

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
)  
GARY MICHAEL FREEMAN, ) CASE NO. BK93-81061  
)  
DEBTOR )  
A93-8185  
GARY MICHAEL FREEMAN, )  
)  
Plaintiff )  
vs. )  
)  
JULIE MAE FREEMAN, )  
)  
Defendant )  
JULIE MAE FREEMAN, ) A93-8187  
)  
Plaintiff )  
vs. ) CH. 7  
)  
GARY MICHAEL FREEMAN, )  
)  
Defendant )

MEMORANDUM

Hearing was held on June 15, 1994, on the adversary complaint. Appearing on behalf of debtor was George A. Sutera of Sutera & Sutera, Omaha, Nebraska. Appearing on behalf of Julie Mae Freeman was William J. Lindsay, Jr., of Lindsay & Lindsay, Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Background

The Chapter 7 debtor, Gary M. Freeman (plaintiff), filed this adversary proceeding on October 1, 1993. Plaintiff is requesting that \$5,300.00 be determined to be dischargeable debt pursuant to 11 U.S.C. §§ 523(a)(5) and 727(b). Said debt was ordered to be paid by the plaintiff to Julie Mae Freeman (defendant) in a dissolution of marriage decree.

The defendant filed her own adversary proceeding on October 4, 1993 to determine the dischargeability of the \$5,300.00 debt and other obligations of the plaintiff to the defendant which stem from the dissolution decree. Since the underlying issues in the adversary proceedings are identical, the two adversary proceedings were tried together, and therefore, are treated as one proceeding in this Memorandum.

The parties were married November 19, 1983 in Omaha, Nebraska. The District Court of Sarpy County, Nebraska entered a Decree of Dissolution (the decree) on January 7, 1993, which terminated the marriage. The district judge ordered the marital property divided and determined all issues of support and maintenance. The only remaining issue in the adversary proceedings and the sole issue presented at the trial is the dischargeability of the \$5,300.00 debt that the plaintiff owes to the defendant.

The plaintiff was ordered to pay the \$5,300.00 to the defendant in thirty six (36) monthly installments of \$166.08. Decree, at 8. The defendant alleges that this payment was intended by the district judge to be alimony and is, therefore, non-dischargeable pursuant to Section 523(a)(5). The plaintiff alleges that this payment resulted from the division of marital property and is dischargeable.

### Discussion and Decision

#### A. Dischargeability Pursuant to Section 523(a)(5)

11 U.S.C. § 727(b) grants a discharge to an individual debtor of all debts which arose before the bankruptcy petition date, except as provided in 11 U.S.C. § 523. In this case, the defendant takes the position that the \$5,300.00 debt should not be discharged pursuant to Section 727(b) because the debt is excepted from discharge pursuant to 11 U.S.C. § 523(a)(5). Section 523(a)(5) states the following:

A discharge under section 727, ... of this title does not discharge any 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 ... divorce decree ..., but not to the extent that -- (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

11 U.S.C. § 523(a)(5)(B).

The Court, when determining the "alimony" versus "property division" question, makes a factual finding based on federal standards.

[W]hether a debt falls within [the Section 523(a)(5)] exception is an issue of federal, not state, law. See, e.g., In re Williams, 703 F.2d 1055, 1056 (8th Cir. 1983); In re Gojn, 808 F.2d 1391 (10th Cir. 1987). The

bankruptcy court is bound by neither a state law definition nor by the designation in the parties' separation decree, but must determine for itself whether the debt was intended to serve as alimony or property settlement. In re Maune, 133 Bankr. 1010, 1014 (E.D. Mo. 1991); Boyle v. Donovan, 724 F.2d 681 (8th Cir. 1984). And such a determination of intent is essentially one of fact. Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992); In re McCauley, 105 Bankr. 315, 319 (E.D. Va. 1989); Boyle v. Donovan, supra.

Sturdevant v. Sturdevant, Neb. Bkr. 93:180, 181-82 (D. Neb. 1993).

1. Nebraska Law

The \$5,300.00 payment, which was ordered to be paid in installments, arose in the portion of the decree which dealt with the division of the marital assets. Decree, at 8. The state district judge found that the plaintiff was awarded \$10,600.00 more in equity from the marital estate than the defendant. As a result of this inequitable result, the district judge ordered the following award to the defendant:

Therefore, the Petitioner shall be awarded alimony in lieu of property in the amount of \$5,300.00 to equalize the division of the marital estate in light of the award of the property to the respondent. This amount will be paid in 36 monthly payments of \$166.08. Interest is at 8% per annum. This alimony shall not constitute income to the Petitioner, nor a deduction to the Respondent.

