2016 IL App (1st) 153667-U

THIRD DIVISION
September 29, 2016

No. 1-15-3667

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JASMINA KECINSKA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 D 331110
	)	
LYNN WYPYCH,	)	The Honorable
	)	Alfred Levinson,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: Trial court's order declaring attorney fees incurred by court-appointed children's representative during child custody proceedings nondischargeable in bankruptcy as domestic support obligation was proper.

¶ 1 During divorce proceedings between plaintiff-appellant Jasmina Kecinska (Jasmina) and her husband Miroslaw Nalepka (Miroslaw), the trial court appointed defendant-appellee Lynn Wypych (Lynn) as guardian *ad litem* for the couple's children. After the divorce was finalized, Jasmina filed for bankruptcy. Lynn filed a petition seeking to declare her attorney fees a domestic support obligation nondischargeable in bankruptcy, which the trial court granted.

Jasmina filed a motion to reconsider, which the trial court denied. Jasmina now appeals, *pro se*, contending that Lynn's fees do not constitute a domestic support obligation and asking that we reverse the trial court's decisions. For the record, Lynn has not filed a brief in this matter. Accordingly, we consider this appeal on appellant's brief only, pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Jasmina and Miroslaw began divorce proceedings. They shared two very young children, a boy and a girl. A final dissolution of marriage was entered in November 2011. However, the relationship between Jasmina and Miroslaw grew extremely contentious with respect to visitation and custody of the children.[1] In October 2012, the trial court appointed Lynn to be the children's representative. It is clear from various letters, reports and comments throughout the record that Jasmina became very disenchanted with Lynn's representation of the children, questioning her attentiveness to different situations and her overall effectiveness and concern for their health, safety and welfare.

¶ 4 In June 2013, Lynn field a petition for attorney fees against both Jasmina and Miroslaw. With respect to Jasmina, the trial court ordered that she pay Lynn $3,266.75, her portion of fees owed through May 2013. Lynn continued to represent the children, pursuant to her court appointment.

[1]The record demonstrates, in part, various orders of protection, allegations of physical and mental abuse, a suicide attempt on the part of the minor son, refusals to attend family therapy, harassment, and stalking.

¶ 5 In March 2014, Lynn filed a second petition for attorney fees against both Jasmina and Miroslaw. In granting her petition, the trial court expressly wrote in a June 2014 order that Lynn's "fees as GAL were reasonable and necessary and incurred as GAL thus not being dischargeable by either party in bankruptcy." With respect to Jasmina, the court entered a judgment against her and in favor of Lynn in the amount of $6,470.75.[2] The court also discharged Lynn as the children's representative at this time.

¶ 6 In January 2015, Jasmina filed a motion to appoint a new representative for the children, specifically asking the trial court to "appoint independent Guardian Ad Litem, with not [*sic*] acquaintance to Lynn Wypych, *** to evaluate neglectful action of former Guardian Ad Litem - Lynn Wypych and to protect the children." In July 2015, the trial court reappointed Lynn as the children's representative.

¶ 7 However, in May 2015, Jasmina filed for chapter 7 bankruptcy in federal bankruptcy court, listing Lynn as one of her creditors. Lynn filed a motion for relief from automatic stay in bankruptcy court. She also brought Jasmina's bankruptcy to the attention of the trial court. In August 2015, the bankruptcy court denied Lynn's motion for relief from automatic stay; additionally, the trial court vacated that portion of its prior order reappointing Lynn as guardian *ad litem* for the children and stayed proceedings with respect to fees Jasmina owed her.

¶ 8 In September 2015, Lynn filed another motion for relief from automatic stay and this time, the bankruptcy court granted her motion

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[2]As noted in the court's order, Jasmina still owed $1,766.75 to Lynn pursuant to the prior June 2013 fees order.

> "to the extent the automatic stay applies to Debtor [Jasmina's] divorce case currently pending" in the trial court "to permit Lynn Wypych to initiate a non-dischargeability action or other appropriate action against Debtor [Jasmina] in Divorce Court with the Divorce Case to determine the non-dischargeability of fees owed to Lynn Wypych as the Court appointed Child Representative in the Divorce Case."

Lynn then filed in the trial court a petition to declare her fees a domestic support obligation and nondischargeable in bankruptcy.[3] On October 14, 2015, the trial court granted Lynn's petition, stating that Lynn's fees "are declared a domestic support obligation and are non-dischargeable in bankruptcy."[4] Jasmina filed a motion to reconsider. On November 30, 2015, the trial court denied Jasmina's motion, restating that Lynn's attorney "fees as the child[ren]'s rep are hereby non-dischargeable in bankruptcy." Jasmina appeals both of these orders.

