UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	Case No. 92-476-D H
JAMES JOHN THOMAS and KATHLEEN THOMAS,	:	Chapter 7
	:	
Debtors.	:	
	:	
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	:	
JAMES JOHN THOMAS and KATHLEEN THOMAS,	:	Adv. No. 92-92089
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
IOWA DEPARTMENT OF HUMAN SERVICES,	:	
	:	
Defendant.	:	

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ORDER ON SUMMARY JUDGMENT AND COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT AND RETURN OF INTERCEPTED TAX REFUNDS

PlaintiffS' motion for summary judgment and Defendant's objection thereto came before the Court by telephonic hearing on December 17, 1992. Martha Easter Wells appeared for the Plaintiffs and Michael J. Parker appeared for the Defendant. At the conclusion of the hearing the Court canceled the trial date for the matter because it found the matter could be resolved by ruling on the motion for summary judgment.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Upon review of the pleadings and arguments of counsel, the Court now enters its findings and conclusions

pursuant to Fed.R.Bankr.P. 7056.

FINDINGS OF FACT

1. In approximately 1986 or 1987 the Plaintiffs separated for nine or ten months at a time when both Plaintiffs were unemployed.

2. During their separation, Kathleen Thomas received AFDC benefits.

3. While she was receiving benefits she did not file for divorce or obtain any support order.

4. The State of Iowa holds an Order dated April 23, 1990, in State of Iowa ex rel Kathleen Thomas v. James Thomas (#27-0282) in the amount of $5,876.00 for reimbursement of the benefits. This Order is not based upon Mr. Thomas' income but on the amount of benefits paid.

5. The Plaintiffs filed their Chapter 7 bankruptcy case on February 13, 1992.

6. After the bankruptcy was filed, the State of Iowa intercepted the tax refunds of the Plaintiffs in the amount of approximately $800 federal and $200 state and refuses to return it to the Plaintiffs.

7. The Plaintiffs filed this adversary proceeding on May 6, 1992 requesting that the Court find the debt to the Defendant is dischargeable and that the tax refund should be turned over to the Plaintiffs.

8. Subsequent to the State's interception of the tax refunds, the Plaintiffs filed an Amended Schedule C on May 8, 1992 whereby the tax refunds were claimed as exempt property pursuant to Iowa Code § 627.6(9)(c).

DISCUSSION

Plaintiffs move for summary judgment determining the AFDC reimbursement debt is not one which is excepted from discharge under 11 U.S.C. § 523(a)(5) as it did not arise from a "separation agreement, divorce decree or property settlement." Plaintiff further argues that the debt is not an assignment of support that would be excepted from discharge under 11 U.S.C. § 523(a)(5)(A). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. In re Miera, 926 F.2d 741, 745 (8th Cir. 1991).

11 U.S.C. § 523(a) provides that a discharge under § 727 does not discharge an individual from any debt:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree **or other order of a court of record,** determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not the extent that --
>
> > (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section

> 402(a)(26) of the Social Security Act, **or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such state); . . . .**

The revisions emphasized in bold type were enacted July 10, 1984 by Pub. Law 98-353 § 454(b), 98 Stat. 375; underlined text added in 1986 by Pub. Law 99-554 § 281, 100 stat. 3116.

Plaintiffs rely on In re Ramirez, 795 F.2d 1494 (9th Cir. 1986), where the Ninth Circuit held that debt incurred for payments made during a period when debtor was under no support order or dissolution decree or separation agreement requiring support was dischargeable in bankruptcy. The court in Ramirez, considering the applicability of 11 U.S.C. § 523(a)(5)(A) with respect to dischargeability of a reimbursement judgment, stated:

> [Section 523(a)(5)(A)] does not permit a debtor to discharge in bankruptcy any debt to a spouse, former spouse, or child, in connection with a separation agreement, divorce decree or property settlement agreement, but not to the extent that--
>
> such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act [42 U.S.C. § 602(a)(26)]) (emphasis original).

Id. at 1496. However, the court in Ramirez did not take into consideration the aforementioned 1984 revisions. See In re Morris, 139 B.R. 17 (Bankr. C.D. Cal. 1991) (questioning the continued validity of Ramirez noting that the opinion in Ramirez did not consider the 1984 revisions, which was

appropriate because the law applicable to Ramirez was pre-1984 statute.) See also In re Spell, 650 F.2d 375 (2nd Cir. 1981); In re Combs, 101 B.R. 609, 614 (9th Cir. Bankr. Appellate Panel, 1989). Consequently, under the plain language of § 523(a)(5) existing at that time, Mr. Ramirez's debt was dischargeable because it did not arise from a separation agreement, divorce decree, or property settlement. Ramirez, 795 F.2d at 149. (emphasis added).

In the instant case, applying the revised language of § 523(a)(5), it is clear that the debt for reimbursement of ADFC benefits is "a debt ... in connection with ... [an] other order of court of record." Accordingly, the Court must find that the debt is not dischargeable pursuant to § 523(a)(5).

Additionally, § 456(b) of the Social Security Act, 42 U.S.C. § 656(b), likewise excepts from discharge in bankruptcy child support obligations assigned to a state pursuant to § 402(a)(26) of the Social Security Act, 42 U.S.C. § 602(a)(26). Although § 456(b) was repealed by the Bankruptcy Reform Act of 1978, this provision was reenacted in almost identical form in 1981. At the same time, 11 U.S.C. § 523(a)(5) was amended to find nondischargeable child support obligations assigned to a state pursuant to § 402(a)(26) of the Social Security Act, 42 U.S.C. § 602(a)(26). Pub.L. 97-35, § 2334(b), 95 stat. 863 (1981).

