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COULD MY ATTORNEY FEES BE A DOMESTIC SUPPORT OBLIGATION?

Bankruptcy-shmankruptcy, why do you always talk about bankruptcy? The reason is that financial problems are a natural consequence of divorce. Setting up two households, child and spousal support, an upside down home, 401(k) loans and overwhelming consumer debt all contribute to forcing couples to address their debt. Frequently, bankruptcy is the most efficacious solution.

Many family practitioners know enough to say that an obligation which is in the "nature of support" is non-dischargeable in bankruptcy. The bankruptcy code defines a "domestic support obligation" ("DSO") as: "...a debt that accrues before, on, or after the..." filing of a bankruptcy petition, which is: "**...owed to or recoverable by—a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative...**which is in the nature of alimony, maintenance or support...". The question which was recently answered by the Sixth Circuit Court of Appeals was whether fees payable to the attorney in a custody case could be considered a DSO.

At first blush, most would respond, no, the attorney's claim for fees could not be construed as a DSO. The attorney for a party is clearly not a spouse, former spouse or child of the debtor. Nor is he or she (in most cases) the child's parent, legal guardian or responsible relative. However, in the unpublished case of *Rugiero v. DiNardo*, WL 4800059, (6th Cir Mich. 2012), the Sixth Circuit considered whether the unpaid attorney fees awarded in a custody dispute were a

DSO and whether an exception to the automatic stay applied.

Attorney fees payable by your own client to you will be dischargeable in bankruptcy. Your only hope is to claim that you are a secured creditor. It could be claimed that, while the debt to you may be dischargeable, your charging lien claim is not. Unfortunately, if the parties are without assets or your client is not awarded property, there is nothing upon which the charging lien might affix. As such, your attorney fee claim against your client will be discharged.

A different result occurs if the attorney fees are owed by your client's spouse to you. In that case, the fees will track the underlying support obligation. See *In re Kline*, 54 F3d. 749, 750 (8th Cir. 1995). In *Kline*, the circuit court reversed the district court's decision that the debt was not owed to a spouse or child. The Eighth Circuit held that the attorney fees were non-dischargeable even though they were payable directly to the attorney. *Id.*

Other examples of non-dischargeable, non-spouse/child payees include:

Guardian ad litem fees, *In re Peters*, 964 F2d. 166 (2nd Cir. 1992);

Paternity suit fees, *In re Barbre*, 91 B.R. 846 (Bankr. S.D. Ill. 1988),

Matter of Hudson, 107 F3d. 355 (5th Cir. 1993);

Psychologist's fees, *In re Miller*, 55 F3d. 1487 (10th Cir. 1995); and

Accountant's fees, *In re Brasslett*, 233 B.R. 177 (Bankr. D. Me. 1999).



In each case, though the payee was not the spouse or child, the court indicated that the debt would be non-dischargeable under 11 USC §523(a)(5).

So why wouldn't these courts strictly construe the statute? If the attorney isn't the former spouse or child, what was the reasoning? In *DiNardo v. Rugiero*, the Sixth Circuit noted that:

Nothing in the statute precludes an attorney's fee award from being treated as "in the nature of . . . support." Were it otherwise, a litigious boyfriend, to use one example that comes to mind, could make life miserable for his girlfriend by waging a costly custody dispute over their children, one that the girlfriend might not be able to fend off based on her earnings (and other child support payments) alone. That is why many courts have treated fee awards as "support" payments; it is the only way to allow some parents to vindicate their rights in court. See *DiNardo v. Rugiero*, supra WL 4800059 at 2.

With tongue firmly implanted in cheek, the Sixth Circuit was likely referring to Mr. Rugiero when it used the metaphor of a "litigious boyfriend". In other words, just like child support does not have to be used exclusively for the child, nor does an obligation need to be payable to a spouse or child to be non-dischargeable.

Conclusion

The best way to determine whether attorney or other fees are non-dischargeable is to look to the purpose of the service provided. If the service fulfills a traditional indicia of support, it will likely be construed as a DSO.

By contrast, when courts have held that fee awards do not amount to domestic support obligations, that was because the state court's orders failed to tie the awards to the creditor spouse's financial needs. *Rugiero* at 3 (citations omitted).

Do not be bound by titles or headings. The Bankruptcy Court will look to the true nature of an obligation and its purpose rather than arbitrary or self serving titles.



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