UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 7
JANA STARLING OLSOMMER, a/k/a JANA H. BALLARD,	:	
Debtor	:	Case No. 99-54055 RFH
JANA STARLING OLSOMMER, a/k/a JANA H. BALLARD,	:	
Plaintiff	:	
vs.	:	
DONALD EDWARD OLSOMMER, JR.; DONALD EDWARD OLSOMMER, SR.; JANET H. OLSOMMER; EDWARD T. KELAHER; HAROLD M. HEIDT; C. BARTON SAYLOR,	:	
Defendants	:	Adversary Proceeding No. 00-5012

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Harold M. Heidt:	ROBERT M. MATSON Post Office Box 1773 Macon, Georgia 31202-1773
For Jana Starling Olsommer, a/k/a Jana H. Ballard:	JASON M. ORENSTEIN Post Office Box 4086 Macon, Georgia 31208-4086

MEMORANDUM OPINION

Harold M. Heidt, Defendant, filed on March 28, 2001, a motion for summary judgment.[1] The Court advised Jana Starling Olsommer, a/k/a Jana H. Ballard, Plaintiff, that her response to the motion should be received by the Court within twenty days. Plaintiff did not file a response. The Court, having considered the record and the arguments of counsel, now publishes this memorandum opinion.

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[1] Harold M. Heidt is one of six defendants in this adversary proceeding. The Court will refer to Dr. Heidt as Defendant in this memorandum opinion. The remaining defendants will be referred to by their names.

Plaintiff's obligations to the six defendants arose from a hotly contested child custody action. The Court entered an order on August 16, 2000, in this adversary proceeding, which determined that Plaintiff's obligation to Edward T. Kelaher was nondischargeable in bankruptcy.

The Court entered an order on December 28, 2000, which determined that Plaintiff's obligation to Donald Edward Olsommer, Jr. was nondischargeable in bankruptcy.

Donald Edward Olsommer, Sr. and Janet H. Olsommer withdrew their responses to Plaintiff's complaint. The Court entered a judgment by default on March 1, 2001, which determined that Plaintiff's obligations to Donald Edward Olsommer, Sr. and Janet H. Olsommer were dischargeable in bankruptcy.

Dr. C. Barton Saylor did not file a response to Plaintiff's complaint. The Court entered a judgment by default on April 20, 2000, which determined that Plaintiff's obligation to Dr. Saylor was dischargeable in bankruptcy.

The material facts are not in dispute. Donald Edward Olsommer, Jr. (hereafter "Mr. Olsommer") is the former spouse of Plaintiff. Plaintiff and Mr. Olsommer have two minor children. Plaintiff filed in state court in South Carolina a child custody action against Mr. Olsommer. The Horry County Department of Social Services filed a complaint, alleging that Mr. Olsommer had sexually abused his children. Mr. Olsommer had no contact with his children for seventeen months because of the pending sexual abuse charges. The state court appointed Edward T. Kelaher as guardian ad litem to promote and protect the interests of the children. The state court later dismissed the sexual abuse complaint against Mr. Olsommer.

Defendant is a clinical psychologist. The guardian ad litem, pursuant to an order of the state court, retained Defendant to assist in reunifying Mr. Olsommer with his children. Defendant was successful in re-establishing the relationship between Mr. Olsommer and his children.

The issue presented to the state court for determination was whether Plaintiff or Mr. Olsommer should have custody of their children. Defendant testified at the child custody hearing that the unification process between Mr. Olsommer and his children had been completed. The state court awarded custody of the children to Mr. Olsommer. The state court noted that it benefited from Defendant's services

in deciding that Mr. Olsommer should be awarded custody. The state court noted that neither Plaintiff nor Mr. Olsommer had any significant resources. The state court, however, ordered Plaintiff to pay $6,100 to Defendant for his professional services.[2]

The state court's order provided, in part, as follows:

> Based on her testimony, Plaintiff clearly has the skills and educational training necessary to secure viable outside employment and I believe she is capable of fully meeting all financial obligations imposed by this Order. Moreover, her financial situation is not appreciably different from the Defendant-father from whom she sought fees and costs. In the interest of equity, I retain jurisdiction to ensure the enforcement of this award of fees and costs for a period of one (1) year from the date of this Order.

