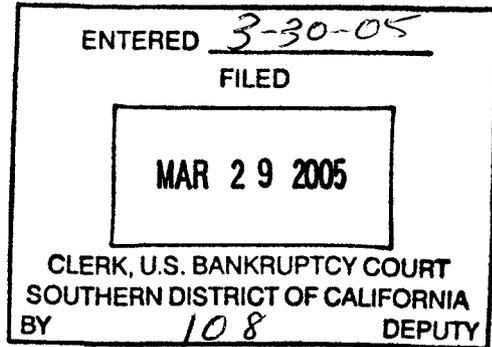


1 **NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 In re) Case No. 03-07494-B7
12) Adv. No. 03-90385-B7
13 MARIA ELENA DOUGLAS,)
14) Debtor.) ORDER
15)
16 WILLIAM M. BENJAMIN,)
17) Plaintiff,)
18)
19 v.)
20 MARIA ELENA DOUGLAS)
21) Defendant.)
22)

23 Pursuant to a family court order, William Benjamin
24 (Plaintiff) provided legal services on behalf of Debtor's minor
25 daughter in connection with a review hearing regarding custody
26 and visitation. The court apportioned Plaintiff's fees between
Debtor and her ex-spouse. Debtor paid a small portion of the
fees, but owed Plaintiff over \$5,000 as of the date of her
petition. Plaintiff commenced this adversary proceeding seeking

1 a determination that the debt was nondischargeable under
2 Bankruptcy Code § 523(a)(5), claiming it was in the nature of
3 support for Debtor's child. The parties submitted a joint
4 statement of issues and facts as well as written argument and
5 asked this Court for a ruling without hearing. The Court took
6 the matter under submission. For the reasons set forth below,
7 the Court holds that the debt is in the nature of support and
8 falls within the scope of § 523(a)(5). However, in her written
9 argument, Debtor raised an alternative issue, which was not
10 included in the joint statement of issues, and necessitates
11 further participation by the parties. To that end, a status
12 conference will be held as set forth below.

13 This Court has subject matter jurisdiction pursuant to
14 28 U.S.C. § 1334 and General Order No. 312-D of the United
15 States District Court for the Southern District of California.
16 This is a core proceeding under 28 U.S.C. § 157(b)(2)(A)&(I).

17 **FACTS¹**

18 On September 6, 2001, the Superior Court, County of San
19 Diego entered an order appointing Plaintiff as counsel for
20 Debtor's minor child DiAnne Douglass (DiAnne) to represent her in
21 preparation of a review hearing ("Order"). At issue was Debtor's
22 percent timeshare of custody/visitation of DiAnne. Plaintiff was
23 appointed to investigate and submit recommendations to the family
24 court based upon the best interest of DiAnne. Plaintiff

25
26 ¹ The facts are taken from the "Amended Joint Statement of Issues of Fact and Law"
submitted by Debtor and Plaintiff on August 19, 2004.

1 connection with a separation agreement, divorce decree or other
2 order of a court of record...."

3 The Debtor cites no authority to the contrary, but rather
4 argues that the plain language of § 523(a)(5) excepts from
5 discharge only debts to "a spouse, former spouse, or child of the
6 debtor." An obligation owed to counsel for a child of the debtor
7 does not, argues the Debtor, fall within this list.

8 The courts which have addressed the issue disagree. In In
9 re Jones, the Tenth Circuit held that "the term 'support'
10 encompasses the issue of custody ... [consequently, court-ordered
11 attorney's fees arising from post-divorce custody actions are
12 deemed in the nature of support under § 523(a)(5) as being
13 incurred on behalf of the child." 9 F.3d 878, 882 (10th Cir.
14 1993). Similar holdings were made by the courts in In re Dvorak,
15 986 F.2d 940, 941 (5th Cir.1993) and In re Peters, 964 F.2d 166,
16 167 (2d Cir.1992), both cited and summarized by the court in
17 Jones.

18 Debtor's argument was specifically addressed and rejected by
19 the Ninth Circuit in In re Chang, 163 F.3d 1138 (9th Cir. 1998).
20 That case involved a guardian ad litem; however, the analysis is
21 the same. In Chang the bankruptcy court had held an obligation
22 owing to the guardian to be nondischargeable, but the BAP
23 reversed on the ground that the debt was not owing directly to
24 the child. In re Chang, 210 B.R. 578, 583 (9th Cir. BAP 1997).
25 The Ninth Circuit reversed the BAP:

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1 Fees paid to third parties on behalf of a child or
2 former spouse can be "as much for ... support as
3 payments made directly to [the former spouse or
4 child]." Catlow, 663 F.2d at 962-63. We hold in the
5 instant case that the identity of the payee is less
6 important than the nature of the debt. Thus, although
7 Chang does not owe money directly to Lindsay, because
8 Chang's debts to Ting and Beaupied are in the nature of
9 support of Lindsay, they are nondischargeable.

6 163 F.3d at 1141. See also In re Kline, 65 F.3d 749, 751 (8th
7 Cir.1995); In re Miller, 55 F.3d 1487, 1488 (10th Cir.1995); and
8 In re Spong, 661 F.2d 6, 9-10 (2d Cir.1981), cited and summarized
9 in Chang.

10 The Court not only agrees with the position of these courts,
11 but is bound by the Ninth Circuit precedent. The fact that the
12 fees are owed to Plaintiff, not DiAnne, does not render them
13 other than support.

14 In Adams v. Zentz, the Eighth Circuit held that in a
15 custody/visitation matter, the court must look into the facts of
16 the case to determine "the function the award was intended to
17 serve." 963 F.2d 197, 200 (8th Cir. 1992). The court held the
18 debt to be dischargeable because the custody action focused not
19 on the child's welfare, but rather the parents. Id. at 201. The
20 Tenth Circuit in Jones rejected the Eighth Circuit's:

21 directive that the bankruptcy court must look at the
22 purpose behind the custody action and examine whether
23 that action was held in order to determine the best
24 interests of the child. In our view, in all custody
actions, the court's ultimate goal is the welfare of
the child.

25 9 F.3d at 881. This Court agrees that the bankruptcy court
26 should not attempt to divine the underlying purpose of the

1 custody action. However, it is a moot point. In the case at
2 hand, it is clear that the review hearing proceeding and the
3 services of Plaintiff were clearly undertaken for the benefit of
4 the child.

5 Accordingly, the Court holds that the Debt owed to Plaintiff
6 for services rendered for Debtor's child is in the nature of
7 "support" and is therefore within the parameters of Bankruptcy
8 Code § 523(a)(5).

9 In her written argument, Debtor raises the "unusual
10 circumstances" exception, arguing that a debt incurred in the
11 nature of support shall nevertheless be discharged when "unusual
12 circumstances exist." The "unusual circumstance" in this case
13 is, according to Debtor, that she needs all of her income to
14 support the child who lives with Debtor. According to Debtor's
15 schedules her monthly income is exceeded by expenses resulting in
16 a shortfall of \$163.46.

17 Debtor finds support for her argument in In re Lowther, 321
18 F.3d 946 (10th Cir. 2002), in which the Tenth Circuit recognized,
19 or created, the "unusual circumstances" exception:

20 Nevertheless, since this rule is fashioned around the
21 best interests of the child, it also follows that the
22 type of unusual circumstances most likely to warrant
23 exception are those where discharge is in the best
24 interests of the child. To hold that the general rule
of nondischargeability should prevail despite adverse
effects upon the child would be to ignore the policy
considerations behind § 523(a)(5).

25 Id. at 948-49. The court held the support obligation in that
26 case to be dischargeable:

1 In light of Appellee's financial condition, and
2 considering the needs and constraints of the custody
3 relationship, it is clear that the obligation to pay
4 the attorney's fees will adversely affect her ability
5 to financially support the child in this case. These
6 facts constitute unusual circumstances warranting this
7 narrow exception to nondischargeability.

8 Id.

9 This Court is not aware of another court recognizing or
10 applying the "unusual circumstances" exception. One court at
11 least has called it into question. See In re Sonntag, 2004 WL
12 764728 (N.D.Tex. 2004) ("The court is not persuaded that the
13 Fifth Circuit, having spoken so plainly in Dvorak and Hudson,
14 would follow the Tenth Circuit.")

15 The Court finds that there are two issues raised by Debtor
16 that are beyond the scope of the "Joint Statement of Issues and
17 Fact and Law." First, an issue of law, whether the "unusual
18 circumstances" exception exists. Second, if so, whether it
19 should apply to the facts of this case -- the Joint Statement
20 contained no information regarding Debtor's financial condition.
21 Since both parties submitted simultaneous written argument,
22 Plaintiff has not been afforded an opportunity to address these
23 issues. Accordingly, the Court elects not to rule on either
24 issue until the parties have had an opportunity to address them.

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1 **CONCLUSION**

2 The Court holds as follows:

3 1. The debt owed to Plaintiff for services provided under
4 the Order for benefit of Child in the amount of \$5,064.80 is
5 in the nature of support and falls within Bankruptcy Code
6 § 523(a)(5).

7 2. A status conference shall be held on May 2, 2005 at
8 9:30 a.m. in this department to discuss a briefing schedule and
9 whether discovery is necessary on the "unusual circumstances"
10 issues raised by Debtor in her written argument.

11 IT IS SO ORDERED.

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13 DATE: MAR 29 2005

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17 PETER W. BOWIE, Judge
18 United States Bankruptcy Court
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