

Dated: May 24, 2019



Daniel P. Collins

Daniel P. Collins, Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:)	Chapter 13 Proceedings
)	
AARON JOSEPH HURST,)	Case No.: 2:18-bk-03882-DPC
)	
Reorganized Debtor.)	Adversary No. 2:18-ap-00282-DPC
<u>KIMBERLY LAUREN HURST,</u>)	
)	UNDER ADVISEMENT RULING RE:
Plaintiff,)	MOTION AND COUNTER-MOTION
)	FOR SUMMARY JUDGMENT
v.)	
)	
AARON JOSEPH HURST,)	[NOT FOR PUBLICATION]
)	
Defendant.)	

Before this Court are a Motion and Counter-Motion for Summary Judgment to determine whether a state court judgment for attorneys’ fees is a domestic support obligation (“DSO”). Kimberly Lauren Hurst (“Ms. Hurst”) holds a judgment (“Judgment”) against Aaron Joseph Hurst (“Debtor”) arising from a divorce case #FC2014-009478 (“Divorce Case”) in the Superior Court of Arizona, Maricopa County (“State Court”). Ms. Hurst contends the Judgment is a DSO. Debtor contends the Judgment should not be treated as a DSO and is therefore dischargeable.

This Court now finds that, under the facts of this case, the Judgment is a DSO within the meaning of 11 U.S.C. § 101(14A).¹ The Judgment is non-dischargeable under § 523(a)(5).²

¹ Unless indicated otherwise, statutory citations refer to the U.S. Bankruptcy Code (“Code”), 11 U.S.C. §§ 101-1532 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

² This ruling (the “Order”) constitutes this Court’s findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

1 **I. BACKGROUND**

2 1. A trial was held in the Divorce Case on September 22, 2016. The State Court
3 heard testimony regarding a Petition Re: Contempt for Non-Payment of Child Support
4 and Attorney Fees (“Petition for Contempt”). Ms. Hurst requested attorneys’ fees against
5 Debtor during those proceedings. Attorneys’ fees were granted, in favor of Ms. Hurst, as
6 reflected by the State Court’s minute entry.³

7 2. The minute entry required a *China Doll* affidavit⁴ supporting the claimed
8 reasonableness of attorneys’ fees.⁵ Ms. Hurst filed the *China Doll* affidavit. Reply briefs
9 followed.

10 3. On November 22, 2016, the State Court entered the Judgment⁶ pursuant to
11 A.R.S. § 25-324, awarding Ms. Hurst attorney’s fees in the amount of \$30,000 plus
12 interest if not paid within 60 days of the Judgment.

13 4. On August 11, 2017, the State Court dissolved the parties’ marriage.⁷

14 5. On April 12, 2018 (“Petition Date”), Debtor filed the instant voluntary
15 Chapter 13 bankruptcy.⁸

16 6. On April 19, 2018, Debtor filed his chapter 13 plan (“Plan”).⁹ The Plan
17 failed to acknowledge the Judgment as a DSO.

18 7. On July 23, 2018, Ms. Hurst initiated this Adversary Proceeding by filing
19 her complaint (“Complaint”)¹⁰ against the Debtor. The Complaint seeks this Court’s
20 declaration that the Judgment is a DSO as defined by § 101(14)(A) and, therefore, not
21 subject to discharge pursuant to §§ 1328(a) and 523(a)(5).

22 ³ Statement of Facts in Support of Summary Judgment Exhibit 2, page 22 ¶ 4-5. DE 12. Unless indicated otherwise,
23 “DE” references a docket entry in this adversary proceeding (“Adversary Proceeding”).

24 ⁴ A *China Doll* affidavit references an affidavit required by the case of *Schweiger v. China Doll Restaurant, Inc.*,
138 Ariz. 183 (App. 1983) when a party seeks an award of attorney’s fees.

25 ⁵ Statement of Facts in Support of Summary Judgment Exhibit 2, page 22 ¶ 6-7. DE 12.

26 ⁶ Statement of Facts in Support of Motion for Summary Judgment Exhibit 5. DE 12.

⁷ Statement of Facts in Support of Motion for Summary Judgment Exhibit 1. DE 12.

⁸ Admin DE 1. “Admin DE” references a docket entry in the administrative bankruptcy case.

⁹ Admin DE 11.

¹⁰ DE 1.

