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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE: ) CASE NO. 00-52203  
 )  
PRINCE WASHINGTON, JR ) CHAPTER 13  
 )  
 ) JUDGE MARILYN  
 ) SHEA-STONUM  
DEBTOR )  
 ) **ORDER RE: OBJECTION**  
 ) **OF TONI WASHINGTON**  
 ) **TO CONFIRMATION OF**  
 ) **DEBTOR'S CHAPTER 13 PLAN**

This matter came before the Court on the Objection of Toni Washington to Confirmation of the Debtor's Chapter 13 Plan (the "Objection"), filed on October 3, 2000, and the debtor's Response, filed on October 13, 2000. The Objection was based on the plan's treatment of the movant's award of benefits and attorney's fees by the Domestic Relations Court of Summit County.

A hearing on the Objection was held on November 16, 2000. Appearing at the hearing were James E. Banas, counsel for the debtor, and Marc P. Gertz, counsel for Toni

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<sup>1</sup> Debtor's amended plan was confirmed on September 28, 2000. Creditor Toni Washington objected to the plan by filing her Objection on October 3, 2000, prior to having filed her Proof of Claim, which was filed on October 4, 2000. However, debtor's petition was sent not to Toni Washington at her address, but to an attorney who had apparently represented Ms. Washington at some point in her divorce

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Washington, the debtor's ex-wife. Because the Objection to the plan was filed a day after the plan was confirmed, the Court treated the Objection as a Motion to Reconsider Confirmation and set a schedule for the parties to brief the issues raised in the Objection.<sup>1</sup> On November 22, 2000, movant filed a formal Motion for Reconsideration of Confirmation Order. On November 28, 2000, the parties filed a Stipulated Statement of Facts and Submission of Documents (the "Stipulated Statement"). On December 15, 2000, Toni Washington filed her Brief in Opposition to Confirmation of the Plan and the debtor filed his Response on December 28, 2000. The court took the matter under advisement on December 29, 2000. On February 1, 2001, Toni Washington filed a Reply Brief.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

**I. BACKGROUND**

The following facts were stipulated to in the Stipulated Statement:

Prince Washington, Jr., (the "debtor") and Toni Washington (the "movant") were married on February 21, 1970. In 1992, movant filed for divorce in Summit County

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proceedings and the subsequent actions filed in Summit County Court of Common Pleas. It is unclear when Ms. Washington received notice that Mr. Washington had filed and when she was able to retain an attorney to review the plan. Since debtor's plan purported to treat her claims quite differently than other claims, and since only several days were involved in the delay causing little, if any prejudice to other parties, the Court determined that equity and due process considerations demanded that the Objection to the Confirmation be treated as a Motion to Reconsider Confirmation of the Plan. *See, e.g., In re Fiorilli*, 196 B.R. 83 (Bankr. N.D. Ohio 1996).

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Common Pleas Court case No. 92-5-1065, entitled *Washington v. Washington*. The Domestic Relations Court granted movant her divorce on December 16, 1993. See the Judgment Entry/Decree of Divorce, attached and incorporated into the Stipulation Statement (the "Divorce Decree").

Pursuant to Paragraph 8 of the Divorce Decree, debtor, at the time he retired from the Akron Police Department, was to pay movant a portion of his Police and Fireman's Disability & Pension Fund (the "Pension") proceeds as part of the property division of the divorce. Debtor was to secure movant's interest in said pension with a term life insurance policy naming movant as the beneficiary of \$50,000.00 of insurance. Additionally, debtor was to pay movant the sum of \$2,700.00 for her attorney's fees from the original divorce action.

Debtor failed to comply with the above conditions. He retired in May 1998. Movant filed a contempt action against the debtor in 1999. The result of the action was the Domestic Relations Court's Magistrate's Decision of February 7, 2000 (the "Magistrate's Decision"). A copy of that decision was also affixed and incorporated into the Stipulation Statement. The relevant points of that order were as follows:

- A. The Court granted a judgment in movant's favor against the debtor in the sum of \$11,962.09 for past due pension payments; judgment on the sum of \$2,700.00 for past attorney's fees; and a judgment for \$2,915.62 for present attorney's fees and costs. The Court awarded movant ten percent (10%) interest per annum on the declining judgment balance. The debtor was ordered to pay \$1,000.00 per month toward the judgments. Finally, the debtor was found in contempt for his failure to pay the past due attorney's fees and to take out the life insurance policy.

