

No. 06-20879

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

In the Matter of: TERESA LAUDERDALE,

Debtor,

TERESA LAUDERDALE,

Appellant,

v.

IMOGEN S. PAPADOPOULOS,

Appellee.

On Appeal from the United States District Court for
the Southern District of Texas, No. 4:06-CV-2284

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument. The appeal warrants oral argument because affirming the decision below would create a circuit split with the Tenth Circuit.

Oral argument is appropriate for the additional reason that this appeal involves a significant legal issue: whether a custodial parent's debt for a guardian *ad litem*'s fees is exempt from discharge in bankruptcy under the statutory exception for debts "to" the debtor's children "for alimony, maintenance, or support." 11 U.S.C. § 523(a)(5) (2004). Not discharging the debt would effectively require the custodial parent to surrender the child-support payments that she receives for the benefit of her children to the guardian *ad litem*, thus frustrating both the purpose of the discharge exception—to protect the children—and the fresh start policy of the Bankruptcy Code. The parties' familiarity with this area of law should aid the Court in resolving any questions it may have about what analysis should apply to custodial parent debtors.

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JURISDICTIONAL STATEMENT

The bankruptcy court had subject-matter jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157(b)(1) and 1334(b) because this is a “core proceeding” arising under Title 11 to determine the dischargeability of a debt. The bankruptcy court issued its final order in the adversary proceeding on June 20, 2006. Because the defendant-appellant filed a notice of appeal on June 30, 2006—within the 10-day limit contained in the version of Bankruptcy Rule 8002 then in effect—the district court had appellate jurisdiction under 28 U.S.C. § 158(a)(1).

The district court issued its final order affirming the bankruptcy court on September 13, 2006. The defendant-appellant filed a notice of appeal on October 12, 2006, which is within the 30-day limit of Federal Rule of Appellate Procedure 4(a)(1)(A); *see also* FED. R. APP. P. 6(b)(1). This Court therefore has appellate jurisdiction under 28 U.S.C. §§ 158(d) and 1291.

ISSUE PRESENTED FOR REVIEW

The issue in this appeal is whether a custodial parent’s debt to the guardian *ad litem* for her children in her divorce proceedings is exempted from discharge in bankruptcy as a debt to a “child of the debtor” for “support of such * * * child” under 11 U.S.C. § 523(a)(5) (2004).

STATEMENT OF THE CASE

On October 14, 2005, appellant Teresa Lauderdale filed a bankruptcy peti-

tion under Chapter 7. RE 8. One of the debts that she sought to have discharged arose from her earlier divorce, in which she was ordered to pay part of the fee of her children's guardian *ad litem*, appellee Imogen Papadopoulos. *Id.* at 64–65. On January 31, 2006, Papadopoulos began an adversary proceeding against Lauderdale in the bankruptcy court, contending that Lauderdale's debt to her was exempted from discharge by the then-current version of 11 U.S.C. § 523(a)(5) (2004).¹ *Id.* at 14.

On June 20, 2006, the bankruptcy court granted summary judgment to Papadopoulos, holding that the debt was exempted from discharge by Section 523(a)(5). *Id.* at 21–25. The bankruptcy court thereafter granted Lauderdale a discharge of her other debts on June 28, 2006. Final Decree, *In re Lauderdale*, No. 05-92128 (Bankr. S.D. Tex. June 28, 2006).

Lauderdale, who had proceeded *pro se* in the bankruptcy court's adversary proceeding, pursued an unsuccessful *pro se* appeal of that court's ruling in the United States District Court for the Southern District of Texas. RE 18. After filing a notice of appeal to this Court, Lauderdale obtained *pro bono* counsel.

¹ Lauderdale commenced her bankruptcy before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, PUB. L. NO. 109-8, 119 STAT. 23 (2005), which amended 11 U.S.C. § 523(a)(5).

STATEMENT OF THE FACTS

Lauderdale obtained a final decree of divorce from her ex-husband, Sami Kabbani, from a Texas state court on August 16, 2002. RE 27. That decree also resolved the custody of Lauderdale's and Kabbani's two young daughters, for whom the court had appointed Papadopoulos as guardian *ad litem*. *Id.* The court designated Lauderdale to be the "sole managing conservator"—*i.e.*, the custodial parent. *Id.* at 30. Kabbani, as the "possessory conservator," received the right to visitation, with all visits to be supervised by an armed guard. *Id.* at 30–35.²

In the decree, the court awarded Lauderdale exclusive control of "any custodial accounts * * * held by the parties for the parties' children" (*id.* at 34), and directed Kabbani to maintain health insurance for the children and to pay Lauderdale "child support of \$1,500 per month" (*id.* at 41, 44). Lauderdale was directed to pay the first \$750 per month of the cost of the armed guard, with Kabbani to pay the remainder. *Id.* at 35.

At the conclusion of the decree, after the division of the marital property and debts (*id.* at 56–61), the court addressed Papadopoulos's fees. The court found that Papadopoulos has "satisfactorily performed her duties and obligations as Guar-

² If certain conditions are met, however, such as the use of a tracking device on the children during visitation periods, the court indicated that it might revisit the armed-guard requirement. RE 38.

dian/Attorney Ad Litem” and “ha[d] incurred as necessaries the Court-approved sum of \$48,758.88 in reasonable and necessary Guardian/Attorney Ad Litem fees and expenses during the pendency of this case.” *Id.* at 62–63. Because the parties had already paid \$22,000 of this amount, the court ordered them each to pay, in identical terms, half of the remaining balance (*i.e.*, \$13,379.44) “as additional child support for the safety and welfare of the children * * * on or before September 16, 2002.” *Id.* at 63 (Kabbani); *id.* at 64 (Lauderdale).

Three years later, on October 14, 2005, Lauderdale filed a petition for bankruptcy under Chapter 7. *Id.* at 8, 21. At that time, the unpaid balance on Lauderdale’s debt to Papadopoulos was \$12,529.44, not including interest. *Id.* at 22. Papadopoulos commenced an adversary proceeding to obtain a determination that Lauderdale’s debt to her was exempted from discharge by the then-current version of 11 U.S.C. § 523(a)(5) (2004). RE 22. Lauderdale filed a cross motion for summary judgment, contending that the debt did not constitute “support” under Section 523(a)(5) because she is the custodial parent. *Id.*

On June 20, 2006, the bankruptcy court granted summary judgment to Papadopoulos, holding that Section 523(a)(5) exempted the debt from discharge. *Id.* at 25–26. The court held that the debt did constitute “support” under Section 523(a)(5) because it was incurred “for the benefit and support of [Lauderdale]’s minor children.” *Id.* at 25. The court also explained that Lauderdale’s contrary in-

terpretation of Section 523(a)(5) had been rejected in *In re Dvorak* (*Dvorak v. Carlson*), 986 F.2d 940 (5th Cir. 1993). RE 24–25.³

Lauderdale, who had proceeded *pro se* in the bankruptcy court’s adversary proceeding, appealed *pro se* to the United States District Court for the Southern District of Texas. *Id.* at 18. The district court affirmed, holding that Lauderdale’s contention that her debt to Papadopoulos was “not in the nature of * * * support” under Section 523(a)(5) was “foreclosed” by *Dvorak*. *Id.* at 10.

