justification was that child support is a priority claim; that is distinct from the lack-of-mutuality argument he presented on appeal. An argument must "be pressed, and not merely intimated. In short, the argument must be raised to such a degree that the trial court may rule on it." *Butler Aviation Int'l, Inc. v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1128 (5th Cir.1993) (internal quotation marks and citations omitted). If a party does not argue a point plainly enough for the trial court to recognize and rule on it, that argument is waived on appeal.

****3** The record demonstrates that Raul argued that setoff was inappropriate because the child support claim was of a higher priority,[4] but now he contends that child support is different from other types of debt and therefore cannot be set off against ordinary debt. To support this, he reasons that the payments are really for the child—merely held by the parent in a fiduciary capacity—and that such support payments are treated differently from other debt under Texas Law (*i.e.*, not terminating on death of the obligee).

4 *E.g.*, Renewed Motion To Direct Payment of Child Support Obligations, 3 ("Child support obligations are an unsecured priority claim, and take precedence over all other unsecured non-priority claims."); *id.* 7 ("This court cannot deny the immediate application of RAUL GALAZ's judgment (and priority claim against Debtor's estate) based on the mere possibility of Debtor's future judgment against Raul Galaz."). Raul also claims (unopposed by Lisa Ann) that he made this priority argument at other times before the bankruptcy court.

***794** These new lack-of-mutuality arguments are completely distinct from Raul's initial argument to the bankruptcy court against setoff, to the effect that child support claims are of a higher priority. A priority claim is one that gets paid from the estate before others, providing its holder a greater likelihood of repayment, and does not generally affect the applicability of setoff.[5] Because Raul presented the argument that his claim's priority status prohibited setoff, the bankruptcy court specifically addressed the issue of priority when it made its decision. In the oral discussion of the order, the court stated:

5 5 COLLIER ON BANKRUPTCY 553.03[3][f][vi] ("In general, the priority of a claim is irrelevant under section 553....").

> I'm not saying the claim shouldn't be paid or shouldn't be allowed as a priority claim. What I'm saying is ... the claim against Mr. Galaz by Lisa Galaz ... far exceeds the claim by Mr. Galaz against Lisa Galaz.
>
> ....
>
> The claim of Mr. Galaz is non-dischargeable, in any event, and will be credited against any judgment, or it will be allowed as a non-dischargeable priority claim in the event that the judgment is set aside for any reason.
>
> The priority nature of the claim is still given its full value: It gets fully credited against the amount Raul owes Lisa Ann, or if that judgment against him is set aside, he retains a priority claim. Because no argument was presented that some other theory against mutuality existed, none was addressed.

[2] Raul also provides a portion of the record that he argues shows the bankruptcy court recognized mutuality was at issue. The court asked, "There's really no defense to [the child support claim], other than offset, for unrelated claims against [Raul]?" Raul maintains that by recognizing that the only way setoff applied was between unrelated claims, the bankruptcy court recognized that mutuality was at issue. The quoted statement, however, does not indicate a recognition that mutuality was disputed. The context shows that the court had been asking Lisa Ann's counsel whether there was any defense to Raul's request for the funds. After Lisa Ann's counsel described that she was seeking a larger judgment against Raul, the court made that statement. It was likely just descriptive, given that the defense was actually setoff of an unrelated claim.

In fact, the mutual obligations that the doctrine of setoff contemplates usually arise from separate transactions and thus are unrelated.[6] The court was likely just describing that this fit into the usual case rather than the rarer situation in which setoff was for more closely related claims.[7] The relatedness of the facts underlying the debts is not part of the inquiry and does not call mutuality into question. Therefore, this brief note by the bankruptcy court that the setoff was for an unrelated claim does not demonstrate that the court recognized Raul to be arguing that setoff should be disallowed for lack of mutuality.

6 *Id.* 553.03[3][f].

[7] Because the court had recently been discussing with the parties that previously the Galazes had argued about who owed whom child support payments, finally resolving that issue through arbitration, the court may have been unsure whether the alleged setoff was for a related claim.

III.