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- B. In addition to the terms set forth in Paragraph A, the debtor was ordered to pay movant 36.01% of his current monthly net pension benefit. If the pension increased, movant was to receive a proportionate share of the increase. As of February 7, 2000, the debtor's net pension check was \$1,696.81 per month. Accordingly, movant's share of said proceeds was \$614.42 per month. Debtor's monthly pension increased to \$1,729.01 as of November 1, 2000, meaning that movant's proportionate share should have increased to \$622.62 per month.

After the Magistrate's Decision was entered, debtor started paying movant \$1,000.00 per month from March through May. The payments ceased altogether in June and July. The Domestic Relations Court issued an order dated June 16, 2000, also attached to and incorporated in the Stipulation Statement, which sustained the Magistrate's Decision of February 7, 2000, and which ordered the debtor to appear before the Magistrate on July 20, 2000, to determine whether he should be incarcerated for failure to purge himself from contempt of court due to his failure to provide proof of life insurance and to pay prior attorney's fees.

The Chapter 13 case was filed on July 19, 2000, one day before the contempt hearing. In August, the debtor started making payments of \$614.00 per month to the movant.

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Exhibits stipulated to and attached to the Stipulated Statement included:

|    |   |          |
|----|---|----------|
| A. | Divorce complaint and attendant documentation | 5/01/92  |
| B. | Motion for Temporary Orders                   | 5/12/92  |
| C. | Judgment entry - Temporary Orders             | 5/20/92  |
| D. | Motion for Spousal Support & Atty Fees        | 6/08/92  |
| E. | Judgment Entry - Supplemental Orders          | 8/04/92  |
| F. | Judgment Entry/Decree of Divorce              | 12/16/93 |
| G. | Post-decree Motion - Motion to Show Cause     | 4/12/99  |
| H. | Judgment Entry - Magistrate's Decision        | 2/07/00  |
| I. | Judgment Order                                | 6/16/00  |

The following facts were recited in the parties' briefs and do not appear to be disputed:

During the marriage and at the time of the divorce, the debtor was employed by the Akron Police Department and participated in the Police and Firemen's Disability & Pension Fund of Ohio. The value of the Pension at the time of the divorce was \$94,346.00. Divorce Decree, Para. 8. Debtor continued his employment after his divorce, retiring from the Akron Police Department on May 23, 1998, and began receiving pension benefits as of August 1998. Magistrate's Decision, Para. 4. The debtor did not turn over any of the pension proceeds to the movant, who filed her Motion to Show Cause, resulting in the Magistrate's Decision of February 7, 2000. The day before the hearing in the Summit County Domestic Relations Court to determine whether the debtor was in compliance with the court's orders, the debtor filed his petition in the above-captioned chapter 13 action.

The debtor's chapter 13 plan stated that "Toni Washington is owed the sum of \$614.62 per month which represents a property distribution from Debtor's pension through Ohio's Police & Fire Pension Fund pursuant to a divorce decree entered in Summit Co. Domestic Case No. 92-5-1065. This monthly distribution shall be paid outside of the plan. The judgment amounts entered in a judgment rendered on June 16, 2000 in

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that court shall be treated in the same manner as the other unsecured nonpriority creditors and be paid at the rate of 37% of the claims. These amounts are dischargeable under 11 U.S.C.(a)(15)(A) and (B). The judgment lien filed by Toni Washington will be avoided under 11 U.S.C. §§ 522(f), 547-549." Amended Chapter 13 Plan at 2(F). Pursuant to the proposed plan, Debtor is now making monthly payments of \$614.00. Movant's Brief at 3, Debtor's Response at 3 (unnumbered pages).

