

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: November 04 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 05-32690
)	
Dennis J. Metzler,)	Chapter 7
)	
Debtor.)	Adv. Pro. No. 05-3163
)	
Ella M. Metzler,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
v.)	
)	
Dennis J. Metzler,)	
)	
Defendant.)	

MEMORANDUM OF DECISION

This case came before the court for trial upon Plaintiff’s Complaint to Determine Dischargeability of Debt or Property Rights of Ella M. Metzler. In the underlying Chapter 7 case, Defendant/Debtor seeks to discharge an unsecured debt in the amount of \$20,400 that is purportedly owed to Plaintiff, his ex-wife, and that is being paid on a monthly basis by the plan administrator of his pension plan pursuant to a Qualified Domestic Relations Order. Plaintiff seeks a declaration that the \$20,400 represents a property interest in Defendant’s pension plan that constitutes her individual property and not a debt owed by

Defendant or, alternatively, that any debt owed to her is nondischargeable in Defendant's Chapter 7 case under 11 U.S.C. § 523(a)(2), (5), (6), (7), (13), (15) and (17). The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district. Proceedings to determine the dischargeability of debts are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(2)(I).

This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether or not specifically referred to in this Memorandum of Decision, the Court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons that follow, the court finds that Plaintiff is entitled to judgment in her favor since any claim by Plaintiff for the \$20,400 is a claim against the pension plan and not Defendant. Defendant has no personal liability to Plaintiff and, thus, no liability to her that is dischargeable in his Chapter 7 case.

FINDINGS OF FACT

On July 24, 2001, the Court of Common Pleas of Wood County, Ohio, entered a Consent Judgment Entry of Divorce, granting the parties a divorce. The judgment entry provides that Plaintiff receive, "as her marital share of the Defendant's interest in the 'Toledo Manufacturing Division of AP Parts Manufacturing Company - UAW Retirement Plan,' the agreed upon sum of \$300.00 per month commencing June 1, 2001." [Pl. Ex. 1, ¶ 8]. The state court ordered that a Qualified Domestic Relations Order ("QDRO") be prepared to implement the order and further ordered Defendant to pay directly to Plaintiff \$300.00 per month until the QDRO was implemented. [*Id.*]. The state court also ordered that Defendant pay Plaintiff \$275.00 per month as spousal support for a period of five years, beginning on June 1, 2001, as well as \$400 temporary spousal support owed by Defendant for May, 2001. [*Id.*, ¶ 9]. In addition, the state court ordered Defendant to pay property taxes for the first half of 2001 in the amount of \$823.28. On September 14, 2001, the state court entered a QDRO implementing its July 24 judgment. [Pl. Ex. 2]. Thereafter, Plaintiff began receiving payments of \$300.00 from the administrator of the pension plan. However, at no time did she receive any payments directly from Defendant as ordered by the state court.

On April 5, 2002, after a hearing on Defendant's Motion to Modify Spousal Support and Plaintiff's Motion to Show Cause, the decision of the Magistrate of the Wood County Common Pleas Court, Domestic Relations Division, was entered. [Pl. Ex. 3] The Magistrate found that Defendant was voluntarily

unemployed and that the spousal support previously ordered was reasonable and appropriate. She further found that Defendant had failed to pay to Plaintiff the spousal support and temporary support required under the divorce decree, as well as the real estate taxes and the \$300 monthly payments due to Plaintiff while awaiting implementation of the QDRO. [*Id.* at 1-2]. The Magistrate found Defendant in contempt of court for violations of the divorce decree and imposed a ten-day jail sentence. The Magistrate's Decision provided, however, that Defendant could purge himself of contempt by making certain cash payments or by making arrangements for an additional QDRO for the entire amount owed to Plaintiff. The Magistrate also awarded Plaintiff attorney's fees in the amount of \$750. [*Id.* at 3].

There is no evidence that Defendant exercised his option to make a cash payment to purge himself of contempt. Instead, after Defendant's objections to the Magistrate's Decision were denied, the parties entered into an agreement that was presented in open court resolving all matters between the parties. [Pl. Ex. 4]. On January 28, 2003, finding that both parties fully understood and voluntarily entered into the agreement without the exertion of any undue influence, the state court found that the agreement was well taken and should be granted. It therefore ordered, pursuant to the agreement, that Defendant pay \$20,400 to Plaintiff "in full satisfaction of all amounts due her . . . by a Supplemental Qualified Domestic Relations Order" in amounts starting at \$175 per month and increasing by \$25 per month every two years over an eight year period. [*Id.*, ¶ 3]. The state court ordered that the parties agreement "satisfies and discharges" Defendant's obligations to pay amounts set forth in the divorce decree for support, temporary support, and property taxes. [*Id.*, ¶ 4]. Finally, the state court ordered that the \$20,400 to be paid by Defendant be discharged upon the death of Plaintiff. [*Id.*, ¶ 5].

