

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
CHARLES LLOYD BAKER,	)	CASE NO. 01-34691 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
DOROTHY A. BAKER,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 01-3160
	)	
CHARLES LLOYD BAKER,	)	
	)	
DEFENDANT.	)	

Appearances:

Loraine P. Troyer, Esq., attorney for plaintiff, 121 North Third Street, Goshen, Indiana 46526; and

Michael K. Banik, Esq., attorney for defendant, Banik & Renner, 217 South Fourth Street, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 31, 2003.

Before the court is the Complaint to Determine Dischargeability of Debts and Objection to Discharge, filed on December 26, 2001, by the plaintiff Dorothy A. Baker (“plaintiff” or “Dorothy”). The complaint asks that the debt to the plaintiff arising out of the decree of dissolution be excepted from the discharge of the debtor defendant Charles Lloyd Baker (“defendant” or “Charles”). The sole provision of the Bankruptcy Code at issue, pursuant to the language of the complaint, is 11 U.S.C. § 523(a)(15). The defendant filed his Answer to Complaint on January 17, 2002. After delays in the filing of the parties’ proposed pre-trial orders, the court held a trial on the complaint on August 7 and 26, 2002. It then took the matter under advisement.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The plaintiff and the defendant were previously married for seventeen years. Their marriage was dissolved on May 15, 1995, pursuant to a Decree of Dissolution (“decree”) entered in the Elkhart Superior Court. The decree contained this provision, which is central to the matter before us:

9. a) In recognition of the value of the Husband’s Military Pension, and in consideration of the likelihood of his receiving a substantial inheritance, the parties agree that a judgment should be, and hereby is, entered against the Husband and in favor of the Wife in the sum of One Hundred Twenty Nine Thousand Five Hundred Dollars (\$129,500). This judgment shall not be due and payable for a period of ten (10) years from the date of entry of this decree, and shall bear no interest during that time period. If, however, the Husband’s grandmother dies during such ten year period and the Husband inherits the real estate and improvements commonly known as 146 Burrell Drive, Elkhart, Indiana, then such real estate shall be transferred by the Husband to the Wife within a reasonable time as soon as the administration of the Estate of his grandmother allows. Such transfer shall be without cost and shall transfer the real estate free of encumbrances to Dorothy A. Baker except as to any real estate taxes accruing after the date of death and through the date of transfer. Transfer of such real estate shall constitute full satisfaction of the judgment entered herein. If for any reason the Husband does not inherit such real estate, but inherits other real estate or personal or intangible property in excess of the current value of such real estate then Husband shall pay to the Wife a sum equal to the agreed appraised value of such real estate at the present time to-wit: \$129,500.00, within one year from the date of the first published notice of the opening of the estate of Husband’s grandmother. Such sum shall not bear interest provided payment is made within one year of that date, but shall bear statutory interest if not paid by that date.

b) If at the time such judgment becomes due and payable the Husband's grandmother is still living, then the judgment entered herein shall bear interest from that date at the rate of ten percent (10%) per annum. The Husband shall pay such judgment amortized over ten years, provided that the entire outstanding balance shall become immediately due and payable if he shall fail to make monthly payments as due, or in the event of the death of his grandmother.

c) The Husband shall make the Wife his beneficiary on at least \$129,500 of his life insurance until such time as this judgment is paid or satisfied.

Pl. Ex. 5 at 4-5 ("the judgment").

The defendant filed his voluntary petition under chapter 7 on September 21, 2001. He listed his former wife, the plaintiff, on Schedule F as an unsecured creditor. The plaintiff then filed a complaint asking the court to determine that the defendant's obligation to her under the Decree of Dissolution was nondischargeable. The plaintiff stated in the Complaint that she believed she was a beneficiary of Charles' grandmother's trust. She explained that she relinquished her right to a share of the defendant's military pension in exchange for the \$129,500 judgment in the decree. According to the complaint, the defendant did not disclose his interest in this trust on his bankruptcy schedules. The plaintiff asserted that discharging the debt due to her would not result in a benefit to the debtor that would outweigh the detrimental consequences to her. She asked that the debt be declared nondischargeable.

#### Discussion

The issue before the court is whether the defendant's obligation to the plaintiff under the divorce decree is excepted from the discharge of the defendant's bankruptcy under § 523(a)(15), as the plaintiff's complaint suggests. It is generally the case that divorce property settlements are dischargeable in bankruptcy. *See Kolodziej v. Reines (In re Reines)*, 142 F.3d 970, 972 (7th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). However, § 523(a)(15) provides two exceptions to that rule by setting forth that an individual debtor is not discharged from any debt –

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with state or territorial law by a governmental unit unless –

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15); *see In re Crosswhite*, 148 F.3d 879, 883 (7th Cir. 1998). The plaintiff has the initial burden of proving, by a preponderance of the evidence, that she holds a subsection (15) claim against the debtor, and then the burden shifts to the debtor defendant to prove that he falls within either of the two exceptions found in § 523(a)(15)(A) and (B). *See id.* at 884.

