UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT
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Barbara A. Schermerhorn
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December 10, 2003

TO: All Recipients of the Captioned Order and Judgment

RE: BAP No. UT-00-026 (In re Black)
Filed April 11, 2003; Hon. Tom R. Cornish authoring

Please be advised of the following correction to the captioned decision.

Page 5, part III, first sentence: The citation is amended to delete the reference to 11 U.S.C. § 502(f) and replace it with Fed. R. Bankr. P. 3001(f). The sentence and citation will now read as follows:

> A proof of claim is prima facie evidence as to the validity of the claim. Fed. R. Bankr. P. 3001(f).

If you received a hard copy of the decision, please make this correction to your copy.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By: 
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CHERISE ROUNDY BLACK , Debtor.	BAP No. UT-00-026 UT-00-030
STEVE S. CHRISTENSEN, Appellant, v. CHERISE ROUNDY BLACK and ANDRES DIAZ, Chapter 13 Trustee, Appellees.	Bankr. No. 99-27020 Chapter 13 ORDER AND JUDGMENT*

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

Before PUSATERI, CORNISH, and MICHAEL, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Steve Christensen ("Appellant"), Cherise Roundy Black's ("Debtor") attorney in her divorce action, appeals the bankruptcy court's order granting Objection to Claim and Order Confirming Amended Plan. For the reasons set forth below, we reverse the trial court's reduction of Appellant's attorney fees earned during the divorce proceeding and remand for further proceedings.

* 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.

I. BACKGROUND

The Appellant represented the Debtor in a divorce action against Dr. V. Craig Barney ("Dr. Barney") in the District Court of Utah. The Debtor retained Appellant in September 1998. Appellant was Debtor's fourth attorney. At the time Appellant was retained, the divorce had been granted and the issues of alimony, support and property were set for trial in approximately two weeks. At their initial meeting, the Debtor requested a fee estimate from Appellant. Appellant informed the Debtor it could cost as much as $5,000 to take the case to trial. He testified he told the Debtor he billed hourly and that his fees varied. Five days later, the Debtor went to Appellant's office and signed a written fee agreement, which provided for compensation to Appellant at the rate of $120 per hour and specifically stated that the estimate of hours charged could not be given because the issues were not yet known. The Debtor and Appellant initialed each page of the agreement.

Appellant obtained a continuance of the trial and thereafter hired experts to appraise Dr. Barney's dental practice and property. At the conclusion of the trial, the Appellant asked the court to have Dr. Barney pay Debtor's attorney's fees. The court awarded Debtor's attorney fees and expert witness fees in the amount of $15,655.22. The trial court denied other requested fees of approximately $15,000. The Appellant was successful in obtaining alimony in the amount of $1,500 per month for the Debtor, even in the event the Debtor remarried or cohabitated. The Appellant also represented the Debtor in another legal matter.

In March 1999, the Appellant requested supplemental attorney's fees from the divorce court, which was denied. At that time, attorney fees and expenses billed to Debtor exceeded $41,000. The Appellant had filed a Notice of Attorney's Lien against the Debtor's property.

On July 1, 1999, the Debtor filed bankruptcy. Even though the Debtor had remarried, her new husband did not file for bankruptcy. The Debtor testified that

she filed bankruptcy because of the Appellant's fees. The Chapter 13 Plan proposed to pay Appellant $15,655.22, as awarded to the Debtor and against Dr. Barney in the divorce court. The Appellant filed a secured proof of claim in the amount of $41,428.66. The Debtor objected to the Appellant's proof of claim and stated that the amount of claim was "unreasonable and exorbitant." The Debtor sought to reduce the claim to $5,000. Appellant did not file an adversary proceeding to have the attorney's fees determined nondischargeable as alimony or support, and no Motion to Avoid Lien was filed.

The bankruptcy court held an evidentiary hearing on the Objection to Proof of Claim of Appellant. The Debtor testified that it was her understanding that the Appellant's maximum fee would be $5,000. The Debtor claimed that she did not read the fee agreement when she signed it because she did not have her glasses with her and that she could not have signed the agreement on the date indicated because she was in Las Vegas with her teenaged daughter. The Debtor further testified that she was shocked that Appellant's fees were so high and she had never received a bill for his fees prior to the trial. Additionally, the Debtor claims that the Appellant assured her that Dr. Barney would pay all of her attorney fees. The Debtor's husband testified that during the divorce proceedings, the Debtor did not open her mail.

The Appellant testified that the $5,000 fee quote was only an estimate because he did not know the details of the case. He further testified that the Debtor stopped by his office to sign the agreement, which was corroborated by Debtor's daughter, whose recollection prompted Debtor to change her testimony that she and her daughter had in fact stopped by the office on the way to Las Vegas. The Appellant testified that the Debtor never told him she could not read the agreement because she did not have her glasses with her. This Court notes that the Debtor and Appellant initialed the agreement on each page in a small box. The Appellant testified that the Debtor insisted on litigation of certain issues,

including the nonterminable alimony.

Appellant testified that he told the Debtor that Dr. Barney would be responsible for the $15,655.22 that was awarded to her by the divorce court. Appellant testified that he never told the Debtor that her fees were approximately $40,000; however, he testified that he periodically sent her statements reflecting the attorney fees.

