UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re:	:	**Case No. 00-4811-WH**
DONALD L. MADSEN,	:	**Chapter 7**
Debtor.	:	
M. JANE MADSEN,	:	**Adv. No. 01-20033**
Plaintiff,	:	
v.	:	
DONALD L. MADSEN,	:	
Defendant.	:	

ORDER—MOTION FOR SUMMARY JUDGMENT AND OBJECTION THERETO; MOTION TO COMPEL DISCOVERY AND OBJECTION THERETO

On October 18, 2001, a telephone hearing was held on the Plaintiff's Motion for Summary Judgment and Objection Thereto. G. Mark Rice represented plaintiff M. Jane Madsen; Leslie G. Peters represented defendant Donald L. Madsen. At the conclusion of the hearing, the court took the matter under advisement. The court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(1) & § 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

The court finds the following facts to be undisputed:

1. The plaintiff, M. Jane Madsen (hereinafter Jane), is the former spouse of the defendant, Donald L. Madsen (hereinafter Don).

2. Donald and Jane were married on August 16, 1975, at Underwood, Otter Tail County, Minnesota.

3. At the time of the marriage, Don was on active duty with the United States Air Force. He entered military service on November 28, 1956. He retired from active duty on May 31, 1977, after more than twenty years of service.

5. Don and Jane's marriage lasted almost twenty-four years. The first twenty-two months of the marriage overlapped the final months of Don's active military service.

6. The District Court of Scotts Bluff County, Nebraska, dissolved the marriage by decree entered on May 12, 1999. Jane was represented by counsel during the dissolution proceedings. Don was not represented by counsel.

7. The dissolution of marriage decree incorporated a stipulated property settlement agreement dated April 29, 1999. Jane's counsel drafted the property settlement agreement, which both parties signed.

8. The stipulation provided for the division of the parties' property and liabilities. The property division included a pension that Don earned through his years of service in the military. In pertinent part the settlement agreement provided:

> 2. Alimony & Qualified Relations Order: Both parties wave their right to alimony. The parties acknowledge that the Husband is the owner of a pension/retirement plan through the United States Military Pension and a portion of that plan is a marital asset. The parties agree that the court should enter a Qualified Domestic Relations Order setting

aside 70% of the value of such plan to Wife as of April 29, 1999. Wife Shall[sic] remain responsible for any tax consequences resulting from withdrawal of her share of the retirement account.

9. At the time the Nebraska district court entered the dissolution decree, Don received $956.00 per month in pension payments. The payments were direct deposited into a joint account. From January through May of 1999, Don was denied access to the account and Jane received full use of the funds. In June and July of 1999, Jane received $500.00 per month in pension payments. From September 1999 through the filing of this adversary, Jane received $482.70 per month. The funds are paid by direct deposit to Jane's account through an authorization provided by Don.

10. The Nebraska district court has not entered a qualified domestic relations order.

11. On December 28, 2000, Don filed a petition for chapter 7 relief with the United States Bankruptcy Court, Southern District of Iowa. Jane was scheduled as a creditor holding an unsecured nonpriority claim of an unknown amount resulting from a property settlement in 1999.

12. On March 22, 2001, Jane commenced the above captioned adversary proceeding.

DISCUSSION

Federal Rule of Bankruptcy Procedure 7056 applies Federal Rule of Civil Procedure 56, governing summary judgment, to adversary proceedings. Summary judgment shall be granted if the court determines that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A court considering a motion for summary judgment must view all the facts in the light most favorable to the non-moving party, and give the non-moving party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita Electric Industries, Co. v.

Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 574 (1962)); Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1280 (8th Cir. 1996). The court is not to weigh the evidence, but determine whether there is a genuine issue of fact for trial. Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex, 477 U.S. at 323-24; Matsushita, 475 U.S. at 586-87.

In her motion for summary judgment, Jane asks the court to find that the 70% share of Don's military pension granted to her through the property settlement agreement and awarded in the dissolution decree is her sole and separate property. As such, it is not included in Don's bankruptcy estate under 11 U.S.C. § 541, nor is it a debt owed to her. Alternatively, Jane argues that her rights to the pension payments should be excepted from discharge as alimony, maintenance and support under 11 U.S.C. § 523(a)(5) or as otherwise nondischargeable debts incurred in the course of dissolution proceedings under 11 U.S.C. § 523 (a)(15).

The parties do not dispute the material facts concerning the dissolution decree and the division of the military pension. For the following reasons, the court will grant Jane's motion for summary judgment.

The District Court of Scotts Bluff County, Nebraska entered a decree on May 12, 1999, dissolving the parties' marriage. The dissolution decree incorporated a stipulated property settlement agreement dated April 29, 1999, and signed by both parties.

