United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

Will this opinion be published? **No**

Bankruptcy Caption: **In Re: Samella H. Ramirez**

Bankruptcy No.: **99 B 22274**

Adversary Caption:

Adversary No.:

Date of Issuance: **February 7, 2000**

Judge: **Carol A. Doyle**

Appearance of Counsel:

Attorney for Movant or Plaintiff: **Yanick Polycarpe**
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Attorney for Respondent or Defendant: **Paul W. McVicker**
Peck, McVicker & Landry
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Tenney & Bentley

Trustee or Other Attorneys:	**Elaine Jensen, Chapter 13 Trustee**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	**)**	
	)	**Chapter 13**
SAMELLA H. RAMIREZ,	**)**	
	)	**Case No. 99 B 22274**
Debtor.	**)**	**Honorable Carol A. Doyle**

MEMORANDUM OPINION AND ORDER

This matter is before the court on the motions of Debtor Samella H. Ramirez ("Debtor") to avoid judicial liens held by the law firms of Tenney and Bentley, L.L.C. ("Tenney"), and Peck, McVicker and Landry ("Peck"), and on Tenney and Peck's objections to Debtor's proposed Chapter 13 plan of reorganization. The liens of these law firms arose from court orders in a child custody proceeding ordering the Debtor to pay the fees of her former husband's attorney and her child's guardian ad litem.

The Debtor seeks to avoid the judicial liens held by Tenney and Peck against her home pursuant to § 522(f)(1)(A) of Title 11 of the United States Code. Tenney and Peck oppose the motions, contending that the lien indebtedness is in the nature of child support, an exception to lien avoidance under § 522(f)(1)(A). Each of the parties has also requested that the court determine the dischargeability of the debts giving rise to the liens pursuant to 11 U.S.C. § 523(a)(5), a provision containing language substantially similar to that of § 522(f)(1)(A). The court finds that the debts are in the nature of child support, and fall within the exception to discharge in § 523(a) and the exception to

lien avoidance in § 522(f)(1)(A). Therefore, these debts are not dischargeable under § 523(a)(5), and Tenney's and Peck's liens cannot be avoided under § 522(f)(1)(A).

I. JURISDICTION

This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(I) and (K). This court has jurisdiction pursuant to 28 U.S.C. §§ 151, 157, and 1334, and Internal Operating Procedure 15(a), formerly known as General Rule 2.33(A), of the United States District Court for the Northern District of Illinois.

II. BACKGROUND

The Debtor filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. The Debtor claims a $7,500.00 homestead exemption in her residence pursuant to 735 Ill. Comp. Stat. 5/12-901.

As of the petition date, Tenney and Peck held judicial liens against the Debtor's residence in the amounts of $15,090.09 and $22,891.25. Both liens were based upon awards made in connection with a child custody proceeding between the Debtor and her former husband, conducted in the Circuit Court of Cook County, Illinois. In that proceeding, Tenney served as counsel for the Debtor's former husband. Paul McVicker, of the Peck law firm, served as guardian ad litem for the child of the Debtor and her former husband. The Circuit Court entered several orders awarding the fees of Tenney and Peck against the Debtor. Those orders are discussed more fully below.

The Debtor filed motions in this court to avoid Tenney and Peck's liens pursuant to § 522(f)(1)(A). Tenney and Peck filed objections to the Debtor's proposed Chapter 13 plan of reorganization, and sought a determination that their lien indebtedness is nondischargeable pursuant to § 523(a)(5). In her answer to the objections, Debtor also sought a determination that the lien indebtedness is dischargeable under § 523(a)(5).

Several hearings were conducted, during which the parties reiterated their request for a determination of dischargeability under § 523(a)(5), and expressly waived the requirement for an adversary proceeding on this issue.[1] The parties submitted documents into evidence by agreement, and chose to present no testimony.

III. DISCUSSION

Sections 523(a)(5) and 522(f)(1)(A) contain the same operative language regarding debts for child support, and are interpreted in the same manner. The court will first address the dischargeability issue under § 523(a), which will effectively resolve the lien avoidance issue.

