

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,	:	
	:	Adversary Proceeding
Defendants	:	No. 00-5012

BEFORE

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

COUNSEL:

For Donald Edward Olsommer, Jr.:

KARL E. OSMUS
Suite 800
544 Mulberry Street
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

Donald Edward Olsommer, Jr., Defendant, filed on August 3, 2000, a motion for summary judgment.¹ Jana Starling Olsommer, a/k/a Jana H. Ballard, Plaintiff, filed on September 6, 2000, a cross-motion for summary judgment. The Court, having considered the record, Defendant's affidavit, the statements of uncontested facts, and the arguments of counsel, now publishes this memorandum opinion.

Defendant is the former spouse of Plaintiff. Plaintiff and Defendant have two minor children. Plaintiff filed in state court in South Carolina a child custody action against Defendant. The state court appointed Edward T. Kelaher as guardian ad litem to promote and protect the interests of the children. The state court allowed the

¹ Donald Edward Olsommer, Jr. is one of six defendants in this adversary proceeding. The Court will refer to Mr. Olsommer 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 dischargeability of Plaintiff's obligations to Donald Edward Olsommer, Sr., Janet H. Olsommer, and Dr. Harold M. Heidt is pending before the Court.

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

children's grandparents, Donald Edward Olsommer, Sr. and Janet H. Olsommer, to intervene as parties in the custody action. Dr. Harold M. Heidt is a therapist who rendered professional services. Dr. C. Barton Saylor is a psychiatrist who rendered professional services.

The issue presented to the state court for determination was whether Plaintiff or Defendant should have custody of their children. The custody action was hotly contested. The state court awarded custody of the children to Defendant. The state court did not consider the issue of child support. The state court ordered Plaintiff to pay some of the attorney's fees and costs incurred by Defendant and to pay the attorney's fees and costs of the children's grandparents. The state court ordered Plaintiff to pay: (1) \$35,000 to Defendant for part of his attorney's fees; (2) \$35,054.35 to the children's grandparents for their attorney's fees; (3) \$12,540 to Mr. Kelaher 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:

THIS MATTER is before me to adjudicate each party's request to recover fees and costs incurred in connection with this contested custody and visitation action. On July 2, 1999, I issued an Order granting Defendant custody of his two daughters. I also specifically reserved the right to issue a

separate order on the issue of fees and related costs and allowed the parties and the guardian ad litem to submit affidavits and memoranda in support of their respective positions. I find Defendant is entitled to at least a partial recovery for the fees and costs incurred in this matter and that the Intervening Defendants are entitled [to] be fully reimbursed. Lastly, I find Plaintiff is not entitled to recover fees and costs from either the Defendant or the Intervening Defendants.

My decision to award Defendant and the Intervening Defendants fees and costs was, in retrospect, a difficult ruling to make due primarily to the degree of legal services that have been required in this matter and the significant costs which have been incurred. In reaching my decision, I have reviewed the criteria set forth by the Supreme Court in Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974), Atkinson v. Atkinson, 279 S.C. 454, 309 S.E.2d 14 (S.C. Ct. App., 1983); and Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991). I have also reviewed the affidavits and memoranda submitted by each party and by the guardian ad litem.

This was a hotly contested action in which the only issue ultimately presented for my determination was which party should have custody of the minor children. While neither the Plaintiff nor the Defendant have significant resources, both sought custody and the right to recover fees and costs from the other. Both Plaintiff, Defendant, and the Intervening Defendants were represented by competent counsel each of whom represented their respective client(s) effectively and with great diligence. The fees charged by all counsel were appropriate and within the range of fees customarily charged by seasoned domestic practitioners in South Carolina.

