

Consumer Workshop II

Divorce and Bankruptcy

Tara G. Salinas, Moderator

Colorado Bankruptcy Solutions; Denver

Hon. Angela R. Arkin

Douglas County District Court; Castle Rock, Colo.

David C. Hoskins

David C. Hoskins, P.C.; Denver

Drew Moore

Drew Moore P.C.; Grand Junction, Colo.



When Worlds Collide

Bankruptcy and Its Impact on Domestic Relations and Family Law, Fourth Edition

Divorce and bankruptcy are similar in that each attempts to provide a “fresh start.” However, the objectives of divorce are not necessarily consistent with the goals of bankruptcy. The Bankruptcy Code makes it harder to discharge certain obligations that arise in divorce. This desk book provides a brief, readable primer on the bankruptcy law that impacts their subject-matter jurisdictions. These materials provide a satisfactory starting point for any domestic-relations lawyer who needs a basic understanding of how bankruptcy intersects with family law. Appendices feature relevant sections of the Code, as well as a list of cases and articles on the issues discussed within the text.



By: Michaela M. White

Member Price: \$35

Product #: 10_013



Overview of Divorce in Colorado

Divorce and Bankruptcy
2015 Rocky Mountain ABI
Friday January 23, 2015

Hon. Angela R. Arkin, District Court Judge, Kim Willoughby, Esq., Amy Goscha, Esq.

I. GENERAL OVERVIEW OF THE DIVORCE PROCESS

1. Judicial Discretion.

Domestic relations judges have enormous discretion, but it is absolutely essential. This is because every family is unique, and every family comes to the court fully formed. The court had absolutely nothing to do with how that family was created. Two people decided how to run their finances: they decided to accumulate assets and debts, they were employed inside or outside the home, they worked for others or for themselves, until one or both adults decided that the intact family must end. That is how they come to the court.

When the family arrives, the judge must address these questions:

- A. What were the decisions made by the parties that created this family?
- B. How will this family move on?

The court must find an equitable financial solution for the parties, if the parties cannot do so themselves. The court must fully understand the societal realities the family will encounter, the parties' previous ways of conducting their financial business, the value and liquidity of their assets, and the nature and amount of their debts, so the court can equitably divide the marital estate and then ensure appropriate support for a dependent spouse and children.

Parties stand in a fiduciary relationship to one another, and must follow special procedures to reach an equitable conclusion to their case, or prepare for the court to enter permanent orders. Full disclosure is required without a formal discovery request, and the assertions often made by parties in other kinds of civil cases that they have the right to protect their client list, trade secrets, or other income or business-related information are generally irrelevant between husband and wife. See, *In re the Marriage of Roberts, Schelp and Barnett*, 228 P.3d 151 (Colo. Mar. 22, 2010); and C.R.C.P. 16.2.

2. Law.

- A. C.R.S. §14-10-101 et. seq. (Uniform Dissolution of Marriage Act).

3. Steps.

- A. File Petition or Co-Petition for Dissolution of Marriage, and obtain service of process.
- B. Attend Initial Status Conference (C.R.C.P. 16.2)

- C. Set Temporary Orders to address interim issues until case can go to trial (optional) (C.R.S. §14-10-108):
- 1.) Address temporary use and possession of marital property;
 - 2.) Address temporary payment of marital debts;
 - 3.) Address temporary allocation of parental responsibility;
 - 4.) Address payment of temporary support (maintenance and child support);
 - 5.) Address temporary payment of attorney's fees (C.R.S. §14-10-119).

Also at temporary orders, Court will appoint experts and set case for "permanent orders (the divorce trial).

- D. Permanent Orders.
- 1.) Address permanent allocation of parental responsibility (C.R.S. §14-10-124);
 - 2.) Address permanent use and possession of marital property (C.R.S. §14-10-113);
 - 3.) Address permanent payment of marital debts (C.R.S. §14-10-113);
 - 4.) Address payment of support (permanent maintenance (C.R.S. §14-10-114) and child support (C.R.S. §14-10-115));
 - 5.) Address payment of attorney's fees (C.R.S. §14-10-119).

NOTE RELATED TO BANKRUPTCY: *In re the Marriage of Huff, 834 P.2d 244 (Colo.1992)* states:

The dual intention of C.R.S. §14-10-114 and § 14-10-113 "is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance." Uniform Marriage and Divorce Act § 308, 9a U.L.A. 348 official cmt. (1987). Only after the trial court has divided the property may the court determine whether maintenance is necessary to provide for the reasonable needs of the parties.

II. PROPERTY

1. **Law.**
 - A. C.R.S. § 14-10-113.
2. **Steps.**
 - A. Identify property.
 - B. Determine if marital or separate.
 - C. Value.
 - D. Divide.
 - A. Identify Property.
 - a. What is property?

- i. Real estate, personal property, vehicles, bank accounts, investment and financial accounts, stocks, bonds, deferred benefits, retirement accounts, pension benefits, some stock options, business interests, frequent flyer miles, contract rights, personal injury claims and other legal claims, some trust interests, tax refunds, escrows, security deposits, etc.
- b. What is not or might not be property?
 - i. Educational degrees, some stock options, some trust interests and anticipated inheritance.

B. Marital vs. Separate property.

- a. Marital property. C.R.S. § 14-10-113(3).
 - i. All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation, regardless of titling, unless it is separate; and
 - ii. Any increases in the value of the separate property of the spouse during the marriage.
- b. Separate property.
 - i. Property acquired by gift, bequest, devise, or descent;
 - ii. Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
 - iii. Property acquired by a spouse after a decree of legal separation; and
 - iv. Property excluded by valid agreement of the parties. C.R.S. § 14-10-112(2).

C. Valuation Issues.

- a. Value of property.
 - i. Property shall be valued as of the date of the decree or as of the date of the hearing on the disposition of

property. C.R.S. § 14-10-112(5); *IRM Balanson*, 25 P.3d 38 (Colo. 2001).

ii. Costs of sale.

1. The selling costs of a residence should not be subtracted from the gross equity without evidence of possible sale. *IRM Finer*, 920 P.2d 325 (Colo. App. 1996).

iii. Taxes.

1. The consideration of tax consequences in the division of property is within the Court's discretion. *IRM Goldin*, 923 P.2d 376 (Colo. App. 1996).

b. Valuation of pensions.

- i. Three basic approaches. *See IRM Hunt*, 909 P.2d 525 (Colo. 1995).

1. Net present value method.

- a. If the Court can determine the present value of the benefit, it may award the non-employee spouse a lump sum share of the benefit or offset the share with other marital property.

2. Deferred distribution method.

- a. Award the non-employee a specific share or percentage of the benefits when received.

3. Reserved jurisdiction.

- a. Court can reserve jurisdiction to divide the benefit to the time the employee actually receives the benefits.

4. Value of a pension is not usually the value on the pension statement. Consider using an expert to value.

- c. Valuation of businesses. *See IRM Thornhill*, 232 P.3d 782 (Colo. 2010) and "Business Valuations in Light of Thornhill," by Jennifer G. Feingold, Robert M. Glucksman, and Steven B. Epstein, *The Colorado Lawyer* (August 2009).

- i. Fair market value approach.
 - 1. The amount at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.
 - 2. Trial courts may, in their discretion, apply marketability discounts when valuing ownership interests in closely-held corporations in divorce proceedings. *IRM Thornhill*, 232 P.3d 782 (Colo. 2010).
- ii. Investment value approach.
 - 1. The value to a particular buyer, as compared with the population of willing buyers, as is the case in fair market value.
- iii. Fair value approach.
 - 1. Generally is a value prescribed by Courts for use in dissenting shareholder actions and corporate dissolutions.

D. Division of property.

- a. The law does not require an equal division of marital property.
- b. Equitable distribution. C.R.S. § 14-10-112(1).
 - i. The Court shall set apart to each spouse his or her property and shall divide the marital property, without regard to marital misconduct, in such proportions as the Court deems just after considering all relevant factors including:
 - 1. The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
 - 2. The value of the property set apart to each spouse;
 - 3. The economic circumstances of each spouse at the time the division of property is to

become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse with whom any children reside the majority of the time; and

4. Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes. C.R.S. § 14-10-112(1).

