UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

STANLEY JEAN DOUGLAS
SANDRA DOUGLAS,
Debtors.

Case No. 96-36595
Chapter 7

ROBERT F. DONOHUE,
Plaintiff

Adv. Pro. No. 97-0273

v.

STANLEY JEAN DOUGLAS,
Defendant.

MEMORANDUM OPINION AND ORDER ON COMPLAINT OBJECTING TO DISCHARGE OF DEBTOR AND TO DETERMINE DISCHARGEABILITY OF DEBT

Before the court is the complaint of Robert F. Donohue to determine the dischargeability[1] of an attorney fee awarded to the plaintiff in connection with a paternity proceeding in which a Consent Order of Paternity was entered declaring the debtor to be the father of "A", a minor.[2] The plaintiff is an attorney appointed by the Juvenile Court of Shelby County, Tennessee, to represent the interests of the minor child. The court conducted a trial of the issues on June 4, 1997. For the reasons given below, the court finds the obligation to pay the attorney fee to be nondischargeable. This

---

[1] Although the Complaint is titled "Robert F. Donohue's Complaint Objecting to Discharge of Debtor and to Determine Dischargeability of Debt," the complaint contains no prayer that the debtor's discharge be denied pursuant to 11 U.S.C. § 727(c)(1) and the plaintiff did not present any argument relating to the denial of the general discharge of the debtor. Thus this opinion will deal only with the question of whether the particular debt is nondischargeable pursuant to one or more subsections of 11 U.S.C. § 523.

[2] The name of the minor child will not be used in this opinion to protect the identity of the child in the event of publication.

memorandum shall constitute findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

Robert Donohue is an attorney licensed to practice law in the State of Tennessee. On or about August 22, 1980, Donohue was notified by letter that he had been appointed to represent Connie Ewing, in the matter of *Stanley Gene Douglas v. Connie Ewing*, Juvenile Court Docket No. 110482, and that the case had been transferred to the Circuit Court of Shelby County for jury trial.[3] Trial Exhibit 3. Connie Ewing is the mother of the minor child, "A". Douglas was never married to Connie Ewing. Donohue is under contract with the Tennessee Department of Human Services ("TDHS") to represent its interests in cases in which minor children are the beneficiaries of Aid to Families with Dependent Children ("AFDC") and the custodial parent's right to receive child support is assigned to TDHS. Donohue further testified that he is paid by TDHS only in cases in which he is not awarded a fee by the court. Donohue testified that he felt that he was retained to represent the interests of the child *and* the state, but that the primary purpose of the proceeding was to establish paternity in order to provide for the future welfare of the child, not to obtain a

[3] Pursuant to TENN. CODE ANN. § 36-2-103(2)(c), original and exclusive jurisdiction of paternity matters is vested in the juvenile court. If the defendant demands a jury trial or if determined on the juvenile judge's own motion, the juvenile judge transfers the case to the circuit or chancery court for a jury trial on the issue of paternity. TENN. CODE. ANN. § 36-2-106(a).

reimbursement of benefits provided by TDHS. The original attorney fee awarded in this case was $500. Donohue testified that there is a balance remaining to be paid of $325.

The defendant agreed that there is $325 remaining to be paid of the court-awarded fee. The defendant testified that he has no way to pay the remaining balance because of his obligations to his wife of fifteen years and three children. The defendant further testified that he was not the father of "A", but that he agreed to enter into the Consent Order because he had paid thousands of dollars in attorneys fees to contest a prior paternity action brought by the child's mother and could no longer afford to fight. In the prior action, the mother was found by the Tennessee Court of Appeals to be collaterally estopped from asserting that Douglas was the father of "A" because of her prior sworn statements that Douglas was not the father of "A" but that another man was. *Ewing v. Douglas*, 1989 WL 28300 (Tenn. Ct. App. 1989) (permission to appeal denied by the Tennessee Supreme Court).

The debtors filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code on December 12, 1996. The deadline for filing complaints to determine the dischargeability of certain debts was March 14, 1997. The plaintiff timely filed his complaint on March 11, 1997.

DISCUSSION

The plaintiff claims that the subject attorney fee should be excepted from discharge in this bankruptcy case pursuant to one or more subsections of 11 U.S.C. § 523(a). Because the court

concludes that the fees are not dischargeable pursuant to 11 U.S.C. § 523(a)(5), the court need not consider the plaintiff's other theories of recovery.

Section 523(a)(5) provides in pertinent part:

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

As a preliminary matter, it is noted that exceptions to discharge are to be narrowly construed. *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991). The party objecting to discharge has the burden of proving by a preponderance of the evidence that a debt is not dischargeable. *Id*. "Section 523(a)(5) represents Congress' resolution of the conflict between the discharge of obligations allowed by the bankruptcy laws and the need to ensure necessary financial support for the divorced spouse and children of the debtor." *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983). The debtor's duty to support his or her family takes precedence over the debtor's right to receive a discharge.

Judicial Estoppel

Despite the entry of a Consent Order in the Circuit Court in which the defendant admitted that he is the father of "A", the defendant now asserts that he is not the child's father. The Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to give full faith and credit to the judicial proceedings of state courts. *Bay Area Factors v. Calvert (In re Calvert),*105 F.3d 315, 317 (6th Cir. 1997) (citing *Migra v. Warren City Sch. Dist. Bd. Of Ed.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed2d 56 (1984); *Kremer v. Chemical Contr. Corp*., 456 U.S. 461, 466, 102 S.Ct. 1883, 1889-90, 72 L.Ed.2d. 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415-16, 66 L.Ed.2d 308 (1980)). The federal courts look to the law of the state in which a judgment is rendered to determine its preclusive effect. *Calvert*, 105 F.3d at 317 (citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 375, 105 S.Ct. 1327, 1329, 84 L.Ed.2d 274 (1985). Ironically, the law of judicial estoppel in Tennessee is given in the opinion of the Tennessee Court of Appeals in *Ewing v. Douglas*:

> A general statement of the doctrine of judicial estoppel is that where one states on oath in former litigation, either in a pleading or in a deposition or on oral testimony, a given fact is true, he will not be permitted to deny that fact in subsequent litigation, although the parties may not be the same.

Ewing v. Douglas, 1989 WL 28300, at *1 (quoting *Melton v. Anderson*, 222 S.W.2d 666 (Tenn. Ct. App. 1948). The Consent Order of Paternity in this case indicates that the defendant submitted himself to the jurisdiction of the Chancery Court and admitted and acknowledged that he is the father of "A". Trial Exhibit 1. The debtor acknowledged the contents of the Consent Order in the

trial before me in this proceeding. Although the court found credible the defendant's statement that he entered into the Consent Order because he could no longer afford the emotional and financial strain of the paternity proceedings, it would be improper and imprudent for this court to look behind the order of the Chancery Court. Thus for purposes of this proceeding, the defendant is deemed to have admitted that he is the father of "A".

Dischargeability of Attorneys Fees

This case presents the issue of whether a debt owed to an attorney, but incurred in connection with a proceeding brought by a governmental agency to establish that the debtor is the father of a minor child and ordering the debtor to provide support for such child, is dischargeable. The plain language of the statute requires the debt to be owed to a spouse, former spouse or child of the debtor. The plaintiff in this case is none of these.

Bankruptcy Code section 523(a)(5) was amended in 1984 by adding the reference to "other order of a court of record" to make it clear that the exception covers cases in which there was no marriage, such as support awards for children born out of wedlock. LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 523.11[3] (15th ed. Rev. 1996). Further, Bankruptcy Code Section 523(a)(5)(A) explicitly excepts from discharge debts assigned to governments in connection with assistance payments to a spouse or child. WILLIAM P. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE, 2D § 47.34 (1994).

A number of courts of appeal have excepted from discharge attorneys fees payable to the attorney for a former spouse incurred in connection with proceedings to dissolve a marriage or to establish custody of a minor child. *Joseph v. J. Huey O'Toole, P.C. (In re Joseph),* 16 F.3d 86 (5th Cir. 1994); *Dvorak v. Carlson (In re Dvorak),* 986 F.2d 940 (5th Cir. 1993); *Jones v. Jones (In re Jones),* 9 F.3d 878 (10th Cir. 1993); *Peters v. Hennenhoeffer (In re Peters),*964 F.2d 16 (2d Cir. 1992); *Silansky v. Brodsky, Greenblatt & Renehan (In re Silansky),* 897 F.2d 643 (4th Cir. 1990); *Williams v. Williams (In re Williams),* 703 F.2d 1055 (8th Cir. 1983). In each of these cases, it was decided that the nature of the debt, rather than the identity of the payee, determines whether a debt should be excepted from discharge. Similarly, it has been held that debts owed to a guardian ad litem and psychologist fees incurred in connection with divorce and child custody proceedings and ordered to be paid directly to the guardian ad litem and psychologist are nondischargeable. *Miller v. Gentry (In re Miller),* 55 F.3d 1487 (10th Cir. 1995).