Movant claims in her Objection and Briefs that the Pension benefits awarded to her are her separate property and not property of the debtor's estate, that pursuant to 11 U.S.C. § 541(d) the property interest in her share of the Pension benefits is held by the debtor in constructive trust in her favor, pursuant to 11 U.S.C. § 541(d), and that the award of attorney's fees for the past and present cases is non-dischargeable pursuant to §523(a)(5).

Debtor alleges that it is not the debtor's intention to discharge the entire Pension award, only to avoid a portion of the arrearage, including fees and costs, granted to the movant by lump sum judgment of the Domestic Relations Court. Debtor claims that reduction of the arrearage of the Pension benefits to a judgment by the Domestic Relations Court converted the arrearage to a debt dischargeable in bankruptcy.

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**II DISCUSSION**

**A. The Pension Benefits**

**1. Ohio Rev. Code § 3105.171**

Section 3105.171 of the Ohio Revised Code provides that domestic relations courts are to divide marital property between spouses equitably. § 3105.171(B), (C)(1). In *Erb v. Erb*, 75 Ohio St.3d 18, 20 (1996), the Ohio Supreme Court stated that "[p]ension or retirement benefits accumulated during the course of a marriage are marital assets subject to property division in a divorce action." In *Erb* the divorce decree was found to have awarded the wife a separate ownership in the husband's pension benefits. *See also In re McCafferty*, 96 F.3d 192, 197 (6<sup>th</sup> Cir. 1996). The *Erb* Court went on to state that when distributing these assets "a trial court must apply its discretion based upon the circumstances of the case, the status of the parties, the nature, terms and conditions of the pension or retirement plan and the reasonableness of the result." *Erb* at 20.

In *In re McCafferty*, 96 F.3d at 197, the Sixth Circuit stated that "[u]nder Ohio law, '[o]nce the division of property is fixed by the court, both spouses are legally entitled to the share respectively allowed to them.' *Zimmie v. Zimmie*, 11 Ohio St.3d 94, 97 (1984)." In the present case the Ohio divorce decree awarded the movant "her proportionate share in the Defendant's Pension." Divorce Decree at Para. 8. Based on the review of state law and the language of the divorce decree, this Court concludes that the Ohio divorce order awarded movant a separate property interest in a portion of the Pension benefits from the debtor's employment.

**2. Imposition of a "Constructive Trust."**

Having found that the divorce decree awarded movant a separate interest in the debtor's Pension benefits, the Court now must determine "whether the effect of the

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divorce decree was to 'impress' a constructive trust upon those assets." *Id.* at 198. In *Ferguson v. Owens*, Ohio St.3d 223 (1984), the Ohio Supreme Court defined a constructive trust as:

a trust by operation of law which arises contrary to intention . . . against one . . . who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

*Id.* at 225 (quoting 76 Am. Jur.2d Trusts § 221, at 446 (1975)). In *Croston v. Croston*, 18 Ohio App.2d 159 (1969), the Court stated that a constructive trust had been defined to arise "where a person holding title to property is subject to an equitable duty to convey it to another on ground that he would be unjustly enriched if he were permitted to retain it . . . ." *Id.* at 162 (quoting Restatement of the Law of Restitution 640, Section 160). The *McCafferty* Court stated that this "language indicates that it is not necessary for a court in Ohio to declare a constructive trust; it arises by operation of law to prevent unjust enrichment." *In re McCafferty* at 198.

In *In re McGraw*, 176 B.R. 149, 151-52 (Bankr. S.D. Ohio 1994), the Bankruptcy Court held that "where there is a valid Domestic Relations Court order predating the bankruptcy, there has in fact been a judicial determination by a court in a separate proceeding that the Debtor's property is held for the benefit of another." In this case, there has been such a judicial determination by a court in a separate proceeding. Having already determined that the movant has a separate interest in the Pension plan, this Court finds that the Ohio Domestic Relations Court's order created a constructive trust to protect that interest which survived bankruptcy, regardless of whether the court actually used the words "constructive trust." *See In re McCafferty* at 198. The Sixth Circuit in *In re Omegas Group, Inc.*, 16 F.3d 1443 (6<sup>th</sup> Cir. 1994), stated that a constructive trust may



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only exist by grace of a judicial action which orders one party to convey property to another. *Id.* at 1449 (quoting Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. Ill. L. Rev. 297, 301 (1989)). In the present case the Divorce Decree did order the debtor to convey property to the movant and the Court finds that a constructive trust was "impressed" on the debtor's Pension benefits for the benefit of the movant.