4 Raul argues that the bankruptcy court abused its discretion in waiting to decide on his motion to award him child support based on the possibility that Lisa Ann would win an unrelated lawsuit against him. We review grants or denials of continuances **795 for abuse of discretion. See *United States v. Lewis,* 476 F.3d 369, 387 (5th Cir.2007). Raul's argument has two components: (1) The judgment had not yet been awarded, so it was only a possibility when he filed his motion; and (2) child support obligations are exempt from the automatic stay in the bankruptcy code. No party cited caselaw concerning whether waiting until the unrelated lawsuit resolved was within or beyond the bankruptcy court's discretion.

[3] First, the fact that the judgment had not yet been handed down does not prohibit the bankruptcy court from finding setoff appropriate. Setoff is not prohibited just because the claim sought to be used for setoff is disputed.[8] The court had already scheduled a trial to assess Lisa Ann's claim and had been dealing with that case against him for many months. Because a defense of setoff had been advanced, it makes sense that the bankruptcy court would want to wait on ordering money paid out of the estate to determine whether setoff was appropriate, as long as the court did not believe doing so would cause undue delay. With a trial in the Adversary Proceeding already scheduled for the near future, the bankruptcy court could reasonably believe there would be no undue delay in waiting to see whether money really needed to be paid out of the bankruptcy estate. Moreover, because the Adversary Proceeding had been moved to the bankruptcy court and had been there for some time, the court presumably knew the claim was not frivolous.

[8] *See* 5 COLLIER ON BANKRUPTCY 553.03[1][e].

[4] Raul's additional argument—that because child-support obligations are exempt from the automatic stay in the bankruptcy code, the bankruptcy court cannot delay releasing those funds—misunderstands the scope of that provision: Section 362(b) does exempt child support obligations from the automatic stay, but refusing to stay something as a matter of course is not the same as guaranteeing immediate payment. Section 362 is not meant to put child support obligations beyond the reach of the entirety of the bankruptcy system; it merely recognizes—similar to the fact that such claims receive priority status—that these claims are considered more important.

For example, § 362(b)(2)(B) still stays collection of such obligations from property of the bankruptcy estate. Nothing in the Bankruptcy Code suggests the bankruptcy court should not consider child-support obligations in the overall administration of the estate, so if justice requires waiting on paying out the obligations, the bankruptcy court may do so in a specific case. Exempting child-support obligations from the automatic stay means that usually these claims should not be delayed by bankruptcy; it does not mean there are no exceptional circumstances in which such a delay is warranted.

**5 Here, a defense of setoff was claimed, based on a soon-to-be-tried claim that the bankruptcy court had managed long enough to know was not frivolous. Moreover, regardless of the outcome after the continuance, Raul would be entitled to the benefits of his claim: He either maintains a non-dischargeable priority claim, or he gets a valuable setoff. On these facts, we cannot say the court abused its discretion in waiting to determine whether setoff was warranted before ordering payments from the bankruptcy estate.

The judgment of the district court, affirming the bankruptcy court, is AFFIRMED.

All Citations

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This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals, Fifth Circuit.

In the Matter of: Anne M. MCCLOSKEY; Michael A. Craig, Debtors.
Christopher J. McCloskey, Appellant
v.
Anne Miriam McCloskey; Michael A. Craig, Appellees.

No. 08-20147
|
Summary Calendar.
|
Sept. 30, 2009.

Synopsis

Background: The United States District Court for the Southern District of Texas affirmed a bankruptcy court's conclusion that an attorney fee award was not dischargeable in bankruptcy, and appeal was taken.

Holding: The Court of Appeals held that domestic support obligation is not dischargeable in bankruptcy.

Vacated and remanded.

West Headnotes (1)

[1] Bankruptcy
Property Distribution and Alimony, Maintenance, or Support

Domestic support obligation is not dischargeable in bankruptcy. 11 U.S.C.A. § 523(a)(5).

Cases that cite this headnote

Attorneys and Law Firms

***105** Christopher J. McCloskey Sugar Land, TX, pro se.

Kelly C. Heallen, Craig & Heallen, Houston, TX, for Appellees.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:07-cv-2381.

Before SMITH, STEWART, and SOUTHWICK, Circuit Judges.

