

**ORIGINAL**

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SUPREME COURT

OCT 6 '00

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20000200      **20000200**

Ardella Stein f/k/a Ardella Kopp,

Plaintiff-Appellee,

- VS -

Myron Kopp,

Defendant-Appellant.

FILED  
 IN THE OFFICE OF THE  
 CLERK OF SUPREME COURT  
 OCT - 6 2000  
 STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT AMENDED JUDGMENT  
 SOUTH CENTRAL JUDICIAL DISTRICT  
 BURLEIGH COUNTY CIVIL NO. 98-C-2642  
 THE HONORABLE BURT L. RISKEDAH, PRESIDING

APPELLANT'S BRIEF

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**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

**CASES**

*Becker vs. Becker*  
262 N.W.2d 478 (N.D. 1978) . . . . . 7, 8, 11

*Schmallee vs. Schmallee*  
1998 ND 201, 586 N.W.2d 677 . . . . . 10

**STATUTES**

North Dakota Rules of Civil Procedure:

N.D.R.Civ.P. 60 . . . . . 2, 4

North Dakota Century Code:

N.D.C.C. 14-05-24 . . . . . 5, 11

**OTHER AUTHORITIES**

11 U.S.C.A. § 523(15) . . . . . 10

**STATEMENT OF THE ISSUES**

1. **WHEN A DIVORCE JUDGMENT HAS BEEN ENTERED, AND THE APPEALS TIME HAS ELAPSED, IF THERE IS NO AWARD OF SPOUSAL SUPPORT, AND NO RESERVATION OF JURISDICTION OVER MARITAL PROPERTY AND DEBTS, DOES THE DISTRICT COURT HAVE JURISDICTION TO AMEND THE JUDGMENT AND AWARD SPOUSAL SUPPORT AND A DIFFERENT DISTRIBUTION OF THE PROPERTY?**
  
2. **AFTER A DIVORCE JUDGMENT HAS BEEN ENTERED, AND THE APPEALS TIME HAS LAPSED, DOES THE DISTRICT COURT HAVE ANY CONTROL OVER, OR CAN IT ISSUE ANY SANCTIONS AGAINST A PARTY WHO LEGALLY DISCHARGES THEIR MARITAL DEBTS IN A BANKRUPTCY PROCEEDING?**

## NATURE OF THE CASE

This is a divorce case which was tried to the Court on October 5, 1999. The original Judgment is dated December 15, 1999 and was entered on December 17, 1999.

The time for Plaintiff to appeal from the original Judgment ended on February 15, 2000. The Plaintiff did not appeal during this time.

Defendant filed for bankruptcy on February 29, 2000. As a result, the Plaintiff filed a motion under Rule 60 of the N.D.R.Civ.P. requesting the Court amend the original Judgment.

The Court granted Plaintiff's Rule 60 Motion and entered an Amended Judgment on April 25, 2000. The Amended Judgment awarded the Plaintiff spousal support and some of the marital property awarded to the Defendant in the original Judgment.

Defendant filed a Motion to Reconsider the Amended Judgment on April 25, 2000. Defendant argued the Trial Court did not have jurisdiction to amend the Judgment as it did because the Court only reserved jurisdiction over Defendant's state retirement in the original Judgment.

The Court denied Defendant's Motion to Reconsider the Amended Judgment on June 29, 2000.

The Defendant made a Motion to Extend the Appeal time on June 6, 2000.

The Defendant filed a timely Notice of Appeal on July 11, 2000.

**STATEMENT OF THE FACTS**

The parties to this action are Plaintiff/Appellee, Ardella Stein f/k/a Ardella Kopp (Ardella) and Defendant/Appellant, Myron Kopp (Myron).

Myron is appealing from an Amended Judgment. (App., p. 82 - 88). Neither party appealed from the original Judgment and the appeals time from that Judgment has long since lapsed.

The original divorce Judgment (App., p. 37 - 43) awarded Myron certain marital property debts. These debts consisted of the following:

Attorney Fees	\$ 3,700.00
Visa (Joint)	\$ 5,625.00
RM Visa	\$ 2,407.00
Household Bank Visa	\$ 3,808.00
1 <sup>st</sup> USA Visa	\$ 5,547.00
Sears (Myron)	\$ 6,617.00
Discover	\$ 3,727.00
Pickup	\$10,706.00 - Capital Credit Union Loan} combined
Motor home	<u>\$55,824.00</u> - Capital Credit Union Loan} combined
Total	\$97,961.00

The Court found Myron's net monthly income was \$1,860. From this income Myron was ordered to pay \$526.00 per month child support. (App., p. 31 - 32). The monthly interest on the credit cards was \$550.25; and the monthly interest on the Capital Credit Union Loan was \$415.81.

Therefore, it would cost Myron \$1,492.00 per month to pay just the child support and just the interest on the marital property debts. That would leave him with only \$367.90 per month for his living expenses.

