UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. MB 01-006

IN RE: LORENE A. BARRASSO,
Debtor

LORENE A. BARRASSO,
Appellant

v.

SUSAN D. STAMPS AND ARNOLD & KANGAS, P.C.,

Appellees

Appeal from the United States Bankruptcy Court
for the Eastern District of Massachusetts
(Hon. William C.Hillman, U.S. Bankruptcy Judge)

Before
DE JESÚS, VAUGHN, CARLO, U.S. Bankruptcy Judges

Lorene Barrasso, *Pro Se*.

October 12, 2001

PER CURIAM.

Based on agreed facts, the bankruptcy court ruled that a state court judgment awarding guardian *ad litem* fees was a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(5), and denied actual and punitive damages caused by the guardian's violation of the automatic stay. Aggrieved by this decision, Ms. Barrasso ("Barrasso") appeals, claiming the bankruptcy court erred when it ruled without granting her a full and fair hearing. For the reasons set forth below, we affirm the bankruptcy court's legal conclusion on the non-dischargeability of the debt, but reverse its order denying section 362(h) relief, remanding the matter for a hearing on determination of damages.

Background

The Massachusetts state probate court appointed Susan S. Stamps ("Stamps") guardian *ad litem* in a post divorce child custody dispute.[1] The copy of the "Amended Judgment on Complaint for Modification" on record shows that the Court held Stamps' fees were to be paid by Barrasso and her former spouse.[2] Barrasso appealed

[1] See Exhibit A of the Complaint, the "Amended Judgment on Complaint for Modification". (Appellant's App., p. 10)

[2] The Plaintiff shall be responsible for her share of the outstanding balance of the Guardian-ad-Litem bill, which totals $4,075.69 (after a deduction of the $1,500.00 payment for her share of the retainer fee). The Defendant shall be responsible for his share of the balance in the amount of $2,975.69 (after a deduction of the $1,500.00 payment for his share of the retainer fee and a deduction of $1,100.00 for an additional payment

and the matter is apparently pending before the state appellate courts. Although Stamps knew of Barrasso's bankruptcy under Chapter 7, she sent her two, or three invoices. She then filed an adversary proceeding to determine that her fees were not dischargeable.

Barrasso counterclaimed, alleging Stamps violated the automatic stay and requested actual and punitive damages, including costs and attorney's fees.

The bankruptcy court scheduled the proceeding for a trial. Before beginning the trial, the bankruptcy judge granted counsels' request for a "lobby conference" (in chambers). We have no record of matters discussed in chambers. We do know that the parties agreed to the facts described above, and these were recited for the record with the participation of counsel. (Tr. hr'g of October 4, 2000, at pp. 2-5.)

The bankruptcy court framed the issue of dischargeability as follows:

> I just determine...whether we are dealing with dischargeable debt or non dischargeable debt.
>
> Now there are two possibilities. One is that on appeal it will be found the award of fees in 1999 was appropriate. On the other hand, it may be held that it was not appropriate. That's not my issue. My issue is if there is any money payable--if there is--is that a dischargeable debt? (Tr. hr'g October 4, 2000, at p. 5)

---

made). (Appellant's App., p. 11)

The court then cited relevant case law in this circuit stating all the opinions held that guardian *ad litem's* fees in divorce proceedings are not dischargeable, therefore, ruling as follows:

> Given all of that local authority to the effect that these debts are not dischargeable, I hold that the guardian *ad litem* fees to the extent properly awarded by the Probate Court are not dischargeable. (Tr. hr'g October 4, 2000, at p.6., lines 21-24.)

The court then considered the controversy surrounding the counterclaim, stating:

> Now then we have the counterclaim for the sending of bills after the automatic stay issued in this Chapter 7 case. The automatic stay being what it is, of course those are automatic stay violations, but that isn't enough for me to go forward and award money damages because the mere sending of a bill in my opinion does not support a claim for damages, and I will find for the plaintiff on the counterclaim. (Tr. hr'g October 4, 2000, at p.6, line 25; p.7, lines 1-6.)

When Appellant's counsel claimed his client was scheduled for a trial and demanded an opportunity for her to testify on damages resulting from the violation of the automatic stay, the court denied her request, stating:

> I don't think that is appropriate, Mr. Satin, I see no reason to keep this matter going. I've made my decision. Court is in recess. (Tr. hr'g October 4, 2000, at p.7, lines 24-25; p.8, lines 1-2.)

Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 158(a) and (c).

