UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT TENNESSEE

In re:	**Case No. 96-29199whb**
RICHARD A. EARWOOD,	
Debtor.	**Chapter 7**
TONIA BERTOLDO,	
Plaintiff,	
v.	**Adv. Proc. No. 01-0880**
RICHARD A. EARWOOD,	
Defendant.	

OPINION AND ORDER ON COMPLAINT

This adversary proceeding was filed by the Plaintiff, the former spouse of the chapter 7 Debtor, seeking alternative determinations by this Court, either that the parties' divorce decree awarded a separate property interest to the Plaintiff or that the debt resulting from that decree was excepted from the Debtor's discharge. The latter remedy is a difficult one for the Plaintiff, due to the fact that she learned of the Debtor's chapter 7 filing at least by 1999 but did not move to reopen his bankruptcy case to file her complaint until August 2001. Thus, an argument of laches and limitations is raised by the Debtor.

The issues raised in this proceeding were presented to the Court on March 26, 2002, by stipulations of counsel for the parties that no factual issues existed; rather, the issues are purely legal ones, calling for this Court to interpret the meaning of the divorce decree and subsequent proceedings in the state court. At the March 26 hearing, the parties submitted two documents in addition to those attached to the pleadings: a copy of the parties' divorce decree (Exhibit 1) and a copy of the Plaintiff's motion for new trial in the Chancery Court (Exhibit 2). Based upon a review of all relevant pleadings and documents, as well as the statements of counsel, the Court makes the following findings and conclusions.

ISSUE

The issue before the Court is whether the divorce decree awarded a 28% separate property interest to Ms. Bertoldo in the Debtor's retirement fund with the Shelby County government, where he was working at the time of their divorce. If not designated as a separate interest that vested in Ms. Bertoldo through that decree, did the decree establish a debt that would have been dischargeable in this bankruptcy case, absent a timely complaint to determine dischargeability?

BACKGROUND

The parties were divorced by a decree entered by the Shelby County Chancery Court on December 12, 1994. In relevant part, that decree, which incorporated the parties' written marital dissolution agreement, provided in its paragraph 9:

> Plaintiff [Ms.Bertoldo] should receive Twenty-Eight Percent (28%) of the value of the Defendant's [Debtor's] retirement fund with the Shelby County Government, based upon the value of said retirement as of July 13, 1994, Plaintiff's share is estimated to be Seven Thousand Eight Hundred Ninety Dollars and No Cents ($7,890.00). The rest and remainder of the retirement fund should be sole and exclusive property of the Defendant.

Although the prefatory language is "should receive,"other paragraphs of the decree begin with similar language, and there is nothing in the decree itself to indicate that the Chancellor intended anything but a specific award to Ms. Bertoldo of a 28% share in the retirement fund. In fact, the actual ordering clauses included paragraph 6, which says that she "is awarded" the 28%.

Based upon this language, there is controlling precedent in the Sixth Circuit and Tennessee for the outcome. In *McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192 (6th Cir. 1996), the Court considered a similar award in a divorce from Ohio. The divorce court had awarded 50% of one spouse's retirement pension to the other spouse, calling it a property division. A judgment was given for the value of the 50% interest, with Mr. McCafferty to pay it in monthly installments. Mr. McCafferty then filed for chapter 7 relief in Ohio, listing his former wife as an unsecured creditor, and he filed a complaint to determine dischargeability under 11 U.S.C. § 523(a)(5). Since the state court made it clear that it intended a property division rather than a support award, the Sixth Circuit held that the "debt" was not one subject to the discharge exception of § 523(a)(5). A similar

conclusion would be true in the Earwood case, since the plaintiff does not contend that the retirement award was anything but a property division.

Just as in *McCafferty*, that does not end the inquiry. The Sixth Circuit went on to conclude that under Ohio law the divorce decree and property division had vested in Ms. McCafferty a property interest separate from her husband's, an interest that never became a part of his chapter 7 bankruptcy estate. *See* 11 U.S.C. § 541(d). The Court got there by finding that the state court's decree created a constructive trust under Ohio law, through its language designating the monetary judgment as Ms. McCafferty's interest in the retirement plan. The court also distinguished these facts from its earlier opinion, *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443 (6th Cir. 1994), which had generally restricted application of constructive trusts in those bankruptcy circumstances involving distribution disputes among creditors. *Omegas* did not control the McCafferty's facts because of the application of Ohio law in divorce and its related property divisions.

