FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit
February 18, 1999
Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN CRANE KING, doing business as King Law Office, Ltd., doing business as Law Office of John C. King, Ltd.,

Debtor.

BAP No. KS-98-036

JOHN C. KING,

Plaintiff–Appellant,

v.

LINDA D. KING,

Defendant–Appellee,

WILLIAM B. SORENSEN, JR.,

Defendant.

Bankr. No. 96-12769
Adv. No. 96-5244
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the District of Kansas

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Before BOHANON, BOULDEN, and CORNISH, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

The Court has before it the Memorandum Decision on Dischargeability Complaint finding that pre-petition child support, including medical and school related expenses, was nondischargeable. For the reasons set forth below, we affirm the order of the bankruptcy court determining the debt nondischargeable.

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* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

JURISDICTION

A Bankruptcy Appellate Panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within this Circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). Since neither party has opted to have the appeal heard by the District Court for the District of Kansas, they are deemed to have consented to jurisdiction. 10th Cir. BAP L.R. 8001-1(d).

STANDARD OF REVIEW

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood,* 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013. The parties did not contest the Findings of Fact, and as a result, the questions of law will be reviewed de novo.

BACKGROUND

The Debtor and his former spouse, Linda D. King ("King"), were married in 1988. One child was born during the marriage. King had a previous child who was formally adopted by the Debtor. In 1992, King filed a petition for divorce in Kansas. In April, 1994, the court ordered the Debtor to pay spousal maintenance in the amount of $750.00 per month for a period of forty-eight (48) months and child support in the amount of $1,424.00 per month, plus school and medical costs. King was also awarded $15,000.00 from a loss arising from an attempted sale of the marital residence. This loss was sustained by King due to a lack of cooperation in selling the residence by the Debtor.

On September 15, 1995, King filed her voluntary Chapter 7 bankruptcy

petition. William Sorensen ("King Trustee") was appointed as the Chapter 7 trustee. The spousal support and child support were listed in King's schedules as assets; however, she claimed them as exempt under Kansas law. On June 24, 1996, an Order Approving Compromise Regarding Amended Exemptions was entered in King's bankruptcy case. The King Trustee filed a Motion to Determine Extent of Property of the Estate and Objection to the Amended Exemptions. At issue was the amended exemption of child support and spousal maintenance. The King Trustee and King agreed that the child support awards, both past and prospective, were determined not to be property of the estate under 11 U.S.C. § 541.[1] Further, the first twenty-four (24) months of the spousal support, through May 5, 1996, was determined to be property of the estate and not subject to the exemption, and the balance of the spousal maintenance award was exempt.

On May 15, 1996, the Debtor filed for protection under Chapter 7 of the Bankruptcy Code. He further filed a Complaint to Determine Dischargeability against King and the King Trustee, alleging that the property award, spousal support, and child support were dischargeable under § 523(a)(5). The King Trustee and the Debtor entered into a Joint Stipulation and Order Determining Dischargeability of a Debt and Avoiding Lines Under § 522(f)(1)(A), wherein the King Trustee agreed that "[t]he amounts due from the debtor to the Chapter 7 bankruptcy estate of . . . King are properly subject to discharge in this proceeding, if and when a discharge is entered in this case." Appellant's Appendix, P. 63, ¶4. After the trial, the bankruptcy court found that the $15,000.00 award was a property settlement and was dischargeable; the pre-petition child support, including medical and school-related expenses, was not property of the estate and therefore nondischargeable; the pre-petition spousal maintenance award was

[1] Future references are to Title 11, United States Code, unless otherwise noted.

nondischargeable to the extent that it was retained by King as exempt; and, the post-petition spousal maintenance was nondischargeable. The Debtor appeals the order as it relates only to the child support.

