

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

DELLA KAY ELLIS MCKEEHAN,

Case No. 96-29658-K

Debtor.

Chapter 7

LARRY RICE,

Plaintiff,

vs.

Adv. Proc. No. 96-1251

DELLA KAY ELLIS MCKEEHAN,

Defendant.

**MEMORANDUM AND ORDER RE DEFENDANT-DEBTOR'S "DEEMED" MOTION TO
QUASH GARNISHMENT AND FOR RECONSIDERATION OF PRIOR ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT COMBINED WITH NOTICE
OF THE ENTRY THEREOF**

The instant proceeding before the court arises out of a "deemed" motion filed by the defendant, Della Kay Ellis McKeehan, the above-named chapter 7 debtor ("Ms. McKeehan"), acting pro se, seeking (1) a reconsideration of this court's prior order granting summary judgment in favor of the plaintiff, Larry Rice, Esquire ("Plaintiff"), and (2) to quash a garnishment previously caused to be issued by the plaintiff.

By virtue of 28 U.S.C. § 157(b)(2)(I) this is a core proceeding. Based on consideration of the case record as a whole and statements of Ms. McKeehan and counsel for the plaintiff, the court renders the following findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

The relevant background facts may be summarized as follows: Ms. McKeehan and Luther Oliver McKeehan, III ("Mr. McKeehan") were divorced by a decree entered on April 24, 1991, in the Circuit Court of Shelby County, Tennessee. Both Ms. and Mr. McKeehan were represented by counsel during the

divorce action. Mr. McKeehan was granted custody of their then six year old daughter. On June 18, 1993, Ms. McKeehan filed a petition for change of child custody. After the appointment of a guardian ad litem to represent the minor daughter's interest, a three-day bifurcated evidentiary hearing was held in October 1993, resulting in an order being entered on January 11, 1994, denying Ms. McKeehan's petition for change of custody and also ordering her to, inter alia, pay a \$10,000 attorney's fee to the plaintiff herein, who represented Mr. McKeehan in connection with the contested post-divorce child custody hearing.

Ms. McKeehan appealed the order denying her request for a change of custody to the Tennessee Court of Appeals. In a written opinion entered on November 21, 1995, the Honorable W. Frank Crawford, Presiding Judge, affirmed the trial court and stated, in relevant part here, at pages 5-6, as follows:

The last issue for review is whether the trial court erred in ordering Mother [Ms. McKeehan] to pay Father's [Mr. McKeehan's] attorney fees....Mother concedes that T.C.A. § 36-5-103(c) authorizes the trial court to award attorney fees in a custody case.... The trial court is allowed broad discretion in the award of such fees, and an appellate court may disturb the trial court's award only upon a clear showing of abuse of that discretion . *Salisbury v. Salisbury*, 657 S.W.2d 761, 770 (Tenn. App. 1983).

Mother asserts that the trial court arbitrarily awarded the fees with no evidence offered at the trial. While requests for legal expenses do not require a fully developed record of the nature of the services, *Kahn v. Kahn*, 756 S.W.2d 685, 696 (Tenn. 1988), it is certainly preferable for the party requesting the fees to outline the work performed to justify the fee. In this case, Father's counsel merely elicited from Father that counsel was owed "about \$30,000.00" in fees. However, Mother's counsel did not object to the trial court's award of the fee, nor did he insist on cross-examining Father's lawyer or offering proof of his own on the issue of the fees. The trial court was cognizant of the proof introduced at the hearing and could partially deduce from this proof the amount of time required for Father's counsel to prepare the case. The trial court had before it enough evidence from which to make an award of legal fees, and under the state of this record we cannot say that the trial court abused its discretion in making the award. *See Sherrod v. Wix*, 849 S.W.2d 780 (Tenn. App. 1992).