1 8. On December 6, 2018, the Debtor filed a Motion for Summary Judgment
2 (“MSJ”)¹¹ and Debtor’s Statement of Facts (“DSOF”).¹²

3 9. On December 28, 2018, Ms. Hurst filed a Response to the MSJ, a Counter-
4 Motion for Summary Judgment (“CMSJ”), and a Statement of Facts (“PSOF”).¹³

5 10. On January 11, 2018, Debtor filed his Reply to Ms. Hurst’s Response to
6 MSJ (“DMSJ Response”) and his Response to CMSJ (“CMSJ Response”).¹⁴
7 Additionally, Debtor filed a Response to PSOF.¹⁵

8 11. On January 25, 2018, Ms. Hurst filed her Reply to CMSJ Response.¹⁶

9 12. This Court heard oral arguments on the MSJ and CMSJ on March 18, 2018.
10 The Court and parties agreed some additional information was necessary for the Court to
11 make a final determination. The record was supplemented with additional information.¹⁷

12 13. The Court heard continued oral arguments on April 22, 2018, and then took
13 this matter under advisement.

14
15 **II. JURISDICTION**

16 Pursuant to 28 U.S.C. § 157(b)(2)(I), this Court has jurisdiction over the
17 dischargeability issues presented by the parties.

18
19 **III. ISSUE**

20 Whether the Judgment is a DSO under § 101(14A) and, therefore,
21 nondischargeable under § 523(a)(5).

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23 _____
24 ¹¹ DE 11.

25 ¹² DE 12.

26 ¹³ DE 15.

¹⁴ DE 16.

¹⁵ DE 17.

¹⁶ DE 18.

¹⁷ DE 21-23, 26.

1 **IV. ANALYSIS**

2 “One of the ‘main purpose[s]’ of the federal bankruptcy system is ‘to aid the
3 unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain
4 character.’” *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018)
5 (quoting *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918)). “To that end, the Bankruptcy
6 Code contains broad provisions for the discharge of debts, subject to exceptions.” *Id.* One
7 such exception is “an overriding public policy favoring the enforcement of familial
8 obligations.” *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984).

9 Section 523(a)(5) does not discharge an individual debtor from any debt “for a
10 domestic support obligation[.]” Section 101(14A) defines the term “domestic support
11 obligation,” in relevant part, as:

12 [A] debt that accrues before, on, or after the date of the order for relief in a
13 case under this title...that is—

(A) owed to or recoverable by—

14 (i) a spouse, former spouse, or child of the debtor or such child’s parent,
15 legal guardian, or responsible relative;

...

16 (B) in the nature of alimony, maintenance, or support...of such spouse,
17 former spouse, or child of the debtor or such child’s parent, without regard
18 to whether such debt is expressly so designated;

19 (C) established or subject to establishment before, on, or after the date of the
20 order for relief in a case under this title, by reason of applicable provisions
21 of—

(i) a separation agreement, divorce decree, or property settlement
agreement;

(ii) an order of a court of record...

22 “When determining whether a debt is within the § 523(a)(5) exception to discharge,
23 a court considers whether the debt is ‘actually in the nature of . . . support.’” *In re Chang*,
24 163 F.3d 1138, 1140 (9th Cir. 1998) (quoting *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th
25 Cir. 1984)). “This question is a factual determination made by the bankruptcy court as a
26 matter of federal bankruptcy law.” *Id.* “In the absence of a specific conflict with federal

1 law, we must look to state law to delineate the parties' state-created support obligations."
2 *In re Catlow*, 633 F.2d 960, 962 (9th Cir. 1981).

3 Several factors guide courts in determining whether an award is actually in the
4 nature of support. Those factors include: the recipient spouse's need for support, presence
5 of minor children, an imbalance in the relative income of the parties, and the intent of the
6 state court. *See In re Gionis*, 170 B.R. 675, 682 (B.A.P. 9th Cir. 1994), *aff'd*, 92 F.3d
7 1192 (9th Cir. 1996). Furthermore, "[a] relevant factor for the bankruptcy court to
8 consider when making this determination is how the particular state law characterizes the
9 debt." *In re Chang*, 163 F.3d at 1140 (citing *In re Catlow*, 663 F.2d 960, 962-63 (9th Cir.
10 1981).