DISCUSSION

Child Support

The Debtor argues that when King filed her Chapter 7 case, the child support that accrued prior to her petition date was assigned by operation of law to the King Trustee and therefore, is not excepted from discharge under § 523(a)(5)(A). Section 523(a)(5)(A) provides:

> (a) A discharge . . . does not discharge an individual 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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State) . . . .[2]

11 U.S.C. § 523(a)(5)(A). The critical question becomes whether the Debtor is liable to his children or to King.

Property rights are determined by state law. *Butner v. United States,* 440 U.S. 48, 54 (1979). Once there has been a determination of an obligation of support under state law, the determination of its dischargeability in bankruptcy is a matter of federal law. *Brown v. Felsen,* 442 U.S. 127, 129 (1979). Kansas law provides that a right to payment of child support belongs to the child, not the custodial parent. *In re Welch,* 31 B.R. 537, 539 (Bankr. D. Kan. 1983) (citing *Wheeler v. Wheeler,* 414 P.2d 1, 7 (Kan. 1966); *Myers v. Anderson,* 67 P.2d 542

[2] Shortly after this case was filed, the reference in § 523(a)(5)(A) to § 402(a)(26) of the Social Security Act was amended by the 1996 amendments to the Bankruptcy Code to reference § 408(a)(3).

(Kan. 1937)). The emerging view, in many jurisdictions, is that "child support is a property interest belonging to the child. The custodial parent merely has a right to enforce the child's property interest." *In re Anders,* 151 B.R. 543, 546 (Bankr. D. Nev. 1993) (citations omitted); *see also Reed v. Prettyman (In re Prettyman),* 117 B.R. 503, 505 (Bankr. W.D. Mo. 1990) (child support belongs to the children and is not property of debtor's estate); *Zimmerman v. Starnes,* 35 B.R. 1018, 1022 (D. Colo. 1984) (right to receive back child support is not property of the custodial parent).[3]

Further, § 541 provides, in pertinent part, as follows:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
> * * *
> (b) Property of the estate does not include--
> (1) Any power that the debtor may exercise solely for the benefit of an entity other than the debtor.

11 U.S.C. § 541. The court in *Welch* noted:

> While the legislative history discusses powers of appointment rather than rights to collect child support, this Court finds that § 541(b) applies to child support by analogy. Like a donee of a power of appointment, a custodial parent is charged with certain responsibilities, yet maintains wide discretion in distributing or selectively spending funds. But, like a power of appointment, a right to collect child support was created for and inures to the sole benefit

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[3] The Debtor cites to several cases to attempt to distinguish *Welch.* However, our review has disclosed that three cases have been reversed and two others were affirmed in part and reversed in part. There were no notations of the subsequent history in the Debtor's brief. The most glaring misstatements were regarding *In re Velis,* 109 B.R. 64 (Bankr. D.N.J. 1989), *aff'd,* 123 B.R. 497 (D.N.J. 1991), *rev'd in part*, *aff'd in part,* 949 F.2d 78 (3d Cir. 1991), and *Zimmerman v. Starnes (In re Fields),* 23 B.R. 134 (Bankr. D. Colo. 1982), *rev'd in part, aff'd in part,* 35 B.R. 1018 (D. Colo. 1984). The subsequent decision in *Velis v. Kardanis,* 949 F.2d 78 (3d Cir. 1991), did not agree with the proposition for which the earlier case was cited. *Zimmerman* was cited for the proposition that past due child support was property of the debtor-mother's estate. However, that case was reversed by *Zimmerman v. Starnes,* 35 B.R. 1018 (D. Colo. 1984), finding that the child support arrearage belongs to the child, that no assignment to the trustee occurred, and as a result, the debt was not dischargeable.

> of someone else. Without determining the custodial parent's status as a trustee, fiduciary or natural guardian, the Court finds enough similarities between the rights, duties, powers and privileges of custodial parents and donees of powers of appointment to hold that § 541(b) exempts from the estate rights to collect child support arrearage.

Welch, 31 B.R. at 540. The Debtor attempts to distinguish the *Welch* case since it was decided when § 522(d)(10)(D) was not available. Section 522(d)(10)(D) provides that child support may be exempt. The Debtor is correct in his argument that exempt property is property of the estate that becomes exempt upon the debtor's declaration of such exemption. However, property of the estate is governed by state law and § 541. King's inclusion of the child support in her list of exemptions does not render the child support property of the estate. Further, the children should not be penalized because of King's disclosure of the child support.[4]

The Debtor also argues that § 522(d)(10)(D) would be meaningless if the child support is not considered property of the estate which may be exempt. However, § 522(d)(10)(D) has meaning in states such as Ohio and Indiana, where child support has been determined under those respective state laws to be property of the estate. *See In re Henady,* 165 B.R. 887 (Bankr. N.D. Ind. 1994); *Welch,* 31 B.R. at 539 (discussing Ohio cases).