After the hearing on the Objection to Claim, the bankruptcy court reduced the Appellant's claim to $5,000 plus 10 percent interest to be paid through the Plan. Additionally, the court noted he was concerned about the actions of the Appellant, stating:

> [T]he first thing that I am disturbed about is your violation of the automatic stay by continuing to bill this debtor after the filing of the petition in bankruptcy even after the last hearing before this court. That is such a clear violation but I make no decision on that. If the debtor wants to bring an action for violation of the stay and damages, that can be done and I won't make a decision there. But that does disturb me.

Appellant's Appendix at 300. The bankruptcy court found that there was no understanding with the Debtor as to the work done and the amount to be charged, except that the Debtor believed the bill would not exceed $5,000 and that Dr. Barney would have to pay all attorney fees. The court further found that the Appellant had failed to overcome the Debtor's claimed Objection by showing that his fees were reasonable. The court also stated that the Appellant could pursue Dr. Barney for the difference between the $15,655.22 awarded by the divorce court and the $5,000 allowed by him through the Plan. The Appellant has appealed both the Order Determining Claim and the Order Confirming the Chapter 13 Plan.

II. JURISDICTION AND STANDARD OF REVIEW

The Court, with the consent of the parties, has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), (c)(1). The parties have

not opted to have this appeal heard by the United States District Court for the District of Utah. *Id*. § 158(c); 10th Cir. BAP L.R. 8001-1(a), (d). The appeal was timely filed by the Appellant, and the bankruptcy court's order is "final" within the meaning of 28 U.S.C. § 158(a)(1). *See* Fed. R. Bankr. P. 8001-8002.

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Fed. R. Bankr. P. 8013. "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). If questions are a mixture of law and fact, and legal principles are the primary consideration, de novo review is required. *Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.),* 836 F.2d 1263, 1266 (10th Cir. 1988).

III. DISCUSSION

A proof of claim is prima facie evidence as to the validity of the claim. Fed. R. Bankr. P. 3001(f). Once the objecting party has introduced sufficient evidence to place the claim at issue, the burden of going forward with the evidence to sustain the claim shifts to the claimant. *In re Harrison,* 987 F.2d 677, 680 (10th Cir. 1993).

The bankruptcy court determined there should be a $5,000 cap on the Debtor's attorney's fees. The court allowed parol evidence to explain the Debtor's understanding. The parol evidence rule has narrow application. *Union Bank v. Swenson,* 707 P.2d 663, 665 (Utah 1985). The parol evidence rule excludes "contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract." *Id.*

The Debtor cites *Jones, Waldo, Holbrook & McDonough v. Dawson,* 923 P.2d 1366 (Utah 1996), to support the action of the bankruptcy court. However,

Jones, Waldo is distinguishable. The alleged statement in *Jones, Waldo* occurred after a fee agreement was signed, and the fee agreement did not contain an hourly rate. Here, the parol evidence considered by the court pertains to conversations of the parties prior to the execution of an unambiguous written fee agreement. The court made no finding that this fee agreement was ambiguous. This Court notes that the document, on its face, appears to be a complete document, which was initialed on each page by the Appellant and the Debtor. Thus, we find the fee agreement was unambiguous, and it was error for the court to allow parol evidence.

The *Jones, Waldo* case does support the proposition that the Appellee/Debtor can attack the reasonableness of attorney fees in a subsequent proceeding awarded against the opposing spouse because the prior adjudication did not give rise to the defense of collateral estoppel or judicial estoppel. *Jones, Waldo*, 923 P.2d at 1371. The *Jones, Waldo* court noted that "[i]t is unrealistic to expect that Dawson could have challenged the reasonableness of her own attorney fees at the divorce trial where plaintiff was her only advocate." *Id.* However, the bankruptcy court in this case did not reduce Appellant's fees on the basis of reasonableness.

The bankruptcy court also ordered that the difference of fees allowed in the divorce action of $15,655.22 and the fees of $5,000 allowed in the Plan could be collected by the Appellant from Dr. Barney, Debtor's ex-husband. The Utah Code grants the trial courts the power to award attorney fees in divorce actions. Utah Code Ann. § 30-3-3 (1989). However, Utah appellate courts have consistently awarded those fees to the spouse, not to the spouse's attorney. *See, e.g., Sorensen v. Sorensen,* 839 P.2d 774, 779 (Utah 1992). Further, the Utah courts have held that an attorney does not have the right, independent of his client, to enforce an award of attorney fees. *Adamson v. Adamson,* 439 P.2d 854, 855 (Utah 1968); *McDonald v. McDonald,* 866 P.2d 1253, 1255 (Utah Ct. App.

1993); *Neilson v. Neilson,* 780 P.2d 1264, 1271 (Utah Ct. App. 1989). Although it appears the bankruptcy court intended that Appellant collect the balance of his attorney fees from Dr. Barney, its decision in reality left him without a remedy under Utah state law. As a result, this Court finds that the orders entered by the bankruptcy court should be reversed and remanded for consideration of the issue of reasonableness of Appellant's fees and the effect of Utah state law with respect to Appellant's right to enforce an award of those fees.

III. CONCLUSION

The bankruptcy court erred when it considered parol evidence to explain the Debtor's understanding of an unambiguous written fee agreement. The court's Orders reducing the Appellant's proof of claim and confirming the Chapter 13 Plan are REVERSED, and the matter is REMANDED for further proceedings consistent with this order and judgment.