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UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

FILED

MAY 1 2004

CLERK OF COURT
FOR THE DISTRICT OF ARIZONA

In re OWEN R. ALESHIRE
and LYDIA M. ALESHIRE,

Debtors.

MARY JO ALESHIRE,

Plaintiff,

v.

OWEN R. & LYDIA ALESHIRE,

Defendants.

Chapter 7 Proceeding

Case No. BK-04-01277 CGC

Adv. Proc. 04-1277

UNDER ADVISEMENT DECISION RE:
CROSS MOTIONS FOR SUMMARY
JUDGMENT

I. Introduction

Plaintiff Mary Jo Aleshire, Debtor Owen Aleshire's ex-wife, has filed a Complaint to Determine Dischargeability of Debt against Debtors arising from a state court judgment issued by the state court in a divorce proceeding. Both Plaintiff and Defendant seek summary judgment on the issue of whether the attorneys' fees and forensic accounting fees awarded to Plaintiff, and against Defendant, in the state court proceedings are nondischargeable under 11 U.S.C. section 523(a)(5).

II. Facts

The following facts are undisputed. Plaintiff and Debtor Owen Aleshire were divorced on June 12, 1992. Debtor fell behind in payment of child support and various uncovered medical expenses. In 2001, Debtor filed Request for Simplified Modification of Child Support, requesting that his child support obligation be reduced. As part of that process, the parties agreed to the appointment of a forensic accountant to determine Debtor's income for purposes of calculating his child support obligation. According to the parties, Plaintiff was ordered to pay the costs of the forensic accountant "subject to reallocation at a later time." A trial was ultimately conducted in state court and the matter taken under advisement.

On February 25, 2004, the Court issued its minute entry decision in which it found Debtor \$1,285.50 in arrears on his child support obligation plus interest for a total judgment owing of

1 \$3,343.42. The court also awarded Plaintiff judgment in the amount of \$291.87 for unpaid
2 medical expenses. Both parties agree that these amounts are in the nature of child support and,
3 therefore, nondischargeable. However, the court also awarded Plaintiff 50% of the cost of the
4 forensic accountant (\$5,500) and 25% of her attorneys' fees (\$4,502.50) and costs (\$68.06), for
5 a grand total of \$10,070.56. The parties disagree as to whether these costs and fees are
6 dischargeable. Plaintiff argues that the court awarded these fees and costs pursuant to Arizona
7 Revised Statute ("A.R.S.") section 25-324 and are therefore nondischargeable under 11 U.S.C.
8 section 523(a)(5); Debtor argues the fees and costs were awarded pursuant to A.R.S. section 25-
9 503 and are dischargeable.

10 **III. Analysis**

11 The presumption is that the fees and costs are dischargeable. To find them
12 nondischargeable, Plaintiff bears the burden of demonstrating that the obligations at issue are
13 actually in the nature of alimony, maintenance or support under 11 U.S.C. section 525(a)(5). *In*
14 *re Gibson*, 103 B.R. 218, 220 (9th Cir. BAP 1989). 11 U.S.C. section 523(a)(5) states, in
15 pertinent part,

16 A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does
17 not discharge an individual debtor from any debt . . . to a spouse, former spouse,
18 or child of the debtor, for alimony to, maintenance for, or support of such spouse
19 or child in connection with a separation agreement, divorce decree or other order
of a court of record . . . but not to the extent that such debt includes a liability
designated as alimony, maintenance, or support, unless such liability is actually in
the nature of alimony, maintenance, or support.

20 The parties are correct that how the state court characterizes the debt is a relevant factor for this
21 Court to consider, although the question is ultimately one of federal law. *In re Chang*, 163 F.3d
22 1138 (9th Cir. 1998); *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984). Also of importance to
23 consider, is the parties' intent and the "substance of the obligation." *Shaver*, 736 F.2d at 1316.

24 A factor in characterizing an obligation as one intended for support is the need of
25 the recipient spouse. . . . Factors indicating the need for support "include the
26 presence of minor children and an imbalance in the relative income of the parties"
and whether the obligation terminates on the death or remarriage of the recipient
spouse.