¶ 9 ANALYSIS

¶ 10 Jasmina's sole contention for review is that the trial court erred in declaring that Lynn's attorney fees, incurred as the children's representative in Jasmina's divorce, constitute a "domestic support obligation" under title 11, section 532(a) of the Bankruptcy Code (11 U.S.C.A. § 523(a) (West 2012), so as to render them nondischargeable by Jasmina as part of her bankruptcy proceedings. As both state and federal law clearly dispute Jasmina's contention, we

[3]In conjunction with this, Lynn also filed a petition for rule to show cause for indirect civil contempt against Jasmina for her failure to pay pursuant to court orders.

[4]The court also granted Lynn leave to filed a wage garnishment action against Jasmina, which Lynn did.

wholly disagree.

¶ 11 The few cases Jasmina presents in her brief on appeal, which she attempts to argue support her contention, are all federal cases or cases from other states. Upon our review, however, we need not even reach out to those jurisdictions. This is because Illinois law both our cases and statutes are very clear on this issue, declaring, as the trial court did in the instant cause, that the attorney fees of a guardian *ad litem* or child representative are considered a domestic support obligation nondischargeable in bankruptcy. First and foremost, section 506(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) states, in pertinent part:

> "Representation of child.
>
> ***
>
> (b) Fees and costs. The court shall enter an order as appropriate for costs, fees and disbursements, including a retainer, when the attorney, guardian ad litem, or child's representative is appointed. Any person appointed under this Section shall file with the court *** a detailed invoice for services rendered ***. The court shall review the invoice submitted and approve the fees, if they are reasonable and necessary. Any order approving the fees shall require payment by either or both parents ***. *Unless otherwise ordered by the court at the time the fees and costs are approved, all fees and costs payable to an attorney, guardian ad litem, or child representative under this Section are by implication deemed to be in the nature of support of the child and are within the exceptions to discharge in bankruptcy under 11 U.S.C.A. 523.*" (Emphasis added.) 750 ILCS 5/506(b)

(West 2016).

What occurred in the instant cause follows the precepts of section 506(b) of the Act to the letter. The record demonstrates that, upon Lynn's first and second petitions for fees, the trial court entered orders which it felt were appropriate for costs and fees incurred by Lynn, who the trial court had appointed (not once, but twice) as the representative for Jasmina's children during the custody proceedings that took place in relation to Jasmina's divorce from Miroslaw. As section 506(b) prescribes, Lynn filed detailed invoices with the court with respect to her services; these, too, are contained in the record. The trial court then reviewed these and approved Lynn's fees: $3,266.75 owed through May 2013, and $6,470.75 owed through June 2014.[5] Upon the second petition, and immediately before it discharged Lynn as the children's representative, the trial court specifically stated that Lynn's fees were "reasonable and necessary and incurred as GAL thus not being dischargeable" in bankruptcy. It repeated this in its subsequent orders granting Lynn's petition to declare her fees a domestic support obligation and in its denial of Jasmina's motion to reconsider. Accordingly, as the trial court directly tracked the language of section 506(b), we find no error in its determination.

¶ 12 Further support for our conclusion here can be found in our state's case law and the principles it extols. Jasmina is correct to note that section 532(a) of the Bankruptcy Code states:

> "(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]Again, this second amount comprised an outstanding portion of the amount ordered with respect to Lynn's first petition, which Jasmina had not completely paid.

> ***
>
> (5) for a domestic support obligation;
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> ***
>
> (15) to a spouse, former spouse, or a child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with state or territorial law by a governmental unit." 11 U.S.C.A. § 532(a)(5), (15) (West 2012).

¶ 13 Our state courts have recognized that the issue of whether a debt is nondischargeable as being in the nature of "maintenance" or "support" is a matter of federal, not state, law. See *In re Marriage of LaShelle*, 213 Ill. App. 3d 730, 735 (1991); accord *Nuellen v. Lawson*, 123 Ill. App. 3d 202, 204 (1984); *In re Marriage of Lytle*, 105 Ill. App. 3d 1095, 1099 (1982). However, state law can be used to develop federal standards in this context and to interpret whether the nature of the debt at issue fits within the exception of dischargeability. See *Nuellen*, 123 Ill. App. 3d at 204; *Lytle*, 105 Ill. App. 3d at 1099. Accordingly, it has been said that state and federal courts have concurrent jurisdiction to determine whether debts are nondischargeable under section 532. See *LaShelle*, 213 Ill. App. 3d at 735; accord *Lytle*, 105 Ill. App. 3d at 1099; *Nuellen*, 123 Ill. App. 3d at 204.

