IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: EDWARD JOHN HESTER and JENNIFER LEE HESTER, Debtors.	Chapter 13 Case No. 99-00367-YUM-EWH
EDWARD JOHN HESTER and JENNIFER LEE HESTER, Plaintiffs, v. GREG ABBOTT, Attorney General of the State of Texas, Defendant.	Adv. No. 04 -06 **MEMORANDUM DECISION**

INTRODUCTION

Edward and Jennifer Hester filed for bankruptcy protection and sought to discharge a child support obligation they owed to the State of Texas. After the Bankruptcy Court determined it lacked jurisdiction over Texas, the debtors converted their chapter 7 bankruptcy case to a chapter 13 case and, in their plan, provided for the treatment and discharge of the obligation owing to Texas. Texas never objected to the chapter 13 plan, but after the debtors completed their plan and obtained a discharge, Texas renewed garnishment actions against the debtors. Because the Bankruptcy Court's order determining it lacked jurisdiction was a final non-appealed order, the debtors could not treat the child support obligation in their plan and

Texas is not bound by the plan's treatment of its claim. Accordingly, the Hesters are not entitled to injunctive relief against Texas' continued attempts to collect on the child support obligation. The reasons for this conclusion are set forth below.

FACTS

Edward John and Jennifer Lee Hester ("Debtors") filed a chapter 7 bankruptcy petition on April 9, 1999. On April 21, 1999, the Debtors filed an adversary proceeding against the Office of the Attorney General of Texas ("Texas") to determine the dischargeability of Edward's child support obligation.

The child support obligation arose from an April 22, 1996 Order Establishing the Parent-Child Relationship which found that Edward was the biological father of Timothy Ortiz (the "Paternity Order"). The Paternity Order appointed Micaela Meyers the primary conservator of the child entitled to periodic child support payments and directed Edward to pay Micaela Myers $350.00 per month. The Paternity Order also found that retroactive child support (assigned pursuant to statute) was owing to Texas in the amount of $26,830.00 with 12% interest. Edward was ordered to pay $100.00 per month on the retroactive support obligation (the "Texas Obligation").

It was the retroactive child support obligation that Debtors sought to discharge in the adversary proceeding (the "Adversary"). The Complaint for Injunctive and Declaratory Relief ("Complaint") alleged that the claim by Texas against the Debtors was an obligation to reimburse Texas for welfare payments owed to the mother or the child, and, as such, was

dischargeable. The Debtors cited two 1995 Ninth Circuit cases to support their contention.[1] A copy of the Complaint and summons was sent to Texas' Child Support Unit at 1908 N. Laurent in Victoria, Texas; Texas' Child Support Litigation Division at Post Office Box 530 in Victoria, Texas; and Texas at Post Office Box 13499 in Austin, Texas.[2]

On May 21, 1999, Assistant Attorneys General Ildelfonso Ochoa and Lynn Hamilton Butler, on behalf of Texas and its Child Support Division,[3] filed a motion to dismiss the Complaint for lack of jurisdiction on sovereign immunity grounds. The Debtors opposed the motion, arguing the statutory discharge did not constitute a suit against a state, and reiterating its argument that the debt was dischargeable because it was assigned to the state. The Debtors sent their opposition to the motion to dismiss to Ms. Butler, Assistant Attorney General, Child Support Unit at the Post Office Box she provided at 12548 in Austin, Texas. On June 19, 1999, Ms. Butler filed (and was granted) an Application for Limited Admission to appear in the matter on behalf of Texas. She again provided her address at Post Office Box 12548 in Austin, Texas, and designated Lisa Perry Banen of the Office of the Attorney General of Arizona as co-counsel.

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[1]County of Santa Clara v. Ramirez, 795 F.2d 1494 (9th Cir. 1986) and Viseness v. Contra Costa County, 57 F.3d 775 (9th Cir. 1995), which held that an absent parent could discharge an obligation owed to a county or state for pre-judgment support obligations under 11 U.S.C. 523(a)(5). However, these cases pre-dated the 1996 amendment to the Bankruptcy Code which added Section 523(a)(18) which buttresses Section 523(a)(5) and prohibits debtors from discharging any child support obligations.