Subsequently, the plaintiff caused a garnishment to issue to Ms. McKeehan's employer; and

as a result thereof, the plaintiff apparently collected the sum of \$607.38. On August 5, 1996, Ms. McKeehan filed an original petition under chapter 7 of the Bankruptcy Code. Her bankruptcy Schedule F listed the plaintiff as a creditor and reflects, in relevant part here, as follows:

Larry Rice	
44 N. Second Street	attorney's fees \$9,862.00
Tenth Floor	
Memphis, TN 38103	

On October 8, 1996, the plaintiff filed the above-captioned adversary proceeding number 96-1251 seeking to have his particular debt (i.e., the State trial court awarded attorney's fee arising out of the contested child custody hearing) determined to be nondischargeable under 11 U.S.C. § 523(a)(5).¹ Ms. McKeehan, by and through her attorney, filed a written answer. Plaintiff later filed a motion within this adversary proceeding pursuant to FED. R. BANKR. P. 7056 seeking a summary judgment. On June 6, 1997, this court orally granted the plaintiff's motion for summary judgment. The court notes that Ms. McKeehan was represented by counsel at the hearing on the plaintiff's motion for summary judgment. A copy of the transcript of the bankruptcy court's June 6, 1997 oral findings of fact and conclusions of law is attached and incorporated herein. The written order granting the plaintiff's motion for summary judgment was entered on June 27, 1997, and no appeal was taken.

On October 8, 1998, the bankruptcy court received from Ms. McKeehan a six-page typed

¹Section 523(a)(5) provides in part as follows:

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 --

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise...; 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.

letter seeking to quash the garnishment caused to be issued by the plaintiff to her employer and also “to re-examine and reconsider” this court’s June 27, 1997 order granting the plaintiff’s summary judgment motion arising out of the above-captioned section 523(a)(5) complaint. The court then “deemed” Ms. McKeehan’s letter as being in the nature of a motion seeking the relief requested. Plaintiff filed a written response in opposition to Ms. McKeehan’s instant requests.

Plaintiff’s original complaint under 11 U.S.C. § 523(a)(5), the above-captioned adversary proceeding, presented the following bankruptcy question: Whether an award of pre-petition attorney fees to a chapter 7 debtor’s former spouse for successfully defending against the debtor’s post-divorce child custody action is nondischargeable “support” under 11 U.S.C. § 523(a)(5). See, for example, *In re Strickland*, 90 F.3d 444 (11th Cir. 1996). Here, it is noted that the January 1994 State trial court order denying Ms. McKeehan’s request for a change of child custody, in ordering clause six at page two, specifically provided as follows:

Della McKeehan should be required to pay Larry Rice, Attorney for Luther McKeehan, the sum of ten thousand dollars as attorney’s fees and liquidation expenses. (emphasis added.)

Although State law does not control section 523(a)(5) bankruptcy non- dischargeability determinations, it does provide guidance for the federal bankruptcy court in determining whether a debtor’s obligation should be considered in the nature of “support.” See *In re Calhoun*, 715 F.2d 1103, 1111 (6th Cir. 1983). Payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable. *In re Calhoun*, 715 F.2d 1107. Compare *In re Morello*, 185 B.R. 753 (Bankr. E.D. Tenn. 1995), where an attorney, who had represented a chapter 7 debtor’s ex-wife in a state court divorce action, had standing to bring a non- dischargeability proceeding to determine whether the state court attorney fee award fell within the exception to discharge for alimony, maintenance, or support under section 523(a)(5). Mr. Morello argued that only his ex-wife could bring the proceeding under section 523(a)(5) because the state court awarded the fees to her. The divorce judgment in *Morello* stated that “[c]ounsel for the mother is awarded an attorney’s fee...” but neither the state court’s final judgment nor its memorandum opinion

expressly ordered that the fees be paid by the debtor directly to the attorney. The bankruptcy court reasoned that the attorney was the direct recipient of the fees. In addition, the state court's designation of the award as "spousal support" did not preclude a finding that the attorney fees were awarded to the attorney, instead of the ex-wife. Compare also *Palmer v. Palmer*, 562 S.W.2d 833, 839 (Tenn. Ct. app. 1977), *cert. denied* (Tenn. 1978); contra *In re Perlin*, 30 F.3d 39 (6th Cir. 1994) (on the standing issue, but decided under Arizona State law).

