

In the United States Bankruptcy Court

for the Northern District of Iowa

BRADLEY SHANAHAN, SR.
Debtor.

Bankruptcy No. 94-11127KC
Chapter 7

ORDER

On February 7, 1995, the above-captioned matter came on for trial pursuant to assignment. Debtor appeared in person with Attorney Mark McCool. Attorney William Olinger, the objector, appeared by Attorney John Stitely. Evidence was presented after which the Court took the matter under advisement.

The specific matter before the Court is a Motion to Avoid Judicial Lien filed by Debtor on October 3, 1994. This motion seeks to set aside judicial liens purportedly in favor of Attorney William Olinger who represented Debtor's ex-wife, Denise R. Schulze, in dissolution proceedings, post-dissolution appeals and related contempt proceedings. The specific judgments which Debtor seeks to avoid are:

(1) A \$1,000 award entered by the Iowa Court of Appeals on August 27, 1991 as a result of an appeal taken by Debtor challenging the provisions of a dissolution decree entered by Linn County District Court Judge Thomas L. Koehler. At page 9 of the appellate decision, the Court addresses the issue of appellate attorney's fees. After setting out the applicable law, the Court states that "taking these considerations into account, we order Brad to pay \$1,000 toward Denise's appellate attorney's fees."

(2) On January 19, 1991, a contempt hearing was held in Linn County District Court before the undersigned as Judge. Largely pursuant to an agreement reached between counsel and with no formal hearing held, the matter was continued for a period of time to allow all matters raised in the contempt application to be resolved without formal proceedings. Nevertheless, as a result of those proceedings, Debtor was ordered to pay \$100 as attorney's fees. At page 3 of the order dated January 22, 1991, the Court stated: "Further, the Respondent (Debtor) shall be assessed \$100 as attorney's fees toward the attorney's fees of the Petitioner (Denise Schulze). This shall be payable within 60 days of the date of this order."

It is these two attorney's fees awards against Debtor for fees owed to William Olinger as attorney for Debtor's ex-wife which Debtor is attempting to avoid in his Motion to Avoid Judicial Lien. Attorney Olinger has filed an objection to the Motion. This objection largely addresses two specific issues. First, Olinger asserts that Denise Schulze, the former spouse of Debtor, is the real party-in-interest who holds the judgment against Debtor regardless of how the Clerk of Court may have indexed this judgment. In other words, it is Olinger's position that Ms. Schulze is actually the judgment creditor here and that Olinger is not.

Secondly, Olinger takes the position that these fees were awarded in such a way that they are in the nature of alimony or support. It appears that the contempt action in which \$100 attorney fees was awarded was focused directly on Debtor's failure to be current on his child support. The allegation

was also made that he had allowed the health insurance on the children to lapse and that he had either encumbered his life insurance, which was designated for the benefit of the children, or allowed it to lapse.

The second judgment for attorney fees in the amount of \$1,000 arose after Debtor appealed the dissolution decree largely because it awarded Ms. Schulze the parties' home. Other issues on appeal also dealt with property division. However, there was also entangled in these issues language from the Court of Appeals that the house was ultimately given to Ms. Schulze because she was awarded custody of the children, the children needed to maintain some reasonable standard of living and her earning capacity was less than Debtor's. Therefore, she was entitled to the house impliedly partly for the reason that she had custody of the children and this was some kind of indirect support for her also.

Debtor seeks to avoid liens arising from these judgments which have attached to property located at 619 8th Avenue SW, Cedar Rapids, Iowa which he received from his mother's probate estate. In a ruling filed in this case on November 17, 1994, the Court made the finding that Debtor received his interest in the property on the date of his mother's death which was June 27, 1992. It was at this time that his homestead interest was created.

CONCLUSIONS OF LAW

Pursuant to § 522(f)(1)⁽⁴⁾, Debtor may avoid a judicial lien to the extent it impairs an exemption to which he is otherwise entitled. Initially, the Court must determine whether a lien exists in favor of William F. Olinger which might impair Debtor's homestead exemption. Debtor asserts that Olinger holds judicial liens by virtue of the judgments entered for attorney fees in Debtor's dissolution proceedings. Olinger argues that Denise R. Schulze, Debtor's ex-wife, is the only owner of those judgments and is the real party in interest.

The Iowa Supreme Court has held in condemnation cases that the allowance of attorney fees in a judgment gives the attorney no interest and ownership in the judgment, but the judgment in its entirety is property of the client. Carmichael v. Iowa State Highway Comm'n, 219 N.W.2d 658, 664 (Iowa 1974); Stanley v. City of Indianola 153 N.W.2d 706, 710 (Iowa 1967). This situation was distinguished from a proceeding determining compensation of a defense attorney for representation in a murder case in which the attorney is the owner of the fees awarded. Parrish v. Denato, 262 N.W.2d 281, 285 (Iowa 1978). The court in Parrish noted that Iowa Code sec. 598.11, which provides for allowance of attorney fees in dissolution proceedings, makes the award to the party. Id. The language of sec. 598.11 upon which such awards are based states that the court may order either party in a dissolution action to pay a sum of money for the other party "to enable such party to prosecute or defend the action." Iowa Code § 598.11; see In re Marriage of Zoellner, 219 N.W.2d 517, 523 (Iowa 1974) (stating that under sec. 598.11 the court may order a litigant to pay the adverse party a sum "to enable such party to prosecute or defend the action").