11 "The Arizona superior court has authority under A.R.S. § 25-324 to award
12 attorney's fees and costs in custody disputes[.]" *In re Jarski*, 301 B.R. 342, 346 (Bankr.
13 D. Ariz. 2003). Here, the Judgment is an award of attorney's fees and costs pursuant to
14 A.R.S. § 25-324, which states:

- 15 A. The court from time to time, after considering the financial resources of
16 both parties and the reasonableness of the positions each party has taken
17 through the proceedings, may order a party to pay a reasonable amount
18 to the other party for the costs and expenses of maintaining or defending
19 any proceeding under this chapter or chapter 4, article 1 of this title. On
20 request of a party or another court of competent jurisdiction, the court
21 shall make specific findings concerning the portions of any award of fees
22 and expense that are based on consideration of financial resources and
23 that are based on consideration of reasonableness of positions. The court
24 may make these findings before, during or after the issuance of a fee
25 award.
- 26 B. If the court determines that a party filed a petition under one of the
following circumstances, the court shall award reasonable costs and
attorney fees to the other party:
1. The petition was not filed in good faith.
 2. The petition was not grounded in fact or based on law.

1 3. The petition was filed for an improper purpose such as to harass
2 the other party, to cause an unnecessary delay or to increase the
3 cost of litigation to the other party.

4

5 In summary, under A.R.S. § 25-324(A) a court must consider two elements when
6 determining whether to award attorneys' fees: (1) the financial resources of both parties
7 and (2) the reasonableness of the positions each party has taken in the proceedings. Under
8 A.R.S. § 25-324(B), fee awards must be made under certain circumstances but without
9 regard to a parties' financial resources.

10 A party objecting to the bankruptcy discharge "bears the burden of proving by a
11 preponderance of the evidence that [the debtor's] discharge should be denied." *In re Retz*,
12 606 F.3d 1189, 1196 (9th Cir. 2010) (quoting *Khalil v. Developers Sur. & Indem. Co. (In*
13 *re Khalil)*, 379 B.R. 163, 172 (B.A.P. 9th Cir. 2007)). However, "[t]he Ninth Circuit has
14 recognized that a presumption exists that fees awarded under [A.R.S. § 25-324(A)] in
15 matters involving child custody or child support are considered in the nature of child
16 support unless the record reflects otherwise." *In re Bradshaw*, Adversary Case No. 06-
17 00245, 2007 WL 2460619, at *1 (Bankr. D. Ariz. Aug. 24, 2007) (citing *See In re Chang*,
18 163 F.3d at 1141; *In re Catlow*, 663 F.2d 960; *In re Jarski*, 301 B.R. at 347). "In order
19 for an award of attorneys' fees to be presumed to be a DSO, the award must have been
20 entered in a matter involving child custody or support, and the award must have been
21 entered pursuant to A.R.S. § 25-324(A)." *Matter of Sodergren*, No. 2:16-BK-12689-SHG,
22 2018 WL 4304582, at *6 (D. Ariz. Sep. 10, 2018).

23 The first prong of the § 25-324(A) test is met here. The parties agree that the
24 Judgment was entered in a domestic relations proceeding involving child support¹⁸ and
25 child custody.¹⁹ The principal issue is whether the Judgment was entered pursuant to

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¹⁸ Plaintiff's Complaint, ¶ 9 (DE 1) and Debtor's Answer ¶ 9 (DE 5).

¹⁹ Plaintiff's Complaint, ¶ 11 (DE 1) and Debtor's Answer ¶ 11 (DE 5).

1 A.R.S. § 25-324(A) or (B). If the Judgment was entered pursuant to A.R.S § 25-324(A),
2 a presumption arises that the attorneys’ fees are a DSO. However, no such presumption
3 arises if the Judgment was entered pursuant to A.R.S. § 25-324(B). *See Matter of*
4 *Sodergren*, No. 2:16-BK-12689-SHG, 2018 WL 4304582, at 3 (D. Ariz. Sep. 10, 2018).

5 At trial in the Divorce Case, the State Court heard extensive testimony regarding
6 Ms. Hurst’s Petition for Contempt.²⁰ Ms. Hurst’s Petition for Contempt alleged that
7 Debtor failed to provide for the payment of attorneys’ fees and child support payments in
8 violation of the State Court’s previous May 29, 2015 under advisement order.²¹ In addition
9 to the previously submitted child support worksheets and child support payment histories,
10 the State Court admitted various financial affidavits from both Ms. Hurst and Debtor. The
11 State Court heard testimony regarding the financial disparity between Ms. Hurst and
12 Debtor. In its ruling, the State Court numerous times discussed the relative financial
13 positions of the parties.²² The State Court also discussed the unreasonable positions taken
14 by Debtor and expressly stated that “...a trial could have been avoided...”²³