There was no dispute concerning those elements the plaintiff initially must demonstrate. The parties did not doubt that the judgment for \$129,500 (payable in ten years in a lump sum rather than in periodic payments) or for the grandmother's residence was not a debt for alimony, support or maintenance, as described in § 523(a)(5), and therefore was not excepted from discharge under § 523(a)(5). The plaintiff showed that the judgment was a debt incurred by the defendant in connection with the state court divorce decree. The plaintiff therefore met her burden of demonstrating that her claim falls under § 523(a)(15).

The court finds that the judgment was not labeled as alimony, support, or maintenance, and that the parties did not express or suggest implicitly any intent to create some type of maintenance for the plaintiff. *See In re Reines*, 142 F.3d at 972 (reviewing factors to consider for proving support in case where wife was awarded a money judgment in lieu of receiving monthly pension payments). Nevertheless, the defendant questioned the nature of the judgment debt. Because the judgment was based upon the defendant's future inheritance of property from his grandmother's trust, the defendant's divorce attorney called it a "mere expectancy" of Charles' 50% interest in that trust. In determining whether the defendant's possible future inheritance is property to be

considered in the marital estate, therefore, the court considers the testimony of witnesses at the trial to glean the understanding of that judgment between the parties.

Steven R. Bowers, an attorney practicing in Elkhart, executed the revocable trust agreement for Delotia V. Klose, the defendant's grandmother, in 2000.<sup>1</sup> He testified at trial that Ms. Klose is perhaps 92 years old, elderly, physically infirm, but mentally competent. The attorney testified that, under the trust, when Ms. Klose dies, Charles will receive a 50% interest in the trust; the other 50% is left to his sister. Charles has an expectancy in the trust, he stated. However, nothing prevents Ms. Klose from changing the trust agreement. He opined that paragraph 9 of the decree was ill advised in light of the fact that Charles might never receive the house or other proceeds from the trust.

Bowers represented Charles Baker in his divorce proceedings. He reviewed the property divisions incorporated into the decree and noted that there was no provision for monthly payments to her. He also pointed out that the defendant has no present ownership interest in the real estate, which is his grandmother's house. In paragraph 9, he explained, the parties agreed to a \$129,500 judgment against his client and in favor of the wife with the understanding that, if Charles inherits the real estate from his grandmother, he could pay off the judgment by transferring the real estate to Dorothy. According to the attorney, that was the intention of paragraph 9 when they entered into the decree. The parties indicated that the defendant was likely to receive an inheritance. The provision set forth a judgment to be satisfied by a sum of money or by transfer of the real estate. It also established that interest would begin to accrue ten years from the date of dissolution if the grandmother was still

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<sup>1</sup> Ms. Klose executed a trust agreement on May 2, 2000. The pertinent provision stated:

As of the date of my death, but after providing for the payments, if any, required by Article III of this instrument, the trustee shall distribute the remaining trust principal . . . in equal shares to my grandchildren, Brenda Lee Porter and Charles L. Baker. . . .

Pl. Ex. 6, Art. IV at 6.

living. Bowers noted that the judgment was in lieu of Charles' military pension, as the decree stated. He also testified that he believed the \$129,500 figure was the appraised value of the house at the time of the decree.

The plaintiff testified that she chose not to take any of Charles' military funds. She knew that he had been in counseling and perhaps had a breakdown around the time of the divorce. She decided, therefore, not to take half of Charles' pension for emotional and humane reasons, she said. Instead, she explained, the \$129,500 judgment was intended to fund her retirement. She was aware that there was a possibility he would not get the real estate from his grandmother; at that point, she stated, the agreed \$129,500 payment would cover her retirement costs.

Indiana law requires that all property be considered in the marital estate. *See* Ind. Code 31-15-7-5; *Fobar v. Vonderahe*, 771 N.E.2d 57, 60 (Ind. 2002). A trust is properly made a marital asset and included as part of the parties' settlement agreement when the parties so agree. *See Adler v. Adler*, 713 N.E.2d 348, 353 (Ind. Ct. App. 1999). Once the parties agree to the division of assets, the property settlement is incorporated into a final divorce decree and becomes a binding contract. *See id.* at 354. This decree of dissolution, which incorporates the parties' agreed property settlement, is a contract binding on the plaintiff and defendant, the court finds.