Since Myron couldn't live on \$367.90 a month, and he couldn't pay off debts by just paying on the interest, he decided to file bankruptcy.

Before Myron went through bankruptcy, he gave Ardella a chance to join in the bankruptcy. Her response is found in a letter Irvin B. Nodland sent to Myron's attorney on December 8, 1999. This response indicates Ardella believes bankruptcy is morally wrong and she wanted nothing to do with it. (App., p. 93).

Myron filed bankruptcy on February 29, 2000. After he filed bankruptcy, Ardella, under N.D.R.Civ.P. 60 asked the Trial Court to amend the original Judgment. The Trial Court then amended the original Judgment and gave Ardella the following items awarded to Myron:

Life Insurance Policy (1) - cash value

Life Insurance Policy (2) - cash value

Myron's State Retirement

IRA (Myron's) (App., p. 80).

The Trial Court, in the Amended Judgment also awarded Ardella \$300.00 per month in spousal support. (App., p. 80 - 81).

Myron then moved the Trial Court to reconsider the Amended Judgment because the only jurisdiction reserved in the original Judgment was over child custody, child support, visitation, and Myron's state retirement. (App., p. 97).

The Trial Court denied Myron's Motion to Reconsider.

On December 4, 1999, the Trial Judge's Memorandum Opinion contained the following language:

"The Plaintiff did not seek spousal support in this proceeding, and made no claim for spousal support at the time of trial. She likewise did not make a claim for a portion of the Defendant's public employee pension." (App., p. 15).

The Findings of Fact, dated December 13, 1999, at VII state: "The Plaintiff did not seek an award of spousal support from [sic] (Defendant)." The Court awards none. The Plaintiff also has not asked for an assignment of any portion of the Defendant's public employees pension to her. (App., p. 30).

The original Judgment dated December 15, 1999 states: (App., p. 37).

"SPOUSAL SUPPORT: Neither party shall be entitled to temporary or permanent alimony, support, rehabilitation or maintenance, whether past, present or future." (App., p. 42).

Notice of Entry of that Judgment was mailed to Myron's attorney, Benjamin C. Pulkrabek on December 17, 1999. (App., p. 45).

The Court did reserve jurisdiction over Myron's state retirement in the original Judgment, to insure Defendant paid certain marital debts as follows:

"The Court found the motor home to have a value of \$50,000 to \$55,000 with the same amount of indebtedness to the present value. The motor home is allocated to Myron and the Court's order is that the motor home is sold to reduce the indebtedness. Ardella is obligated on the notes related to the motor home and



the Court will require that Ardella be “held harmless” as it relates to the dispersion of this item of personal property. If the motor home sells for less than what is owed on it, Myron will be responsible for the debt and Ardella, should she incur any expenses as a result of this transaction, will be able to make a claim against Myron and if necessary obtain a court order authorizing her to receive a portion of Myron’s state retirement proceeds.” (App., p. 40).

The time for appealing the original Judgment expired on February 15, 2000.

After the Amended Judgment was entered, Myron brought a Motion to Reconsider. (App., p. 97). His reasons for this Motion were that the trial court lacked jurisdiction to award spousal support, that he should be allowed to discharge the marital debts in bankruptcy, and that it was premature to award Ardella his state retirement because she hadn’t had to pay one cent on the motor home debt.

The Trial Court denied Myron’s Motion to Reconsider. (App., p. 130). Myron then filed a Motion for Extension of Time to File Appeal, (App., p. 125), and then timely appealed.

## ARGUMENT

### ISSUE I.

**WHEN A DIVORCE JUDGMENT HAS BEEN ENTERED, AND THE APPEALS TIME HAS ELAPSED, IF THERE IS NO AWARD OF SPOUSAL SUPPORT, AND NO RESERVATION OF JURISDICTION OVER MARITAL PROPERTY AND DEBT, DOES THE DISTRICT COURT HAVE JURISDICTION TO AMEND THE JUDGMENT AND AWARD SPOUSAL SUPPORT AND A DIFFERENT DISTRIBUTION OF THE PROPERTY?**

The Statute that applies to alimony and division of property is N.D.C.C. 14-05-24 which states:

**Permanent alimony — Division of property.** When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects.

That Statute has been reviewed by this COURT. In *Becker vs. Becker*, 262 N.W.2d 478 at 483, (N.D. 1978), this COURT stated:

“Jurisdiction granted for the initial decree can be maintained if there is an award of alimony. Section 14-05-24, N.D.C.C. It is also generally accepted that jurisdiction to later award alimony may be expressly reserved in the initial decree. *Kronforst v. Kronforst*, 21 Wis.2d 54, 123 N.W.2d 528 (1963); *Daw v. Daw*, 212 Minn. 507, 4 N.W.2d 313 (1942). A general reservation of jurisdiction is not

effective. *Unser v. Unser*, 86 N.M. 648, 526 P.2d 790 (1974).”