Numerous courts have held that attorney fees, designated as alimony, but awarded and payable directly to an attorney, are nondischargeable. For example, the Tenth Circuit Court of Appeals, based on the conclusion that the emphasis in section 523(a)(5) proceedings should be on whether a debt is in the nature of support rather than on the identity of the payee, held that professional fees incurred in divorce and child custody proceedings can be determined nondischargeable regardless of whether the fees are ordered payable directly to the professional. *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1490 (10th Cir. 1995).

The Tenth Circuit, in deciding *Miller*, followed the Second Circuit Court of Appeals' *Pauley v. Spong (In re Spong)*, 661 F.2d 6 (2nd Cir. 1981) decision which held, based on an exhaustive analysis of section 523(a)(5), that attorney fees payable by the debtor to his ex-spouse's attorney were nondischargeable because "it would be exalting form over substance to fail to treat [the debtor's] agreement to pay his wife's counsel fee as a 'debt...to a spouse...for alimony...[,] maintenance..., or support'" *Id.* at 11 (quoting section 523(a)(5)). Many courts have adopted a holding similar to that of the Second and Tenth Circuits. See cases cited in *Miller*, 55 F.3d at 1490; see also *In re Calhoun*, *infra*.

In determining whether debts arising from a debtor's agreement to hold a former spouse harmless as part of a marriage separation agreement are nondischargeable under section 523(a)(5), the Sixth Circuit Court of Appeals has held "that payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable." *In re Calhoun*, 715 F.2d 1103, 1106-07 at n. 4 (6th Cir. 1983). Furthermore, the Bankruptcy Reform Act of 1994 did not alter the widely accepted interpretation of section 523(a)(5) that a debt can be deemed nondischargeable regardless of whether payments will be made directly

to the spouse or child. Instead, the protection provided to spouses and children was broadened in 1994 with the addition of 11 U.S.C. § 523(a)(15).

Under applicable Tennessee law, a former spouse is statutorily entitled to an award of attorney fees in a post-divorce child custody case. TENN. CODE ANN. § 36-5-105(c); see also *D v. K*, 917 S.W.2d 682 (Tenn. Ct. App. 1995). Attorney fees awarded pursuant to a state statute for professional fees incurred in a post-divorce child custody case are in the nature of spousal or child support and thus are nondischargeable. See, for example, *In re Strickland*, supra; *In re Jones*, 9 F.3d 876 (10th Cir. 1993); *In re Catlow*, 663 F.2d 960 (9th Cir. 1981); *In re Paulson*, 27 B.R. 330 (Bankr. W.D. Tenn. 1983). As noted earlier, the State trial court made a judicial determination that the plaintiff herein was entitled to a \$10,000 attorney's fee under TENN. CODE ANN. § 36-5-105(c) arising out of the post-divorce child custody litigation and thereafter the Tennessee Court of Appeals affirmed this award.

The term "support" as used in the section 523(a)(5) discharge exception for maintenance, alimony, or support is entitled to broad application. *In re Jones*, 9 F.3d 878, 881 (10th Cir. 1993). It has been said that for purposes of section 523(a)(5), attorney fees essentially take on the character of the litigation in which they were incurred -- at least in the absence of clear indication of special circumstances to the contrary.

Id.

In *In re Poe*, 118 B.R. 809, 812 (Bankr. N.D. Okl. 1990), the court stated as follows:

In Oklahoma, child custody is assigned according to the best interests of the child....In this Court's view, the best interest of the child is an inseparable element of the child's "support" -- put another way, 11 U.S.C. § 523(a)(5) should be read as using the term "support" in a realistic manner; the term 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.