Turning to the language of the decree, the court finds paragraph 9 to be clear in its basic intent. Importantly, the parties, in their testimony, also agreed on the intent of that provision. There are several options stated in the paragraph. (1) A \$129,500 judgment is entered against Charles, due to be paid on May 15, 2005. (2) However, Charles, "in consideration of the likelihood of his receiving a substantial inheritance," agrees to transfer his grandmother's real estate to Dorothy if he should inherit it after the decree was executed. The transfer to Dorothy of his future interest in the trust property is in full satisfaction of the judgment. (3) However, if he inherits other real estate or other property "in excess of the current value of such real estate," then Charles pays Dorothy \$129,500 within a one-year period. (4) If his grandmother is still living on May 15, 2005, the

judgment shall begin to bear interest from that date and Charles “shall pay such judgment amortized over ten years.” (5) Charles must make Dorothy a beneficiary of a life insurance policy to cover the judgment.

The court considers first the defendant’s promise to transfer his grandmother’s real estate or \$129,500 in proceeds from her trust. Under Indiana law, the court finds, that provision, agreed upon by the parties, is characterized most appropriately as an assignment of an expectancy interest to property made by the husband to the wife in their negotiated settlement of property during the pendency of the divorce. An assignment of an expectancy interest is property that is validly included in a marital estate when “executed in the midst of an adjustment of familial obligations” such as a property settlement in conjunction with a decree of dissolution. *Kuhn v. Kuhn*, 385 N.E.2d 1196, 1199 (Ind. Ct. App. 1979).

[A]n “equitable assignment” is a conveyance recognized by courts of equity where one has conveyed an expectant interest to another, and . . . the transfer is made binding upon the reliance or other consideration of the assignee as an executory contract. Or, stated differently, where the facts and circumstances are such that equity places a duty to convey upon the assignor, he will be estopped from denying the validity of the transfer.

*Id.* (citing *McAdams v. Bailey*, 169 Ind. 518, 82 N.E. 1057 (Ind. 1907)). In this case, Dorothy has relied upon the assignment, thinking that the proceeds Charles would inherit from the grandmother’s trust (either the grandmother’s real estate or other property) would be passed to her to protect her retirement. Therefore, as the Indiana appellate court found, “an equitable assignment was created which can be specifically enforced as a binding executory contract in the absence of an affirmative showing by Charles of a countervailing equity, such as fraud.” *Id.*

The court concludes that the parties and the state court divided the marital property “in a ‘just and reasonable manner.’” *Fobar*, 771 N.E.2d at 58-59 (citing Ind. Code 31-15-7-4 and 31-15-7-5, affirming the trial court’s division of the marital property to reflect respondent’s interest in inheritance property).<sup>2</sup>

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<sup>2</sup> The court notes, as well, that, in the decree’s paragraph 9, the parties acknowledged the value of the Husband’s military pension but chose to accept the judgment, rather than the pension, to the plaintiff. A spouse’s military (continued...)

The court finds, therefore, that the judgment in the divorce decree awards an assignment, from Charles to Dorothy, of Charles' expectancy interest in his grandmother's trust property, in lieu of his monthly military pension benefits. It is a marital debt and is properly included in the property division of a dissolution decree under Indiana law. However, the payments are not due and payable for ten years from the date of the decree. Under bankruptcy law, therefore, they are postpetition payments. Generally, a wife's postpetition payments of pension funds are treated as obligations not subject to the husband's discharge. This court now considers the postpetition payment of the husband's inheritance in the same way.

The case law uniformly has found that a former spouse's interest in postpetition pension payments was not dischargeable because payments that are not yet due and payable do not represent a debt under the Bankruptcy Code. See *McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 199-200 (6th Cir. 1996); *Bush v. Taylor*, 912 F.2d 989, 993 (8th Cir. 1990); *Teichman v. Teichman (In re Teichman)*, 774 F.2d 1395, 1400 (9th Cir. 1985); *Brown v. Grossman (In re Grossman)*, 259 B.R. 708, 711 (Bankr. D. N.D. 2001); *Zeitler v. Martel (In re Zeitler)*, 255 B.R. 172, 177-78 (E.D.N.C. 1999). Some of the courts find that the future benefits are not property of the estate at all and thus are not dischargeable in bankruptcy. See, e.g., *McCafferty*, 96 F.3d at 200; *Bush*, 912 F.2d at 993. Others find that the future benefits are postpetition payments being held in bankruptcy in constructive trust for the debtor's wife and therefore nondischargeable even if the evidence bearing on dischargeability under § 523(a)(15) demonstrates that the debt is dischargeable. See *McCafferty*, 96 F.3d at 198-99; *Bush*, 912 F.2d at 992-93; *Grossman*, 259 B.R. at 711. The United States District Court of the Southern District of Indiana recently found that the former wife's property interest in her former husband's pension fund