Also on January 28, 2003, the court entered a Supplemental QDRO, stating that "Defendant owes the Plaintiff an additional \$20,400 . . . which the parties agree should be paid by an additional Qualified Domestic Relations Order against the Defendant's UAW Retirement Plan. . . ." [Pl. Ex. 5, p.1-2]. The Supplemental QDRO names Plaintiff as the alternate payee and provides that "the benefit to be paid from the Plan to the alternate payee pursuant to this assignment of the participant's benefits . . . shall be Twenty Thousand Four Hundred Dollars (\$20,400.00) of [Defendant's] vested benefits payable" in amounts starting at \$175 per month and increasing by \$25 per month every two years over an eight year period. [*Id.* at 2-3]. The Supplemental QDRO further provides that Plaintiff "shall include in gross income for the tax years of receipt all retirement benefits that the alternate payee receives due to [Defendant's] assignment of benefits herein" and that "[i]f the alternate payee dies prior to the participant, the benefits assigned to the alternate

payee pursuant to this Supplemental Order shall revert to the participant.” [*Id.* at 3-4]. Finally, the Supplemental QDRO states that “[t]he intent of this Supplemental Order is to provide the alternate payee with a settlement of support related issues as agreed upon by the parties and ordered by the Court.” [*Id.* at 5].

Plaintiff testified that she currently receives \$500 per month from the administrator of Defendant’s pension plan – \$300 as payment under the initial QDRO and \$200 as payment under the Supplemental QDRO. In addition, she receives monthly rental income of \$388 and monthly Social Security Disability payments of \$487, having become disabled before the parties’ divorce as the result of back surgery. She further testified that her monthly expenses total \$1,650.

Defendant also testified regarding his current financial situation. His monthly income includes Supplemental Security Income of \$1,413 plus pension plan after-tax payments of \$209. [Def. Ex. A]. He shares a home with a woman who is attending school and is not working at this time. He testified that his monthly expenses total \$2,023, which represent the total household expenses. [Def. Ex. B].

On March 25, 2005, Defendant filed a petition for relief under Chapter 7 of the Bankruptcy Code. He listed an unsecured debt in the amount of \$20,400 owed to Plaintiff as a result of a property settlement obligation incurred by him in the parties’ divorce proceedings. Plaintiff timely filed the instant complaint on June 6, 2005.

LAW AND ANALYSIS

Plaintiff seeks a declaration that the \$20,400 being paid under the Supplemental QDRO constitutes her individual property and is not a debt owed by Defendant. Alternatively, she seeks a declaration that any debt owed to her is nondischargeable in Defendant’s Chapter 7 case under 11 U.S.C. § 523(a)(2), (5), (6), (7), (13), (15) and (17). While Defendant concedes that the \$300 per month ordered to be paid to Plaintiff under the initial QDRO constitutes Plaintiff’s individual property interest in his pension plan, he argues that the amounts ordered to be paid under the Supplemental QDRO constitute installment payments of a property settlement debt owed to Plaintiff under the parties’ settlement agreement and that the debt is dischargeable under § 523(a)(15)(A) and (B). Thus, the primary issue before the court, and the issue the court finds dispositive, is whether the Supplemental QDRO created in Plaintiff a separate property interest in Defendant’s pension plan or merely a claim against Defendant.

Although the Employee Retirement Income Security Act (“ERISA”) generally prohibits the assignment or alienation of pension benefits, 26 U.S.C. § 401(a)(13); 29 U.S.C. § 1056(d)(1), Congress

expressly excepted QDROs from this anti-alienation rule, *Id.* at § 1056(d)(3)(A). “The QDRO exception was enacted to protect the financial security of divorcees.” *Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815, 817 (9th Cir. 1997). A QDRO is defined as a domestic relations order that “creates or recognizes the existence of an alternate payee's right to, *or assigns to* an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan” and with respect to which certain requirements are met. 29 U.S.C. § 1056(d)(3)(B)(i). Thus, ERISA clearly contemplates awards of pensions to non-employee spouses as separate property under a QDRO. There is no dispute that the Supplemental QDRO at issue in this case is a QDRO as contemplated under ERISA.

Property interests are generally defined and created by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979). Under Ohio law, an assignment is “a transfer to another of all or part of one’s property in exchange for valuable consideration.” *Roselawn Chiropractic Center, Inc. v. Allstate Ins. Co.*, 160 Ohio App. 3d 297, 299 (2005). “[A]ny word or transaction which shows an intention on the one side to assign and on the other to receive, if there is a valuable consideration, will operate [to create an assignment]” *Id.* (quoting *Grogan Chrysler-Plymouth, Inc. V. Gottfried*, 59 Ohio App. 2d 91, 96 (1978)).