STANDARD OF REVIEW

In bankruptcy appeals, this Court “review[s] the district court’s decisions by the same standards [that court] applied to the decisions of the bankruptcy court.” *In re Whitaker Constr. Co. (Fidelity & Deposit Co. v. FitzGerald Contractors, Inc.)*, 439 F.3d 212, 216 (5th Cir. 2006). A grant of summary judgment is reviewed *de novo*. *High v. E-Sys. Inc.*, 459 F.3d 573, 576 (5th Cir. 2006). “Summary judgment is only appropriate if * * * there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Id.*

³ Lauderdale had also argued that Section 523(a)(5) did not exempt her debt to Papadopoulos from discharge for the independent reason that the debt was not “to” Lauderdale’s children, as Section 523(a)(5) requires. RE 10, 23. The courts below held that this contention was foreclosed by *In re Hudson* (*Hudson v. Raggio & Raggio, Inc.*), 107 F.3d 355, 356 (5th Cir. 1997). RE 10, 23. We acknowledge that *Hudson* also is binding on this panel. We respectfully preserve for further review—by this Court *en banc* or by the Supreme Court—the contention that *Hudson* was wrongly decided.

Because the parties do not dispute the facts and the only issue is a question of statutory interpretation, review is *de novo*. See, e.g., *In re ADM/Growmark River Sys., Inc.* (*ADM/Growmark River Sys. v. Lowry*), 234 F.3d 881, 886 (5th Cir. 2000).

SUMMARY OF ARGUMENT

Section 523(a)(5) of the Bankruptcy Code does not exempt from discharge Lauderdale's debt to Papadopoulos for guardian *ad litem* fees because the debt is not for "alimony to, maintenance for, or support of" Lauderdale's children. 11 U.S.C. § 523(a)(5) (2004). Child "support" is the obligation of a noncustodial parent either to reimburse the custodial parent for their children's expenses or to pay those expenses directly. Lauderdale, however, is the custodial parent. Her debt to Papadopoulos is no different for bankruptcy purposes than one she might owe to any other provider of goods or services to her children, such as a grocery store, pediatrician, or toy store—all of which would be dischargeable. Indeed, a determination that Lauderdale's debt to Papadopoulos is not dischargeable would in essence require Lauderdale to surrender the child-support payments that she receives from her ex-husband, thus harming her children's interests. Section 523(a)(5) should not be construed in a manner that would threaten those whom it was intended to protect.

The district court nonetheless rejected Lauderdale’s argument that her debt to Papadopoulos is not child “support,” holding that argument to be “foreclosed” by this Court’s decision in *In re Dvorak (Dvorak v. Carlson)*, 986 F.2d 940 (5th Cir. 1993). That case, however, addressed only the debts of a *noncustodial* parent—the traditional obligor of child “support.” Taking *Dvorak*’s holding as governing the debts of a *custodial* parent thus fails to read that opinion in the context in which it was decided. It also would create a circuit split with the Tenth Circuit, which rejected the argument embraced by the district court here in the only published appellate opinion expressly to confront the issue.

Moreover, the plain language of Section 523(a)(5) is not susceptible to the district court’s interpretation—that any debt for goods and services which “benefits” a debtor’s children constitutes nondischargeable “support.” RE 10–12. That interpretation would read the word “support” out of the statute, as all goods and services provided to children can be said to “benefit” them. In addition, that interpretation would render meaningless the independent statutory discharge exception for debts to the debtor’s dependents that are “incurred by the debtor in the course of a divorce” but that are *not* “support.” 11 U.S.C. § 523(a)(15) (2004).

Although Congress did not define the term “support” in Section 523(a)(5), its meaning is not a mystery. That is because Congress intended courts to follow the usual practice of interpreting legal terms in statutes—such as the term “sup-

port” (as well as “alimony” and “maintenance,” which immediately precede it)—in light of their settled meanings. Alimony, maintenance, and support are the obligations at common law of one spouse to another and of a parent to his or her children. Neither traditional common-law nor modern domestic-relations principles deem a *custodial* parent’s debts to providers of even essential goods and services to his or her children to constitute “support”; only an absentee, *noncustodial* parent bears that special liability. Congress therefore did not intend Lauderdale’s debt to Papadopoulos to be nondischargeable. Indeed, the legislative history of Section 523(a)(5), decisions construing its forerunner, and other federal statutes regulating state child-support orders confirm that the term “support” refers to the obligations of only noncustodial parents. Because Lauderdale is the custodial parent, her debt to Papadopoulos is fully dischargeable under Section 523(a)(5).

ARGUMENT

A Custodial Parent’s Obligation To Pay Part Of A Guardian *Ad Litem*’s Fee Is Not A Debt “Actually In The Nature Of * * * Support” Made Nondischargeable By Section 523(a)(5).

At the time of Lauderdale’s bankruptcy, Section 523(a)(5) provided:

A discharge under * * * this title does not discharge an individual debtor from any debt * * * 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 government unit, or property settlement agreement, but not to the extent

that * * * such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.⁴

Any doubts as to the meaning of Section 523(a)(5) should be resolved in Lauderdale's favor. This Court "strictly construe[s]" exceptions to discharge "against a creditor and liberally construe[s] [them] in favor of a debtor so that the debtor may be afforded a fresh start." *In re Hudson* (*Hudson v. Raggio & Raggio, Inc.*), 107 F.3d 355, 356 (5th Cir. 1997); *accord, e.g., In re Platter* (*DeKalb Cty. Div. of Family & Children Servs. v. Platter*), 140 F.3d 676, 680 (7th Cir. 1998); *In re Geiger* (*Geiger v. Kawaauhau*), 113 F.3d 848, 853 (8th Cir. 1997) (en banc), *aff'd*, 523 U.S. 57 (1998).