One court has stated that as a general rule, an allowance of attorney fees in dissolution proceedings is property of the party, not the attorney, unless a statute specifies otherwise. Barber v. Barber, 296 N.W.2d 463, 469 (Neb. 1980). For example, the California statute provides that an award of attorney fees in a dissolution action may be enforced by either the spouse or the attorney. In re O'Leary, 20 B.R. 79, 80 (Bankr. E.D. Cal. 1982). "Unless the statute specifically provides that an attorney's fee allowable thereunder goes to the attorney, however, the rule is that it is an allowance to the party and not to the attorney." 20 Am. Jur. 2d Costs § 3, at 6-7 (1965). It has been held that an allowance of

attorney fees in a divorce action cannot be made to the attorney because the attorney is not a party to the action. 24 Am. Jur. 2d Divorce and Separation § 618, at 619 (1983).

In this case, Attorney William Olinger has no ownership interest in the judgments for attorney fees entered in Debtor's dissolution action. Denise Schulze is the party in whose favor the judgments were entered. Therefore, no judicial lien exists in favor of Olinger which Debtor can avoid under § 522(f)(1). Since no lien exists in favor of Olinger, Debtor's motion to avoid Olinger's lien should be denied.

Even if the dissolution judgment for attorney fees is considered to be a judgment in favor of Olinger, the lien cannot be avoided because the homestead is not exempt from preacquisition debt. Although this issue was not asserted by Olinger, the Court cannot ignore its ruling in this case filed November 17, 1994 concerning avoidance of a judicial lien held by another local attorney, Stephen Swift. In re Shanahan, No. 94-11127KC, slip op. at 5 (Bankr. N.D. Iowa Nov. 17, 1994) (appeal filed Dec. 13, 1994) (Shanahan I). In that ruling, the Court found that Debtor acquired his homestead on June 27, 1992. The Court held that no homestead exemption exists for debts arising before acquisition of the homestead. Id. Therefore, a judicial lien arising from preacquisition debt does not impair an exemption to which Debtor would otherwise be entitled. Debtor may not utilize § 522(f)(1) to avoid a lien based on preacquisition debt. Id. The Court considers this ruling to be the law of the case on these issues.

The judgments for attorney fees arose on January 19, 1991 and August 27, 1991, prior to the acquisition of Debtor's homestead. If Attorney Olinger held a judicial lien arising from those judgments, Debtor could not avoid the lien under § 522(f)(1) pursuant to Shanahan I. Liens arising from debts which existed prior to acquisition of homestead property cannot be avoided because they do not impair an exemption to which Debtor would otherwise be entitled.

Olinger argues that Debtor's motion to avoid lien should be denied because the judgments for attorney fees are nondischargeable pursuant to § 523(a)(5). That statute excepts from discharge debts to a former spouse which are in the nature of alimony, maintenance or support. It is true that § 522(c)(1) allows debts of the kind specified in § 523(a)(5) to reach exempt property. In re Sullivan, 83 B.R. 623, 624 (Bankr. S.D. Iowa 1988). Courts have held that judicial liens based on debts determined to be nondischargeable under § 523(a)(5) will not be avoided by § 522(f)(1). In re DeCosmo, 163 B.R. 227, 228 (Bankr. W.D.N.Y. 1994). If a dissolution judgment is for support, it is excepted from discharge and the accompanying lien will not be avoided. In re Stebbens, 105 B.R. 118, 119 (S.D. Fla. 1989).

However, as Sullivan notes, the Court cannot determine whether a debt is in the nature of support in response to a motion to avoid liens. Sullivan, 83 B.R. at 624. A party must file an adversary proceeding in order for the Court to determine the dischargeability of a debt under § 523(a). Fed. R. Bankr. P. 7001(6). Without a determination by adversary proceeding or agreement of the parties as to dischargeability of a debt as support, the Court cannot rule on whether § 522(c)(1) applies as an exception to a debtor's right to claim his homestead exempt from judicial liens under § 522(f)(1).

In summary, the Court concludes that no judicial lien exists in favor of Attorney William Olinger by virtue of the judgments for attorney fees entered in Debtor's dissolution proceedings. Even if Attorney Olinger had an interest in the judgments, such judgments existed prior to the acquisition of Debtor's homestead. As such, the judicial liens could not be avoided because preacquisition debt does not impair Debtor's exemptions.

Furthermore, in order for a party to rely on § 522(c)(1), a determination of nondischargeability must first be made by adversary proceeding or by agreement of the parties.

WHEREFORE, Debtor's Motion to Avoid Judicial Lien is DENIED.

SO ORDERED this 24th day of February, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge

1. Because this case was filed prior to October 22, 1994, the Court applies § 522(f)(1) as it existed prior to changes arising from the Bankruptcy Reform Act of 1994.