Standard of Review

We review the bankruptcy court's conclusion on the guardian *ad*

litem fees *de novo* and for abuse of discretion. *Neal Mitchell Associates v. Braunstein (In re Lambeth Corporation)*, 227 B.R. 1, 6 n.9 (1st Cir. BAP 1998). The bankruptcy court's refusal to hear testimony before denying damages under section 362(h) was a discretionary ruling, which requires us to determine whether the court abused its discretion. *In re Soares*, 107 F.3d 969, 973 n.4 (1st Cir. 1997); *Perry v. Warner (In re Warner)*, 247 B.R. 24, 25 (1st Cir. B.A.P. 2000) (*quoting Independent Oil & Chem. Workers of Quincy, Inc. v. Proctor & Gamble Mfg., Co.*, 864 F.2d 927, 929 (1st Cir. 1988)).

Discussion

Barrasso argues the bankruptcy court failed when it did not reexamine the factual and legal bases for the state court's ruling awarding the guardian *ad litem's* fees, and ruled such fees were an exception to the order of discharge under 11 U.S.C. § 523(a)(5), without affording her an opportunity to present evidence on the quality of the guardian's services, the reasonableness and amount of these fees.

The record shows Barrasso was satisfied with the agreed findings which the bankruptcy judge recited for the record to uphold this portion of his decision. The record also shows she did not request to be heard on this issue. Hence, she may have waived this argument. However, if her argument is viewed as a denial of due process, it may be raised at any time, so we think it

is proper to address the merits of her claim.

Barrasso argues she would have testified as to the inadequacy of the guardian's services, the unreasonableness of her fees and that the State probate court erred when it ordered the spouses, instead of the State, to pay these fees. Appellant's argument misconstrues the role of the bankruptcy court when it determines a debt is not dischargeable under section 523(a)(5). As stated in *In re Stacey*, "the issue before the Court is not the quality of the guardian *ad litem* services, the reasonableness of the fees, or the exact amount owed. The sole and narrow issue before the Court is the non-dischargeability of the fees under 11 U.S.C. § 523(a)."[3] In that case the court continues,

> [a]lthough exceptions to discharge are to be construed narrowly so that interference with the debtor's fresh start is minimized, the 'nature of support' language of 11 U.S.C. § 523(a)(B)(5) should be interpreted broadly in the light of the countervailing policy consideration of the needs and financial stability of the family of the bankrupt spouse. [cit. omitted] In making its determination, the Court must look at the character and the substance of the guardians' responsibilities to determine if the duties are, in fact, 'in the nature of support' and therefore within the scope of 11 U.S.C. § 523(a)(5). The character of an obligation is a question of federal law although state law is relevant to the determination. [4]

Under Massachusetts law a guardian *ad litem* is appointed as a

---

[3] 164 B.R. 210, 211 (Bankr. N.H. 1994). See *In re Sinewitz*, 166 B.R. 786, 788 (Bankr. 1994); *In re Tremblay*, 162 B.R. 60 (Bankr. Me. 1993); *In re Whitney*, 2001 WL 867012 (1st Cir. B.A.P. 2001).

[4] 164 B.R. at 211.

party in a divorce proceeding to "investigate the facts of any proceeding pending in said court relating to or involving questions of care, custody or maintenance of minor children." Mass Gen. Laws c. 215 § 56A.

This report is used by the court "in arriving at a just resolution in custody cases. There is no question that court-appointed investigators can help a judge determine what is in the best interest of a child," when the parents are embroiled in a custody dispute. *Gilmore v. Gilmore*, 369 Mass. 598, 607, 341 N.E.2d 655, 658 (1976). The guardian's role is to act as an advocate for the child and as an impartial court official, subject to the scrutiny of cross examination. *Cf*. *Gilmore* at 607. Hence, to fulfill the role set by Massachusetts law, the guardian *ad litem* must represent the best interest of the child throughout the proceeding. While it is true the cited statute speaks to the State paying the guardian's fees, the bankruptcy court's ruling was carefully crafted, referring only "to any money payable", thus leaving the question of amount and designated payee to be resolved by the appeal pending in the State court. Finally, "[a]lthough the monies are not paid to the child, they are paid to a third party strictly for the benefit of the child. It is the type of moral and legal obligation parents would normally provide their offspring." *Stacey* at 212. Accordingly, the bankruptcy court correctly narrowed the issue before it, setting aside matters concerning the

quality, reasonableness and exact amount of the guardian's fees, and focusing on the character and substance of guardian's duties set by Massachusetts' laws when it ruled. The bankruptcy court did not need Barrasso's proffered testimony in order to afford Appellant due process before ruling.

Constrained by the recent opinions of *In re Rijos*, 263 B.R. 382, (1st Cir. B.A.P. 2001) and *In re Meléndez Colón*, BAP No. PR 00-092 (1st Cir. B.A.P., August 21, 2001), we cannot endorse the bankruptcy court's denial of Barraso's request to be heard before refusing her petition for section 362(h) relief. We remand so that she may be heard before the bankruptcy court adjudicates her claim for damages resulting from Stamp's violation of the automatic stay.