⁴ Since Lauderdale commenced her bankruptcy, Congress amended Section 523(a)(5) in 2005 to exempt from discharge any debt "for a domestic support obligation." PUB. L. NO. 109-8, § 215(1)(A), 119 STAT. at 54. A "domestic support obligation" is defined as a debt that is (1) "owed to or recoverable by" either "a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative, or a governmental unit"; (2) "in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parents, without regard to whether such debt is expressly so designated"; (3) established under a "separation agreement, divorce decree, or property settlement agreement" or by a court order, or applicable government unit; and (4) "not assigned to a nongovernmental entity" except for collection purposes. 11 U.S.C. § 101(14A). As under the prior version of Section 523(a)(5), Lauderdale's debt to Papadopoulos would not be exempted from discharge under the amended version. But these amendments were not retroactive. *See* PUB. L. NO. 109-8, § 1501, 119 STAT. at 216.

As this Court has noted, Section 523(a)(5) directs courts to “look beyond the labels which state courts—and even parties themselves—give obligations which debtors seek to have discharged.” *In re Dennis (Dennis v. Dennis)*, 25 F.3d 274, 277 (5th Cir. 1994); *see also id.* at 577 n.5 (collecting decisions). The courts below therefore correctly disregarded the Texas court’s characterization of Lauderdale’s debt to Papadopoulos in the divorce decree as “additional child support.” RE 12, 22–23. But the courts below erred in holding that, even though Lauderdale is the custodial parent, the debt constitutes nondischargeable “support” because it was incurred for the benefit of her children. RE 10–12, 25. That interpretation of Section 523(a)(5) cannot be squared with the plain text and history of the statute. The courts below also believed that their rulings were compelled by this Court’s decision in *Dvorak*. But *Dvorak*’s holding was limited to debts owed by noncustodial parents.

A. The Plain Language Of Section 523(a)(5) Excludes A Custodial Parent’s Debts To Providers Of Goods And Services To His Or Her Children.

The courts below erred in adopting an overly expansive interpretation of the term “support.” The plain meaning of the term “support” does not include a custodial parent’s debt to providers of even essential goods or services to her children—including guardians *ad litem*. Section 523(a)(5) thus does not apply to Lauderdale’s debt to Papadopoulos. As even a “literal application” of a law may be

disregarded if it “will produce a result demonstrably at odds with the intentions of its drafters” (*United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (internal quotation marks omitted)), this Court should not adopt a strained interpretation of the term “support” that harms the very children whom Congress intended to protect.

1. An Overly Expansive Interpretation Of “Support” In Section 523(a)(5) Would Read The Term Out Of The Statute And Render Section 523(a)(15) Surplusage.

Section 523(a)(5) exempts from discharge all debts “to * * * a child of the debtor” that are “for * * * support of” that “child.” 11 U.S.C. § 523(a)(5) (2004). The courts below held that Lauderdale’s debt to Papadopoulos is a debt for “support” of her children under Section 523(a)(5) because Papadopoulos’s services benefited the children. RE 10–12, 25. Because *all* goods and services provided to a child benefit the child in some sense, that interpretation effectively reads the term “support” out of the statute.

The Supreme Court has explained that a statute should be construed to prevent words from being “superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). That principle applies with special force here because Section 523(a)(5) defines its coverage of divorce-related debt in unusually restrictive terms. Rather than merely requiring the debt to be “for alimony to, maintenance for, or support of” a debtor’s dependent, the debts

also must be “*actually in the nature of* alimony, maintenance, or support.” 11 U.S.C. § 523(a)(5) (emphasis added). By directing courts to look to the substance rather than merely the label placed upon the debt to the child, Congress signaled that the requirement that the debt constitutes “support” is a meaningful one.

Moreover, the existence of Section 523(a)(15) demonstrates that Section 523(a)(5) does not discharge *every* divorce- or custody-related debt that a parent might owe to or on behalf of her children, even though any such debt would contribute to their “support” in a colloquial sense. Section 523(a)(15) exempts from discharge all divorce- or custody-related debts to the debtor’s dependents that are “*not* of the kind described in [Section 523(a)(5)],” unless either (i) paying the debt would require using income or assets “reasonably necessary” to support the debtor or his or her dependents, or (ii) the benefits of discharging the debt to the debtor “outweigh[] the detrimental consequences” to the party owed the debt. 11 U.S.C. § 523(a)(15) (2004) (emphasis added). As this Court has explained, “[t]he existence of this new provision suggests Congress envisioned that there would be other types of payments [to a debtor’s dependents that are] authorized in divorce agreements that would not qualify as alimony, maintenance, or support.” *In re Evert (Milligan v. Evert)*, 342 F.3d 358, 367–38 (5th Cir. 2003). Under the lower courts’ interpretation of Section 523(a)(5), however, all debts that might benefit a dependent constitute “support,” thus rendering Section 523(a)(15) surplusage.

2. Congress's Use Of The Term "Support" Incorporates That Term's Common-Law Definition.

In Section 523(a)(5), Congress did not define "alimony, maintenance, or support," but it did not need to do so: those terms have a settled meaning at common law. As the Supreme Court explained in construing another statutory discharge exemption, "[w]here Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Field v. Mans*, 516 U.S. 59, 69 (1995) (alteration and omission in original) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)) (quoting in turn *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)); see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003) ("[C]ongressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law.").

It is true that committee reports from the 1978 enactment of Section 523(a)(5) states that the definition of "support" "will be determined under the bankruptcy laws, not State law." H.R. REP. NO. 95-595, at 364 (1977), reprinted at 1978 U.S.C.C.A.N. 5963, 6320; S. REP. NO. 95-989, at 79 (1978), reprinted at 1978 U.S.C.C.A.N. 5787, 5865; see also *Grogan v. Garner*, 498 U.S. 279, 284 (1991)). But Congress did not intend bankruptcy courts to disregard settled state-

law domestic relations principles. Indeed, “there is no federal law of domestic relations, which is primarily a matter of state concern.” *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

Instead, Congress contemplated that bankruptcy courts would fashion a uniform federal rule from *general* state-law principles rather than, as had been the practice of some courts (*e.g.*, *In re Waller* (*Waller v. Waller*), 494 F.2d 447 (6th Cir. 1974)), having “a different standard in each state” that “depend[s] on the relative strictness or leniency of the state’s divorce laws.” *In re Yeates* (*Yeates v. Yeates*), 44 B.R. 575, 578 (Bankr. D. Utah 1984), *aff’d*, 807 F.2d 874 (10th Cir. 1986); *see also, e.g.*, H.R. Rep. No. 95-595, at 364, *reprinted at* 1978 U.S.C.C.A.N. at 6320 (repudiating *Waller*).⁵ As we next explain, those general state-law principles do not include a custodial parent’s debt to a guardian *ad litem*.