3. Special Issues.

A. Stock options. *In re Balanson*, 25 P.3d 28 (Colo. 2001).

- a. Issue of vesting is not determinative in ascertaining whether an interest in employee stock options constitutes marital property.
- b. Employee stock options constitute property, for purposes of dissolution proceedings, only when the employee has an “enforceable right” to the options.
- c. If employee stock options were granted in consideration for future services, the employee does not have enforceable rights under the option agreement.

B. Taxes.

- a. Maintenance.
 - i. Recapture rule.
 - ii. Other ways to potentially get a payment disqualified.
- b. Retirement.
 - i. Alternate payee is taxed on benefits received unless rolled over into a qualified IRA upon receiving the lump sum benefit.
 - ii. Alternate payee not subject to ten percent penalty.
- c. Brokerage accounts.
 - i. Gains and losses.
 - ii. How to allocate.
- d. Real estate.
 - i. How to allocate.
- e. Personal income taxes.
 - i. Filing jointly.
 - ii. Past tax returns.

- iii. Taxes due.
- iv. Allocation of deductions in year of dissolution of marriage.
- v. Carry forward losses.
- vi. Allocation of maintenance in year of dissolution of marriage.
- vii. Allocation of exemptions.

C. Property division cannot be changed.

- a. Court loses jurisdiction to reallocate property unless:
 - i. The parties or Court reserves jurisdiction; or
 - ii. A party fails to disclose assets or debts. C.R.C.P. Rule 16.2(e)(10).

II. SUPPORT

1. Maintenance.

Maintenance is one of the most contentious issues in DR cases. A judge's maintenance award may vary significantly from case to case.

A. Law: C.R.S. § 14-10-114; C.R.S. § 14-10-108, C.R.S. §14-10-122.

B. Maintenance is not an entitlement. It is a needs-based assistance program.

- i. The Court may order maintenance to one spouse if the spouse is unable to meet his or her own reasonable needs by him or herself.
- ii. Parties are obligated to support themselves.

C. Factors the Court considers when awarding maintenance: C.R.S. § 14-10-114(4).

- i. *General statutory factors* (3(a)(II)(B) and 3(c)) – In proceeding for maintenance, the court shall consider all relevant factors including but not limited to:
 - a. Financial resources and need of each spouse
 - b. Lifestyle
 - c. Property distribution
 - d. Income, employment/employability
 - e. Historical earnings
 - f. Duration of marriage

- g. Amount of temporary maintenance
- h. Age and health
- i. Significant economic or noneconomic contributions
- j. Nominal maintenance
- k. Any other fact court deems relevant

D. *Threshold* (3(a)(II)(C) and 3(d))

- i. Requesting spouse
 - a. lacks sufficient property
 - b. to meet reasonable needs
 - c. through appropriate employment

E. Non-modifiable vs. modifiable maintenance.

a. Non-modifiable.

- a. Parties can agree to contractual, non-modifiable maintenance (a defined maintenance amount for a defined term).
- b. The Court will not be able to modify contractual, non-modifiable maintenance.

b. Modifiable.

- a. The Court orders one party to pay maintenance to another party, the amount ordered can subsequently be modified upon a showing of changed circumstances so substantial and continuing as to make the terms of the existing maintenance award unfair. C.R.S. § 14-10-122(1)(a).

F. Tax considerations.

- a. Spousal maintenance payments are deductible from income by the payor and includable as income to the payee.
- b. All payments intended to be maintenance must terminate on the death of the payee.
- c. All payments intended to be maintenance must be paid under an Order of Court or written agreement that is made a Court Order.
- d. Be careful of recapture rules.
- e. Should not have same term as child support.

2. Child Support.

A. Law.

- i. C.R.S. § 14-10-115, C.R.S. § 14-10-122.

B. Issues around what numbers are used in the formula.

- i. Determination of income.
 - a. Gross income C.R.S. § 14-10-115(7).
 - i. Salaried.
 - ii. Bonuses/commissions/tips.
 - iii. In kind payments.
 - 1. If significantly reduces parent's personal living expenses.
 - iv. Self-employed.
 - 1. Gross receipts minus reasonable and necessary business expenses.
 - v. Dividends.
 - vi. Interest.
 - vii. Capital gains.
 - viii. Trust income.
 - ix. K-1s.
 - b. Exclusions from income C.R.S. § 14-10-115(7).
 - i. Government assistance programs.
 - ii. Child support received.
 - iii. Second jobs unless intertwined.
 - iv. Overtime (unless mandatory).
 - v. "Significant other" income.
 - c. Imputation of income.
 - i. Court can impute a parent income for child support purposes that is higher than the income they are actually earning.
 - ii. However, income cannot be imputed to a parent who is the primary custodian of a child under 30 months of age.
 - d. Higher incomes.
 - i. The statutory child support guidelines are for parents with combined gross monthly incomes of no greater than \$20,000 per month.
 - ii. If the combined gross incomes of parents is greater than \$20,000 per month, the Court may:
 - 1. Calculate incomes at a combined gross income of \$20,000; or

2. Extrapolate beyond the guidelines and use actual combined gross monthly incomes for child support purposes.
3. Threshold to extrapolation.

C. Modifiable C.R.S. § 14-10-122(1)(a) & (b).

- i. A child support order is modifiable if application of the child support formula would result in more than a ten percent (10%) change in the amount of support due per month.

III. PARENTING ISSUES

1. Law.

A. C.R.S. § 14-10-124, C.R.S. § 14-10-129, § 14-10-131.

B. Allocation of parental responsibilities.

i. Decision-making authority.

a. Joint decision-making authority.

1. If parents have joint parental responsibility of a child, they will share decision-making responsibility for that child's health, education, religion and general welfare.
2. If the parents cannot agree on how to allocate parental responsibility, the Court will make the decision based on the best interest of the child and taking into consideration, C.R.S. § 14-10-124(1.5)(b):
 - i. The ability of the parents to cooperate and make decisions jointly;
 - ii. Whether the past pattern of involvement of the parents with the child reflects a system of values, time commitment and mutual support that would indicate an ability as mutual decision makers to provide a positive and nurturing relationship with the child;

- iii. Whether an allocation of mutual decision making responsibility on any one or a number of issues will promote more frequent or continuing contact between the child and each of the parents;
- iv. Whether one parent has been a perpetrator of child abuse or neglect under the law of any state; and
- v. Whether one of the parents has been a perpetrator of spousal abuse.

ii. Parenting time.

- a. Parenting time refers to the actual time the child is in the care and control of each parent.
- b. If parents cannot decide on parenting time, the Court will make the decision based on the best interest of the child, and take into account the following factors, C.R.S. § 14-10-124(1.5)(a):
 - 1. The wishes of the child's parents as to parenting time;
 - 2. The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule;
 - 3. The interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests;
 - 4. The child's adjustment to his home, school, and community;
 - 5. The mental and physical health of all individuals involved;
 - 6. The ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent;
 - 7. Whether the past pattern of involvement of the parents with the child reflects a system of values, time commitment, and mutual support;

8. The physical proximity of the parents to each other as this relates to the practical considerations of parenting time;
9. Whether one of the parents has been a perpetrator of child abuse or neglect under the law of any state; and
10. Whether one of the parents has been a perpetrator of spousal abuse.

iii. Relocation issues.

- a. Pre-decree. *Spahmer v. Gullette*, 113 P.3d 158 (Colo. 2005) and C.R.S. § 14-10-124(1.5)(a).
 1. In an initial determination to allocate parental responsibilities, a Court has no statutory authority to order a parent to live in a specific location. The Court must accept the location in which each party intends to live and allocate parental responsibilities accordingly in the best interests of the child considering all relevant factors in C.R.S. § 14-10-124(1.5)(a).

C. Experts.

- i. Child and Family Investigators (CFI). C.R.S. § 14-10-116.5; Chief Justice Directive 04-08.
 - a. Appointed to investigate, report and make recommendations taking into account the best interests factors.
 - b. \$2,000 presumptive cap unless prior Court approval is obtained in the form of a written order with specific findings concerning the extraordinary circumstances that justify the excess fees.
 - c. \$500 presumptive cap on total testimony and preparation time fees unless prior Court approval is obtained in the form of a written order with specific findings concerning the extraordinary circumstances that justify the excess fees.
- ii. Parental Responsibilities Evaluation (PRE) C.R.S. § 14-10-127.

- a. Mental health professional to produce a report regarding disputed parental responsibilities issues.
- b. Can conduct psychological testing if an order to do so.

