United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Van Metre, Hanson & Meyer, Plaintiff, v.
Norman C. Thompson, Sr., Defendant
(In re Norman C. Thompson, Sr., Debtor)
Bankruptcy Case No. 93-32155-7, Adv. Case. No. 93-3421-7

United States Bankruptcy Court
W.D. Wisconsin

May 19, 1994

John D. Hanson, Van Metre, Hanson & Meyer, Madison, WI, for plaintiff.
Jenny R. Armstrong, Armstrong Law Offices, Ltd., Madison, WI, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On January 22, 1990, Judith Wiesner filed a paternity suit in the Dane County Circuit Court. The debtor, Norman Charles Thompson, Sr., admitted paternity of Ms. Wiesner's son and a judgment was entered on May 5, 1990. At a May 29, 1990 hearing, Ms. Wiesner obtained sole legal custody of the child and settled past and current support and expenses for pregnancy. Subsequently, the debtor brought an action to obtain visitation rights and attorney John D. Hanson was appointed the child's guardian ad litem. On March 12, 1993, the state court action was dismissed due to the debtor's noncompliance with a court order. The state court approved Attorney Hanson's application for guardian ad litem fees and costs totalling $1,682.80 and ordered the debtor to pay one half of the fee, or $841.40. On July 22, 1993, the debtor filed a Chapter 7 bankruptcy. The guardian ad litem fees remain unpaid. Attorney Hanson brought an adversary proceeding to challenge the dischargeability of the guardian ad litem fees pursuant to 11 USC § 523(a)(5).

11 USC § 523(a)(5) provides, in pertinent part, that:

(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--

. . . .

(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 party asserting the objection carries the burden of proof. Bankruptcy Rule 4005; In re Coleman, 37 BR 120, 125 (Bankr WD Wis 1984). The definition of child support under 11 USC § 523(a)(5) is not affected by the type of action, be it for divorce or paternity. See In re Balthazor, 36 BR 656, 657-58 (Bankr ED Wis 1984); In re Barbre, 91 BR 846, 847 (Bankr SD Ill 1988).

Courts have differed in their definition of "support" based upon whether the fees were incurred to represent the child's interests in disputes regarding economic or noneconomic factors. In In re Lockwood, 148 BR 45 (Bankr ED Wis 1992) a guardian ad litem was appointed pursuant to Wis Stat § 767.045 and guardian ad litem fees were incurred to represent the debtor's children in a custody and visitation dispute. The court held that the debtor's portion of guardian ad litem fees were nondischargeable under 11 USC § 523(a)(5), reasoning that even though the state court proceeding focused on custody and visitation, a child support request was included in the debtor's petition. The court distinguished between the spouse and the child in defining "support" under 11 USC § 523(a)(5). The court states:

For former spouses, the line between nondischargeable support and dischargeable property division is often blurred, but the substantive difference between the two may justify the continued distinction under 11 U.S.C. § 523(a)(5).

Child support does not exist in a vacuum either, but child support is fundamentally different from spousal support. Former spouses often are not economically dependent; minor children almost always are. Both economic and noneconomic factors can be vital to children's interests, and separating these factors is not realistic. Children's welfare is influenced by whom they live with, how much money the family has to live on, where they live and go to school (often dictated by finances), and countless other factors. Children are entitled to legally enforceable noneconomic support (such as visitation) after dissolution of a marriage; adults are not. "Support" for a former spouse is not synonymous with "support" for children, and it is appropriate in the bankruptcy context to recognize that difference.

Id at 48.

The court recognized other bankruptcy court decisions holding that noneconomic issues are unrelated to "support" under 11 USC § 523(a)(5), but concluded by stating that "this court is persuaded that virtually all services related to the children's interests, including custody and visitation, also relate to their support." Id at 48.

In Matter of Dvorak, 986 F2d 940, 941 (5th Cir 1993), the Fifth Circuit Court of Appeals seems to agree with the Lockwood decision by finding guardian ad litem fees were nondischargeable when incurred for representing a child's interests in noneconomic support disputes. In Dvorak, a guardian ad litem was appointed and incurred fees for a child during a custody dispute. Ms. Dvorak subsequently filed for Chapter 7 bankruptcy while still owing her portion of the guardian ad litem fees. The bankruptcy court found the fee nondischargeable as child support based upon two Texas bankruptcy cases, In re Snider, 62 BR 382 (Bankr SD Tex 1986) (holding that a custody proceeding was necessary for the child's best interests and fees in connection with the proceeding were for the child's support) and In re Laney, 53 BR 231 (Bankr ND Tex 1985) (holding that all guardian ad litem fees incurred in a custody and support proceeding were support). The district court agreed with the bankruptcy court and the Fifth Circuit Court of Appeals affirmed the decision because the debt was incurred [1] for the benefit and support of the child, and [2] the debt was incurred due to a court order.

The Second Circuit Court of Appeals in In re Peters, 964 F2d 166, 168 (2nd Cir 1992) also seems to agree with the Lockwood decision by holding that the guardian ad litem fees incurred for a child in a custody dispute were nondischargeable support. The court affirmed the reasoning of the district court that "support" is to be broadly construed and any service to benefit the child in a matrimonial dispute is "support" pursuant to § 523(a)(5). See In re Peters, 133 BR 291, 295 (SD NY 1991). The Second Circuit emphasized the statement in In re Spong, 661 F2d 6,9 (2d Cir 1981) that dischargeability must be determined by the substance of the liability rather than its form. See In re Peters, 964 F2d at 167.

In Matter of Coleman, 37 BR 120 (Bankr WD Wis 1984), the court did not adopt an absolute rule as in Lockwood, but held that guardian ad litem fees are rebuttably presumed to be "support." In Coleman, a guardian ad litem was appointed to represent the debtor's child in a custody dispute. The guardian ad litem moved for nondischargeability of her fee, which included a guardian ad litem fee of $832.50 and a fee for services regarding a contempt order imposed under Wis Stat § 785.03(1)(a) totalling $1,000.00. The court concluded that the debtor did not meet her burden of rebutting the presumption that all guardian ad litem fees are incurred for nondischargeable support. Id at 125.

Although some courts have disagreed with the Lockwood and Coleman holdings, [(1)] they do not compel me to abandon the views eloquently expressed by other Wisconsin bankruptcy judges.

Upon the foregoing, which constitute my Findings of Fact and Conclusions of Law in this matter, the claim of Van Metre, Hanson & Meyer shall be held to be nondischargeable.

END NOTE:

1. See In re Lanza, 100 BR 100 (Bankr MD Fla 1989); In re Aughenbaugh, 119 BR 861 (Bankr MD Fla 1990); and Matter of Shaw, 67 BR 911, 914 (Bankr MD Fla 1986).