

In the United States Bankruptcy Court
for the Northern District of Iowa

- Filed Stamped 1/11/94;
- Signed by Judge Kilburg 1/10/94

MICHAEL DAVID PLUEMER	Bankruptcy No. 93-20214LD
<i>Debtor.</i>	Chapter 7

JEFFREY A. TRANNEL and KAREN KAY PLUEMER n/k/a KAREN KAY SCANNEL Plaintiff(s)	Adversary No. 93-2071LD
vs.	
MICHAEL DAVID PLUEMER Defendant(s)	

ORDER

On November 23, 1993, the above-captioned matter came on for trial pursuant to assignment. Plaintiffs appeared by Attorney Jeffrey Trannel. Defendant/Debtor appeared in person with Attorney Douglas Henry. Evidence was presented after which the Court took the matter under advisement.

The above-captioned adversary proceeding was filed April 30, 1993. This is an action brought under 523(a)(5). Plaintiffs ask the Court to determine that certain attorney's fees awarded to Attorney Trannel in the representation of Plaintiff Karen Kay Pluemer in a State Court dissolution proceeding constitute support which may not be discharged. This Court has jurisdiction pursuant to 28 U.S.C. 1334. This matter is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(I).

FINDINGS OF FACT

Plaintiff Karen Kay Scannel, f/k/a Karen Kay Pluemer, and Debtor Michael Pluemer were married in 1980. This was a second marriage for both. Michael had two children from the previous marriage: Reta, born in 1974 and Sean, born in 1976. Karen and Michael Pluemer had two children of this marriage: Christopher, born in 1981 and Elizabeth, born in 1986. The parties were granted a Decree of Dissolution in Dubuque County District Court in November of 1990. As a part of the Dissolution Decree, the parties were awarded joint legal custody of the parties' two minor children. Karen was awarded primary physical care with liberal visitation granted to Michael.

In setting child support, Judge George Stigler computed the amount of support payable by Michael to Karen utilizing the Iowa Supreme Court Child Support Guidelines. He included in the formula the two children of the parties as well as the two children from Michael's former marriage. He computed the percentage of Michael's income to be allocated to child support utilizing four children. Using this methodology, Judge Stigler ordered that Michael pay one-half of the formula amount or \$83.00 per week for the support of the two children born of the present marital relationship. The other half presumably would be applied to the support of the two children from his prior marriage.

At the time of the entry of the decree of dissolution, Karen was residing in Dubuque and was employed by Dubuque Community Schools. Debtor Michael was employed by John Deere in Dubuque. After the entry of the divorce decree, the parties continued to live and reside in the Dubuque community for a period of time. Eventually, Karen became engaged and married Mr. Scannel. At the time of contemplation of marriage, it was considered that Karen and her future spouse might move to Grundy Center, Iowa. It soon became apparent the visitation schedule would have to be changed because of the geographical distance between Grundy Center, Iowa and Bellevue, Iowa where Debtor was then living.

At about the same time, Debtor's oldest child Reta turned 18 years of age. She had moved out of her father's house and lived with Karen for a short time. On February 25, 1992, Karen filed an Application for Modification. The modification sought an increase in child support payable by Debtor to Plaintiff for the parties' two minor children. The Application alleged that Reta was now 18 years of age and living with Karen. Karen asked that the support obligation be recomputed.

This language was subject to two interpretations. Plaintiff says that she did not file the Application to Modify to seek support for Reta, who is not her legal responsibility and who was 18 years of age. She testified that she sought the increase in child support because the original support obligation ordered by Judge Stigler was computed on the basis of four children who were the legal responsibility of Debtor. Then the obligation was divided in half and Debtor was ordered to pay one-half of that amount or \$83.00 per week in support to Plaintiff. As Reta is no longer the legal responsibility of Debtor, Karen asked that the child support be recomputed to reflect three or two children depending upon the analysis applied.

Debtor interpreted the Application for Modification as a request by Plaintiff for Debtor to pay increased child support and also pay child support for Reta. Debtor filed his Answer and filed a counterclaim on March 13, 1992. The counterclaim sought additional visitation as well as the right to claim a tax exemption for one of the parties' two children on his State and Federal income tax returns. Plaintiff filed an Application to Amend Petition for Modification in July. This was approved in October.

The amended Petition for Modification contained two divisions. Division I sought modification of the child support for two reasons. The first was the same as stated in the original Application for Modification. The second was that the Iowa Legislature had amended Iowa Code 598.21(9). The amendment stated that a deviation of 10% or more from the Iowa Supreme Court Guidelines constitutes a change of circumstances warranting a change in the child support obligation and a recomputation of the support based upon the then existing Iowa Supreme Court Guidelines. Division II of the Amended Petition for Modification asked for a change in the visitation schedule because by that time Plaintiff had determined that she would be moving to Grundy Center, Iowa.

In response to all of the foregoing, Debtor filed an Amended Counterclaim in August alleging a substantial change of circumstances based upon Plaintiff's projected move to Grundy Center, Iowa, warranting a change in primary care. Debtor asked the Court to award him primary physical care of the parties' two minor children.

The modification action followed a difficult discovery process, much of which is memorialized in the Exhibits. The matter ultimately went to trial on November 17 and 18, 1992. A substantial amount of the trial time was expended on the custody and visitation issues. The ultimate child support award was based largely on the financial statements which required little trial time. A Decree of Modification was entered by Judge Margaret Lingreen in Dubuque County District Court on December 14, 1992.

Pursuant to Judge Lingreen's Decree, Plaintiff and Debtor retained joint legal custody of the parties' two minor children. Plaintiff retained primary physical care. The visitation schedule was modified to reflect the reality of two parents who live at some geographical distance. Child support awarded to Plaintiff increased from \$83.00 per week to \$706 per month. Debtor was allowed to claim the parties' son Christopher as a dependent for income tax purposes. Debtor was assessed Court costs and was ordered to pay the sum of \$2,000 towards Plaintiff's attorney's fees.

Plaintiff incurred substantial attorney's fees in her original dissolution. She still owes a portion of these fees. In addition, Plaintiff incurred approximately \$5,500 in attorney's fees as a result of the modification proceeding. Judge Lingreen ordered that Debtor be responsible for \$2,000 of this amount with Plaintiff being responsible for the remainder. She has been paying this at approximately \$50 per month. Plaintiff asserts that she was awarded attorney's fees in the amount of

\$2,000 as she was the prevailing party. Additionally, the issue was raised whether Judge Lingreen ordered the payment of a portion of these fees by Debtor as Debtor is covered, at least partially, by an attorney insurance plan through his employer. Plaintiff asks the Court to determine that the entire \$2,000 award is not dischargeable. Debtor asserts that this award is not in the nature of alimony or support and is, therefore, dischargeable.

Debtor filed a Chapter 7 Bankruptcy proceeding, No. 93-20214LD on the 11th day of February, 1993. The adversary proceeding before the Court was filed on April 30, 1993 seeking a determination of dischargeability on the attorney's fees issue.

CONCLUSIONS OF LAW

1. The Eighth Circuit considered the dischargeability of obligations arising from dissolutions of marriage in In re Williams, 703 F.2d 1055 (8th Cir. 1983).

The Bankruptcy Reform Act of 1978 prohibits the discharge of a debtor's obligation to make alimony, maintenance, or support payments to his or her former spouse. Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law. Debts payable to third persons can be viewed as maintenance or support obligations; the crucial issue is the function the award was intended to serve. Though we of course regard the decisions of the state courts with deference, bankruptcy courts are not bound by state laws that define an item as maintenance or property settlement, nor are they bound to accept a divorce decree's characterization of an award as maintenance or a property settlement. . . . "Provisions to pay expenditures for the necessities and ordinary staples of everyday life" may reflect a support function. . . . Whether in any given case such obligations are in fact for 'support' and therefore not dischargeable in bankruptcy, is a question of fact to be decided by the Bankruptcy Court as trier of fact in light of all the facts and circumstances relevant to the intention of the parties.

Id. at 1057-58 (citations omitted); 11 U.S.C. 523(a)(5).

2. The burden of proving an exception to discharge is on the party seeking such relief. The party objecting to dischargeability has the burden to prove by a preponderance of evidence that the obligation is in the nature of alimony, maintenance or support. In re Pallesen, No. X92-00202S, Adv. No. X92-0075S, slip op. at 14 (Bankr. N.D. Iowa Jan. 14, 1993).

3. The ultimate issue for the Court's determination is establishing the function or purpose that an award was intended to serve at the time of the entry of the decree. A determination of intent is often elusive. Often, neither the parties nor the Court entering the dissolution decree made a specific determination when the decree was entered nor did they contemplate the effect which a bankruptcy might have. The Court must frequently, after the fact, establish the constructive intent of the parties on a case by case basis. In re Gianakas, 917 F.2d 759, 763 (3d Cir. 1990).

4. The critical issue for determination is the function that the award was intended to serve. This is a question of fact to be decided by the Court. In re Williams, 703 F.2d 1055 (8th Cir. 1983); and Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992).

5. Though not absolute, as a general rule, attorney's fees awarded in the course of dissolution proceedings take on the character of the litigation in which they were incurred. If the attorney's fees award does take the character of the underlying issues, the Court must then evaluate the underlying issues to determine whether their character is in the nature of alimony, maintenance or support which is nondischargeable, or whether it takes on some other character which may be dischargeable under the Bankruptcy Code. In re Poe, 118 B.R. 809, 811 (Bankr. N.D. Okla. 1990).

RULING

To properly analyze this issue, the Court must first determine the underlying nature of the claims made in the modification proceedings. Plaintiff filed the Application to Modify seeking an increase of child support. There is no question that awards of child support are excepted from discharge under 523(a)(5).

The matter of visitation was raised in the modification proceeding. It was first raised by Debtor in his counterclaim of March, 1992 in which he sought a change of visitation. The matter was again raised by Plaintiff in her amendment of July, 1992. Custody was raised by Debtor in his amendment of August, 1992. Visitation and custody under appropriate factual circumstances can constitute matters incident to maintenance or support. Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992).

The final issue raised in the modification proceedings related to the status of tax exemptions for the children. This issue was raised by Debtor in his March, 1992 counterclaim. Whether issues relating to tax exemption status constitute maintenance or support under 523(a)(5) does not appear to have been addressed by the Bankruptcy Court in the Northern District of Iowa. Iowa Appellate case law, however, has unequivocally determined that issues of tax exemption status are considered to be support. The Iowa Supreme Court has stated that:

The allocation of the right to claim income tax exemptions has a direct effect on the financial resources available for the support of children and is often considered in connection with the award of support payments when the decree is entered.

In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977).

While State law determinations on these issues are not controlling, the analysis utilized by the Iowa Supreme Court in making its determination is identical to that used in similar bankruptcy contexts such as Adams v. Zentz, *id.* It is the conclusion of this Court that tax exemption status constitutes a matter sufficiently incident to maintenance or support to bring it within the clear meaning of 523(a)(5).

To the extent that success or failure is relevant, Plaintiff prevailed on the issue of support. She was successful in raising support from approximately \$357 per month to \$706 per month.

It is impossible to conclude there was a prevailing party on the issue of visitation. Both parties raised the issue and asked the Court to intervene to modify the visitation schedule. However, it was apparent, based upon the anticipated move of the Plaintiff to Grundy Center, that the visitation schedule had to be modified in any event to reflect the reality of the situation. In today's mobile society, it is not unusual for parties to move after the entry of a dissolution decree. This, of necessity, requires a modification of the visitation schedule to accommodate the geographical differences of the parties. It appears to this Court that this is an issue where neither party was victorious. It is merely a practical adjustment allowing both parties to continue to have maximum contact with the children. Maximum contact with parents is in the best interests of the children.

Custodial issues are considered an extension of support for the children. Debtor raised custody as an issue in his amendment of August, 1992. A substantial portion of the trial time was allocated to the presentation of evidence on custody. Debtor did not prevail on his request for modification of custody (transfer of primary physical care).

The final issue related to the tax exemption status of the children. Debtor asked for a modification of tax exempt status in his counterclaim of March, 1992. On this issue, Debtor did prevail in the final decree entered by Judge Lingreen.

In summary, the end result is mixed. Plaintiff was successful in the issues of support and custody. Debtor was successful on the issue of tax exemption status. Neither party prevailed on visitation.

Analyzing the foregoing in terms of the dischargeability of an award of attorney's fees, all issues raised in the modification proceeding were issues impacting support and, therefore, the award of attorney's fees is potentially nondischargeable under 11 U.S.C. 523(a)(5). Both parties incurred substantial attorney's fees in the course of these modification proceedings. Judge Lingreen awarded Plaintiff \$2,000 out of total attorney's fees of approximately \$5,500.

While it is apparent that Judge Lingreen intentionally awarded a percentage of the total attorney's fees to Plaintiff, the record is silent as to the reason. Several possibilities are presented. Judge Lingreen is authorized under Iowa law to award attorney's fees to the prevailing party. Her evaluation of the issues possibly led her to conclude that this was an appropriate award to the extent that Plaintiff was the prevailing party. The financial resources of the respective parties

may have been a consideration. Though the parties had similar incomes while both parties were employed in the Dubuque area, Plaintiff was unemployed after her move to Grundy Center. A final consideration may be that Debtor had attorney fee insurance which paid a portion of his attorney's fees incurred in this matter. Judge Lingreen may have awarded attorney's fees to help equalize representation.

For whatever reason, this Court is not bound by the characterization placed upon the award by the State trial court, though deference is given to the State Court's ruling. The determination of this issue is a question of fact to be decided by this Court. The Court concludes that Judge Lingreen's analysis in awarding Plaintiff attorney's fees is identical to the analysis this Court would make in determining whether the fees are excepted from discharge as support. Therefore, the entire \$2,000 awarded by Judge Lingreen to Plaintiff for attorney's fees, as a part of judgment on the Application to Modify, is in the nature of maintenance or support as defined by 11 U.S.C. 523(a)(5) and is accordingly determined by this Court to be nondischargeable.

IT IS THEREFORE ORDERED that the unpaid obligation of Michael David Pluemer to Karen Kay Pluemer, n/k/a Karen Kay Scannel, in the sum of \$2,000.00 is determined to be a nondischargeable debt.

SO ORDERED this 11th day of January, 1994.

Paul J. Kilburg, Judge
U.S. Bankruptcy Court