

FINDINGS OF FACT

1. Plaintiff, Carol Henderson, and Defendant, Charles Henderson, received a dissolution of their marriage in 1990 from the Iowa District Court for Polk County. Plaintiff, Mary Bernabe, was the attorney who represented Carol in that proceeding.

2. The dissolution proceeding involved issues of child custody, child support, claiming of the child for tax purposes, and property division. Pursuant to the dissolution decree, Carol was awarded the cost of attorney fees in the amount of \$9000. Judgment was entered against Charles in that amount. The Iowa District Court based the award of attorney fees on the finding that, by his actions, Charles delayed the trial and forced Carol to obtain restraining orders.

3. Attorney Mary Bernabe filed a lien for attorney fees pursuant to Iowa Code § 602.10116.

4. On April 11, 1991, Carol filed a petition for bankruptcy relief under Chapter 7. On July 8, 1991, Mary Bernabe filed a complaint to Determine Dischargeability of Debt in connection with that proceeding arguing that the underlying debt for attorney fees owed to her by Carol should not be discharged.

5. On August 27, 1992, a judgment entry was entered on

the Complaint. The judgment provided that 1) judgment be rendered against Carol and in favor of Mary Bernabe in the amount of \$1000 plus interest to be paid in \$25 installments; 2) that Carol "shall assign all of her right, title and interest in the \$9000 Judgment entered in her favor" to Mary Bernabe; 3) that the first \$1000 plus interest, if any, collected before August 11, 1993 upon the judgment against Charles be an offset to the \$1000 plus interest judgment against Carol; 4) that Carol take all steps reasonably necessary to discover the location of Charles and his assets and inform Mary Bernabe; and 5) that Mary Bernabe inform Carol of any amounts received on the judgment against Charles and credit Carol as provided.

6. Said judgment entry was prepared by Mary Bernabe as pro se plaintiff and signed as approved as to form and content by Leala S. Mann as counsel for Carol Henderson.

7. On September 10, 1992, Charles filed his own petition for bankruptcy relief under Chapter 7. Charles scheduled both Carol and Mary Bernabe as unsecured creditors. Subsequently, Plaintiffs filed this Complaint to Determine Dischargeability of Debt. Motions for summary judgment have been filed by the parties.

ISSUES

Whether a judgment on the pleadings should be considered

or whether said motion should be treated as a motion for summary judgment.

Whether the debt is nondischargeable pursuant to 11 U.S.C. § 523(a)((5)(A).

DISCUSSION

Failure to State a Claim

Included in his Memorandum in Support of Motion for Summary Judgment, the Defendant requests a "judgment on the pleadings" that Mary Bernabe has failed to properly stated a claim in the Complaint. Fed.R.Civ.P. 12(c) provides as follows:

Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.

A defense of failure to state a claim may be raised in a motion for judgment on the pleadings. St. Paul Ramsey County Medical Center v. Pennington County, 857 F.2d 1185, 1187 (8th Cir.1988). Where no evidence outside the pleadings is submitted, the standard of a Rule 12(b) motion to dismiss will be applied. Paist v. Town & Country Corp., 744 F.Supp. 170, 181 (N.D.Ill. 1990). Fed.R.Civ.P. 8(a) requires, among other things, "a short plain statement of the claim showing that the pleader is entitled to relief." This rule is made applicable

to bankruptcy proceedings by Fed.R.Bankr.P. 7008.

If the Court were to entertain a motion for judgment on the pleadings, the facts strongly suggest that Mary Bernabe has failed to state a claim in the complaint showing that she is entitled to relief as minimally required by Fed.R.Civ.P. 8(a). This adversary proceeding is brought by both Carol and Mary Bernabe as Plaintiffs. The complaint alleges that Carol was awarded her attorney's fees in the dissolution of her marriage to Charles. The complaint states that Mary Bernabe was Carol's attorney in the dissolution proceeding. The complaint also alleges that Carol filed for bankruptcy in 1991, retains an interest in the attorney fee award, and that the debt is nondischargeable. The complaint does not allege that Mary Bernabe has an interest in the \$9000 debt owed by Charles. The complaint makes no mention of the previous adversary complaint objecting to discharge filed by Mary Bernabe against Carol nor of the judgment entry assigning the debt to Mary Bernabe.

However, Defendant has submitted exhibits attached to the motion for summary judgment which constitute evidence outside the pleadings. Specifically, Defendant includes the judgment entry which assigns the debt at issue to Mary Bernabe, clearly giving her a right to bring a claim. Moreover, this motion for judgment on the pleadings was titled a motion for summary judgment and in Defendant's prayer for relief he appears to

request summary judgment. Therefore, pursuant to the language of Rule 12(c), the Court declines to consider a motion for judgment on the pleadings and shall treat said motion as a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Upon review of the entire record, including the judgment entry assigning said debt, the Court finds that Mary Bernabe has stated a claim on the basis of the assignment of interest in the \$9000 judgment. Accordingly, Defendant's motion is denied as to this issue.