D. Parenting plans.

- i. Child driven.
 - a. Devise a plan around children's schedules.
- ii. Parenting plans shall be in the best interests of the child(ren).

E. Modification.

- i. Modification of parenting time C.R.S. § 14-10-129.
 - a. Standard.
 - i. The Court may modify a parenting time order where such order is in the child's best interests.
- ii. Substantial modification by Court C.R.S. § 14-10-129(2).
 - a. Changing the majority time parent only if the child's present environment endangers the child's physical health or significantly impairs the child's emotional development, and the harm likely to be caused by the change in environment is outweighed by the advantage of the change to the child.
- iii. Modification of decision-making authority C.R.S. § 14-10-131.
 - a. Timing issue.
 - i. Cannot file within 2 years of filing a motion to modify decision-making authority unless the child is endangered.
 - b. Standard for Court to modify.
 - i. A party has consistently consented for the other party to make individual decisions for the child.
 - ii. The retention of the current decision-making responsibility order would endanger the child's physical health or significantly impairs the child's emotional development, and the harm likely to be caused by the change in environment is outweighed by the advantage of the change to the child.

- iv. Relocation issues.
- a. Post-decree. *IRM Ciesluk*, 113 P.3d 135 (Colo. 2005), C.R.S. § 14-10-129(2)(c) and C.R.S. § 14-10-124(1.5)(a).
 - i. Both parents now share equally the burden of demonstrating what is in the child's best interests.
 - ii. There is no presumption in favor of either parent.
 - iii. The Court must consider the best interests factors under C.R.S. § 14-10-124(1.5)(a) as well as the following factors under C.R.S. § 14-10-129(2)(c):
 - 1. The reasons why the party wishes to relocate with the child;
 - 2. The reasons why the opposing party is objecting to the proposed relocation;
 - 3. The history and quality of each party's relationship with the child since any previous parenting time order;
 - 4. The education opportunities for the child at the existing location and at the proposed new location;
 - 5. The presence or absence of extended family at the existing location and at the proposed new location;
 - 6. Any advantages of the child remaining with the primary caregiver;
 - 7. The anticipated impact of the move on the child;
 - 8. Whether the court will be able to fashion a reasonable parenting time schedule if the change requested is permitted; and
 - 9. Any other relevant factors bearing on the best interest of the child.

F. ADR clauses/conflict management.

- i. Mediation.
- ii. Arbitration.
- iii. Parenting Coordinator C.R.S. § 14-10-128.1.
 - a. By agreement of the parties or Court Order.

- b. 2 year term unless extended by agreement of the parties.
- iv. Decision-Maker C.R.S. § 14-10-128.3.
 - a. Consent of all parties required.
 - b. 2 year term unless extended by the parties.

**THE IMPACT
OF
BANKRUPTCY ON FAMILY LAW PROCEEDINGS**

- I. Introduction
- II. Family Law Basics
 - A. Divorce - Basics for Divorce - Family Law Primer
- III. Automatic Stay
 - A. Specific Examples of the Stay's Applicability to Family Law Proceedings
 - 1. When Does a Bankruptcy Filing Stay or Stop the Divorce?
 - a. Timing Considerations
 - 2. The Impact of the Filing of the Bankruptcy upon the Non-filing Spouse.
 - 3. Temporary Matters Prior to Permanent Orders.
 - 4. Temporary Orders
 - a. Temporary Maintenance
 - b. Temporary Child Support
 - c. Temporary Allocation of Parental Responsibilities
 - d. Temporary Parenting Time Plan
 - e. Temporary Award of Marital Property
 - f. Temporary Award of Payment of Marital Debt
 - g. Temporary Attorney Fees and Costs
 - 5. Issues to be Aware of.
 - a. Fraudulent Conveyances
 - 6. Exemptions in Bankruptcy.
 - a. Family Support Obligation Still Only a Claim.
 - b. Child Support Reduced to Proceeds
- IV. Appendix
 - A. 11 USC §362
 - B. Definition of Domestic Support Obligation
 - C. C.R.S. §13-54-102.5.
 - D. 11 USC §523. Exceptions to Discharge
 - E. 11 USC §523(A)(5)
 - F. 11 USC §523(A)(15)
 - G. 11 U.S.C. §548(a)(1)
 - H. *In re the Marriage of Weis*, 09 SA 126 (Colo. 2010)
 - I. Form Motions For Relief from Stay
 - J. *In re Gazzo*, 505 B.R. 28 (Bankr. D. Colo. 2014)

I. INTRODUCTION

Bankruptcy can be indicated in those situations where a marriage or other domestic partnership is dissolving due to the financial strain of all of the expenses of separation. The timing of a bankruptcy can be crucial and it is important that domestic relations counsel have a clear understanding of the impact of bankruptcy on state law proceedings.

The Bankruptcy Code was substantially amended in 2005. Those revisions, which were quite major, are referred to as the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). BAPCPA had the effect of creating additional restrictions with respect to what is considered “marital debt” and thus potentially not dischargeable.

Traditionally, any debt attributable to support for either a child or a spouse has been exempted from the Bankruptcy Discharge. The Discharge is the final Order of the Bankruptcy Court which extinguishes all liability for any obligations which have been duly scheduled on a Bankruptcy Petition Schedules, other than those obligations which are nondischargeable. One of the nondischargeable items is of course child support or spousal support, which we refer to as “maintenance” in Colorado. Any amounts due for child support or maintenance are nondischargeable under any Chapter of the Bankruptcy Code and are referred to as “domestic support obligations.”

An additional area of potential nondischargeability arises with respect to debts and obligations for payment rendered against an individual by a state domestic relations court. All that is required for the debt to be potentially nondischargeable is for the obligation have been awarded either via a separation agreement or contested permanent orders. Once that occurs, it creates rights in a spouse or former spouse to proceed against a potential or actual Chapter 7 debtor for the collection of those debts notwithstanding the filing of a bankruptcy.

Some debts which arise during a marriage are joint in nature. Examples of these joint debts include such common sense items as joint credit cards where both spouses are signors. Other examples of this include medical debts. Colorado recognizes what is known as the Family Necessaries Doctrine. Under the Colorado Family Necessaries Doctrine, which is codified at C.R.S. § 14-6-1110, a creditor may seek payment from either spouse for any debt incurred for a “family necessary.” This is a form of joint and several liability, meaning the creditor is entitled to go against either spouse for payment, regardless of which spouse incurred the debt.

If the debtor has a debt which is joint and several with a spouse or former spouse, as explained in greater detail above, and the debtor files a Chapter 7 Liquidation Bankruptcy, careful consideration must be paid to the permanent orders or the separation agreement prior to filing a bankruptcy. If the joint debt is awarded to the debtor by the Court, whether it is by the Court’s own initiative or by virtue of a separation agreement that the debtor voluntarily entered into, and the creditor pursues a spouse or former spouse for the debt, then that former spouse may seek redress from the debtor in the state domestic relations court if he or she is sued.

Therefore, even though the Chapter 7 Bankruptcy would give a debtor relief with respect to a given creditor, the debtor's non-filing spouse or former spouse can require indemnification in the domestic relations court. Also the filing of a bankruptcy can delay family law court proceedings due to the automatic stay.

These materials are intended to provide some guidance as to the various issues that arise at the intersection of divorce and bankruptcy.

II. FAMILY LAW BASICS - BRIEF OVERVIEW OF PROCESS OF DIVORCE PROCESS

Filing and Service of the Petition, Entry of Decree. To give a brief overview of the divorce process, divorce in Colorado is no-fault. Therefore, the only grounds to dissolve a marriage is irretrievable breakdown of the marriage. It is sufficient if only one party believes that the marriage is irretrievably broken.

After the filing of a divorce, the Court may enter a Decree of Dissolution the soonest at 91 days after both filing and upon service of the other party. The person filing the divorce petition is called the Petitioner, and the other party is either called the Co-Petitioner (if they sign-off on the Petition) or the Respondent if that person has to be individually served. Who is who with respect to who filed the Petition is irrelevant and makes no difference in the outcome of the proceeding. A Decree of Dissolution cannot be entered any sooner than after 90 days from filing, thus technically on the 91st day.

