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 Edward T. Kelaher:	RICHARD M. KATZ 355 Cotton Avenue Macon, Georgia 31201
For Jana Starling Olsommer, a/k/a Jana H. Ballard:	JASON M. ORENSTEIN Post Office Box 4086 Macon, GEORGIA 31208-4086

MEMORANDUM OPINION

Edward T. Kelaher, Defendant, filed on June 22, 2000, a motion for summary judgment.[1] Jana Starling Olsommer, a/k/a Jana H. Ballard, Plaintiff, filed on July 17, 2000, a cross-motion for summary judgment. The Court, having considered the record and the arguments of counsel, now publishes this memorandum opinion.

The material facts are not in dispute. Donald Edward Olsommer, Jr. is the former spouse of Plaintiff. Plaintiff filed in state court in South Carolina a child custody action against her former spouse. The state court appointed Defendant as guardian ad litem to promote and protect the interests of the two minor children. Plaintiff concedes that her children substantially benefited from Defendant's services.[2] The state court allowed the children's grandparents, Donald Edward Olsommer, Sr. and Janet H. Olsommer, to intervene as parties in the custody action.

The issue presented to the state court for determination was whether Plaintiff or her former spouse

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[1] Edward T. Kelaher is one of six defendants in this adversary proceeding. The Court will refer to Mr. Kelaher as Defendant in this memorandum opinion. The remaining defendants will be referred to by their names.

[2] See Plaintiff's Motion for Summary Judgment as to Defendant Edward T. Kelaher and Brief in Support Thereof, p. 4 (filed July 17, 2000).

should have custody of their children. The state court awarded custody of the children to Plaintiff's former spouse. The state court noted that it had benefited from Defendant's services in deciding that Plaintiff's former spouse should be awarded custody. The state court noted that neither Plaintiff nor her former spouse had any significant resources. The state court ordered, however, Plaintiff to pay: (1) $35,000 to her former spouse for his attorney's fees; (2) $35,054.35 to the children's grandparents for their attorney's fees; (3) $12,540 to Defendant for part of his fees as guardian ad litem; (4) $6,100 to Dr. Harold M. Heidt; and (5) $1,436.65 to Dr. C. Barton Saylor.

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

> As I noted in my Order of July 2, 1999, the guardian ad litem did an outstanding job in promoting and protecting the best interests of the minor children. He expended a significant amount of time in this matter and is entitled to be fully paid for his extraordinary efforts. A significant amount of the time and expense incurred by the guardian ad litem was a result of Plaintiff's failure to cooperate with him and the independent experts he retained. Conversely, Defendant and the Intervening Defendants fully cooperated with the guardian and his experts in every particular. Thus as to the issue of guardian ad litem fees, I find Plaintiff shall be responsible for two-thirds of his statement or the amount of $12,540; while Defendant shall pay the guardian ad litem the sum of $6,175.00. The fees due to the guardian ad litem from Plaintiff and Defendant shall be paid directly to the guardian ad litem within ninety (90) days of the date of this

> Order. . . .
>
> 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 (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 section 523(a)(5)(B) of the Bankruptcy Code.[3] In the motion and the cross-motion for summary judgment, the only issue presented is whether Plaintiff's obligation to Defendant for his guardian ad litem fees 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

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

> 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).

Section 523(a)(5)(B) requires that the Court make only "a simply inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support." Harrell v. Sharp (In re Harrell), 754 F.2d 902, 906 (11th Cir. 1985) (emphasis original).

Plaintiff urges the Court to strictly construe support to mean financial support or child support payments. Plaintiff argues that the relevant inquiry is the nature of the obligation rather than the nature of the services rendered.

Exceptions to discharge are construed strictly

against the creditor and in favor of the honest debtor. St. Laurent, II v. Amborse (In re St. Laurent, II), 991 F.2d 672, 680 (11th Cir. 1993).

In Strickland v. Shannon (In re Strickland),[4] the debtor's former spouse had physical custody of their minor child. The debtor petitioned the state court to gain physical custody of his child, to terminate his child support obligations, and to require that his former spouse pay child support. The state court denied the debtor's requests and ordered the debtor to pay his former spouse's attorney's fees and costs.

The Eleventh Circuit Court of Appeals noted that federal law, rather than state law, determines whether a domestic obligation actually is in the nature of maintenance or support under section 523(a)(5). State law, although not controlling, does provide guidance in determining the true nature of the obligation. The Eleventh Circuit determined that the debtor's obligation was nondischargeable and held that: "[A]n attorney fees award arising from a post-dissolution custody action constitutes 'support' for the former spouse under 11 U.S.C. § 523(a)(5) where, as here, the award is based on ability to pay." 90 F.3d at 447.

See also Miller v. Gentry (In re Miller), 55 F.3d

[4] 90 F.3d 444 (11th Cir. 1996).

1487 (10th Cir.), cert. denied, 516 U.S. 916, 116 S. Ct. 305, 133 L. Ed. 2d 210 (1995) (guardian ad litem fees incurred in divorce/child custody proceedings were nondischargeable); Dvorak v. Carlson (In re Dvorak), 986 F.2d 940 (5th Cir. 1993) (guardian ad litem fees incurred in postdivorce child custody proceedings were nondischargeable); Madden v. Staggs (In re Staggs), 203 B.R. 712, 717 (Bankr. W.D. Mo. 1996) (majority of courts hold that guardian ad litem fees incurred in custody proceeding are nondischargeable).

In Peters v. Hennenhoeffer (In re Peters),[5] the District Court for the Southern District of New York held that the fees of an attorney appointed to represent the debtor's child in a custody dispute were nondischargeable. The district court stated, in part, as follows:

> As noted earlier, what constitutes support is determined under federal bankruptcy law. In general, the federal law is that attorneys' fees incurred by a guardian ad litem acting on behalf of a child during a custody dispute are "in the nature of support." The reasons for this view are clear. The support of a child does not just rest upon daily sustenance. The protection of the child's interests in court by the guardian ad litem constitutes a measure of support for the child whose value to the child cannot be diminished. Indeed, it is in the child's best interests to have custody matters fully and fairly litigated. Insuring this is done is part of the parents' duty to support the child. In re Hicks, 65 B.R. at 229.

[5] 133 B.R. 291 (S.D.N.Y. 1991), aff'd, 964 F.2d 167 (2d Cir. 1992).

133 B.R. at 296.

The undisputed facts show that Plaintiff's children substantially benefited from Defendant's services. Defendant was appointed as guardian ad litem to promote and protect the interests of Plaintiff's children. The state court ordered Plaintiff to pay $12,540 to Defendant for his fees as guardian ad litem. The state court determined that Plaintiff had the skills and educational training necessary to secure employment and fully meet her financial obligation.

Finally, Plaintiff argues that payment of the guardian ad litem fees cannot have a support function because Defendant's services have already been rendered. Plaintiff argues that payment for services already rendered cannot be characterized as support. Plaintiff concedes that her children benefited substantially from Defendant's services.

The Court is persuaded that Plaintiff's children continue to benefit from Defendant's services. Defendant's services helped the state court to determine that Plaintiff's former spouse should be awarded custody of the children.

Furthermore, a support obligation does not become dischargeable simply because the reason for the obligation has been satisfied. To hold otherwise would encourage debtors not to timely pay their support obligations. See Ehlers v. Ehlers (In re Ehlers), 189 B.R. 835, 838-39 (Bankr. N.D. Ala. 1995).

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 16th day of August, 2000.

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ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court