

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
ANTHONY AND DONNA ARROWSMITH, ) CASE NO. BK98-82871  
)  
DEBTOR. ) CH. 7

MEMORANDUM

This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

**Background**

Anthony and Tanya Arrowsmith were divorced on July 25, 1996. On September 4, 1998, the District Court of Douglas County, Nebraska, entered an Order of Modification pertaining to the custody, support, visitation, and day and health care of the parties' children. The Order specifically directed Anthony Arrowsmith to reimburse Tanya Arrowsmith for \$700 costs and attorney fees incurred in bringing the modification action. Two months later, on November 6, 1998, Anthony Arrowsmith and his current spouse, Donna Arrowsmith (Debtors), filed a no-asset bankruptcy under Chapter 7, scheduling Tanya Arrowsmith's debt to the Wandel Law Offices ("Wandel") for attorney fees as an unsecured nonpriority claim. On December 21, 1998, Wandel filed documents clearly intended to show that the award of attorney fees is in the nature of support and, therefore, excepted from discharge. By letter brief, Wandel maintains that the debt for attorney fees is excepted from discharge pursuant to 11 U.S.C. § 523(a)(5).

Debtors contend that the debt for Tanya Arrowsmith's attorney fees should be determined to not be in the nature of support and not excepted from discharge, because the children were separately represented in the proceeding and because the proceeding itself dealt only in small part with an increase in child support, thus rendering the proceeding not one "actually in the nature of alimony, maintenance, or support" as required by 11 U.S.C. § 523(a)(5)(B).

### Decision

The attorney fees in question are in the nature of support and are, by virtue of 11 U.S.C. § 523(a)(5), nondischargeable.

### Discussion

A Chapter 7 debtor cannot discharge obligations to a former spouse for alimony, maintenance, or support of that former spouse or children. 11 U.S.C. §§ 523(a)(5), 727(b). Generally, exceptions to discharge are narrowly construed in favor of the debtor, but the exception to discharge for spousal and child support is to be liberally construed in favor of the recipient of the support. In re Kline, 65 F.3d 749, 750-51 (8th Cir. 1995). The determination of whether a particular debt constitutes maintenance or support as regards dischargeability is an issue of federal, not state law. Adams v. Zentz (In re Zentz), 963 F.2d 197, 199 (8th Cir. 1992) citing Williams v. Williams (In re Williams), 703 F.2d 1055, 1056 (8th Cir. 1983). Furthermore, the determination is a factual one, to be made by the bankruptcy court. Zentz, 963 F.2d at 199-200. As a result, this Court must independently determine if the award of attorney fees was in the nature of alimony, maintenance or support, as those words are used in section 523(a)(5).

Although there is no binding authority in this circuit, bankruptcy courts from other jurisdictions have addressed this issue. In Holtz v. Poe (In re Poe), 118 B.R. 809 (Bankr. N.D. Okla. 1990), the court, in holding that the award of attorney's fees was excepted from discharge under 11 U.S.C. § 523(a)(5), found that child custody litigation was inseparable from the best interest of the child and thus pertained to support of that child. The court stated, "[s]ince determination of child custody is essential to the child's proper 'support,' attorney fees incurred and awarded in child custody litigation should likewise be considered as obligations for 'support,' at least in the absence of clear indication of special circumstances to the contrary." In re Poe, 118 B.R. at 812.

In the case currently before this Court, the attorney fees are even more clearly in the nature of support than those at issue in Poe, because the action in which these fees were incurred specifically modified, among other provisions, the

monthly support obligation of Anthony Arrowsmith for his children. Debtors argue that the alteration of the monthly child support was but one of the issues addressed as a result of the action and that the attorney fees awarded could therefore not be in the nature of support. However, in their own brief, Debtors concede that the alteration of the child support obligation was "numerically significant." Furthermore, even if the Court were to accept Debtors' contention that attorneys fees incurred in the modification of those provisions pertaining to day and health care, or custody were not actually in the nature of support, Debtors cite no case law supporting their assertion that this Court should identify and separate out what percentage is attributable to the "numerically significant" modification of child support.

This Court declines to do so. In light of the liberal construction required by In re Kline, supra, Debtors' contention that the debt for attorneys fees should not be excepted from discharge is rejected. This conclusion is not altered by the fact that the debt is owed directly to Wandel, rather than to Tanya Arrowsmith, as nothing in the facts suggests that Tanya Arrowsmith would not remain liable on the debt to her attorneys, should Wandel be unable to collect the debt directly from Anthony Arrowsmith. Compare In re Kline, 65 F.3d at 751.

Debtors' argument that the attorney fees should not be found to be in the nature of support because the children were represented by a guardian ad litem is likewise rejected. The guardian ad litem did not bring the action which resulted in the increase in child support; Tanya Arrowsmith did, and in so doing clearly represented the interests of the children by her action.

### **Conclusion**

For the foregoing reasons, Debtors' Objection to Wandel's "Appearance" is overruled. The attorney fee obligation is determined to be in the nature of support and is, by statute, 11 U.S.C. § 523(a)(5), nondischargeable.

Separate journal entry to be filed.

DATED: March 22, 1999

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

STALNAKER, THOMAS	12
KRATVILLE, MICHAEL	393-0629

Copies mailed by the Court to:

Bernard McNary, 2712 So. 87th Ave., Omaha, NE 688114  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
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ANTHONY AND DONNA ARROWSMITH, ) CASE NO. BK98-82871  
) A  
DEBTOR(S) )  
)  
) CH. 7  
) Filing No. 4  
Plaintiff(s) )  
vs. ) JOURNAL ENTRY  
)  
)  
)  
) DATE: March 22, 1999  
Defendant(s) )

Before a United States Bankruptcy Judge for the District of  
Nebraska regarding Objection by the Debtors to the Appearance  
of the Child Support Creditor's Appearance

IT IS ORDERED:

Debtors' Objection to Wandel's "Appearance" is overruled.  
The attorney fee obligation is determined to be in the nature  
of support and is, by statute, 11 U.S.C. § 523(a)(5),  
nondischarge-able. See memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

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KRATVILLE, MICHAEL 393-0629

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