I find Defendant, Donald E. Olsommer, Jr., is entitled to a partial reimbursement of attorney's fees in the amount of \$35,000.00. This amount shall be paid by Plaintiff to Defendant within ninety (90) days of the date

of this Order. The most compelling factor warranting an award of fees and costs to Defendant lies in the beneficial results he obtained. Defendant was awarded custody of his two children despite the fact Plaintiff had served as the children's primary caretaker during the pendency of this action. The parties entered into a consensual resolution concerning the visitation to be enjoyed by the noncustodial parent; thus, the only issue Plaintiff and Defendant submitted for my determination was who should be awarded custody of the two minor girls. In light of my decision to award custody to Defendant, I believe he may be entitled to full reimbursement for the fees and costs he incurred in connection with this action; however, I decline to award Defendant complete relief on this issue based on the fact that both parties had meritorious positions. I am fully convinced, based on the record before me, that Defendant is entitled to this partial award and, in support of my decision regarding the issues of fees and costs, I incorporate by reference the findings of fact and conclusions of law set forth in my Order of July 2, 1999.

. . . Based upon my view of the evidence and my determination on the merits, I find both Defendant and especially the Intervening Defendants incurred significant additional expenses in connection with the defense of Plaintiff's action and the prosecution of their respective counterclaims. Plaintiff's refusal to cooperate with both the guardian ad litem and experts retained by the guardian ad litem are addressed in my Order of July 2, 1999, and support my conclusion that both Defendant and Intervening Defendants should recover costs from Plaintiff. See Anderson v. Tolbert, 322 S.C. 543, 473 S.E.2d 456 (S.C. Ct. App., 1996).

. . . .

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.

IT IS SO ORDERED.

/s/ H. T. Abbott
H. T. Abbott, III, Family Court Judge for
the Fifteenth Judicial Circuit

Dated: August 3, 1999

Conway, SC

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

Defendant is the sole source of financial support for his children. Since custody of the children was awarded to Defendant, Plaintiff has not provided any financial support to her children other than purchasing some eyeglasses. Defendant and his children, in order to control expenses, reside in a rental house near his parents' residence. Defendant's ability to provide for his children would suffer if Plaintiff's obligation for part of Defendant's attorney's fees is determined to be dischargeable in bankruptcy. See [Defendant's] Affidavit (filed August 3, 2000); [Defendant's] Statement of Uncontested Facts Pursuant to L.B.R. 7056-1 (filed August 3, 2000).

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) of the Bankruptcy Code.² In the cross-motions for summary judgment, the only issue presented is whether Plaintiff's obligation to Defendant for part of his attorney's fees is dischargeable in bankruptcy.

Section 523(a)(5) 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-

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which

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

has been assigned to the Federal Government or to a State or any political subdivision of such State); or

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

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

Section 523(a)(5) requires that the Court make only "a simple 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).

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),³ 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

³ 90 F.3d 444 (11th Cir. 1996).

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 "an 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." In re Strickland, 90 F.3d at 447.⁴

In the case at bar, the state court noted that it had relied upon a number of state appellate court decisions in awarding attorney's fees to Defendant. In Anderson v.

⁴ Other circuit courts of appeal also have held that awards of attorney's fees arising from post-divorce child custody actions are "in the nature of support" under section 523(a)(5). Custody actions are directed at determining which parent can provide the best home for the child and are, therefore, for the child's benefit and support. See Jones v. Jones, 9 F.3d 878 (10th Cir. 1993); Dvorak v. Carlson (In re Dvorak), 986 F.2d 940 (5th Cir. 1993); Peters v. Hennenhoefter (In re Peters), 964 F.2d 166 (2d Cir. 1992); see also Beaupied v. Chang (In re Chang), 163 F.3d 1138 (9th Cir. 1998), cert. denied, 526 U.S. 1149, 119 S. Ct. 2029, 143 L. Ed. 2d 1039 (1999) (relying upon Marks v. Catlow (In re Catlow), 663 F.2d 960 (9th Cir. 1981) (attorney's fees awarded in post-divorce child custody proceeding were nondischargeable under former Bankruptcy Act)).