Most courts that have considered the issue have concluded that attorneys fees incurred by a mother in connection with the establishment of paternity are in the nature of support and thus are nondischargeable. *E.g., Hudson v. Raggio & Raggio, Inc. (In re Hudson),* 107 F.3d 355 (5th Cir. 1997); *Matter of Seibert,* 914 F.2d 102, 107 (7th Cir. 1990); *Smith v. Barbre (In re Barbre),* 91 B.R. 846, 847 (Bankr. S.D. Ill. 1988); *Blanchard v. Booch (In re Booch),* 95 B.R. 852 (Bankr. N.D. Ga. 1988); *but see Berry v. Brown (In re Brown),* 43 B.R. 613 (Bankr. M.D. Tenn 1984) (Pre-1984 amendment, court held that attorney fee incurred by mother in successful paternity suit was

dischargeable because debt was not incurred in connection with separation agreement, divorce decree or property settlement agreement and was not owed to spouse, former spouse or child of debtor).

The fact that the action to establish paternity was originally brought by TDHS does not affect the outcome of this proceeding because this case falls within the exception at Bankruptcy Code Section 523(a)(5)(A). Further, the court is persuaded based upon the authorities cited that the fact that the attorney fee was awarded to the attorney directly does not affect the outcome of the case. In *Calhoun*, the United States Court of Appeals for the Sixth Circuit specifically held that payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable. *Calhoun*, 715 F.2d at 1107. The only question remaining is whether the award of an attorney fee, which is not specifically designated as support in the Consent Order, is actually in the nature of support.

In determining whether an obligation not specifically designated as such is in the nature of support, a bankruptcy court must determine that:

> (1) there was an intent to create a support obligation;
>
> (2) the obligation has the effect of providing necessary support; and
>
> (3) if the first two steps are satisfied, that the amount of support represented by the obligation is not excessive; and
>
> (4) if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law.

Calhoun, 715 F.2d at 1109-10; *Fitzgerald v. Fitzgerald (In re Fitzgerald*); 9 F.3d 517 (6th Cir. 1993). It has been said that "the majority rule is that an obligation to pay attorneys fees is 'so tied in with the obligation of support as to be in the nature of support or alimony and excepted from discharge.'" *Booch*, 95 B.R. at 855 (quoting *Shaw v. Smith*, 67 B.R. 911, 912 (Bankr. M.D. Fla. 1986)). In a somewhat analogous case, Bankruptcy Judge William Houston Brown of this district concluded that attorneys fees awarded to a former spouse in an action to modify the debtor's visitation and support were intended to create a support obligation and had the effect of providing necessary support to the minor child. *Truhlar v. Doe (In re Doe)*, 93 B.R. 608, 613 (Bankr. W.D. Tenn. 1988).

In this case, it was the effort of the attorney, Donohue, that established the child's right to support. The benefit of the Consent Order and the anticipated child support payments flow to the child. Without the efforts of Donohue, the child would not have received this support. As a result, the court finds that the attorney fee awarded to Donohue was intended for support and has the effect of providing necessary support to the minor child "A". Further, even though *Calhoun* does not require the consideration of additional factors where the first two factors are satisfied, the court finds that the award is clearly not excessive or unreasonable.

CONCLUSION

The court concludes that the plaintiff has carried his burden of establishing that the fee awarded to him was intended for support and has the effect of providing necessary support to the

minor child "A". Accordingly, it is ORDERED that the award of attorney fee contained in the Consent Order of the Chancery Court is nondischargeable and judgment shall be entered for the plaintiff in the amount of $325.

BY THE COURT:

_____

JENNIE D. LATTA
United States Bankruptcy Judge

Dated: July 1, 1997

cc: Felix H. Bean, III
Attorney for Plaintiff

Gary C. McCullough
Attorney for Defendant