Nebraska favors the settlement of property division issues incident to the dissolution of marriage. Paxton v. Paxton, 270 N.W.2d 900, 902 (Neb. 1978). The parties may enter into enforceable agreements providing for the maintenance of either of them, the disposition of

property, and the custody and support of minor children. Neb. Rev. St. § 42-366(1). Except for the provisions concerning minor children, the agreement shall be binding on the court unless after reviewing all the evidence and circumstances, the court determines that the agreement is unconscionable. Neb. Rev. St. § 42-366(2). If the agreement is not unconscionable, the parties shall be ordered to perform the terms of the agreement, and the performance may be enforced by all the remedies available to enforce a judgment, including contempt. Neb. Rev. St. § 42-366(4) & (5). If the parties cannot agree on the division of property, then the district court shall order a division of the marital property that is equitable under all the circumstances. Neb. Rev. St. 42-366(8); Kullbom v. Kullbom, 306 N.W.2d 844, 848 (Neb. 1981); Cozette v. Cozette, 246 N.W.2d 473, 475 (Neb. 1976).

In this case, Don and Jane entered into a property settlement agreement dated April 29, 1999. Among other things, the agreement provided that Jane would receive 70% of the value of Don's military pension. Both parties signed the agreement. At the dissolution hearing, Jane (Petitioner) and Don (Respondent) testified as to the agreement. Ex. A at Paragraph 5. Both acknowledged reviewing the agreement and stated that it reflected their intentions. Id.

The District Court for Scotts Bluff County, Nebraska, reviewed the agreement and determined that it was not unconscionable. Id. The court incorporated the agreement into the dissolution decree, dissolved the parties' marriage by decree entered on May 12, 1999, and ordered the parties to perform their obligations under the agreement.

The Eighth Circuit, sitting en banc, considered the issue of whether a debtor's obligation to pay over a portion of his monthly pension payments to his former spouse pursuant to the terms of a dissolution decree constituted a debt that was dischargeable in bankruptcy. Bush v. Taylor,

912 F.2d 989 (8th Cir. 1990). The circuit court affirmed the bankruptcy and district court's holding that the obligation was not a pre-petition debt. Rather, it constituted the sole and separate property of the ex-spouse. Id. at 994. The only reason that the property flowed through the debtor was because the plan administrator did not pay the ex-spouse directly. The pension would be paid as long as the debtor lived, and the court reasoned that if the debtor could discharge his obligation to turn over the ex-spouses share, she would be deprived of the sole and separate property that the state court awarded her. See Ellis v. Ellis (In re Ellis), 72 F.3d 628, 632 (8th Cir. 1995) (explaining and distinguishing Bush).

In the present case, the property settlement agreement provides that Jane is to receive 70% of the value of Don's military pension. Although the agreement does not use the words "sole and separate property," the court finds that it sufficiently transfers such a property interest to Jane. Under Bush, and this court's own analysis in Cummins v. Cummins (In re Cummins), Ch. 7 90-2435-CH Adv. 90-0207, slip op. (Bankr. S.D. Iowa July 29, 1991) (Judge Hill No. 184), Jane's interest in the military pension is one of ownership and not a pre-petition debt. Accordingly, if Jane has a valid interest in the pension fund, Don's obligation to turn over her share each month is nondischargeable in bankruptcy.

Don contends that Jane is not entitled to her claimed ownership interest in the pension and consequently his obligation is one of pre-petition debt. He argues that the court should conduct a § 523(15) analysis to determine whether the debt is nondischargeable.

First, Don argues that the district court could not award Jane 70% of the military pension because only a small portion of the pension constituted marital estate property. In Nebraska, pension plans, retirement plans, annuities, and other deferred compensation benefits owned by

either party are included in the marital estate in a dissolution proceeding. Kullbom, 306 N.W.2d at 848. However, their inclusion is limited to the portion earned during the marriage. Reichert v. Reichert, 516 N.W.2d 600, 605 (Neb. 1994).

Don served in the military for twenty-two years. His marriage to Jane encompassed less than two of those years. According to Don, only two twenty-seconds, or less than 10%, of the military pension should be included in the marital estate and subject to division. Consequently, the dissolution decree is not valid and presumably, could not transfer an ownership interest to Jane.

Don's argument fails to recognize that under Neb. Rev. St. 42-366 the parties are free to enter into property settlement agreements. If the agreement is not unconscionable, it is binding on the parties and the district court. The district court makes an equitable division of property if there is no settlement agreement. Neb. Rev. St. 42-366(8); see also Reichert, 516 N.W.2d at 603. Don was free to negotiate with Jane to determine what property each would receive. Nothing prevented him from offering, and her from accepting more of the pension than would be subject to court ordered division. This court notes that the agreement states that both parties waive their rights to alimony. Based on the length of the marriage and the parties' ages, it is reasonable to infer that alimony might well have been a consideration in the division of the pension. Jane might not have entered into it without the pension provision.