According to a Senate Report 93-139, the purpose of the

1981 revisions was to

> . . . reverse the effect of an amendment made by section 328 of P.L. 95-598 and reinstate a provision of the Social Security Act previously in effect, declaring that a child support obligation assigned to a state as a condition of a AFDC eligibility is not discharged in bankruptcy. The Committee believes that a parent's obligation to support his child is not one that should be allowed to be discharged by filing for bankruptcy, and that a child support obligation assigned to a state as a condition of AFDC eligibility should not be subject to termination in that way.

S.Rep. No. 139, 97th Cong., 1st Sess. 523(1981), 1981 U.S. Code Cong. & Ad. News § 764 at 789-90.

When 11 U.S.C. § 523(a)(5)(A), as amended, is read in connection with 42 U.S.C. § 656(b), it is apparent that Congress did not intend for support obligations such as those at issue here to be discharged in bankruptcy.

The Court must next address the question of whether the Defendant's interception of Plaintiffs' tax refunds violated the automatic stay provisions of 11 U.S.C. § 362.

11 U.S.C. § 362 provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under § 301, 302, or 303 of this title, . . ., operates as a stay, applicable to all entities, of--
>
> > (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> >
> > (3) any act to obtain possession of property of the estate or of property from the estate or to

> exercise control over property of the estate;
>
> (b) The filing of a petition under section 301, 302, or 303 of this title, . . ., does not operate as a stay--
>
> (2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(emphasis added).

The automatic stay is effective at the moment of filing of bankruptcy petition, In re Davis, 74 B.R. 406, 410 (Bankr. N.D. Ohio 1987), and applies to all entities which by definition includes governmental units. 11 U.S.C. § 101(15). The protection afforded by the automatic stay continues, unless otherwise terminated by the Court or the operation of statute, until such property is no longer property of the estate, until debtor's discharge is granted or denied, or the case is closed or dismissed. 11 U.S.C. § 362(c).

Property of the estate, pursuant to 11 U.S.C. § 541(a)(1), includes "all legal or equitable interest of the debtor in property, wherever located and by whomever held, as of the commencement of the case." Section 541(a)(1) is a broad provision that encompasses all apparent interests of the debtor. In re Peterson, 897 F.2d 935, 936 (8th Cir. 1990). Neither possession nor constructive possession by the debtor is required. In re Hawkeye Chem. Co., 71 B.R. 315, 319 (Bankr. S.D. Iowa 1987). A debtor's right to a tax refund attributable to prepetition income, is property of the bankruptcy estate

even if the refund is received postpetition. In re Wallen, 75 B.R. 897, 908 (Bankr. D. Comm. 1987) (citing Kokoszka v. Belford, 417 U.S. 642, 648, 94 S.Ct. 2431, 2435, 41 L.Ed.2d 374 (1974)). The Bankruptcy Code requires that even exempt property is initially included in the bankruptcy estate. After the property comes into the estate, the debtor is then permitted to exempt property for a fresh start. See Samore v. Graham (In re Graham), 726 F.2d 1268, 1271 (8th Cir. 1984); Matter of Davis, 136 B.R. 203, 295 (Bankr. S.D. Iowa 1991). The only estate property to which a chapter 7 debtor has a right to is that property which may be claimed as exempt.

In the instant case, Chapter 7 was filed by the Plaintiffs on February 13, 1992, at which point in time they did not claim as exempt from property of the estate the tax refunds in question. Consequently, the tax refunds intercepted by the State, subsequent to the filing of the bankruptcy petition, are considered property of the estate. It was not until after the tax refunds had been intercepted by the State that the Plaintiffs filed an amended schedule in which they claimed the tax refunds as exempt pursuant to Iowa Code § 627.6(9)(c). Accordingly, the Court finds that when the State intercepted Plaintiffs' tax overpayments, the Plaintiffs' right to receive the tax overpayment refund was property of the estate, subject to and protected by the automatic stay. Therefore, the interception of Plaintiffs' tax overpayments

violated the automatic stay.

Although the Court holds that the State violated the automatic stay when it intercepted the Plaintiffs' tax refunds, the Plaintiffs subsequent claiming of the tax refund as exempt property does not relieve such property from § 523(a)(5) debts. Thus, it could be argued that the Plaintiffs are attempting to defeat the intercept program by claiming the exemption of property which is by law subject to or "liable for" the § 523(a)(5) AFDC debt owed to the state. See U.S.C. § 522(c)(1). Under these circumstances, it is clear that the State has a prior right to the refund. This result is consistent with the federal policy which gives priority to a state's claim of recoupment over an individual's claim for a tax refund. In re Wallen, 75 B.R. 897 (Bankr. D. Conn. 1987) (citing Sorenson v. Secretary of Treasury, 106 S.Ct. 1600, 1604 (1986). As such, no useful purpose would be served by requiring the State to deliver a refund to the Plaintiffs, which is subject to the State's claim.

ORDER

IT IS THEREFORE ORDERED, in accordance with the above discussion, that the $5,876.00 State Court judgment entered against Plaintiff and in favor of Defendant is a nondischargeable debt pursuant to 11 U.S.C. § 523(a)(5).

IT IS FURTHER ORDERED that Plaintiffs' request for return

of the intercepted tax refunds is denied.

Dated this __25th_____ day of August, 1993.

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RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE