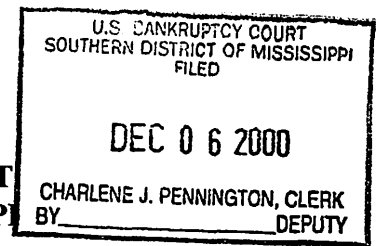


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE:

CHAPTER 7

DONNA LYNN (MORIN) ROGERS

CASE NO. 99-05514JEE

MARK ANTON MORIN

PLAINTIFF

VS.

ADVERSARY NO. 00-0039JEE

DONNA (MORIN) ROGERS

DEFENDANT

Hon. William C. Bell
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Counsel for Plaintiff

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Counsel for Debtor

Edward Ellington, Judge

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
MOTION FOR SUMMARY JUDGMENT
AND
*COUNTER-MOTION FOR SUMMARY JUDGMENT***

This matter came before the Court on the *Motion for Summary Judgment* filed by the Plaintiff, Mark Anton Morin, and the *Response* thereto filed by the Debtor, Donna Morin Rogers, and on the *Counter-Motion for Summary Judgment* filed by the Debtor and the *Reply* thereto filed by the Plaintiff. The Court, having considered the memorandum briefs and exhibits in support of the motions, along with the other pleadings filed in this adversary proceeding, concludes for the following reasons that no genuine issues of material fact exist, that Plaintiff's *Motion for Summary Judgment* is well taken and should be granted, and that the *Counter-Motion for Summary Judgment*

filed by the Debtor is not well taken and should be denied.

FINDINGS OF FACT

This case arises from lengthy divorce proceedings conducted in the Chancery Court of Scott County, Mississippi, between Donna Lynn (Morin) Rogers¹ and her ex-husband, Mark Morin. During the divorce proceedings in state court, Mr. Morin was accused of sexual abuse of the parties' minor daughter, accusations against which he successfully defended himself. On December 23, 1997, the state court rendered its opinion on the issue of Mr. Morin's visitation with the parties' child, and on May 26, 1998, rendered its opinion as to all remaining issues, including child custody and child support. On July 24, 1998, the state court entered the *Final Judgment of Divorce* granting the parties' divorce on the grounds of Irreconcilable Differences. In the *Final Judgment*, the state court granted custody of the parties' daughter to Ms. Rogers; ordered Mr. Morin to pay monthly child support; awarded Ms. Rogers \$12,426.91 in lump sum alimony; and, pursuant to Mississippi Code Annotated § 93-5-23, awarded Mr. Morin \$29,388.25 "for attorney fees in defending sexual abuse allegations" and \$9,962.42 "for court costs incurred in connection with defending sexual abuse allegations."

On November 18, 1999, the Debtor filed her petition for relief under Chapter 7 of the Bankruptcy Code, seeking to discharge the \$39,350.67 in attorney fees and court costs which she owes to Mr. Morin pursuant to the state court judgment. On March 8, 2000, Mr. Morin initiated this adversary proceeding by filing his *Complaint Objecting to Discharge* wherein, pursuant to 11 U.S.C.

¹ The Debtor's maiden name was restored to her in the divorce proceeding.

§ 523(a)(5),² he objects to the Debtor's discharging the \$39,350.67 in fees and costs awarded to him by the state court for his successful defense against the abuse allegations.

Upon completion of discovery in the adversary proceeding, Mr. Morin filed a *Motion for Summary Judgment* and supporting memorandum of law, contending that no genuine issues of material fact exist and that the \$39,350.67 owed to him by the Debtor for attorney fees and court costs is non-dischargeable as a matter of law pursuant to § 523(a)(5). The Debtor filed her *Response* in opposition and *Counter-Motion for Summary Judgment* wherein she also asserts that no genuine issues of material fact remain for trial but disputes that the \$39,350.67 awarded to her ex-husband by the state court falls within the exception to discharge set out in § 523(a)(5).

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this action pursuant to 28 U.S.C. § 1334 and § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).