15 The State Court did not explicitly specify in the Judgment under which subsection
16 of A.R.S. § 25-324 it awarded Ms. Hurst the attorneys’ fees and costs at issue. However,
17 during the Divorce Case trial, the State Court found and awarded attorneys’ fees and costs
18 for Ms. Hurst. The State Court specifically stated:

19 There is a **financial disparity**. I think that the behavior of not supporting
20 your children for actually months, and then only really at times nominally
21 supporting them, I think **was unreasonable**. And the violation of the courts
22 orders, that’s unreasonable. And so I am going to grant Mother’s request for
23 attorney’s fees.²⁴ (emphasis added).

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20 Plaintiff’s Supplement to the Record, Exhibits F and G (DE 21).

25 ²¹ *Id.*

²² DSOF Exhibit 2 (DE 12).

26 ²³ *Id.* at 23.

²⁴ *Id.* at 22-23.

1 The State Court specifically mentioned both elements of A.R.S. § 25-324(A) when
2 it granted Ms. Hurst attorneys' fees in the State Court action. Thereafter, the State Court
3 requested a *China Doll* affidavit and responses stating, "I'll obviously take into
4 consideration the – you know, the finances of the parties and all."²⁵ All parties agree that
5 the financial disparity is significant here. The State Court found Debtor's gross income
6 was \$7,642 per month, and Ms. Hurst's gross income was \$0.²⁶ The State Court awarded
7 Ms. Hurst spousal maintenance of \$1,750 per month and \$570.86 per month in child
8 support.²⁷

9 Ms. Hurst's attorney's *China Doll* affidavit was used by the State Court to
10 determine the reasonableness of fees charged. Ms. Hurst had the burden of presenting an
11 affidavit indicating "the type of legal services provided, the date the service was provided,
12 the attorney providing the service (if more than one attorney was involved in the appeal),
13 and the time spent in providing the service." *Weinstein v. Weinstein*, 235 Ariz. 40, 52, 326
14 P.3d 307, 319 (Ct. App. 2014) (citing *Schweiger v. China Doll Rest. Inc.*, 138 Ariz. 183,
15 188, 673 P.2d 927, 932 (App. 1983).

16 The Debtor urged the Court to look at the *China Doll* affidavit and briefs filed by
17 Ms. Hurst, after the State Court awarded attorney's fees at trial, to ascertain the basis for
18 the attorneys' fee award. The Debtor argues Ms. Hurst's State Court fee application was
19 devoid of references to financial need. Therefore, Debtor contends, the fee award must
20 have been intended by the State Court as a sanction and Ms. Hurst has not met her burden
21 of demonstrating that the fee award was based upon A.R.S. §25-324(A) alone. Debtor
22 relies heavily on *Sodergren* for this proposition.

23 *Sodergren* involved a vague state court explanation for its fee award. 2018 WL
24 4304582 at *3. In *Sodergren*, a domestic dispute arose wherein attorney's fees were

25 ²⁵ DSOF Exhibit 2, page 23 (DE 12).

26 ²⁶ PSOF Exhibit A (DE 15).

²⁷ DSOF Exhibit 1 (DE 12).

1 awarded in a matter involving child support. *Id.* at *1. The judgment “simply states that
2 it is being entered pursuant to [the] application for fees and costs, and the response and
3 reply thereto, and sets out the amount of the award.” *Id.* at *3. Judge Gan placed
4 significant emphasis on the application for fees and costs in determining the state court’s
5 intent. *Id.* at *4.

6 Unlike the vague state court judgment in *Sodergren*, the State Court in the Divorce
7 Case issued the Judgment in an under advisement ruling explaining,

8 THE COURT FINDS Petition/Father’s conduct has **been**
9 **unreasonable** under A.R.S. §25-324 **and** there is **financial**
10 **disparity** between the parties with Respondent/Mother having
11 less financial resources than Petition/Father.²⁸ (Emphasis
added).

12 Ms. Hurst argues, and this Court agrees, that the State Court already determined
13 Ms. Hurst’s financial need during an earlier trial, considered it when reviewing the *China*
14 *Doll* affidavit, and expressly referenced the financial disparity in the Judgment.

