UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 19-50016
	)	Chapter 13
STEPHANIE LYNN BUSSIERE	)	
SSN/ITIN xxx-xx-7025	)	
	)	
Debtor.	)	
	)	
RYAN BUSSIERE	)	Adv. No. 19-5002
	)	
Plaintiff	)	
-vs-	)	DECISION RE:
	)	DISCHARGEABILITY
STEPHANIE BUSSIERE	)	OF PLAINTIFF'S CLAIM
	)	
Defendant.	)	

The matter before the Court is Plaintiff Ryan Bussiere's Complaint Objecting to Dischargeability of Debts. This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.Rs.Bankr.P. 7052 and 9014(c). For the reasons discussed below, the Court will declare Plaintiff Ryan Bussiere's claim is not excepted from discharge.

I.

Stephanie Lynn Bussiere ("Debtor") commenced a chapter 7 bankruptcy case and then voluntarily converted it to chapter 13. Among her scheduled creditors was her former husband, Ryan Bussiere.[1] Ryan commenced this adversary proceeding against Debtor seeking a determination that his claim is a domestic support obligation

[1]Ryan did not file a proof of claim within the time permitted by Fed.R.Bankr.P. 3002(c). As of the date of this decision, neither Debtor nor the chapter 13 trustee has utilized Fed.R.Bankr.P. 3004 to file a proof of claim on Ryan's behalf.

that is excepted from discharge pursuant to 11 U.S.C. § 523(a)(5).[2] The parties submitted the matter to the Court on the exhibits attached to Ryan's complaint, the exhibits attached to Debtor's answer, and briefs.

The exhibits show Debtor initiated, in state court, a child custody modification action to accommodate a desired relocation due to a new job. Ryan resisted the modification. During the course of the matter, the parties incurred the cost of a formal child custody evaluation and significant attorney fees. Eventually, Debtor did not permanently relocate, and the terms of their child custody agreement were not substantively modified. The parties did, however, resolve a federal income tax issue and address Debtor's concerns regarding Ryan's participation in a particular band.[3]

Ryan sought a reallocation of the child custody evaluator's fees and an award of half his attorney fees and costs. A half-day trial ensued, with the state court receiving testimony regarding the parties' respective incomes, assets, and liabilities. The state court ordered Debtor to pay Ryan $8,230.28 plus interest at a stated rate. The $8,230.28 comprised $4,730.28 for Ryan's half of the cost of the child custody evaluation and $3,500.00 for a portion of the attorney fees Ryan incurred. It is his claim arising from this state court order that Ryan wants excepted from Debtor's discharge pursuant to 11 U.S.C. § 523(a)(5) as a claim that is a domestic support obligation.

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[2]Ryan commenced this adversary proceeding while Debtor's case was still a chapter 7. His allegations that his claim is also nondischargeable under 11 U.S.C. § 523(a)(15) became moot when Debtor converted her case to chapter 13, since 11 U.S.C. § 1328(a)(2) does not exclude from discharge a claim under § 523(a)(15).

[3]The record indicates the band embraces a demonic or satanic genre.

II.

A debt for a "domestic support obligation" ("DSO") is excepted from a chapter 13 debtor's discharge. 11 U.S.C. §§ 1328(a)(2) and 523(a)(5). A DSO is defined as:

> a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
>
> (A) owed to or recoverable by—
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

The party asserting a particular claim falls under § 523(a)(5) bears the burden

of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991); *Phegley v. Phegley* (*In re Phegley*), 443 B.R. 154, 158 (B.A.P. 8th Cir. 2011). "[T]he crucial question is the function the award was intended to serve." *Phegley*, 443 B.R. at 157. The determination is a question of federal bankruptcy law, not state law. *Id*. at 158. The state court's characterization of the claim serves as the starting point for the bankruptcy court in determining the claim's intended function, but that characterization is not binding on the bankruptcy court. *Id*.

In determining whether a particular claim is a DSO, a bankruptcy court should consider the following factors:

> [1] the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; [2] the relative financial conditions of the parties at the time of the divorce; [3] the respective employment histories and prospects for financial support; [4] the fact that one party or another receives the marital property; [5] the periodic nature of the payments; and [6] whether it would be difficult for the former spouse and children to subsist without the payments.

Id. Further,

> [e]xceptions from discharge for spousal and child support deserve a liberal construction, and the policy underlying § 523 favors the enforcement of familial obligations over a fresh start for the debtor, even if the support obligation is owed directly to a third party.

Id.

III.

In recognition of the parties' stipulated exhibits and after considering the *Phegley* factors, the Court finds the $8,230.28 for the attorney fees and the child custody evaluation cost the state court ordered Debtor to pay Ryan is not a DSO. While the state court clearly considered each party's strained financial situation, it was

Debtor's disputatious conduct, which prolonged the action and increased costs, that led the state court to order Debtor to pay Ryan the $8,230.28.