1. The Standard for Dischargeability Under § 523(a)(5)

[1]A proceeding "to determine the dischargeability of a debt" should ordinarily be brought as an adversary proceeding pursuant to Rule 7001(6) of the Federal Rules of Bankruptcy Procedure. However, when a matter that should be brought as an adversary is presented by motion, the defect is merely procedural and may be waived. In re Pence, 905 F.2d 1107, 1109 (7th Cir. 1990); In re Price, 134 B.R. 313, 316 (Bankr. N.D. Ill. 1991) (Squires, J.).

Section 523(a)(5) renders nondischargeable any debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of the spouse or child that is created by court order.[2] 11 U.S.C. § 523(a)(5) (1994). Ordinarily, exceptions to discharge are strictly construed against the creditor objecting to discharge in order to better effectuate the debtor's fresh start in bankruptcy. See Kolodziej v. Reines (In re Reines), 142 F.3d 970, 972-73 (7th Cir. 1998), cert. denied, --- U.S. ---, 119 S. Ct. 797, 142 L.Ed.2d 689 (1999); McCarthy v. McCarthy (In re McCarthy), 179 B.R. 876, 880 (Bankr. N.D. Ill. 1995) (Ginsberg, J.). However, the debtor's interest in a fresh start yields to public policy considerations, and a more liberal construction applies, with respect to the exception to discharge in § 523(a)(5) for alimony, maintenance and support. As the United States Court of Appeals for the Seventh Circuit stated in In re Crosswhite, 148 F.3d 879 (7th Cir. 1998):

> Bankruptcy law has . . . a longstanding . . . policy of protecting a debtor's spouse and children when the debtor's support is required. ... This policy is manifest in the Bankruptcy Code's § 523(a)(5); this section declares nondischargeable a marital obligation that was incurred by the debtor for alimony, maintenance or support of the debtor's spouse, former spouse or child. This exception therefore expresses Congress' determination to protect former spouses in matters of alimony, maintenance, and support despite the Bankruptcy Code's general policy of providing a debtor with a fresh start. Because of this Congressional determination, a § 523(a)(5) exception from discharge is construed more liberally than other § 523 exceptions.

Id. at 881-82 (citations and footnotes omitted); see Beaupied v. Chang (In re Chang), 163 F.3d 1138, 1140 (9th Cir. 1998), cert. denied, --- U.S. ----, 119 S. Ct. 2029, 143 L.Ed.2d 1039 (1999);

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[2]Section 523(a)(5) provides that a debt incurred "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" shall not be dischargeable to the extent that the debt "is actually in the nature of alimony, maintenance or support."

Holliday v. Kline (In re Kline), 65 F.3d 749, 751 (8th Cir. 1995) (quoting same); Miller v. Gentry (In re Miller), 55 F.3d 1487, 1489 (10th Cir.), cert. denied, 516 U.S. 916, 116 S. Ct. 305, 133 L.Ed.2d 210 (1995); Jones v. Jones (In re Jones), 9 F.3d 878, 880 (10th Cir. 1993); Shevick v. Brodsky (In re Brodsky), 239 B.R. 365, 370 (Bankr. N.D. Ill. 1999) (Squires, J.).

Section 523(a)(5) contains three elements that must be satisfied: (1) the debt in question must be in the nature of alimony, maintenance, or support; (2) it must be owed to a spouse, former spouse, or child of the debtor; and (3) it must be incurred in connection with a separation agreement, divorce decree or other order of a court of record, or property settlement agreement. In re Reines, 142 F.3d at 972; Kinnally v. Fonnemann (In re Fonnemann), 128 B.R. 214, 217 (Bankr. N.D. Ill. 1991) (Ginsberg, J.). The party claiming an exception to discharge bears the burden of proving the elements of the exception by a preponderance of the evidence. Crosswhite, 148 F.3d at 881; Reines, 142 F.3d at 973; In re Brodsky, 239 B.R. at 370.