In this case, the Supplemental QDRO clearly indicates that Defendant is assigning a portion of his pension benefits to Plaintiff. For example, the order provides that (1) “[t]he benefit to be paid from the Plan to the alternate payee *pursuant to this assignment of the participant’s benefits . . .* shall be Twenty Thousand four Hundred Dollars (\$20,400.00) of the participant’s vested benefits. . . .” [Pl. Ex. 5, ¶ E]; (2) “[i]f the alternate payee dies prior to the participant, *the benefits assigned to the alternate payee pursuant to this Supplemental Order* shall revert to the participant, [*Id.* at ¶ F]; (3) “[t]he alternate payee, alone, shall be treated as the distributee under Sections 72 and 402 of the Internal Revenue Code of 1986, as amended, of any payment or distribution that is made to the alternate payee *under the participant’s assignment of benefits herein,*” [*Id.* at ¶ I]. Defendant’s agreement to assign a portion of his pension benefits to Plaintiff was in exchange for valuable consideration, that is, the satisfaction and discharge of his support obligations under the divorce decree. [Pl. Ex. 4, ¶ 4 (indicating that the parties agreement “satisfies and discharges the Defendant’s obligation to pay amounts set forth in Paragraphs 6, 9, and 10 of the Judgment Entry of Divorce”)]. And the Supplemental QDRO served to execute the parties’ settlement agreement. [Pl. Ex. 5, ¶ L (indicating that the “intent of this Supplemental Order is to provide the alternate payee with a settlement of support related issues as agreed upon by the parties and ordered by the Court”)]. The court concludes that the Supplemental QDRO constitutes a valid assignment transferring Defendant’s interest in the pension

benefits at issue to Plaintiff and, thus, that Plaintiff's interest in Defendant's pension plan is her separate property. See *Wisniewski v. Piasecki (In re Piasecki)*, 171 B.R. 49, 52 (Bankr. N.D. Ohio 1994) (holding that the transfer of pension plan interest by QDRO gave non-employee spouse independent ownership of her share of the pension).

As explained in *Piasecki*, "Plaintiff's independent ownership of rights under the pension plan have not created a Debtor and Creditor relationship between Defendant and Plaintiff." *Id.* A "debt" is defined under the Bankruptcy Code as a "liability on a claim," 11 U.S.C. § 101(12), and a "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured," 11 U.S.C. § 101(5)(A). In this case, any obligation of Defendant to pay Plaintiff was satisfied and discharged by transferring ownership of certain rights in Defendant's pension plan to Plaintiff. In the event that the pension plan failed to pay Plaintiff as provided in the Supplemental QDRO, Plaintiff's recourse would be to sue the plan, not Defendant. See *Gendreau*, 122 F.3d at 818; *Piasecki*, 171 B.R. at 52 (finding that any payment obligation imposed by a QDRO is between the non-employee spouse and the plan administrator). As Plaintiff has no right to payment that is enforceable against Defendant, no debt, either dischargeable or nondischargeable, is owed by Defendant to Plaintiff.

There being no debt owed to Plaintiff that is subject to discharge in Defendant's Chapter 7 case, the court need not address Plaintiff's alternative argument that the debt is excepted from discharge under any particular provision of § 523.

Finally, Plaintiff seeks an award of her attorney fees in this litigation. She argues that attorney fees should be awarded as a punishment for Defendant incorrectly scheduling a debt owed to Plaintiff. Generally, under the "American Rule," which applies to litigation in the bankruptcy courts, a prevailing litigant may not collect attorney's fee from his opponent unless authorized by federal statute or an enforceable contract between the parties. *In re Sheridan*, 105 F.3d 1164, 1166 (7th Cir. 1997). There is no basis in the Bankruptcy Code for an award of attorney's fees to a creditor successfully prosecuting a § 523 claim, *cf.* 11 U.S.C. § 523(d) (debtors shall be awarded attorney's fees in certain circumstances not present here), and Plaintiff cites no other authority for such an award. While the court is aware that, under Ohio law, plaintiffs who successfully prove fraud are entitled to an award of attorney's fees under certain circumstances, Plaintiff has neither pled nor proved fraud in this case.

Moreover, Rule 7008(b) of the Federal Rules of Bankruptcy Procedure provides: "A request for an

award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." Thus, attorney's fees must be sought in a bankruptcy adversary proceeding by a separate count of the complaint or other pleading and not merely in the prayer for relief. *E.g., Leonard v. Onyx Acceptance Corp.*, Nos. 02-8125, Civ. 03-1117 ADM, 2003 WL 1873283, at *2 (D. Minn. Apr. 11, 2003); *Citibank USA, N.A. v. Spring (In re Spring)*, Nos. 03-35552 (LMW), 04-3007 (LMW), 2005 WL 588776, at *6 (Bankr. D. Conn. Mr. 7, 2005); *Garcia v. Odom (In re Odom)*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990); *see V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002). Plaintiff's complaint does not include a count setting forth a claim for attorney's fees; rather, that request is included only in the prayer for relief.

CONCLUSION

In light of the foregoing, the court finds that Plaintiff is entitled to judgment in her favor declaring her interest in Defendant's pension plan to be her individual property rather than a debt owed by Defendant that is subject to discharge in his underlying Chapter 7 case. The court further finds that Plaintiff is not entitled to an award of attorney fees. A separate judgment in accordance with this Memorandum of Decision will be entered.