Opinion

PER CURIAM:[*]

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

****1** The sole issue properly before this court in this bankruptcy appeal is whether the district court erred in affirming the bankruptcy court's conclusion that an attorney's fee award was not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(5). In bankruptcy appeals, we "perform the same function as did the district court: Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed *de novo*." *Nationwide Mut. Ins. Co. v. Berryman Prods.*, 159 F.3d 941, 943 (5th Cir.1998) (citation omitted). This court reviews a grant of summary judgment *de novo*. *Evans v. City of Houston*, 246 F.3d 344, 347 (5th Cir.2001). Summary judgment is appropriate when "the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c).

A domestic support obligation is not dischargeable from debt in bankruptcy. 11 U.S.C. § 523(a)(5); *see generally In re Hudson*, 107 F.3d 355, 357 (5th Cir.1997) ("A court ordered obligation to pay attorney fees charged by an

attorney that represents a child's parents in child support litigation against the debtor is non-dischargeable.") (citation omitted); *In re Sonntag*, 115 Fed.Appx. 680, 681-82 (5th Cir.2004) (unpublished) ("Attorney fees awarded in connection with a child custody dispute are for the benefit of the parties' children.... Thus, such debts fall under the exception to dischargeability outlined in 11 U.S.C. § 523(a)(5).").

While this case was pending on this appeal, the Texas Court of Appeals entered an opinion holding that "[b]ecause this is not a case of child support enforcement, the trial court erred in characterizing the attorney's fees as child support." *McCloskey v. McCloskey*, No. 14-06-00470-CV, 2009 WL 3335868, at *4 (Tex.Ct.App. Apr. 2, 2009). The appellate court modified the trial court judgment to "delete any reference to the characterization of attorney's fees as 'additional child support.' " *Id.*[1] Because the Texas Court of ***106** Appeals held the trial court's characterization of the attorney's fee award as child support to be in error, we vacate the judgment and remand this cause to the bankruptcy court to determine whether the attorney's fee award is dischargeable in bankruptcy.

[1] By letter dated July 30, 2009, we requested that the parties file letter briefs addressing whether the judgment on appeal should be vacated and remanded to the bankruptcy court in light of the Texas Court of Appeals' decision filed on April 2, 2009. Appellant McCloskey filed a letter brief, but he devotes most of the brief arguing that the debt has already been paid, that the fees are based on an assignment that is prohibited, and that the Appellees have violated the automatic stay. These issues are outside our review on this appeal. Appellees did not file a letter brief.

VACATED and REMANDED.

All Citations

347 Fed.Appx. 104, 2009 WL 3150318

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189 Fed.Appx. 299
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

In the Matter of Donna ROGERS, Debtor.
Donna Rogers, Appellant,
v.
Mark Anton MORIN, Appellee.

No. 04-60999.
|
Decided June 22, 2006.

Synopsis

Background: Former husband of Chapter 7 debtor initiated adversary proceeding, contending that debt owed to him was for their child's support and therefore not dischargeable. The bankruptcy court granted summary judgment for husband, and debtor appealed. The United States District Court for the Southern District of Mississippi affirmed. Debtor appealed.

Holdings: The Court of Appeals held that:

[1] debt to husband for attorney fees related to his defense of sexual abuse allegations brought as part of a custody determination was in the nature of support for the child and thus exempt from discharge, and

[2] debtor failed to establish special circumstances warranting an exception to the exemption from discharge.

Affirmed.

West Headnotes (2)

[1] **Bankruptcy**
Child Support

Debt to Chapter 7 debtor's former husband for attorney fees related to his defense of sexual abuse allegations brought as part of a child custody determination was in the nature of support for the child and thus exempt from discharge in bankruptcy. 11 U.S.C.A. § 523(a)(5).

6 Cases that cite this headnote

[2] **Bankruptcy**
Child Support

Chapter 7 debtor failed to establish special circumstances warranting an exception to the exemption from discharge for a debt owed to former husband for attorney fees related to his defense of sexual abuse allegations brought as part of a child custody determination, where she alleged that she had been awarded custody of the child and payment of the debt would therefore detract from her ability to financially support the child, but she did not identify specific facts of actual hardship to the child. 11 U.S.C.A. § 523(a)(5).

3 Cases that cite this headnote

Attorneys and Law Firms

***300** Robert W. Gambrell, Robert Gambrell & Associates, Biloxi, MS, for Appellant.

William Charles Bell, Ridgeland, MS, for Appellee.