Since determination of child custody is essential to the child's proper "support," attorney fees incurred and awarded in child custody litigation should likewise be considered as obligations for "support," at least in the absence of clear indication of special circumstances to the contrary. There being no such indications in this matter,

the attorney fee of \$1,000.00 herein should be treated as “support” and as excepted from discharge pursuant to 11 U.S.C. § 523(a)(5).

This court previously concluded that the attorney fees incurred by the plaintiff in connection with the litigation involving Ms. McKeehan’s prior request for change of custody also is in the nature of “support” as contemplated under section 523(a)(5). The propriety (and amount) of these fees, like their nature as “support,” has already been determined by the Tennessee trial and appellate courts. There is no reason why this court should at this late stage “re-examine and reconsider” the matter as requested by Ms. McKeehan. If the State court award of fees in favor of the plaintiff was erroneous, Ms. McKeehan’s remedy was the State appellate process, which she availed herself to without success. Her remedy is not a subsequent collateral attack of the amount of the State court award in the federal bankruptcy court.

As early as 1809, the United States Supreme Court found that even if a judgment is erroneous, it is a judgment and until reversed, cannot be disregarded. *Kempe’s Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173 (1809). Further, a bankruptcy court, as a federal court, will not sit as an appellate court in review of state court decisions. See, for example, *Anderson v. Colorado*, 793 F.2d 262 (10th Cir. 1986); *Staley v. Ledbetter*, 837 F.2d 1016 (11th Cir. 1988); *Mohler v. Mississippi*, 782 F.2d 1291 (5th Cir. 1986). The bankruptcy court, as a court of equity, will not intercede when there is or was an adequate remedy at law by appeal. *Loveland v. Davenport*, 188 S.W.2d 850, 852 (Mo. Ct. App. 1945). Nor will courts of equity grant relief for the purpose of giving a defeated party a second opportunity to be heard on the merits of his/her defense. *Id.* In the instant case the amount of the fee award by the State court in favor of the plaintiff (i.e., \$10,000 less than the amount garnished), will not be disturbed by this court. See, for example, *Kelleran v. Andrijevic*, 825 F.2d 692 (2nd Cir. 1987), *cert denied*.

The Federal Rules of Bankruptcy Procedure, which incorporate certain Federal Rules of Civil Procedure, do not specifically address motions for reconsideration; however, such motions are generally considered under the Federal Civil Rule, entitled “motions to alter or amend judgment,” and are within the discretion of the trial court to grant or deny. See, for example, *In re Village Craftsman, Inc.*, 160 B.R. 740

(Bankr. D. N.H. 1993); *In re Oak Brook Apartments of Henrico County, Ltd.*, 126 B.R. 535 (Bankr. S.D. Ohio 1991). That is and simply put a motion for reconsideration of a bankruptcy court order is generally treated as a motion to alter or amend. See also *In re Investors Florida Aggressive Growth Fund, Ltd.*, 168 B.R. 760 (Bankr. N.D. Fla. 1994).

FED. R. BANKR. P. 7052 states that FED. R. CIV. P. 52 applies in bankruptcy cases. Pursuant to Rule 7052(b) and on a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings -- or make additional findings -- and may amend the judgment accordingly.

FED. R. BANKR. P. 9023 states that FED. R. CIV. P. 59 applies in bankruptcy cases (except as provided in FED. R. BANKR. P. 3008). Pursuant to Rule 9023(b) and (e), a motion for a new trial or a motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

In *In re Greco*, 113 B.R. 658, 664 (D. Haw. 1990), *aff'd Greco v. Troy Corp.*, 952 F.2d 406 (9th Cir. 1991), the court stated that there are three alternative grounds that would justify reconsideration of a prior order or judgment: (1) an intervening change in controlling law; (2) the availability of new evidence; and, (3) the need to correct clear error or to prevent manifest injustice. Reconsideration is not permitted to assert new legal theories that could just as well have been raised before the initial hearing; to present new facts which could have been presented before the initial hearing; or to rehash the same arguments made the first time or simply express an opinion that the court was wrong. See also *In re Mitchell*, 70 B.R. 524, 525-26 (Bankr. N.D. Ill. 1987).