[2]These entities and addresses are listed in the Paternity Order as the addresses to which all notices regarding the payment of the child support should be sent.

[3]The motion to dismiss has an address on the letterhead of Post Office Box 12548 in Austin, Texas, but lists a Houston, Texas address under the names of Ildelfonso Ochoa and Lynn Butler. The bankruptcy court clerk's office sent its hearing notice to the Houston, Texas address.

On July 22, 1999, Judge Ollason, who was, at the time, presiding over the case in Yuma, granted Texas' motion to dismiss (the "Dismissal Order"). The Dismissal Order states the adversary proceeding constituted a suit against Texas without its consent and that Texas had immunity from such suit under the Eleventh Amendment. Debtors did not appeal the Dismissal Order.

After entry of the Dismissal Order, the Debtors sought conversion of their case to chapter 13, and Judge Baum, who was assigned to the case, granted the Debtors' motion to convert on September 1, 1999. The Debtors filed their chapter 13 plan ("Plan") on September 20, 1999. The Plan states, in a footnote, that Texas' claim of $31,500.00[4] is an obligation for payments provided under a public welfare program to Micaela Meyers prior to any court order requiring Edward to make child support payments. It also states:

> The claim of the State of Texas was never an obligation owed to the mother of Timothy Ortiz. Instead it is an obligation arising solely by statute and owed solely to the State of Texas. Because the claim held by the State of Texas against Edward J. Hester is a claim that arose prior to any court requiring Edward J. Hester to support Timothy Ortiz, it is an unsecured claim. It is not a claim for child support and is not excepted from discharge under 11 U.S.C. Section 523(a)(5).[5]

The Plan further states that upon successful completion of all Plan payments, the amount owed to unsecured creditors would be discharged. The Plan and Notice of Date to File

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[4]Texas did not file a proof of claim.

[5]The Debtors cited again to Ramirez and Viseness, and also to a BAP case, In re Cervantes, 229 B.R. 19 (9th Cir. BAP 1998), but not to any Ninth Circuit Court of Appeals authority because at that time the Ninth Circuit Court of Appeals had not issued any opinion on the question. Texas' statement of facts in support of its summary judgment pleadings states that the majority of the child support claim was owed primarily to the mother, Micaela Myers.

Objections to Plan was noticed to Texas at Post Office Box 12017 in Austin, Texas. Texas, in its Response to [Debtors'] Motion for Summary Judgment, admits it received notice of the Plan but that it did not object to the Plan or otherwise respond because it relied on the estoppel effect of the Dismissal Order. On May 23, 2000, Judge Baum entered a Stipulated Order Confirming Chapter 13 Plan and Approval of Attorneys Fees (the "Confirmation Order"). The chapter 13 trustee, Ford Motor Credit, and the Debtors were parties to the stipulation.

On June 19, 2000, the Debtors filed a Motion for an Order Implementing the Confirmed Chapter 13 Plan. The motion requested Edward's employer to withhold $350.00 (as opposed to the $450.00 it was originally withholding) and forward the money to the State of Texas in payment of accruing child support. The Debtors' filed a Certificate of Service showing the notice of hearing was sent to all creditors on the master mailing matrix, including Texas at Post Office Box 12017 in Austin; however, the underlying motion was only sent to the chapter 13 trustee, the Clerk of the Bankruptcy Court in Yuma, and the employer. A hearing was held July 28, 2000; Texas did not appear or object; and, an order granting that motion was entered the same day ("Implementation Order") by Judge Ollason.

