

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

CASE NO. 04-32648-BKC-PGH
Chapter 7

DOUGLAS J. PETERSON,

Debtor.

JUPITER LAW CENTER, P.A., and
RANDY D. ELLISON

Plaintiffs,

ADV. NO: 04-3218-BKC-PGH-A

v.

DOUGLAS J. PETERSON

Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This Matter came before the Court pursuant to Jupiter Law Center, P.A., and Randy D. Ellison's (the "Plaintiffs") Motion for Summary Judgment (the "Motion"). Douglas J. Peterson (the "Defendant") filed a Response to the Motion (the "Response") and the Plaintiffs filed a Reply (the "Reply"). The parties filed a Joint Stipulation of Facts on March 11, 2005. The present adversary proceeding seeks a determination that attorneys' fees owed to the Plaintiffs from a state court action concerning paternity of the Defendant's child and visitation rights to the child are not dischargeable. The Court having considered the Motion, the Response, the Reply, and the Joint Stipulation hereby grants the Motion for Summary Judgment.

Background

On or about April 21, 1999, Defendant filed an action in the 15th Judicial Circuit in Palm Beach County, Florida (the “State Court Action”) against Alexandra Asklipious, to whom he was not married, seeking a declaration of paternity with respect to a child born February 26, 1999, and for visitation rights with respect to the child. The State Court Action also involved custody, visitation, and child support issues. Asklipious was represented by Plaintiff, Jupiter Law Center, in the State Court Action. During the State Court Action, the parties stipulated that Defendant had paternal rights.

Although the parties stipulated to certain facts, they disagree on the amount of attorneys’ fees incurred by Asklipious in the State Court Action that were devoted to determining child support as opposed to the paternity and visitation issues. The Plaintiffs contend that “several months of litigation ensued . . . as to the contested amount of Mr. Peterson’s child support obligation.” Defendant counters that “[e]arly in the proceedings, the mother and I agreed to my payment of child support in the monthly amount of \$800.00.” Defendant avers that the \$800.00 amount was agreed to in June 2000 and incorporated as the amount of support ordered in the final judgment. He further avers that Asklipious did not seek child support in excess of the agreed to \$800.00 per month. On November 16, 2000, the State Court entered an order establishing a time sharing and visitation schedule for November and December 2000. Thus, Defendant claims that the majority of the attorneys’ fees incurred in the State Court Action dealt with litigation over the visitation issue. The State Court Action did not involve dissolution of a

marriage or a division of property or assets because Asklipious and Defendant were never married.

The State Court entered an order granting Jupiter Law Center's Motion for Attorneys' Fees (the "Order") on June 24, 2002. According to the Order, Jupiter Law Center represented Asklipious through December 2000, at which time the firm withdrew from representing her, and she proceeded *pro se*. The Order also provides that "the Court's findings clearly establish the Respondent's [Asklipious] need and the Petitioner's [Peterson] ability to pay attorney fees and costs." The Order further stated that \$7400.00 of the fees Asklipious paid directly to Jupiter Law Center could not be recovered from Defendant "due to her own intransigence and litigious behavior" but required Defendant to pay Jupiter Law Center \$13,475.00 in attorneys' fees and \$2,079.20 in costs.

Defendant appealed the Order from the State Court, and Asklipious retained Randy Ellison to represent her in the appeal. On remand back to the State Court, Defendant was ordered to pay Asklipious' attorneys' fees in the amount of \$11,275.00 incurred in connection with the appeal in addition to those incurred at the trial level. The fee awards to Plaintiffs were affirmed in a *per curiam* opinion by the Fourth District Court of Appeal on October 3, 2003. *Peterson v. Asklipious*, 855 So.2d 704, 705 (Fla. Dist. Ct. App. 2003). That decision also reversed a contempt order against Defendant. As of this date, Defendant has not paid any of the fees awarded in the State Court Action.

Defendant filed a petition under Chapter 7 of the Bankruptcy Code on June 1, 2004. The Plaintiffs filed this adversary proceeding on August 30, 2004, to contest Defendant's attempt to discharge the attorney fees awarded in the State Court Action.

Conclusions of Law

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(I). This is a core matter in accordance with 28 U.S.C. § 157(b)(2)(I). This is a proceeding objecting to Defendant's attempt to discharge attorney's fees incurred in the State Court Action pursuant to 11 U.S.C. § 523(a)(5).

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that Summary Judgment is appropriate if the Court determines that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In considering a motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) (citing *Anderson*, 477 U.S. at 248). Summary Judgment is appropriate when, after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party. *Anderson*, 477 U.S. at 248-49.