Mandatory Disclosures. As part of the divorce, Mandatory Financial Disclosures are going to be required by both parties. Each party is required to complete the Sworn Financial Affidavit and provide all documents as described in the *Notice of Disclosure Requirement*. Each party is required to comply with Rule 16.2 no later than 42 days after the Petition was signed by the other party, the other party signed a Waiver and Acceptance of Service, or the other party was served with the Petition and Summons.

PURSUANT TO RULE 16.2 of Colorado Rules of Civil Procedure, both parties are required to make the following disclosure to the Court and opposing counsel.

Temporary Orders. After the divorce is filed, it is the party/litigant's job to move the divorce forward. Since a divorce cannot be completed sooner than 91 days from filing and service, there are temporary orders which are available. As the name implies temporary orders is an expedited (somewhat) proceeding which is designed to give parties some relief for temporary financial and parental responsibilities issues. Custody in Colorado is now referred to as parental responsibilities. Parental responsibilities consist of both decision-making for a minor child and also parenting time. These issues can be addressed at temporary orders and are also addressed at permanent orders. If a party requests temporary orders, which again are optional and not mandatory, the Court will typically require the parties to attend mediation. Mediation is discussed below and it is possible that mediation can be required multiple times in a case.

Mediation. Every divorce case filed with the Court that has any pending issues is ordered to mediation, unless excepted from this requirement. Mediation is a confidential process whereby a trained neutral third party assists disputing parties to reach their own resolution. The costs of mediation are typically shared equally by the parties.

Preparing for Permanent Orders. Parties are allowed to enter into Separation Agreements freely and can also enter into their own parenting plans which address decision-making and parenting time. With respect to agreements concerning parental responsibilities, the Court must find that the agreement is in the child's best interests; with respect to all other agreements, the Court must find that the agreements are fair and equitable, and not unconscionable. Many of these form agreements are available on the State Judicial Website link below:

<http://www.courts.state.co.us/>

Trial Management Certificate. When going to Court the parties are required to provide the Judge with an advisory statement as to the issues and the undisputed facts. This is done by providing the Court with a Trial Management Certificate. The Trial Management Certificate lists for the Court the issues for it to decide, lets the Court know how many witnesses there will be from each side, and also lets the Court know that the parties have exchanged exhibits and other relevant information. The Certificate must be approved by both parties.

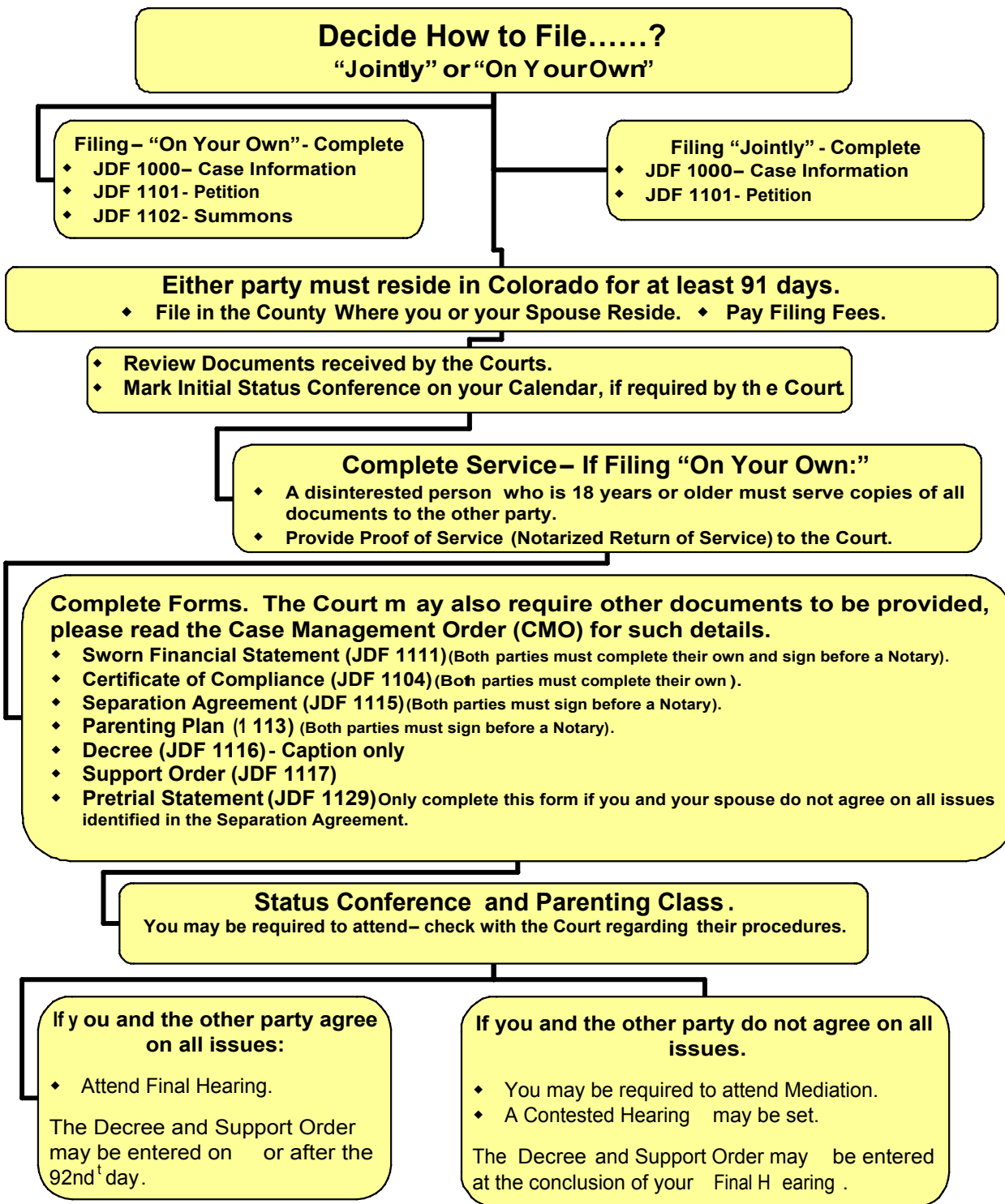
Permanent Order. Permanent Orders is the hearing that is designed to dissolve the marriage and enter permanent orders regarding property (which includes debt), addresses parental responsibilities if there is a minor child, and also to enter financial support orders if appropriate. This means either child support or maintenance. Colorado's Maintenance Statute was revised for cases filed after January 1, 2014, to adopt a formulaic approach to be used as guidance, but while not mandatory in nature, may tend to result in an award of more maintenance orders and more predictable maintenance orders. Each of these items will be discussed in somewhat more detail below.