On June 21, 2002, the Debtors filed a Motion for an Order to Stop Garnishment and Implement the Confirmed Chapter 13 Plan ("Stop Garnishment Motion"). The Stop Garnishment Motion requested that Edward's employer be directed to terminate withholdings because Timothy Ortiz had reached the age of 18. The Stop Garnishment Motion stated that when the Debtors had contacted Texas to terminate the garnishment, they were informed that an obligation was still owing on past child support. The Stop Garnishment Motion also

reiterated the chapter 13 Plan provision regarding the Texas Obligation and sought an injunction against Texas for collecting on the debt.

The Stop Garnishment Motion and its notice of hearing were not sent to Texas. At the July 12, 2002 hearing, the court[6] directed the Debtors to notice Texas for a continued hearing. The Debtors sent a new hearing notice to Texas at Post Office Box 12017 in Austin on July 16, 2002. The Certificate of Service indicates only the notice of hearing and not the Stop Garnishment Motion was served on Texas. The continued hearing on the Stop Garnishment Motion was held August 23, 2002. There were no objections, Texas did not appear, and the court entered an order ("Stop Garnishment Order") submitted by Debtors' counsel. The Stop Garnishment Order finds that, as previously ordered in the Implementation Order, the Plan is binding on Texas.

The Debtors made all payments under their confirmed Plan and received a discharge on October 9, 2002.[7] The Debtors' case was closed on January 13, 2003. On January 12, 2004, the Debtors moved to reopen their case. The motion to reopen stated that Texas was garnishing the Debtors' federal tax returns in collection of the retroactive child support obligation and that the Debtors wanted to reopen their case in order to clarify the discharge order. The order reopening the case was entered on January 28, 2004.

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[6]The case was assigned to me after being appointed to the Bench in September 2000.

[7] The discharge notice was sent to the Master Mailing List which includes Texas at P.O. Box 12017 in Austin, Texas.

On February 17, 2004, the Debtors filed a Complaint for Injunctive and Declaratory Relief seeking to bar Texas from collecting the retroactive child support debt that the Debtors alleged was discharged under the confirmed Plan (the "Second Complaint"). The Second Complaint was served on Texas at Post Office Box 12548 in Austin, Texas and on Texas' Child Support Division at 1980 Laurent Street in Victoria, Texas.

On March 15, 2004, Arturo Alvarez from Texas' Child Support Division at Post Office Box 12548 in Austin filed, on behalf of Texas, a motion to dismiss the Second Complaint based on Eleventh Amendment immunity. A hearing was held on the matter on April 4, 2004, and the motion to dismiss was denied.

On June 1, 2004, the Debtors filed a motion for summary judgment. Oral arguments were held on October 10, 2004. The court denied the motion for summary judgment and asked Texas to submit a statement of facts to be tried or a motion for summary judgment by November 5, 2004. The court also invited the Debtors to submit further briefing on the effect of the Dismissal Order. The Debtors filed a Motion for Reconsideration, which supplemented their motion for summary judgment, on November 5, 2004. Texas filed a motion for summary judgment on November 8, 2004. The parties have responded and the matter is now ready for decision.

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this case pursuant to 28 U.S.C. § 157(b)(2)(L) and (O).

ISSUES

1. Did the Dismissal Order bar the Debtors from treating the Texas Obligation in their chapter 13 Plan?

2. Are the terms of the Debtors confirmed chapter 13 Plan binding on Texas?

DISCUSSION

A. Standard of Review

Summary judgment is appropriate only when, in viewing the evidence in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The bankruptcy court is entitled to take judicial notice of documents within the bankruptcy file. In re Bucknum, 105 B.R. 25 (9th Cir. BAP 1989).

B. The Dismissal Order Precluded the Debtors from Treating the Texas Obligation in their Chapter 13 Plan.

Once the Dismissal Order became final on July 22, 1999, the bankruptcy court could not assert personal jurisdiction over Texas. The Debtors did not appeal the Dismissal Order. A final order that is not appealed cannot be collaterally attacked in a later proceeding. In re Pardee, 193 F.3d 1083, 1087 (9th Cir. 1999); Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995).