Appeal from the Unites States District Court for the Southern District of Mississippi, (No. 3:01-CV-879).

Before REAVLEY, CLEMENT, and PRADO, Circuit Judges.

Opinion

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

****1** In this bankruptcy proceeding, the debtor appeals from the bankruptcy court's grant of summary judgment in favor of the creditor. Because, like the courts below, we hold that the debt is not dischargeable, we affirm.

I. FACTS AND PROCEEDINGS

The debt in question stems from a custody determination in a divorce proceeding before the Chancery Court of Scott County, Mississippi. At the outset of the proceeding, the chancellor initially awarded the wife, Donna Rogers, temporary custody over the couple's three-year-old daughter, Erin, subject to unrestricted visitation by the husband, Mark Morin. During the course of the proceeding, Rogers alleged that Morin had sexually abused Erin.

Pursuant to Mississippi law, the chancellor conducted a hearing on the abuse allegation as part of the overall custody determination. The abuse hearing lasted over two weeks and involved seventeen witnesses and over fifty exhibits. Morin incurred $29,388.25 in attorney's fees related to his defense of the sexual abuse allegation. Court costs, largely attributable to the cost of a guardian *ad litem* on Erin's behalf, reached $9,962.42. The chancellor concluded that Morin had not abused Erin and, under MISS.CODE § 93-5-23, awarded to Morin attorney's fees and costs, totaling $39,350.67, incurred in defending the abuse allegations. The chancellor based the award on Morin's successful defense of the sexual abuse claim and establishment of reasonable visitation rights. In addition, the chancellor awarded a lump-sum alimony payment from Morin to Rogers and on-going child support payments from Morin for Erin's benefit. As a result of the ***301** custody hearing, the chancellor finalized the temporary custody order.

After Morin attempted to collect the debt from Rogers, Rogers filed a Chapter 7 bankruptcy action.[1] Morin initiated an adversary proceeding, in which he contended that the debt was not dischargeable under 11 U.S.C. § 523(a)(5). Rogers argued, as she does now on appeal, that because she is the custodial parent the debt cannot be for Erin's support and, therefore, is not exempt from discharge. The bankruptcy court disagreed, granted Morin's motion for summary judgment, and deemed the debt not dischargeable because it was in the nature of support for Erin. Rogers appealed to the district court, which affirmed the bankruptcy court on similar grounds. Rogers now appeals to this court.

1 Around this time, Rogers also sought review of the chancellor's order. The Mississippi Supreme Court affirmed the chancellor's order.

II. STANDARD OF REVIEW

This court reviews the bankruptcy court's order in the same manner as did the district court. *Hickman v. Texas (In re Hickman)*, 260 F.3d 400, 401 (5th Cir.2001) (citing *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 402 (5th Cir.2001) (en banc)). The bankruptcy court's summary judgment order is reviewed de novo. *First Am. Title Ins. Co. v. First Trust Nat'l Ass'n (In Re Biloxi Casino Belle Inc.)*, 368 F.3d 491, 496 (5th Cir.2004) (citing *Williams v. Int'l Bhd. of Elec. Workers, Local 520 (In re Williams)*, 298 F.3d 458, 461 (5th Cir.2002)). A bankruptcy court's grant of summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* (citing FED.R.CIV.P. 56(c); BANKR.R. 7056). In an adversary proceeding challenging the discharge of a debt, the creditor has the burden to prove by a preponderance of the evidence that the debt is not dischargeable. *Grothues v. IRS (In re Grothues)*, 226 F.3d 334, 337 (5th Cir.2000) (citing *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). "If the moving party meets its burden, the non-movant must designate specific facts showing there is a genuine issue for trial." *Zer-Ilan v. Frankford (In re CPDC, Inc.)*, 337 F.3d 436, 441 (5th Cir.2003) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc)).

III. DISCUSSION

A. Nature of the debt

****2** Rogers contends that the bankruptcy court and district court erred in determining that the debt was in the nature of support because those courts did not employ the factors set out in *Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 279 (5th Cir.1994). Rogers's argument fails for two

reasons. First, the debt in *Dennis* involved the payment of a portion of the ex-husband's pension in support of the ex-wife; support of a child was not in question. Second, this circuit and the majority of other circuits have plainly held that debts like the one at issue are in the nature of support of the child.

