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Angela Rohman Russo
Angela.Russo@chicagounbound.edu

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Costs in Child Custody Actions and the Question of Dischargeability

Angela Rohman Russo[†]

Section 523(a)(5) of the Bankruptcy Code provides that debts to a spouse, former spouse, or child in connection with the support of a child are not dischargeable in bankruptcy.¹ Support includes all “genuine support obligations.”² The circuits have split on whether costs incurred in a child custody action, such as attorney or guardian *ad litem* fees, qualify as support.

The Fifth Circuit has taken the majority position, finding that costs incurred in child custody disputes are not dischargeable in bankruptcy. In *Dvorak v Carlson*,³ the court held that court-ordered attorney and guardian *ad litem* fees incurred during custody litigation did constitute child support because custody hearings are inherently for the benefit and support of the child.⁴ Thus, the court found that such debts are not dischargeable during bankruptcy.⁵ The Second, Tenth, and Eleventh Circuits also have found that debts for costs awarded in child custody actions were not dischargeable.⁶

Only one circuit has held that debts incurred in child custody disputes are dischargeable in bankruptcy. In *Adams v Zentz*,⁷ the Eighth Circuit held that a debt from a custody dispute was not “in the nature of support.”⁸ Thus, the debt was dischargeable in bankruptcy, where the proceeding focused on the

[†] A.B. 2001, Dartmouth College; J.D. Candidate 2005, University of Chicago.

¹ See 11 USC § 523(a)(5) (2000).

² *Shine v Shine*, 802 F2d 583, 588 (1st Cir 1986).

³ 986 F2d 940 (5th Cir 1993).

⁴ *Id* at 941 (noting that custody hearings are “clearly” for the child’s support as “the purpose of the hearing [is] to determine who could provide the best home” for the child).

⁵ *Id* at 942.

⁶ See *Strickland v Shannon*, 90 F3d 444 (11th Cir 1996); *Jones v Jones*, 9 F3d 878 (10th Cir 1993); *In re Peters*, 964 F2d 166 (2d Cir 1992).

⁷ 963 F2d 197 (8th Cir 1992).

⁸ *Id* at 200.

welfare of the parent being denied contact with the child, rather than on the child herself.⁹

The reasoning of the Second, Fifth, and Eleventh Circuits can be reconciled on some level with that in *Adams*. One can argue, for example, that in each case the court of appeals accepted the bankruptcy court's determination and adopted the approach to discharge that would allow them to uphold it. The Fifth Circuit in *Dvorak* based its holding entirely on the supposition that the custody proceeding ultimately provides support for the child, effectively making all costs incurred in child custody disputes nondischargeable in bankruptcy.¹⁰ The decision, however, can be read—just as *Adams* can be read—as driven by the bankruptcy court's initial determination of whether the debts at issue were in the nature of support.

This attempt at reconciliation, however, fails when applied to the position of the Tenth Circuit. While the Fifth Circuit sees the question as one of mixed law and fact, the Tenth Circuit treated the question as solely one of law. Thus, the Tenth Circuit found that costs incurred in child custody disputes were not dischargeable as a matter of law.¹¹ The fact-intensive inquiry of *Adams* stands in direct opposition to this position, which would limit the bankruptcy court's discretion to overturn family court awards for costs in custody actions to those situations in which the bankruptcy court finds "unusual circumstances."¹²

This Comment argues in favor of the position adopted by the Tenth Circuit: debts that consist of costs awarded in custody and visitation disputes should be nondischargeable as a matter of law. As a matter of law, costs awarded in custody actions should constitute support for two reasons. First, bankruptcy courts do not have the institutional capacity to determine what is in the best interests of children. Second, allowing dischargeability in the child custody context would improperly interfere with the province of the state courts.

Deference by the bankruptcy courts to awards in child custody disputes properly reflects the relative institutional capacities of both bankruptcy and family courts. Family courts are bet-

⁹ Id at 200-01.

¹⁰ See *Dvorak*, 986 F2d at 941.

¹¹ *Jones*, 9 F3d 878.

¹² Id at 882 ("Therefore, in order that genuine support obligations are not improperly discharged, we hold that the term 'support' encompasses the issue of custody absent unusual circumstances not present here.").

ter suited than bankruptcy courts to make the fact-intensive inquiry into subjective motivations in custody cases to determine what is necessary for support.¹³ Furthermore, because family courts award costs under the best interests of the child standard, allowing the bankruptcy courts to make factual determinations of whether costs constitute support would result in the discharge of some costs and fees awarded for the benefit of a child. When state courts make awards for costs in child custody disputes, they base these awards on whether making the award would serve the child's best interests. Costs awarded under such a standard are, by their nature, support. Thus, the discharge of awards for costs in child custody disputes is a discharge of genuine support obligations, in contravention of congressional policy.¹⁴

The discharge of debts for costs awarded in child custody actions would improperly interfere with the province of the state courts. Family law has a unique place in the federal system: it is held up as the mainstay of exclusive localism.¹⁵ In the bankruptcy context, the position that federal courts should not interfere with the states in matters of federal law has much merit both on a policy level and an historical level. On a policy level, bankruptcy courts lack the institutional capacity to handle determinations of support in contentious child custody actions.¹⁶ On an historical level, under the common law understanding of bankruptcy law that prevailed before the adoption of Section 523(a)(5), familial support obligations were not dischargeable in bankruptcy.¹⁷

Part I of this Comment gives background on Section 523(a)(5) of the Bankruptcy Code, discharge rules, and the current split among the circuits over whether costs incurred in custody disputes constitute nondischargeable debts in bankruptcy. Part II demonstrates that even if the Eighth Circuit's decision in *Adams* can be reconciled with the majority position, the circuits remain split as to whether costs from child custody actions con-

¹³ Id at 881.

¹⁴ Consider *Shine*, 802 F2d at 588.

¹⁵ Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L Rev 1297, 1298 (1998) (summarizing the arguments for a special status of exclusive localism in family law).

¹⁶ *Jones*, 9 F3d at 881-82 (arguing that the bankruptcy courts are ill-equipped to determine what constitutes support in a particular custody dispute).

¹⁷ Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 Cath U L Rev 351, 356 (1994) (describing the "trend in common law whereby state courts denied debtors the right to discharge alimony debts").

stitute support as a matter of law. Part III argues that the question of dischargeability should be addressed as a matter of law. Part IV argues that congressional policy and institutional capacity favor the conclusion that costs incurred in child custody actions are not dischargeable in bankruptcy as a matter of law, and that allowing bankruptcy courts to make the fact-intensive *Adams* inquiry improperly intrudes on the province of the state courts.

I. SECTION 523(A)(5) OF THE BANKRUPTCY CODE, DISCHARGEABILITY, AND THE CIRCUIT SPLIT

A. Background on Dischargeability and Section 523(a)(5)

In bankruptcy, an “honest but unfortunate debtor” relieves himself of his indebtedness by surrendering his property for distribution and having his debts discharged by the bankruptcy courts.¹⁸ Discharge provides the mechanism by which the debtor receives a fresh start.¹⁹ To facilitate the fresh start, courts have construed narrowly the statutory exceptions to the general rule of discharge.²⁰ The law limits exception to discharge to those categories of debts for which “Congress evidently concluded that the creditors’ interest in recovering full repayment of debts . . . outweighed the debtors’ interest in a complete fresh start.”²¹

Section 523 of the Bankruptcy Code lists the exceptions to the rule of discharge of pre-bankruptcy debts,²² including certain family obligations.²³ Section 523(a)(5) identifies as nondischargeable those debts owed “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.”²⁴ This exception only applies to those obligations “actually in the nature of alimony, maintenance, or support.”²⁵

Although this language might seem to limit the debts that fall under the Section 523(a)(5) exception, courts have, contrary

¹⁸ *Local Loan Co v Hunt*, 292 US 234, 244 (1934).

¹⁹ *Id.* at 244-45.

²⁰ See *Grogan v Garner*, 498 US 279 (1991).

²¹ *Id.* at 287.

²² See 11 USC § 523 (2000).

²³ See *id.* at § 523(a)(5).

²⁴ *Id.*

²⁵ See *id.* at § 523(a)(5)(B).

to their usual policy, construed the statutory language broadly in keeping with “[c]ongressional policy . . . to ensure that genuine support obligations would not be discharged.”²⁶ Under Section 523(a)(5), therefore, debts for legal fees undertaken on behalf of a spouse, former spouse, or child of the debtor can be nondischargeable, even though Section 523(a)(5) provides that debts assigned to parties other than the spouse, former spouse, or child of the debtor are dischargeable.²⁷

B. Background on the Circuit Split

The circuits have split as to whether costs in child custody actions properly qualify as genuine support obligations that cannot be discharged under Section 523(a)(5). One circuit has held that such costs are not support;²⁸ four other have found them to be support obligations.²⁹ These four circuits, however, do not apply a consistent standard of review; instead, they disagree over whether the dischargeability of costs incurred in child custody disputes should be analyzed as a question of law or as a mixed question of fact and law.³⁰

1. *Costs incurred in child custody disputes constitute support.*

The four circuits determining that debts for costs from child custody actions are not dischargeable in bankruptcy have adopted one of two theories. The Fifth Circuit has held that debts for costs necessary to the child custody dispute are nondischargeable simply “[b]ecause the ultimate purpose of such a proceeding is to provide support for the child.”³¹ Alternately, the

²⁶ See, for example, *Shine v Shine*, 802 F2d 583, 588 (1st Cir 1986).

²⁷ See *Pauley v Spong*, 661 F2d 6, 10 (2d Cir 1981) (“We view appellee’s undertaking to pay his wife’s legal fees as a pragmatic third party beneficiary contract, which is not, and should not be confused with, an assignment.”).

²⁸ The Eighth Circuit upheld the bankruptcy court’s discharge of attorney’s fees from a child custody proceeding in *Adams*, 986 F2d at 940.

²⁹ See *Strickland v Shannon*, 90 F3d 444 (11th Cir 1996); *Dvorak*, 986 F2d at 940; *Jones v Jones*, 9 F3d 878 (10th Cir 1993); *In re Peters*, 964 F2d 166 (2d Cir 1992).

³⁰ See *Falk & Siemer v Maddigan*, 312 F3d 589, 593-94 (2d Cir 2002) (collapsing its determination of legal and factual conclusions by the bankruptcy court); *Strickland*, 90 F3d at 446-47 (reviewing the issue as a matter of law, but deciding the issue narrowly so as to allow departures under different factual circumstances); *Dvorak*, 986 F2d at 941 (reviewing the issue as a matter of law); *Jones*, 9 F3d at 882 (holding that costs awarded in custody actions are deemed to be support as a matter of law).

³¹ *Hudson v Raggio & Raggio, Inc.*, 107 F3d 355, 357 (5th Cir 1997).

Second, Tenth, and Eleventh Circuits have held that such debts are presumed to be support under Section 523(a)(5), but that special circumstances might indicate otherwise.³²

The Fifth Circuit has decided on public policy grounds that because child custody and support are inexorably connected, costs from child custody actions are debts in the nature of support.³³ In *Dvorak*, the Fifth Circuit held that debts for fees incurred and awarded in child custody actions are nondischargeable in bankruptcy, because such actions are categorically for the benefit and support of the child.³⁴ The court reasoned that child custody hearings are “clearly for . . . [the child’s] benefit and support” because their purpose is “to determine who could provide the best home” for the child.³⁵ That is, because of the purpose of the resolution of child custody disputes, the associated costs constitute a form of support. Once the court in *Dvorak* made a categorical determination that the custody proceedings “[were] clearly for [the child’s] benefit and support,” it neither inquired whether any ulterior motive existed nor made any further inquiry into whether the costs associated with the action constituted support.³⁶ The court defined the ultimate purpose of the underlying action objectively with respect to the nature of the proceeding, and then utilized that objective purpose to control the decision as to dischargeability.³⁷

In *Hudson v Raggio & Raggio, Inc.*,³⁸ the Fifth Circuit reasoned that attorney’s fees incurred in a child custody dispute could not be discharged in bankruptcy “[b]ecause the ultimate purpose of such a [custody] proceeding is to provide support for the child.”³⁹ Just as in *Dvorak*, the court looked to the nature of the proceeding to determine whether the costs constituted sup-

³² See *Strickland*, 90 F3d at 447 (holding that when an award of costs in a child custody action derives from a party’s relative ability to pay, such an award constitutes support in the absence of unusual circumstances); *Jones*, 9 F3d at 881 (holding that costs awarded in child custody disputes constitute support “in the absence of clear indication of special circumstances to the contrary”); *Peters v Hennenhoefter*, 133 BR 291, 296 (S D NY 1991) (questioning whether any facts warrant an exception to a rule classifying custody actions as in the nature of support).

³³ See *Hudson*, 107 F3d at 357 (reasoning that the services for which the costs were incurred cannot be separated from support).

³⁴ *Dvorak*, 986 F2d at 941.

³⁵ *Id.*

³⁶ *Id.* (analyzing the issue of dischargeability objectively in terms of whether the underlying action is for the support of the child).

³⁷ *Id.*

³⁸ 107 F3d 355 (5th Cir 1997).

³⁹ *Id.* at 357.

port.⁴⁰ In both cases, the courts reasoned that custody actions are for a child's benefit and support, because determining the best home for a child is part of support.⁴¹ On this basis, the court in *Hudson* concluded that the costs associated with the child support action fell within the exception to dischargeability in Section 523(a)(5).⁴²

The objective analysis underlying the holdings in *Dvorak* and *Hudson* is consistent with treatment of the dischargeability issue as one of law. The Fifth Circuit, however, characterized the question as one of both fact and law, even as it made a narrow decision of law.⁴³ Furthermore, it qualified its holding in *Hudson* with the statement that its analysis depended on a proper determination by the bankruptcy court that the fees at issue were "necessary to provide support for the child."⁴⁴

The Second Circuit adopted an objective analysis similar to that in *Dvorak*, but carved out an exception for unusual circumstances in its analysis. In *Peters v Hennenhoefter*,⁴⁵ the circuit court upheld the district court's determination that an award for attorney's fees owed for representation of the debtor's son was in the nature of support, and thus was not dischargeable under Section 523(a)(5).⁴⁶ The court based its decision on public policy grounds, arguing that the discharge of such debts generally would impair the ability of parents to bring or defend custody actions in the best interests of their children.⁴⁷ Although the Second Circuit in *Peters* did not explicitly carve out an unusual circumstances exception, it did substantially adopt the district court's reasoning that incorporated this exception.⁴⁸ Further-

⁴⁰ See *Dvorak*, 986 F2d at 941.

⁴¹ *Id.*

⁴² See *Hudson*, 107 F3d at 357 ("Because the ultimate purpose of such a proceeding is to provide support for the child, the attorneys fees incurred inure to her benefit and support, and therefore fall under the exception to dischargeability set out in § 523(a)(5)."); *Dvorak*, 986 F2d at 941 (reasoning that the fees fall under the discharge exception when they are incurred during proceedings that are in the nature of support).

⁴³ *Dvorak*, 986 F2d at 941 ("We review findings of fact under the clearly erroneous standard, but are free to review conclusions of law *de novo*.").

⁴⁴ *Hudson*, 107 F3d at 357.

⁴⁵ 964 F2d 166 (2d Cir 1992).

⁴⁶ *Peters*, 133 BR at 297.

⁴⁷ See *Peters*, 964 F2d at 167, quoting *Spong*, 661 F2d at 9 ("An award of attorney's fees may be essential to . . . [the] ability to sue or defend a [support] action and thus a necessary under the law. . . . [D]ischargeability must be determined by the substance of the liability rather than its form.").

⁴⁸ *Peters*, 133 BR at 296 ("We must consider whether there are any facts here warranting an exception to this rule [of the custody dispute being classified as in the nature

more, the Second Circuit explicitly approved this exception ten years later in *Falk & Siemer, LLP v Maddigan*.⁴⁹

Like the Fifth Circuit, the Second Circuit did not clarify whether each of its determinations should be reviewed as a question of law or fact.⁵⁰ The Tenth and Eleventh Circuits, on the other hand, approach the issue as a question of law.⁵¹ In doing so, the two circuits explicitly carve out an exception for unusual circumstances in their analyses while holding that costs incurred and awarded in custody actions are nondischargeable as support obligations because such actions are for the benefit and support of the child.⁵²

The Tenth Circuit in *Jones v Jones*,⁵³ like the Fifth Circuit in *Dvorak*, looked to the nature of the custody action to determine whether such actions generally are necessary to the support of the child.⁵⁴ It relied on the ultimate goal of the proceeding to a greater extent than the Fifth Circuit did, finding that the ultimate purpose of a child custody proceeding is controlling because the best interest of the child standard is synonymous with a determination of support.⁵⁵ The court reasoned that “in all custody actions, the court’s ultimate goal is the welfare of the child,” and the best interest of the child is “an inseparable element” of support.⁵⁶ However, unlike in *Dvorak*, the court qualified its holding, reserving the issue of whether a custody proceeding automatically constitutes “support” in the presence of “unusual circumstances,” without defining what those circumstances might be.⁵⁷

Lastly, the Eleventh Circuit, in *Strickland v Shannon*,⁵⁸ held that “an attorney fees award arising from a post-dissolution custody action constitutes ‘support’ for the former spouse” when the

of support].”).

⁴⁹ 312 F3d 589, 594 (2d Cir 2002).

⁵⁰ See *Falk*, 312 F3d at 593-94 (2d Cir 2002) (collapsing its determination of legal and factual conclusions by the bankruptcy court in its application of the standard of review).

⁵¹ See *Strickland*, 90 F3d at 446; *Miller v Gentry*, 55 F3d 1487, 1489 (10th Cir 1995); *Jones*, 9 F3d at 880.

⁵² See *Strickland*, 90 F3d at 446; *Miller*, 55 F3d at 1489; *Jones*, 9 F3d at 880.

⁵³ 9 F3d 878 (10th Cir 1993).

⁵⁴ Id at 881 (“Since determination of child custody is essential to the child’s proper ‘support,’ attorney fees incurred and awarded in child custody litigation should likewise be considered as obligations for ‘support,’ at least in the absence of clear indication of special circumstances to the contrary.”).

⁵⁵ Id at 882.

⁵⁶ Id at 881.

⁵⁷ *Jones*, 9 F3d at 882.

⁵⁸ 90 F3d 444 (11th Cir 1996).

award derived from the spouse's relative ability to pay, in the absence of special circumstances.⁵⁹ It affirmed the district court's determination that the debt in question constituted support.⁶⁰ The court found this appropriate "in the absence of special circumstances showing otherwise from the record in the underlying proceedings."⁶¹

The use of the term "unusual circumstances" in *Jones*, could have two meanings. First, the phrase could refer to unusual facts present in the underlying custody or visitation action. Second, the phrase could refer to abuse of discretion or some other procedural irregularity. If "unusual circumstances" refers to the facts of the underlying custody action, then those circuits that carve out unusual circumstances exceptions will, in effect, decide dischargeability of costs awarded in child custody cases on a factual case-by-case basis.