The second and third elements are not in dispute. The Debtor expressly conceded in her response to the Peck objection to confirmation that, if the debt is in the nature of alimony maintenance or support, it can be owed to a third party. As the Debtor recognizes, courts are in substantial agreement that attorneys' fees incurred to obtain nondischargeable alimony, maintenance or support are also held to be nondischargeable.[3] See Chang, 163 F.3d at 1141; Macy v. Macy, 114 F.3d 1, 2 (1st Cir. 1997);

[3]The exception is based on the principle that form should not be placed over substance, and that the nature of a debt should control, rather than the identity of a payee. See In re Miller, 55 F.3d at 1490 (collecting cases); Chang, 163 F.3d at 1141. Under this rationale, "[f]ees paid to third parties on behalf of a child or former spouse can be 'as much for . . . support as payments made directly to [the former spouse or child].'" Chang, 163 F.3d at 1141 (quoting Marks v. Catlow (In re Catlow), 663 F.2d 960, 962-63 (9th Cir. 1981)); see also Hudson v. Raggio & Raggio, Inc. (In re Hudson),

Hudson v. Raggio & Raggio, Inc. (In re Hudson), 107 F.3d 355, 357 (5th Cir. 1997); In re Strickland, 90 F.3d at 447; In re Kline, 65 F.3d at 751; Joseph v. J. Huey O'Toole, P.C. (In re Joseph), 16 F.3d 86, 88 (5th Cir. 1994); In re Jones, 9 F.3d at 881-82; Dvorak v. Carlson (In re Dvorak), 986 F.2d 940, 941 (5th Cir. 1993); Peters v. Hennenhoeffer (In re Peters), 964 F.2d 166, 167 (2d Cir. 1992) (per curiam); In re Rios, 901 F.2d 71, 72 (7th Cir. 1990) (per curiam); Pauley v. Spong (In re Spong), 661 F.2d 6, 9-11 (2d Cir. 1981); Salerno v. Crawford (In re Crawford), 236 B.R. 673, 678 (Bankr. E.D. Ark. 1999); In re Fulton, 236 B.R. at 631; In re Allen, 217 B.R. 247, 249 (Bankr. S.D. Ill. 1998); Wawak v. Smolenski (In re Smolenski), 210 B.R. 780, 783 (Bankr. N.D. Ill. 1997) (Squires, J.); James C. Booth, Inc. v. Ratcliff (In re Ratcliff), 195 B.R. 466, 468 (Bankr. C.D. Cal. 1996); Wright v. Wright (In re Wright), 184 B.R. 318, 324 (Bankr. N.D. Ill. 1995) (Barliant, J.)

The parties also do not dispute that the third requirement of § 523(a)(5) is satisfied, because the debts arise from state court orders. The parties disagree about whether the first element of § 523(a) has been satisfied. The issue presented is whether the fees of the attorneys for the Debtor's former spouse and the child's guardian ad litem in the child custody proceeding are debts in the nature of child support.

Whether a debt is actually in the nature of alimony, maintenance or support is a matter of federal bankruptcy law rather than state law. As the Eleventh Circuit noted in In re Strickland, "[b]ecause federal law, rather than state law, controls [the] inquiry, a domestic obligation can be deemed actually in

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107 F.3d 355, 357 (5th Cir. 1997) ("A court ordered obligation to pay attorney fees charged by an attorney that represents a child's parent in child support litigation against the debtor is non-dischargeable. Because the ultimate purpose of such a proceeding is to provide support for the child, the attorney fees incurred inure to her benefit and support, and therefore fall under the exception to dischargeability set out in § 523(a)(5).").

the nature of support under § 523(a)(5) even if it is not considered 'support' under state law." 90 F.3d at 446; Chang, 163 F.3d at 1141; Reines, 142 F.3d at 972; In re Joseph, 16 F.3d at 87; Jones, 9 F.3d at 880. The court must look at the substance of any challenged obligation, and not merely to the label imposed upon it by state law. Maitlen v. Maitlen (In re Maitlen), 658 F.2d 466, 468 (7th Cir. 1981); Brodsky, 239 B.R. at 371; Douglas v. Douglas (In re Douglas), 202 B.R. 961, 964 (Bankr. S.D. Ill. 1996); Reines, 142 F.3d at 972. Nevertheless, state law may provide guidance in determining whether the obligation should be considered in the nature of support under § 523(a)(5). Strickland, 90 F.3d at 446 (11th Cir. 1996); Chang, 163 F.3d at 1140.

A. Attorneys Fees in Child Custody Proceedings

The issue with respect to Tenney is whether an award of attorneys' fees in a child custody proceeding is in the nature of support for purposes of § 523(a)(5). The majority of courts addressing this issue have held that attorneys' fees in this situation are in the nature of child support. For example, in In re Jones, 9 F.3d 878 (10th Cir. 1993), the Tenth Circuit defined the term "support" under § 523(a)(5) very broadly in the context of child custody proceedings. It found that "support" encompasses much more than the mere paying of bills on behalf of the child, and that the best interest of the child is an "inseparable element of the child's 'support.'" Id. at 881. The court held that, in all custody actions, the court's ultimate goal is the welfare of the child. Id. It concluded that, "Generally, custody actions are directed towards determining which party can provide the best home for the child and are, therefore, held for the child's benefit and support. Therefore, in order that genuine support

obligations are not improperly discharged, we hold that the term 'support' encompasses the issue of custody absent unusual circumstances not present here." Id. at 881-82.

The Fifth Circuit reached the same conclusion in In re Dvorak, 986 F.2d 940, 941 (5th Cir. 1993), as have most other courts addressing the issue. See, e.g., Miller, 55 F.3d at 1490; Whipple v. Fulton (In re Fulton), 236 B.R. 626, 631 (Bankr. E.D. Tex. 1999); Sinton v. Blaemire (In re Blaemire), 229 B.R. 665, 667 (Bankr. D. Md. 1999); Peters v. Hennenhoeffer (In re Peters), 133 B.R. 291, 295 (S.D. N.Y. 1991), aff'd, 964 F.2d 166 (2d Cir. 1992).

The Eight Circuit is the only Circuit Court of Appeals of which this court is aware that has reached a different conclusion. In Adams v. Zentz, 963 F.2d 197 (8th Cir. 1992), the court affirmed a bankruptcy court's factual determination that a custody proceeding did not involve the health and welfare of the child. The state court found that the wife had gone to extensive lengths to destroy the husband's relationship with the child. The bankruptcy court found that the custody proceedings were the result of the husband's desire to enforce his rights against the wife, and did not involve the child's health and welfare. The bankruptcy court therefore concluded that the fees awarded in the proceeding were not in the nature of support. 963 F.1d at 198. The Eighth Circuit affirmed the bankruptcy court's decision. The court held that, although the record in the case could support the opposite conclusion, under the "clearly erroneous" standard applied to findings of fact, the bankruptcy court's factual determinations on the issue of support should be upheld. 963 F.2d at 200-201. The Eight Circuit implicitly approved of the bankruptcy court's inquiry into the facts and circumstances of the custody proceeding to determine whether the child's health, welfare and best interests were truly at issue in the proceeding.

In Jones, the Tenth Circuit expressly rejected the Eighth Circuit's directive that a bankruptcy court look at the purpose behind the custody action and examine whether that action was held to determine the best interests of the child. The Jones court held that, "In our view, in all custody actions, the court's ultimate goal is the welfare of the child. 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." 9 F.3d at 881. The court concluded that, absent exceptional circumstances, fees awarded in custody actions are in the nature of support for purposes of § 523(a)(5).

This court agrees with the Tenth Circuit that the best interest of the child is necessarily the key issue in all custody actions, and that fees incurred in custody actions should be presumed to be in the nature of support unless exceptional circumstances exist. The Eight Circuit's approach ignores that the fundamental issue in every child custody proceeding is the best interests of the child. Moreover, the Adams court's affirmance of a factual finding that a mother's extensive efforts to destroy a father's relationship with his child does not affect the health, welfare and best interests of the child defies common sense. This court will follow the Jones decision and the other consistent cases cited above, and concludes that attorneys' fees awarded in child custody litigation are in the nature of support for purposes of § 523(a)(5) absent unusual circumstances.[4]

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[4]The Debtor relies on Woods v. Crabb, 561 F.2d 27 (7th Cir. 1977) (per curiam) and Daulton v. Daulton (In re Daulton), 139 B.R. 708 (Bankr. C.D. Ill. 1992), in asserting that a number of factors must be considered in determining whether an award of fees is in the nature of support under § 523(a)(3). Woods involved whether a divorce decree was intended to provide for the support and maintenance of the wife. Daulton addressed the factors to examine in determining whether a property settlement agreement is in the nature of alimony, maintenance or support. These cases, and the factors