Dismissal on the basis of the Eleventh Amendment has been characterized as a lack of subject matter jurisdiction. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 53 (1996); Corbett v. MacDonald Moving Serv., Inc., 124 F.3d 82, 88 (2d Cir. 1997) (internal citations omitted). When an action is dismissed for lack of jurisdiction, it does not result in a final judgment on the merits. Therefore, it is not a final judgment for the purposes of claim preclusion[8] because the only thing that has been litigated is the issue of jurisdiction. However, once the dismissal order becomes final and no appeal is taken, it becomes a final determination of that single issue so that in a subsequent suit, the outcome will be determined by the rules of issue preclusion. In re Northwest Pipe & Casing Co., 67 B.R 639, 641 (Bankr. D. Ore. 1986). Issue preclusion generally requires there be: (1) the same issue (2) actually litigated and determined (3) by a valid and final judgment (4) as to which the determination is essential to the judgment. In re Paine, 283 B.R. 33, 39 (9th Cir. BAP 2002).

The Debtors argue that the Complaint and the Plan were not seeking the same form of relief, and therefore, the Dismissal Order did not bar the Debtors from treating the Texas claim in their Plan. However, the Debtors' Plan was simply a second run at achieving substantially similar relief as in the Complaint. The Debtors' Complaint sought to discharge the obligation owed to Texas. The Debtors' Plan again sought to discharge the obligation owed to Texas.[9]

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[8]Claim preclusion requires there be: (1) the same parties or privity of parties, (2) a judgment rendered by a court of competent jurisdiction, (3) a prior action concluded to final judgment on the merits, and(4) the same claim or cause of action involved in both actions. In re Paine, 283 B.R. 33, 39 (9th Cir. BAP 2002).

[9]The difference is that the Plan actually gives the Debtors more than the relief requested in the Complaint because it gives the Debtors de facto declaratory relief on the issues of personal jurisdiction and dischargeability of the Texas Obligation.

Both the Complaint and the Plan sought assertion of the bankruptcy court's jurisdiction over Texas. But, that requested relief was rejected by the Court when it dismissed the Complaint and is now law of the case.

The law of the case doctrine is recognized by the US Supreme Court and the Ninth Circuit as a rule that promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues. Christianson v. Colt Industr. Operating Corp., 486 U.S. 800, 816 (1988). The doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Arizona v. California, 460 U.S. 605, 618 (1983).

Additionally, under the effect of issue preclusion, once the Dismissal Order was final, the Debtors could not attempt to deal with the Texas Obligation in their converted case because had been a final determination that the bankruptcy court could not assert jurisdiction over Texas without its consent. Because the Dismissal Order was final, and unappealed, Texas, under law of the case doctrine and issue preclusion, had a right to rely on the determination that it did not have to submit to the bankruptcy court's jurisdiction regarding the dischargeability of the assigned child support. See Christianson v. Colt Industr. Operating. Corp., 486 U.S. at 816.

C. The Debtors did not Provide Texas with Adequate Notice of the Chapter 13 Plan and a Number of Post-Confirmation Orders Regarding the Plan

Before a creditor's rights may be adversely affected by a chapter 13 plan, the creditor must receive adequate notice and an opportunity to be heard in a manner sufficient to meet due process concerns. See In re Dynamic Brokers, Inc., 293 B.R. 489 (9th Cir. BAP 2003). To

satisfy due process requirements, notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to object. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). It must be of such a nature as to reasonably convey the required information and afford a reasonable time for response. Id.

The bankruptcy rules provide procedures for affecting the rights of creditors. If a party follows the procedure provided by the rules, the other party will receive adequate notice that its rights may be affected. In re Loloee, 241 B.R. 655, 661-662 (9th Cir. BAP 1999). An adversary proceeding must be initiated in order for a determination regarding the dischargeability of a debt to be made. Fed. R. Bankr. P. 7001(6). Adversary proceedings are initiated by service under Fed. R. Bankr. P. 7004(a), which mandates that a summons be served together with a copy of the complaint.