27 *Gard v. Gibson (In re Gibson)*, 103 B.R. 218, 221 (9th Cir. BAP 1989) (quoting *Shaver*, 736 F.2d

1 at 1316). Where the award of attorneys' fees was not based on the financial need, courts have
2 found the obligation dischargeable. See *In re Hoberg*, 300 B.R. 752 (Bankr. C.D. Cal. 2003)
3 (holding that parties expressly agreed to allow award of attorneys' fees to prevailing party and
4 therefore, fees are dischargeable); see also *In re Gibson*, 103 B.R. 218 (9th Cir. BAP 1989); *In re*
5 *King*, 15 B.R. 127 (Bankr. D. Kan. 1981) (holding that where ex-wife not in dire financial need
6 at time of divorce, fees would be considered part of the dissolution of debts rather than in the
7 nature of support);

8 Plaintiff attempts to meet her burden by asserting that the Superior Court based its
9 judgments for attorney's fees and costs and forensic accounting fees on A.R.S. section 25-324,
10 which states,

11 The court from time to time, after considering the financial resources of both parties
12 and the reasonableness of the positions each party has taken throughout the
13 proceedings, may order a party to pay a reasonable amount to the other party for
the cost and expenses of maintaining or defending any proceeding under this chapter
or chapter 4, article 1 of this title.

14 According to Plaintiff, fees and costs awarded pursuant to A.R.S. section 25-324 have been
15 interpreted by courts in the Ninth Circuit to qualify as in the nature of support and therefore
16 nondischargeable under section 523(a)(5). In particular, Plaintiff points to Judge Haines' decision
17 in this Court in *In re Jarski*, 301 B.R. 345 (Bank. D. Ariz. 2003), in which the Court held that
18 fee awards in custody disputes under A.R.S. section 25-324 are founded on a spouse's duty of
19 support: "Fees incurred in a child custody dispute are in the nature of support for the child, even
20 if payable to someone else." 301 B.R. at 347 (citing *Marks v. Catlow (In re Catlow)*, 663 F.2d
21 960, 963 (9th Cir. 1981); *In re Chang*, 163 F.3d 1138, 1141 (9th Cir. 1998)). In *Jarski*, the Court
22 expressly found that the state court, in all its rulings before it, "including the award of attorney's
23 fees, were made primarily with the best interests of the child in mind, and therefore the awards
24 were in the nature of child support." *Id.*

25 Debtor counters that the fees were not in fact awarded pursuant to A.R.S. section 25-324,
26 but instead were awarded pursuant to A.R.S. section 25-503(E), which states, in pertinent part,
27 "The order of modification or termination may include an award of attorney fees and court costs
28

1 to the prevailing party." The award, therefore, was not based on financial need of the parties and
2 was not intended as support.

3 While both parties properly set forth the state of the law in regards to the respective
4 statutory provisions upon which they rely, neither convinces this Court that either provision was
5 the lynch pin for the trial court's award. While admittedly the parties were litigating issues of
6 child support modification, child custody and health care expenses, that alone does not make the
7 fees and costs in the nature of support. Nowhere did the trial court identify what statute it was
8 relying on in awarding fees and nowhere did it set forth any analysis of the parties' the financial
9 needs. In fact, perhaps diluting Plaintiff's argument that the fee award was based on the financial
10 standing of the parties, is the fact that the court simply divided equally between Plaintiff and
11 Debtor the forensic accounting fees and ordered Debtor to pay only 25% of her attorneys' fees.
12 This suggests that perhaps the award was more in the nature of a property division than an
13 allocation based on financial need. Certainly, however, this Court cannot agree with Plaintiff on
14 summary judgment that "the presumption was made that the attorney's fee award was in the nature
15 of child support." There is simply no evidence to support either parties' position on summary
16 judgment.

17 **IV. Conclusion**

18 For the foregoing reasons, the Court denies both Plaintiff's Motion for Summary Judgment
19 and Debtor's Cross Motion for Summary Judgment. Further, the parties shall appear before this
20 Court for a Rule 16(b) Scheduling Conference on January 4, 2006, at 1:00
21 a.m./p.m. in order to proceed to trial.

22 So ordered.

23 DATED: Nov. 15, 2005

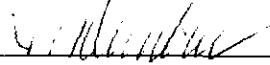
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25 CHARLES G. CASE II
26 United States Bankruptcy Judge

27 COPY of the foregoing mailed and/or via facsimile
28 this 11th day of November, 2005 to:

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