**OPINION NOT FOR PUBLICATION**

**Honorable Duncan W. Keir**

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF MARYLAND**
**at Greenbelt**

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| **In re:** | * | |
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| **FRANCIS K. BAJOWSKI, JR.** | * | **Case No. 99-23465-DK** |
| | * | **Chapter 7** |
| **Debtor.** | * | |
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| **CATHERINE A. BAJOWSKI,** | * | |
| | * | |
| **Plaintiff,** | * | |
| **vs.** | * | **Adversary No. 99-1704-DK** |
| | * | |
| **FRANCIS K. BAJOWSKI JR** | * | |
| | * | |
| **Defendant.** | * | |
| | * | |

## MEMORANDUM OF DECISION

Before the court is Plaintiff's Motion for Summary Judgment stemming from an adversary complaint to determine the dischargeability of a debt. The Complaint in this proceeding seeks an order declaring Defendant's debt to Plaintiff non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). Defendant opposes the summary judgment motion. Upon consideration of the motion, opposition and the accompanying memoranda, and for the reasons set forth below, Plaintiff's Motion for Summary Judgment is granted.

Parties obtained a Judgment of Absolute Divorce on May 24, 1999 from the Circuit Court for Prince George's County . Prior to its entry, the matter was placed before the Master for Family Division who made recommendations concerning the parties' divorce, child support & arrearages, marital property and attorney fees based on Findings of Facts

and Conclusions of Law. Pursuant to the Judgment of Absolute Divorce, Defendant was ordered in part to pay $10,000 towards Plaintiff's attorney fees for litigation involving custody, visitation and permanent child support. The issue before this Court concerns whether the $10,000 attorney fee award entered by the Circuit Court is in the nature of alimony, maintenance and support and thus non-dischargeable under 11 U.S.C. § 523(a)(5) (hereinafter all sections will refer to Title 11 of the United States Code).

Plaintiff contends that the Master determined the $10,000 in attorney's fees as the amount of fees directly related to child support, making said fees non-dischargeable under § 523(a)(5). Plaintiff relies on the Judgment of Absolute Divorce and Master of Family Law Operations Report to establish an absence of genuine issues of material fact. Specifically, Plaintiff points to the expressed language decreed by the Circuit Court to conclude that the $10,000 debt owed by the Defendant related to child support issues rendering it non-dischargeable under § 523(a)(5). The Judgment of Absolute Divorce provides in part,

> "ORDERED, that the defendant shall pay to the plaintiff the sum of $10,000 as contribution toward her attorney's fees and costs for litigation involving custody, visitation, and permanent child support..."

(Judgment of Absolute Divorce p.2). Plaintiff alleges that this prepetiton debt remains outstanding.

Through the same documents, Defendant avers that the award does not designate the $10,000 as support and therefore there remains an issue for trial. Furthermore, Defendant argues that the Circuit Court failed to incorporate the parties' true financial status, thus improperly applying the statutory requirements of MD. CODE ANN., FAM. LAW § 12-103. In addition, Defendant alleges that the order to pay attorney fees was punishment for proceeding *pro se.* Thus, Defendant contends that the $10,000 award

should not be excepted from discharge pursuant to §523(a)(5).[1]

This court's standard of review for summary judgment is set forth in Ramsey v. Bernstein (In re Bernstein), 197 B.R. 475 (Bankr. D.Md. 1996), aff'd 113 F.3d 1231 (4th Cir. 1997):

> Pursuant to Fed.R.Civ.P. 56(c), made applicable by Bankruptcy Rule 7056, summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202 (1986). In determining the facts for summary judgment purposes, the court may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to such affidavits. Fed.R.Civ.P. 56(e), made applicable by Bankr. Rule 7056. When a motion for summary judgment is made and supported by affidavits or other evidence, "an adverse party may not rest upon mere allegations or denials..."

Id.

After the movant has met his summary judgment burden of production, the burden shifts to the nonmovant to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also* Anderson , at 477 U.S. 250. The summary judgment standard mandates that the court should view the record as a whole and in the light most favorable to the non-moving party. Clark v. Alexander, 85 F.3d 146, 150 (4th Cir. 1996). The standard of proof in a dischargeability action for summary judgment purposes, is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991). The spouse seeking a determination that an obligation is non-dischargeable on the grounds that it was actually in the nature of alimony maintenance or support, has the burden of proof. In re

[1] Defendant also contends that due to his inability to pay the $10,000 debt, the debt is dischargeable under §523(a)(15). In large part, the Defendant's argument is fueled by his disagreement with the award made by the Circuit Court which he seeks this court to address. This Court does not sit as a Court of Appeals and therefore will not review the domestic issues before the Circuit Court. In addition, if the debt is for child support and non-dischargeable under § 523(a)(5), § 523(a)(15) and debtor's alleged inability to pay are not material.