Decree, at 8. In the portion of the decree which addressed alimony, the state court stated: "The Court finds that neither party shall pay alimony to the other." Decree, at 4.

It is not clear from the decree whether the installment payments are alimony, as stated in the plain language of page 8, or not alimony because the decree at page 4 specifically declines to award alimony to either party. Since the decree is ambiguous, it is necessary to examine the circumstances surrounding the decree.

In the transcript included in the Bill of Exceptions, the district judge responded to the defendant's request for alimony by stating: "The length of the marriage and the respective education, training, and income capability of the parties leaves me to believe that alimony is just not appropriate. So I am not going to award alimony to either party." Bill of Exceptions, Exhibit A2, at 82.

The district judge then referred to the \$5,300.00 payment as "alimony" by stating: "So it's a fifty-three hundred dollar judgment and we can frame that as alimony in lieu of property to equalize the property out." Id. at 84.

The district judge states in the next sentence, "I don't want him to go out right away and sell stuff to pay [the \$5,300.00 payment] off." Id. at 84-85. At this point, it appears that the installment payments were a division of marital property because the district judge awarded the installment payments instead of forcing the plaintiff to sell the excess property that he received in the decree.

The Nebraska Statute distinguishes between "property division" and "alimony" as follows:

The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in the section make it appropriate.

**Neb. Rev. Stat.** § 42-365 (Reissue 1988). Based on the district judge's comments in the Bill of Exceptions, there is a strong probability that the installment payments were intended to be part of the property division by the district judge. The district judge specifically stated that the defendant was not entitled to support because the economic circumstances of the parties were the same, and he stated that the installment payment award was granted to avoid selling the assets that were awarded to the plaintiff.

The Nebraska Supreme Court generally identifies payments to equalize property distributions, such as the installment payment award, as property division and not alimony or support. Ritz v. Ritz, 229 Neb. 859, 429 N.W.2d 707 (1988) (distinguishing an installment payment ordered to be paid to equalize a property distribution from an order to pay alimony); Accord Reichert v. Reichert, 246 Neb. 31, 39, \_\_\_ N.W.2d \_\_\_ (Neb. 1994).

There are Nebraska cases in which "alimony" is treated as part of the property division. These types of payments are known as "alimony in gross" or "lump-sum alimony" and are defined as follows:

The phrase "alimony in gross" or "gross alimony" is always for a definite amount of money, the payment is always for a definite length of time, and it is always a charge on

the estate of the husband and is not modifiable. It, therefore, appears that a decree providing for "alimony in gross," must incorporate each and every one of the following propositions to meet the recognized requirements for this type of judgment, to wit: (1) the award must be for a definite sum or for installments payable over a definite period of time; (2) it must be payable in full regardless of the death or remarriage of the judgment creditor; and (3) it cannot terminate on the death of the judgment debtor.

Ball v. Ball, 183 Neb. 216, 219-220, 159 N.W.2d 297 (Neb. 1968); Murrell v. Murrell, 232 Neb. 247, 440 N.W.2d 237 (Neb. 1989) (quoting Ball). "Alimony in gross" vests on the date of judgment, which precludes modification of the award. Ball, at 220. "Alimony in gross" is in fact and effect a structured property distribution, rather than an award of alimony or support maintenance. Murrell v. Murrell, 232 Neb. at 251.

Traditional alimony, which is also "alimony in general" or "installment alimony," is distinguishable from "alimony in gross." "Alimony in general" is a different type of payment, which "contemplates periodic payments of a definite sum for the indefinite future, and terminates on the death of either party or the remarriage of the wife." Ball, 183 Neb. at 220 (citations omitted); Murrell, 232 Neb. at 250 (quoting Ball).

In this case, the installment payment award satisfies the requirements for "alimony in gross" but not "alimony in general." The award was for a sum certain, \$5,300.00, which is payable in installments of \$166.08 for 36 months, a definite period of time. The liability for the installment payment is taxed to the plaintiff's estate. There is no provision in the decree that conditions the installment payments on the death or remarriage of the parties, and thus, the future time period for making the installment payments is certain.

Despite the fact that the installment payments constitute "alimony in gross," the current status of "alimony in gross" in Nebraska law is not completely apparent. The Ball case was decided before Section 42-365 was passed, which eliminated the "alimony in gross" and "alimony in general" distinction from Nebraska statutory law. Murrell, 232 Neb. at 249. Even though Murrell, a case decided after Section 42-365 was passed, revisited the rule of Ball and clearly preserved the distinction at common law, the Supreme Court has, to an uncertain extent, limited the rule.

In the case Van Pelt v. Van Pelt, 206 Neb. 351, 292 N.W.2d 917 (Neb. 1980), another post-Section 42-365 case, the Nebraska Supreme Court held that since the decree expressly designates the payment

as "alimony in gross" and expressly precludes modification, the payment in question was "alimony in gross." 206 Neb. at 355. At issue in Van Pelt was whether the decree could be modified. The case emphasized the fact that the decree expressly stated that the award was not capable of being modified. Id. ("Under the terms of Neb. Rev. Stat. §§ 42-365 and 42-366 (Reissue 1978), we believe [the "alimony in gross"] rule must be extended to those cases in which the decree expressly precludes modification.").

In this case, the district judge ordered in the decree: "If no such [appeals] have been instituted within such thirty (30) day period the Court may, at any time within such six (6) months, vacate or modify its decree." Decree at p. 9. Since the district judge reserved the right to modify the decree, it is not absolutely clear that the installment payments constitute "alimony in gross." The payments, by definition, are "alimony in gross" and thus, property settlement payments. However, since the decree did not expressly identify the payments as "alimony in gross" and the decree permitted modification of the award, uncertainty remains as to whether the Nebraska Supreme Court would find that the installment payments constitute "alimony in gross."

Nebraska state law favors finding that the installment payments in this case relate to property division. The intent of the judge in awarding the installment payments to avoid equally dividing the property by selling the property is very clear. Likewise, there are no conditions on these payments, e.g. death or remarriage of a spouse, similar to conditions found in regular alimony payments. Also, it appears to the extent that Nebraska law once did or possibly still does distinguish between property settlements in the form of "alimony in gross" and "alimony in general," the law would favor finding that the installment payments constitute a part of the property division. Under Nebraska law, this award would be considered a division of property and not for support.

Even though it has been decided that under Nebraska law the installment payments constitute property division, Nebraska law is not entirely conclusive and is not binding on the bankruptcy court for the purposes of 11 U.S.C. § 523(a)(5).

## 2. Equity

There are arguments in equity which support finding that the installment payments constitute alimony payments. The district judge stated that the parties' education, training potential, and income potential is similar. The district judge did not discuss the fact that the defendant was unable to pursue her maximum income potential during the marriage because she was the primary caretaker of the parties' child, which would have been a reasonable ground for the grant of alimony.

The plaintiff's net earnings are, without subtracting \$350.00 for child support, approximately \$1,953.42 per month, while the defendant's monthly net earnings are \$1,064.10, which includes \$300.00 she receives from the State of Nebraska for food expenses. Bill of Exceptions, Vol. II, Ex. 17, but does not include child support.

The plaintiff received considerably more equity in the marital estate than did the defendant. Even though property is not income, equity in property will definitely enhance the standard of living that the plaintiff will enjoy in the future. If this debt is dischargeable, the defendant will walk away with most of the marital property and will earn considerably more income than the defendant, while the defendant will have received little of the property that she helped acquire during the marriage and will be living on a much smaller income than the plaintiff.

These arguments, which are based in equity, support the conclusion that the obligation was meant as support. If equity were the only factor considered for this decision, the debt would be non-dischargeable. However, equity is not the only consideration, and several other areas of federal law must also be considered.

### 3. Federal Tax Law

After the district judge granted the defendant the installment payments to equalize the property division, the district judge wrote in the decree: "This alimony shall not constitute income to the Petitioner, nor a deduction to the Respondent." Decree, at 8. Under federal tax law, the installment payments would not constitute alimony because the installment payments are not intended to be taxable income to the defendant or deductible by the plaintiff. The Internal Revenue Code (IRC) defines gross income to include "alimony and separate maintenance payments." 26 U.S.C. §§ 61(a)(8), 71(a) (1988). If the defendant has been ordered not to claim the installment payments as gross income, then for federal tax purposes, she has not received "alimony" or "separate maintenance payments."

