

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE
JEAN ELIZABETH NEVILLE,
Debtor.

Case No. 96-32004-WHB
Chapter 13

HAROLD G. WALTER,
Plaintiff

v.

Adversary No. 97-0254

JEAN ELIZABETH NEVILLE,
Defendant.

OPINION AND ORDER GRANTING PLAINTIFF'S COMPLAINT

The Plaintiff Harold G. Walter was appointed guardian ad litem by a circuit court judge in a Shelby County, Tennessee divorce action involving this debtor and her former spouse James Martin Neville. At the time of the divorce, the couple had one minor child. Mr. Walter filed this complaint seeking that "the debt owed to [Mr. Walter] by the [debtor] for the representation of the [debtor's] children as Guardian ad Litem be declared to be non-dischargeable." Plaintiff's Complaint. An answer was filed denying the relief sought. At the trial of this proceeding on July 16, 1997, counsel for the parties stipulated that the Final Decree of Divorce and Marital Dissolution Agreement be admitted as Exhibit 1. Mr. Walter testified as to the nature of his appointment and his duties as guardian ad litem.

Based upon the pleadings from the divorce action and the testimony of Mr. Walter, the Court concludes that the debtor's liability for one-half of the guardian ad litem fee, or \$2,415.00, is excepted from the debtor's available discharge by virtue of 11 U.S.C. § 523(a)(5).

This is a chapter 13 case in which the debtor has obtained a confirmation of her plan. Mr.

Walter's claim of \$2,415.00 has been allowed as an unsecured claim by an administrative order entered on February 5, 1997. By virtue of 11 U.S.C. § 1328(a)(2), the debts described in § 523(a)(5) are excepted from the discharge available in chapter 13 cases upon completion of all plan payments.

The issue in this proceeding is whether the debt owed to Mr. Walter is of the type described in § 523(a)(5).

The Marital Dissolution Agreement acknowledges under its section "I. Child Custody and Support" the agreed terms for joint child custody, for the child's residences, for visitation, and for support to be paid by the father, with adjustments for those periods that the child resided with the father. In paragraph m. of section I, the parties agreed that the guardian ad litem would submit a statement for services rendered and that the divorce court would determine the amount of those fees and "how the fee should be paid." In the Final Decree of Divorce at paragraph 5 of the ordering clause, Circuit Judge D'Army Bailey stated: "The fee of the Guardian ad Litem, Harold G. Walter, is hereby approved in the sum of \$4,830.00, each of the parties to pay one-half (1/2) thereof." No issue was raised in this proceeding about the reasonableness of the amount of those fees. The debtor's attorney argued that the fact that paragraph m. of the Marital Dissolution Agreement fell under the heading "Child Custody and Support" did not control a determination that the guardian ad litem fees were support in nature. Moreover, that attorney pointed to the specific provisions of that section providing for child support to be paid by the child's father. This Court agrees that the heading of the Marital Dissolution Agreement does not necessarily control the nature of the obligations falling under that heading; however, the Circuit Judge clearly ordered that the parents would be jointly liable for the fee.

The testimony of Mr. Walter established the nature of the fee. Mr. Walter was appointed in a

case where the parents were disputing custody, visitation, and monetary support obligations. There were, moreover, allegations of abuse of the child by someone. Mr. Walter obtained an evaluation of the child by a psychologist, and Mr. Walter met with the parents and their attorneys to negotiate an agreement. His work resulted in the Marital Dissolution Agreement that was submitted as an exhibit. He testified that his work was essential to the assurance of the child's welfare and best interests. The Court has no difficulty in finding that Mr. Walter's work was of benefit to the minor child and that the role of a guardian ad litem was necessary for the protection of the child's best interests.