In a motion for summary judgment, the moving party initially bears the burden of establishing the absence of a genuine issue as to any material fact. *See Celotex*, 477 U.S. at 322

(citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970)). That burden can be satisfied by demonstrating the absence of evidence supporting the nonmovant's case. *See id.* at 325. When a motion for summary judgment is made and supported by the movant, Federal Rule of Civil Procedure 56(e) requires the nonmoving party to set forth specific facts demonstrating that genuine issues of material fact remain for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 586-87 (1986). The party opposing a summary judgment motion "must do more than simply show that there is some metaphysical doubt as to the material facts," and mere conclusions are not enough to create an issue of material fact. *Matsushita*, 475 U.S. at 586.

Plaintiffs argue that, under Florida law, attorneys' fees incurred in an action related to child support are not dischargeable. The Plaintiffs also argue that the attorneys' fees incurred in litigating the paternity and visitation issues in the State Court Action are in the nature of support because they are inextricably intertwined with support proceedings affecting the welfare of a child. Accordingly, Plaintiffs' assert that the attorneys' fees that Defendant was ordered to pay to Plaintiffs in the State Court Action are not dischargeable pursuant to § 523(a)(5).

Defendant argues that issues of material fact exist as to what portion of the fees were incurred for legal services dedicated to the visitation controversy. The Defendant cites *Shaw v. Smith (In the Matter of Shaw)*, 67 B.R. 911 (Bankr. M.D.Fla. 1986), for the proposition that attorney fees rendered to the mother in connection with litigating the issue of a natural father's right of visitation are dischargeable. Hence, Defendant argues that the fees incurred in the portion of the State Court Action devoted to visitation are dischargeable. The Defendant further argues that, because he was never married to Asklepious, the cases that deal with attorney fees incurred for litigating paternity and visitation issues in the context of dissolution or post-

dissolution actions do not apply in this case. Finally, Defendant argues that pursuant to the Order, any fees the Court holds to be nondischargeable should be reduced by \$7,400.00 due to Asklipious' "intransigence and litigious behavior" in the State Court Action.

Under Chapter 7 of the Bankruptcy Code, a debtor may obtain a general discharge "from all debts that arose before the date of the order for relief." 11 U.S.C. § 727(b). The Bankruptcy Code does not, however, discharge a debtor from any debt:

(5) 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, . . . but not to the extent that—
* * *

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

11 U.S.C. § 523(a)(5). The issue of whether an award of attorney's fees in a state court paternity and custody action constitutes "support" within the meaning of § 523(a)(5) is a matter of federal law. *See Strickland v. Shannon (In re Strickland)*, 90 F.3d 444, 446 (11th Cir. 1996) (citing *Harrell v. Sharp (In re Harrell)*, 754 F.2d 902, 904-05 (11th Cir. 1985)). When determining whether an award of attorneys' fees in a state court action constitutes support "the Bankruptcy Court may only undertake a simple inquiry as to whether the debt can be characterized as 'support.'" *Smallwood v. Finlayson (In re Finlayson)*, 217 B.R. 666, 669 (Bankr. S.D.Fla. 1998) (citing *In re Harrell*, 754 F.2d at 906)). "Since federal law controls, a domestic obligation may be deemed in the nature of support under § 523(a)(5) even though it may not be classified as support under state law." *Id.* However, the Court may look to state law for guidance on whether the obligation should be considered "in the nature of support" under § 523(a)(5). *Id.* (citing *In re Jones*, 9 F.3d 878, 880 (10th Cir. 1993)).

Florida law requires an inquiry into whether former spouses have the ability to pay their own attorney's fees and costs in a child support modification action. *Hyatt v. Hyatt*, 672 So.2d 74, 76 (Fla. Dist. Ct. App. 1996). In awarding attorney's fees to a former spouse, the family court must determine that the former spouse has a greater need and/or lesser ability to pay than the debtor. *Id.* Therefore, once it is determined that the attorney's fees should be awarded based on the need or the ability to pay, the fees can "legitimately be characterized as support." *In re Harrell*, 754 F.2d at 906. Furthermore, the family court record may be sufficient to support summary judgment if the record unambiguously establishes that the award of attorney's fees and costs was determined to be in the nature of support. *In re Finlayson*, 217 B.R. at 669.

Defendant's argument as to the dischargeability of attorneys' fees devoted to adjudicating paternity fails because attorney's fees incurred as the result of a paternity and visitation action are "in the nature of support." Defendant cites *Shaw v. Smith (In re Shaw)*, 67 B.R. 911 (Bankr. M.D.Fla. 1986), as support for his argument that attorneys' fees incurred in conjunction with a paternity action are dischargeable. *In re Shaw* involved the dischargeability of attorneys' fees that were incurred by the out of wedlock child's mother in a dispute concerning the father's right to visit the child. *Id.* at 913. The Court noted the then-existing split among bankruptcy courts that had considered the question of whether attorneys' fees are nondischargeable under § 523(a)(5) when they relate not to a divorce, but to paternity actions. *Id.* The Court did not decide the issue of the dischargeability of attorneys' fees related to a paternity action, but instead decided the case in favor of dischargeability of the fees because the fees were incurred "merely in connection with litigation involving the natural father's right of visitation" and not support. *Id.* at 914. The Court concluded that "[e]ven the most liberal

construction of this statute would not permit the inclusion of the right to visitation . . .” *Id.* at 914. Therefore, *In re Shaw* does not hold that attorney fees incurred in a paternity action are dischargeable. Instead, *In re Shaw* holds that attorney fees incurred in a visitation action are dischargeable. *Id.* at 914.

In addition, Defendant is also incorrect in his assertion that attorneys’ fees devoted to a state court visitation proceeding are dischargeable. The holding in *Shaw* has been explicitly rejected by courts in the Southern District of Florida. *Dellapa v. Vazquez (In re Vazquez)*, 84 B.R. 848, 850 (Bankr. S.D.Fla. 1988) (holding that visitation is sufficiently related to child support so as to bring the award of attorneys’ fees to the plaintiff within the purview of § 523(a)(5)), *aff’d Dellapa v. Vazquez (Matter of Vasquez)*, 92 B.R. 533, 535 (S.D.Fla. 1988) (affirming Bankruptcy Court that attorney fees incurred in action pertaining to visitation are in nature of support under § 523(a)(5)). Even if the Plaintiffs’ fees were incurred in an action solely devoted to visitation, the fees would not be dischargeable. *Id.* However, in this case, the visitation issue was litigated along with the paternity and support issues; so there exists stronger support to conclude that the award of attorneys’ fees to the Plaintiffs was in the nature of support. *See id.*

Bankruptcy Courts in the Southern District of Florida have not yet decided whether attorney fees incurred in paternity actions not associated with a marriage are dischargeable. However, this Court joins those courts that hold that attorney fees related to paternity actions are not dischargeable under § 523(a)(5). *See e.g., Smith v. Barbre (In re Barbre)*, 91 B.R. 846, 847 (Bankr. S.D.Ill. 1988); *Pierson v. Toman (In re Pierson)*, 47 B.R. 258, 261 (Bankr. D.Ne. 1985); *Cain v. Isenhower (In re Cain)*, 29 B.R. 591, 597 (Bankr. N.D.Ind. 1983). A paternity suit is

similar to a child custody proceeding, in which “a decision to grant attorney’s fees is an adjudication of [the mother’s] need of such support in order to litigate with her husband on an equal basis.” *In re Cain*, 29 B.R. at 593 (quoting *Marks v. Catlow (In re Catlow)*, 663 F.2d 960, 963 (9th Cir. 1981)). In addition, a child’s paternity must be established before a duty of support will be imposed on the child’s purported father. *Daniel v. Daniel*, 695 So.2d 1253, 1254 (Fla. 1997) (“a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose care and support he has not contracted”).

Although Defendant has not specifically raised such arguments, parties who have opposed including attorneys’ fees from paternity actions in § 523(a)(5)’s exception from discharge have argued that the wording of § 523(a)(5) does not contemplate fees incurred in paternity actions, and a holding that such fees are nondischargeable thwarts the Bankruptcy Code’s policy of a fresh start. *See, e.g., Williams v. Kemp (In re Kemp)*, 252 B.R. 178, 182 (B.A.P. 8th Cir. 1999); *In re Barbre*, 91 B.R. at 847; *In re Cain*, 29 B.R. at 593-94. However, this Court agrees that such arguments “use the letter of the law against its spirit,” *In re Cain*, 29 B.R. at 593. This Court echoes those courts that recognize that the policy of the “fresh start” counsels that exceptions to discharge are generally to be construed narrowly. Nonetheless, “the exceptions from discharge for spousal and child support are given a more liberal construction, and the policy considerations underlying section 523(a)(5) favor enforcement of support obligations over debtor’s fresh start.” *In re Kemp*, 242 B.R. at 181. More specifically, this Court agrees that to allow a discharge for attorneys’ fees incurred for actions involving children out of wedlock as opposed to refusing to discharge such fees for actions involving children within marriage is to use the Bankruptcy Code to discriminate against children born out of wedlock. *See*

In re Pierson, 47 B.R. at 261. Therefore, the Court holds that attorneys' fees incurred in the context of a paternity action, whether the child was born in or out of wedlock and whether the paternity action was joined with an action for visitation or support, are not dischargeable in bankruptcy. The debt for attorneys' fees incurred in a paternity action between unwed parents is a debt to a child of the debtor for support pursuant to § 523(a)(5).