The Eleventh Circuit reasoned in *Strickland* that where one parent receives an award for attorney's fees based on the parties' comparative ability to pay, the debt created by that award constitutes support for the purpose of Section 523(a)(5).⁶² In so ruling, however, the court explicitly carved out an undefined exception for special circumstances that might indicate that the debt should be discharged.⁶³ The Second Circuit spelled out one possible definition for such special circumstances.⁶⁴ In *Falk*, the Second Circuit relied on *Peters* and held that attorney's fees were not dischargeable as they were incurred at least partially for the benefit of the child.⁶⁵ The court sought to limit its holding by emphasizing that in certain circumstances, costs incurred in custody actions do not constitute support. The court warned:

In reaching this conclusion, we do not suggest that a debt for legal services incurred by a nonspouse parent as part of custody proceedings is *always* for the benefit of a child within the meaning of § 523(a)(5). It is possible that legal

⁵⁹ *Id.* at 447.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Strickland*, 90 F3d at 447.

⁶³ *Id.*

⁶⁴ *Falk*, 312 F3d at 594.

⁶⁵ *Id.*

fees in a custody proceeding may be incurred solely for the benefit of the interests of a parent.⁶⁶

Some bankruptcy courts have endorsed this reasoning. In *In re Ramirez*⁶⁷ and *Bower v Deickler*,⁶⁸ the district courts distinguished the Eighth Circuit's allocation of discretion to the bankruptcy court over the dischargeability of costs from the holdings of the majority of circuits that have found debts incurred for fees in custody actions to be nondischargeable.⁶⁹ Both courts found the majority position persuasive, but carefully qualified their holdings by reference to "circumstances" or "indications" which might have made the instant cases come out the other way.⁷⁰

The unusual circumstances exception to the general rule against discharge can also be read as referring to abuse of discretion or another procedural irregularity. In holding that costs incurred in custody disputes constitute support "absent unusual circumstances not present here," the Tenth Circuit created a high standard for such circumstances.⁷¹ While using the same language as other circuits that carved out such exceptions, the Tenth Circuit made a strong institutional capacity argument against allowing or forcing bankruptcy courts to determine the "subjective motivations" of parents in a custody action.⁷² The court stated in *Jones* that a state court has more ability than the bankruptcy court to determine whether a parent's motive in bringing a custody action is malicious and, furthermore, that custody proceedings generally are "held for the child's benefit and support" rather than for the parent's benefit.⁷³ State courts' greater experience with fleshing out malicious motives in custody actions,⁷⁴ together with their expertise in deciding the question of

⁶⁶ Id.

⁶⁷ 2000 Bankr LEXIS 2019 (Bankr N D Ill).

⁶⁸ 1999 Bankr LEXIS 1877 (Bankr D NH).

⁶⁹ *Ramirez*, 2000 Bankr LEXIS 2019, *11-15 (examining the circuit split and rejecting the position of the Eighth Circuit); *Bower*, 1999 Bankr LEXIS 1877, *6-9 (examining the circuit split and finding the majority's position persuasive).

⁷⁰ See *Ramirez*, 2000 Bankr LEXIS 2019, *14 ("This Court agrees . . . that the best interests of the child is necessarily the key issue in all custody actions, and that fees incurred in custody actions should be presumed to be in the nature of support unless exceptional circumstances exist."); *Bower*, 1999 Bankr LEXIS 1877, *8-9 ("In the absence of any indication to the contrary, the Court will find that the attorney's fees incurred . . . in the child custody litigation should be considered support under section 523(a)(5).").

⁷¹ See *Jones*, 9F3d at 882.

⁷² Id at 881.

⁷³ Id at 882.

⁷⁴ Id at 881.

support,⁷⁵ make them better suited to decide whether costs constitute support.

In *Jones*, the debtor's ex-husband claimed that she only attempted to obtain custody in order to avoid paying child support. The court deemed this argument insufficiently "unusual" to warrant a departure from the state court determination.⁷⁶ That finding, together with the court's institutional argument and its emphasis on the goal of custody proceedings, suggests that the "unusual circumstances" exception would not include a proceeding brought for the interests of one parent, as the Second Circuit suggested. Rather, only a procedural anomaly or an abuse of discretion by the state court would warrant a departure from the award made. The court's broad statement that, "in all custody actions, the court's ultimate goal is the welfare of the child," supports this view.⁷⁷ This broad language regarding the underlying goal of child custody actions generally is reminiscent of the unqualified approach to construing costs awarded in child custody actions as support seen in *Dvorak*.⁷⁸ If family courts only award costs in support of the child, bankruptcy courts should only discharge or uphold discharge of costs if there had been such an abuse of discretion or other procedural irregularity.

2. *The minority position of the Eighth Circuit.*

In contrast to the other circuits, the Eighth Circuit in *Adams* found that costs incurred in custody and visitation litigation were dischargeable in bankruptcy.⁷⁹ The court reasoned that in determining "whether to characterize an award as maintenance or support the crucial issue is the function the award was intended to serve."⁸⁰ Because the Eighth Circuit characterized the issue presented as a factual question for the bankruptcy court, it upheld the bankruptcy court's finding that both parents were "fit and adequate."⁸¹ The custody action in question benefited, and took place in order to benefit, a father whose ex-wife's conduct damaged his "ability to maintain a relationship with his daugh-

⁷⁵ *Jones*, 9 F3d at 881.

⁷⁶ *Id.* at 882.

⁷⁷ *Id.* at 881.

⁷⁸ See *Dvorak*, 986 F2d at 941.

⁷⁹ *Adams*, 963 F2d at 199.

⁸⁰ *Id.* at 200 (internal quotation omitted).

⁸¹ *Id.*

ter.”⁸² Thus, the bankruptcy court reasoned that the action was not for the child’s benefit and support.⁸³

The Eighth Circuit reviewed the findings of the bankruptcy court for clear error. It determined that the question of dischargeability presented issues of fact, rather than of law.⁸⁴ The approach of the Eighth Circuit differs from the majority of courts in that it requires bankruptcy courts to make an independent and fact-intensive inquiry into whether the child custody or visitation proceedings were actually in the nature of support.⁸⁵ Other courts have criticized the Eighth Circuit’s understanding of the issue.⁸⁶ These courts have instead adopted the majority position, and generally presume that custody proceedings are in the nature of support as a matter of law, even where the presumption is rebuttable.⁸⁷

Both the Tenth and Eleventh Circuits found that a simple legal inquiry was better suited to deciding the dischargeability question than a fact-intensive inquiry. The Eleventh Circuit interpreted the statutory language to require a simple inquiry: “whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support.”⁸⁸ The Tenth Circuit instead focused on the general appropriateness of a bankruptcy court making a fact-intensive inquiry in the custody context. The court reasoned that such an inquiry “could require extensive hearings and fact-findings into the parties’ subjective

⁸² Id.

⁸³ *Adams*, 963 F2d at 201.

⁸⁴ Compare id at 200 (“This is a question of fact to be decided by the bankruptcy court.”) with *Strickland*, 90 F3d at 446 (“The issue of whether the attorney fees award in this case constituted ‘support’ within the meaning of § 523(a)(5) is a matter of federal law, which we review *de novo*.”).

⁸⁵ *Adams*, 963 F2d at 200-01. See also *Ramirez*, 2000 Bankr LEXIS 2019, *13-14 (stating that the Eighth Circuit “implicitly approved of the bankruptcy court’s inquiry into the facts and circumstances of the custody proceeding to determine whether the child’s health, welfare and best interests were truly at issue in the proceeding”).

⁸⁶ See, for example, *Werthen v Werthen*, 282 BR 553 (BAP 1st Cir 2002), in which the court first relied on *Adams* for the proposition that it must accept the bankruptcy court’s findings on whether an award constituted support unless those findings were clearly erroneous, but then qualified that standard of review. Id. Citing *Shine v Shine*, 802 F2d 583, 588 (1st Cir 1986), the court in *Werthen* made clear that federal law, not state law, controls factual findings, “and occasions will arise where a court is asked to determine whether a given obligation is within the subsection’s reach as a matter of law.” *Werthen*, 282 BR at 556 n 4.

⁸⁷ See *Jones*, 9 F3d at 881 (“[I]n all custody actions, the court’s ultimate goal is the welfare of the child.”).

⁸⁸ *Strickland*, 90 F3d at 446, citing *In re Harrell*, 754 F2d 902, 904-05 (11th Cir 1985).

motivations which is more appropriate to the state court than a bankruptcy court.”⁸⁹ Thus, the Tenth Circuit held that “in order that genuine support obligations are not improperly discharged . . . the term ‘support’ encompasses the issue of custody absent unusual circumstances.”⁹⁰

II. THE CIRCUIT SPLIT SHOULD BE REFRAMED AS A SPLIT BETWEEN CHARACTERIZING THE ISSUE AS ONE OF LAW OR OF FACT

The Eighth Circuit’s approach to the question of whether debts incurred for fees awarded in custody and visitation litigation are dischargeable in bankruptcy can be reconciled with the majority approach under one of three theories. First, it is possible to read *Adams* as embodying the fact-based unusual circumstances exception articulated by the Second Circuit in *Falk*.⁹¹ Second, when examined closely, the Eighth Circuit’s reasoning in *Adams* is similar to the Fifth Circuit’s reasoning in *Dvorak* in that both hinge on the underlying purpose of the custody action.⁹² Third, the differences between the position taken by the Eighth Circuit in *Adams* and that taken by most other circuits stem from each circuit’s adoption of the approach to discharge that would allow them to better defer to the factual determination made by the bankruptcy court.⁹³ Even so, the approach taken by the Eighth Circuit stands in sharp contrast to that of the Tenth Circuit, which has held that debts incurred for fees in custody disputes are nondischargeable as a matter of law.⁹⁴ This Part attempts to reconcile *Adams* with the majority approach, but concludes that a split remains as to whether this question should be treated as a question of law or of fact.

A. *Adams* and the *Falk* Exception

The Second Circuit in *Falk* carved out an exception to its holding that the award of costs constituted a nondischargeable debt.⁹⁵ If “legal fees in a custody proceeding . . . [are] incurred

⁸⁹ *Jones*, 9 F3d at 881.

⁹⁰ *Id* at 882.

⁹¹ *Falk*, 312 F3d at 594.

⁹² Compare *Adams*, 963 F2d at 200, with *Dvorak*, 986 F2d at 941.

⁹³ Compare *Adams*, 963 F2d at 200, with *Falk*, 312 F3d at 592.

⁹⁴ See *Jones*, 9 F3d at 882.

⁹⁵ *Falk*, 312 F3d at 594.

solely for the benefit of the interests of a parent,” then they are not for the benefit of the child under Section 523(a)(5).⁹⁶ The decision of the Eighth Circuit in *Adams* can be read as an example of this exception.

In *Adams*, the court found that the costs “were a repercussion of” the battle between the parents, specifically the debtor’s attempts to enforce custody rights against a wife determined to frustrate them.⁹⁷ In such a circumstance, costs ostensibly incurred in bringing and defending a custody action actually served the parents’ interests, and not the child’s.⁹⁸ Thus, the Eighth Circuit reasoned, the debts for such costs did not fall under the statutory exception and could be discharged in bankruptcy.⁹⁹

While this analysis generally reconciles the result in *Adams* with the jurisprudence of the majority, the Eighth Circuit’s own reasoning contrasts more sharply with the majority. The main difference between the approaches taken by the Second and the Eighth Circuits stems from the question of whether the court must make an independent evaluation of the subjective purpose of the custody proceedings at issue.¹⁰⁰ The Second Circuit relies on the decision of the state court and presumes that the costs of proceedings constitute support, but allows litigants to rebut the presumption.¹⁰¹ The Eighth Circuit, on the other hand, mandates that bankruptcy courts make an independent evaluation based on the record.¹⁰²

B. Similarity of Reasoning in *Adams* and *Dvorak*

In *Adams*, the Eighth Circuit held that dischargeability depends on the function the state family court intended the award

⁹⁶ *Id.*

⁹⁷ *Adams*, 963 F3d at 199.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Compare *Falk*, 312 F3d at 595-96 (reviewing the objective evidence such as financial records cited by the bankruptcy court for its characterization of the underlying custody proceedings as in the nature of support, but failing to require an independent evaluation of the function of every award), with *Adams*, 963 F2d at 199-200 (upholding the independent factual inquiry made by the bankruptcy court into the motives of the parties to the custody action as necessary to the determination of whether an award constitutes support).

¹⁰¹ See *Falk*, 312 F3d at 594 (conceding that debts from costs can be unrelated to a child’s welfare).

¹⁰² *Adams*, 963 F2d at 200.

of costs to serve.¹⁰³ The analysis in *Adams* turned on the court's conclusion that the custody proceedings did not serve to benefit and support the child.¹⁰⁴ In *Dvorak*, on the other hand, the Fifth Circuit reasoned that custody hearings to determine the best home for a child are categorically for her "benefit and support."¹⁰⁵ While the two circuits came to different conclusions, both evaluated whether the custody proceedings were necessary for the welfare of the child. Those courts that have excepted costs from discharge determined that the proceeding was necessary for determining the child's support.¹⁰⁶ Conversely, the court in *Adams* determined that the costs were unnecessarily incurred—and thus did not constitute support—because the proceeding was not for the child's welfare.¹⁰⁷ Under either analysis, a court focuses on the purpose of the child custody proceedings.

This attempt at reconciliation is open to the criticism that the courts of appeals' deference to the factual findings of the bankruptcy court may explain the differing results between *Adams* and *Dvorak*. The Eighth Circuit in *Adams* viewed the matter as purely a question of fact;¹⁰⁸ for the Fifth Circuit, the question embodied both fact and law.¹⁰⁹ Deference to findings of fact remains an incomplete explanation, however, in the face of the differences in the courts' underlying understandings of the function of custody proceedings and the fees incurred in them. The bankruptcy court for the Northern District of Illinois made this point vividly. In rejecting the position taken by the Eighth Circuit, the bankruptcy court sharply criticized *Adams*:

[The Eighth Circuit's] approach ignores that the fundamental issue in every child custody proceeding is the best interests of the child. Moreover, the *Adams* court's affirmation of a factual finding that a mother's extensive ef-

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citing numerous examples from the factual record in support of the bankruptcy court's conclusion that the custody proceeding was a battle between the child's parents).

¹⁰⁵ *Dvorak*, 986 F2d at 941.

¹⁰⁶ *Id.*

¹⁰⁷ Compare *Peters v Hennenhoefter*, 133 BR 291, 295 (Bankr S DNY 1991) (holding that "fees incurred on behalf of a child . . . are deemed to be support when those fees are inextricably intertwined with proceedings affecting the welfare of a child"), with *Adams*, 963 F2d at 201 (holding that costs associated with custody and visitation proceedings were dischargeable where the proceedings were not focused on the child's welfare).

¹⁰⁸ *Adams*, 963 F2d at 200.

¹⁰⁹ *Dvorak*, 986 F2d at 941 ("We review findings of fact under the clearly erroneous standard, but are free to review conclusions of law *de novo*." (citations omitted)).

forts to destroy a father's relationship with his child does not affect the health, welfare, and best interests of the child defies common sense.¹¹⁰

Whether or not the Eighth Circuit's deference to the decision of the bankruptcy court "defies common sense," this criticism reflects a fundamental difference in opinion about how courts should evaluate the nature of child custody proceedings. Under one view, the nature of custody proceedings shifts with the factual situation of each case. Under the competing view, the purported purpose of deciding the welfare and best interests of the child necessarily determines the nature of all custody proceedings. In both *Adams* and *Dvorak*, the courts looked to the nature of custody proceedings and made a determination about the proceeding's relationship to "support."

C. Procedural Posture and the Circuit Split

Deference to the findings of the bankruptcy courts may explain the divergence in outcome between *Adams* and the other cases in this area. In *Adams*, the Eighth Circuit upheld the bankruptcy court's finding of dischargeability.¹¹¹ The court found that whether a debt was in the nature of support was a factual finding for the bankruptcy court, and must be upheld unless clearly erroneous.¹¹² Because it could not find the bankruptcy court's finding clearly erroneous, the Eighth Circuit affirmed, but "acknowledge[d] that the record might plausibly be read to support a finding" of the debts as support.¹¹³ The holding in *Adams* does not preclude a finding of support for costs incurred in child custody disputes; it simply refuses to require them.

Like the Eighth Circuit, the Second and Fifth Circuits chose to uphold the initial determinations of the bankruptcy courts below.¹¹⁴ While the impact of findings of fact on the appellate courts is unclear in these cases, deference to the findings of fact of the lower court may partially explain each outcome. Both circuits upheld determinations of nondischargeability by bank-

¹¹⁰ *Ramirez*, 2000 Bankr LEXIS 2019, *14-15.

¹¹¹ *Adams*, 963 F2d at 200.

¹¹² *Id.*

¹¹³ *Id.* at 201.

¹¹⁴ For examples of cases affirming bankruptcy and district courts' determinations that the awards fit into the § 523(a)(5) exception to discharge, see *Falk*, 312 F3d at 592; *Hudson*, 107 F3d at 356; *Dvorak*, 986 F2d at 940; *Peters*, 964 F2d at 167.

ruptcy courts, and did not reach the question of whether bankruptcy courts must, as a matter of law, find costs in custody actions nondischargeable. While the Second Circuit in *Falk* made it clear that not all debts for awards of attorney's fees in custody disputes would be nondischargeable,¹¹⁵ the Fifth Circuit did not address this point. This silence permits two interpretations of its holdings: broad support for the proposition that costs awarded in child custody disputes should be deemed support, or narrow reliance on the initial bankruptcy court's characterization.

Hudson highlighted this ambiguity by juxtaposing the broad proposition that custody proceedings are in the nature of support¹¹⁶ with the assumption that the fees in question "were correctly characterized by the bankruptcy court as necessary to provide support for the child."¹¹⁷ The determination that the bankruptcy court's finding was correct as a matter of law merely implies that such debts *could* fall under the exception to dischargeability, despite dicta which might go further.¹¹⁸

Even if the outcome in *Hudson*—and perhaps in *Dvorak*—can be confined to situations where bankruptcy courts have characterized costs in custody actions as support, the Tenth Circuit's decisions cannot be so reconciled. The Tenth Circuit in *Jones and Miller v Gentry*¹¹⁹ reversed denials of nondischargeability by lower courts.¹²⁰ In *Jones*, the Tenth Circuit reversed the bankruptcy court's finding that the debt for attorney's fees did not fall within the exception under Section 523(a)(5).¹²¹ The court held that "the term 'support' encompasses the issue of custody absent unusual circumstances not present here."¹²² In *Miller*, the

¹¹⁵ See *Falk*, 312 F3d at 594 ("In reaching this conclusion, we do not suggest that a debt for legal services incurred by a nonspouse parent as part of custody proceedings is *always* for the benefit of a child within the meaning of § 523(a)(5). It is possible that legal fees in a custody proceeding may be incurred solely for the benefit of the interests of a parent.").