15 The Debtor further argues that the attorneys’ fees at issue were not solely based
16 upon the relative financial resources of the parties so the fee award was not in the nature
17 of support and was not a DSO²⁹. However, A.R.S. § 25-324(A) incorporates consideration
18 of the (1) parties’ financial resources and (2) reasonableness of positions of the parties’
19 respective positions during the litigation. The record is clear that the State Court
20 considered both the financial resources of the parties and the reasonableness of the parties’
21 position during litigation. Every mention of the attorneys’ fees awarded by the State Court
22 expressly references both prongs of A.R.S. § 25-324(A) even if subsection (A) was not
23 explicitly referenced.

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²⁸ DSOF Exhibit 5 (DE 12).

²⁹ DE 11.

1 Based on the above, the Court holds that the State Court Judgment was entered
2 pursuant to A.R.S. § 25-324(A). Since the Judgment was also entered in a matter
3 involving child custody and child support, the presumption is that the Judgment is a non-
4 dischargeable DSO under § 523(a)(5). The burden of proof is then shifted to the Debtor
5 to rebut the presumption. As was stated by the court in *Jarski*,

6 With Arizona’s statutory requirement that custody disputes be resolved in
7 the “best interests of the child,” and that any award of attorney’s fees must
8 be based upon consideration of “the financial resources of both parties and
9 the reasonableness of the positions each party has taken” in the child custody
10 dispute, it would take a strong showing by the Debtor to demonstrate that an
award of attorneys fees was intended to be, or in fact was, something other
than in the nature of support for the child. Perhaps such a showing could be
made if the fees were awarded purely as a sanction.

11 301 B.R. at 347.

12 Debtor failed to rebut the presumption and, therefore, failed to meet the burden that
13 shifted to him. Although the Debtor contends the Judgment must have been purely a
14 sanction against him, the facts do not support such a finding. In addition to imposing the
15 Judgment, the State Court imposed specific misconduct sanctions against the Debtor. The
16 State Court specifically found the Debtor in contempt for failure to comply with a valid
17 award of attorneys’ fees and child support in favor of Ms. Hurst.³⁰ Additionally, the
18 Debtor violated a preliminary injunction and was required to pay a monetary award to Ms.
19 Hurst for the resulting damages that derived from the Debtor’s conduct.³¹ These separate
20 sanctions support Ms. Hurst’s argument that the State Court sanctioned the Debtor outside
21 of the Judgment and that the Judgment was not intended as a sanction. Furthermore,
22 during the State Court trial and in its Judgment the State Court expressly noted the
23 attorneys’ fees award was due to the Debtor’s unreasonable conduct and the financial
24 disparity of the parties. The Debtor carries the burden of providing a strong showing that

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26 ³⁰ PSOF Exhibit B, page 4 (DE 15).

³¹ DSOF Exhibit 1, page 6, 11 (DE 12).

1 the Judgment was something other than in the nature of support for the child. The
2 evidence put forth does not supply the requisite showing that the Judgment was not in the
3 nature of support or purely as a sanction.

4 Although Debtor argues that the State Court trial involved several issues including,
5 but not limited to child support and therefore the presumption created in *In re Catlow*
6 should not arise, the Court disagrees. Ms. Hurst needed to bring the Petition for Contempt
7 because Debtor failed to comply with the State Court's May 29, 2015 Under Advisement
8 Ruling.³² The May 29, 2015 Under Advisement Ruling directly relates to child custody³³
9 and child support.³⁴ Debtor's failure to make the required child support payments and
10 \$5,000 payment for attorneys' fees is what caused Ms. Hurst to file the Petition for
11 Contempt and incur the additional attorneys' fees awarded to Ms. Hurst in the Judgment.

12
13 **V. CONCLUSION**

14 Based on the foregoing, this Court determines the State Court's Judgment against the
15 Debtor was a DSO under § 101(14A). As a DSO, the Judgment is non-dischargeable
16 under § 523(a)(5). Ms. Hurst's counsel is directed to upload a form of judgment consistent
17 with this Under Advisement Ruling.

18
19 **DATED AND SIGNED ABOVE.**

20
21 COPY of the foregoing mailed by the BNC and/or
22 sent by auto-generated mail to interested parties.

23
24 _____
25 ³² Plaintiff's Supplement to the Record, Exhibits E and F (DE 21).

26 ³³ *Id.* at Ex. E, page 1 (“**IT IS FURTHER ORDERED** affirming the Court's April 16, 2015 Orders regarding parenting time.”)

³⁴ *Id.* at Ex. E, page 2 (“**IT IS FURTHER ORDERED** that Father shall pay to Mother as and for child support the sum of **\$1,871.80** per month....”)