B. Guardian Ad Litem Fees

The issue with respect to Peck is whether an award of fees of a guardian ad litem in a child custody proceeding is in the nature of support. As with attorneys' fees, the great majority of reported cases decided under § 523(a)(5) hold that guardian ad litem fees incurred in child custody proceedings are in the nature of support and are, therefore, nondischargeable. See Chang, 163 F.3d at 1141; Miller, 55 F.3d at 1490; In re Dvorak, 986 F.2d at 941; Olszewski v. Joffrion (In re Joffrion), 240 B.R. 630, 633 (M.D. Ala. 1999); Cloyd v. Alaruri (In re Alaruri), 227 B.R. 824, 825-26 (Bankr. S.D. Ind. 1997); Madden v. Staggs (In re Staggs), 203 B.R. 712, 717-19 (Bankr. W.D. Mo. 1996); Douglas v. Douglas (In re Douglas), 202 B.R. 961, 963-65 (Bankr. S.D. Ill. 1996); In re O'Toole, 194 B.R. at 631; Walker v. Laing (In re Laing), 187 B.R. 531, 533 (Bankr. W.D. Va. 1995); Spear v. Constantine (In re Constantine), 183 B.R. 335, 336-37 (Bankr. D. Mass. 1995); Lawson v. Lever (In re Lever), 174 B.R. 936, 942 (Bankr. N.D. Ohio 1991); Baillargeon v. Stacey (In re Stacey), 164 B.R. 210, 212 (Bakr. D. N.H. 1994); Heintz v. Tremblay (In re Tremblay), 162 B.R. 60, 62 (Bankr. D. Me. 1993); Swartzberg v. Lockwood (In re Lockwood), 148 B.R. 45, 47 (Bankr. E.D. Wis. 1992); Jenkins v. Glynn (In re Glynn), 138 B.R. 360, 362 (Bankr. D. Conn. 1992); Hack v. Laney (In re Laney), 53 B.R. 231, 234-35 (Bankr. N.D. Tex. 1985); see also In re Peters, 964 F.2d at 167 (Fees incurred by attorney appointed to represent debtor's minor son in custody dispute held nondischargeable); Brodsky, 239 B.R. at 373 (Fees incurred by minors' counsel in custody dispute held nondischargeable under § 523(a)(5), with court noting that "[w]hile the roles and specific duties of

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cited in them, are not relevant to whether attorneys' fees or a guardian ad litem's fees in a child custody proceeding are in the nature of support.

guardian-ad-litem and attorney for a minor child may be somewhat different, the Court sees no functional difference between the two for purposes of determining whether . . . services rendered . . . [are] in the nature of support."); In re Blaemire, 229 B.R. at 667 (to the same effect); Moore v. Harr (In re Harr); 224 B.R. 718, 722 (Bankr. E.D. Mo. 1998) (Attorneys' fees incurred by debtor's mother in relation to state court proceeding to determine custody of debtor's child held nondischargeable as having benefitted debtor's child "[i]n the same way that guardian ad litem fees benefit a child[.]").

The Debtor relies on In re Staggs, 203 B.R. 712, 717-19 (Bank. W.D. Mo. 1996), to support what she describes as a "minority view" that guardian ad litem fees are dischargeable. However, the court in Staggs, even following the Eighth Circuit's mandates in Adams v. Zentz, found that the guardian ad litem fees were in the nature of support and nondischargeable. This court agrees with the vast majority of courts that guardian ad litem fees in child custody proceedings are in the nature of support, and are not dischargeable under § 523(a)(5).

2. The Fee Awards in This Case.

In the Debtor's divorce case, the Circuit Court originally awarded joint custody of the Debtor's child to the Debtor[5] and her former spouse. However, on June 17, 1998, after an evidentiary hearing, the Circuit Court entered a Judgment Order, containing detailed findings of fact, that transferred permanent custody of the child to her father.[6] The court's Judgment Order also discharged Mr.

[5]The Debtor was known as Samella Phillips in the child custody proceedings.

[6]The court's Judgment Order and is excerpted below:

1. The joint custody order heretofore entered herein has proved itself to be

McVicker from further service in the case as guardian ad litem, granted him leave to file his petition for fees, and "reserved for future consideration" issues of child support. This last issue was decided on December 10, 1998, by an order directing the Debtor to pay her former husband a specified sum twice monthly for child support.