Additionally, the Debtor argues that judicial estoppel prohibits King from arguing that child support belongs to the children since she listed it in her schedules. Generally, the Tenth Circuit does not recognize judicial estoppel. *Golfland Entertainment Ctrs. v. Peak Inv., Inc. (In re BCD Corp.),* 119 F.3d 852,

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[4] The Debtor argues that King did not meet her burden of proof under § 523. (Appellant's Brief, pp. 5-8). However, because this issue was not raised in either the Debtor's statement of the issues filed pursuant to Fed. R. Bankr. P. 8006 or the Debtor's statement of the issues presented in his brief pursuant to Fed. R. Bankr. P. 8010(a)(1)(C), we decline to address the issue. *See Interface Group-Nevada, Inc. v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.),* 145 F.3d 124, 132-33 (3d Cir. 1998) (declining to address issues not raised as required by Fed. R. Bankr. P. 8006 and 8010).

858 (10th Cir. 1997); *Dewey v. Dewey (In re Dewey),* 223 B.R. 559 (10th Cir. BAP 1998). Accordingly, we reject the Debtor's argument.

The Debtor also argues the bankruptcy court should have determined the amount of the arrearage which was reasonably necessary as support. The Debtor is attempting to attack King's exemption in his bankruptcy case. The time for objecting to King's exemption has expired. *See* Fed. R. Bankr. P. 4003(b).

Lien Avoidance Under § 522(f)(1)(A)

The Debtor next argues that the bankruptcy court did not address the lien avoidance issue. The lien avoidance issue was not set forth in the complaint; however, the pre-trial conference order reflects the following issue of law:

> 4. Whether plaintiff is entitled to avoid the lien on his homestead in connection with the amounts due to Mr. Sorensen or Mrs. King that are discharged.

The pre-trial conference order provided:

> B. The pleadings in the above captioned case are incorporated herein by reference, but this order shall control the subsequent course of this action and shall not be modified except by order of the Court on its own motion or on motion of the parties to prevent manifest injustice.
> C. The Court finds that this case is at issue, all discovery is complete and the case is ready for trial. This order shall supersede the pleadings filed herein in defining issues for trial to the Court.

Section 522(f)(1) provides:

> (f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--
> (A) a judicial lien, other than a judicial lien that secures a debt--
> (i) 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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and
> (ii) to the extent that such debt--
> (I) is not assigned to another entity, voluntarily, by

operation of law, or otherwise; and
(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support . . . .

This issue was not decided by the bankruptcy court and therefore should be remanded for such determination by that court.

Sanctions

King seeks sanctions against the Debtor and his attorney for pursuing a frivolous appeal. This Court may award "just damages or double costs" against the Debtor and his attorney for bringing a frivolous appeal. Fed. R. App. P. 38; Fed. R. Bankr. P. 8020; *see also Rivermeadows Assocs., Ltd. v. Falcey (In re Rivermeadows Assocs., Ltd.),* 205 B.R. 264 (10th Cir. BAP 1997); *Personette v. Kennedy (In re Midgard Corp.),* 204 B.R. 764 (10th Cir. BAP 1997). In order for an appeal to be frivolous, the court must find that a result is obvious or that arguments are wholly without merit. *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987) (en banc). Fed. R. App. P. 38 requires a separately filed motion or notice from the court and a reasonable opportunity to respond before sanctions may be imposed. However, the Tenth Circuit has stated "if a party has already made a motion or request in its brief that sanctions be imposed, and identified the party or counsel it wants sanctioned, the notice requirements are satisfied, so long as the court gives the person against whom sanctions are requested an opportunity to file a brief or otherwise be heard before imposing sanctions." *Braley,* 832 F.2d at 1514.

King did not file a separate motion; however, King requested sanctions in her brief and the Debtor's counsel was given the opportunity to respond at the oral argument. Although the Appellant's arguments were not persuasive, the Appellant did attempt to distinguish the *Welch* case. The Court does not find that this appeal is frivolous or that it multiplied the proceedings.

CONCLUSION

The child support award was not property of the King estate, and therefore was not transferred to the King Trustee as contemplated by § 523(a)(5). Thus, the child support debt is nondischargeable and the bankruptcy court's decision is AFFIRMED; however, the lien avoidance issue was not determined by the bankruptcy court and the matter is REMANDED for further proceedings on that issue.