

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of :  
MICHAEL B. CUMMINS, : Case No. 90-2435-C H  
Debtor. : Chapter 7  
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SHARON LOUISE CUMMINS :  
Plaintiff, : Adv. No. 90-0207  
v. :  
MICHAEL BRENT CUMMINS, :  
Defendant. :

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**ORDER--COMPLAINT TO DETERMINE DISCHARGEABILITY  
OF DEBTS AND OBJECTIONS TO DISCHARGE**

The trial on the complaint was held on May 13, 1991. The following attorneys appeared on behalf of their respective clients: Leslie Babich, Babich, Bennett and Nickerson, Attorneys at Law, for Plaintiff; and Patrick H. Payton, Patrick H. Payton & Assoc., P.C., for Defendant. At the conclusion of the trial the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed, and the Court considers the matter fully submitted.

The Court has jurisdiction pursuant to 28 U.S.C. §157(b)(2)(I) and (J). The Court, upon review of the pleadings, arguments of counsel, and submitted briefs, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

### FINDINGS OF FACT

1. On August 20, 1990, a dissolution decree dissolving the marriage of Sharon Louise and Michael Brent Cummins was entered in the Iowa District Court for Polk County.

2. The parties were married September 10, 1971. At the time of the dissolution decree, Sharon and Michael were each 37 years of age.

3. The dissolution decree granted Sharon permanent physical care of the parties' two minor children.

4. During the parties' marriage, Sharon was a homemaker and the children's primary caretaker. She had some periodic employment outside of the home.

5. At the time of the dissolution decree, Sharon was employed by Valley National Bank. She earned approximately \$866.40 a month in net income.

6. At the time of the dissolution decree, Michael was a recruiter for the United States Marine Corp. He had been with the Marines since approximately May 1972 and at the time of the decree earned approximately \$2,609.92 in monthly net income.

7. The dissolution decree included the following provisions:

- A. Michael was ordered to pay \$715.42 per month for child support.

- B. Michael was ordered to maintain full and comprehensive medical, hospitalization and dental insurance upon the parties' minor children. Michael was to be solely responsible for one-half of all reasonable medical, hospital, dental, orthodontic, optical, psychological and prescription expenses incurred for the benefit of the parties' minor children and not covered by insurance.
- C. Michael was ordered to maintain two separate (\$50,000 and \$10,000) life insurance policies on his life with the children of the parties being the exclusive co-equal beneficiaries of the policies. Michael was also required to maintain two \$10,000 existing life insurance policies upon the children's lives.
- D. Michael was ordered to pay Sharon \$200 per month for alimony. This obligation was to continue until Michael or Sharon died or until Sharon received her share of Michael's retirement benefits.
- E. Each party was awarded a vehicle and was to be solely responsible for any debts or encumbrances upon the vehicle. Each party was to hold the other harmless for those debts or encumbrances.

- F. Michael was ordered to be solely responsible for ten categories of debt specified in the decree. This included debts owing to Ford Motor Credit Corporation, Household Finance, Sears, and J.C. Penney. Michael was ordered to hold Sharon harmless on these obligations.
- G. The decree granted Sharon one-half of all military benefits Michael had accrued as of August 1, 1990. Her share of his benefits was to be computed by granting her one-half of a fraction of his benefits, the fraction to be based on the years of marriage in which the benefits accumulated and the total number of years in which the benefits accumulated.
- H. Michael was ordered to pay \$2500 of Sharon's attorney fees.

8. Michael filed a petition for relief under Chapter 7 of the Bankruptcy Code on September 20, 1990. He listed Sharon and her attorney as unsecured creditors on his bankruptcy schedules.

9. On October 19, 1990, Sharon filed a "Complaint to Determine Dischargeability of Debts and Objections to Discharge."

#### **DISCUSSION**

## I. Dischargeability of Debt

The Bankruptcy Code prohibits the discharge of a debtor's obligation to make alimony, maintenance, or support payments to a former spouse or child of the debtor. 11 U.S.C. § 523(a)(5). Whether a debt is actually "in the nature" of alimony, maintenance or support, § 523(a)(5)(B), is a question of federal bankruptcy law, not state law. In re Williams, 703 F.2d 1055, 1056 (8th Cir. 1983). Numerous factors have been set forth for a court to consider when making a determination as to the nondischargeability of a debt under § 523(a)(5). See In re Coffman, 52 B.R. 667, 674-75 (Bankr. D. Md. 1985); In re Voss, 20 B.R. 598, 602 (Bankr. N.D. Iowa 1982). A bankruptcy court does not examine the present situation of the parties; the crucial question is what function an award was intended to serve when it was entered. See Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984). The burden of proof for the dischargeability exceptions of § 523(a) is the preponderance-of-the-evidence standard. Grogan v. Garner, \_\_\_ U.S. \_\_\_ 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991).