On December 10, 1998, the Circuit Court also entered an order providing that: "Tenney [and] Bentley be and is hereby awarded judgment against Samella H. Phillips in the amount of $14,447.00 as and for her share of attorney's fees of [her former husband's] attorneys." The court further ordered that the Debtor and her former husband were jointly and severally liable for the fees and costs of their child's guardian ad litem, Mr. McVicker of the Peck firm.[7] The order specifically provides that the judgment is

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entirely unworkable and ill advised.

2. Samella Phillips has engaged in a campaign to subvert the parental rights and parental effectiveness of [debtor's former husband].
3. The evidence discloses that there is no substantial risk of harm to the minor child from the father but that there is a danger of emotional harm through the mother's behavior to a greater degree than physical harm.
4. Based upon the standards of Section 610 of the IMDMA, there has been proven by clear and convincing evidence that there is reason to believe that the child's present environment of living primarily with the mother will seriously endanger the child's mental and emotional health.
5. The foregoing facts have arisen since the entry of the Judgment for Divorce and were unknown to the court at the time of the entry of the prior Judgment.
6. That a change has occurred in the circumstances of the child and in both parents and that these changes make modification necessary to serve the best interests of the child, in connection with which the Joint Parenting Agreement must be terminated.
7. That [debtor's former husband] is a fit and proper person to exercise the care, custody, control and education of the child. . . .

[7]The order provides as follows:

This matter coming to be heard on the Guardian Ad Litem's Petition for

in the form of child support. Both Peck and Tenney recorded their attorneys' fee orders against the Debtor's residence.

The relevant court orders and a transcript of one of the proceedings in the state court are the only evidence in this case. From this evidence, the court concludes that the debts owed to both Tenney and Peck are nondischargeable under § 523(a)(5). The custody proceeding clearly addressed the best interests of the child. After an evidentiary hearing, the state court specifically found that the Debtor posed a danger of emotional harm to her child, and that living with the mother would seriously endanger the child's mental and emotional health. The court concluded that modification of the custody order was necessary to serve the best interests of the child. The court also specifically found that the judgment for the guardian ad litem fees was "in the form of child support." In addition, during the state court's June 16, 1998 hearing, the court specifically commended the guardian ad litem "for his service to the welfare of this child." He also commended the debtor's former husband for his perseverance. Thus, the court made clear that both the guardian ad litem and the debtor's former husband, and therefore,

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> fees [and] costs, the Respondent being present [and] represented by counsel[,] the Petitioner not present nor represented by counsel, proper notice having been given [and] the Court being fully advised
>
> IT IS SO ORDERED
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> A judgment in the amount of $22,891.25 in attorney's fees [and] costs is hereby entered joint[ly] [and] severally against Samella Phillips [and] [her former husband]. The judgment is in the form of child support.

On January 27, 1999, another order was entered making the award "nunc pro tunc" to December 10, 1998. On August 30, 1999, the Circuit Court entered an order correcting its December 10, 1998 order "to read that the Judgment entered herein nunc pro tunc December 10, 1998 in favor of Peck, McVicker and Landry is against Samella Phillips n/k/a Samella Ramirez, and [Debtor's former husband], jointly and severally, in the amount of $22,891.25."

indirectly, the former husband's attorneys, had made a significant contribution toward the well-being and best interests of the child.

The Debtor presented no evidence to contradict the clear language of the orders and the state court's oral statements. Instead, the Debtor makes several arguments, none of which is persuasive. First, the Debtor argues that the fact that the guardian ad litem fees were awarded against her jointly and severally with her former husband is somehow relevant to the factors set forth in the Woods and Daulton cases on which she relies. As noted above, those cases did not deal with a child custody issue, and the factors cited do not apply in this case. Moreover, whether the judgment for the guardian ad litem's fees was joint and several with her husband is simply not relevant to the question of whether the fees are in the nature of support. In fact, the guardian ad litem fees in many of the cases cited above were awarded against both spouses. This has no bearing on whether the guardian ad litem's efforts protected the child's best interests.

Next, the Debtor asserts that the attorneys' fee award was entered against her merely because she lost the custody litigation, and therefore should not be considered as an award of support. However, regarding both the attorneys' fees and the guardian ad litem's fees, whether the fees were awarded to the winning party, the losing party or both, the fundamental fact remains that the fees were awarded in the context of a custody battle to determine the best interests of the child.

Finally, the Debtor argues that the issue in the custody hearing was child abuse, not the support of the child. Although her point is unclear, the court assumes that the Debtor is arguing that the issue of child abuse does not involve the money needed for the child's housing, food, medical and other needs. As the case law discussed above makes clear, "support" for purposes of § 523(a)(5) is not limited to

paying the bills of the child, but encompasses many aspects of the child's well-being. A proceeding to determine whether child abuse is occurring (which apparently was one issue in the child custody proceeding in this case) focuses on the child's best interests and clearly falls within the broad scope of the term "in the nature of support" in § 523(a)(5).

Tenney and Peck have met their burden of proving that the elements of § 523(a)(5) have been satisfied. All of the evidence in this case establishes that the awards of attorneys' fees of the Debtor's former husband and the guardian ad litem's fees were in the nature of support. Under the Tenth Circuit's Jones decision, it is beyond question that these debts are nondischargeable, because they were incurred in connection with a child custody action. In addition, even under the Eighth Circuit's decision in Adams v. Zentz, these debts are not dischargeable.[8] In this case, the state court made clear that the best interests of the child were central to the proceeding. The state court even specifically commended the guardian ad litem and (indirectly) the counsel for the debtor's former husband for their contribution to the child's welfare. As a factual matter, there is no question that the child's best interests, health and welfare were greatly served by the efforts of both Tenney and Peck. Therefore, even applying the more fact-intensive analysis approved by the Eighth Circuit, these debts are in the nature of support and are nondischargeable under § 523(a)(5).

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[8]It should be noted that, although the Eighth Circuit in Adams v. Zentz affirmed the bankruptcy court's finding of fact that the debt was not support, applying the "clearly erroneous" standard on appeal for findings of fact, it did not *require* such a finding. To the contrary, the court readily acknowledged that a trier of fact court could reasonably reach the opposite conclusion (as the district court in the case had). 963 F.2d at 201. Thus, Adams does not compel a finding that a debt is dischargeable even if identical or more compelling facts are presented in another case. It merely holds that the factual conclusions of the bankruptcy court in that case were not clearly erroneous.

3. Lien Avoidance: 11 U.S.C. § 522(f)(1)(A)

Section 522(f)(1)(A) generally permits a debtor to avoid the fixing of a judicial lien on an interest in the debtor's property to the extent that such lien impairs the debtor's entitlement to an exemption under § 522(b). 11 U.S.C. § 522(f)(1)(A) (1994). However, the statute prohibits a debtor from avoiding judicial liens securing a debt to a spouse, former spouse or child of the debtor if the debt is actually in the nature of alimony, maintenance or support. Id.

Section 522(f)(1)(A) contains language that is virtually identical in relevant part to that of § 523(a)(5). In re Allen, 217 B.R. 247, 249 n. 3 (Bankr. S.D. Ill. 1998). ("The language of § 522(f)(1)(A) . . . mirrors that of § 523(a)(5) and was intended to be read coextensively with it.") (citing H.R.Rep. No. 835, 103rd Cong., 2d Sess. 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3363). Therefore, a finding of nondischargeability under § 523(a)(5) precludes a debtor from avoiding a lien under § 522(f)(1)(A). See, e.g., In re Citrone, 159 B.R. 144, 146 (Bankr. S.D. N.Y. 1993) ("[T]o the extent that . . . judgment liens represent judgment debts for child and spousal support, they are not dischargeable under 11 U.S.C. § 523(a)(5) and thus may not be avoided under 11 U.S.C. § 522(f)(1).").

Because the court has already determined that the Debtor's lien indebtedness is nondischargeable pursuant to § 523(a)(5), the Debtor may not avoid Tenney and Peck's liens under § 522(f)(1)(A). All other issues raised by the parties on the issue of lien avoidance under § 522(f)(1)(A) are moot.

III. ORDER

For the foregoing reasons, the lien indebtedness held by the law firms of Tenney and Bentley, L.L.C., and Peck, McVicker and Landry, against Debtor Samella H. Ramirez is hereby declared to be **NONDISCHARGEABLE** pursuant to 11 U.S.C. § 523(a)(5). Debtor's motions to avoid the lien indebtedness of the Tenney and Peck firms are hereby **DENIED**.

SO ORDERED.

Dated this 7th day of February, 2000.

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CAROL A. DOYLE
United States Bankruptcy Judge