[1] At the time of Rogers's bankruptcy, 11 U.S.C. § 523(a)(5) provided:

> A discharge under ... 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, 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 ***302** to the extent that ... such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support....[2]

[2] Rogers initiated bankruptcy proceedings in November 1999. Section 523(a)(5) has since been amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L. No. 109-8, § 215(1)(A), 119 Stat. 23, 54 (2005).

There is no question that the debt arose "in connection with a ... divorce decree" and that the chancellor's order was a "determination made in accordance with State ... law." Accordingly, to determine whether the debt is exempt from discharge under § 523(a)(5), the essential question is whether the "liability is actually in the nature of alimony, maintenance, or support." This court's precedent dictates that the liability is in the nature of support of Erin, and, as such, the debt is exempt from discharge.

This circuit has been clear on the nature of the debt involved: "A court ordered obligation to pay attorney fees charged by an attorney that represents a child's parent in child support litigation against the debtor is non-dischargeable." *Hudson v. Raggio & Raggio, Inc. (In re Hudson)*, 107 F.3d 355, 357 (5th Cir.1997). The same holds true as to debts incurred in the adjudication of custody disputes. *See Dvorak v. Carlson (In re Dvorak)*, 986 F.2d 940, 941 (5th Cir.1993) (holding that under § 523(a)(5) attorney's fees and court costs from a custody hearing were not dischargeable because the "court hearing ... was for [the child]'s benefit and support"). *See also Sonntag v. Prax (In re Sonntag)*, 115 Fed.Appx. 680, 682 (5th Cir.2004) (*"Sonntag II "*) (per curiam) ("Attorney fees awarded in connection with a child custody dispute are for the benefit of the parties' children, as the purpose of such a proceeding is to determine who can provide the best home and environment for the children at issue."), *aff'g* No. 4:04-CV-145-A, 2004 WL 764728 (N.D.Tex. Apr.7, 2004) ("*Sonntag I "*).

****3** Regarding the nature of the debt involved, the *Hudson* court reasoned that "[b]ecause the ultimate purpose of such a proceeding is to provide support for the child, the attorney fees incurred inure to her benefit and support, and therefore fall under the exception to dischargeability set out in § 523(a)(5)." 107 F.3d at 357. The majority of other circuits agree that "custody actions are directed towards determining which party can provide the best home for the child and are, therefore, held for the child's benefit and support." *Lowther v. Lowther (In re Lowther)*, 266 B.R. 753, 757 (B.A.P. 10th Cir.2001) ("The majority of circuit courts addressing this issue have reached similar conclusions.") (collecting cases), *aff'd*, 321 F.3d 946 (10th Cir.2002). The nature of the debt in question here is no different.

The attorney's fees and court costs that make up the debt arose as a direct result of the adjudication of Rogers's allegations of sexual abuse by Morin. The abuse hearing formed a part of the overall custody determination. The resolution of the abuse allegations and determination of whether Morin should be permitted reasonable rights of visitation plainly were for Erin's benefit and well-being: the chancellor made custody and visitation determinations based on Erin's needs after determining that Morin had not abused her. As such, under this court's precedent, the liability incurred from the proceedings is a debt that is in the nature of support for Erin. In light of *Hudson* and *Dvorak*, the bankruptcy court and the district court did not err in holding that the debt was in the nature of support.

***303 B. Unusual circumstances**

Rogers urges the court to follow the Tenth Circuit and recognize an exception to the exemption from discharge under § 523(a)(5) where "unusual circumstances exist." *See Lowther*, 266 B.R. at 757 (citing *Jones v. Jones (In re Jones)*, 9 F.3d 878, 881 (10th Cir.1993)). Rogers identifies as an unusual circumstance the fact that she was awarded custody, but the chancellor assessed the

attorney's fees and court costs against her. As the custodial parent and debtor, she continues, if the debt is not discharged, the effect of the ruling would be to "take food out of the mouth of the minor child."

