

**United States Bankruptcy Court
District of New Mexico**

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Case Number: 00-01012
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

RICHARD STEVEN MARTINEZ,
Debtor.

No. 7-99-15816 SA

LORRAINE MARTINEZ,
Plaintiff,

v.

No. 00-1012 S

RICHARD STEVEN MARTINEZ,
Defendant.

MEMORANDUM OPINION

This matter is before the Court pursuant to the Scheduling Order entered in this matter on March 13, 2000, which called for the submission of stipulated facts and simultaneous briefs and response briefs on the issue of the nondischargeability of defendant's debt to plaintiff. Plaintiff appears through her attorney Emily A. Franke. Defendant appears through his attorney James I. Bartholomew. This memorandum opinion constitutes the Court's findings of fact and conclusions of law. This is a core proceeding, 28 U.S.C. § 157(b)(2)(I). For the reasons set forth below, the Court finds that plaintiff is entitled to judgment on her complaint.

FACTS

Plaintiff is the former spouse of Defendant, under a final decree of dissolution of marriage dated July 1, 1994. On February 27, 1996 plaintiff filed a motion in the state court dissolution action to continue and increase spousal support. On

September 15, 1999, the state court entered findings of fact and conclusions of law awarding to plaintiff \$500 per month in spousal support for an indefinite duration. The Court also awarded judgment in favor of Plaintiff in the amount of \$35,800, comprised of \$19,500 for spousal support owed from June, 1996 through August, 1999, and \$16,300 for attorneys fees and costs imposed by the court and incurred in the course of the filing of the motion to continue and increase spousal support in the divorce proceeding. Plaintiff's financial arrangement with her attorney was to pay costs only, not fees. (Plaintiff was employed as a part-time file clerk at her counsel's office and the firm undertook her representation on a pro bono basis.) At the initial pretrial conference in this proceeding, counsel for defendant conceded that the portion of the award designated spousal support is not dischargeable. The issue in this case, then, is the award of \$16,300 for attorneys fees and costs, comprised of \$10,000 in attorney fees and costs and \$6,300 for expert witness fees and costs.

CONCLUSIONS OF LAW

1. The Court of Appeals for the Tenth Circuit has held that attorney fees arising from post-divorce child custody and support proceedings are in the nature of support and not dischargeable under section 523(a)(5). Jones v. Jones, 9 F.3d 878, 883 (10th Cir. 1993).

2. The Court of Appeals for the Tenth Circuit has also held that expert witness fees and costs incurred in divorce or child custody proceedings and ordered by the court to be paid by an ex-spouse are in the nature of support and not dischargeable under section 523(a)(5). Miller v. Gentry, 55 F.3d 1487, 1490 (10th Cir. 1995). This is true even if the court orders payment directly to the creditor. “[F]orm should not be placed over substance and ... it is the nature of the debt that controls, not the identity of the payee.” Id.
3. Defendant’s first argument is that the state court award is on appeal to the New Mexico Court of Appeals, and is therefore only a contingent liability. Defendant claims that his liability cannot be determined until the appeal is decided. The Court disagrees. First, the claim is not contingent, except in the loosest sense of that word. “[A] contingent debt is ‘one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor.’” Fostvedt v. Dow (In re Fostvedt), 823 F.2d 305, 306 (9th Cir. 1987)(citing Brockenbrough v. Commissioner, 61 B.R. 685, 686 (W.D. Va. 1986)). A debt is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor’s filing

for bankruptcy. Mazzeo v. United States (In re Mazzeo), 131 F.3d 295, 303 (2nd Cir. 1997). The fact that a debtor might have counterclaims, setoffs, affirmative defenses, or mitigating circumstances does not make a claim contingent because it "does not obviate the basic claim or negate the fundamental right to payment on the claim." In re Clark, 91 B.R. 570, 575 (Bankr. D. Co. 1988). In this case, the debtor's liability, if any, was triggered by events that happened before the bankruptcy. Debtor may disagree that he owes this amount, but it is not contingent. Furthermore, section 523 does not differentiate between contingent and noncontingent debts, it simply declares that certain debts are not discharged. A "debt" is a liability on a claim, 11 U.S.C. § 101(12), and "claim" is a "right to payment, whether or not such right is ... contingent." 11 U.S.C. § 101(5). Therefore, even if this debt were contingent, it can be declared nondischargeable. See also Federal Trade Commission v. Black (In re Black), 95 B.R. 819, 823 (Bankr. M.D. Fl. 1989)(The fact that a claim is unliquidated, contingent and disputed is "without significance" in a motion to dismiss a section 523 complaint.)

4. Debtor's next argument is that the state court's award for legal services is a contingent fee in violation of New Mexico's public policy against contingent fees in domestic

cases. The Court disagrees that this is a contingent fee. The court's award was based on New Mexico statute, see N.M.S.A. § 40-4-7(A) ("The court may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his case."), and not on any impermissible contract or agreement between plaintiff and her attorneys. More important, however, is the fact that this argument is a direct attack on the validity of the state court judgment; this court lacks jurisdiction to hear such an argument. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)("[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings.") See also Hayes v. Hayes (In re Hayes), 235 B.R. 885, 890 (Bankr. W.D. Tn. 1999):

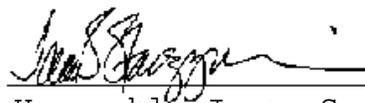
The Defendant in effect seeks appellate review of the final judgment and subsequent orders of the [state family-court judge]. The jurisdiction of the bankruptcy court in this Adversary Proceeding is limited to a determination of the dischargeability of the obligations established by the [state judge]. The bankruptcy courts, as units of the federal district courts, have no appellate jurisdiction over decisions of the state courts. The Defendant's attacks upon the validity of the Marital Dissolution Agreement in this forum fail for lack of subject matter jurisdiction.

Debtor's remedy is the appeal that he is already taking to the

New Mexico Court of Appeals.

5. Debtor next argues that plaintiff lacks standing to bring this action because she has no interest in the fees awarded. The state court awarded the fees to her, however, so the Court finds she does have standing. Also, under Miller v. Gentry, 55 F.3d at 1490, the focus should be on the nature of the debt, not the identity of the payee.
6. Defendant's final argument is that the plaintiff's arrangement with her attorney did not require or expect payment of fees. The Court finds that this is also an argument that was more properly addressed in the state court.

In conclusion, the Court finds that the award of \$16,300 in attorney fees and costs is nondischargeable under 11 U.S.C. § 523(a)(5). The Court will enter a judgment declaring that the Plaintiff's claim is not discharged.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

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A handwritten signature in black ink, reading "James S. Burke", is written over a horizontal line.