¹¹⁶ *Hudson*, 107 F3d at 357 (reasoning that awards for attorney's fees in child support actions are nondischargeable because "the ultimate purpose of such a proceeding is to provide support for the child" and therefore "the attorney fees incurred inure to her benefit and support") (citations omitted).

¹¹⁷ *Id* at 357.

¹¹⁸ *Id* ("A court ordered obligation to pay attorney fees charged by an attorney that represents a child's parent in child support litigation is non-dischargeable.").

¹¹⁹ 55 F3d 1487 (10th Cir 1995).

¹²⁰ See *id* at 1488-89 (affirming the district court's reversal of the bankruptcy court's finding of dischargeability); *Jones*, 9 F3d at 880 (affirming the district court's reversal of the bankruptcy court's finding of dischargeability).

¹²¹ *Jones*, 9 F3d at 880-81.

¹²² *Id* at 882.

court interpreted this language to limit a dischargeability inquiry to the relationship between the debt and the custody proceeding, consequently forbidding an inquiry into the nature of the custody proceeding itself.¹²³ These cases therefore imply that bankruptcy courts cannot discharge debts related to custody disputes. That is, they suggest both that bankruptcy courts must find that costs in a child custody dispute constitute support, and that the unusual circumstances language refers to procedural irregularities.

D. The Circuits Remain Split as to Whether Exceptions to Dischargeability Pose Questions of Fact or of Law

The attempt to reconcile the Eighth Circuit's decision with the majority preference for dischargeability does not resolve the underlying tension between the approaches that treat the question as a matter of law and those that consider it one of fact. The Eighth Circuit's position remains in conflict with the reasoning and position taken by the Tenth Circuit in *Jones* and by the Eleventh Circuit in *Strickland*, even if reconcilable with the majority position through any one or all of the three arguments above. In both the Tenth and Eleventh Circuits, the question of whether a debt fits into the Section 523(a)(5) exception from discharge "is a matter of federal law" subject to de novo review.¹²⁴ In the Eighth Circuit, the question of whether a debt fits into the Section 523(a)(5) is a question of fact for the bankruptcy court and is reviewed for clear error.¹²⁵ Bankruptcy courts must undertake an independent and fact-intensive inquiry into whether the underlying proceedings were actually necessary for the support of the child.¹²⁶

The Tenth Circuit twice reversed a lower court's discharge of costs related to child custody proceedings.¹²⁷ In *Jones*, the Tenth Circuit upheld the district court in reversing the bankruptcy

¹²³ *Miller*, 55 F3d at 1489 ("The analysis [in *Jones*] focused entirely upon whether the debt was in the nature of support. We held that it would be inappropriate to require a bankruptcy court to determine the purpose of the custody action and that 'in all custody actions, the court's ultimate goal is the welfare of the child.'").

¹²⁴ *Strickland*, 90 F3d at 446. See also *Miller*, 55 F3d at 1489; *Jones*, 9 F3d at 880.

¹²⁵ *Adams*, 963 F2d at 200 ("This is a question of fact to be decided by the bankruptcy court.").

¹²⁶ *Id.* at 200-01. See also Part I B 2.

¹²⁷ See *Miller*, 55 F3d at 1488; *Jones*, 9 F3d at 879. The cases that reached the court of appeals from the Second and Fifth Circuits, in contrast, were upheld rather than reversed. See Part II C.

court's finding that attorney's fees and costs related to a custody dispute were dischargeable.¹²⁸ The bankruptcy court had reasoned that Section 523(a)(5) did not exempt a custody dispute, as separate from a support dispute, from discharge.¹²⁹ In *Miller*, the court reversed a substantially similar holding by another bankruptcy court.¹³⁰ The Tenth Circuit's analysis of the question as a matter of law forced it to reach the question of whether bankruptcy courts are bound to find that costs incurred in custody and visitation actions are in the nature of support, while other circuits merely determined that such costs are not dischargeable when in the nature of support.¹³¹ It has consistently found that such costs do constitute support.¹³²

The Eleventh Circuit, like the Tenth Circuit, analyzed the dischargeability question as one of law. In *Strickland*, the court rejected the bankruptcy court's determination that debts to a former spouse in relation to child custody proceedings were dischargeable, instead agreeing with the district court's determination that such debts are nondischargeable as a matter of law.¹³³ This holding is particularly illuminating because the decisions of the bankruptcy court and the district court in *Strickland* mirror the decisions in *Adams* procedurally: in both cases the bankruptcy court found that costs did not constitute support and the district court reversed.¹³⁴ In *Adams*, the Eighth Circuit upheld the bankruptcy court's initial determination that the costs awarded did not constitute support, and reversed the district court's determination to the contrary.¹³⁵ The Eleventh Circuit in *Strickland* took the opposite approach and determined that so long as the obligation can "legitimately be characterized as support," it is nondischargeable under Section 523(a)(5).¹³⁶ This de-

¹²⁸ *Jones*, 9 F3d at 879.

¹²⁹ This holding is a plain text reading of 11 USC § 523(a)(5), which states that only debts "actually in the nature of alimony, maintenance, or support" are dischargeable.

¹³⁰ *Miller*, 55 F3d at 1488 (describing the bankruptcy court's holding as based on the "plain language of 11 USC § 523(a)(5)").

¹³¹ *Id.* at 1489-90 (holding that the bankruptcy court was bound by precedent to find that those debts that relate directly to child custody proceedings are in the nature of support).

¹³² *Jones*, 9 F3d at 882.

¹³³ *Strickland*, 90 F3d at 445.

¹³⁴ Both *Strickland*, 90 F3d at 445, and *Adams*, 963 F2d at 199, describe the bankruptcy court's finding of dischargeability and the district court's reversal as a matter of law.

¹³⁵ *Adams*, 963 F2d at 199-200.

¹³⁶ *Strickland*, 90 F3d at 447, quoting *In re Harrell*, 754 F2d at 906.

termination seems largely based on the concern that a more intensive factual inquiry would necessarily “embroil federal courts in domestic relations matters which should properly be reserved to the state courts.”¹³⁷

As the contrast between the approaches of the Tenth and Eleventh Circuits and that of the Eighth Circuit demonstrates, even if *Adams* can be reconciled with the holdings of the Second and Fifth Circuits, courts still must choose a consistent standard under which to review the question of the dischargeability of debts from costs incurred in child custody actions.

III. DISCHARGEABILITY OF COSTS SHOULD BE DECIDED AS A MATTER OF LAW

The dischargeability of costs awarded in child custody disputes should be decided as a matter of law. The circuits have framed the current split in terms of outcome: most courts have decided that costs awarded in child custody disputes may be dischargeable, while the Eighth Circuit alone presumes such costs to be nondischargeable.¹³⁸ This framing misses the most important divide between the circuits—those that see the issue as a question of law and those that see the issue as a question of fact.¹³⁹ Making case-by-case determinations of whether costs constitute support is beyond the institutional capacity of the bankruptcy courts, and thus the question should be decided as a matter of law.

Unlike debts incurred in contractual relationships, from which an honest but unfortunate debtor usually seeks relief, the parent-child relationship is one of status and cannot be wiped out by a “fresh start.” Support of a child is a parent’s continuing obligation, and consequently persists even in bankruptcy.¹⁴⁰ Such continuing obligations are outside the usual realm of the bankruptcy courts. The family courts, on the other hand, have great expertise in evaluating what is necessary for the continuing obligation of support.¹⁴¹ Furthermore, the best interests of the child

¹³⁷ Id., quoting *In re Harrell*, 754 F2d 902, 907 (11th Cir 1985).

¹³⁸ See, for example, *Bower*, 1999 Bankr LEXIS 1877, *5-9 (characterizing the split as between the Eighth Circuit’s discharge of a fee award and the nondischargeability of such fees in the majority of circuits, and finding the rationale that “child custody is necessarily tied” to support persuasive).

¹³⁹ See Part II D.

¹⁴⁰ See 11 USC § 523(a)(5).

¹⁴¹ *Jones*, 9 F3d at 881.

standard mandates that any award for costs in child custody disputes constitutes support in the broad sense required by bankruptcy law.¹⁴² Deference to the grant of awards made by family court judges, therefore, seems wise and would be consistent with the “[c]ongressional policy . . . that genuine support obligations would not be discharged.”¹⁴³

IV. AS A MATTER OF LAW, COSTS IN CHILD CUSTODY DISPUTES SHOULD CONSTITUTE SUPPORT UNDER THE BANKRUPTCY CODE

The question of whether costs awarded in child custody actions constitute support should be decided as a matter of law, and such costs should be considered support as a matter of law. The discharge of custody proceeding debts is outside the “fresh start” framework because of continuing status obligations between debtors and their children. Family courts have particular expertise in deciding these questions, and exercise that expertise when deciding whether to award costs under the best interests of the child standard. Furthermore, this standard works to ensure that such awards constitute support as it is broadly construed in bankruptcy law.