Timeline

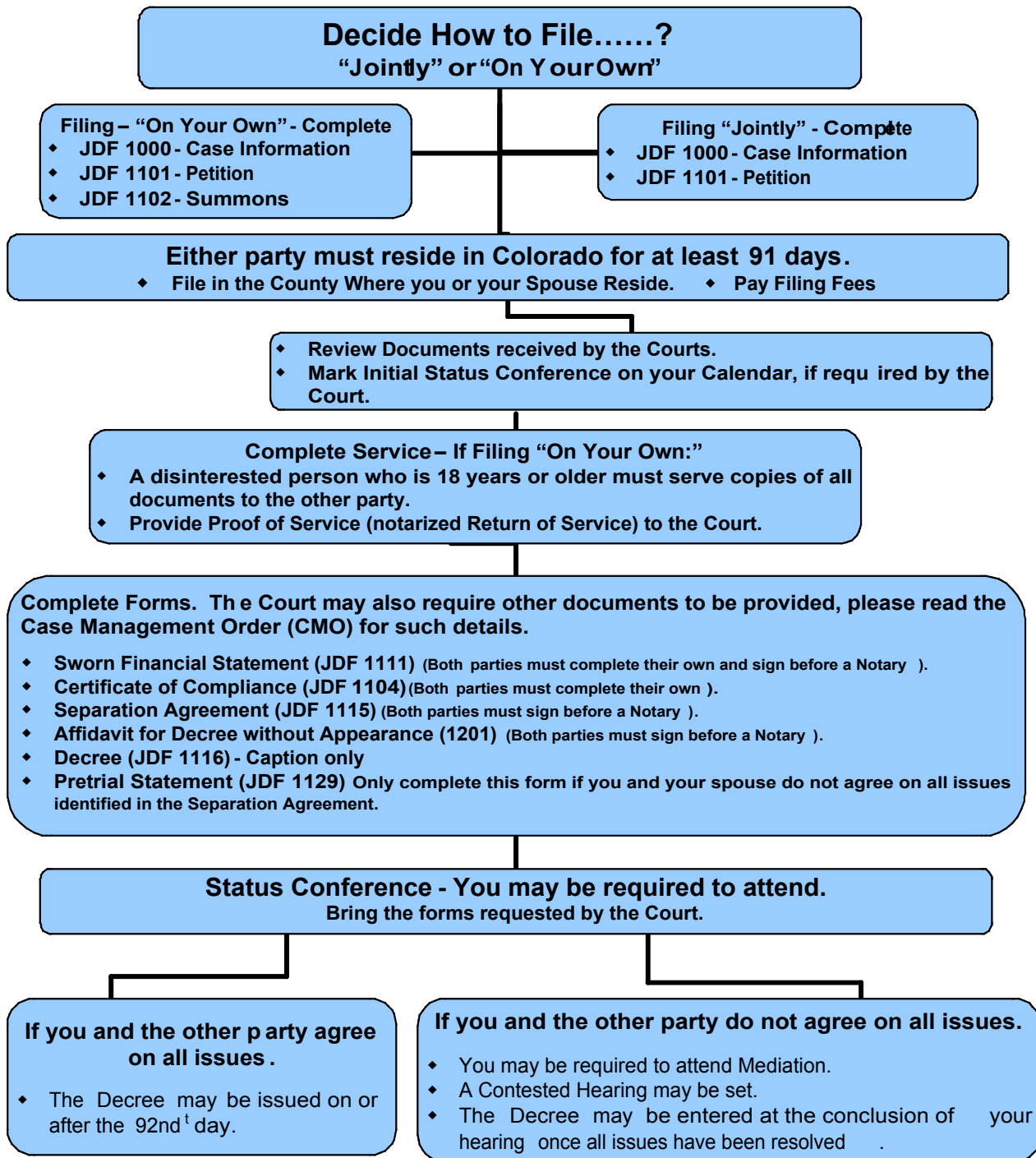
Attached a flow-chart outlining the divorce process with children, and without. Basically, the following is the timeline:

- Filing of Case.
- Service of process on Respondent or Co-Petitioner filing.
- Mandatory Disclosures - Due 42 days from the date of filing.
- Temporary Orders available. (Optional)
- Mediation
- Witness Disclosure (63 days prior to hearing or as ordered by Court).
- Trial Management Certificate (7 days prior to hearing).
- Permanent Orders
- Post Decree Proceedings to enforce permanent orders
- Post Decree Contempt proceedings
- Post Decree Motions for Modifications of Domestic Support Obligations

Guide to Getting a Divorce or Legal Separation With Children of this Marriage



Guide to Getting a Divorce or Legal Separation With No Children of This Marriage



III. Automatic Stay

A. Specific Examples of the Stay's Applicability to Family Law Proceedings

To begin making sense the following materials will discuss the existence of the automatic stay, exceptions to the automatic stay, dischargeability of divorce-related obligations, and the impact of the bankruptcy of bankruptcy filing on a divorce proceeding.

1. When Does a Bankruptcy Filing Stay or Stop the Divorce?

Of all of the protections of the Bankruptcy Code, the Automatic Stay is perhaps one of the most powerful protections for a debtor in bankruptcy. Immediately upon the filing of bankruptcy, an automatic stay arises, the scope of which is broad, which prevents the bringing of any action to collect a debt, the maintenance of any action to collect a debt, or the continuing collection of any action to collect a debt. **11 U.S.C. §362(a)(1)**. The following actions are affected by the filing of the bankruptcy:

Actions that are affected

- commencement or continuation, ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title (11 USC §362(a)(1))
- the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title (11 USC §362(a)(2))
- any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate (11 USC §362(a)(3))
- any act to create, perfect, or enforce any lien against property of the estate (11 USC §362(a)(4))

The filing of the bankruptcy will impose the automatic stay upon a continuation of divorce proceedings subject to an exception concerning the following: actions for establishment and modification of domestic support obligations, actions concerning child custody or parenting time/visitation matters, actions regarding domestic violence, actions for the collection of domestic support obligations *from property that is not property of the Bankruptcy Estate*.

2. Property of the Bankruptcy Estate

a. 11 U.S.C. §541: The filing of a bankruptcy case creates the bankruptcy estate, which includes “all legal or equitable interests of the debtor in property, as of the date of filing (11 U.S.C. §541(a)).

- i. As of the date of filing of a bankruptcy petition, the bankruptcy court has

absolute authority and jurisdiction to determine what property belongs to the estate. 28 U.S.C. §1471(e)

1. *In re Ebel*, 144 B.R. 510 (D. Colo. 1992) -
2. *In re Gardner*, 913 F.2d 1515 (10th Cir. 1990)

ii. A debtor's property rights are created and defined by the law of the state in which the property is located. *In re Fordu*, 210 F.3d 693 (6th Cir. 1999) – Under Ohio law, non-filing spouse's lottery winnings were marital property and therefore part of her husband's bankruptcy estate, filed when divorce proceedings were pending; *Nobleman v. American Savings Bank*, 508 U.S. 324, 329, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993)

iii. As of the filing of a dissolution of marriage action, each party's interests in marital property vest, and are analogous to those of one party who can establish a resulting trust in the property of the other party. *In re Questions Submitted by the U.S. District Court, for the District of Colorado*, 184 Colo. 1, 517 P.2d 1331, 1335 (1974).

iv. Income of the debtor in a Chapter 13 is also property of the bankruptcy estate to the extent the income is necessary to fund the Chapter 13 plan. *In re Vitt*, 250 B.R. 711 (Bankr. D. Colo. 2000) (SBB – estate transformation theory adopted, and only amounts necessary to perform on terms of plan remained in estate after confirmation).

b. **Bankruptcy Before Divorce:** If the bankruptcy case is filed prior to the commencement of the dissolution action, the bankruptcy estate will include all legal or equitable interests of the debtor in property; but will not include any interest in the separate property interests of his spouse.

c. **Divorce Before Bankruptcy:** If the bankruptcy case is filed, after a dissolution action has been filed, the bankruptcy estate will include all legal or equitable interests of the debtor in property, including the debtor's vested interest in marital property.

i. **Trustee in bankruptcy succeeds to a debtor's right to assert** or waive the attorney-client privilege. *In re Inv. Bankers, Inc.*, 30 B.R. 883 (Bankr. D. Colo. 1983).

One issue which has arisen is the extent to which a bankruptcy Trustee may seek to intervene in a state domestic relations action. One such instance where intervention was allowed was *Todd v Todd*, 291 P. 2d 386, 133 Colo. 1 (Colo. 1955) The *Todd* Court recognized that "the Trustee in Bankruptcy has the status of a lien creditor as of 'the date of bankruptcy' and 'shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon * * *.' Consequently the Trustee as of the date of the bankruptcy, is vested with all the rights, remedies and powers of a judgment creditor then holding an execution duly returned and unsatisfied." 291 P. 2d at 387. Prior to permanent orders in divorce, an involuntary bankruptcy was commenced against the husband. The bankruptcy trustee filed for partition of the marital home and that claim was determined by the divorce court. The court found that the wife was entitled to her one-half interest in the property, plus her homestead rights, and not vested

with any other rights superior to the bankruptcy trustee. The court ordered the property sold & proceeds divided accordingly. Wife appealed and the Supreme court affirmed the judgment of the trial court

Not stayed are the following actions:

11 U.S.C. §362(b)(2)

(A) of the commencement or continuation of a civil action or proceeding

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

While the exceptions to the automatic stay above do seem voluminous, the filing of bankruptcy does stay in the divorce context establishing any orders concerning property which is property of the bankruptcy estate. In almost any domestic relations matter there is likely to be some property that either is, or potentially could be property of the bankruptcy estate.

The bankruptcy estate consists of any interest in property of the debtor, whether real,

legal or equitable, in existence as of the date of filing. 11 U.S.C. §541(a)(1). It is likely that somewhere in the domestic relations property and debt scheduled will be some form of property which will belong to the bankruptcy estate. The stay is effective with respect to such property in the domestic relations context. 11 U.S.C. §362(a).

