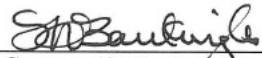




**SO ORDERED.**

**SIGNED this 21st day of August, 2018**

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.  
PLEASE SEE DOCKET FOR ENTRY DATE.**

  
Suzanne H. Bauknicht  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

ANDREW HENSLEY  
aka ANDREW SCOTT HENSLEY  
aka ANDY HENSLEY  
aka SCOTT HENSLEY  
aka ANDY S. HENSLEY  
aka ANDREW HENSLEY

Case No. 3:17-bk-32350-SHB  
Chapter 13

Debtor

**MEMORANDUM AND ORDER ON  
DEBTOR'S OBJECTION TO PROOF OF CLAIM  
FILED BY JAMIE L. HERMAN (#9)**

This contested matter is before the Court on Debtor's Objection to Proof of Claim Filed by Jamie L. Herman (#9) ("Objection to Claim"), filed by Debtor on January 29, 2018 [Doc. 29], objecting to creditor Jamie L. Herman's claim [Claim 9-1] that attorney's fees owed to her are a priority domestic support obligation, and Ms. Herman's response filed on February 23, 2018 [Doc. 31]. This is a core proceeding pursuant to 11 U.S.C. § 157(b)(2)(A) and (O).

On July 28, 2017, Debtor filed the Voluntary Petition commencing this Chapter 13 bankruptcy case. Ms. Herman filed a Proof of Claim on December 4, 2017 [Claim 9-1], for attorney's fees awarded to her by the Washington County Circuit Court for representation of Samantha Fry in her divorce proceeding against Debtor in 2013, as reflected in the parties' Decree of Divorce ("Divorce Decree") entered on April 19, 2013. Specifically, the Divorce Decree ordered "that Defendant shall pay Plaintiff's attorney fees in the amount of two thousand and five hundred (\$2,500.00) directly to attorney Jamie L. Herman, at 409 Watauga Avenue, Johnson City, Tennessee 37604 within sixty days from the entry of this [Divorce] Decree." [Claim 9-1-1.]

Debtor filed the Objection to Claim on January 29, 2018, arguing that the attorney's fees owed to Ms. Herman are not a domestic support obligation, do not provide her with a priority claim, and will be discharged if Debtor completes his Chapter 13 plan. Ms. Herman filed Creditor's Response to Debtor's Objection to Claim on February 23, 2018 [Doc. 31], arguing that the attorney's fees awarded through the divorce case constitute alimony *in solido* and are a non-dischargeable domestic support obligation. Debtor filed a reply, alleging that Ms. Herman misrepresented the holding in *Gonsewski v. Gonsewski*, 350 S.W.3d 99 (Tenn. 2011), and arguing that the divorce court must indicate that an award of attorney's fees is intended to be alimony and the Divorce Decree contains nothing indicating that any moneys awarded are spousal support. [Doc. 32.] Following a hearing on the Objection to Claim, Ms. Herman filed a brief, claiming that she was in agreement with the holding in *Gonsewski*, and although the spouse was denied attorney's fees in that case, the statutory analysis supports her argument that when a court awards attorney's fees, the award is intended as alimony. [Doc. 35.]

Debtor's argument has three elements. First, the attorney's fees owed to Ms. Herman are not a domestic support obligation because payment of attorney's fee is not a payment in the nature of alimony, maintenance, or support of a spouse as defined under 11 U.S.C. § 101(14A). Second, because the Divorce Decree does not mention alimony, spousal support, or child support, the attorney's fee is a debt incurred in the course of divorce under 11 U.S.C. § 523(a)(15). Third, debts falling under 11 U.S.C. § 523(a)(15) do not give the ex-spouse creditor a priority claim and are discharged under § 1328(a) once a debtor completes a chapter 13 plan. [Doc. 29.]

The Code is clear that domestic support obligations are non-dischargeable under a Chapter 13 plan. *See Garner v. Garner (In re Garner)*, 520 B.R. 683, 689 (Bankr. E.D. Tenn. 2014). The Bankruptcy Code defines "domestic support obligation" as:

debt that accrues before, on, or after the date of the order for relief . . . owed to . . . a spouse, former spouse, . . . or a governmental unit . . . in the nature of alimony, maintenance, or support of such spouse [or] former spouse, . . . without regard to whether such debt is expressly so designated, [that is] established . . . by . . . a separation agreement, divorce decree, or property settlement agreement [or] an order of a court of record . . . .

11 U.S.C. § 101(14A). This Court has determined that the award to Debtor's ex-wife was not "intended to be anything other than repayment of money that she had loaned to him." [Doc. 40.] Even though the underlying award was not a domestic support obligation, the inquiry does not end as to the nature of the attorney's fee award. Under Tennessee law, attorney's fees in a divorce case generally are considered to be in the nature of support and, therefore, nondischargeable. *See In re Rogers*, No. 05-36084, 2008 WL 1740248, at \*8 (Bankr. E.D. Tenn. 2008) (citing *Macy v. Macy*, 114 F.3d 1, 2-3 (1st Cir. 1997)).