Further, the court finds the fact that Don was not represented by counsel in the dissolution to be of no significance. For whatever reason, he made the decision to proceed without counsel. Don testified that he understood the settlement agreement, and it represented his intentions. He has not raised any allegations of fraud, mistake, duress, or coercion relating to

the settlement agreement. Apparently, his position is that he could have negotiated a more favorable settlement had he retained counsel. Regardless, the bankruptcy court would be the wrong forum to raise such issues. Likewise, it is the wrong forum to argue that the district court improperly applied Nebraska law in dividing the pension. The modification of dissolution decrees is outside the jurisdiction of this court. See Ankenbrandt v. Richards, 504 U.S. 689, 693-704 (1992) (exception to federal jurisdiction for domestic relations cases). Accordingly, Don's arguments concerning the application of Nebraska law and his lack of counsel must fail.

Next, Don argues that federal law prohibits Jane from receiving 70% of his military pension. He contends that the Uniformed Services Former Spouses Protection Act (USFSPA) 10 U.S.C. § 1408 caps the interest that she may receive at 50% of his disposable retired pay. Therefore, notwithstanding the property settlement agreement, the state court lacked jurisdiction over the remaining amount of the pension, and the decree would be void to the extent that it awarded Jane an excess amount. Cf. Ryan v. Ryan, 600 N.W.2d 739, 745-46 (Neb. 1999) (state court lacked jurisdiction to divide military disability benefits so that part of the decree was void and severable from the whole).

Congress passed the USFSPA in response to the United States Supreme Court's decision McCarty v. McCarty, 453 U.S. 210 (1981); where the court held that the statutes governing military retirement pay pre-empted state property division law in dissolution of marriage cases. Mansell v. Mansell, 490 U.S. 581, 584 (1989) (explaining the holding of McCarty). In McCarty, the Supreme Court determined that Congress intended that the retirement pay go only to the retired service person and no one else. Id. It reasoned that allowing a state court to divide the pension would do clear damage to "important military personnel objectives." Id. The Supreme

Court concluded by observing that Congress was free to change the statutes to provide relief for distressed former spouses. Id. Some fifteen months after the Supreme Court decision, Congress enacted the USFSPA to remove the effect of McCarty. S. Rep. 97-502 at 1, 1982 U.S.C.C.A.N. 1982, 1596.

The USFSPA provides in pertinent part:

> (c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court….
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> (d)(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.
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> (e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.
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> (6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. § 1408.

Courts dividing military retired pay in dissolution proceedings are split as to their interpretation of the USFSPA. Some courts have determined that the act grants a state court the authority to bring the military pension into the marital estate, but limits the amount of direct payments to the former spouse to 50% of disposable retired pay. If the state court chooses to award the former spouse more than 50% it must order direct payments by the government and payments by the service person. Deliduka v. Deliduka, 347 N.W.2d 52, 55 (Minn. App. 1984). Those courts hold that the limitation of § 1408(e)(1) applies only to government direct payment orders, and § 1408(e)(6), the "savings clause" provides the act will not limit the service person's liability for alimony, support, or other payments provided in the dissolution decree. See Ex parte Smallwood, 811 So.2d 537, 539-40 (Ala. 2001).

Courts holding that the USFSPA caps the amount of disposable retired pay available for division in a dissolution proceeding, find that § 1408(e)(1) limits the amount of the pension that is brought into the marital estate. Further, they find that the entire payment scheme supports the limitation view. A Missouri appellate court stated the rationale thusly:

> The "savings clause" at 10 U.S.C. § 1408(e)(6) only eliminates a defense for a retired armed services member from asserting that he or she cannot meet maintenance, child support, or property awards ordered by a court by showing that his or her only source of income derives from retired pay. The fifty percent limitation must have been intended as a cap on the division of retired pay, whether received directly from the Secretary or from the retired member. It is not logical that a nonmilitary spouse could receive ninety, or even all, of the pension but the government only remit fifty percent to that spouse. Why the government would care if it dispenses fifty percent or ninety percent escapes us, unless the fifty percent is the limit a nonmilitary spouse can receive through any means of disbursement.

Marriage of Bowman, 972 S.W.2d 635, 639 (1998).