This Part develops the above argument in further detail and suggests that not only institutional capacity and congressional policy, but also broader federalism concerns weigh in favor of deference to state court awards for fees and costs.

A. Institutional Capacity and Congressional Policy Weigh Against Discharge of Debts from Costs Incurred in Child Custody Actions

The congressional policy against the discharge of genuine support obligations in bankruptcy, together with the institutional incapacity of the bankruptcy courts to analyze these questions, weigh in favor of construing costs awarded in child custody actions as support as a matter of law. Such a rule would require

¹⁴² See *Shine v Shine*, 802 F2d 583, 588 (1st Cir 1986). See also notes 26-27 and accompanying text.

¹⁴³ See *Shine*, 802 F2d at 588. Compare family court awards to the Bankruptcy Code’s deference to state law in specifying property exempted from the bankruptcy estate. 11 USC § 522(b)(2)(A)(2000) (allowing the debtor to exempt from the bankruptcy estate any property exempt under state law, even if the property would not be exempt under federal law).

bankruptcy courts to defer to state court awards for costs (and the corresponding distribution of costs) in child custody actions.

1. *Congressional policy.*

Congress has long maintained a policy that genuine support obligations not be discharged in bankruptcy.¹⁴⁴ Since 1903, the Bankruptcy Code has included an exception to discharge for alimony, maintenance, and support payments.¹⁴⁵ When the section embodying this policy was revised in 1978, the broad exception for alimony, maintenance, and support remained.¹⁴⁶ The Congressional Commission on Bankruptcy Laws of the United States' proposal for this amendment left the exception intact, and in fact proposed to "broaden the bankruptcy law's protection of the families of the bankrupt spouse in accordance with changing times."¹⁴⁷ In 1984, another amendment widened the scope of Section 523(a)(5) to include children born outside of marriage, by extending the exception to spousal or child support debts in connection with any order by a court of record.¹⁴⁸ As the First Circuit concluded in *Shine v Shine*,¹⁴⁹ legislative history supports a finding that congressional policy is consistent with excluding genuine support obligations from discharge in bankruptcy.¹⁵⁰

2. *Institutional capacity and costs awarded as support.*

The family court's ultimate goal in custody proceedings is to decide what is necessary to support the welfare and best interests of the child, a determination which coincides both with support obligations under Section 523(a)(5) and the best interest of the child standard of review. Because family courts make deci-

¹⁴⁴ *Shine v Shine*, 802 F2d 583, 586-88 (1st Cir 1986) (reviewing the history of the congressional policy that support obligations not be discharged in bankruptcy and concluding that the 1978 Amendment did not alter that policy).

¹⁴⁵ Act of Feb 5, 1903, 5, 23 Stat 797, 798 (repealed 1978). See *Shine*, 802 F2d at 586 (describing the incorporation of the common law exception to discharge for obligations of alimony, maintenance, and support into Section 17 of the 1898 Bankruptcy Act).

¹⁴⁶ See Alexander, 43 Cath U L Rev at 357 (cited in note 17) (noting that Section 523(a)(5) of the current Bankruptcy Code is "the gender-neutral replacement for section 17(a)(7) of the 1898 Act" amended to comply with equal protection requirements).

¹⁴⁷ See *Shine*, 802 F2d at 586-87, citing Report of the Commission on the Bankruptcy Laws, HR Rep No 93-137, 93d Cong, 1st Sess (1973).

¹⁴⁸ 11 USC § 523(a)(5). See also David N. Ravin and Kenneth A. Rosen, *The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations*, 60 Am Bankr L J 1, 6-7 (1986) (detailing the history of Section 523(a)(5)).

¹⁴⁹ 802 F2d 583 (1st Cir 1986).

¹⁵⁰ *Id* at 586-88.

sions about whether to award fees and costs based on what they determine to be in the best interest of the child, by definition they can only award costs if such awards serve the child's best interests. Bankruptcy courts should, therefore, interpret the existence of a family court award as proof that the award constitutes support. The reasoning outlined in *Jones* and *Ramirez* supports the deference shown by the Fifth Circuit to state court determinations of the child's welfare.¹⁵¹

In *Jones*, the Tenth Circuit stated that bankruptcy courts are ill-equipped to determine whether the subjective purpose of a particular custody action matches the objective purpose of custody actions generally.¹⁵² Because custody actions focus on finding the best home for the child, they are necessarily "held for the child's benefit and support."¹⁵³ The Tenth Circuit reasoned that "to require the [bankruptcy] court to determine the purpose of the custody action could require extensive hearings and fact-findings into the parties' subjective motivations which is more appropriate to the state court than a bankruptcy court."¹⁵⁴ The Bankruptcy Court for the Northern District of Illinois explicitly followed *Jones*, and rejected *Adams*, in *Ramirez*.¹⁵⁵ The court in *Ramirez* cited with approval the Tenth Circuit's rejection of the factual inquiry required by the Eighth Circuit because "[the Eighth Circuit's] approach ignores that the fundamental issue in every child custody proceeding is the best interests of the child."¹⁵⁶

The goal of custody proceedings in state courts is to serve the best interests of the child.¹⁵⁷ The purpose of the bankruptcy court,

¹⁵¹ See *Jones*, 9 F3d at 881-82 (arguing that deference is due to awards made in child custody proceedings because the award of fees in those actions are made with the goal of promoting the welfare of the child); *Ramirez*, 2000 Bankr LEXIS 2019, *14-15 (arguing that a lack of deference to awards for fees made by family courts ignores the fundamental premise that all decisions made by courts in child custody actions are made to further the best interests of the child).

¹⁵² *Jones*, 9 F3d at 881.

¹⁵³ *Id.* at 882.

¹⁵⁴ *Id.* at 881.

¹⁵⁵ *Ramirez*, 2000 Bankr LEXIS 2019, *14-15 ("This Court agrees with the Tenth Circuit that the best interest of the child is necessarily the key issue in all custody actions, and that fees incurred in custody actions should be presumed to be in the nature of support unless exceptional circumstances exist. The Eight [sic] Circuit's approach ignores that the fundamental issue in every child custody proceeding is the best interests of the child.").

¹⁵⁶ *Id.*

¹⁵⁷ *Jones*, 9 F3d at 881 ("In our view, in all custody actions, the court's ultimate goal is the welfare of the child.").

on the other hand, is to give the debtor a fresh start.¹⁵⁸ Bankruptcy courts, therefore, emphasize the debtor's interests over a child's interests.¹⁵⁹ Furthermore, because they do not have the advantage of witness testimony, they may not know all of the facts needed to make an informed determination about the child's welfare.¹⁶⁰ The relative institutional capacities of state and bankruptcy courts thus weigh in favor of allowing state family courts to evaluate what distribution of costs serves the best interests of a child.¹⁶¹

B. Discharge Interferes with the Family Court's Determination of a Child's Welfare And Support

Bankruptcy courts should not discharge debts from custody and visitation actions because custody actions focus on the child's welfare.¹⁶² The purpose of custody hearings is in fact to provide for the welfare and support of the child.¹⁶³ Family courts award costs in custody hearings based on the best interests of the child standard, which is designed to promote the child's welfare.¹⁶⁴ Because the congressional policy behind Section 523(a)(5) is that no genuine support obligation should be discharged in bankruptcy,¹⁶⁵ allowing bankruptcy courts to reevaluate the decision

¹⁵⁸ *Local Loan Co v Hunt*, 292 US 234, 244 (1934).

¹⁵⁹ See Alyson F. Finkelstein, *A Tug of War: State Divorce Courts Versus Federal Bankruptcy Courts Regarding Debts Resulting from Divorce*, 18 Bankr Dev J 169, 194 (2001) ("Bankruptcy courts are not the proper forums within which to address family law issues. . . . Bankruptcy courts tend to place a larger emphasis on the debtor's interests and may not know all of the facts.").

¹⁶⁰ See *id.*

¹⁶¹ In *Peters v Hennenhoefter*, 133 BR 291, 296 n 5 (Bankr S D NY 1991), the court made a point of deferring to the state court's decision regarding the child's well-being, because the Second Circuit is not in the "business of modifying matrimonial decrees established by state courts" through the bankruptcy laws.

¹⁶² *Jones*, 9 F3d at 881 ("[I]n all custody actions, the court's ultimate goal is the welfare of the child.").

¹⁶³ See *Hudson*, 107 F3d at 357 ("[T]he ultimate purpose of such a proceeding is to provide support for the child."); *Dvorak*, 986 F2d at 941 ("That hearing was clearly for . . . [the child's] benefit and support, as the purpose of the hearing was to determine who could provide the best home for her."); *Jones*, 9 F3d at 881 ("In our view, in all custody actions, the court's ultimate goal is the welfare of the child."); *Ramirez*, 2000 Bankr LEXIS 2019, *14-15; *Bower*, 1999 Bankr LEXIS 1877, *9 ("The issue of child custody is necessarily tied to the issue of a child's support.").

¹⁶⁴ Consider *Hudson*, 107 F3d at 357 ("Because the ultimate purpose of such a proceeding is to provide support for the child, the attorney fees incurred inure to her benefit and support, and therefore fall under the exception to dischargeability set out in § 523(a)(5).").

