## UNITED STATES BANKRUPTCY COURT
## WESTERN DISTRICT OF WISCONSIN

Cite as: [Unpublished]

**Green County Corporation Counsel, Plaintiff v.**
**Angela A. Kline, Defendant**
(In re Angela A. Kline, Debtor)
Bankruptcy Case No. 05-17777-7
Adversary Case No. 05-252-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

April 12, 2006

William E. Morgan, Monroe, WI for Plaintiff

Robert D. Martin, United States Bankruptcy Judge

## MEMORANDUM DECISION

Green County filed a complaint against Angela Kline, Chapter 7 debtor, seeking a determination that a debt owed to it for unpaid guardian ad litem fees is nondischargeable. The complaint[1] prays only "The undersigned hereby requests that the Court enter an order determining that the claim of the creditor, Green County, is nondischargeable pursuant to Bankruptcy Code 11 U.S.C.A. § 523(a)(18)." Green County also submitted a pre-trial statement of the case indicating that the debt arose when a guardian ad litem was appointed to represent the best interests of the debtor's child in a juvenile action in Green County Circuit Court. The pre-trial statement refers only to nondischargeability under 11 U.S.C. § 523(a)(5), it makes no mention of § 523(a)(18).[2]

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[1]The complaint was captioned "Objection to Discharge," but the adversary proceeding cover sheet indicated that it was a complaint to determine the dischargeability of a debt under 11 U.S.C. § 523. Based on the plaintiff's citation to § 523 and the adversary proceeding cover sheet, it seems that the plaintiff filed a miscaptioned complaint to determine the dischargeability of a debt.

[2]The debtor's bankruptcy case was filed before October 17, 2005. Citations to the Bankruptcy Code in this Opinion refer to the Bankruptcy Reform Act of 1978, as amended, prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Green County does not provide any details of the underlying juvenile action. However, guardian ad litem bills proffered in this adversary proceeding seem to indicate that the fees arose from a Child in Need of Protection or Services (CHIPS) proceeding. Also proffered were several Green County Circuit Court orders. They order Green County to pay the guardian ad litem; they also order Green County to pursue collection of the fees from the debtor. The debtor paid only $50.00 of the approximately $1,800.00 debt to Green County. Green County contends that the balance owed to it is nondischargeable as a debt in the nature of support.

The parties appeared for a pre-trial conference on February 28, 2006. Ms. Kline is proceeding pro se. They agreed between themselves that there were no issues of fact to be decided by this court. The matter was taken under advisement. The parties were given 14 days to submit additional materials and briefs on the matter. Neither party did.

Section 523 provides, in relevant part:

> **§ 523. Exceptions to discharge**
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> (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–
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>> (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–
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>>> (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;

"In order to establish whether a debt related to a minor child is dischargeable under § 523(a)(5), a court must determine 1) whether the obligation is a debt to the child or validly

assigned by the child to a governmental entity and 2) whether the obligation is one of support." DeKalb County Div. of Family & Children Serv. v. Platter (In re Platter), 140 F.3d 676, 681 (7th Cir. 1998).

Green County has not met its burden to prove nondischargeability. The record does not reveal whether the debt was ever owed "to a spouse, former spouse, or child." All we can tell is that the debt is now owed to the county, and that is not enough.

Whether this debt is dischargeable under § 523(a)(5) hinges on several facts that cannot be discerned from the record made by the plaintiff. The principal unanswered question is whether the underlying proceeding giving rise to the guardian ad litem fees was a CHIPS proceeding. If it was a CHIPS proceeding, we must further answer whether the fees paid by the County and collectable from the debtor were paid pursuant to Wis. Stat. § 48.235(8).