The procedure for confirming a chapter 13 plan is different from an adversary procedure. Notice of the time for filing objections and the hearing on plan confirmation is given pursuant to Fed. R. Bankr. P. 2002(b) and need not be mailed to any particular person at a creditor's address provided by the debtor on his master mailing list. If a creditor designated a mailing address in a filed proof of claim or requested notice, then the notice requirements must meet 2002(g) and be sent to that designated address.

Initially, the Debtors' brought the Adversary to challenge the dischargeability of the retroactive child support obligation due to Texas. The Adversary was noticed to Texas in Austin, Texas' Child Support Division and its Child Support Litigation Division in Victoria, Texas.

Ms. Butler appeared on behalf of Texas' Child Support Division, providing, a number of times, an address at Post Office Box 12548 in Austin, Texas. While the Debtors noticed their chapter 13 Plan to all creditors on the master mailing matrix and provided the requisite 30 days to object, the address on the master mailing matrix for Texas was a Post Office Box that Texas never used in its appearance in the Adversary. Nor was that address one the Debtors used when initiating the Adversary. Furthermore, the notice of the Plan did not reference any particular individual or department within the Office of the Attorney General of Texas.

The Debtors only conformed their notice to Fed. R. Bankr. P. 2002 by sending the Plan, notice of hearing, and date by which objections were due, to the address the Debtors provided on their master mailing matrix Post Office Box 12017, which was a Post Office Box that Texas never used or provided on its pleadings in the Adversary or even listed on the Paternity Order under which the Texas Obligation arose.[10] Such notice is particularly defective in light of the fact that a particular person and agency appeared in the Adversary.[11]

If proper service of process is not made as required by Fed. R. Bankr. P. 7004(b), the defendant is not a party to the action and the court is without jurisdiction to enter a judgment against that defendant. In re Venegas, 257 BR 41 (Bankr. D. Idaho 2001).

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[10]The Paternity Order directs payment to Post Office Box 13499 in Austin, Texas and that all notices shall be given to Texas at Post Office Box 530 in Victoria, Texas. Debtors' Adversary complied with this directives, but the Plan did not.

[11]Significantly, the Debtors' Second Complaint service was sent to Texas at the 12548 Post Office Box (which was the address Texas provided in the Adversary) as well as the Child Support Division.

The Debtors, relying on In re Pardee, 193 F.3d 1083 (9th Cir. 1999), assert that because Texas had notice of the Plan and the entry of various orders confirming and reaffirming the Plan's provisions and the Plan's treatment of the assigned child support obligation, that Texas is bound by the Plan regardless of the entry of the Dismissal Order and regardless of whether the Texas Obligation was dischargeable.

In Pardee, the debtor's chapter 13 plan provided for the discharge of interest on a student loan debt. The Ninth Circuit held that because the creditor had actual notice of the plan and did not file an objection, it was bound by the plan's terms even though interest on student loan debt is otherwise nondischargeable. While Pardee remains good law in the Ninth Circuit, a number of subsequently decided cases have held that the notice given to the non-acting creditor must comply with due process requirements. See e.g., In re Repp, 307 B.R. 144 (9th Cir. BAP 2004); In re Enewally, 368 F.3d 1165 (9th Cir. 2004); In re Whelton, 312 B.R. 508 (Bankr. D. Vt. 2004). These cases have held that if a chapter 13 plan provides for the discharge of a type of debt which a debtor could otherwise obtain only by filing an adversary proceeding, then notice of the plan must be the equivalent of what would be required had the debtor commenced an adversary proceeding under Fed. R. Bankr. P. 7004.

While Pardee did not analyze whether the notice requirements of Fed. R. Bankr. P. 2002 were "reasonably calculated to reach" the creditor whose debt was discharged through the plan, the BAP found the minimal service requirements for chapter 13 plan confirmations "[could not] be used as a way to stay below the creditors' radar." In re Repp, 307 BR at 154. Repp's holding was true even though, in that case, the creditor received actual notice of the confirmation

hearing and received a copy of the plan. Judge Ryan, in his dissent, recognized that in order to determine whether notice was reasonably calculated to reach the interested party, a case by case analysis is necessary. Judge Ryan found that because the student loan creditor had filed a proof of claim in the bankruptcy case, it knew or should have known, that its rights could be affected by the plan. That the creditor ignored the plan terms did not allow it to later claim that its rights were adversely impacted by the plan. Id. at 156.

Even though Texas has admitted it received notice of the Plan and the notice of hearing on the Plan confirmation, Texas had not made an appearance in the bankruptcy case or filed a proof of claim; and, because, under the Dismissal Order, it was found to be immune from litigating its claim in the bankruptcy court, Texas may not have been aware (nor should it have been aware) that its rights would be adversely affected by the Plan. In fact, Texas states that it relied on the estoppel effect of the Dismissal Order and did not file an objection to the Plan. Moreover, the other governmental agencies associated with Texas with respect to its claim (i.e., the Child Support Division or the Child Support Litigation Division), who may have been in the position to make litigation decisions for Texas, were not given notice of the Plan as required under the Bankruptcy Rules. Id. at 149. In order to assure that the interested party is apprised of the pendency of an action, valid service requires more than to address the document to a (incorrect) Post Office Box. In re Villar, 2004 WL 2587803, *3 (9th Cir. BAP 2004).

The Confirmation Order made no specific findings that the Texas Obligation is dischargeable; it merely confirmed the terms of the Plan which buried the treatment of the Texas Obligation in a footnote. The Implementation Order and the Stop Garnishment Order

arose from motions which the record indicates were never served on Texas, even under the notice requirements of Fed. R. Bankr. P. 2002. In this case, it appears that the method chosen for notice was calculated to minimize the chance that Texas would be made aware that the Debtors were discharging the retroactive child support obligation in their Plan. In re Repp, 307 B.R. at 149.

Furthermore, even if service on Texas was sufficient, placing the treatment of the obligation owing to Texas in a footnote was not. One of the purposes of the adversary rules of pleading is for a defendant to receive adequate notice of the claim being made. If the Debtors wanted to use their chapter 13 Plan as a request for declaratory relief as to the dischargeability of the Texas Obligation they had to do more than bury its treatment in a footnote. Had Texas' attorney or its Child Support Division (who appeared on behalf of Texas in the Adversary) received the Plan, and had the treatment of the Texas Obligation been prominently set forth, due process standards, arguably, would have been satisfied. However, for the reasons discussed above, nothing the Debtors did in their chapter 13 Plan could properly reverse the Dismissal Order and give the bankruptcy court jurisdiction over Texas. By treating the Texas Obligation in the Plan the Debtor was impermissibly collaterally attacking the Dismissal Order.

Not only did notice of the chapter 13 Plan to Texas not meet due process requirements, but a number of post confirmation motions and orders which reaffirmed the bankruptcy court's jurisdiction over Texas and the Plan's treatment of Texas Obligation were equally or more deficient. The Debtors rely on the Implementation Order entered by the Court

a few weeks after entry of the Confirmation Order to support their argument that Texas is barred from collecting on the Texas Obligation. The Implementation Order contains a provision finding that Texas was bound by the terms of the confirmed Plan. However, a review of the record indicates that Texas was only sent a notice of hearing and not the motion itself. Nothing in the notice of hearing (or the caption of the motion) alerted Texas that the Debtor would be seeking an order of the type submitted which made a specific finding that Texas was bound by the terms of the Debtors' chapter 13 Plan. Texas received deficient notice of all the pleadings, which resulted in the orders on which the Debtors rely in seeking injunctive relief. Therefore, independent of the preclusive effect of the Dismissal Order, due process standards were not met in the notices sent to Texas, and Texas is not bound by the Plan's treatment of the Texas Obligation.

D. Debtors' Other Arguments

The Debtors make a number of other arguments in support of their request for an injunction against continued collection efforts by Texas, but those arguments are either irrelevant, or, they improperly seek a reversal of the unappealed Dismissal Order.