A review of the Defendant/Debtor's briefs and arguments indicates he does not appear to contest the nondischargeable nature of the child support, health insurance, medical expenses, life insurance and alimony obligations set out in the decree and listed above in the Findings of Fact ¶7(A)-(D). The Court finds imposition of these obligations was

necessitated by the Debtor's obligation to support his children and the vast disparity in income levels which existed between him and his ex-spouse. These obligations are clearly in the nature of alimony, support, and maintenance and are nondischargeable pursuant to § 523(a)(5).

The Defendant does challenge the Plaintiff's contention regarding the dischargeable nature of the award of attorney fees, debts for which Defendant was ordered to hold Plaintiff harmless, and the interest the Plaintiff was awarded in the Defendant's pension benefits. The Court will address each of these issues in turn.

A) Attorney Fees

The dissolution decree ordered the Defendant to pay \$2500 of the Plaintiff's attorney fees. The Eighth Circuit has previously recognized an order in a dissolution decree requiring a party to pay a former spouse's attorney fees can be intended as "support" for bankruptcy purposes and is therefore nondischargeable under § 523(a)(5). Williams, 703 F.2d at 1057. The affidavit of financial status the Plaintiff submitted to the dissolution court reveals she had a monthly net income of \$866.40, while her monthly living expenses for herself and two children exceeded \$1,985.00. The disparity in the parties' income and the amount of expenses Plaintiff incurred in providing for herself and her minor children lead this court to conclude the award of attorney fees was in the

nature of support and nondischargeable.

B) Debts

The dissolution decree ordered the Defendant to be solely responsible for debts owed to ten specified creditors and the Defendant was to hold the Plaintiff harmless on these obligations. In her complaint and brief the Plaintiff specifies four debts which she contends should be held nondischargeable--Ford Motor Corporation, Household Finance, Sears, and J.C. Penney.

Debts payable to third persons can be viewed as maintenance or support obligations; the crucial issue is the function the award was intended to serve. Williams, 703 F.2d at 1057; see also Poolman v. Poolman, 289 F.2d 332, 335 (8th Cir. 1961) (debtor's obligation under separation agreement to make payments on judgment note secured by trust deed on family home was nondischargeable as a liability for maintenance or support of a wife or child). The Court finds the obligation imposed by the dissolution decree holding the Defendant solely responsible for the debts and requiring him to hold the Plaintiff harmless thereon was in the nature of support. As noted earlier, there was a wide disparity in the parties' respective levels of income and the Plaintiff's income far exceeded her expenses. The Plaintiff was awarded a relatively small amount of alimony and would not receive her interest in

the Defendant's military pension benefits until he became eligible for them. Under these circumstances the Defendant's obligation to be responsible for these debts and hold the Plaintiff harmless thereon was in the nature of support.

This Court's finding that the obligation imposed by the dissolution decree was in the nature of support does not render the obligation owing to those creditors nondischargeable. As Defendant notes in his brief, there is a distinction between the dischargeability of the underlying obligations owed to third-party creditors and the Defendant's obligation to hold the Plaintiff harmless on those debts. Section 523(a)(5) does not render nondischargeable a debt to a third party itself, but only the debtor's obligation to hold his or her ex-spouse harmless from the payment of the debt. In re Lord, 93 B.R. 678, 681 (Bankr. E.D. Mo. 1988). The Defendant is discharged from the debts, however, any debt arising under the hold harmless clause is nondischargeable. The Defendant is required to reimburse the Plaintiff, or to indemnify and hold her harmless only to the extent Plaintiff is actually required to repay those creditors.

C) Pension Benefits

The Defendant contends the dissolution court's award of a share of his pension benefits to the Plaintiff was an obligation pursuant to a property settlement and is



dischargeable in bankruptcy. The Defendant relies heavily on Iowa case law which regards pensions benefits as marital property and not alimony. The Plaintiff asserts the dissolution decree awarded her one-half of all of the Defendant's military retirement benefits accrued as of August 1, 1990, and therefore her interest in the pension benefits is not property of the bankruptcy estate, 11 U.S.C. § 541, and is not a "debt" of the Defendant's subject to discharge. Alternatively, the Plaintiff argues that if her interest in the retirement benefits is property of the estate subject to a §523(a)(5) analysis, the obligation is in the nature of alimony and not subject to discharge.

Until enactment of the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408, military retirement pay was regarded as a personal entitlement not subject to distribution under state property laws. See McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). Subject to limitations in the Act, a court may now treat disposable retired pay "either as property solely of the military member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1). The Act and regulations establish a procedure by which a former spouse may receive her interest in retirement benefits directly from the government. See 10 U.S.C. § 1408(d)(1); 32 C.F.R. § 63.6.

