The following constitutes the ruling of the court and has the force and effect therein described.

Signed October 28, 2009 **United States Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	**CASE NO. 09-40011-DML-13**
MICHAEL DENSMORE	§	
	§	
AND	§	
	§	
SANDEE DENSMORE,	§	
	§	**CHAPTER 13**
DEBTORS.	§	

Memorandum Order

Before the court is the objection (the "Objection") of the above-named Debtors to the claim (the "Claim") of Judith K. Mattern Hearn ("Hearn"). Hearn filed the Claim as a priority claim under section 507(a)(1)(A) or (B) of the Bankruptcy Code (the "Code")[1] on

[1] 11 U.S.C. §§ 101 *et seq*.

Section 507(a)(1)(A) and (B) provides that "unsecured claims for domestic support obligations" are entitled to priority payment ahead of all other unsecured claims. Because section 1322(a)(2) of the Code requires that claims entitled to priority under section 507 of the Code must be paid in full under a chapter 13 plan, the effect of the Claim falling within section 507(a)(1)(A) or (B) would be full payment of Hearn.

the basis that the Claim represents a domestic support obligation within the meaning of section 101(14A) of the Code.[2]

The court held a hearing respecting the Objection on October 15, 2009, at which the parties presented argument.[3] The Objection is subject to the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B) and (O). The court embodies its findings of fact and conclusions of law in this memorandum order. FED. R. BANKR. P. 9014 and 7052.

Hearn bases her claim to first priority status on her appointment by the court (the "State Court") as attorney ad litem for Mr. Densmore's minor children[4] in custody proceedings styled *In the Interest of Ashton Loyad Densmore and Christopher Aaron Densmore*, Cause no. 48272 (43rd Judicial District Court, Parker County, Tex. 2003). Debtors ground the Objection on this court's opinion in *In re Brooks*, 371 B.R. 761

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[2] Section 101(14A) of the Code states:

> The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--
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> (A) owed to or recoverable by--
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
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> (B) 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 parent, without regard to whether such debt is expressly so designated;
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> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

[3] The facts are not in dispute, and the court considers, as *prima facie* valid, the Claim, including attached exhibits, in addressing the Objection. *See* FED. R. BANKR. P. 3001(f).

[4] The children are the issue of Mr. Densmore and his former wife, Geraldine Densmore.

(Bankr. N.D. Tex. 2007), in which the court held that only a debt owed to or recoverable by one of those entities described in section 101(14A)(A) could be a domestic support obligation. 371 B.R. at 764.

Hearn contends that an earlier decision of this court, *In re Laney*, 53 B.R. 231 (Bankr. N.D. Tex. 1985), supports a broader reading of the definition of "domestic support obligation." *Laney*, however, is not only distinguishable on its facts from the case at bar but also antedates the enactment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") of section 101(14A). That provision replaced language in former section 523(a)(5) of the Code (dealing with dischargeability) that was construed by the *Laney* court. As the court noted in *Brooks*, 371 B.R. at 765, the changes made by BAPCPA significantly altered the description of those entitled to assert a claim of the kind described in section 523(a)(5) (and, as a result of BAPCPA, entitled to first priority in payment under Code § 507(a)(1)(A) and (B)).

Though not cited by Hearn, the Court of Appeals for this circuit also in the past gave a broad reading to section 523(a)(5)(A). *See Hudson v. Raggio & Raggio, Inc. (In re Hudson)*, 107 F.3d 355, 357 (5th Cir. 1997). However, Congress is assumed to know and take into account the state of the law when it amends a statute. *Cannon v. University of Chicago*, 441 U.S. 677, 697-98 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); *Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir. 1992) ("We assume that Congress is aware of existing law when it passes legislation."). Thus, the court concludes that the explicit description of those to whom a domestic support obligation must be owed or by whom it must be

recoverable reflects congressional intent to limit domestic support obligations and, consequently, claims entitled to priority under section 507(a)(1)(A) and (B) accordingly.

Given that *Hudson*, like *Laney*, long ante-dated passage of BAPCPA, the court concludes Congress rejected the reasoning in *Hudson*, and the court must apply the limited, but unambiguous, language of section 101(14A)(A) in determining whether the Claim is properly filed as a priority claim. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *U.S. v. Osborne*, 262 F.3d 486, 490 (5th Cir. 2001) ("We give effect to plain, unambiguous language, unless a literal interpretation would produce an irrational result."). It is neither irrational nor patently inconsistent with legislative intent for Congress to limit those entitled to assert claims as domestic support obligations. The question that the court must then address is whether Hearn is included within a category described by section 101(14A)(A).

It is clear that Hearn is neither Debtor's "spouse, former spouse, or child . . . or such child's parent . . . or responsible relative." Nor is Hearn a governmental unit (*see* Code § 101(27)).[5] It is less clear that Hearn is not the "legal guardian" of the minor children she was appointed to represent.

[5] Arguably, the State Court is a governmental unit that could cause collection of the Claim. However, being able to cause a claim's collection does not equate to being entitled to recovery of the claim. *See Brooks*, 371 B.R. at 765.

The Code contains no definition of "legal guardian."[6] Likewise, Texas law does not provide for appointment of a "legal guardian" for a minor child.[7] Elsewhere, however, federal law defines "legal guardian." *See* 42 U.S.C. § 675(7); 45 C.F.R. § 1355.20; 28 C.F.R. § 94.12; 20 C.F.R. § 725.506; 8 C.F.R. § 208.30. These definitions typically contemplate that a legal guardian will have custody of and/or will exercise control over the person of his or her ward. *See, e.g.*, 45 C.F.R. 211.1 ("legal guardian means a guardian . . . whose powers, duties and responsibilities include . . . guardianship of the person").

In the absence of any definition of "legal guardian" in the Code, the court considers the consistent description of legal guardianships elsewhere in federal law, as including custody and control over the person, persuasive. *See City of Clinton v. Pilgrim's Pride Corp.*, No. 4:09-CV-386-Y, 2009 U.S. Dist. LEXIS 83527, at *12-13 (N.D. Tex. 2009); *cf. In re Pilgrim's Pride Corp.*, No. 08-45664, 2009 Bankr. LEXIS 2763, *6-7 n. 3 (Bankr. N.D. Tex. 2009).

Case law also supports the conclusion that, to fit within the term "legal guardian," one must have custody of and/or control over the person of the child in question. *See In*

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[6] Neither can a definition of "legal guardian" be found in Black's Law Dictionary nor Garner's Dictionary of Modern Legal Usage. BLACK'S LAW DICTIONARY (9th ed. 2009); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE (2d ed. 2001).

[7] The State Court, pursuant to Tex. Fam. Code § 107.021, was empowered to appoint a guardian ad litem for Mr. Densmore's children or an attorney ad litem, choosing to do the latter. A guardian ad litem is "a person appointed to represent the best interests of a child." Tex. Fam. Code. § 107.001(5). An attorney ad litem is "an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation." Tex. Fam. Code § 107.001(2). Texas provides in two statutes for "legal guardians." *See* Tex. Health & Safety Code § 535.001(4); Tex. Hum. Res. Code § 35.001(5). In each of these contexts, the legal guardian is one who is appointed to exercise powers over his or her ward (a person with a disability). The Texas Probate Code provides for a guardian of the person, who will have custody and control over a minor child. *See* Tex. Prob. Code § 767. The court believes, for reasons stated below, that the latter is the sort of creature that is meant by "legal guardian" in section 101(14A)(A).

re Greco, 397 B.R. 102, 109 (Bankr. N.D. Ill. 2008), and cases cited therein. ("[T]he ordinary meaning of 'legal guardian of a child' is a person appointed by a court to have custody of and general responsibility for the child." *Id*.).

In the case at bar, Hearn's duties were to represent the interests of Mr. Densmore's minor children in a custody dispute.[8] *See* Tex. Fam. Code. §§ 107.003 and 107.004; *In the Interest of Ashton Loyad Densmore and Christopher Aaron Densmore*, Cause no. 48272 (43rd Judicial District Court, Parker County, Tex. 2003) (Temporary Orders in Suit to Modify Parent-Child Relationship). Hearn exercised no control over the persons of the children for whom she acted. Thus, Hearn was not a "legal guardian" within the meaning of section 101(14A)(A). Because the Claim is not one for a debt owed to or recoverable by a legal guardian or other listed category of persons and so does not meet the requirements of section 101(14A)(A), it does not represent a domestic support obligation. Because it does not represent a domestic support obligation, the Claim is not entitled to priority under section 507(a)(1)(A) or (B).

The Objection must be sustained. The Claim will be allowed as a general unsecured claim only.[9]

It is so ORDERED.

END OF ORDER###

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[8] Indeed, the Texas Family Code distinguishes clearly between *attorneys* ad litem (the role assigned to Hearn) and *guardians* at litem, neither of which has custody of or control over the minor child, versus a non-parent appointed as sole managing conservator. *Compare* Tex. Fam. Code § 153.371 (listing the rights and duties of a non-parent appointed as sole managing conservator) *with* Tex. Fam. Code §§ 107.002, 107.003, and 107.004 (listing the powers and duties of attorneys ad litem and guardians ad litem); *see also* Tex. Prob. Code § 601(1), (11), and (12) (defining "attorney ad litem," "guardian," and "guardian ad litem.").

[9] The court sympathizes with Hearn. It is unfortunate that her work, which clearly benefited the minor children for whom she acted, is not covered by the definition of "domestic support obligation" crafted by Congress. The court, however, is not at liberty to adjust Congress's definition of "domestic support obligation."