**3. 11 U.S.C. § 541**

Section 541 of the Bankruptcy Code states that the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." § 541 (a)(1). However, § 541(d) provides that "[p]roperty in which the debtor holds . . . only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." § 541(d). In this case the Ohio Domestic Relations court awarded movant "her proportionate share in the Defendant's Pension", Divorce Decree at Para. 8, and pursuant to *In re McCafferty*, this Court finds that the debtor "retained only a bare legal title in the designated portion of the plain benefits and that [movant] became equitable owner of the retirement plan to that extent." *In re McCafferty* at 198. "Thus the property interest never became part of the bankruptcy estate." *Id.* In *In re Wilson*, 158 B.R. 709, 711 (Bankr. S.D. Ohio 1993), the Court stated that the wife's separate property interest in husband's pension would neither be a part of the bankruptcy estate nor subject to the jurisdiction of the bankruptcy courts. However, the Court went on to state that because a discharge of the debtor would not affect the wife's ownership interest in the pension itself and because the husband would remain subject to the contempt powers of the domestic relations court, the wife's interest would continue to be adequately protected. *Id.* at

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It would work an unjust enrichment for the debtor to receive and spend the Pension benefits awarded to the movant and subsequently to consider those spent proceeds as debt dischargeable in a bankruptcy action.<sup>2</sup> Pursuant to a provision of the Divorce Decree, the debtor remains subject to the contempt powers of the Ohio Domestic Relations court in order to protect the separate ownership rights of the movant. Divorce Decree, Para. 10.

Thus the Court finds that because the movant's award of Pension benefits did not constitute property of the bankruptcy estate under 11 U.S.C. § 541, the lump sum award of past Pension benefits and reasonable attorney's fees by the Magistrate is not dischargeable debt. "No known policy would be furthered by allowing [the debtor] to manipulate the bankruptcy system as a means to emasculate the decree of a state domestic relations court." *In re McCafferty* at 200. "We doubt that Congress ever intended that a former wife's judicially decreed sole and separate property interest in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving the debtor a fresh start." *Bush v. Taylor*, 912 F.2d 989, 994 (8<sup>th</sup> Cir. 1990).

**B. The Attorney Fees - Past and Present**

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<sup>2</sup> The debtor states that the reason he did not pay over any amounts to the movant from his Pension benefits received since 1998 was that he could not determine the exact amount to pay her or where to send such payments. Magistrate's Decision, Findings of Fact, Paras. 8, 11. The Divorce Decree sets out a formula to determine the exact proportionate share of the Pension owed to movant depending on the date of retirement, the number of years the debtor was employed during the marriage and taking into account the total years of employment at the Akron Police Department. In Paragraph 10 of the Divorce Decree the Court stated: "The Court shall retain jurisdiction to interpret, modify, amend or enforce the equitable division of the Defendant's Pension benefits and insurance order." If the debtor was unsure what amount he should pay over to the movant, he could have requested assistance from the Court since it specifically retained jurisdiction to enforce its Order.

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In Paragraph 11 of the Divorce Decree the Court ordered that

[t]he Defendant shall pay to the Plaintiff the sum of two thousand dollars (\$2,000.00) for her attorney fees, plus seven hundred dollars (\$700.00) for a total of two thousand seven hundred dollars (\$2,700.00). The Defendant shall pay the sum in monthly installments of fifty dollars (\$50.00) per month. The first monthly installment shall be due on September 15, 1993.