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<sup>2</sup>(...continued)

retirement benefits are properly classified as marital property that can be awarded to the other spouse. See *Warren v. Warren*, 563 N.E.2d 633, 635-36 (Ind. Ct. App. 1999); *In re Warfield*, 157 B.R. 651, 654 (Bankr. S.D. Ind. 1993) (finding that "vested pension rights and retirement benefits are marital property in Indiana" and are "subject to the presumptive '50-50 split' established by the Indiana dissolution statute"). Whether the choice was "ill advised," as attorney Bowers suggested, or not, it was not unjust or unreasonable.

vested upon the issuance of the divorce decree and thus that her interest in the pension fund was “neither a debt owned by [the debtor] nor a part of his bankruptcy estate subject to discharge.” *Brown v. Pitzer*, 249 B.R. 303, 308-09 (S.D. Ind. 2000). The court particularly noted that the divorce court did not need to create a constructive trust to give the wife an ownership interest in the pension funds that vested when the divorce decree was issued. *See id.* at 312.

Under either theory – the concept of an equitable trust or assignment of the husband’s property to the wife, or the theory that the payments were not due and payable at the inception of the bankruptcy — the court finds that the plaintiff’s entitlement to the defendant’s expectancy in the trust property cannot be discharged in his bankruptcy case. It believes that Charles is bound by his agreements under the divorce decree and would be unjustly enriched if he received the entire value of his grandmother’s trust estate. Dorothy’s entitlement to the judgment debt, either in 2005 or whenever the defendant becomes entitled to the trust proceeds, is not dischargeable in these proceedings.<sup>3</sup>

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<sup>3</sup> Because the parties, at trial, focused on setting forth evidence to demonstrate the weighing of the benefits and detriments to the parties pursuant to § 523(a)(15)(B), the court notes that it reviewed the evidence in its entirety and engaged in an examination of the relative financial situations of the debtor and his former spouse in the totality of the circumstances. *See Turner v. McClain*, 227 B.R. 881, 885 (Bankr. S.D. Ind. 1998) (citing *Crosswhite*, 148 F.3d at 883). The court considered the defendant’s Schedules I and J along with the plaintiff’s testimonial evidence of her income and expenses. The court has taken into account the parties’ ages, their need to fund their retirements, and the status of their health as factors influencing their financial condition. When the court applies a balancing test and compares their relative standards of living in the totality of the circumstances, it finds that the defendant’s standard of living is approximately equal to the plaintiff’s. It was the burden of the debtor, under § 523(a)(15)(B), to demonstrate that the benefit to him of discharging the debt outweighs the detrimental consequences to the plaintiff. When the defendant proves only that his standard of living is about the same as the plaintiff’s if the debt is not discharged, then he fails in his burden of showing that the debt should be discharged. Indeed, courts consistently conclude that, when a debtor’s standard of living is greater than or equal to the plaintiff’s, a discharge of the debt is not warranted. On the other hand, if the debtor’s standard of living falls materially below that of the plaintiff’s, the bankruptcy court may grant a discharge under § 523(a)(15). *See, e.g., Chance v. White (In re White)*, 265 B.R. 547, 556-559 (Bankr. N.D. Tex. 2001) (citing *In re Molino*, 225 B.R. 904, (B.A.P. 6th Cir. 1998)); *see also Mesenbrink v. Eiklenborg (In re Eiklenborg)*, 286 B.R. 718, 723 (Bankr. N.D. Iowa 2002); *Courtney v. Traut (In re Traut)*, 282 B.R. 863, 870-71 (Bankr. N.D. Ohio 2002); *In re Williams*, 210 B.R. 344, 347 (Bankr. D. Neb.1997). The court concludes that, had the determination of dischargeability of debt been made under § 523(a)(15)(B), it would have found that the benefit to the defendant (continued...)

Conclusion

For the reasons stated above, the court finds that the obligations due and owing to the plaintiff Dorothy A. Baker pursuant to the Decree of Dissolution are not dischargeable in the bankruptcy of the defendant Charles Lloyd Baker. The relief sought in the plaintiff's Complaint therefore is granted.

SO ORDERED.



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HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT

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<sup>3</sup>(...continued)

of discharging his responsibility for the debt is outweighed by the detriment to the plaintiff and would have been excepted from discharge under § 523(a)(15).