Olsommer v. Olsommer, File No. 97-DR-26-2616 at 4-5 (Family Court of the Fifteenth Judicial Circuit, Horry County, S.C., Aug. 17, 1999).

Plaintiff filed a petition under Chapter 7 of the Bankruptcy Code on October 21, 1999. Plaintiff filed on January 24, 2000, a Complaint to Determine Dischargeability of Certain Debts. Plaintiff contends that her obligations arising under the state court's order are dischargeable under

[2] The state court also ordered Plaintiff to pay certain expenses of the other defendants in this adversary proceeding.

section 523(a)(5)(B) of the Bankruptcy Code.[3] In the motion for summary judgment, the only issue presented is whether Plaintiff's obligation to Defendant for his professional services is dischargeable in bankruptcy.

Section 523(a)(5)(B) provides, in part, as follows:

> **§ 523. Exceptions to discharge**
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–
>
> . . . .
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

11 U.S.C.A. § 523(a)(5)(B) (West 1993 & Supp. 2000).

In Cummings v. Cummings,[4] the Eleventh Circuit Court of Appeals stated, in part:

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[3] 11 U.S.C.A. § 523(a)(5)(B) (West 1993 & Supp. 2000).

[4] 244 F.3d 1263 (11th Cir. 2001).

> Pursuant to § 523(a)(5), "a given domestic obligation is not dischargeable if it is 'actually in the nature of' alimony, maintenance, or support." In re Harrell, 754 F.2d 902, 904 (11th Cir. 1985). Whether a given debt is in the nature of support is an issue of federal law. In re Strickland, 90 F.3d 444, 446 (11th Cir. 1996). Although federal law controls, state law does "provide guidance in determining whether the obligation should be considered 'support' under § 523(a)(5)." Id. To make this determination a bankruptcy court should undertake "a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support." In re Harrell, 754 F.2d at 906.
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> In conducting this inquiry, a court cannot rely solely on the label used by the parties. As other courts have recognized, "'it is likely that neither the parties nor the divorce court contemplated the effect of a subsequent bankruptcy when the obligation arose.'" In re Gianakas, 917 F.2d 759, 762 (3d Cir. 1990) (citation omitted). The court must therefore look beyond the label to examine whether the debt actually is in the nature of support or alimony. Id. A debt is in the nature of support or alimony if at the time of its creation the parties intended the obligation to function as support or alimony. See In re Brody, 3 F.3d 35, 38 (2d Cir. 1993); In re Sampson, 997 F.2d 717, 723-24 (10th Cir. 1993); In re Davidson, 947 F.2d 1294, 1296-97 (5th Cir. 1991); In re Gianakas, 917 F.2d at 762; Tilley v. Jessee, 789 F.2d 1074, 1077 (4th Cir. 1986); Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057-58 (8th Cir. 1983). Thus, "the party seeking to hold the debt nondischargeable has the burden of proving by a preponderance of the evidence that the parties intended the obligation as support . . . ." In re Sampson, 997 F.2d at 723.

The undisputed facts show that Plaintiff's children

benefited from Defendant's services. Defendant was successful in re-establishing a relationship between Plaintiff's children and their father. The state court noted that it benefited from Defendant's services in deciding that Mr. Olsommer should be awarded custody of the children. Plaintiff's children will continue to benefit from Defendant's services.

Other courts have held that a debtor's obligation to pay the fees of a psychologist incurred in a child custody proceeding are nondischargeable in bankruptcy. Miller v. Gentry (In re Miller), 55 F.3d 1487 (10th Cir.), cert. denied, 516 U.S. 916, 116 S. Ct. 305, 133 L. Ed. 2d 210 (1995); Moeder v. Moeder (In re Moeder), 220 B.R. 52, 55 (8th BAP 1998); see generally Sinton v. Blaemire (In re Blaemire), 229 B.R. 665, 668 (Bankr. D. Md. 1999) (implies that fees awarded to psychologist appointed to represent interest of child would be nondischargeable).

The Court can only conclude that Plaintiff's obligation to Defendant is a nondischargeable support obligation under section 523(a)(5)(B).

An order in accordance with this memorandum opinion will be entered this date.

DATED the 2nd day of May, 2001.

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ROBERT F. HERSHNER, JR.
Chief Judge