⁵ *See also In re Spong* (*Pauley v. Spong*), 661 F.2d 6, 9 (2d Cir. 1981) (“Congress could not have intended that federal courts were to formulate the bankruptcy law of alimony and support in a vacuum, precluded from all reference to the reasoning of the well-established law of the States.”); Daniel A. Austin, *For Debtor or Worse: Discharge of Marital Debt Obligations Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 51 WAYNE L. REV. 1369, 1389–90 (2005) (“Congress most likely did not intend for bankruptcy courts to disregard state law domestic relations principles when dealing with whether a debt is in the nature of alimony, maintenance, or support.”); Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 BUFF. L. REV. 369, 378 (1997) (“Congress might have had [the] traditional type of alimony in mind in 1978 when it enacted § 523(a)(5).”).

3. The Common-Law Meaning Of “Support” Does Not Include Custodial Parents’ Debts To Providers Of Goods And Services, Even Legal Services, To Their Children.

At common law, children could not sue directly to enforce their parents’ moral obligation for “support.” 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 424, 435 (2d ed. 1987); Comment, *Extent of a Parent’s Duty of Support*, 32 *YALE L.J.* 825, 825 (1923). Instead, children were protected by the doctrine of necessities. See Sheryl L. Scheible, *Defining ‘Support’ Under Bankruptcy Law: Revitalization of the ‘Necessaries’ Doctrine*, 41 *VAND. L. REV.* 1, 8–9 (1988); 1 CLARK, *supra*, at 444. That doctrine allowed a third party who had supplied needed goods or services to a child to sue the child’s father for reimbursement if the father had failed to provide them. Similarly, divorced or deserted wives could recover from their husbands for their necessary expenses in supporting their children. See generally Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 *YALE L.J.* 1123, 1134–41 (1999) (gathering authorities); Leslie J. Harris *et al.*, *Making and Breaking Connections Between Parents’ Duty to Support and Right to Control Their Children*, 69 *OR. L. REV.* 689, 692–99 (1990) (same).

That doctrine applied, however, only when the parent had abandoned his children, thus “fail[ing] or refus[ing] to supply his * * * child with necessities.” 1

CLARK, *supra*, at 445. Custodial parents in normal relations with their children were not liable to third parties who furnished goods or services to their children. *See, e.g., Scott Cty. Sch. Dist. 1 v. Asher*, 324 N.E.2d 496, 498 (Ind. 1975) (“[T]he creditor cannot recover from either child or parent, unless he can show that the parent was at that time failing to provide the child with necessaries.”); *Lamson v. Varnum*, 50 N.E. 615, 615 (Mass. 1898) (dentist may recover from father of patient by proving that “it was necessary for the health and comfort” of the child “and that the [father] negligently failed to provide for [his child] a dentist”); JOSEPH W. MADDEN, *THE LAW OF PERSONS AND DOMESTIC RELATIONS* §§ 110–11, at 387 (1931) (supplier cannot recover if parent has already “decently provided for the child according to the parents’ circumstances”). In order to recover, third parties had to fall back on any ordinary contract rights or rights under other legal doctrines they might have against the parent.

Under these principles, a guardian *ad litem* would not have a claim under the doctrine of necessaries against a custodial parent. Not only are the services of a guardian *ad litem* not critically necessary (*Goldberg v. Miller*, 810 A.2d 947, 959 n.10 (Md. 2002)), the custodial parent has not abandoned her children or otherwise failed to provide them with necessaries. Accordingly, the guardian *ad litem*, like any other provider of services to a custodial parent’s children, may recover, if at all, only contractually or under another legal doctrine or statute.

Moreover, modern state-law domestic relations principles also dictate that a custodial parent's debt for a guardian *ad litem*'s fees is an ordinary debt rather than a child-support obligation. The modern trend in many states is to permit a child to bring a direct civil suit against a noncustodial parent for a decree ordering the parent to make periodic payments either to the custodial parent or directly to the child for the child's support. 1 CLARK, *supra*, at 438; Annotation, 13 A.L.R.2d 1142 (1950); *see also* 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 355 (2d ed. 1987) ("The usual form for child support orders directs payment of a stated sum periodically to the custodian of the child."). If the non-custodial parent were to fail to make the payments, the parent's wages may be garnished, his or her driver's license suspended, and he or she may even be jailed for contempt of court. MARIAN F. DOBBS, DETERMINING CHILD AND SPOUSAL SUPPORT § 2:84 (Supp. 2006). But as with the doctrine of necessities, state courts do not visit these consequences on custodial parents who owe money to creditors who supplied goods or services to their children.

Indeed, although every state that provides for the appointment of a guardian *ad litem* (or its functional equivalent) in custody proceedings provides that either or both parents may be directed to pay the fees, we have not found *any* state decision or statute treating the custodial parent's obligation to a guardian *ad litem* as on par with a child-support obligation. Far from it; state courts that have considered

the question conclude that a custodial parent’s obligation to pay a guardian *ad litem*’s fees does not qualify as “child support” under state law. *See Goldberg*, 810 A.2d at 953–60; *Ex parte Hightower*, 877 S.W.2d 17, 21 (Tex. Ct. App.—Dallas 1994, orig. proceeding). Indeed, one Maryland court researched the statutes governing the compensation of guardians *ad litem* in the other 49 states and concluded that “none of these statutes expressly provide for characterization of such fees as child support.” *Miller v. Miller*, 788 A.2d 717, 724 n.6 (Md. Ct. App. 2002), *aff’d sub nom. Goldberg v. Miller, supra*.

Furthermore, this Court has acknowledged that the Uniform Interstate Family Support Act (“UIFSA”), which all 50 states have adopted in order to receive federal funds (42 U.S.C. § 666(f)), confirms that “only [custodial] parents and children” are owed a “duty of support” under state law. *O’Donnell v. Abbott*, 481 F.3d 280, 282 (5th Cir. 2007); *see also* UIFSA § 101(12) cmt. (1996) (explaining that, “in the context of a child support order,” although “[t]he child is the person to whom the duty of support is owed,” the obligee “is most commonly the custodial parent or other legal custodian” or a “support enforcement agency that has been assigned the right to receive support payments”). Thus, in *O’Donnell* this Court held that a guardian *ad litem* who collects and disburses child-support payments does not qualify as an “obligee” under UIFSA. 481 F.3d at 282.

Because Papadopoulos, as a guardian *ad litem*, could not have recovered from Lauderdale under either the common-law doctrine of necessities or the modern child-support actions, and because uniform legislation enacted in every state confirms that Papadopoulos is not owed a “duty of support,” Lauderdale’s debt to her does not constitute “support” under Section 523(a)(5).

B. The Legislative History Of Section 523(a)(5) Confirms That Papadopoulos’s Claim Is Dischargeable.

The legislative history of Section 523(a)(5) reveals that Congress did not intend for a custodial parent’s debts to third parties rendering even critical services to his or her children to constitute nondischargeable “support.” Congress first enacted the exception to discharge for familial support obligations in 1903. Act of Feb. 5, 1903, ch. 487, § 17a(2), 32 STAT. 797, 798 (1903). That statute, which eventually became Section 523(a)(5), provided that a debtor may not be discharged from his liability “for alimony due or to become due, or for maintenance or support of wife or child.” *Id.*

In enacting this discharge exception, Congress codified several Supreme Court holdings that, although the Bankruptcy Act of 1898 had not expressly excepted common-law familial obligations from discharge, the Act was not meant to be “a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children.” *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904). For example, in *Audubon v. Shufeldt*,

181 U.S. 575 (1901), the Supreme Court held that debts for alimony were non-dischargeable because, unlike the contractual debts that Congress intended to allow to be discharged, alimony arises from “the natural and legal duty of the husband to support the wife.” *Id.* at 577; *see also id.* at 578–80. In *Dunbar v. Dunbar*, 190 U.S. 340 (1903), the Court extended its holding to a father’s “obligation” at “common law” “to support his children.” *Id.* at 351. Immediately after the enactment of Section 523(a)(5)’s forerunner, the Supreme Court explained that the law simply ratified these holdings as “merely declaratory of the true meaning and sense” of the Bankruptcy Act of 1898. *Wetmore*, 196 U.S. at 77. *See also* 7 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 3557 (4th ed. 1934) (Section 523(a)(5)’s 1903 forerunner “is simply declaratory of the law as it stood before the amendment of 1903”).

None of the amendments to the original support-obligation discharge exception untethered its scope from the common-law support obligations that the Supreme Court discussed in *Audoban*, *Dunbar*, and *Wetmore*. The most radical change, in 1978, made the support-obligation exception unisex and confirmed that the substance of the liability rather than the label given to it by the state court controls its classification as “alimony, maintenance, or support.” Bankruptcy Law Reform Act of 1978, PUB. LAW. NO. 95-598, § 523(a)(5)(B), 92 STAT. 2549 (1978) (codified at 11 U.S.C. § 523(a)(5) (1980)). Nothing in the legislative history of

that amendment, however, suggests that Congress wanted to broaden the scope of the exception beyond common-law support obligations. To the contrary, Congress explicitly sustained the distinction between “support” obligations and those resulting from property divisions. *See* H.R. REP. NO. 95-595, at 364, *reprinted at* 1978 U.S.C.C.A.N. at 6320; S. REP. NO. 95-989, at 79, *reprinted at* 1978 U.S.C.C.A.N. at 5865. Indeed, when Congress decided to make certain property divisions nondischargeable, it did so by adding a new discharge exception—Section 523(a)(15)—rather than by amending Section 523(a)(5) to expand its scope beyond the traditional duties of support. *See* H.R. REP. NO. 103-835, at 54–55 (1994), *reprinted at* 1994 U.S.C.C.A.N. 3340, 3363–64.

Moreover, decisions under Section 523(a)(5)’s 1903 precursor recognized that it exempted from discharge the claims of only those creditors to whom the debtor would have been liable under the doctrine of necessities. For example, soon after enactment, a district court noted the provision’s “probable application” to the claims of creditors who had provided necessary goods and services to the dependents of a debtor who “had so betrayed his moral and legal duty as a husband or parent that another was justified in providing the maintenance and support denied by the one upon whom the law places the primary duty.” *In re Ostrander*, 139 F. 592, 592 (E.D.N.Y. 1905). The court thus held that the provision did not apply to a doctor’s fee for treating the debtor’s wife while the couple were “in

normal relation.” *Id.* Deeming nondischargeable all debts to persons “supplying goods for a wife or child or rendering a service necessary for support or maintenance, at the request of the husband, without delinquency on his part [to his wife or child],” the court explained, would withhold bankruptcy’s fresh start to debtors with dependents, as the “grocer, the marketman, clothiers of all descriptions, physicians, dentists, in fact all who, by service or sale, contribute to the support of the family, * * * would have claims not dischargeable under the act.” *Id.*

Another court similarly explained that the 1903 amendment “applies to the common law liability involuntarily imposed upon a parent for the support of wife or child * * * where a parent had failed or refused to make provision for maintenance and such was furnished by another.” *Wintrobe v. Connors*, 35 N.E.2d 1018, 1019 (Ohio Ct. App. 1941) (internal quotation marks omitted). But the exception does not apply to the debtor’s “contracted liabilities for goods purchased (although these be necessaries) * * * for the use and benefit of the wife or child.” *Id.*

Other courts agreed that the phrase “‘maintenance or support of wife or child’” in the 1903 amendment “refers only to the involuntary liability under the common law for support of wife and children”—not “to liabilities for goods purchased by a husband or parent * * * and used by wife or child.” *Schellenberg v. Mullaney*, 98 N.Y.S. 432, 432 (App. Div. 1906). *See also In re Netherton (Netherton v. Netherton)*, 2 B.R. 50, 55 (Bankr. M.D. Tenn. 1979) (discharging wife’s

hospital bills during marriage); *Schwoll v. Meeks*, 63 N.E.2d 831, 832–33 (Ohio Ct. App. 1944) (debt to landlord not “support” even though debtor’s wife and children live with him); *In re Lo Grasso*, 23 F. Supp. 340, 340–41 (W.D.N.Y. 1938) (discharging debt for bargained-for services of boarding school); *In re Meyers*, 12 F.2d 938, 938 (W.D.N.Y. 1926) (although discharge exception “does not release [a husband] from liability for maintenance and support of his wife, where the evidence discloses a practical abandonment,” the exception does “not includ[e] a liability for goods purchased for use of wife or child * * * upon the express or implied contract of the husband”).

From these decisions, prominent bankruptcy treatises concluded that the discharge exception that ultimately became Section 523(a)(5) “applies to the common-law liability involuntarily imposed upon the parent for the support of wife or child.” 1A JAMES W. MOORE & LAWRENCE P. KING, *COLLIER ON BANKRUPTCY* ¶ 17.19 (14th ed. 1976). Accordingly, the exception encompasses “liability where a parent had failed or refused to make provision for maintenance and such was furnished by another,” but not “liabilities for goods purchased (although these be necessities), medical attendance furnished, or board supplied, by a parent for the use and benefit of the wife or child.” *Id.* (internal quotation marks and footnotes omitted). As another treatise put it, the exception “does not cover liabilities to third parties for furnishing necessities for the use of the wife or the child, whilst the

normal family relation continues.” 7 REMINGTON ON BANKRUPTCY, *supra*, § 3558 (citing, *e.g.*, *Leman v. Locke*, 134 N.E. 343 (Mass. 1922)).

These decisions under the 1903 precursor to Section 523(a)(5), which link the dischargeability of support obligations to their recognition at common law, should “inform[] [the Court’s] understanding of the language” of Section 523(a)(5). *Kelly v. Robinson*, 479 U.S. 36, 44 (1986) (looking to “treatment of criminal judgments under the [Bankruptcy] Act of 1898” to determine their dischargeability under Section 523(a)(7)). Indeed, in light of these decisions, at least one modern bankruptcy treatise advises that an “ordinary contract by a third party with the debtor for the purpose of supporting the spouse or child, directly or indirectly”—for example, “suppl[ying] necessities, such as medical care, food, or lodging, to a dependent at the request and on the credit of the debtor”—“does not result in a nondischargeable obligation [under Section 523(a)(5)].” 3 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 57:37 (3d ed. 2011). A custodial parent’s obligation to a guardian *ad litem* should be treated no differently.

Indeed, it is hard to fathom why guardians *ad litem* should be placed in a better position in a custodial parent’s bankruptcy than the one occupied by the custodial parent’s own attorney in a proceeding seeking an award of child support. Although the services of the custodial parent’s attorney are as essential as those of the guardian *ad litem*—and presumably as important to the children—the custodial

parent may discharge his or her attorney's fees in bankruptcy. *See, e.g., In re Rios*, 901 F.2d 71, 72–73 (7th Cir. 1990); *see also In re Dean (Dean v. Brunsting)*, 231 B.R. 19, 21 (Bankr. W.D.N.Y. 1999) (custodial parent's debt to attorney from custody and support proceedings is dischargeable); *In re Klein (Gulielmetti & Gesmer, P.C. v. Klein)*, 197 B.R. 760, 762 (Bankr. E.D.N.Y. 1996) (same); *In re Lindberg (Frey, Lach & Michaels, P.C. v. Lindberg)*, 92 B.R. 481, 482–83 (Bankr. D. Colo. 1988) (same).

C. Other Federal Statutes Regulating Child Support Confirm That Congress Did Not Intend Section 523(a)(5) To Apply To Custodial Parents' Debts To Third Parties.

The Bankruptcy Code is not the only federal regulation of state child-support awards. Although traditionally a subject of state concern, Congress has enacted a number of other statutes in the last several decades regulating child-support obligations created by state law. *See* 1 CLARK, *supra*, at 440–41. Each time, Congress has made clear that only noncustodial parents' obligations constitute “support.”

The principal congressional regulation of state child-support awards is Title IV-D of the Social Security Act, 42 U.S.C. §§ 651–669b, which conditions states' receipt of funds under the federal Temporary Assistance for Needy Families program on compliance with federal directives. Congress explicitly stated the “purpose” of Title IV-D in its authorization of appropriations: “enforcing the support obligations owed by *noncustodial* parents to their children and the spouse (or for-

mer spouse) with whom such children are living * * *.” 42 U.S.C. § 651 (emphasis added). Congress accordingly directed the Secretary of Health and Human Services to “establish such standards for * * * obtaining child support and support for the spouse (or former spouse) with whom the noncustodial parent’s child is living as he determines to be necessary to assure that such programs will be effective.” *Id.* § 652(a)(1); *see also* 1 CLARK, *supra*, at 440 (describing legislation as establishing an agency “charged with the responsibility to establish state standards for locating *absent parents* and obtaining child support”) (emphasis added).

Among other things, Title IV-D prescribes procedures that states must provide for the enforcement of child-support awards. For example, Title IV-D requires all states to provide means by which parents who fail to meet their support obligations may have their wages garnished, their state income tax refunds offset, their arrearages reported to credit-reporting agencies, and their property subject to liens. 42 U.S.C. § 666(a). Yet Congress made clear that these penalties apply only to “any *noncustodial* parent who is delinquent in the payment of support.” *Id.* § 666(a)(7)(A) (emphasis added); *see also id.* §§ 666(a)(3)(A), (a)(4)(A), (a)(6), (a)(8)(B)(i)–(ii), (a)(18), (b)(1).

In Title IV-D, Congress also gave federal district courts jurisdiction to enforce the orders of state courts for child support if the Secretary of Health and Human Services approves the suit. *Id.* § 660. Yet Congress has directed the Secre-

tary to approve these suits only when, among other things, the state of the *absent parent's* residence has failed to enforce the order. *Id.* § 652(a)(8).

Beyond Title IV-D, Congress has also made it a federal crime willfully to fail to pay certain child-support obligations or to cross state lines to evade them. 18 U.S.C. § 228. As with Title IV-D, that statute applies only to parents who do not reside with the child whom they are obligated to support—that is, to noncustodial parents. The act defines a “support obligation” as “any amount determined under a court order * * * to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living.” *Id.* § 228(f)(3).

Because Congress has consistently used the term “support” to refer exclusively to the obligations of noncustodial parents in regulating state child-support orders, Congress’s use of the same term in the Bankruptcy Code should be read the same way. Indeed, in interpreting Title IV-D, this Court has recognized that when Congress refers to an “obligee” of child support, it is referring not to a guardian *ad litem*, but “only [to] parents and children” who are “owed a ‘duty of support.’” *O’Donnell*, 481 F.3d at 282 (interpreting 42 U.S.C. § 654b(b)(1)). This is further proof that Section 523(a)(5)’s exemption from discharge of debts that are “actually in the nature of * * * support” does not include the debts owed by custodial parents to third parties, such as a guardian *ad litem*.

D. This Court Has Not Construed “Support” In Section 523(a)(5) To Include A Custodial Parent’s Debt To A Guardian *Ad Litem*.

1. The courts below nevertheless reasoned that Lauderdale’s debt to Papadopoulos must be deemed to be “support” under Section 523(a)(5) because they erroneously believed themselves bound to do so by this Court’s decision in *Dvorak*. That decision, however, involved an attempt by a *noncustodial* parent ordered to pay child support to discharge his obligation to pay his ex-wife’s attorneys’ fees and the fees of the guardian *ad litem*. 986 F.2d at 941. The *Dvorak* court did not hold that the obligation of a *custodial* parent receiving child support to pay a portion of a guardian *ad litem*’s fees also constitutes “support.” The bankruptcy court in this case nonetheless concluded that *Dvorak*’s holding that the non-custodial parent’s debt to the guardian *ad litem* was nondischargeable extended to custodial parent debtors because of the following statement in that decision: “[b]ecause the fees [charged by the debtor’s former spouse’s attorneys and the guardian *ad litem*] were incurred during a court hearing that was for [the debtor’s child’s] benefit and support, * * * we conclude that the fees constitute a nondischargeable debt under § 523(a)(5).” RE 25 (quoting *Dvorak*, 986 F.2d at 941). The district court agreed. RE 10–11

The courts below mistook this broad summary for *Dvorak*’s holding. As the Supreme Court has explained, “the language of an opinion is not always to be parsed as though [the court] were dealing with [the] language of a statute.” *Reiter*

v. Sonotone Corp., 442 U.S. 330, 341 (1979). Rather, “judicial language, like other language, should be read in context.” *Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 1183 (7th Cir. 1991).

The portion of the *Dvorak* opinion upon which the courts below relied—that fees incurred for the “benefit and support” of the debtor’s children constitute “support”—must be read and understood in context. Otherwise, taken to its logical conclusion, that categorical position would abolish bankruptcy’s fresh start for custodial parents: almost all of the expenses a single parent incurs—housing, food, transportation, health care, and so forth—are for the “benefit and support” of their children. *See, e.g.*, Geoffrey D. Paulin & Yoon G. Lee, *Expenditures of Single Parents: How Does Gender Figure In?*, MONTHLY LABOR REVIEW, July 2002, at 18–31 (reporting on expenditures by single-parent households), *available at* <http://www.stats.bls.gov/opub/mlr/2002/07/art2full.pdf>.

By contrast, in the context that the *Dvorak* court was facing—a debtor who is a noncustodial parent—the court’s holding that debts for the guardian *ad litem*’s and the custodial parent’s attorneys’ fees are child “support” makes sense. Noncustodial parents are the traditional obligors of child support. At common law, a noncustodial parent would be liable under the doctrine of necessities—from which the notion of a “support” obligation derives—to an attorney who rendered necessary legal services to the noncustodial parent’s child. *See* pages 15–17, *supra*.

Moreover, *Dvorak*'s holding advances the purpose of the support-obligation exception: to protect the debtor's dependents from the adverse consequences of bankruptcy. *See, e.g., In re Chang (Beaupied v. Chang)*, 163 F.3d 1138, 1140 (9th Cir. 1998); *Platter*, 140 F.3d at 683; *In re Jones (Jones v. Jones)*, 9 F.3d 878, 880–81 (10th Cir. 1993); *Forsdick v. Turgeon*, 812 F.2d 801, 802 (2d Cir. 1987); 3 NORTON, *supra*, § 57:30. If the non-custodial parent were excused from paying those debts, the custodial parent potentially must shoulder them alone.

When the debtor is the custodial parent, however, withholding a discharge of her debt to the guardian *ad litem* would harm rather than help the child who is the beneficiary of the support award. The custodial parent effectively would be required to turn over the child-support payments that she receives to the guardian *ad litem* rather than use them to pay the child's expenses. For example, here, if Lauderdale were to relinquish the entirety of the monthly child-support payments to Papadopoulos, it would take her almost nine months to pay off the principal on the \$12,529.44 debt.⁶ Thus, rather than protecting the children's support payments, applying the discharge exception for "support" obligations to the guardian *ad litem*

⁶ If Kabbani were to exercise his visitation rights, \$750 per month must be paid to the cost of the armed guard, meaning that it would take Lauderdale almost 17 months to pay the principal of her debt to Papadopoulos. Moreover, because the lower courts' decision also awarded 10 percent annual interest since the date the original divorce decree was signed (August 16, 2002), many more months of child-support payments would be required to satisfy the debt.

fees here would partially eliminate them. That result is inimical to both the purpose of Section 523(a)(5) and the fresh start policy of the Bankruptcy Code. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’”) (quoting *Grogan*, 498 U.S. at 286–87).

2. For this reason, the Tenth Circuit has held that a custodial parent’s debt to a guardian *ad litem* is not nondischargeable child “support” under Section 523(a)(5) when, as here, failing to discharge the debt “would clearly affect [the custodial parent’s] ability to financially support the child.” *In re Lowther (Lowther v. Lowther)*, 321 F.3d 946, 949 (10th Cir. 2002). Previously, the Tenth Circuit had held in *Jones*, 9 F.3d at 880—as did this Court in *Dvorak*—that Section 523(a)(5) bars a noncustodial parent from discharging his obligation to pay his former spouse’s attorneys’ fees from the custody hearing.

In *Lowther*, the Tenth Circuit explained that, in *Jones*, it had construed “the term ‘support’ * * * broadly” in order to further the congressional purpose of Section 523(a)(5) “to protect the best interests of the child.” 321 F.3d at 948. The Tenth Circuit then observed that extending this “general rule of nondischargeability” to a debtor who is a custodial parent “despite adverse effects upon the child would be to ignore the policy considerations behind § 523(a)(5).” *Id.* at 949. The court noted that the debtor’s monthly income was small, and reasoned that forcing

her to pay the debt would “essentially negate the support payments” that she received from her ex-husband. *Id.* Because exempting the debt from discharge would impoverish rather than “support” the children, the court held that Section 523(a)(5) did not preclude discharging the debt. *Id.*⁷

No other published decision by a court of appeals has disagreed with the Tenth Circuit’s conclusion in *Lowther*. Most cases in which a guardian *ad litem*’s fees or a former spouse’s attorneys’ fees were held nondischargeable involved—as did *Dvorak*—debtors who were noncustodial parents.⁸ In fact, only the Second Circuit has exempted a custodial parent’s debt to a guardian *ad litem* from discharge—but it did so in a two-sentence *per curiam* opinion affirming a district court’s decision that did not consider the import of the debtor’s status as the cus-

⁷ Similarly, the Seventh Circuit has held that Section 523(a)(5) does not bar discharge of a custodial parent’s debt to the state for providing assistance to her child because withholding a discharge would not advance the statute’s purpose of protecting the debtor’s child. *Platter*, 140 F.3d at 683. As the court explained, “if [the state’s claim] is unsatisfied, [the state] cannot take action [on the debt] against [the debtor’s] child. * * * Excluding this debt from discharge [under Section 523(a)(5)], therefore, will neither protect spouses, former spouses, or children from being injured by a debtor’s discharge nor will it further the bankruptcy goal of a fresh start for the debtor.” *Id.* The same is true here—Lauderdale’s children would not be liable to Papadopoulos if Lauderdale’s debt were discharged.