Rogers identifies no cases from this circuit holding that the presence of unusual circumstances permit an otherwise non-dischargeable debt to be discharged. Nor does Rogers provide support for her proposition that a custodial parent's debt to the non-custodial parent necessarily constitutes unusual circumstances. To the contrary, as the district court identified, cases from outside this circuit show that the debtor's status as the custodial parent is irrelevant to whether the debt is dischargeable. *See, e.g., Swartzberg v. Lockwood (In re Lockwood),* 148 B.R. 45, 47 (Bankr.E.D.Wisc.1992) (holding that the debtor's status as custodial parent does not necessarily preclude the denial of discharge under § 523(a)(5)); *Wedgle & Shpall, P.C. v. Ray (In re Ray),* 143 B.R. 937, 939 (D.Colo.1992) (reversing the bankruptcy court's discharge of debt because, "in determining whether attorney fees are nondischargeable under § 523(a)(5), the bankruptcy court should have focused on the character of the underlying proceedings, not [on] who was to have been paid the attorney fees, since the putative beneficiary of the award is, in fact, the child").

****4** In this circuit, Rogers's *Lowther* argument has been rejected implicitly. In *Sonntag II,* this circuit considered whether one parent's debt to the other parent could be discharged under § 523(a)(5). 115 Fed.Appx. at 681. The debtor-parent argued that this circuit should adopt the Tenth Circuit's unusual circumstances rationale from *Lowther* because deeming the debt not dischargeable would negatively affect the debtor-parents ability to support the child. Without commenting on the *Lowther* argument, the panel simply cited *Hudson* and *Dvorak* for the proposition that "[a]ttorney fees awarded in connection with a child custody dispute are for the benefit of the parties' children, as the purpose of such a proceeding is to determine who can provide the best home and environment for the children at issue" and held the parent's debt not dischargeable under § 523(a)(5). *Sonntag II,* 115 Fed.Appx. at 682.

While the *Sonntag II* panel did not address the argument now before the court, the district court, in *Sonntag I,* squarely addressed, and rejected, the debtor-parent's *Lowther* argument Rogers now advances:

> The United States Court of Appeals for the Fifth Circuit has interpreted § 523(a)(5) to include court-ordered payment of attorneys' fees incurred in post-divorce/child custody litigation. The Fifth Circuit has not allowed, much less alluded to, any exception to its strict interpretation of the statute.
>
> Appellant argues that the court should follow the reasoning of the Tenth Circuit in [*Lowther*]. There, the Tenth Circuit determined that an exception to the general rule of nondischargeability exists in "unusual circumstances." There, unusual circumstances were found to exist based on the bankruptcy court's fact findings that payment of court-ordered attorney's fees "would essentially negate the support payments awarded by the state court [to the debtor] for at least ***304** five years and would clearly affect her ability to financially support the child." The court is not persuaded that the Fifth Circuit, having spoken so plainly in *Dvorak* and *Hudson,* would follow the Tenth Circuit.

Sonntag I, 2004 WL 764728, at *2 (internal citations omitted).

The district court, in *Sonntag I,* continued noting that, even assuming the circuit did adopt the *Lowther* rationale, the debtor-parent would have failed to establish the unusual circumstances alleged: "[Debtor-parent] did not request the bankruptcy court to make any fact findings and the record would not support the kind of findings necessary to meet the Tenth Circuit's test in any event." *Sonntag I,* 2004 WL 764728, at *2. The same shortcoming is demonstrated in the record before this court.

[2] On summary judgment, Morin established as a matter of law that the debt is not dischargeable under § 523(a)(5) because at the time it was incurred, the debt was in the nature of support for Erin. Even if the court decided to adopt the unusual circumstances rationale, Rogers failed to identify in the record specific facts of actual hardship to Erin to support her special circumstances argument. And while she now requests remand to develop her allegations of hardship, the time to do so has passed. *See Varnado v. Lynaugh,* 920 F.2d 320, 321 (5th Cir.1991) (holding that allegations of factual issues may not be raised for the first time on appeal).

****5** Because Rogers does not qualify for relief under *Lowther,* we decline to decide whether to endorse or reject the Tenth Circuit's rationale. For our purposes it is enough to hold that the debt is not dischargeable because it is in the nature of support for Erin and that Rogers has failed to identify facts to support her special circumstances argument.

IV. CONCLUSION

Finding no error, we AFFIRM.

All Citations

189 Fed.Appx. 299, 2006 WL 1765428

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