The same is true here, in light of controlling Tennessee law. In *Holt v. Holt*, 995 S.W.2d 68 (Tenn. 1999), the Supreme Court of Tennessee addressed a constructive trust in a divorce decree, which had vested a right in any life insurance policy that was to be obtained by the husband/father. The decree had required the father to obtain a $100,000 life insurance policy listing his son as beneficiary, but the father failed to fully comply. Beginning with its observation that "[e]quity regards that as done which in good conscience ought to be done," 995 S.W.2d at 71 (quotation omitted), the Court discussed the "equitable device" of constructive trust, saying that it is a

> formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.

Id. at 72 (citation omitted). Applying the device in its case, the *Holt* Court said that "it is clear under Tennessee law that an enforceable agreement, such as a marital dissolution agreement, which mandates" a beneficial interest, vests that interest in the beneficiary.

There is no material difference between vesting a beneficial interest in an insurance policy not yet acquired at the time of divorce and vesting a beneficial interest in one spouse's existing retirement fund. In the present case, the Chancellor's language and intent is clear: The former Ms.

Earwood was awarded a 28% interest in Mr. Earwood's existing retirement plan. It makes no difference for constructive trust purposes, under the *Holt* authority, that Mr. Earwood had not yet retired nor that he could not immediately withdraw the funds to pay his former spouse. Her beneficial interest vested immediately upon entry of the divorce decree, which had incorporated the parties' marital dissolution agreement.

The Debtor argued that all of this had been decided by the Chancery Court when it denied some of the relief sought by Ms. Bertoldo in her various post-divorce pleadings before that Court, and the Debtor argues application of preclusion and the *Rooker-Feldman* Doctrine. The latter doctrine, which was addressed by the Bankruptcy Appellate Panel for this Circuit in *Singleton v. Fifth Third Bank (In re Singleton),* 230 B.R. 533 (B.A.P. 6th Cir. 1999), generally prohibits federal trial courts from appellate review of state court decisions. However, the pleadings presented to this Court don't show any ruling by the Chancery Court on the issue of whether the 28% interest was property of the Debtor's chapter 7 estate. Based upon the representations of counsel, it would appear that when the Chancellor was told that Mr. Earwood had filed for bankruptcy, the Chancellor deferred to the bankruptcy court to determine the property interest question. It would be anomalous for this Court to now say that it is precluded from deciding the very issue not decided by the Chancellor. Moreover, although this Court often decides property of the estate issues by reliance upon applicable state law, it is nevertheless within the bankruptcy court's exclusive jurisdiction to decide what is and what is not property of the bankruptcy estate. *See In re Omegas Group, Inc.*, 16 F.3d at 1450 ("federal bankruptcy law dictates to what extent [an] interest is property of the estate.") (citation omitted).

CONCLUSION

Based upon precedent in both the Sixth Circuit and the Tennessee Supreme Court, this Court concludes that the divorce decree entered by the Chancery Court vested a 28% beneficial interest in the Debtor's retirement fund with Shelby County, Tennessee, in his former spouse, Ms. Bertoldo. Her beneficial interest never became property of the Debtor's chapter 7 bankruptcy estate, since § 541(d) excludes such an interest from the bankruptcy estate.

The determination that Ms. Bertoldo's separate beneficial interest in the retirement fund

vested in her eliminates any need to determine whether there was a "debt" discharged in the bankruptcy. How Ms. Bertoldo recovers her interest and from whom is not an issue before this Court nor should it be. Ms. Bertoldo may return to an appropriate state court to establish her remedy for recovery of her 28% interest previously awarded by the Chancery Court.

IT IS THEREFORE ORDERED:

1. The Plaintiff's complaint is **GRANTED** in that the 28% interest in the Debtor's retirement fund was awarded as a property division by the Chancery Court's divorce decree, a beneficial interest that vested in her upon entry of the decree by operation of a constructive trust. That 28% interest never became property of the Debtor's chapter 7 estate.

2. Ms. Bertoldo may return to an appropriate state court to enforce her constructive trust and beneficial interest in the retirement fund against appropriate parties. No automatic stay nor discharge injunction prevents her recovery of her interest in this fund.

3. Upon this Order becoming final, the Clerk may re-close the chapter 7 case and then close this adversary proceeding.

4. The parties shall each bear their own costs for this proceeding, including their own attorney fees.

SO ORDERED this 28th day of March, 2002

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WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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