Although, Defendant asserts that the attorneys' fees related to the support issue are not inextricably bound with the fees incurred for visitation and paternity, this argument is unavailing. Once an issue related to the parentage, visitation, or custody of the child is joined with an action for support, fees for the entire action are in the nature of support. *See In re Pierson*, 47 B.R. at 261; *In re Cain*, 29 B.R. at 597. In this case, fees for the paternity and visitation issues were incurred in the same action as were fees for support. Therefore, fees for the entire State Court Action were in the nature of support, and the Court need not determine what portion of the legal fees were incurred in relation to paternity, visitation, or support issues. *See In re Vazquez*, 84 B.R. at 850 (refusing to analyze fee award to determine what portion of services went to custody issue).

In this case, the State Court found that the child's mother had the need and Defendant had the ability to pay fees and costs. Defendant raises the point that he initiated the paternity and visitation actions because he wanted to be a part of the child's life and support her over the mother's objections. However, it is irrelevant who initiated the action and for what reason. The touchstone of this Court's inquiry is only whether the State Court found that one party had the ability to pay and the other did not. *In re Strickland*, 90 F.3d at 446-47. Therefore, the attorneys'

fees assessed against Defendant in the State Court Action are in the nature of support and are not dischargeable under § 523(a)(5).

Finally, Defendant argues that the Court should make a downward adjustment to the attorneys' fees owed to the Jupiter Law Center because some of those fees were incurred due to their client's "intransigence and litigious behavior." However, the order granting the fees in the State Court Action makes clear that Asklipious was not entitled to recover those fees from Defendant, so those fees were not included in the total that Defendant was directed to pay to Jupiter Law Center. It is clear from the Order that the State Court already adjusted the fee award to reflect the reduction. The State Court found that the \$200.00 hourly rate for the attorney and \$75.00 hourly rate for the paralegal were reasonable. Similarly, the court found that the 120 hours expended by the attorney and 5 hours expended by the paralegal were reasonable. According to these figures, the total fee award should have been \$24,375.00. However, the total fee award was \$13,475.00, which reflects a deduction of \$7400 for the fees due to Asklipious' intransigence and \$3500.00 that she paid to Jupiter Law Center in "temporary fees." The fee award of \$13,475.00 clearly reflects that the State Court subtracted \$10,900.00 (representing the fees for intransigence and temporary fees) from \$24,375.00 to reach the \$13,475.00 figure. Moreover, even if a mistake in the amount awarded had been made in the State Court, the Bankruptcy Court is not the proper forum in which to correct that award. Only the State Court can amend its own order. The Bankruptcy Court is only charged with determining whether the amount of attorneys' fees awarded in a state court are dischargeable. *In re Strickland*, 90 F.3d at 446-47. The amount of the award that Defendant must pay is *res judicata*.

Defendant raises no objection to the fees awarded to Plaintiff Ellison except to say that “Plaintiff Randy D. Ellison’s representation of the mother on appeal concerned support only in a very limited and insubstantial context.” Aside from his unhappiness with the fee award, Defendant introduced no evidence or legal argument challenging the propriety of those fees. This Court holds that attorney fees incurred in the appeal of an award of attorney fees in a support proceeding also are not dischargeable. *In re Snider*, 62 B.R. 382, 387 (Bankr. S.D.Tex. 1986) (holding appellate attorneys’ fees as well as trial fees nondischargeable). Therefore, the Court finds that both awards of attorneys’ fees to Plaintiffs are nondischargeable.

Conclusion

The attorneys’ fees awarded to Plaintiffs in the State Court Action are nondischargeable and the amounts will not be adjusted by the Court.

Order

The Court, having reviewed the submissions of the parties, applicable law, and being otherwise fully advised in the premises, **ORDERS AND ADJUDGES** that :

1. The Plaintiffs’ motion for summary judgment is **GRANTED**.
2. The Defendant’s debt of \$13,475.00 in attorneys’ fees and \$2079.20 in costs to Jupiter Law Center is **Not Discharged**.
3. The Defendant’s debt of \$11,275.00 to Randy D. Ellison is **Not Discharged**.

ORDERED in the Southern District of Florida on March 21, 2005.

PAUL G. HYMAN, JR.
United States Bankruptcy Judge