The decree also orders that the husband not receive a deduction for the installment payments on his income taxes. The IRC permits a deduction to a payor spouse for "alimony" pursuant to Section 215 of Title 26. 26 U.S.C. § 62(a)(10) (1988). Section 215(b) states that the deduction may be used only if the "alimony and separate maintenance payments" meet the definition located at Section 71 of the IRC. 11 U.S.C. § 215(b) (1988). The IRC is silent concerning deductions for payments constituting the division of the marital assets. Therefore, for federal tax purposes at least, if the installment payments do not meet the definition of "alimony or separate maintenance payments" in the IRC, the

plaintiff is making a payment for the purpose of property division and not for "alimony" or "separate maintenance payments."

The term "alimony and separate maintenance payments" is defined at Section 71(b) of the IRC:

The term "alimony or separate maintenance payment" means any payment in cash if --

(A) such payment is received by (or on behalf of) a spouse under a divorce ... ,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce ... the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

26 U.S.C. § 71(b)(1) (1988).

Even though the district judge labeled the payment as an alimony payment, the judge must have intended that these installment payments would not constitute "alimony or separate maintenance payments" under the IRC. The installment payments were ordered pursuant to a dissolution decree and were made while the parties inhabited separate households, which satisfies Section 71(b)(1)(A) & (C), but the installment payments were specifically excluded from the gross income of the defendant and were not allowable as a deduction pursuant to 26 U.S.C. § 215, which does not satisfy Section 71(b)(1)(B). In addition, the decree does not condition the liability of the plaintiff to make such payments during the lifetime of the defendant as required under Section 71(b)(1)(D). Because these two subsections of Section 71(b) are not satisfied, the installment payments are not "alimony or separate maintenance payments" under the IRC.

The federal tax code is not binding on this Court for two reasons. The first reason is that a statement in the Bill of Exceptions indicates that the district judge did not intend for his ruling concerning tax treatment to be binding on the parties. The district judge stated:

[I]f the two of you [the plaintiff and the defendant], with your lawyers, sit down and you decide you want to work out something different that's more advantageous to yourselves and less advantageous to Uncle Sam, I don't know if there are any tax consequences here, but if there are and you want to change it some way and it's all by agreement, that's okay with me.

Bill of Exceptions, at 87. It appears from this statement that the district judge's ruling on tax liability was not intended by the judge to bind the parties, and the parties could have renegotiated this portion of the decree on their own.

The second reason why federal tax law is not binding in this case is because the state district court judge characterized the payment as non-alimony for federal tax purposes, and the installment payments, themselves, were not necessarily designed to meet the conditions set forth in the tax code. As discussed above, this Court is not bound by the state district judge's characterization of the payments. See Williams v. Williams (In re Williams), 703 F.2d at 1055, 1057 (8th Cir. 1983). Therefore, if these payments are non-alimony under the federal tax code only because the district judge characterized them as such, then this Court can disregard the characterization by the state district judge.

#### 4. Federal Case Law

In the bankruptcy case, Morel v. Morel (In re Richard J. Morel), 983 F.2d 104 (8th Cir. 1992), the Eighth Circuit affirmed the bankruptcy court's and the district court's holdings that the payment in lieu of property was not alimony, but constituted property settlement and was, therefore, dischargeable in bankruptcy. The Court enumerated factors that are similar to the factors listed in 26 U.S.C. § 71(b)(1), where the IRC definition of "alimony or separate maintenance" is located, to determine whether the payment constituted alimony or property settlement. The Court stated:

The decree of dissolution of marriage contains a separate provision for alimony, payable until the death of either party, or until the remarriage of the former wife. The obligation to pay the property settlement was partly in a

lump sum and partly periodic, but it was unconditional. That is, the obligation did not cease upon the death or remarriage of either spouse.

Id. at 105. Similar to Morel, the installment payments owed to the defendant are not conditioned on the death or remarriage of either spouse, and the decree addresses these installment payments in the portion that divides the marital estate. The rule in Morel that an alimony payment be conditioned on the remarriage or death of either spouse is similar to the requirement under 26 U.S.C. § 71(b)(D) that the liability for making alimony payments be based upon the lifetime of the payee spouse.

#### Summary

Taking into consideration the factors enumerated in Morel, the federal tax code, and Nebraska state law, the Court reluctantly concludes that the installment payment award to the defendant was property division and not alimony. There are certain factors that both federal law and Nebraska state law emphasize as distinguishing between alimony and property division payments. Those factors include: the installment payments are not conditioned on the death or remarriage of either spouse; the installment payments were awarded to equalize the property distribution and to avoid selling assets, not to provide support for the defendant; and the defendant was not entitled to alimony in the portion of the decree addressing alimony.