¶ 14 Exceptions to dischargeability are few and have always been narrowly construed. See *Lytle*, 105 Ill. App. 3d at 1099; see also *Nuellen*, 123 Ill. App. 3d at 204 (Act provides for certain

exemptions to general rule of discharge). This is so in an effort to promote the goals of the Bankruptcy Code, namely, to allow debtors a "fresh start." *Lytle*, 105 Ill. App. 3d at 1099; accord *Nuellen*, 123 Ill. App. 3d at 204. But, one type of debt that has consistently been held to be nondischargeable, and to which a debtor is always bound even in bankruptcy, is a debt related to the support of her children. See *Nuellen*, 123 Ill. App. 3d at 204; *Lytle*, 105 Ill. App. 3d at 1100. The key in determining whether the debt is related to the support of debtor's children is to look at the substance of the obligation. See *LaShelle*, 213 Ill. App. 3d at 735; accord *Nuellen*, 123 Ill. App. 3d at 204; *Lytle*, 105 Ill. App. 3d at 1099. The label given to the obligation and the language used therein are irrelevant, as is to whom the debt is to be paid. *LaShelle*, 213 Ill. App. 3d at 735; accord *Nuellen*, 123 Ill. App. 3d at 204; *Lytle*, 105 Ill. App. 3d at 1099. Rather, if the essence of the obligation is for the support or maintenance of the debtor's children, the obligation is not dischargeable in bankruptcy. Compare *Lytle*, 105 Ill. App. 3d at 1100 (where debt at issue was clearly in nature of property settlement between ex-spouses, it was dischargeable in bankruptcy), with *Nuellen*, 123 Ill. App. 3d at 204-05 (where attorney fees incurred in course of proceeding to enforce an award of child support were clearly related to support of children, they were not dischargeable in bankruptcy, regardless of the fact that they were payable to an attorney rather than to the children or ex-spouse).

¶ 15 Recently, our very court has been even more specific with respect to attorney fees in the context of divorce cases. It has explicitly recognized that a child's representative " 'acts as an arm of the court in assisting in a neutral determination of the child's best interests.' " *Shen v. Shen*, 2015 IL App (1st) 130733, ¶ 118, quoting *Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶

23. As such, and because this attorney represents the children and not the divorcing parties, the payment of her fees is considered substantively different from that of the other attorneys involved in the divorce proceedings. See *Shen*, 2015 IL App (1st) 130733, ¶ 118. That is, while the fees of the attorneys representing the ex-spouses may be dischargeable in bankruptcy (depending on their classification,) the child representative's fees are never dischargeable because, by implication, these fees are inherently deemed to be in the nature of support of the child an obligation that cannot be discharged in bankruptcy. See *Shen*, 2015 IL App (1st) 130733, ¶ 118.

¶ 16 In the instant cause, Lynn's fees as the children's representative in the custody proceedings following Jasmina's divorce are, without a doubt, related to the support of Jasmina's children. The very essence of Lynn's work in that cause, via her appointment by the trial court, was to advocate for the best interest of the children, *i.e.*, to assist the court in establishing their custody and related issues such as visitation, therapy, etc. Lynn provided invoices of her fees to the court which, again, determined that these were "reasonable and necessary." Pursuant to the case law cited, Jasmina could not be discharged of Lynn's fees by filing for bankruptcy.

¶ 17 Finally, even were we to disregard our state precedent and follow only federal law as Jasmina presents in her brief on appeal, the result would be the same. This is because federal law is directly in line with Illinois state law on this issue. See *Nuellen*, 123 Ill. App. 3d at 205 (citing several federal bankruptcy cases from the Northern District of Illinois holding that attorney's fees awarded in divorce proceedings that are in the nature of alimony, maintenance or support are not dischargeable in bankruptcy, even though paid to attorney and not to spouse or children). In fact, the federal cases Jasmina cites are in contradistinction to her position and do not support her

contention. See *In re Miller*, 55 F.3d 1487, 1489-90 (10th Cir. 1995) (holding that fees ordered to be paid to guardian *ad litem* and to child psychologist incurred in divorce and child support proceedings are not dischargeable in bankruptcy under section 532(a) of Bankruptcy Code, since familiar obligations trump fresh start policy and these services, which were directly related to the child's best interest, constitute "support"); *In re Dvorak*, 986 F.2d 940, 941 (5th Cir. 1993) (holding that fees ordered to be paid to guardian *ad litem* constituted a debt that could not be discharged in bankruptcy, as this representative supplied services during custody hearing which were clearly for child's benefit and support; "[s]ection 532(a)(5) does not discharge a debtor from any debt for support of his or her child, if that debt is in connection with a court order"). Rather, and again, as we have already discussed, attorney fees incurred during child custody proceedings are in the nature of support and, pursuant to section 532(a) of the Bankruptcy Code, are not dischargeable in bankruptcy. See, *e.g.*, *In re Anderson*, 463 B.R. 871 (Bankr. N.D. Ill. 2011) (holding same, and noting that "[d]ebts owed to a guardian ad litem in a child custody proceedings [*sic*] can be said to relate just as directly to the support of the child as attorney's fees incurred by the parents in a child custody proceeding"); *In re Ramirez*, 2000 WL 356314 (Bankr. N.D. Ill. 2000) (citing myriad cases holding same, and noting that "support" is more than paying a child's bills and also encompasses the issue of custody). Jasmina presents us with no viable precedent to the contrary.

¶ 18 CONCLUSION

¶ 19 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 20 Affirmed.