Macys, 115 B.R. 883, 890 (Bankr. E. D. Va.1990); In re Quinn, 97 B.R. 837, 839 (Bankr. W. D. N. C. 1988).

Section 523(a)(5) provides as follows:

> (a) A discharge ... does not discharge an individual debtor from any debt--
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> (5) 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--
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> (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.

11 U.S.C. § 523(a)(5).

In order for a debt to be determined non-dischargeable under § 523(a)(5), it must be in the nature of alimony, maintenance or support. Whether a debt arising from divorce proceedings is in the nature of alimony, maintenance or support is a matter of bankruptcy law, not state law. In re Long, 794 F.2d 928 (4th Cir. 1986); In re Coffman, 52 B.R. 667, 670 (Bankr. D. Md. 1985). "[D]omestic matters, which include equitable distributions, are primarily for state courts to decide." Robbins v. Robbins, 964 F.2d 342 (4th Cir. 1992). While this court is not bound by a label in determining whether an award from a domestic case is in the nature of alimony, maintenance or support, and hence non-dischargeable, that is not to say that this court should or will substitute its judgment for that of the state court, as to the granting of such awards.

The majority rule espoused by the Fourth Circuit and Bankruptcy Courts dictates that an attorney fee award in a divorce judgment may be excepted from discharge under § 523(a)(5). In re Silansky, 897 F.2d 743, 744 (4th Cir. 1990); In re Blaemire, 229

B.R. 665 (Bankr. D. Md. 1999); In re Roberson, 187 B.R. 159, 163 (Bankr. E. D. Va. 1995); In re Grady, 180 B.R. 461 (Bankr. E. D. Va. 1995). In particular, those fees which may be viewed as "inextricably intertwined" with the litigation for non-dischargeable support qualify for nondischargeability under § 523(a)(5). In re Robinson, 193 B.R. 367 (Bankr. N. D. Ga. 1996); Blaemire at 668-669 (citing In re Peters, 133 B.R. 291, 295 (S.D.N.Y. 1991)); Roberson, 187 B.R. at 165. Further, where a fact finder makes the decision that one party must pay the other's attorney fees, it is the intention of the finder of fact that controls. In re Zerbe, 161 B.R. 939, 941 (E. D. Va. 1994)(citing In re McCauley, 105 B.R. 315, 320 (E. D. Va. 1989)). Such intent may be derived by examining the fee award's nature with its underlying litigation. In re Jones, 9 F.3d 878, 881-882 (10th Cir.1993); Robinson, at 193 B.R. 374; Roberson, at 187 B.R. 163.

Upon reviewing the Judgment of Absolute Divorce and Master's Report, this court finds the Master's Findings have met the federal standard for nondischargeability under § 523(a)(5). The attorney's fees awarded were not all of the fees incurred by Plaintiff in the divorce action, but only the amount which the Master found were for issues involving custody, visitation and child support. Specifically, the Master found that the "plaintiff's accumulation of legal fees had a direct and negative impact on the children, depriving them of family income, which could otherwise be used for their benefit". (Report and Recommendations of Master for Family Law Operations, p.7) ("Report"). It was the Master's primary intention to replenish the money spent, in effect support utilized, in determining the children's welfare. In order to fulfill that intention the Master recommended that the Defendant pay $10,000 as contribution towards

Plaintiff's attorney fees and costs for litigation involving custody, visitation, and permanent child support. (Report, p.8). The Circuit Court awarded the fees on that basis. The award comports with the federal standard for non-dischargeability. Notably, In re Jones states that child custody encompasses determinations made for the child's benefit and support, hence attorney fees incurred and awarded in child custody litigation are in the nature of support, absent unusual circumstances. Jones 9 F.3d at 881-882. This court finds that the $10,000 attorney fee award is inextricably linked to the custody, visitation and child support litigation.

To the extent the Defendant seeks to have this court review the findings of the state court as to the amount of the awarded fees, this court cannot do so. While this court has the independent jurisdiction to determine whether a debt is non-dischargeable, it cannot re-hear a fully adjudicated order of the state court as to the existence or amount of such debt. There are no genuine material facts in dispute that the attorney fee award set forth in Master's findings and confirmed by the judgment of the Circuit Court is support as described in and treated under 11 U.S.C. § 523(a)(5).

For the reasons enumerated herein above, Plaintiff, as a matter of law, is entitled to summary judgment. An order will be entered in conformity with this decision.

Date signed_____

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Duncan W. Keir
United States Bankruptcy Judge
for the District of Maryland

cc: Francis K. Bajowski, Jr.
Charles M. Spears, Esq.
Michael G. Wolfe, Chapter 7 Trustee