There is an additional complication that can arise with the filing of the bankruptcy which can delay orders concerning alimony or maintenance depending upon a particular jurisdiction. In some jurisdictions, notably Uniform Dissolution of Marriage Act Jurisdiction, it is common for the statutory framework for arriving at the maintenance order to include the domestic relations court's consideration of its orders concerning the division of marital property and the debt prior to entering a maintenance order. Specifically, some jurisdictions may require that, prior to considering an alimony or maintenance award, the Court consider its orders concerning the payment of debts, the award of property, and the payment of attorney fees. In those jurisdictions where this consideration must precede a consideration of the award of maintenance, the filing of the bankruptcy will in fact prevent the entry of a maintenance order. *See In re the Marriage of Huff*, 834 P.2d 244 (Colo. Sup. 1992).

Whether there is a pending contempt proceeding.

Contempt is a *quasi*-criminal proceeding which can be initiated before the domestic relations court for a party's alleged failure to follow court orders. While you will necessarily have to consult your jurisdiction's specific rules, generally contempt consists of the failure of a party to follow known court orders where the party has the present ability to comply. *See, e.g., FRCP 107*. Because orders issuing from a domestic relations court will touch on a variety of areas, it may be important for you to determine whether or not this is a factor affecting the timing of the bankruptcy filing by determining the factual basis for the contempt.

Consider the Court in *In re Gazzo*, 505 B.R. 28 (Bankr. D. Colo. 2014). "The automatic stay under 11 U.S.C. §362(a) should be broadly construed in favor of the Debtor and exceptions thereto should be applied narrowly." *In re Gazzo*, 505 B.R. 28 (Bankr. D. Colo. 2014) – Defendants, ex-spouse of Debtor and her counsel, brought contempt action v Debtor in domestic court for non-payment of DSOs. On the eve of the contempt hearing in domestic court, Debtor filed chapter 11; and, simultaneously, he filed a motion to hold proceeding in abeyance and to vacate hearing in domestic court. Defendants, despite bankruptcy stay, opposed Debtor's motion to hold proceeding in abeyance, and domestic court proceeded with its hearing, the day after the bankruptcy petition was filed, and considered: motion to hold proceeding in abeyance, allegations of contempt by Debtor, and appointment of a liquidating receiver for Debtor's business interests. Defendants argued that they were seeking only "criminal contempt." Defendants argued for appointment of a receiver for when the property "falls out of the bankruptcy estate ... ceases to be property of the estate it would come into the hands of the receiver." Defendants persistently argued for their positions, despite the absence of precedential authority and misgivings expressed by the domestic court. The domestic court did grant Defendant's request for an injunction enjoining Debtor from disposing of any property not of the bankruptcy estate. Defendants request that the domestic court grant costs and qualify them as DSO in order to exempt that order from the auto stay was granted, arguing that such was a

modification of a DSO, excepted from the auto stay. Applying *In re Weis*, 232 P.3d 789 (Colo. 2010), the bankruptcy court held that the contempt proceeding, being remedial in nature, was not a criminal proceeding, excepted from the auto stay, and the creditor could not turn it into a criminal proceeding by merely seeking punitive sanctions. Further applying *In re Weis*, the court held that absent a specific finding of the availability of non-estate funds to pay a DSO, the exception for payment out of non-estate property doesn't apply. Finally, the bankruptcy court held that order for costs as DSO was not an establishment or modification of a DSO, but as the domestic court's order clearly stated, it was intended as an order to collection a DSO from non-estate property.

If a given debt is a DSO, then that debt is nondischargeable under any chapter of the bankruptcy code. **11 U.S.C. §523(a)(5)**(excepting from discharge domestic support obligations)¹.

The automatic stay will not stay actions with respect to actions to modify support, determined paternity, or custody/parenting time actions, and thus if the contempt is in the nature of what basically boils down to a custody dispute, the timing of the filing of the bankruptcy is completely and totally irrelevant. However, if the basis for the contempt is for failure of the alleged contemnor to follow the property and/or debt portions of the permanent orders, then the automatic stay may be implicated and thus you may want to file the bankruptcy specifically to prevent a contempt hearing from proceeding.

Whether or not the filing of the bankruptcy will prevent a particular hearing is dependent upon additional factors, including whether or not the contempt is punitive, which is usually interpreted as a *quasi*-criminal proceeding, or whether or not the contempt is purely remedial and thus more civil in nature. Under this circumstance the stay may apply to the punitive contempt proceeding, depending on a variety **11 U.S.C. §362(b)(1)2**; see also *In re Gruntz*, 202 F.3d 1047 (9th Cir. 2000)(finding that the exception to the automatic stay for criminal actions applies even if the intent of the action is to basically collect a debt); *In re Musilli*, 398 B.R. 447 (E.D. Mich., Nov. 25, 2008)(District Court on appeal from the bankruptcy court upholding the bankruptcy court's finding that relief from stay was appropriate remedy to allow party

¹ See also **11 U.S.C. §727** (discussing the discharge and noting exceptions), **§1141** (discussing discharges afforded under Chapter 11), **§1228(a)** (noting exception to discharge in Chapter 12 for DSO debt), **§1228(b)**, and **§1328** (excepting from the Chapter 13 discharge DSO debt).

² **§ 362(b)(1)** provides an exception to the automatic stay as follows: A under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor@ thus if the nature of the contempt is punitive and thus quasi-criminal, the stay may not apply. Best practice would always be to seek relief from stay, however, if you are representing the party bringing the contempt.

bringing contempt to pursue contempt in state court as contempt was criminal in nature).

It is worth noting that even if the contempt is punitive and thus *quasi*-criminal, if the relief requested by the party bringing the contempt action includes payment of debt or the surrender of any property, the stay would still be implicated if the property sought could potentially be property of the bankruptcy estate. *See In re Pearce*, 400 B.R. (Bankr. N.D. Iowa, Jan. 27, 2009)(noting the split among courts in the application of §362(b)(1) in criminal proceedings with some courts condoning any conduct which occurs in the state court criminal proceeding [presumably including contempt if punitive in nature]).

Once again, the facts should be developed as to the basis of the contempt and you should consult the laws of your jurisdiction concerning the potential remedies.

As a good rule of thumb, whenever you are in doubt as to whether the stay applies seek relief from the stay. A sample Motion for Relief from Stay is included in the appendix. Local Bankruptcy Rule 4001 also applies.

3. Temporary Matters Prior to Permanent Orders

When people separate and divorce is imminent, typically there is a lot of expense. Basically you are taking one household and dividing it multiplying the expenses and debt is necessarily incurred in many instances. Therefore, collection proceedings can occur before the ability to have permanent orders. It is natural for a party being sued to want to not be garnished and therefore to seek protection in the bankruptcy.

The automatic stay will affect any proceeding to the extent that the proceedings seek to affect property of the bankruptcy estate. This could be in the nature of an award of property at permanent orders or even an award of the temporary use of property at temporary orders. In a Chapter 13, property of the bankruptcy estate also includes the post-petition earnings of the debtor.

4. Temporary Orders

In a temporary orders proceeding, typical issues include:

- Temporary Maintenance
- Temporary Child Support
- Temporary Allocation of Parental Responsibilities
- Temporary Parenting Time Plan
- Temporary Award of Marital Property
- Temporary Award of Payment of Marital Debt
- Temporary Attorney Fees and Costs

Of these issues, the question should be as to the applicability of the automatic stay, whether or not the temporary orders would impact or affect the property of the bankruptcy estate. Let's turn to each of these matters and see if the answer is yes, therefore the same applies, and if so, whether there is an

applicable exception to the estate.

a. **Temporary Maintenance.** An existing order for maintenance is not affected by the automatic stay since it is an exception. 11 USC §362(b). However, if the proceeding is one to modify maintenance, then the stay may apply if the debtor has sought relief in Chapter 13. If the proceeding is a proceeding to establish Maintenance and the debtor filed under Chapter 7, then this proceeding would not be stayed.

b. **Temporary Child Support** An existing order for child support is not affected by the automatic stay since it is an exception. 11 USC §362(b). However, if the proceeding is one to modify child support, then the stay may apply if the debtor has sought relief in Chapter 13.

c. **Temporary Allocation of Parental Responsibilities** There would be no stay for the allocation of parental responsibilities.

d. **Temporary Parenting Time Plan** There would be no stay for the allocation of parenting time.

e. **Temporary Award of Marital Property** The award of the use of marital property may be an award of property in which the bankruptcy estate has an interest. Therefore, it would be subject to the automatic stay whether the case is filed under Chapter 7 or 13.

f. **Temporary Award of Payment of Marital Debt** The award of the allocation of marital debt may be an award of debt in which the bankruptcy estate has an interest. Therefore, it would be subject to the automatic stay whether the case is filed under Chapter 7 or 13.

g. **Temporary Attorney Fees and Costs** In a Chapter 7, if the temporary orders hearing is after the debtor has filed the bankruptcy, it would not be a violation of the stay for the fees to be awarded by a Colorado Court pursuant to **CRS §14-10-119**. This is because the debt

would be considered post-petition and it would not have been subject to the automatic stay in any event. If the debtor filed under Chapter 13, an award of attorneys' fees may be a violation of the automatic stay since the bankruptcy estate includes amounts necessary to be paid to fund the debtor's Chapter 13 plan.