II.

The parties each filed a motion for summary judgment alleging that no genuine issues of material fact exist and that consequently, the court may enter judgment as a matter of law pursuant to Federal Rule of Bankruptcy Procedure 7056, which states in pertinent part:

(a) A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

² Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless noted otherwise.

(c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Bank. P. 7056. The Court agrees that the facts of this case are clear and undisputed and that judgment may be rendered as a matter of law.

III.

Under the Bankruptcy Code, all debts of a debtor are dischargeable unless they are subject to objections set out in § 727 or are expressly excepted from discharge by § 523. Debts for maintenance or support of a spouse, former spouse or child are expressly excepted from discharge pursuant to § 523(a)(5). In his *Motion for Summary Judgment*, Mr. Morin contends that his claim against the Debtor for attorney fees and court costs awarded to him by the state court is non-dischargeable as a debt in the nature of child support pursuant to § 523(a)(5).³ In seeking relief under § 523, the party asserting non-dischargeability of a debt has the burden to prove its exemption from discharge by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991); Benich v. Benich (In the Matter of Benich), 811 F.2d 943, 945 (5th Cir. 1987). Therefore, Mr. Morin must prove that the state court award falls within the ambit of the § 523(a)(5) exception to discharge.

³ The Court notes that although § 523(a)(5) provides that a debt to a former spouse of a debtor for alimony to, maintenance for, or support of such spouse in connection with divorce decree may be excepted from discharge, Mr. Morin does not argue that the state court award of attorney fees or court costs constitutes such spousal maintenance or support, and argues only that the state court award is "in the nature of child support." The Court will therefore limit its discussion to whether the award is a debt "in the nature of child support."

IV.

As noted above, § 523 of the Bankruptcy Code sets forth a list of certain debts which are excepted from discharge in bankruptcy. Section 523(a)(5) specifically excepts from discharge a debt for alimony, maintenance or support, providing in pertinent part as follows:

11 U.S.C. § 523

§ 523. Exceptions to discharge.

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

. . . .

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that -

. . . .

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

11 U.S.C. § 523(a). Therefore, "obligations that are actually in the nature of alimony, maintenance, or support, as provided in subsection (B) above, are not obligations that may be discharged in bankruptcy." Smith v. Smith (In re Smith), 114 B.R. 457, 461 (Bankr. S.D. Miss. 1990). However, "[t]he Bankruptcy Code requires the bankruptcy court . . . to determine the true nature of the debt, regardless of the characterization placed on it by the parties' agreement or the state court proceeding." Benich, 811 F.2d at 945. Thus, the Court "must place substance over form to determine the true nature and purpose of the award, regardless of the label used." Joseph v. J. Huey

O'Toole, P.C. (Matter of Joseph), 16 F.3d 86, 88 (5th Cir. 1994).

V.

The state court awarded attorney fees and court costs to Mr. Morin on the basis of Mississippi Code Annotated § 93-5-23, which states in pertinent part as follows:

Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services.

....

If after investigation by the Department of Human Services . . . allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

Miss. Code Ann. § 93-5-23. Mr. Morin argues that because the attorney fees and court costs granted to him pursuant to Mississippi Code Annotated § 93-5-23 were awarded following litigation involving divorce, child custody, child support and child visitation issues, the fees and costs are non-dischargeable as being "in the nature of child support." In support of his position, he relies primarily upon two Fifth Circuit cases, Dvorak v. Carlson, 986 F.2d 940 (5th Cir. 1993) and Hudson v. Raggio & Raggio, Inc., 107 F.3d 355 (5th Cir. 1997).

In Dvorak, the debtor, Mrs. Dvorak, sought custody of the parties' child after the parties had divorced. As a result of the child custody case, the state court terminated the debtor's parental rights, awarded custody to the ex-husband, and ordered the debtor to pay her ex-husband's attorney fees as well as the court-appointed guardian ad litem fees. The debtor subsequently filed Chapter 7 bankruptcy and attempted to discharge the attorney fees she was ordered to pay by the state court. The bankruptcy court concluded that the "court-ordered payment of attorneys' fees incurred in post-

divorce/child custody litigation should be recognized as child support, and therefore non-dischargeable under § 523(a)(5)." Dvorak, 986 F.2d at 941. On appeal, the Fifth Circuit elaborated that § 523(a)(5) "does not discharge a debtor from any debt for support of his or her child, if that debt is in connection with a court order." Id. Concluding that the fees "were incurred during a court hearing that was for [the child's] benefit and support," the Fifth Circuit affirmed the bankruptcy court's and district court's finding that the fees were non-dischargeable pursuant to § 523(a)(5). Id.

In Hudson v. Raggio & Raggio, Inc., the debtor was named as the defendant in a paternity action. The state court, upon its determination that the debtor was the father of the child in the case, ordered the debtor to pay child support, and to pay attorney fees to the law firm that represented the mother of the child. Hudson, 107 F.3d at 356. Although the debtor's primary argument in the case was that the fees were dischargeable because the state court ordered payment directly to the law firm rather than to a "spouse, former spouse or child of the debtor," the Fifth Circuit held that under Dvorak, the fees were non-dischargeable because "[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." Id. at 357. The Fifth Circuit further stated, "Because 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)." Id.

Based on the controlling law of the Fifth Circuit, the Court concludes that the attorney fees and court costs in issue are non-dischargeable. The structure of Mississippi Code Annotated § 93-5-23 and the wording of the state court *Final Judgment* suggest that the attorney fees and court costs granted to Mr. Morin were more in the nature of reimbursement of his costs for successfully defending himself against the abuse allegations than an award of child support. Yet, the expansive

language of Fifth Circuit case law dictates the finding that attorney fees awarded in connection with litigation involving child custody, child support and visitation inure to the benefit and support of the parties' child and are accordingly, in the nature of non-dischargeable child support. *See also Stark v. Bishop*, 149 F.3d 1167 (4th Cir. 1998) (bankruptcy court did not err in finding that award of attorney ad litem fees in connection with parties' divorce decree constituted "support" within meaning of § 523(a)(5) and was therefore not subject to discharge in bankruptcy because "in all custody actions, the court's ultimate goal is the welfare of the child."); *Adams v. Zentz*, 1991 WL 525000 (W.D. Mo. 1991) (majority rule on attorney's fees incurred in litigating child custody and visitation issues is that debt is non-dischargeable under § 523(a)(5)); *In re Doe*, 93 B.R. 608 (Bankr. W.D. TN 1988) (debtor's obligation to pay attorney fees and costs awarded to former spouse in action to modify debtor's visitation and support was in nature of "support" obligation so as to be non-dischargeable in bankruptcy); *In re Laney*, 53 B.R. 231 (Bankr. N.D. TX 1985) (debt for attorney fees awarded in state court to children's guardian was in nature of child support obligation and thus non-dischargeable even though state court characterized fee award as cost of litigation and expressly excluded it from category of support, because litigation concerned custody and support obligations and services of guardian inured to benefit of children). Based on the foregoing, the Court finds that the state court award of attorney fees and court costs to Mr. Morin is "in the nature of child support" and should be excepted from discharge pursuant to § 523(a)(5).

CONCLUSION

For the foregoing reasons, the Court concludes that the *Motion for Summary Judgment* filed by the Plaintiff is well taken and should be granted. The Court further concludes that because the debt in issue falls within the exception to discharge under § 523(a)(5), the debt is non-dischargeable

as a matter of law. Accordingly, the Debtor's *Counter-Motion for Summary Judgment* is not well taken and should be denied, and the state court judgment against the Debtor in the amount of \$39,350.67 should not be discharged.

A separate final judgment consistent with this opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure 7056 and 9021.

This the 6th day of December, 2000.


UNITED STATES BANKRUPTCY JUDGE