Tolbert,⁵ the Court of Appeals of South Carolina stated:

At common law, a spouse had no right to recover attorney fees from an adversary spouse. *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961); *Brunner v. Brunner*, 296 S.C. 60, 370 S.E.2d 614 (Ct. App. 1988). In this state, S.C. Code Ann. §§ 20-3-120 through 20-3-140 (1985 & Supp. 1995) provide for statutory entitlement to attorney fees from an adversary spouse in domestic litigation. In this connection, S.C. Code Ann. § 20-3-145 (1985) mandates that an award of attorney fees shall constitute a lien on the property of the person ordered to pay the fee. The fact that attorney fees and costs are provided for in the same statutory sections as alimony is not mere coincidence. The American legal system's practice of imposing a duty on a husband to pay his wife's attorney fees in marital litigation rests solely on the husband's duty to provide necessary support for his wife and children. Homer H. Clark, Jr., *The Law of Domestic Relations In The United States* § 17.2 (2d ed. 1987). Matrimonial litigation statutes require the husband to pay the wife's attorney fees for reasons similar to those underlying temporary alimony. *Id.* Historically, the prevailing view was that when a wife became involved in litigation, legal services were as necessary an element of her support as food and lodging. *Id.* It was not until *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979) was decided that this obligation was made to apply to both spouses in order to satisfy the demands of the Fourteenth Amendment's Equal Protection Clause. See *Armaly v. Armaly*, 274 S.C. 560, 266 S.E.2d 68 (1980).

473 S.E.2d at 457.

The court also stated:

In determining whether an attorney's fee should be awarded, the following factors should be considered:

⁵ 322 S.C. 543, 473 S.E.2d 456 (S.C. Ct. App. 1996).

- (1) the party's ability to pay his/her own attorney's fee;
- (2) beneficial results obtained by the attorney;
- (3) the parties' respective financial conditions;
- (4) effect of the attorney's fee on each party's standard of living.

307 S.C. 471, 476-477, 415 S.E.2d 812, 816.
Accord *Sexton v. Sexton*, 310 S.C. 501, 427
S.E.2d 665 (1993); *Wingate v. Wingate*, 305 S.C.
368, 409 S.E.2d 346 (1991); *Cannon v. Cannon*,
321 S.C. 44, 467 S.E.2d 132 (Ct. App. 1996).

473 S.E.2d at 459.

Another factor is whether one party's uncooperative conduct either hampered or prolonged the domestic proceedings. 473 S.E.2d at 459.

In determining the amount of an attorney's fee award in a domestic proceeding, South Carolina courts must consider the following factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results accomplished; and (6) the fee customarily charged in the locality for similar legal services. The fee award must be based upon a reasonable hourly rate. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313, 315 (S.C. 1991); Atkinson v. Atkinson, 279 S.E. 454, 309 S.E.2d 14, 16 (S.C. Ct. App. 1983).

Plaintiff contends, "That is, simply put, a genuine

issue of material fact exists as to whether the state court assigned the obligation to pay [Defendant's] attorney from [Defendant] to Plaintiff. If such were the case, the obligation would be dischargeable under 11 U.S.C. § 523(a)(5)(A). [Defendant] having failed to present any evidence on this essential element, summary judgment would therefore be improper." Plaintiff's Brief in Response to Defendant Donald Edward Olsommer, Jr.'s Motion for Summary Judgment, p. 2 (filed Sept. 6, 2000). See also Plaintiff's Response to Defendant Donald Edward Olsommer, Jr.'s Statement of Uncontested Facts, p. 2 (filed September 6, 2000).

The state court determined that Defendant was entitled to a partial reimbursement of his attorney's fees. The court ordered that "[t]his amount [\$35,000] shall be paid by Plaintiff to Defendant within ninety (90) days of the date of this Order." Plaintiff has presented no evidence that the state court assigned to Plaintiff the obligation of Defendant to pay attorney's fees. Furthermore, this Court has held that an obligation to pay a former spouse's attorney's fees directly to the attorney does not make the obligation nondischargeable. Westmoreland, Patterson and Moseley v. Painter (In re Painter), 21 B.R. 846, 848 (Bankr. M.D. Ga. 1982). See also Hudson v. Raggio & Raggio, Inc. (In re Hudson), 107 F.3d 355, 357 (5th Cir. 1997).