Several courts have recognized that military retirement benefits awarded a spouse as her "sole and separate" property in a dissolution decree are not an obligation of the debtor subject to discharge. See In re Chandler, 805 F.2d 555, 557 (5th Cir. 1986), cert. denied, 481 U.S. 1049, 197 S. Ct. 2180, 95 L. Ed. 2d 837 (1987); Matter of Hall, 51 B.R. 1002, 1004 (S.D. Ga. 1985); In re Farrow, 116 B.R. 310, 312 (Bankr. M.D. Ga. 1990). Iowa Courts regard pension benefits as marital property subject to equitable distribution. In re Huffman, 453 N.W.2d 246, 248 (Iowa App. 1990); In re Marriage of Wilson, 449 N.W.2d 890, 892 (Iowa App. 1989); In re Marriage of Mott, 444 N.W.2d 507, 510 (Iowa App. 1989). The courts specifically hold the distribution of pension benefits is a property award and not alimony. Huffman, 453 N.W.2d at 249; Wilson, 449 N.W.2d at 892.

Subsequent to enactment of the Uniformed Services Former Spouse's Protection Act, the Iowa Supreme Court examined military pensions and found no justification for treating them differently from private pensions. In re Marriage of Howell, 434 N.W.2d 629, 632 (Iowa 1989). "[A] military pension in Iowa is to be considered marital property and divided as such in a dissolution proceeding." Id. at 630.

The language of the dissolution decree indicates the dissolution court intended to award the Plaintiff an ownership interest in the Defendant's retirement benefits. The relevant

provision of the decree is as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner is granted one-half of all military retirement benefits the Respondent has accrued as of August 1, 1990. Her equal share of his retirement benefits shall be computed by granting her one-half of a fraction of his military retirement benefits, the numerator of the fraction being 18.25 (the years of marriage during which the benefits were accumulated), and the denominator being the total number of years which benefits are accumulated prior to when paid. Subsequent to the entry of this Decree, a Qualified Domestic Relations Order will be entered effectuating this provision.

The recent decision of Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990), is instructive in this case. The ex-wife in Bush was awarded one-half of the debtor's government pension benefits as her sole and separate property in a dissolution decree. The court's decision found the ex-wife's entitlement to the post petition payments was nondischargeable based upon a constructive trust theory (the pension payments were received by the debtor and he in turn was to pay the ex-spouse her share thereof). Bush, 912 F.2d at 993. The court's recognition of a constructive trust was based upon the fact that the ex-wife's share of the pension had been awarded to her as her "sole and separate" property. Likewise in the case now before this Court the wife was awarded one-half of the Debtor's accrued retirement benefits and this award of an ownership interest is not a "debt" subject to discharge in

bankruptcy.

In light of: 1) the federal law allowing military pensions to be treated as the property of a former spouse; 2) Iowa law which recognizes military pension benefits as marital property subject to distribution; and 3) the decretal language which reflects an intent to award the Plaintiff an ownership interest in the pension benefits, this court concludes the Plaintiff holds an ownership interest in the Defendant's military retirement benefits and her interest was not subject to discharge by the Defendant's bankruptcy.

Even if the Plaintiff's interest in the Defendant's retirement benefits was regarded as a "debt" subject to the effects of the Defendant's discharge, this Court would conclude the obligation was in the nature of support or alimony and was not dischargeable pursuant to § 523(a)(5). The disparity in the parties' levels of income, the length of the marriage, and the fact that the Defendant's obligation to make alimony payments ceased when the Plaintiff began receiving her share of his pension benefits convinces this Court the award of pension benefits was in the nature of support or alimony and was nondischargeable.

## II. Objection to Discharge

In her complaint and brief the Plaintiff objects to the Defendant's discharge under § 727. The Plaintiff cited no

specific subsection of § 727 on which to deny discharge and provided no evidence to support her objection. Plaintiff's objection to Defendant's discharge is denied.

IT IS HEREBY ORDERED:

1) The Plaintiff has not sustained her burden of proof in objecting to the Defendant's discharge and the objection is denied;

2) The Plaintiff has met her burden of proof and the Defendant has not contested that the obligations created by the dissolution decree and listed above in the findings of fact ¶7(A)-(D) are nondischargeable;

3) The Plaintiff has met her burden of proof in establishing the nondischargeability of the Defendant's obligation to pay her attorney fees;

4) The interest awarded the Plaintiff in the Defendant's pension benefits is an ownership interest not subject to discharge in bankruptcy and, in the alternative, if Plaintiff's interest in Defendant's pension benefit is considered a "debt," it is nondischargeable pursuant to 11 U.S.C. § 523(a)(5); and

5) While the underlying debts owed to third party creditors are discharged, Defendant's obligation to hold Plaintiff harmless on the debts owed to Ford Motor Corporation, Household Finance, Sears, and J.C. Penney is in the nature of support and is nondischargeable pursuant to 11

U.S.C. § 523(a)(5).

Dated this 29th day of July, 1991.

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RUSSELL J. HILL  
U.S. BANKRUPTCY JUDGE