Becker, goes on to state that:

1. Judgments that contain language indicating neither party shall pay alimony to the other are not reservations of jurisdiction, but are clear denials of alimony. Id. at 484.
2. If there is no language in the divorce decree reserving jurisdiction over alimony, even the most severe change in circumstances will not provide the District Court with jurisdiction. Id. 484.

When the original Judgment, (App., p. 37), is examined for reservations of jurisdiction, the only ones that can be found relate to child custody, child support, child visitation and Myron’s state retirement. The only one of these that relate to this appeal is Myron’s state retirement.

The language in the Judgment that reserves jurisdiction over Myron’s state retirement is as follows:

“The Court found the motor home to have a value of \$50,000 to \$55,000 with the same amount of indebtedness to the present value. The motor home is allocated to Myron and the Court’s order is that the motor home is sold to reduce the indebtedness. Ardella is obligated on the notes related to the motor home and the Court will require that Ardella be “held harmless” as it relates to the dispersion of this item of personal property. If the motor home sells for less than what is owed on it, Myron will be responsible for the debt and Ardella, should she incur any expenses as a result of this transaction, will be able to make a claim against Myron

and if necessary obtain a court order authorizing her to receive a portion of Myron's state retirement proceeds."

The Amended Judgment, (App., p. 82), gives Myron's entire state retirement to Ardella. Myron asserts such an award is premature because to date Ardella hasn't paid a cent to the Capitol Credit Union on the debt for the motor home. At the time, the Amended Judgment was entered, all that had happened was Ardella has been told by phone and letter that she would be liable for the motor home debt.

In the future, if Ardella has to pay any money to the Capitol Credit Union for this debt, Myron acknowledges she is entitled to be reimbursed from his state retirement.

## ISSUE II.

**AFTER A DIVORCE JUDGMENT HAS BEEN ENTERED, AND THE APPEALS TIME HAS LAPSED, DOES THE DISTRICT COURT HAVE ANY CONTROL OVER, OR CAN IT ISSUE ANY SANCTIONS AGAINST A PARTY WHO LEGALLY DISCHARGES THEIR MARITAL DEBTS IN A BANKRUPTCY PROCEEDING?**

Myron sought to discharge, in a Chapter 7 Bankruptcy, most of the marital debts that were awarded to him in the property division of the original Judgment. These debts are as follows:

117.	Visa	\$ 5,625.00
118.	RM Visa	\$ 2,407.00
119.	Household Bank Visa	\$ 3,080.00
120.	1 <sup>st</sup> USA Visa	\$ 5,547.00
121.	Sears	\$ 6,617.00
122.	Discover	\$ 3,727.00

124. Motor Home \$55,824.00

The only marital property debt that Myron is not going to discharge is the one on his 1992 Chevrolet Pickup. Myron has reaffirmed this debt because he needs a vehicle to get to and from work and for transportation in general.

The federal Statute that determines the dischargeability of the above debts is 11 U.S.C.A. § 523(15). This paragraph was enacted as part of the Bankruptcy Reform Act of 1994. It is an exemption to discharge that supplements paragraph (5).

Debts under 11 U.S.C.A. § 523(15) will be discharged unless a creditor files adversary proceeding in Bankruptcy Court asking to have the debt declared non dischargeable. In this case Ardella filed such an objection to Myron's discharges. A hearing on this objection was held in the Bankruptcy Court on October 3, 2000 at 8:30 a.m.

The North Dakota controlling bankruptcy discharges, of property division for marital debts is, Schmallee vs. Schmallee, 1998 ND 201, 586 N.W.2d 677. Schmallee makes it clear that a former spouse of a debtor must have an opportunity to contest the dischargeability of any of the debts the debtor was awarded as marital property debts in a divorce Judgment. Ardella has contested the dischargeability and had her hearing on October 3, 2000. Should the Bankruptcy Court decide to allow the discharge, such a ruling could void the hold harmless agreement inoperable.

Schmallee, at 11 U.S.C.A. § 523(15) and makes it clear that the Bankruptcy Court, not the North Dakota District Court, controls what marital property debts can be discharged in bankruptcy. However, a District Judge in North Dakota can, according to

Becker, and N.D.C.C. 14-05-24, reserve jurisdiction over marital property, marital debts and spousal support in the original Judgment.

In the case now before the Court, the Trial Judge elected in the original Judgment only reserved jurisdiction over child custody, child support, visitation and Myron's state retirement.

### CONCLUSION

The Plaintiff didn't ask the Trial Court for spousal support. The Trial Court didn't reserve jurisdiction over spousal support. Other than child custody, child support and visitation, the only thing the Trial Court reserved jurisdiction over was Myron's state retirement. The Trial Court did not have jurisdiction to amend the original Judgment.

The Bankruptcy Court now has exclusive jurisdiction to decide whether marital property debts can be discharged in a Chapter 7 Bankruptcy.

DATED at Mandan, North Dakota, this 5 day of October, 2000.

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