Plaintiff also contends that "[i]n light of the

South Carolina state court['s] express finding in its Order that 'neither the Plaintiff nor [Defendant] have significant resources,' a genuine issue exists as to whether the state court intended to award attorney's fees as support or as punishment. Supplemental Order, p. 2. In order to make this determination, it is necessary that this Court hold a trial to engage in a simple inquiry as to the relative financial positions of the parties." Plaintiff's Response to Defendant Donald Edward Olsommer, Jr.'s Statement of Uncontested Facts, p. 2 (filed Sept. 6, 2000).

Plaintiff contends that, "[r]ather, the state court awarded fees as a penalty for Plaintiff's conduct during the course of the custody litigation rather than any need of [Defendant] cited by the state court." Plaintiff's Motion for Summary Judgment as to Defendant Donald Edward Olsommer, Jr. and Brief in Support Thereof, p. 3 (filed Sept. 6, 2000).

The state court stated that "the most compelling factor warranting an award of fees and costs to Defendant lies in the beneficial results he obtained." The "beneficial results" were a determination that Defendant should have custody of his children. The state court also stated that "Plaintiff's refusal to cooperate with both the guardian ad litem and experts retained by the guardian ad litem . . . support my conclusion that both Defendant and the Intervening Defendants should recover costs from Plaintiff." Finally, the

state court stated that "[b]ased 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."

The Court is persuaded that Plaintiff's obligation to pay part of Defendant's attorney's fees is in the nature of support. Defendant is the sole source of financial support for his children. Defendant's ability to support his children would suffer if Plaintiff's obligation is determined to be dischargeable. The state court determined that Plaintiff clearly had the skills and educational training necessary to secure employment to fully meet her financial obligations. The state court stated that the most compelling factor warranting an award of attorney's fees in favor of Defendant was the beneficial results that Defendant obtained, namely, the award of custody of his children.

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

DATED the 28th day of December, 2000.

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

CERTIFICATE OF SERVICE

I, Carolyn Hubbard, certify that a copy of the attached and foregoing was mailed to the following:

Mr. Karl Osmus
Attorney at Law
544 Mulberry Street, Suite 800
Macon, GA 31201

Mr. Jason M. Orenstein
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Post Office Box 4086
Macon, GA 31208-4086

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Mr. Emmett L. Goodman, Jr.
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544 Mulberry Street, Suite 800
Macon, GA 31201

Dr. C. Barton Saylor
857-B Coleman Boulevard
Mt. Pleasant, SC 29464

Mr. J. Coleman Tidwell
Chapter 7 Trustee
Post Office Box 1796
Macon, GA 31202

This 28th day of December, 2000.

Carolyn Hubbard
Deputy Clerk
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

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

ORDER

In accordance with the memorandum opinion entered
this date; it is

ORDERED that the motion for summary judgment filed
on the 3rd day of August, 2000, by Donald Edward Olsommer,
Jr., Defendant, hereby is granted; and it is further

ORDERED that the cross-motion for summary judgment
filed on the 6th day of September, 2000, by Jana Starling

Olsommer, a/k/a Jana H. Ballard, Plaintiff, hereby is denied;
and it is further

ORDERED that the obligation of Jana Starling
Olsommer, a/k/a Jana H. Ballard, Plaintiff, to Donald Edward
Olsommer, Jr., Defendant, hereby is determined to be
nondischargeable in bankruptcy.

SO ORDERED this 28th day of December, 2000.

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

CERTIFICATE OF SERVICE

I, Carolyn Hubbard, certify that a copy of the attached and foregoing was mailed to the following:

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Mt. Pleasant, SC 29464

Mr. J. Coleman Tidwell
Chapter 7 Trustee
Post Office Box 1796
Macon, GA 31202

This 28th day of December, 2000.

Carolyn Hubbard
Deputy Clerk
United States Bankruptcy Court