¹⁶⁵ See *Shine*, 802 F2d at 586-88 (reviewing the legislative history to the 1978 Amendment to the Bankruptcy Act and concluding that "[c]ongressional policy . . . [was]

of the family court would increase the probability that genuine support obligations are discharged.¹⁶⁶

Awards for attorney's fees are used in the child custody context to ensure that the child's best interests are adequately represented.¹⁶⁷ Fees incurred in bringing a custody action do not benefit a child, spouse, or former spouse of the debtor as directly as they benefit the attorney, psychologist, or guardian *ad litem*, for example. Even so, these fees are necessary to the support of the child in that determining the child's best interests in custody proceedings requires that each party's interest be adequately represented.¹⁶⁸ Those fees and costs are thus in the nature of support.¹⁶⁹

This treatment of costs in custody hearings is in line with the treatment in bankruptcy of costs related to divorce. Just as costs constitute support when awarded in child custody proceedings undertaken for the welfare of the child, they are also considered support when granted to parties in divorce "who would otherwise not be able to litigate."¹⁷⁰ That is, the courts distinguish between those fees that constitute support and those that do not based on whether they view the costs to be necessary to the goal of support.¹⁷¹ This reasoning explicitly underlies the Second Cir-

to ensure that genuine support obligations would not be discharged").

¹⁶⁶ See *Jones*, 9 F3d at 882 ("Therefore, in order that genuine support obligations are not improperly discharged, we hold that the term 'support' encompasses the issue of custody absent unusual circumstances not present here."); *Sinton v Blaemire*, 229 BR 665, 668-69 (Bankr D Md 1999) ("The clear purpose of the court in appointing an attorney for the children is to act in the best interests of the attorney's wards. . . . Public policy demands a [] broader reading of what is meant by support for a minor child in 11 USC § 523(a)(5).").

¹⁶⁷ See, for example, *Ramirez*, 2000 Bankr LEXIS 2019, *21-23 (noting that the removal of debtor's child from her care was in the child's best interests and ordering debtor to pay for former spouse's attorney's fees).

¹⁶⁸ See *Peters*, 133 BR at 295 ("In any matrimonial action, whether it concerns the divorce, maintenance, support, custody, or post-decree proceedings implicating any of the foregoing, it is essential that each party be able to adequately represent its interests.").

¹⁶⁹ See *Pauley v Spong*, 661 F2d 6, 9 (2d Cir 1981) ("An award of attorney's fees may be essential to . . . [the] ability to sue or to defend . . . and thus a necessary under the law. . . . [D]ischargeability must be determined by the substance of the liability rather than its form.").

¹⁷⁰ Jeffrey H. Gallet and Bonnie R. Cohen-Gallet, *The Federalization of Family Law: Avoiding the Discharge of Legal Fees in Bankruptcy*, 16 J Am Acad Matrimonial Law 165, 166 (1999) (discussing the support of dependents exemption to the discharge of legal fees). See also *Peters*, 133 BR at 295-96 (describing the "general agreement" of courts that obligations in the nature of support "may include the duty to pay attorney's fees incurred by the former spouse in connection with a divorce proceeding" so that each party's interests can be adequately represented).

¹⁷¹ Gallet and Cohen-Gallet, 16 J Am Acad Matrimonial Law at 166 (cited in note 170).

cuit's approach in *Peters*, and lurks in the background of other decisions as well.¹⁷²

The Second Circuit in *Peters* cited its earlier decision in *Pauley v Spong*¹⁷³ in ruling that debts for costs incurred in child custody actions are not dischargeable in bankruptcy.¹⁷⁴ The court in *Spong* reasoned that, unless costs imposed by family courts constitute support, the ability of parties to litigate or to defend their rights in the domestic relations context would be compromised.¹⁷⁵ *Spong* demonstrates a particular function of awards for costs in the child custody context: family court judges often award fees against a party who is interfering with the rights of another, or against a party who is acting to the child's detriment, or based on ability to pay.¹⁷⁶ While *Spong* dealt with divorce, the district judge in *Peters* extended its reasoning to the child custody context in ordering the debtor to pay half of the attorney's fees and costs owed for representation of the debtor's son.¹⁷⁷ The judge's determination reflected his judgment that the award was necessary because it was in the child's best interests.¹⁷⁸

Discharging debts incurred in child custody actions creates an incentive problem. If bankruptcy courts can discharge these debts, parents would have less incentive to enforce their rights and the rights of their children under custody agreements, or to seek to modify these agreements when they no longer serve the best interests of the child.¹⁷⁹ Judges award fees to parents in cus-

¹⁷² Compare *Peters*, 964 F2d at 167, quoting *Spong*, 661 F2d at 9 ("An award of attorney's fees may be essential to . . . [the] ability to sue or defend a [support] action and thus a necessary under the law. . . . [D]ischargeability must be determined by the substance of the liability rather than its form."), with *Hudson*, 107 F3d at 357 (finding that the attorney who represented a child's parent provided "a necessary service for the child").

¹⁷³ 661 F2d 6 (2d Cir 1981).

¹⁷⁴ *Peters*, 964 F2d at 167 (relying on *Spong* for the proposition that an award of attorney's fees is necessary to the underlying action).

¹⁷⁵ *Spong*, 661 F2d at 9 (reasoning that without the prospect of family court judges awarding costs to the other party, many litigants would be unable to sue or to defend their rights).

¹⁷⁶ See, for example, *Ramirez*, 2000 Bankr LEXIS 2019, *21-23 (noting that the removal of debtor's child from her care was in the child's best interests and ordering debtor to pay for former spouse's attorney's fees). See also *Strickland*, 90 F3d at 445-47 (finding state court's order that debtor pay part of his former wife's attorneys fees and costs based on ability to pay to be debt in the nature of support).

¹⁷⁷ *Peters*, 133 BR at 293.

¹⁷⁸ *Id* at 296 ("The protection of the child's interests in court by the guardian *ad litem* constitutes a measure of support for the child whose value to the child cannot be diminished. Indeed, it is in the child's best interests to have custody matters fully and fairly litigated. Insuring this is done is part of the parents' duty to support the child.").

¹⁷⁹ Consider *id* at 295-96 (reasoning that because both parties in domestic relations

tody disputes when doing so serves the best interests of the child.¹⁸⁰ For example, if a mother is improperly interfering with her ex-husband's custody rights, a judge might make an award of his fees in bringing an action to enforce those rights because enforcing them serves the best interests of the child.¹⁸¹ Such an award promotes the child's welfare by reallocating the cost of the enforcement action to the parent whose actions make enforcement necessary.¹⁸² Courts use this mechanism to encourage parents to bring actions that determine what custody arrangement would serve the child's best interests. When bankruptcy courts disrupt the balance of costs determined by the family court to serve the best interests of the child, they undermine this mechanism and discharge genuine support obligations in contravention of congressional policy.

C. Federalism and the Overlapping Jurisdiction of Bankruptcy Courts and State Family Courts

The determination of whether awards of costs in child custody actions are "in the nature of support" is a matter of federal bankruptcy law.¹⁸³ The concurrent jurisdiction of bankruptcy and state family courts over issues of alimony, maintenance, and support creates the potential for disagreement between the two courts.¹⁸⁴ When federal law and state family law conflict, two types of arguments have been used to support the proposition that federal law should not interfere with the province of the family courts: policy-based arguments and arguments based on

actions such as divorce, maintenance, support, or custody must be able to represent their own interests, awards of attorney's and guardian *ad litem* fees are support obligations under federal bankruptcy law).

¹⁸⁰ See *id.* at 296 (characterizing guardian *ad litem* fees as being incurred in the child's best interests).

¹⁸¹ See, for example, *Ramirez*, 2000 LEXIS Bankr 2019, *21-23 (ordering debtor to pay her former spouse's attorney's fees in bringing an action to remove debtor's child from her care because removal was in the child's best interests).

¹⁸² See *id.*

¹⁸³ Finkelstein, 18 Bankr Dev J at 180 (cited in note 159) ("The source of federal courts' control can be found in the language of . . . section [523(a)(5)], which makes alimony, maintenance, and support debt nondischargeable only if 'such liability is actually in the nature of alimony, maintenance, or support.'"). See *Jones*, 9 F3d at 880 (finding that state law can "provide guidance as to whether a debt is to be considered in the 'nature of support,'" but cannot be determinative) (citations omitted).

¹⁸⁴ Finkelstein, 18 Bankr Dev J at 178-79 (cited in note 159). See *Aldrich v Imbrogno*, 34 BR 776, 779-80 (BAP 9th Cir 1983) (noting that the bankruptcy court has concurrent jurisdiction with the state court as to whether debts arising out of a divorce are excepted from discharge).

the tradition of "exclusive localism."¹⁸⁵ Policy arguments,¹⁸⁶ such as the institutional capacity argument, have been addressed earlier in this Comment.¹⁸⁷ More commonly, the unique status of family law in the federal system is put forward to argue for deference to state courts. In the context of deciding whether costs awarded in child custody disputes should be dischargeable as a matter of law, the exclusive localism of family law suggests that bankruptcy courts should not be in the business of overturning the judgments of family courts.

1. *Family law and exclusive localism in bankruptcy.*

Bankruptcy courts should not discharge debts for costs incurred in custody and visitation proceedings because doing so interferes with the proper province of the state courts. As the Supreme Court pointed out in *Ex parte Burrus*,¹⁸⁸ "there is no federal law of domestic relations, the whole subject of which belongs to the laws of the States."¹⁸⁹ Bankruptcy courts interfere with the state courts' jurisdiction over family law when they void the settlements by which state courts have resolved domestic controversies.¹⁹⁰

The interference with family law judgments differs from interference by bankruptcy courts in other areas controlled by state law—consumer purchases and home loans, for example—both for the practical reasons of institutional capacity and because family law has a special place in the federal scheme.¹⁹¹ Family law is the preeminent example of an area of law regulated exclusively by the states.¹⁹² More specifically, in the context of the Bankruptcy Code, obligations between husband and wife

¹⁸⁵ Hasday, 45 UCLA L Rev at 1298 (cited in note 15) (summarizing the kinds of arguments made for a special status of exclusive localism in family law).

¹⁸⁶ Id ("[C]ourts and commentators . . . do not explain the singular status of family law primarily in terms of public policy or institutional design.").

¹⁸⁷ See Part IV A-B.

¹⁸⁸ 136 US 586 (1980).

¹⁸⁹ Id at 593-94 (citations omitted).

¹⁹⁰ See Finkelstein, 18 Bankr Dev J at 194-95 (cited in note 159) (arguing that "[b]ankruptcy courts are not the proper forums within which to address family law issues" and thus "federal courts are violating basic principles of res judicata and collateral estoppel by addressing the same issues and claims that the state divorce courts already addressed").

¹⁹¹ *Burrus*, 136 US at 593-94.

¹⁹² See Hasday, 45 UCLA L Rev at 1302-04 (cited in note 15) (arguing that the Court's reliance on tradition to single out family law as an area of law "off-limits to the national government" is misplaced).

and between parent and child traditionally were considered duties and not debts, and hence were not dischargeable in bankruptcy.¹⁹³ Thus, even before Congress enacted Section 523(a)(5) and its predecessors, these obligations were not discharged in bankruptcy under common law; the passage of Section 523(a)(5) merely codified that common law exception.¹⁹⁴

The common law exception to the discharge of family obligations is important to the constitutional dimensions of bankruptcy. The Constitution explicitly grants authority to Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."¹⁹⁵ If family obligations were not seen by the Framers as within the "subject" of bankruptcy, then Congress may have no power to discharge those debts.¹⁹⁶ This reasoning is similar to that found in recent Supreme Court cases dealing with federalism in the Commerce Clause context. In *United States v Lopez*,¹⁹⁷ the Court emphasized the traditional local nature of family law, "including marriage, divorce, and child custody," to impose limits on legislation under the Commerce Clause.¹⁹⁸ Like family law, the Court reasoned, criminal law enforcement is an area of law reserved to the states, and thus Congress exceeded its authority under the Commerce Clause in regulating mere possession of a firearm near a school.¹⁹⁹ If family obligations were traditionally beyond the reach of the bankruptcy court, and family law is an area of regulation reserved to the states, then family law may be the outer boundary of Congress's bankruptcy power.

¹⁹³ See *Shine*, 802 F2d at 586 (relying on and describing the common law exception to discharge for alimony, maintenance, and support in interpreting Section 523(a)(5)). See also Alexander, 43 Cath U L Rev at 354-57 (cited in note 17) (describing the common law duty of a man to care for his wife and children as the common law basis for the dischargeability exception formally enacted into the bankruptcy code in 1903).

¹⁹⁴ Alexander, 43 Cath U L Rev at 356-57 (cited in note 17) (describing the enactment of Section 523(a)(5), the gender-neutral replacement for earlier provisions which re-enacted the common law duty of a man to care for his wife and children after divorce). See also *Spong*, 661 F2d at 7-8 (relying on the common law obligation of a husband to support his wife to interpret Section 523(a)(5)).

¹⁹⁵ US Const Art I, § 8, cl 4.

¹⁹⁶ The Supreme Court found the common law exception to discharge for support obligations in the 1898 Bankruptcy Act in *Audubon v Shufeldt*, 181 US 575 (1901).

¹⁹⁷ 514 US 549 (1995) (holding that Congress could not regulate possession of firearms in school zones under its commerce power).

¹⁹⁸ *Id* at 564 (declaring that the commerce power does not extend to family law).

¹⁹⁹ *Id* (arguing that if the Gun-Free School Zones Act of 1990 is upheld, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign").

2. *Exclusive localism and Spong.*

The exclusive localism of family law has factored explicitly into the courts' analysis when deciding whether or not to discharge debts for costs awarded in child custody disputes. Bankruptcy courts do not decide questions of alimony, maintenance, and support "in a vacuum."²⁰⁰ In *Spong*, the Second Circuit justified its decision to overturn the bankruptcy court's decision to discharge a family court award by pointing to Congress's awareness of the lack of federal jurisdiction over family law when it enacted Section 523(a)(5).²⁰¹ The court reasoned that Congress intended to formulate "the bankruptcy law of alimony and support" with "reference to the reasoning of the well-established law of the States."²⁰² The court in *Spong* thus ruled that an award of attorney's fees made by the state in connection with the debtor's divorce proceedings was not dischargeable, despite the bankruptcy court's determination to the contrary.²⁰³

The Second Circuit's deference to the determination by the family court in *Spong* provides a sound solution to the potential conflict between state family courts and bankruptcy courts. In recognizing the special status of family law within the federal system, deference to the family court's determination effectively administers the congressional policy against the discharge of genuine support obligations while avoiding potential constitutional conflicts.²⁰⁴

²⁰⁰ *Spong*, 661 F2d at 9.

²⁰¹ *Id.* ("As Congress undoubtedly was aware, United States courts have no jurisdiction over divorce or alimony allowances."), citing *Boddie v Connecticut*, 401 US 371, 389 (1971) (Black dissenting) and *De La Rama v De La Rama*, 201 US 303, 307 (1906).

²⁰² *Spong*, 661 F2d at 9.

²⁰³ *Id.* at 7-8.

²⁰⁴ The Court has demonstrated its reluctance to construe federal law to conflict with state family law absent clear congressional intent to preempt state law. In *Rose v Rose*, 481 US 619 (1987), the Court declined to insulate veterans' benefits from "the traditional authority of state courts over the issue of child support," based in part on state courts' "unparalleled familiarity with local economic factors affecting [] parents and children." *Id.* at 628. In her concurrence, Justice O'Connor explicitly analogized to the potential conflict between support obligations and bankruptcy law, noting that the Court has always considered support obligations to be outside the scope of bankruptcy law. *Id.* at 637-38 (O'Connor concurring).

D. Genuine Support Obligations Cannot Be Discharged under the Bankruptcy Code

Section 523(a)(5) prohibits the discharge of genuine support obligations in bankruptcy. When state family courts resolve child custody disputes, they are deciding what constitutes support because they resolve disputes under the best interests of the child standard.²⁰⁵ These courts award costs in such actions only when the award itself serves those interests. Bankruptcy courts should recognize the mere existence of the award as proof that these awards are support. Once family courts determine that such an award is in a child's best interests, that award is support, and the bankruptcy court's discharge of the debt discharges a genuine support obligation in contravention of congressional policy, in the face of institutional incapacity, and without regard for constitutional concerns.

CONCLUSION

Courts generally construe exceptions to discharge under Section 523 narrowly, to ensure a debtor's opportunity for a fresh start.²⁰⁶ This rule of narrow construction, however, does not work absolutely. Rather, it limits discharge to those situations in which the creditor's interests in the continuing obligation outweigh the debtor's interest in a fresh start as a matter of congressional policy.²⁰⁷ Children of debtors have an interest in continuing relationships with their debtor parents, independent of the bankruptcy proceedings. To the extent that support obligations are disputed in these proceedings, Congress has concluded that the children's interests outweigh those of their parents.²⁰⁸ Thus, the courts have construed support broadly in the context of Section 523(a)(5) to include "all genuine support obligations."²⁰⁹

The question then becomes whether costs from custody and visitation proceedings are "genuine support obligations" and which court should make that determination. The Eighth Circuit found debts from costs incurred in child custody proceedings to be dischargeable in bankruptcy.²¹⁰ While this position appears on

²⁰⁵ *Jones*, 9 F3d at 882.

²⁰⁶ *Gleason v Thaw*, 236 US 558, 562 (1915).

²⁰⁷ *Grogan v Garner*, 498 US 279, 287 (1991).

²⁰⁸ See 11 USC § 523(a)(5).

²⁰⁹ *Shine*, 802 F2d at 588.

²¹⁰ *Adams*, 963 F2d at 201.

its face to contradict that of the majority of circuits, which have found such costs to be nondischargeable, this Comment demonstrates that the Eighth Circuit's holding can be partially reconciled with the positions of the Second and Fifth Circuits. The divergence of the Eighth Circuit may be attributable to the unusual circumstances exception, the purpose of the underlying custody dispute, or deference to the factual findings of the bankruptcy court.²¹¹ The Tenth and the Eleventh Circuits, in contrast, have found that costs connected to custody proceedings generally constitute support, and thus are nondischargeable as a matter of law.²¹² This determination that the question should be resolved as a matter of law reflects the unique nature of child custody hearings in the bankruptcy context.

Not only should the question of whether costs awarded in child custody disputes constitute support be decided as a matter of law, such costs should be deemed support as a matter of law. As this Comment argues, congressional policy and relative institutional capacity favor this position. Because custody actions are inseparable from a child's welfare and support, and because costs are necessary to enable parties to bring such actions, these costs are always genuine support obligations. This position is superior to allowing individual factual determinations by the bankruptcy courts, because the state family court—with its focus on the child's welfare—is better suited to implement the congressional policy that all genuine support obligations be nondischargeable in bankruptcy. Furthermore, a determination that awards of such costs are nondischargeable reflects the proper division between state and national authorities in our federalist system.

²¹¹ See Part II.

²¹² See *Strickland*, 90 F3d at 446; *Miller*, 55 F3d at 1489; *Jones*, 9 F3d at 880.