

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

11 U.S.C. § 507(a) (7)  
Support

In Re Lutzke

Case # 697-64902-aer13

6/19/98

Published AER

Creditor (ex-husband) overpaid child support. Debtor then filed Chapter 13. Creditor filed a claim for the overpayment as priority under § 507(a) (7) arguing it should retain the same character as when he originally paid the sums to the Debtor. Debtor objected to the claimed priority status.

Held: Objection sustained. None of the factors used in this Circuit to determine whether a debt is actually in the nature of support weighed in Creditor's favor. Neither did § 507(a) (7)'s legislative history. The claim was allowed as a general unsecured claim.

E98-7(7)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
          ) 697-64902-aer13  
PENNY L. LUTZKE, )  
                                  ) MEMORANDUM OPINION  
                                  )  
                                  ) Debtor. )

---

This matter came before the court on the debtor's objection to the claim of James Haas (creditor). After a hearing where argument was heard, the matter was submitted.

BACKGROUND

On August 26, 1997, debtor filed her petition for relief herein pursuant to Chapter 13 of the Bankruptcy Code. On October 29, 1997, creditor filed his proof of claim in the amount of \$3,629.54. The creditor claims that his debt is entitled to priority status as a child support obligation. Debtor has objected to the creditor's proof of claim conceding it should be allowed as a non-priority unsecured claim in the amount stated by creditor but objecting to any treatment of the claim as a priority debt. The material facts are undisputed. Creditor is the debtor's ex-husband,

1 who, pursuant to a pre-petition decree of dissolution and consequent  
2 modified decree, owed child support to the debtor for the benefit of  
3 their two children. Before the petition was filed, creditor  
4 overpaid the amounts specified as support in the amount of  
5 \$3,629.54. No order exists which obligates the debtor to pay  
6 creditor child support.

#### 7 ISSUE

8 The sole issue before the court is whether creditor's claim  
9 deriving from an overpayment of child support is a "priority" claim  
10 under 11 U.S.C. § 507(a) (7).<sup>1</sup>

#### 11 DISCUSSION

12 Section 507(a) (7) provides a seventh priority claim for:

13 ... allowed claims for debts to a spouse, former spouse, or  
14 child of the debtor, for alimony to, maintenance for, or  
15 support of such spouse or child, in connection with a  
16 separation agreement, divorce decree or other order of a  
17 court of record, determination made in accordance with State  
18 or territorial law by a governmental unit, or property  
19 settlement agreement, but not to the extent that such debt-

- 20
- 21 (A) is assigned to another entity, voluntarily, by operation  
22 of Law, or otherwise; or
  - 23 (B) includes a liability designated as alimony,  
24 maintenance, or support, unless such  
25 liability is actually in the nature of  
26 alimony, maintenance or support.

21 The creditor contends that since his claim arises from an  
22 overpayment of child support, the consequent debt owing to him  
23 should retain its character as child support and the statutory  
24 priority accorded thereto. This "overpayment" issue appears to be a

---

25 <sup>1</sup> Unless otherwise noted, all subsequent statutory references  
26 are to Title 11 of the United States Code.

1 matter of first impression in this district. The closest analogous  
2 case, In re Bryer, \_\_\_\_ B.R. \_\_\_\_, 1998 WL 9553 (Bankr. E.D. Pa.  
3 1998) involved an ex-husband who voluntarily paid mortgage payments  
4 on his former marital home to protect his credit rating while his  
5 ex-wife was living there. The ex-wife subsequently petitioned for  
6 an increase in monthly child support payments. The parties agreed  
7 to an increase but with a monthly credit for the mortgage payments  
8 husband made, an order consistent with the agreement was entered.  
9 The wife then filed Chapter 13 and the husband claimed the credits  
10 as a priority child support debt pursuant to § 507(a)(7). In  
11 determining that the credits were not "actually in the nature of  
12 support", the court applied the third Circuit's<sup>2</sup> test used to  
13 determine if this same requirement had been met in § 523(a)(5).<sup>3</sup>

---

14  
15 <sup>2</sup>See, In re Gianakas, 917 F.2d 759 (3rd Cir. 1990).

16 <sup>3</sup> 11 U.S.C. § 523(a)(5) provides:

17 (a) A discharge under section 727, 1141, 1228(a),  
18 1228(b), or 1328(b) of this title does not discharge an  
individual debtor from any debt-

19 (5) to a spouse, former spouse, or child of the  
20 debtor, for alimony to, maintenance for, or support  
21 of such spouse or child, in connection with a  
22 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,  
23 but not to the extent that -

24 (A) such debt is assigned to another entity,  
voluntarily, by operation of law, or otherwise  
25 (other than debts assigned pursuant to section  
402(a)(26) of the Social Security Act, or any  
26 such debt which has been assigned to the Federal  
(continued...)

1 The court reviewed the language and substance of the agreement and  
2 the order involving the credits, the parties' relative financial  
3 circumstances at the time the credits were ordered, and the function  
4 served by the obligation.

5 These are similar to the factors used in the Ninth Circuit  
6 to ascertain whether an obligation is actually in the nature of  
7 support under § 523(a) (5). See, In Re Gibson, 103 B.R. 218 (9th  
8 Cir. BAP 1989) and In Re Gionis, 170 B.R. 675 (9th Cir. BAP 1994)  
9 aff'd, 92 F.3d 1192 (9th Cir. 1996).

10 The Ninth Circuit Bankruptcy Appellate Panel has held that  
11 the same factors are applied to determine whether or not a debt is a  
12 priority support debt pursuant to § 507(a) (7) or a nondischargeable  
13 support debt pursuant to § 523(a) (5), at least insofar as  
14 determining whether or not the debt is actually in the nature of  
15 support. In re Chang, 210 B.R. 578 (9th Cir. BAP 1997), see also,  
16 § 101(12A) which defines "debt for child support" as "a debt of a  
17 kind specified in § 523(a) (5) of this title for maintenance or  
18 support of a child of the debtor."

19  
20  
21 \_\_\_\_\_  
22 <sup>3</sup>(...continued)

Government or to a State or any political  
subdivision of such State); or

(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;

1           Here, assuming the overpayment is "in connection with" the  
2 divorce decree, as required by § 507(a)(7), creditor merely argues  
3 in a conclusory fashion that the overpayment debt should retain the  
4 same character as when he originally paid the sums to the debtor.  
5 He has stipulated, however, that the debtor is under no obligation  
6 to pay him support. As with the husband in Bryer, supra, he makes  
7 no argument that the amount overpaid is necessary either for his or  
8 his children's support. "Need" is an important factor in  
9 determining whether a debt is actually in the nature of support.  
10 See, Gionis, supra. Creditor does not argue any income disparity in  
11 debtor's favor at the time the over payments were made, nor does the  
12 record support such a finding. The record does not show that any  
13 minor children were living with the creditor when he made the  
14 payments. Disparity of income and the presence of minor children  
15 are factors in determining "need". Gionis, supra.

16           Further, while determining what is "support" under  
17 § 507(a)(7) is a matter of federal law, state law may be  
18 instructive. See, Gibson, supra where the court noted that courts  
19 can look to state law for guidance in determining whether an  
20 obligation is actually in the nature of alimony, maintenance, or  
21 support for § 523(a)(5) purposes. Oregon law would not consider  
22 creditor's overpayment claim to be "child support". Support  
23 obligations are for the benefit of the dependent child, not the  
24 parent. State ex rel Juvenile court of State of Louisiana v.  
25 McIntyre, 97 Or.App. 56, 775 P.2d 329 (1989). See also, ORS  
26 107.106(1)(b) which, when this case was filed, required that support

1 orders be accompanied by the following statement: "Oregon law  
2 recognizes that child support and visitation terms are designed for  
3 the child's benefit." <sup>4</sup>

4 Finally, the creditor's argument finds no aid in  
5 § 507(a)(7)'s legislative history. The section was added by  
6 § 304(c) of the Bankruptcy Reform Act of 1994, Pub.L. 103-394  
7 (October 1994) and became effective for all cases commenced after  
8 October 22, 1994.<sup>5</sup> As the Floor Statements placed in the  
9 Congressional Record provide in pertinent part: Section 304:

---

11 <sup>4</sup>This text was revised slightly effective October 4, 1997 to  
12 provide: "[t]he terms of child support and parenting time  
(visitation) are designed for the child's benefit and not the  
13 parent's benefit."

13 See also, OAR 461-195-001(28) defining:

14 "Support" as "cash payments or other benefits that a  
15 person has been ordered by a court or by administrative process, or  
has voluntarily agreed, to provide for the benefit and maintenance  
of another person";

16 "Child Support" as "payments that an obligor has been  
ordered (or has agreed) to pay for the benefit of a child; and

17 "spousal support" as "payments that an obligor has been  
ordered (or has agreed) to pay for the benefit of a current or  
former spouse.

18 "Obligor" is defined under OAR 461-195-001(23) as "any person  
19 who is required (or has agreed) to pay child support, spousal  
support, alimony and/or medical support under an administrative  
20 process order, court order, or voluntary agreement. The obligor is  
usually the absent non-custodial parent of the beneficiary children  
under a support order. "

21 Under these definitions, creditor's claim would not be  
22 considered spousal or child support.

23 <sup>5</sup> Along with § 507(a)(7), several other sections protecting  
24 marital obligations were added (e.g. § 523(A)(15) (excepting certain  
marital obligations from discharge); § 522(f)(1)(A) (protecting  
25 judicial liens that secure support obligations from avoidance);  
§ 362(b)(2)(A) (excepting the establishment or modification of  
26 support from the automatic stay); and § 547(c)(7) (protecting support  
payments from avoidance as preferential transfers).

1 . . .is intended to provide greater protection for alimony,  
2 maintenance and support obligations owing to a spouse, former  
3 spouse, or child of a debtor in bankruptcy...  
Subsection (c) provides a new bankruptcy priority relating to  
debts for alimony, maintenance or support obligations.

4 140 Cong.Rec.H. 10,764 et. Seq. (Daily ed. October 4, 1994). These  
5 comments make it clear that only "support" debt is included within  
6 the ambit of § 507(a) (7).

7 CONCLUSION

8 Section 507(a) (7) was enacted to provide additional  
9 protection for creditors and their dependents, in need of support.  
10 The debtor's objection should be sustained. Creditor's claim should  
11 be allowed in the amount of \$3,629.54 as a general unsecured claim.  
12 A separate order consistent herewith shall be entered. This opinion  
13 constitutes the court's findings of fact and conclusions of law  
14 pursuant to FRBP 7052. They shall not be separately stated.

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

ALBERT E. RADCLIFFE  
Bankruptcy Judge