The installment payments that were ordered to be paid to the defendant in lieu of property granted to the plaintiff were part of the division of the marital assets. The debt is not excepted from dischargeability as alimony or support payments by 11 U.S.C. § 523(a)(5). Because the debt relates to the division of property, the personal obligation of the plaintiff is dischargeable pursuant to 11 U.S.C. 727(b).

#### B. Lien on Real Property and Personal Property

Even though the personal obligation owed to the defendant by the plaintiff is discharged pursuant to 11 U.S.C. § 523(a)(5), the underlying lien on the plaintiff's qualifying real and personal property is not avoided by this order. Nebraska statutory law creates a lien upon real property and personal property once a judgment for money is entered in a dissolution action. Neb. Rev. Stat. § 42-371 creates the lien and provides that under Sections 42-347 to 42-379, the sections addressing dissolution of marriage, alimony, child support and property settlement:

- (1) All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property

registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments...; (3) Alimony and property settlement award judgments, ..., shall cease to be a lien on real or registered personal property ten years from the date (a) the judgment was entered, (b) the most recent payment was made, or (c) the most recent execution was issued to collect the judgment, which ever is latest, and such lien shall not be reinstated;

**Neb. Rev. Stat.** § 42-371 (Reissue 1988). The Nebraska Supreme Court has held that Section 42-371(1) "obviously includes money judgments in lieu of property division in kind." Lacey v. Lacey, 215 Neb. 162, 164-165, 337 N.W.2d 740 (Neb. 1983) (quoting Grosvenor v. Grosvenor, 206 Neb. 395, 400, 292 N.W.2d 96, 100 (Neb. 1980)).

The money judgment is for property division in the amount of \$5,300.00. As discussed earlier in this memorandum, alimony awards that are intended to be property divisions, "alimony in gross," vest upon the entry of the judgment, and therefore, the entire judgment is a lien on the defendant's qualifying real and personal property. See Ball, 183 Neb. at 220 (discussing that a judgment for "alimony in gross" vests upon the entry of the judgment).

Under the bankruptcy code, judicial liens are not discharged, but may, under certain circumstances, be avoided pursuant to 11 U.S.C. § 522(f)(1). Section 522(f)(1) states:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -- (1) a judicial lien...

It may appear that the judicial lien on the debtor's property may be avoided to the extent that the lien impairs property which is exempted under Nebraska's exemption statutes. However, the United States Supreme Court has limited the ability of debtors to avoid judicial liens created by dissolution of marriage decrees. See Farrey v. Sanderfoot, 500 U.S. 291, 111 S. Ct. 1825, 114 L. Ed. 2d 337 (1990).

The plaintiff's bankruptcy schedules show interests in real and personal property which may be subject to defendant's judicial lien and which may, if liquidated through foreclosure, satisfy the

lien interest without violating the discharge injunction of 11 U.S.C. § 524.

CONCLUSION

The personal obligation of plaintiff to defendant of \$5,300.00 is dischargeable. This finding does not avoid any judicial lien held by defendant in property of plaintiff.

Separate journal entry to be entered.

DATED: August 1, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies mailed by the Court to:

George A. Sutera, 1066 Howard Street, Omaha, NE 68102-2815  
William J. Lindsay, Jr., Embassy Plaza, Suite 305, 9110 West  
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United States Trustee

UNITED STATES BANKRUPTCY COURT  
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	)	CH. 7
GARY MICHAEL FREEMAN,	)	
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	)	
<u>Defendant(s)</u>	)	
	)	
JULIE MAE FREEMAN,	)	A93-8187
	)	
Plaintiff	)	
vs.	)	DATE: August 1, 1994
	)	HEARING DATE: June 15,
GARY MICHAEL FREEMAN,	)	1994
	)	
Defendant	)	<u>JOURNAL ENTRY</u>

Before a United States Bankruptcy Judge for the District of Nebraska regarding ADVERSARY COMPLAINT.

APPEARANCES

George A. Sutera, Attorney for debtor  
William J. Lindsay, Jr., Attorney for Julie Freeman

IT IS ORDERED:

The obligation of the debtor to his former spouse relates to a division of marital property and is not alimony or support. Therefore, the obligation is dischargeable in bankruptcy. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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