Wis. Stat. § 48.235(8) allows the court to order payment of guardian ad litem fees by the county if the parent of the child for whom a guardian ad litem is appointed is indigent or otherwise unable to pay for the guardian ad litem's service. The county may also order the parent to reimburse the county for sums paid to the guardian ad litem. Wis. Stat. § 48.235 provides, in relevant part:

> **48.235. Guardian ad litem**
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> (8) Compensation. (a) A guardian ad litem appointed under this chapter shall be compensated at a rate that the court determines is reasonable, except that, if the court orders a county to pay the compensation of the guardian ad litem under par. (b) or (c) 2., the amount ordered may not exceed the compensation payable to a private attorney under s. 977.08 (4m) (b).
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> (b) Subject to par. (c), the court may order either or both of the parents of a child for whom a guardian ad litem is appointed under this chapter to pay all or any part of the compensation of the guardian ad litem. In addition, upon motion by the guardian ad litem, the court may order either or both of the parents of the child to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter. If one or both parents are indigent or if the court determines that it would be unfair to a parent to require him or her to pay, the court may order the county of venue to pay the compensation and fees, in whole or in part. If the court orders the county of venue to pay because a parent is indigent, the court may also

order either or both of the parents to reimburse the county, in whole or in part, for the payment.

The obligation to the County is not a nondischargeable debt for the purpose of § 523(a)(5) if it arose under Wis. Stat. § 48.235. Wis. Stat. § 48.235 allows the County to seek reimbursement from parents of amounts paid by the County to a guardian ad litem. If the debt arose under § 48.235, it is a debt to the County and does not meet the requirement under § 523(a)(5) that the nondischargeable debt be owed to a "spouse, former spouse, or child."

The Seventh Circuit examined dischargeability of support obligations in a similar context. In Platter, a debtor sought to discharge a support obligation owed to the Department of Family and Children Services (DFCS) for sums DFCS had paid to support the debtor's child in a residential treatment program. Platter, 140 F.3d at 677-78. The support debt arose under an Indiana statute that created an obligation that parents reimburse DFCS for support payments. Id. at 678. DFCS argued that the debt was a nondischargeable support obligation under § 523(a)(5). The Seventh Circuit recognized that the debtor's obligation to DFCS was for the support of her child, but determined that the debt was dischargeable. Id. at 682. Where the debtor's child is not seeking support, but a governmental entity is trying to enforce its rights against a parent under a state statute for reimbursement, § 523(a)(5) is not implicated. Id. at 681.

The Seventh Circuit explained that Congress provided a means for third party government entities to recover support obligations by creating an exception to discharge for support debts *assigned* to a government entity by a family member of the debtor. Id. Section 523(a)(5) does not encompass every debt owed to a governmental entity for support of a child. Id. at 682. The plain meaning of § 523(a)(5) does not cover situations where the debtor owes a governmental agency directly for the support of the debtor's child. Id. at 691.

On the evidentiary record I cannot determine that the debt is owed to the debtor's child. Although support debts directly payable to third parties (such as a guardian ad litem or attorney for a child) generally fall within the exception to discharge under § 523(a)(5), that is not true for a statutory obligation that a parent reimburse the state for its expenses. Id. at 682. Because I cannot determine whether this is a debt to reimburse the state for its expenses, I cannot determine that it is nondischargeable.

This is an atypical question of guardian ad litem fee dischargeability because the guardian ad litem fees at issue seem to have arisen from a CHIPS proceeding. Guardian ad litem fees arising from divorce/custody proceedings have a long history in bankruptcy courts, whereas guardian ad litem fees arising from protective service proceedings do not.

The evolution of decisions considering whether guardian ad litem or attorney fees are nondischargeable "support" obligations under § 523(a)(5) has led to a broad definition of "support." See Swartzberg v. Lockwood (In re Lockwood), 148 B.R. 45, 48 (Bankr. E.D.

Wis. 1992). Whether a debt to a child is in the nature of support hinges on whether the debt relates to the welfare of the child. Id. Virtually all services related to children's interests, including custody and visitation, also relate to their support and are nondischargeable in bankruptcy. Id. at 49.

The service of a guardian ad litem in a CHIPS proceeding is clearly for the purpose of ensuring the child's welfare. Wis. Stat. § 48.235(4) provides a non-exhaustive list of various actions in which a guardian ad litem may represent the interests of a child. These actions may include participating in permanency planning, petitioning for a change in placement, petitioning for termination of parental rights, petitioning for revision of dispositional orders, petitioning for extension of dispositional orders, petitioning for a temporary restraining order and injunction, petitioning for relief from a judgment terminating parental rights, petitioning for the appointment of a guardian, the revision of a guardianship order or the removal of a guardian, and bringing an action or motion for the determination of the child's paternity. Wis. Stat. § 48.235(4). Although these proceedings are not all related to the financial support of the child, they are related to the child's welfare and the guardian ad litem's responsibility is to be an advocate for the best interests of the child. Wis. Stat. § 48.235(3)(a).

The Tenth Circuit determined that a Bankruptcy Court need not look into the nature of a custody proceeding to determine whether it was held for the best interest of the child because in all custody actions, the court's ultimate goal is the welfare of the child. Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir. 1993). Further, "to require the court to determine the purpose of the custody action could require extensive hearings and fact findings into the parties' subjective motivations which is more appropriate to the state court than a bankruptcy court." Id. Absent exceptional circumstances, fees awarded in custody actions are in the nature of support for purposes of § 523(a)(5).

Like a guardian ad litem's service in a custody proceeding, a guardian ad litem's service in a CHIPS proceeding is clearly for the purpose of ensuring the child's welfare. There is no need to determine the exact purpose of the underlying CHIPS proceeding because in all CHIPS proceedings the ultimate goal is the welfare of the child. Therefore, fees awarded to a guardian ad litem in a CHIPS proceeding are in the nature of support of purposes of § 523(a)(5).

But determining that a debt is a "support" obligation does not mean that it is a "debt to the child." Green County has not provided the evidence necessary to analyze the issue. Exceptions to discharge of a debt are construed strictly against a creditor and liberally in the debtor's favor. Kolodziej v. Reines (In re Reines), 142 F.3d 970, 972-73 (7th Cir.1998), cert. denied by Kolodziej v. Reines, 525 U.S. 1068 (1999). A party seeking to establish an exception to discharge bears the burden of proof. Reines, 142 F.3d at 973. Nondischargeability must be proven by a preponderance of the evidence. Matter of Crosswhite, 148 F.3d 879, 881 (7th Cir. 1998). Green County has not met its burden of proof.

Green County's failure to provide evidence also dooms any claim under 11 U.S.C. § 523(a)(18). Section 523(a)(18) excepts from discharge any debt:

> (18) owed under State law to a State or municipality that is--
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> > (A) in the nature of support, and
> >
> > (B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.).
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> 11 U.S.C. § 523(a)(18).

Part D of Title IV of the Social Security Act addresses "Child Support and Establishment of Paternity." It directs the Secretary of Health and Human Services to oversee states in developing programs to assist custodial parents in locating noncustodial parents, establishing paternity, and obtaining child and spousal support. See 42 U.S.C. §§ 651-669. Support claims enforceable under Part D of Title IV of the Social Security Act usually concern debts owed pursuant to an order imposing a support obligation against a noncustodial parent. In re Spinks, 233 B.R. 820, 822 (Bankr. S.D. Ill.1999).

Again, Green County has provided no indication as to the nature of the underlying debt. There was only a general pleading that this is the type of debt enforceable under Part D of Title IV of the Social Security Act. Exceptions to discharge of a debt are construed strictly against a creditor and liberally in the debtor's favor. Reines, 142 F.3d at 972-73. A party seeking to establish an exception to discharge bears the burden of proof. Id. at 973. Green County did not specifically allege that the debt is enforceable under Part D of Title IV of the Social Security Act, and has not met its burden of proof that the debt is nondischargeable under 11 U.S.C. § 523(a)(18).