Moreover, based upon the totality of the pleadings from the Circuit Court divorce and the testimony of Mr. Walter, the Court concludes that the obligation of both parents to pay the guardian ad litem's fee was intended by Circuit Judge Bailey as a support obligation. The Court acknowledges that some question may exist under § 523(a)(5) of the non-dischargeability of this obligation due to the language of that statute, which provides for the exception from discharge for "any debt to a spouse, former spouse, or child of the debtor, for alimony, maintenance for, or support of such spouse or child." The statute goes on in its subpart (b) to provide that such debts must "actually" be "in the nature of alimony, maintenance, or support." The Circuit Judge ordered each of the parents to be jointly liable directly to Mr. Walter; thus, it may be argued, although it was not in this proceeding, that this debt was not one owing to the child. "Most courts have held that the determination of whether a particular obligation is a debt owed to a spouse, former spouse or child under section 523(a)(5) does not depend on the identity of the payee." 4 King, COLLIER ON BANKRUPTCY ¶ 523.11[4] (15th ed. revised 1996). This Court has previously held that debts owing to third parties, such as attorneys who represented the minor child in a visitation and support dispute,

may be excepted from discharge if they qualify as debts in the nature of support. See, e.g., In re Doe, 93 B.R. 608 (Bankr. W. D. Tenn. 1988). More importantly, persuasive opinions from other courts, including courts of appeal, have so held.

For example, in Miller v. Gentry (In re Miller), 55 F.3d 1487 (10th Cir. 1995), that Court held that fees owing directly to a guardian ad litem and a child psychologist could be excepted from the general discharge. In that case, the bankruptcy court had read the “to” language of § 523(a)(5) to require discharge of debts that were not payable directly to either the spouse, former spouse, or child. The Circuit Court opted to construe the statute with a view of substance over form and held “that it is the nature of the debt that controls, not the identity of the payee.” 55 F.3d at 1490 (citation of other cases in accord omitted). That Court found the weight of authority from other circuits to support its holding. Id. There is no controlling authority from the Sixth Circuit on this issue.¹

¹ In O’Connor v. Perlin (In re Perlin), 30 F.3d 39 (6th Cir. 1994), that Court dismissed a complaint filed by the attorneys due to their lack of standing where the debt was one owing not to the attorneys but to their client. There is no such standing issue here because Judge Bailey ordered this debtor to be responsible directly to the plaintiff.

The “to” language of the statute is not so clear as to command that this Court must literally require the debt to be paid to the child in this instance. Such a conclusion would ignore that the minor child in this case would not have been legally obligated to pay the guardian ad litem fees. Only her parents were so obligated. A conclusion is inescapable that such fees are in the nature of support for the minor child. In Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1109 (6th Cir. 1983), in circumstances where the nature of the obligation is unclear so as to require application of that opinion’s four-part test, the Court said that the disputed debt must have the “effect” of providing “necessary” support. This obligation to pay the guardian ad litem fees meets that test.² The term “support should not be read so narrowly as to exclude everything bearing on the welfare of the child but the bare paying of bills on the child’s behalf.” Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir. 1993)(quoting Holtz v. Poe (In re Poe), 118 B.R. 809, 812 (Bankr. N. D. Okla. 1990)).

Based upon the foregoing analysis, IT IS THEREFORE ORDERED that the complaint filed by Harold G. Walter is granted, and the debt of \$2,415.00 owing to him is excepted from the debtor’s discharge that may be available in this chapter 13 case.³

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

² As the Court’s analysis demonstrates, the other elements of the Calhoun test also are satisfied. As an alternative to application of Calhoun, it could be concluded that the guardian ad litem fees are so clearly support in nature as to mandate non-dischargeability under the authority of Fitzgerald v. Fitzgerald (In re Fitzgerald), 9 F.3d 517 (6th Cir. 1993).

³ This opinion does not address whether the debtor may separately classify this debt in an amendment to her confirmed chapter 13 plan. See, e.g., Brown and Evans, “A Comparison of Classification and Treatment of Family Support Obligations and Student Loans: A Case Analysis,” 24 MEMPHIS STATE UNIV. LAW REV. 623 (Summer 1994).

DATED: July 22, 1997

cc:

Debtor

Steven F. Bilsky
Attorney for Plaintiff
100 N. Main, Suite 405
Memphis, TN 38103

James M. Allen
Taylor, Haliburton, Ledbetter, and Caldwell
Attorney for Debtor
44 N. Second Street, Suite 200
Memphis, TN 38103

Chapter 13 Trustee