Dischargeability of Debt

Additionally, the Defendant brings his motion for summary judgment arguing that the debt at issue is dischargeable pursuant to 11 U.S.C. § 523(a)(5)(A). Plaintiffs have brought a cross motion for summary judgment maintaining that the debt is excepted from discharge pursuant § 523(a)(5). All parties agree that there are no genuine issues of material fact. Upon review of the entire record, the Court agrees with the parties that there are no material disputed facts. Therefore, pursuant

to Fed.R.Civ.P. 56(c), the Court finds that this is an appropriate matter for summary judgment.

11 U.S.C. § 523(a) provides an exception to discharge for a debt:

(5) to a spouse, former spouse, or a 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 to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . .

An award of attorney's fees in a dissolution proceeding may be nondischargeable if the award is intended as support for the former spouse. In re Williams, 703 F.2d 1055, 1057 (8th Cir.1983). In this case, the attorney fees resulted from a dissolution proceeding involving, among others, issues of child custody and support. The Court will assume, arguendo, that the award of attorney fees was intended to be in the nature of support.

However, this case is complicated by the court order of August 27, 1992 which purported to "assign" such judgment for attorney fees to the attorney. Plaintiffs argue that such order was not a typical assignment of the debt which would bring the debt within § 523(a)(5)(A). Under § 523(a)(5)(A), debts assigned to another entity are not excepted from

discharge. Generally, a valid assignment of a judgment occurs when an assignee assumes the rights, remedies and benefits of the assignor. Broyles v. Iowa Dept. of Social services, 305 N.W.2d 718 (Iowa 1981). The transfer must be "of the whole of any property . . . or of some right or interest therein . . . the transfer of one whole interest must be effected. In re Horner, 125 B.R. 458, 463 (Bankr.W.D.Pa 1991) (citations omitted).

Debts payable to third persons and not directly to the former spouse can qualify as nondischargeable support obligations. Broyles, 305 N.W.2d at 718; see also In re Calhoun, 715 F.2d 1103, 1106 (6th Cir.1983) (citing In re Spong, 661 F.2d 6 (2nd Cir. 1981)). Therefore, in situations where the award for attorney fees is made directly payable to the attorney, the debt may still be nondischargeable to the extent it is in the nature of support. Such a situation is distinguishable from that of an assignment on the grounds that there has been no transfer of interest as required by an assignment. Horner, 125 B.R. at 463. In Horner, the Court noted that although the husband had been ordered to directly pay the wife's attorney, the wife remained fully liable for her debt to the attorney and that the attorney had obtained no right of enforcement against the husband should he fail to pay. Id. at 465.

In this case, the judgment states that Carol must assist

Mary Bernabe in her collection efforts by informing her as to the location of Charles and that Mary Bernabe will keep Carol informed as to amounts received. The circumstances of this case are clearly distinguishable from a situation where the dissolution decree merely provided that the payments be made directly to a third party creditor. Carol does not remain liable to her attorney for the full debt and the attorney has obtained rights of enforcement against Charles if he fails to pay.

Moreover, the judgment clearly states that "all of her (Carol) right, title, and interest" in the judgment was to be transferred. Plaintiffs argue that Carol retains an interest in a portion of the judgment and will benefit by the collection of the debt from Charles. A judgment was entered against Carol and in favor of Mary Bernabe for the amount of \$1000. This amount was to be set-off by the first \$1000 collected from Charles by August 11, 1993. However, this date passed without any collection on the judgment against Charles. Therefore, Carol no longer has any right to set-off and retains no interest in the assigned judgment. Accordingly, the Court finds that the debt was assigned to another entity as provided by § 523(a)(5)(A) and the \$9000 judgment is not excepted from discharge.

ORDER

IT IS THEREFORE ORDERED that Defendant's Motion for

Summary Judgment against Mary Bernabe for failure to state a claim is denied.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment as to the dischargeability of the debt is granted and the debt is found to be dischargeable pursuant to 11 U.S.C. § 523(a)(5)(A).

IT IS FURTHER ORDERED that the Defendant, Charles Dennis Henderson, shall have summary judgment against the Plaintiffs, Carol Jean Henderson and Mary S. Bernabe, dismissing the Complaint.

IT IS FURTHER ORDERED that Plaintiffs' Cross Motion for Summary Judgment is denied.

Dated this day of 18th day of March, 1994.

Russell J. Hill
U.S. Bankruptcy Court