⁸ See, e.g., *In re Maddigan (Falk & Siemer, LLP v. Maddigan)*, 312 F.3d 589, 592 (2d Cir. 2002); *In re Kline (Holliday v. Kline)*, 65 F.3d 749, 750 (8th Cir. 1995); *Jones*, 9 F.3d at 880; *In re Joffrion (Olszewski v. Joffrion)*, 240 B.R. 630, 631 (M.D. Ala. 1999); *In re Staggs (Madden v. Staggs)*, 203 B.R. 712, 714 (Bankr. W.D. Mo. 1996); *In re Laing (Walker v. Laing)*, 187 B.R. 531, 532 (Bankr. W.D. Va. 1995).

custodial parent. See *In re Peters* (*Peters v. Hennenhoeffer*), 964 F.2d 166 (2d Cir. 1992) (per curiam), *aff'g* 133 B.R. 291 (S.D.N.Y. 1991).⁹ Other courts have, like the district court in *Peters*, failed to notice the issue.¹⁰ But no other circuit has expressly ruled that a custodial parent's obligation to pay a guardian *ad litem*'s fees is nondischargeable "support."

Nationwide, lower courts are split on the issue. At least one bankruptcy court has followed the Tenth Circuit's lead in *Lowther*, observing that deeming a custodial parent's obligation to pay a guardian *ad litem*'s fees "to be a nondischargeable debt under Section 523(a)(5) when payment of such claim by the debtor would severely impair the debtor's ability to support the very children whom Sec-

⁹ In an unpublished and therefore non-precedential decision, a panel of this Court rejected a custodial parent debtor's reliance on *Lowther*. *In re Rogers* (*Rogers v. Morin*), 189 F. App'x 299, 303–04 (5th Cir. 2006). But the panel did so because the debtor had failed to identify "specific facts of actual hardship to [the child]" were the debt not discharged. *Id.* at 504. Here, by contrast, the record shows that Lauderdale's annual take-home income when she filed for bankruptcy (not counting child support payments) was less than \$10,000. See Chapter 7 Bankruptcy Petition, at 19, *In re Lauderdale*, No. 05-92128 (Bankr. S.D. Tex. Oct. 14, 2005). The impact on Lauderdale's children of requiring her to pay an amount in excess of her annual income would be dire.

¹⁰ See, e.g., *Chang*, 163 F.3d at 140; *In re Miller* (*Miller v. Gentry*), 55 F.3d 1487, 1489 (10th Cir. 1995); *In re Defilippi* (*Epstein v. Defilippi*), 430 B.R. 1, 2–4 (Bankr. D. Me. 2010); *In re Ross* (*Hamilton v. Ross*), 247 B.R. 333, 334 (Bankr. M.D. Fla. 2000); *In re Brodsky* (*Shevick v. Brodsky*), 239 B.R. 365, 375 (Bankr. N.D. Ill. 1999); *In re Stacey* (*Baillargeon v. Stacey*), 164 B.R. 210, 211–12 (Bankr. D.N.H. 1994); *In re Tremblay* (*Heintz v. Tremblay*), 162 B.R. 60, 62 (Bankr. D. Me. 1993).

tion 523(a)(5) was designed to protect would stand that statute on its head.” *In re Manzi* (*Manzi v. Geenty*), 283 B.R. 103, 110–11 (Bankr. D. Conn. 2002).

Other lower courts have, like the courts below here, believed themselves to be bound by decisions involving noncustodial parents to rule against the custodial parent debtor.¹¹ Those decisions, however, have received a critical reception: one commentator has characterized the analysis of these and other courts in equating a guardian *ad litem*'s fees with child support as “naive,” explaining that those courts fail to “realiz[e] that these nondischarged fees are indeed taking food from children’s mouths and clothing from their backs.” Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT’L L. 106, 149–50 (2002). Because making the debts of custodial and noncustodial parents equally nondischargeable under Section 523(a)(5) would frustrate the purpose

¹¹ See, e.g., *In re Douglas* (*Benjamin v. Douglas*), 330 B.R. 245, 251 (Bankr. S.D. Cal. 2005) (relying on *Chang*); *In re Soffee* (*Landry v. Soffee*), 337 B.R. 837, 839–40 (Bankr. E.D. Va. 2004) (relying on *Jones*); *In re Levin* (*Kretschmer v. Levin*), 306 B.R. 158, 164 (Bankr. D. Md. 2004) (relying on *In re Blaemire* (*Sinton v. Blaemire*), 229 B.R. 665, 668–69 (Bankr. D. Md. 1999), which relied on *Jones, Peters, and Miller*); *In re Constantine* (*Spear v. Constantine*), 183 B.R. 335, 336 (Bankr. D. Mass. 1995) (relying on *Miller, Jones, Dvorak, and Peters*); *In re Lockwood* (*Swartzberg v. Lockwood*), 148 B.R. 45, 47 (Bankr. E.D. Wis. 1992) (relying on district court’s decision that relied on *Peters*); *In re Ray* (*Wedgle & Shpall, P.C. v. Ray*), 143 B.R. 937, 939–40 (D. Colo. 1992) (relying on *Peters* and various bankruptcy court decisions).

of that statute, this Court should confirm that *Dvorak*'s holding is limited to the debts of noncustodial parents.¹²

* * * * *

In sum, the plain language and history of Section 523(a)(5) and the broader statutory scheme regulating child support confirm that the debts owed by custodial parents to third parties are not “actually in the nature of * * * support” and thus are fully dischargeable. Although this Court held in *Dvorak* that a noncustodial parent's debt to a guardian *ad litem* is exempted from discharge by Section 523(a)(5), the courts below erred in giving the same treatment to the debt of the custodial parent. By doing so, those courts turned Section 523(a)(5) on its head by effectively diverting money away from the debtor's children.

CONCLUSION

This Court should reverse the order of the district court and remand with instructions that Lauderdale's debt to Papadopoulos be discharged.

¹² If, however, this Court were to conclude that *Dvorak* requires a holding that Lauderdale's debt to Papadopoulos is nondischargeable, we respectfully preserve for further review the contention that *Dvorak* was wrongly decided. In addition, as noted above (at page 5 n.3), we respectfully preserve for further review the contention that *Hudson* was wrongly decided in holding that a custodial parent's debt to a guardian *ad litem* is a debt “to” the debtor's child, as Section 523(a)(5) requires.

Respectfully submitted,

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MARCH 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2011, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. That system caused all registered users to be served. I also served two bound copies of the foregoing brief by overnight delivery via UPS, postage prepaid—and emailed the brief in PDF format—on the parties herein, at the following addresses:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(d) and 32(a)(7)(B)(i), and Fifth Circuit Rule 32.2, because—according to the word-count facility in Microsoft Word—the brief contains 8,995 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared using Microsoft Word in a proportionally spaced typeface in Times New Roman with 14 point typeface.

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