In a case similar to the instant case, the U. S. District Court for the District of Kansas considered the dischargeability of a division of military pension benefits subject to the USFSPA. MacMeeken v. MacMeeken (In re MacMeeken), 117 B.R. 642 (D. Kan. 1990). In that case, the parties had been married for twenty-three years, sixteen of which the debtor was on active military duty. At the time of the dissolution, the parties had only one child under the age of majority; however, the debtor faced a paternity suit by a third party. In an effort to minimize his assets available to a successful plaintiff, the debtor entered into a property settlement agreement providing that his spouse be "entitled" to the whole amount of his disposable retirement benefit. The state court approved the settlement, and incorporated its terms into the dissolution decree. Id. at 643. After requesting and receiving a determination by the state court that the parties intended the provision to be a property settlement and not an award of alimony or support, the debtor filed for chapter 7 bankruptcy protection. Id.

In an adversary proceeding to determine the dischargeability of a debt, the bankruptcy court determined that the USFSPA limited the power of the state court to award no more than one-half of a service person's disposable retired pay to a former spouse. Id. at 642. Therefore, the bankruptcy court determined that one-half of the pension was property of the estate, and the debtor's obligation to pay that half to his former spouse was dischargeable. Id.

In reversing the bankruptcy court, the district began by noting that nothing in the language of the statute, including subsections 1408(d) and (e) expressly impose a fifty percent cap. Id. at 644. Further, the district court determined that when the savings clause is read "in conjunction with other statutory provisions which expressly recognize and preserve, without stated amount or percentage limitations, a state court's authority to award military retired pay as

support or as property division, the court [would] not find that the statutory language expressly or impliedly limits the amount of military retired pay which a state court can award to a former spouse in a divorce proceeding." Id. at 645. It viewed the fifty percent cap as a limitation on the amounts that the government would pay under the direct payment mechanism. Finally, the court analogized the limitation provided by §1408(e)(1) to that of § 1408(d)(2) whereby a former spouse must be married to the service person for ten years over the course of 10 years of creditable military service by the service person in order to receive direct payment. It noted that the United States Supreme Court in Mansell v. Mansell, 490 U.S. 581, 591 n. 13 (1989) stated that former spouses who did not meet the "ten-and-ten requirement" would not be precluded from receiving a portion of the military retirement pay; they could just not utilize the enforcement mechanism. Id. at 645-46.

This court acknowledges the appeal of the reasoning of the Missouri court in Bowman. If a state court can award a spouse an interest in a military pension as a sole and separate property interest, absent a statutory limitation, the government should be willing to turn over the property and not send it to a third party who no longer has an interest in the funds. However, such reasoning should also apply to the ten-and-ten requirement. As the Kansas district court recognized, the U. S. Supreme Court has rejected that position. Accordingly, this court will follow the analysis in MacMeeken and hold that the USFSPA does not limit the amount of retired military pay that a state court can award to a service person's spouse. Therefore, Jane's interest in the military pension is not capped at 50%; the entire 70 % is her sole and separate property.

Don argues that the court must engage in a constructive trust analysis and determine that the factors required under Nebraska law are present. See Bush, 912 F.2d at 994-96 (J. Arnold dissent). Such argument did not carry the majority in the Eighth Circuit's decision. Rather the circuit court held that the property award constituted the former wife's sole and separate property and therefore, was not a dischargeable debt under the Code. Id. at 993-94; see also Ellis, 72 F.3d at 632.

Finally, the court notes that Don indicated that at the time of the decree he received $956.00 per month in retirement pay. He also states that since September of 1999, Jane has received $482.70 per month. His schedules indicate that he now receives $154.00 per month in retirement pay and $323.00 per month in disability pay. The court deduces that Don took advantage of the provision that allows him to forego retirement pay in order to receive disability payments, thereby, effectively lowering Jane's payments by over $200.00 (956 x 70% = 689.20; 689.20 – 482.70 =206.50).

In conclusion, the court determines that Jane's interest in the military pension is her sole and separate property, and not a debt owed to her by Don. The USFSPA does not limit her interest to 50% of Don's disposable retired pay. Accordingly, the court will grant Jane's motion for summary judgment.

Also, Don's motion to compel will be denied. Generally, such financial information is discoverable when defending a § 523(a)(15) action, so that a debtor can compare financial situations in order to show the benefit of the discharge outweighs the detriment to the creditor. However, because the court has determined that Jane's interest in the pension is her sole and

separate property and not a debt, the § 523(a)(15) action is unnecessary and further discovery is not warranted.

ORDER

IT IS THEREFORE ORDERED that the plaintiffs' Motion for Summary Judgment is GRANTED and Plaintiff M. Jane Madsen shall have judgment against Defendant Donald L. Madsen declaring that Plaintiff's 70% ownership in the military pension is her sole and separate property and not debt owed to her by Defendant.

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RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT