

**(Cite as: 1998 WL 614663 (Bankr.D.Vt.))**

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**In re Gilbert O. PARADIS**

**Deborah C. PARADIS, Plaintiff**

**v.**

**Gilbert O. PARADIS Defendant**

**No. 97-10785, ADV. PRO. 98-1017.**

United States Bankruptcy Court. D. Vermont.

Aug. 27, 1998.

D.L. Leahy, Esq. Bethel, Vermont, for Plaintiff-Creditor Deborah C. Paradis (Plaintiff).

B. Zander, St. Johnsbury, Vermont, for Defendant-Debtor Gilbert O. Paradis (Debtor).

Memorandum of Decision Granting in Part and Denying in Part Plaintiff's Motion  
for Partial Summary Judgement

CONRAD, Bankruptcy J.

\* **1** Before us today is Plaintiff's Motion [FN1] For Partial Summary Judgment, opposed by Debtor, on Plaintiff's complaint to determine the dischargeability of obligations owed to her by Debtor that arise from the parties' divorce. We grant the motion in part and deny it in part, holding that the underlying divorce decree awarded Plaintiff an interest in Debtor's pension but created only a debtor-creditor relationship with respect to Debtor's savings. Whether Debtor's savings plan obligation is dischargeable requires us to determine facts based on the evidence to be presented at the trial set for next week.

FN1. We have jurisdiction to decide this matter under 28 U.S.C. § 1334(b) and the General Reference to this court under Part V of the Local District Court Rules for the District of Vermont. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (I). Our conclusions of law are made under F.R. of Civ. P, 52 as made applicable by Federal Rule of Bankruptcy Procedure 7052.

## FACTS

The underlying facts are not in dispute, and the matter is ripe for Summary Judgement. The parties were once married and are now divorced. Debtor filed for Chapter 7 bankruptcy protection on May 28, 1998. Plaintiff brought this action under 11 U.S.C. §§ 523(a)(5) and (15), [FN2] seeking a determination that her interests in pension and 401(k) savings plans provided to Debtor by his employer, Bell Atlantic, are nondischargeable. [FN3]

FN2. Section 523(a) provides, in pertinent part:

A discharge ... does not discharge an individual debtor from any debt--

....

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

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a 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....

FN3. Due to the eccentricities of the Bankruptcy Code, Plaintiff seeks a nondischargeability determination under §§ 523(a)(5) & (15). Outside of bankruptcy, the proceeding would be better described as a declaratory judgement action seeking a determination of who owns what interests in the savings and pension plans.

The divorce decree awarded alimony, based on specific findings by Vermont Family Court Judge Paul Hudson about the need for alimony and what amount was appropriate. Decree, 9-10. Later in the decree, and separately, at pages 10-11, Judge Hudson addressed the savings and pension plans as follows:

The [Plaintiff] is awarded one-half of the value of the [Debtor's] Bell System account (\$14,000) as found in Finding # 20. The [Debtor] may liquidate that amount, or pay the [Plaintiff] the equivalent in cash within one year from the date of this order.

The [Plaintiff] is awarded one-half of the (Debtor's) Retirement Accounts or Pension Accounts computed during the period of coverture and incorporated into a Qualified Domestic Relations Order (QDRO) prepared by [Plaintiff's] counsel. The [Debtor] shall bear the cost of any transfers assessed by his employer.

Debtor filed for bankruptcy before the QDRO was filed. The section of the decree giving Plaintiff interests in the savings and pension plans, although not expressly delineated as separate and apart from the award of alimony, clearly evinces an intent on the part of Judge Hudson to make a division of property, [FN4] not an award of alimony. Thus, for purposes of these motions, I find Debtor's obligations with respect to the savings and pension plans to arise from a property settlement, and not for alimony or maintenance. Accordingly, § 523(a) (5) is not implicated. Except as hereafter provided, the § 523(a)(15) issues will have to be decided at trial.

FN4. The Vermont Supreme Court remanded Judge Hudson's decision for a determination about the amount of the award to Plaintiff. It left intact all the other portions of the Opinion and Order. See Entry order, Gilbert Paradis v. Deborah Lynn Paradis, Supreme Court Docket, No. 97-03, filed December 31, 1997. Thus, contrary to Debtor's argument, we are free to decide the dischargeability issues. Any amounts due Debtor can be determined by the Family Court at a later date.

## DISCUSSION

Summary judgement is appropriate where the moving party can show there is no genuine issue of material fact. We have on many occasions described the standards for summary judgement. See, e.g., In re U.S. Lines, 169 B.R. 804, 811-12 (Bankr.S.D.N.Y.1994). In the interest of brevity, and to save trees, we do not recite them here. Instead, we simply hold that the summary judgement standards we have recited in the past are satisfied.

### A. Plaintiff's Position

\*2 Plaintiff argues that Judge Hudson equitably divided the marital estate between the parties under 15 V.S.A. § 751(a) ( West 1977) [FN5]. Under this section a Vermont Family Court Judge may divide any and all property owned by either spouse, without regard to which is the actual owner. Under Plaintiff's view, the distribution to her under the divorce decree created neither a debt nor a debtor/creditor relationship. Rather, the divorce decree created an equitable property interest in the portion awarded to the her. Plaintiff opines that an emerging consensus among bankruptcy courts acknowledges the separate and distinct

property interests of the non-debtor former spouse in the marital assets. Family courts grant property interests, she says, to limit the use of bankruptcy courts as a device to avoid marital obligations. In support of her position, Plaintiff cites my brother Marro's opinion in *Deborah A. Buswell v. Donald M. Buswell (In re Ronald M. Buswell)*, slip opinion, dated August 20, 1996. Marro, Senior Bankruptcy Judge. On similar facts, Judge Marro, citing *In re Chandler*, 805 F.2d 555 (5th Cir.1986), held that an award of pension benefits was the sole and separate property of the ex-spouse and that the debtor was a trustee for the ex-spouse in regard to that property. See also, *In re Greenwald*, --- B.R. ---- (Bankr.S.D.N.Y 1991).

FN5. 15 V.S.A. § 751(a) provides: "Upon motion of either party to a proceeding under this chapter, the court shall settle the rights of the parties to their property, by including in its judgment provisions which equitably divide and assign the property. All property owned by either or both of the parties, however and whenever acquired shall be subject to the jurisdiction of the court. Title to the property, whether in the names of the husband, the wife, both parties, or a nominee, shall be immaterial, except where equitable distribution can be made without disturbing separate property."

#### Debtor's Position

Debtor disputes Plaintiff's contention that she has a property interest in his assets. Instead, Debtor claims Plaintiff is merely a creditor of a debt that is subject to discharge in bankruptcy. With respect to the 401(k) savings plan, Debtor argues that the divorce decree created an obligation on the part of the Debtor to pay his former spouse the sum of \$14,000 within one year. As to the Pension Plan, Debtor argues that:

[N]otwithstanding the Family Court divorce decree's division of a pension as marital property, the divorce decree does not create a legal right to the Debtor's pension that may be enforced against the pension administrators, unless and until a QDRO issues. For a divorce decree to create a recognizable interest in an ex-spouses pension or retirement plan, it is necessary that it comply with the provisions of the Employee Retirement Income Security Act of 1974. [FN6]

FN6. We note that Debtor provides no support for this assertion.

Debtor's Response to Plaintiff's Motion For Partial Summary Judgment, page 6.

The issues are easily resolved. Debtor concedes in his papers that Judge Hudson awarded Plaintiff an interest in the pension plan. What Debtor disputes is the operative effect of the automatic stay that arises upon the filing of a bankruptcy case and in this particular instance the effect of an unexecuted QDRO, or at least an unsigned QDRO. Debtor asserts that because the QDRO was never issued prior to the bankruptcy filing this somehow transforms the property interest awarded to Plaintiff into an obligation subject to a dischargeability action.

The automatic stay does not willy-nilly create, destroy, or transfer any property rights. It seeks only to preserve the status quo. We hold today that when a final order of divorce has issued that contains a property division with provisions for a QDRO and the former spouse files bankruptcy before the QDRO can be executed and filed, all the non-debtor ex-spouse has to do is file a motion for relief from stay. Upon the filing of a contested motion for relief from stay we can make the initial summary determination whether the issue is one that involves property of the estate or dischargeability. If we are able to determine that the non-debtor ex-spouse has a QDRO property interest, we will spare the parties and this court from the expense of conducting an adversary proceeding.

**\*3** The final remaining issue pertains to the savings account. Judge Hudson did not articulate clearly whether he was awarding a property interest or creating a debtor/creditor relationship. It is our responsibility to give effect to the language presented, even if it is ambiguous. In this instance, he gave Debtor a choice: Debtor could either liquidate the account or pay the equivalent in cash within one year. The first choice seems to create an ownership interest; the second clearly creates a debtor/creditor relationship. The former being unclear and the latter being unambiguous, I find that the savings account interest is that of debtor/creditor. Accordingly, we hold that because the savings account is not a property interest, summary judgement will be denied.

### Conclusion

Plaintiff's motion for partial summary judgement will be granted with respect to the pension plan and denied as to the savings plan. Plaintiff is to settle an order on Debtor within five (5) days of the entry of this Memorandum of Decision.

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