

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE)
)
CHRISTINE I. HOSIER AND)
JOHN R. HOSIER,)
)
Debtors,)
)
R. MICHAEL FISCHER,) No. BK 86-50586
)
Plaintiff-Appellant,)
) NO. 87 5340
-vs-)
)
CHRISTINE I. HOSIER,)
)
Defendant-Appellee,)

ORDER

Appellant Attorney R. Michael Fischer (Fischer), brings this appeal claiming he is a secured creditor, pursuant to Illinois Revised Statute Ch. 26, ¶9-203(1)(b)(c) of Appellee Christine I. Hosier's (Hosier) bankruptcy proceeding.

Jurisdiction is claimed pursuant to 28 U.S.C. §1334 stating "the district court shall have original jurisdiction, exclusive of the courts of the state, of all matters and proceedings in bankruptcy."

The present dispute between Fischer and Hosier is the result of a Chapter VII bankruptcy proceeding which Hosier filed, listing Fischer as an unsecured creditor. Fischer had previously represented Appellee in a divorce proceeding and Chapter XIII bankruptcy proceeding.

He alleges that his claim for legal fees is a secured debt based on an assignment of a judgment Hosier received for child

support. Specifically, Hosier executed a promissory note and assignment on April 28, 1986. The promissory note provided that appellant was representing her in a Chapter XIII bankruptcy proceeding and in an action against her ex-husband for back child support. The assignment provided that a portion of the judgment Hosier received for child support would be paid to Fischer for legal fees for services already rendered and for fees for anticipated services in the Chapter XIII proceeding.

The standard of review for this court pursuant to 28 U.S.C. §157(c)(1) is de novo review of the bankruptcy judge's proposed conclusions of law.

The issue on appeal is whether a divorced person who has custody of the minor children and a claim for past due child support has the right to assign said claim to a third party.

Paragraph 9-203(1) of the UCC provides, in pertinent part, that "a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless. . .value has been given. . .and the debtor has rights in the collateral." Ill. Rev. Stats. Ch. 26, ¶9-203(1)(b) and (c).

The bankruptcy court, on rehearing, determined that the "assignment" of Hosier's judgment for child support was for both past and future legal services. Thus, the statutory requirement of new value was satisfied. See, Stanwood v. Community Bank of Homewood-Flossmoor, 24 B.R. 761, 763 (Bankr. N.D. Ill. 1982). (Clear and unambiguous security agreement clauses extending collateral to secure past and future advances are valid under the UCC.)

However, the bankruptcy court determined that the debtor, Hosier, had no rights in the judgment as collateral within the meaning of Chapter 26 of the Illinois Revised Statutes. Hosier could not, therefore, assign the child support judgment as security for a debt she owed to Fischer.

The controlling statute regarding these facts is Illinois Revised Statutes, Ch. 26. Paragraph 9-105 of Chapter 26 defines collateral as "the property subject to a security interest." Ill. Rev. Stats. Ch. 26, ¶9-105. As noted above, ¶9-203 requires that the debtor have rights in the collateral in order for a security interest to be enforceable against the debtor. Ill. Rev. Stats. CH. 26, ¶9-203(1)(c). Thus, Hosier must have a property right in the judgment for child support in order to meet the requirement of 19-203 for a security interest to be enforceable against her.

27C C.J.S. Divorce, §704 (1955) notes that "the custodial parent has no propriety right in the child support payments received, but must expend them for the benefit of the supported child." See, **Pavik v. Scheetz**, 108 Ind. App. 494, 29 N.E.2d 922.

The Illinois Courts addressed the issue of a custodial parent's propriety right to child support payments in **Schmitt v. Woods**, 73 Ill. App. 3d. 498, 392 N.E.2d 55 (1979). This court held that, ". . . public policy dictates that amounts payable as child support take precedence over and are not subject to any personal obligation between the parents." Id. at 56. This court went on to note that previous Illinois decisions held past due installments, of child support granted pursuant to a decree of divorce were vested rights,

and thus were not subject to a modification either as to amount or time of payment. see, Dunsky v. Dunsky, 40 Ill. App. 3d 845, 848; 353 N.E.2d 371, 374 (4th Dist. 1976).

Finally, the court in Schmitt stated "considering the vested rights of the support payments and the paramount importance of protecting the rights of children upon the divorce of their parents, these payments are exempt from any set-off resulting from a personal debt of one of the parties." Schmitt at 56-57.

Thus, Hosier had no property rights in the child support payments which are collateral for her debt to Fischer. Fischer's claim, then, does not meet the UCC requirements for a secured interest under ¶9-203(1)(c).

Appellant-Fischer, however, states that a judgment is assignable as stated in 6A C.J.S. Assignments, §41 (1955). However, appellant fails to note that in 49 C.J.S. Judgments §512(b) (1955) it is noted that "in the absence of a statute to the contrary, a judgment . . . which does not constitute a debt or right in property capable of being reduced to possession is not assignable". As noted above, child support payments are a propriety right of the custodial parent. Thus, they are not judgments capable of being assigned. Therefore, appellee, Hosier had no right in the collateral of the security interest and, similarly, no right to assign her judgment for child support payments as collateral for her debts to appellant Fisher.

Accordingly, on review this court does not find that appellant's security interest is enforceable within the meaning of

¶9-203(1)(b) and (c), and therefore, the decision of the bankruptcy judge is affirmed.

IT IS SO ORDERED.

DATED: This 4th day of March, 1988.

/s/ WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE