UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-34189
	)	
Angela C. Garnett,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 04-3323
	)	
Thomas P. Goodwin,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Angela C. Garnett,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Thomas P. Goodwin ("Plaintiff") and debtor and defendant Angela C. Garnett ("Defendant") have filed cross motions for summary judgment. The motions raise the issue whether the fees of a guardian *ad litem* appointed by a state court in a divorce proceeding are non-dischargeable as support under 11 U.S.C. § 523(a)(5). The underlying facts and documents are not in dispute. After reviewing the motions and the exhibits to Plaintiff's motion, the court will grant Plaintiff's motion and deny Defendant's motion.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district. Actions to determine dischargeability are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I).

On July 14, 2003, a Magistrate of the Domestic Relations Division of the Common Pleas Court of Lucas County, Ohio, entered an order appointing Plaintiff guardian *ad litem* for Defendant's minor child in connection with a divorce action, finding the appointment "essential to protect the interests of the minor child." On February 12, 2004, the state court entered a Final Judgment Entry of Divorce between Defendant

and her husband. The divorce decree also rendered a judgment in Plaintiff's favor for his total fees as guardian ad litem for the child. The state court awarded Plaintiff

a lump-sum judgment for $681.62 against Defendant, with judgment for the balance of his fees entered against Defendant's spouse.

On May 18, 2004, Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Her Schedule F listed an undisputed, non-contingent, liquidated, unsecured, nonpriority debt to Plaintiff in the amount of $700.00. On September 13, 2004, Plaintiff filed the complaint initiating this adversary proceeding, asserting that the debt owed to him by Defendant constitutes child support and is, therefore, nondischargeable. On September 22, 2004, the court granted a general discharge to Defendant. On November 2, 2004, Defendant filed an answer denying all allegations of the complaint. The motions presently before the court were filed on January 11 and 25, 2005, respectively.

Plaintiff relies on § 523(a)(5) of the Bankruptcy Code in contending that the debt in question is nondischargeable. That statute provides:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . 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 408(a)(3) 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); or
> >
> > (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 . . . .

The burden of proving that a debt falls within this exception to discharge is on the creditor. *See Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 401 (6th Cir. 1998). There is no question that the debt to Plaintiff was incurred in connection with a divorce decree and it is not claimed that the debt has been assigned.

As for the requirement that the debt be owed "to a spouse, former spouse, or child of the debtor," the Sixth Circuit has held that "payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable." *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1107 (6th Cir. 1983). Consistent with that view, all of the appellate courts considering the issue in reported opinions hold that "legal fees of an attorney appointed to represent the interests of a child in a custody proceeding can be considered a debt to the child." *Falk & Siemer, LLP v. Maddigan (In re Maddigan)*, 312 F.3d 589, 594 (2d Cir. 2002) (citing *Peters v. Hennenhoeffer (In re Peters)*, 964 F.2d 166, 167 (2d Cir. 1992)); *accord*, *Ting v. Chang (In re Chang)*, 163 F.3d 1138, 1141-42 (9th Cir. 1998); *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1489-90 (10th Cir. 1995); *Olszewski v. Joffrion (In re Joffrion)*, 240 B.R. 630, 633 (M.D. Ala. 1999); *accord*, *e.g.*, *Walter v. Neville (In re Neville)*, Ch. 7 Case No. 96-32004, Adv. No. 97-0254, 1997 WL 419386, at *2-*3 (Bankr. W.D. Tenn. July 22, 1997) (citing *Calhoun*); *Lawson v. Lever (In re Lever)*, 174 B.R. 936, 941 (Bankr. N.D. Ohio 1991); *see Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995) (fee owed to attorney for debtor's former spouse). Likewise, all appellate courts considering the issue in reported opinions hold that fees owed to guardians *ad litem* for children in connection with divorce cases are for the support of the children. *Maddigan*, 312 F.3d at 594 ("fees are inextricably intertwined with proceedings affecting the welfare of the child"); *Chang*, 163 F.3d at 1140-41; *Miller*, 55 F.3d at 1490; *Dvorak v. Carlson (In re Dvorak)*, 986 F.2d 940 (5th Cir. 1993); *Joffrion*, 240 B.R. at 632-33; *accord*, *e.g.*, *Neville*, 1997 WL 419386, at *1-*2; *Lever*, 174 B.R. 936. "The legal question is not whether repayment of the debt will benefit the children, but whether the basis of the debt benefitted the children." *Leibowitz v. County of Orange (In re Leibowitz)*, 217 F.3d 799, 803 (9th Cir. 2000) (citations omitted). This court finds these authorities persuasive, both in their reasoning and number, and therefore finds as a matter of law that Plaintiff's state court judgment against Defendant is a nondischargeable debt for support under § 523(a)(5).[1]

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[1] Defendant presents compelling policy arguments, specifically the concern that this judgment occurs at the ultimate expense of ongoing support for her minor child. The state court presumably considered such a potential impact in rendering its final decree, including awarding Plaintiff a judgment against Defendant for

In his complaint, in addition to requesting a determination of dischargeability, Plaintiff asks this court to enter judgment against Defendant in the amount of $681.62. While the court generally has the authority to enter money judgments in dischargeability actions, *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965 (6th Cir. 1993), it declines to do so in this adversary proceeding. Plaintiff already has a final state court money judgment against Defendant. This court does not see any compelling reason to duplicate that judgment in a federal court, especially when the underlying judgment arose from state court domestic relations proceedings to which federal deference is particularly due.

Plaintiff's complaint further requests an award of costs and attorney's fees for litigating this adversary proceeding. Plaintiff has attached his own affidavit to his motion, stating that he has incurred attorney's fees of $1, 275.00 in prosecuting this adversary proceeding. But Plaintiff does not identify nor is this court aware of any legal basis for an award of attorney's fees to the prevailing party in an action of this nature. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 257, 95 S. Ct. 1612, 1621 (1975) (The "American rule" is that, "absent statute or enforceable contract, litigants pay their own attorneys' fees."). The court will, however, award Plaintiff costs in the form of the $150.00 filing fee for this adversary action.

A judgment in accordance with this memorandum of decision will be separately entered by the court.

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Plaintiff's motion for summary judgment [Doc. #8] is granted and Defendant's cross-motion for summary judgment [Doc. #9] is denied.

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge

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part of his fees. Moreover, an equally compelling policy argument is the need for persons to serve as guardians *ad litem* to protect the interests of minor children in divorce proceedings. The willingness to do so will be negatively affected if fees for such services are dischargeable in bankruptcy, with divorce and bankruptcy being an unfortunately frequent legal tandem.