

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

WILLIAM H. GRIFFITHS

Debtor

CASE NO. 98-67605

Chapter 7

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SANDRA M. MENARD

Plaintiff

vs.

ADV. PRO. NO. 99-80075A

WILLIAM H. GRIFFITHS

Defendant

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APPEARANCES:

WILLIAM M. BORRILL, ESQ.  
Attorney for Plaintiff  
214 Oriskany Boulevard  
Whitesboro, New York 13492

CHARLES W. ENGELBRECHT, ESQ.  
Attorney for Defendant  
211 North George Street  
Rome, New York 13440

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is an adversary proceeding commenced by Sandra M. Menard ("Plaintiff") on March 5, 1999. Plaintiff's complaint seeks a determination that a certain debt owed to her by her former spouse, William N. Griffiths ("Debtor") is nondischargeable pursuant to §§ 523(a)(2), (4), (5) and (6) of the United States Bankruptcy Code, 11 U.S.C. §§

101-1330 (“Code”). Plaintiff also seeks a denial of the Debtor’s discharge under Code § 727(a)(2)(A). Issue was joined by the filing of an Answer by the Debtor on March 15, 1999.

A trial of the adversary proceeding was conducted on June 21, 1999, in Utica, New York. At the close of the Plaintiff’s case, the Debtor made a motion seeking the dismissal of the Complaint on the basis that Plaintiff had failed to meet her burden on all causes of action identified in the Complaint. In lieu of closing arguments, both parties were afforded an opportunity to file memoranda of law. The matter was submitted for decision on July 16, 1999.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), (b)(2)(I) and (J)

### **FACTS**

The parties were married on April 23, 1960, and have two children, Cheryl L. Griffiths, born October 4, 1965, and William J. Griffiths, born June 9, 1967. The parties were separated pursuant to a written Separation Agreement, dated March 5, 1984. *See* Plaintiff’s Exhibit 1. The Separation Agreement was incorporated but not merged with a Judgment of Divorce issued April 24, 1984. *See* Plaintiff’s Exhibit 2.

Paragraph 6 of the Separation Agreement, titled “Child Support,” provides that “no

payment shall be made by the Husband to the Wife, or by the Wife to the Husband as for support and maintenance of said children of the marriage.” According to the terms of the Separation Agreement, Cheryl L. Griffiths was 18 years of age and residing with Plaintiff. William J. Griffiths, who was 16 years old at the time, was to reside with the Debtor.

In Paragraph 7 of the Separation Agreement, titled “Support for Wife/Husband,” the parties mutually agreed that “no maintenance shall be paid to the Wife or to the Husband, and both the Wife and Husband hereby waive any and all current rights to receive any support or maintenance.” *See id.* At the time, Plaintiff was 34 years old. Although she had worked part-time during the course of her marriage, upon the couple’s divorce, she obtained full-time employment as a sales manager with Hess Department Store.

In addition to the division of personal property and real property, *see id.* at ¶¶ 8 and 9, the Separation Agreement provided for the disposition of pension rights which had accrued during the period of their marriage. *Id.* at ¶ 11. The Separation Agreement states that Plaintiff

shall be paid and shall own a portion thereof calculated on a monthly basis as follows: 30% of the Husband’s monthly pension benefit multiplied by a fraction wherein the numerator is the number of years of the marriage during which the Husband earned credits toward said pension and wherein the denominator is the number of years of service credited toward the pension plan by the Husband.

*Id.*

Plaintiff testified that approximately two years ago she learned from her daughter that the Debtor had accepted early retirement. Plaintiff acknowledged that she did not contact the Debtor to verify this information. Instead, she contacted an attorney to seek to enforce the terms of the Judgment of Divorce/Separation Agreement with respect to the Debtor’s failure to notify the

Plaintiff of his receipt of monthly pension payments and his refusal to pay the amounts allegedly owing to her under said terms. A state court judge concluded that Plaintiff was entitled to enforce what he termed “vested contract rights.” *See* Exhibit “B” attached to Plaintiff’s Complaint.<sup>1</sup>

On December 1, 1998, Debtor filed a voluntary petition pursuant to chapter 7 of the Code.

### **ARGUMENTS**

The Debtor contends that the pension monies awarded to the Plaintiff under the terms of the Separation Agreement constitute a property settlement and that the debt is dischargeable pursuant to Code § 523(a)(5). Plaintiff takes the position that her right to a portion of the pension paid to the Debtor is her sole and separate property by virtue of the Judgment of Divorce, which incorporated the terms of the Separation Agreement. In the alternative, she asks that if the Court determines that the monies owing her represent a debt that the Court also find it to be nondischargeable.

### **DISCUSSION**

The first issue requiring consideration by the Court is whether the award of a portion of the Debtor’s pension under the terms of the Judgment of Divorce represents a property interest of the Plaintiff or a debt owing to her. This court was confronted with a similar issue in *In re*

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<sup>1</sup> At the trial, the Court agreed that it would take judicial notice of the Decision and Order of the Hon. John T. Buckley, Justice, New York State Supreme Court, Oneida County, issued on September 23, 1998 (“State Court Decision”).

*Potter*, 159 B.R. 672 (Bankr. N.D.N.Y. 1993).

In *Potter* a state court had issued a Qualified Domestic Relations Order (“QDRO”) directing the U.S. Army Retired Pay Operations to pay a portion of the debtor’s retirement benefits directly to his former spouse. *See id.* at 673-74. In that decision, this Court noted that under New York law,<sup>2</sup> “upon entry of a judgment of divorce, ownership vests in the spouse to whom such property has been equitably distributed.” *Id.* at 675 (citations omitted); *see also Clark v. Clark*, 219 A.D.2d 787, 788, 631 N.Y.S.2d 467 (N.Y. App.Div. 1995) (citing *Potter*); *McDermott v. McDermott*, 119 A.D.2d 379, 383, 507 N.Y.S.2d 390 (N.Y. App.Div. 1986) (indicating that inchoate rights [in a pension] become actual ownership interests by virtue of an equitable distribution judgment such that the parties become co-owners of the pension benefits). This is also the majority view of various other bankruptcy courts, namely that “[t]he divorce decree does not create a debtor/creditor relationship between the debtor spouse and the nondebtor spouse. Instead, each becomes an owner of a portion of the pension.” *In re Brown*, 168 B.R. 331, 334-45 (Bankr. N.D.Ill. 1994) (citations omitted); *see also In re Taylor*, 216 B.R. 366, 370 (Bankr. S.D.N.Y. 1998) (noting that “[p]ension interests assigned, but not yet mature, may vest in the non-debtor spouse and not become property of the bankruptcy estate.” (citations omitted)), *rev’d and remanded on other grounds*, 233 B.R. 639 (S.D.N.Y. 1999); *In re McQuade*, 232 B.R. 810, 813 (Bankr. M.D.Fla. 1999) (relying on New York law); *In re Gomez*, 206 B.R. 663, 666 (Bankr. E.D.N.Y. 1997) .

This Court concludes that pursuant to the terms of the Judgment of Divorce, Plaintiff’s

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<sup>2</sup> Property interests generally are to be determined under state law. *See Butner v. U.S.*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979).

right to a percentage of the Debtor's monthly pension benefits awarded prepetition was one of ownership. The fact that there was no entry of a QDRO does not change this conclusion. *See Brown*, 168 B.R. at 335 (finding that the QDRO "merely served to enforce [the plaintiff's] pre-existing property rights in the pension"); *In re Rossi, Jr.*, 1999 WL 253124 at \*8 (Bankr. N.D.Ill. 1999).

Having concluded that a portion of the pension monies received by the Debtor were actually the property of the Plaintiff, the Court must then address whether the debt which arose from the Debtor's failure to pay her those monies prior to commencement of the case,<sup>3</sup> as acknowledged in his Answer (*see* ¶ 9 of Answer), is nondischargeable.

"[T]he conversion of another's property without his [or her] knowledge or consent, done intentionally and without justification and excuse, to the other's injury, is a willful and malicious injury within the meaning of [Code § 523(a)(6)]." 4 COLLIER ON BANKRUPTCY ¶ 523.12[2] (15th ed. 1999). In this case, the Debtor failed to apprise the Plaintiff of his early retirement and failed to forward her share of the pension monies as required in the Judgment of Divorce causing her injury. Case law supports the conclusion that such conduct warrants a finding that the debt is nondischargeable pursuant to Code § 523(a)(6). *See Wood*, 96 B.R. 993, 997 (9th Cir. BAP 1988) (finding that debtor's failure to notify anyone that he had retired "clearly indicate[s] that the debtor intended to keep the money for himself, knowing that such would injure and harm his former wife."); *Thomas*, 47 B.R. at 34 (indicating that "[d]ebtor's actions here, in failing to forward the defendant's share of the retirement pay, even when under a direct court order to do

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<sup>3</sup> The Debtor's responsibility to remit to the Plaintiff her share of the pension monies received postpetition survives the entry of any discharge order obtained by the Debtor as well. *See In re Thomas*, 47 B.R. 27, 33 (Bankr. S.D.Cal. 1984).

so, appears to be a classical case of a deliberate and intentional conversion.” (citations omitted)).

Having concluded that the debt is nondischargeable pursuant to Code § 523(a)(6), the Court need not address the Plaintiff’s causes of action based on Code § 523(a)(2), (4) and (5). The Court concludes that Plaintiff has failed to meet her burden with respect to the Code § 727(a)(2)(A) cause of action based on the Court’s finding that the property which is the subject of the Complaint, namely the monies paid to the Debtor from the pension fund, were not property of the Debtor or the estate but were property of the Plaintiff.

Based on the foregoing, it is hereby

ORDERED that the prepetition debt to the Plaintiff that arose as a result of the Debtor’s failure to comply with the terms of the Judgment of Divorce is nondischargeable pursuant to Code § 523(a)(6);<sup>4</sup> and it is further

ORDERED that the Debtor’s motion made at the close of the Plaintiff’s case is granted to the extent that Plaintiff seeks a denial of the Debtor’s discharge pursuant to Code § 727(a)(2)(A).

Dated at Utica, New York

this 14th day of December 1999

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<sup>4</sup> Plaintiff’s complaint fails to allege the amount of any debt. Justice Buckley’s Decision and Order indicates the Debtor accepted early retirement in 1994. Justice Buckley also indicated that he would not reduce the value of the monthly payments as set forth in the Separation Agreement; however, there is no finding made with respect to the specific date on which such payments were to have commenced and the monthly amount. Based on the formula set out in ¶ 11 of the Separation Agreement, it is hoped that the parties will be able to reach agreement on the amount without the necessity of having to return to the state court.

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge