THE ENFORCER

BY DAVID FINDLING
THE FINDLING LAW FIRM

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The Dischargeability of Attorney Fees

Every family law practitioner, after working hard for a client, wants to get paid. Many have experienced that sinking feeling when a former client or their ex-spouse files for bankruptcy after a lengthy divorce. In our challenged economic environment, parties are frequently fighting over debts rather than assets. Family law and bankruptcy are becoming more intermingled. Consequently, family law practitioners should be aware of situations where their fees and costs are dischargeable by a former client or their ex-spouse in bankruptcy.

My client's attorney fees were ordered to be paid by the former spouse, can the former spouse discharge their obligation to pay my fees?

11 U.S.C. §101(14A) defines a "domestic support obligation" as, "a debt owed to or recoverable by a spouse, former spouse or child of the debtor" or a debt that is, "in the nature of alimony, maintenance or support."

Under §523(a)(5) of the bankruptcy code, a "domestic support obligation" is not dischargeable by a debtor. The importance of this exception is that professional fees ordered to be paid by a client's former spouse may be excepted from discharge. The rationale is that a spouse's agreement to pay a former spouse's attorney fees considered a "debt ...to a spouse divorce...for alimony...maintenance...,or support."

There are several ways the other spouse may become liable for paying your fees. In a divorce action, "all '[n]ecessary and reasonable attorney fees may be awarded to a party to carry on or defend' the action."[1] MCR 3.206(C) allows a trial court to award attorney fees if the party requesting the fees demonstrates that, "the party is unable to bear the expense of the action, and that the other party is able to pay." If a sufficient showing is made, payment of your fees would become the responsibility of the other spouse. Therefore, based on the threshold set by MCR 3.206(C) an award of attorney fees must be for the support of the other spouse.

In other cases, a settlement agreement, arbitration award or judgment of divorce may require one spouse to pay the other's fees. Based on the requirements of MCR 3.206(C), in either case your fees are likely safe from discharge.

Can my own client discharge my fees in bankruptcy?

Where an attorney represents a spouse during their divorce, and that client later files for bankruptcy, the typical result is discharge of the attorney's fees.[2] The reason is that the debt is not owed to a spouse, former spouse or child of the debtor. Instead bankruptcy courts construe a client's obligation to pay their attorney fees as contractual in nature. State courts and practitioners have taken notice of this fact, and typically claim an attorneys charging lien and ensure that the attorneys fees receive secured status in the judgment of divorce.

How can I ensure that my fees aren't discharged?

In determining whether your fees are in the nature of alimony, support or maintenance the bankruptcy court will first look to the intent of the state court in fashioning the obligation. Typically, this means that the bankruptcy court will look directly at the judgment of divorce. In *Sorah v. Sorah*[3], the Sixth Circuit directed bankruptcy courts to look to three factors in determining whether a debt was intended to be in the nature of support, alimony or maintenance. The factors enumerated by the court were:

1. a label such as alimony, support, or maintenance in the decree or agreement;

2. a direct payment to the former spouse, as opposed to the assumption of a thirdparty debt; and

3. payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits.

In addition to the aforementioned factors, the Sixth Circuit has also found several other factors to be relevant in determining intent. Disparity of earning power between the parties, the need for economic support and stability,

the presence of minor children, and marital fault can be considered in determining whether a debt is in the nature of support, alimony or maintenance.[4] What is more intriguing is that bankruptcy courts appear unwilling to "look behind the Judgment to determine the intent of the parties unless the Judgment itself is ambiguous"[5] or "assume the role of a psychological examiner probing the state court's decision for linguistic evidence of ulterior motives."[6]

Because bankruptcy courts review the substance of the obligation rather than the labels used by the state court, an attorney should use clear language within the judgment of divorce, stressing that the payment of attorneys fees are for the spouse's alimony, support or maintenance and explaining why. Also of significance, is that if the state court has previously granted a motion made pursuant to MCR 3.206(C), it will be much easier for the bankruptcy court to conclude that payment of your fees by the debtor was for your client's support or maintenance.

Keep in mind that when your own client files for bankruptcy, separate measures may be necessary to protect your fees. Even if your fees are dischargeable, you may still be able to enforce a charging lien on the assets awarded to your client.

Endnotes

1. *Stallworth v. Stallworth*, 275 Mich.App. 282, 288; 738 N.W.2d 264 (2007)

2. *See In re Dean*, 231 B.R. 19, 20 (Bankr. W.D. N.Y., 1999)

3. *Sorah v. Sorah* (In re Sorah), 163 F.3d 397, 400 (6th Cir.1998)

4. *Bailey v. Bailey* (In re Bailey), 254 B.R. 901, 906 (6th Cir. BAP 2000).

5. *In re Van Aken*, 320 B.R. 620 (6th Cir. BAP 2005).

6. *Sorah*, 163 F.3d at 401