Tennessee law authorizes the award of attorneys' fees related to a divorce in only two instances. First, Tennessee Code Annotated section 36-5-103(c) authorizes an award of attorneys' fees

incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both up on the original divorce hearing and at any subsequent hearing . . . .

Because the Divorce Decree not include any express alimony, child support, or custody determination, the attorney's fee clearly was not awarded under section 36-5-103(c). The other statutory authority for an award of attorneys' fees is found at Tennessee Code Annotated section 36-5-121(d)(5), which provides that "[a]limony in solido may be awarded in lieu of or in addition to any other alimony award, in order to provide support, including attorney fees, where appropriate." *See also Scherzer v. Scherzer*, No. M2017-00635-COA-R3-CV, 2018 WL 2371749, at \*23 (Tenn. Ct. App. May 24, 2018) ("Tennessee Code Annotated § 36-5-121 authorizes an award of attorney fees in a divorce in only two instances. First, pending a final hearing, the court may award attorney fees 'to enable . . . [a] spouse to prosecute or defend the suit of the parties.' *Id.* § 36-5-121(b). Second, the court may award attorney fees as alimony in solido 'calculable on the date the [divorce] decree is entered.' *Id.* § 36-5-121(d)(5), (h)(1); *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 108 (Tenn. 2011) ("The total amount of alimony in solido is set on the date of the divorce decree . . . ."); *cf. Watts v. Watts*, 519 S.W.3d 572, 581 (Tenn. Ct. App. 2016) ("There is no statute in this State requiring the losing party to pay the prevailing party's attorney's fees in a case such as this."). Indeed, Tennessee courts have held that an award of attorney's fees is improper when a plaintiff-wife is financially able to pay her own attorney. *See Duncan v. Duncan*, 652 S.W.2d 913 (Tenn. Ct. App. 1983) (holding that an

attorney's fee award of \$750.00 was improper because the plaintiff was financially able to pay her own attorney).

Because the Divorce Decree is a final judgment, this Court will presume that the state court correctly applied the law to the facts. Given that state law does not authorize the award of attorney's fees under the facts of this case except by the divorce court's finding that fees should be awarded as "[a]limony in solido . . . in lieu of . . . any other alimony award," Tenn. Code Ann. § 36-5-121(d)(5), this Court must find that the fees awarded constitute a nondischargeable domestic support obligation under bankruptcy law.

Both Ms. Herman and Debtor cite to *Gonsewski v. Gonsewski*, 350 S.W.3d 99 (Tenn. 2011), in which the Tennessee Supreme Court ruled that an award of attorney's fees as alimony in solido was unwarranted when the wife was financially able to obtain counsel without an award of fees. The court's explanation of fee awards supports Ms. Herman's position here:

Such awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, *see Houghland v. Houghland*, 844 S.W.2d 619, 623 (Tenn. Ct. App. 1992), or the spouse would be required to deplete his or her resources in order to pay them, *see Harwell v. Harwell*, 612 S.W.2d 182, 185 (Tenn. Ct. App. 1980). Thus, where the spouse seeking such an award has demonstrated that he or she is financially unable to procure counsel, and where the other spouse has the ability to pay, the court may properly grant an award of attorney's fees as alimony. *See id.* at 185.

*Id.* at 113.

Nor does it change the character of the fee award as support because it was directed to be paid to a third party. *See Gonsewski*, 350 S.W.3d at 108; *In re Rogers*, 2008 WL 1740248, at \*1, \*8-9. Tennessee state courts commonly award attorney's fees directly to attorneys in divorce proceedings. *In re Rogers*, 2008 WL 1740248, at \*9. Altogether, the award of attorney's fees in the Divorce Decree "quacks like support." *In re Rogers*, 2008 WL 1740248, at \*7 (quoting *Sorah v. Sorah* (*In re Sorah*), 163 F.3d 397, 401 (6th Cir. 1998)).

Here, the Divorce Decree ordered Debtor to pay his ex-wife's attorney's fees to Ms. Herman in the amount \$2,500.00. Ms. Herman's claim, however, seeks \$7,511.00, and she gives no explanation for the discrepancy of the dollar amount in her proof of claim compared with the fees awarded by the Divorce Decree. Indeed, the proof of claim expressly states that the amount does not include interest. [Claim 9-1.] Accordingly, the Court will limit the amount of the proof of claim to the \$2,500.00 the trial court awarded.

Based on the foregoing, the Court directs the following:

1. Because the Court finds that Ms. Herman's claim is for a debt that is a domestic support obligation, Debtor's Objection to Proof of Claim Filed by Jamie Herman (#9) [Doc. 29] is OVERRULED.

2. Ms. Herman's Proof of Claim [Claim #9] is allowed as an unsecured priority claim in the amount of \$2,500.00 and shall be paid in accordance with Paragraph 4.c) of Debtor's Confirmed Chapter 13 Plan.

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