5. Issues to be Aware of.

Practitioners should be aware of a variety of issues over-and-above the applicability of the automatic stay. The ideal outcome of any divorce or any family law proceeding is for the matter to be resolved by the parties through stipulation. In the case of a divorce, that stipulation is reduced to writing in the form of a Separation Agreement. Parties in fact are encouraged to reach their own resolution by way of Court-Ordered mediation. Even if the matter proceeds to contested permanent orders, the parties are required to file position statements setting forth the request.

In the typical case that settles, it is assumed that the settlement was reached through negotiation and compromise. Resolution of a divorce is generally an exercise in horse trading with each party compromising certain claims to receive the benefit in other areas. While this is good public policy and should be encouraged, it does pose a potential risk if one of the parties is filing bankruptcy and makes certain agreements with that knowledge.

a. **Fraudulent** Conveyances The Trustee, whether Chapter 7 or Chapter 13, can recover fraudulent transfers. The Trustee can proceed under two separate basis, one contained within the Bankruptcy Code and one basis under state law. The Bankruptcy Code provides for the recovery of fraudulent transfers with a two year statute of limitations, see *11 U.S.C. §548(a)(1)*, but by virtue of the incorporation of a State-based fraudulent transfer act being applicable, the State's applicable statute of limitations will also apply. That limitation will generally be four years, but you should of course reference the statute of limitations for your State's version of the Uniform Fraudulent Transfer Act.

6. Exemptions in Bankruptcy

Anytime bankruptcy is contemplated, the debtor must necessarily engage in pre-bankruptcy planning. Debtor and counsel are required to disclose all known property, and as part of the process claim any exemptions which are applicable and appropriate. Colorado has opted-out of the Federal exemptions thus only Colorado exemptions apply. It is very important to understand exemptions that are available, particularly the unique ones that may be created in a family law case, and to not only accurately claim the exemption, but to maintain the exemption. Domestic Support Obligations are exempt. This includes maintenance and child support. See *C.R.S. §13-54-102.5 and §13-54-102*.

The necessity to protect the exemption arises if the support has already been received.

a. **Family Support Obligation Still a Claim Only.** In Colorado the requirement to pay child support based upon a Support Order creates a periodic obligation, usually monthly, which is due upon the date stated in the Support Order. *CR.S. §14-10-122*. Therefore, as each installment becomes due but is unpaid, it is a judgment. It is somewhat common for these payments to become in arrears and to be owed as of the date of filing. If so, and if the claim has not yet been paid, then the claim of exemption with nothing more should suffice to preserve the exemption. The proceeds, if ever received at a later date, would be exempt.

b. **Child Support Reduced to Proceeds.** Colorado law specifies how to preserve a claim of exemption with respect to child support proceeds. In order for the exemption to apply with respect to the proceeds, the recipient of child support must open a custodial account and specifically denominate the account as child support. If any other funds are placed into the account, and commingling occurs, then the exemption is lost. *Id.*

IV. Appendix

- A. 11 USC §362
- B. Definition of Domestic Support Obligation
- C. C.R.S. §13-54-102.5
- D. 11 USC §523 Exceptions to Discharge
- E. 11 USC §523(A)(5)
- F. 11 USC §523(A)(15)
- G. 11 U.S.C. §548(a)(1)
- H. In re the Marriage of Weis, 09 SA 126 (Colo. Sup. Ct)
- I. Form Motions For Relief from Stay
- J. In re Gazzo, 505 B.R. 28 (Bankr. D. Colo. 2014)

Bankruptcy and Divorce

David C. Hoskins, Attorney at Law
Denver, Colorado

I. Dischargeability of Debt

a. **Chapter 7 discharge** - Generally, under 11 U.S.C. §727 (a) an individual debtor will be granted a discharge of all debt, with notable exceptions (11 U.S.C. §523(a)), including: Debts arising out of divorce (11 U.S.C. §523(a)(5) & (15) - See Appendices C & E)

i. **Domestic Support Obligations** - Since enactment of the 2005 amendments to the Bankruptcy Code, 11 U.S.C. §523(a)(5) has excepted from discharge “domestic support obligations,” as defined by 11 U.S.C. § 101(14A) – See Appendix A - Selected Definitions

1. **Choice of Law** - Determination of whether a debt is a Domestic Support Obligation is a matter of federal law. - “The determination of whether an award arising out of marital dissolution proceedings was intended to serve as an award for alimony, maintenance or support, or whether it was intended to serve as a property settlement is a question of fact to be decided by the bankruptcy court.” *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997).” It’s a matter of federal law, not state law. *In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987)
2. **Pre-BAPCPA precedent still applies** - “In determining whether an obligation constitutes a DSO, Courts have been looking to the interpretation of DSOs in case law involving the dischargeability of debts under § 523(a)(5), as enacted prior to the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). *In re Dudding*, No. 10-10557, 2011 WL 1167206, at *5 (Bankr. D. Vt. Mar. 29, 2011),” as cited in *In re Krueger*, 457 B.R. 465 (Bankr. D. S.C., Sept. 19, 2011); see also *In re Fitch*, 2:12-bk-21191 (Bankr. E.D. KY, Jan. 25, 2013) – in the 6th Circuit, pre-BAPCPA cases control for determining debt *in the nature of support* and “. . . courts continue to apply pre-BAPCPA case law to determine whether an obligation is in the nature of support.” *In re Taylor*, 737 F.2d 670, Footnote 4 (10th Cir., Dec. 9, 2013)

(A) **Is the debt “in the nature of” support?** - The bankruptcy court “should look beyond the label the parties have given to a particular debt and determine whether the debt is actually in the nature of alimony or support. *Cummings v.*

Cummings, 244 F.3d 1263, 1265 (11th Cir. 2001); *In re Goin*, 808 F.2d 1391, 1393 (10th Cir., 1987). Thus, a debt is a domestic support obligation if the parties intended it to function as support or alimony, even if they called it something else. *Id.* The court's decision should also be informed by state law. *Id.* But there are other factors a court should consider as well. They include: (1) the agreement's language; (2) the parties' financial positions when the agreement was made; (3) the amount of the division; (4) whether the obligation ends upon death or remarriage of the beneficiary; (5) the frequency and number of payments; (6) whether the agreement waives other support rights; (7) whether the obligation can be modified or enforced in state court; and finally (8) how the obligation is treated for tax purposes. *In re McCollum*, 415 B.R. 625, 631 (Bankr. M.D. Ga. 2009).” *In re Benson*, 441 Fed. Appx. 650 (11th Cir., Sept. 26, 2011) – mortgage payments found to be in the nature of support and non-dischargeable, although agreement included language waiving support.

- (B) **10th Circuit, Pre-BAPCPA** - *In re Goin*, 808 F.2d 1391 (10th Cir. 1987) Several factors are applicable to determination whether debt is support, including: “(1) if the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support; (2) when there are minor children and an imbalance of income, the payments are likely to be in the nature of support; (3) support or maintenance is indicated when the payments are made directly to the recipient and are paid in installments over a substantial period of time; and (4) an obligation that terminates on remarriage or death is indicative of an agreement for support.” (808 F.2d pp 1392 – 1393)
- (C) **Large single payments found to be DSOs** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):
 - i. *In re Ashby*, 485 B.R. 567 (Bankr. W.D. Ky., Jan. 23, 2013) – Debtor's agreement to employ ex-spouse was found to be a DSO, even though

settlement agreement said neither party would be responsible for payment of maintenance; court found intent to provide support.

