

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

KATHRYN SUE GLOVER,

Debtor.

Case No. 01-34632-L
Chapter 7

JILL GRAVES CLYBURN,
Plaintiff,
v.
KATHRYN SUE GLOVER,
Defendant.

Adv. Proc. 01-1041

**MEMORANDUM OPINION AND ORDER
ON MOTIONS FOR SUMMARY JUDGMENT**

BEFORE THE COURT are cross motions for summary judgment filed in this adversary proceeding which raise the legal issue of whether attorneys fees awarded directly to an attorney for services rendered in a child custody dispute are dischargeable.

The following facts are not in dispute. The plaintiff Jill Graves Clyburn was retained by the debtor's ex-husband to file a petition seeking a change in custody of the parties' minor child. The petition was filed on February 23, 2001, and was granted on June 29, 2001. Upon recommendation of a divorce referee, the state court judge ordered the debtor to pay monthly child support to her ex-husband and to pay directly to Clyburn \$2,232.35 representing one-half of the legal fees incurred by the debtor's ex-husband in connection with the custody dispute. The debtor made a payment of \$25.00 toward the attorney fees owed to Clyburn before filing her bankruptcy petition on September 26, 2001.

Both the plaintiff and defendant assert that there are no genuine issues of material fact that require trial, but both assert that they are entitled to judgment as a matter of law. Clyburn asserts that the obligation to her is nondischargeable pursuant to 11 U.S.C. § 523(a)(5) which provides:

(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 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.

The defendant argues that the debt is dischargeable because (a) it is not payable to the spouse, former spouse, or child of the debtor, but rather is payable directly to the attorney; and (b) it is not in the nature of support; and (c) it is a debt assigned to another entity and thus entitled to discharge pursuant to section 523(a)(5)(A).

Despite the fact that the actual words of section 523(a)(5) require that a debt be paid directly to the spouse, former spouse or child of a debtor to be nondischargeable, any number of courts have ruled that attorney fees paid directly to the attorney for a spouse, former spouse, or child of the debtor may be excepted from discharge. Indeed the Sixth Circuit has clearly held that “payments in the nature of support need not be made directly to the spouse or dependent to be

nondischargeable.” *Long v. Calhoun (In re Calhoun)*, 175 F.2d 1103, 1107 (6th Cir. 1983); *see* cases cited at 3 BANKR. SERV. L. ED. § 27:1345. The focus in these cases is upon the ultimate beneficiary of the attorney’s services, rather than upon the direct beneficiary of the award. If the ultimate purpose of the state court proceeding is to provide support for a child, then attorneys fees incurred in connection with that proceeding inure to the benefit of the child and are in the nature of support. *See Hudson v. Raggio & Raggio, Inc. (In re Hudson)*, 107 F.3d 355, 357 (5th Cir. 1997).

In Tennessee, attorneys fees may be awarded in connection with the award of custody pursuant to TENN. CODE ANN. § 36-5-103(c) which provides:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change in custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

The award of fees under this section is not primarily for the benefit of the custodial parent, but to protect the child’s access to the courts. *See Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1993). In determining issues of child custody, the courts of Tennessee seek to determine the best interest of the child. *See* TENN. CODE ANN. § 36-6-106(a). Fees awarded in connection with a proceeding to determine a change in custody of a minor child pursuant to section 36-5-103(c) are in the nature of support of the *child*, not the custodial parent, and are not dischargeable. *See Murray v. Paulson (In re Paulson)*, 27 B.R. 330, 333 (Bankr. W.D. Tenn. 1983).

The fact that the state court judge provided that both parents would be responsible for one-half of the attorneys fees incurred in connection with the custody dispute indicates that the award was intended to support the child and not the debtor's ex-husband. In other words, the award of attorney fees directly to the attorney is not the assignment of a right to support held by the debtor's ex-husband's, but rather represents the direct obligation of the debtor to support her child. Clyburn provided a necessary service for the benefit of the debtor's minor child, and the debtor has a duty to pay Clyburn's fee as a part of her child support obligation.

For the foregoing reasons, the plaintiff's motion for summary judgment should be granted and the defendant's motion should be denied. The debt owed by the defendant to the plaintiff in the amount of \$2,232.25 is nondischargeable. Costs are awarded to the plaintiff, but the plaintiff's request for attorney fees is denied as there is no statutory basis for award of attorney fees in this case.

IT IS SO ORDERED.

BY THE COURT,

JENNIE D. LATTA
U.S. Bankruptcy Judge

Date: _____

cc: Plaintiff
Plaintiff's Attorney
Defendant
Defendant's Attorney