The Debtors suggest that by the time of Plan confirmation, the Court had determined that it did have jurisdiction over Texas. Other than the entry of the Confirmation Order, the Implementation Order and the Stop Garnishment Order, all of which occurred on a default basis as to Texas, there is no evidence the Court ever affirmatively withdrew or renounced the Dismissal Order. Furthermore, in order to satisfy due process requirements, Texas should have received specific and clear notice if the court took a different view of its jurisdictional

powers in the converted chapter 13 case than the position it took in the Dismissal Order. Otherwise, Texas would have no notice of a significant change affecting its rights or interests. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950). There is no evidence that such notice was ever provided.

In any event, under principles of issue preclusion, a court, cannot collaterally attack its own orders. Of course, a court can revisit its prior decisions but it must do so in a way that complies with the requirements of due process. Since Texas did not receive clear notice of the court's alleged change in its view of jurisdiction, due process requirements were not met. Therefore, even if entry of the Confirmation Order somehow constituted a determination of jurisdiction over Texas, the notice of that change (which consisted of burying treatment of the Texas Obligation in a footnote) was insufficient to be binding on Texas for the reasons discussed in Section C of this decision.

The argument that the Dismissal Order was wrongly decided because it did not recognize the in rem nature of a bankruptcy's court jurisdiction, as analyzed in Tennessee Student Assistance Corp. v. Hood, __U.S.__, 124 S.Ct. 1905 (2004), is simply irrelevant. Whether the Dismissal Order was correct or not, it became final and was thereafter law of the case on which Texas was entitled to rely.

The Debtors also devote time explaining, that under existing case law in the Ninth Circuit at the time they proposed their Plan, they had a good faith belief that the Texas Obligation was dischargeable. The cases they relied on, County of Santa Clara v. Ramirez, 795 F.2d 1494 (9th Cir. 1986); Viseness v. Contra Costa County, 57 F.3d 775 (9th

Cir. 1995), were decided before Congress passed the Welfare Reform Act of 1996 which made several changes to the law of discharge and added § 523(a)(18) as well as an identical section to the Social Security Act. Additionally, the Debtors relied on a Bankruptcy Appellate Panel decision that found notwithstanding the Welfare Reform Act's provisions, Congress did not intend to § 523(a)(18) to apply in the typical chapter 13 context. In re Cervantes, 229 B.R. 19 (9th Cir. BAP 1998). Subsequently, the Ninth Circuit found that the Social Security Act provided an independent basis for making all child support obligations nondischargeable in the chapter 7 and the chapter 13 context. See In re Leibowitz, 217 F.3d 799 (9th Cir. 2000); In re Cervantes, 219 F.3d 955 (9th Cir. 2000). However, even if the Ninth Circuit had upheld the BAP's analysis in Cervantes, the Texas Obligation could not be addressed and ultimately discharged by the Debtors' Plan for the simple reason that the Dismissal Order was a final determination that the Court lacked jurisdiction over Texas.

CONCLUSION

The Debtors could not side-step the preclusive effect of the Dismissal Order's determination that the bankruptcy court lacked personal jurisdiction over Texas by converting their chapter 7 case to a chapter 13 case and subsequently treating the Texas Obligation in their Plan. Even if the Dismissal Order was not entitled to preclusive effect, the Debtors' notice of the Plan and other orders asserting the bankruptcy court's jurisdiction over Texas and purportedly binding Texas to the terms of the Plan, did not meet constitutional due process requirements. This is a harsh result for the Debtors who have completed their Plan

and made all other required child support payments for a child who is now past 18 years of age. However, the principles of consistency and finality which underlie the doctrine of issue preclusion as well as the requirements of due process bar the Debtors from receiving the injunctive relief they seek.

Accordingly, an order will be entered this date denying the Debtors' motion for summary judgment, granting Texas' motion for summary judgment, and dismissing this adversary proceeding with prejudice.

Dated this 17th day of February, 2005

EILEEN W. HOLLOWELL
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed this
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