The debtor stipulated that he did not pay the fees and the Domestic Relations Court found that he "did not present an adequate defense to the charge of contempt on the attorney's fees provision." Magistrate's Decision, Findings of Fact, Para. 23. In addition, the Magistrate stated the following:

The court has discretion to award fees both for enforcement purposes and as a form of support. Fees are warranted here. It is clear that Plaintiff needed an attorney to obtain what was already awarded to her by the divorce decree. Further, Defendant has the ability to pay her fees, and Plaintiff would otherwise have been prevented from fully litigating her claims. She is a self-employed realtor earning only \$12 - 18,000 per year. . . . A reasonable award in this case is \$2,200. In addition, Plaintiff incurred travel expenses of \$497.87 and litigation costs of \$217.75. . . . Plaintiff is awarded a judgment against Defendant in the amount of \$2,700 for past attorney fees. . . . Plaintiff is awarded a judgment against Defendant in the amount of \$2,915.62 for fees and costs incurred to prosecute this motion. . . . All judgments awarded herein earn interest at the statutory rate of ten percent per annum based on a declining balance method of calculation, beginning January 5, 2000.

Magistrate's Decision, Findings of Fact, Paras. 26, 27, "Magistrate's Decision," Paras. 8, 9, 10.

The Court clearly indicated that this award represents "a form of support."

Magistrate's Decision, Findings of Fact, Para. 26.

Ohio Rev. Code § 3105.18(H) provides:

In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal, any proceeding arising from a motion to modify a prior order or decree, and any proceeding to enforce a prior order or decree, if it determines that the other party has the ability to pay the attorney's fees that the

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court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating his rights and adequately protecting his interests if it does not award reasonable attorney's fees.

"The award of attorney fees in a divorce proceeding is a matter committed to the sound discretion of the trial court . . . ." *Williams v. Williams*, 116 Ohio App.3d 320, 328 (1996). Divorce, alimony, support and maintenance are issues within the exclusive domain of the state courts. *Bodie v. Connecticut*, 401 U.S. 371, 389 (1971). The Domestic Relations Court stated the reasons for its award, and they clearly track the wording of the statutory provision under which it was made. *See* § 1305.18(H), *supra*.

Section 523(a)(5) of the Bankruptcy Code states:

(A) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

...

(5) to a spouse, former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a separation agreement, divorce decree or other order of a court of record . . .

In *In re Calhoun*, 715 F.2d 1103, 1107-08 (6<sup>th</sup> Cir. 1983), the Sixth Circuit stated that "Congress could not have intended the bankruptcy courts to ignore well developed state law principles of domestic relations in determining whether [an award of attorney's fees] is 'in the nature of' alimony or support for purposes of the bankruptcy act." The Domestic Relations Court clearly stated that its award of reasonable attorney fees for the original divorce action and the Motion to Show Cause was intended as a form of support, and as such is not dischargeable or modifiable under § 523(a)(5).

**III. CONCLUSION**

Based upon the foregoing the Court hereby finds that Toni Washington's Motion for Reconsideration of Confirmation Order should be and hereby is GRANTED.

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**THEREFORE, IT IS HEREBY ORDERED:**

1. That the Order Confirming Plan, filed October 2, 2000, is hereby revoked;
2. That Debtor's chapter 13 Plan shall be amended to reflect that a.) the Pension benefits awarded to the movant by the Domestic Relations Court are her sole and separate property and not property of the estate; b.) the Pension benefits are held in constructive trust for the benefit of the Movant and as such are not dischargeable or modifiable through the Plan; and c.) that payments shall be made to the movant in the manner ordered by the Summit County Domestic Relations Court; and,
3. That the debtor's chapter 13 Plan shall be further amended to reflect that the award of the Domestic Relations Court for movant's reasonable attorney's fees is non-dischargeable pursuant to § 523(a)(5) of the Bankruptcy Code and that the payment of those fees shall be made to the movant in the manner ordered by the Summit County Domestic Relations Court.

**IT IS FURTHER ORDERED** that debtor shall amend the plan consistent with the Court's findings herein **within two weeks of the date of entry of this Order**. If the chapter 13 plan is so amended, then a hearing on the confirmation of the amended plan will be scheduled in due course. If the chapter 13 plan is not so amended then the Court, on **March 28, 2001** at **2:00 p.m.**, in Room 250, U.S. Courthouse and Federal Building, 2 South Main Street, Akron, Ohio, will hold a show cause hearing as to why this case should not be dismissed for failure to abide by this Order.

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MARILYN SHEA STONUM  
United States Bankruptcy Judge

**DATED: 3/12/01**