As noted earlier, a motion to alter or amend a judgment or for a new trial must be filed within ten days of the entry of a judgment. This time period may not be enlarged. FED. R. BANKR. P. 9006(b)(2). Here, Ms. McKeehan's October 8, 1998 request for a re-examination or reconsideration of the June 27, 1997 order granting the plaintiff's motion for summary judgment was filed substantially more than ten days after the entry of such order. Accordingly, Ms. McKeehan's request pursuant to Rules 7052 and 9023 for re-examination or reconsideration are untimely and have to be denied.

FED. R. BANKR. P. 9024 provides, with limited exception, that Rule 60 of the Federal Rules of Civil Procedure applies in bankruptcy cases.² Rule 60(a) regarding clerical mistakes in judgments or orders has no application in this proceeding. Rule 60(b) attempts to balance the interest in stability of judgments (i.e., the policy of res judicata) with the interest in seeing that judgments not become instruments of oppression and fraud.³ A decision to grant or deny a Rule 60(b) motion is within the discretion of the trial court. See, for example, *In re Roxford Foods, Inc.*, 12 F.3d 875 (9th Cir. 1993). Assuming arguendo that Rule 9024 applies here, the court finds that Ms. McKeehan's requests were not made timely or were not made within a reasonable time. Briefly stated, Ms. McKeehan has not demonstrated sufficient reasons to grant

²Rule 60(b) provides in part as follows:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation....

³Unless the motion is filed within ten days after the entry of the judgment, an appeal from an order denying a Rule 60(b) motion brings up for appellate review only the order denying the motion and not the merits of the underlying judgment. *Sanders v. Clemco Industries*, 862 F.2d 161 (8th Cir. 1988); *Trinity Carton Co. v. Falstaff Brewing Corp.*, 816 F.2d 1066 (5th Cir. 1987); *In re Frontier Airlines, Inc.*, 117 B.R. 585, 587 (D. Colo. 1990), *aff'd* without op. 951 F.2d 1259 (10th Cir. 1991); *In re Martinelli*, 96 B.R. 1011, 1013 (Bankr. 9th Cir. 1988).

relief under FED. R. BANKR. P. 9024.

Ms. McKeehan's second request contained in her "deemed" motion seeks to quash the garnishment previously caused by the plaintiff to be issued to her employer. At the initial hearing of this matter scheduled on November 10, 1998, Ms. McKeehan orally stated in open court that in essence she needed the garnished funds to help her regain her real estate agent license. Considering all the facts and circumstances existing at that time, the court prospectively stayed future garnishments in an effort to assist Ms. McKeehan in having her real estate agent license restored. At the final hearing on January 5, 1999, the court orally extended the stay of garnishment until January 26, 1999, at 10:30 a.m. to provide a further breathing spell to her. Ms. McKeehan, inter alia, orally stated in open court on January 5, 1999, that with the financial assistance of a relative, her license to sell real estate has now been reinstated. The stay against garnishments previously ordered against the plaintiff will dissolve, ipso facto, on January 26, 1999, at 10:30 a.m.

Based on the foregoing,

IT IS ORDERED AND NOTICE IS HEREBY GIVEN THAT:

1. The "deemed" motion of the defendant-debtor, Della Kay Ellis McKeehan, seeking a re-examination or reconsideration of this court's June 27, 1997 order granting summary judgment in favor of the plaintiff, Larry Rice, is hereby denied.

2. The "deemed" motion of the defendant-debtor, Della Kay Elis McKeehan, seeking to quash the garnishment previously caused by the plaintiff, Larry Rice, to be issued to her employer is hereby denied, effective January 26, 1999, at 10:30 a.m.

BY THE COURT

DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE

DATE: January 8, 1999

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