Citing S.D.C.L. § 15-17-38[4] and guided by the two-part analysis set forth in *Moulton v. Moulton*, 904 N.W.2d 68 (S.D. 2017), *BAC Home Loans Servicing, LP v. Trancynger*, 847 N.W.2d 137 (S.D. 2014), and *Brosnan v. Brosnan*, 840 N.W.2d 240 (S.D. 2013), the state court thoroughly analyzed Ryan's request for costs and attorney fees. The analysis framework, as detailed in *Kappenman v. Kappenman*, 522 N.W.2d 199 (S.D. 1994), provides:

> In determining whether to award attorney fees [under S.D.C.L. § 15-17-38], a trial court must first consider what constitutes a reasonable fee. On review, this Court will examine the trial court's analysis of the following elements pertinent to fixing legal fees generally: (1) the amount and value of the property involved; (2) the intricacy and importance of litigation; (3) the labor and time involved; (4) the skill required to draft pleadings and try the case; (5) the discovery procedures utilized; (6) the existence of complicated legal problems; (7) the time

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[4]Section 15-17-38 of the South Dakota Codified Laws provides:

> **Award of attorneys' fees--Taxed as disbursements.** The compensation of attorneys and counselors at law for services rendered in civil and criminal actions and special proceedings is left to the agreement, express or implied, of the parties. However, attorneys' fees may be taxed as disbursements if allowed by specific statute. The court, if appropriate, in the interests of justice, may award payment of attorneys' fees in all cases of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, or alimony. The court may award the fees before or after judgment or order. The court may award attorneys' fees from trusts administered through the court as well as in probate and guardianship proceedings. Attorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement.

> required; (8) whether briefs were required; and (9) whether an appeal to this court is involved. Each case must rest on its own facts and there is little to be gained by comparing the present fee with others which have been previously allowed.
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> . . . .
>
> Second, the [trial] court must decide what portion of the fee, if any, should be allowed as costs to be paid by the opposing party. In reaching this decision the court should consider the property owned by each party, their relative incomes, whether the property of the parties is in fixed or liquid assets, and whether the actions of either party unreasonably increased the time spent on the case.

Id. at 204 (cites therein omitted). *See Moulton,* 904 N.W.2d at 75 (citing *Brosnan* therein); *Trancynger*, 847 N.W.2d at 142-43; *Brosnan,* 840 N.W.2d at 252-53 (quoting *Kappenman* therein).

In the first part of its analysis, the state court found Ryan's attorney's hourly rate was "within the acceptable range for this area[,]" but the hours expended were "excessive and unreasonable" for a case that should have required "the most basic skill level[.]" In specifically addressing the elements set forth in the case law cited above, the state court concluded (paragraph numbers omitted):

> There is no dispute over property. This Court concludes that a motion to relocate, converted into a change of custody action, is not, in and of itself, intricate; however, the ramifications of modifying custody is very important, not only to the parents but more specifically to the children. The result in modifying custody in this case is dissimilar to other cases wherein the moving party seeks to relocate the children to the farthest [corners] of this state and in some instances outside South Dakota entirely. Here, [Debtor] desired to relocate [less than sixty miles away].
>
> There was a lot of labor and time involved in litigating this case on both sides of the aisle; however, the amount requested by Ryan appears excessive and unreasonable for the type of case. Nonetheless, it was [Debtor's] self-serving actions that created the situation wherein the parties found themselves in this litigation. A motion to modify custody requires the most basic skill level to draft the pleadings and try the case.

> Moreover, this Court ordered an evaluator to assess the situation, which should have alleviated much of the labor and skill level necessary to try this type of case. No depositions were taken and, excepting the home study evaluator, no experts were consulted in disputing intricate legal issues. To put it plainly, most law firms have their associates cut their teeth into these types of low skill level cases. In this case the time involved in handling discovery and negotiating settlement, which bore no fruit, is where the bulk of the attorney's fees arose. This Court finds [Debtor] created much of the additional time consumption in her unreasonable insistence that Ryan abstain from his hobby in the band. This Court commented on this issue on the record at that time and noted this for future considerations regarding attorney's fees. [Debtor's] position was untenable which directly led to the increased time in resolving this case.
>
> . . . .
>
> If there were complicated legal issues in this case, they were self-created by not having a solid grasp of the very basic legal issues and lacking client control. This Court concludes that award of attorney's fees is warranted, but not in the amount requested.

The state court also noted Ryan's motion for costs took a half day to try and proposed findings and conclusions, but not briefs, were required.

In the second part of its analysis, the state court considered each party's financial wherewithal. The state court acknowledged Ryan consistently advised Debtor–and apparently also advised the state court–he could not afford the cost of a child custody evaluation. In fact, Ryan opined neither he nor Debtor could afford the evaluation. The state court noted that when it originally ordered the child custody evaluation to take place, it split the cost, but did so "subject to [its] ability to reallocate the costs amongst the parties at a later date." The state court found Ryan and his new wife had both a higher household income than Debtor and some rental income. The state court noted both Debtor and Ryan had borrowed funds to pay the child custody evaluator, Debtor had also borrowed money to pay her attorney, and

Ryan still owed approximately $11,642.00 to his attorney. The state court further found neither party had a positive net worth. It also noted Debtor contended she did "not have the financial means" to pay Ryan's portion of the cost of the child custody evaluation or his attorney fees, but went on to say this was "only one factor for the Court to consider."

When deciding "whether the actions of either party unreasonably increased the time spent on the case," the state court noted Ryan contributed in some measure to the length of the proceeding by addressing the collateral issues. More decidedly, however, the state court–throughout its findings and conclusions–identified Debtor's actions as unreasonably increasing the time spent to resolve the matter. The state court noted it was Debtor's "self-serving actions that created the situation wherein the parties found themselves in this litigation[,]" Debtor's proposed parenting plan was "outside the standard guideline" and "not reasonable[,]" and Debtor "only took her best interests into consideration and did not take the children's best interests into consideration." The state court found the mediation preceding the child custody evaluation was unsuccessful because Debtor "was a reluctant participant" and Debtor's "conduct unreasonably and unnecessarily resulted in Ryan incurring significant child custody evaluation costs as well as significant attorney's fees and costs." It noted Debtor's position regarding Ryan's participation in the band was unreasonable and resulted in additional discovery and pre-trial work. The state court further found (paragraph number omitted):

> Thus, after a $9,460.56 child custody evaluation, which expressly found that [Debtor's] desire to relocate did not consider the best interests

> of the children, [Debtor], consistent with the evaluation recommendations, agreed to do exactly what the parties had been doing prior to her filing the Notice of Intent to Relocate and exactly what Ryan stated was in the best interests of the children from the very beginning.

In its summary findings, the state court held (paragraph numbers omitted):

> [Debtor's] conduct of only considering her best interests and not considering the best interests of the children in her decision to attempt to relocate to Rapid City and obtain a modification of the child custody arrangement is the sole reason why the parties incurred any fees and costs in this action whatsoever.
>
> [Debtor's] conduct from the beginning with the proposed parenting plan as set forth in her Notice of Intent to Relocate through the very end with her insistence Ryan not participate in the band were all factors in this protracted and unnecessary litigation.
>
> [Debtor's] conduct unreasonably and unnecessarily resulted in Ryan incurring significant child custody evaluation costs as well as significant attorney's fees and costs.

Ultimately, the state court decided to award Ryan only a portion of the attorney fees he had requested because Ryan was "in a better economic position to bear the cost of litigation," and it ordered Debtor to reimburse Ryan for his half of the cost of the child custody evaluation.

There is nothing in the state court's findings and conclusions that indicates the award was intended to serve as a DSO. When the six *Phegley* factors are considered, none tip in Ryan's favor. The language and substance of the state court's order clearly indicated it awarded Ryan the $8,230.28 because of Debtor's conduct in the state court action. Debtor's and Ryan's financial conditions and employment histories are similar. It should go without saying the child custody modification action did not encompass a division of property. The award of attorney fees and costs to Ryan was

a one-time award, not periodic in nature. Finally, while the $8,230.28 the state court awarded Ryan would lessen his financial burden, there was nothing indicating it would be difficult for Ryan and his family to subsist without the award. Accordingly, the Court finds the $8,230.28 awarded to Ryan in state court was not a domestic support obligation. As such, if and when Debtor has a plan confirmed and completes her plan payments, Ryan's claim may be discharged.[5]

An appropriate order and judgment will be entered.

Dated: June 21, 2019.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

[5]For the purpose of this decision only, the Court is not considering any consequences that may arise from Ryan's not filing a proof of claim within the time permitted by Fed.R.Bankr.P. 3002(c).

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STEPHANIE LYNN BUSSIERE	)	
SSN/ITIN xxx-xx-7025	)	
	)	
Debtor.	)	
	)	
RYAN BUSSIERE	)	Adv. No. 19-5002
	)	
Plaintiff	)	
-vs-	)	ORDER DIRECTING
	)	ENTRY OF JUDGMENT
STEPHANIE BUSSIERE	)	
	)	
Defendant.	)	

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED a judgment shall be entered declaring Plaintiff Ryan Bussiere's pre-petition claim against Debtor-Defendant Stephanie Lynn Bussiere is not excepted from discharge pursuant to 11 U.S.C. §§ 1328(a)(2) and 523(a)(5).

So ordered: June 21, 2019.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

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