- ii. *In re Pylant*, 467 B.R. 246 (Bankr. M.D. Ga., March 14, 2012) Debtor's agreement to purchase \$415,000 home held to be DSO, even though parties' agreement provided otherwise for substantial support payments and characterized purchase of home as part of property settlement.
- iii. *In re Farelli*, 312 Fed. Appx. 445 (3rd Cir., June 6, 2008) - \$94,000, which was 65% of value of marital estate, found to be DSO, due to disparity between parties' resources.

(D) **Large lump sum payments were not DSOs** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at

<http://cbar.pro/subscribers/main.html>):

- i. Costs and expenses for appraisal, done in connection with property division, not DSO, as well as "fair rental credit" of \$5,509, which was not explained by evidence, not DSO. *In re Kennedy*, 442 B.R. 399 (Bankr. W.D. Pa., Sept 15, 2010)
- ii. Debtor's obligation to execute \$70,000 promissory note was found to be property settlement, not DSO. *In re Poole*, 383 B.R. 308 (Bankr. D. S.C., Oct. 9, 2007);
- iii. Similar: *In re Korwin*, 379 B.R. 80 (Bankr. W.D. Pa., Dec. 10, 2007)

(E) **Installment payments were found to be DSOs** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at

<http://cbar.pro/subscribers/main.html>):

- i. Payment of \$31,000 per month to pay off "marital property distribution judgment lien" of \$7,490,000, was found to be for support of ex-spouse and a DSO. *In re Throgmartin*, 462 B.R. 836 (Bankr. M.D. Fla., Jan. 5, 2012)

(F) **Installment payments were found to be property settlement, not DSOs** (collection and categorization of

cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):

\$50 per day "late payment penalty" for late alimony payments found not to be DSO. *In re Smith*, 586 F.3d 69 (1st Cir., Nov. 6, 2009)

- (G) **Installment payments were found to be property settlement, not DSOs** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):
 - \$50 per day "late payment penalty" for late alimony payments found not to be DSO. *In re Smith*, 586 F.3d 69 (1st Cir., Nov. 6, 2009)
- (H) **Debtor ordered to pay mortgage or other debt; found to be DSO** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):
 - i. *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C., Feb. 27, 2008)
 - ii. *In re Krueger*, 457 B.R. 465 (Bankr. D. S.C., Sept. 19, 2011) Obligation to make mortgage and car payments found to be DSO, although not included under support section of agreement.
 - iii. *In re Benson*, 441 Fed. Appx. 650 (11th Cir., Sept. 26, 2011) Although alimony was waived in agreement, bankruptcy court found obligation to pay mortgage was DSO.
 - iv. Similar: *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C., Feb. 27, 2008); *In re Reinhardt*, 478 B.R. 455 (Bankr. M.D. Fla., Oct. 1, 2012)
- (I) **Debtor ordered to pay mortgage or other debt; not found to be DSO** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):
 - i. *In re Poole*, 383 B.R. 308 (Bankr. D. S.C., Oct. 9, 2007);
 - ii. *In re Forgette*, 379 B.R. 623 (Bankr. W.D. Va., Nov. 30, 2007)
- (J) **Payment owed to ex-spouse for her attorney fees is DSO** (collection and categorization of cases attributed to Robin

Miller's bankruptcy case law digest service at
<http://cbar.pro/subscribers/main.html>):

- i. *In re Phegley*, 443 B.R. 154 (8th Cir. B.A.P., Jan. 25, 2011) Due to disparities in parties economic resources, debtor's obligation to pay \$9K towards former wife's attorney's fees was held to DSO.
- ii. *In re Hutchens*, 480 B.R. 374 (Bankr. M.D. Fla., Oct. 4, 2012) Attorney fees incurred enforcing DSO are DSO.
- iii. *In re Louttit*, 473 B.R. 663 (Bankr. W.D. Pa., June 19, 2012) Attorney's fee award in UCCJEA action, without finding of need for support, were held to be DSO.

(K) **Payment owed to ex-spouse for her attorney fees was not a DSO** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):

- i. *In re Kennedy*, 442 B.R. 399 (Bankr. W.D. Pa., Sept 15, 2010) Where there was no evidence in record from which to determine whether debtor's payment of \$5,000 for ex-spouse's attorney was intended as support, court held that it was not DSO.
- ii. *In re Poole*, 383 B.R. 308 (Bankr. D. S.C., Oct. 9, 2007) Payment of ½ of ex-wife's attorney's fees, in addition to other items of property division, without evidence of intent that payment be for support, was not a DSO.

(L) **Payment owed to ex-spouse's attorney for fees were DSO** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):

- i. *Loomas v Loomas (In re Loomas*, 12-11898 HRT), 12-01282 HRT (Bankr. D. Colo. 2013 - Judge Tallman) Relying upon pre-BAPCPA precedent respecting determinations of non-dischargeability of awards of attorney's fees in domestic cases, the court held that the debtor's court-ordered obligation to pay ex-spouse's attorney fees was non-dischargeable.

- ii. *In re Hutton*, 463 B.R. 819 (Bankr. W.D. Tex., Nov. 30, 2011) Although debtor's obligation to pay ex-spouse's attorney's fees was to be by payment to the attorney, because the ex-spouse remained liable for the fees, the debt was a non-dischargeable DSO.
 - iii. Similar: *In re Rogowski*, 462 B.R. 435 (Bankr. E.D. N.Y., Dec. 21, 2011); *In re Morris*, 454 B.R. 660 (Bankr. N.D. Tex., May 25, 2011); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark., July 12, 2010); *In re Papi*, 427 B.R. 457 (Bankr. N. D. Ill., April 30, 2010)
- (M) **Payment owed to ex-spouse's attorney for fees were not DSO** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):
- i. *In re Brooks*, 371 B.R. 761 (Bankr. N.D. Tex., July 19, 2007) Applying the post-BAPCPA language of 11 USC § 523(a)(5) & (15) literally and finding that the ex-spouse's law firm not to be payees protected by the non-dischargeability provisions, the court held the debt not to be non-dischargeable under either subsection of the statute.
 - ii. Similar: *In re Orzel*, 386 B.R. 210 (Bankr. N.D. Ind., 2008)
- (N) **Payment owed to ex-spouse for attorney fees was DSO** (collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at <http://cbar.pro/subscribers/main.html>):
- (O) **Fees owed to GAL or other professionals are DSO:**
- i. *In re Stevens*, 436 B.R. 107 (Bankr. W.D. Wis., May 17, 2010) Fees that domestic court orders debtor to pay to members of custody assessment team in a custody action are non-dischargeable as DSO. Court appointed professionals acted in the interest of the child and, thus associated fees were *in the nature of support*.
 - ii. *Levin v. Greco*, 415 B.R. 663 (N.D. Ill., Sept. 16, 2009) U.S. District court reversed the bankruptcy court and held that debtor's obligation to child representative was DSO.

- iii. *In re Defilippi*, 430 B.R. 1 (Bankr. D. Me., June 3, 2010) Debt for grandchild's GAL, in custody action, was nondischargeable DSO in grandparents' bankruptcy.
- iv. Similar: *In re Kasscieh*, 467 B.R. 445 (Bankr. S.D. Ohio, March 30, 2012), affirmed *In re Kasscieh*, 482 B.R. 190 (6th Cir. B.A.P., Nov. 27, 2012); *In re Anderson*, 463 B.R. 871 (Bankr. N.D. Ill., Oct. 17, 2011)

(P) **Fees owed to GAL or other professionals are not DSO**

(collection and categorization of cases attributed to Robin Miller's bankruptcy case law digest service at

<http://cbar.pro/subscribers/main.html>):

- i. *In re Cordova*, 439 B.R. 756 (Bankr. D. Colo. 2010 – Judge Brooks) Reading the language of the statute literally, the court held that the debtor's obligation to a child and family investigator in dissolution action was not a DSO, as it was to payable to debtor's "spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative" as specified in 11 U.S.C. § 101(14A)(A)(i).
- ii. Similar: *In re Greco*, 397 B.R. 102 (Bankr. N.D. Ill., Nov. 20, 2008), but that court's holding that debt payable to non-spouse, etc. (i.e. child representative) is not a DSO was reversed in *In re Greco*, 415 B.R. 663 (N. D. Ill., Sept. 16, 2009), the U.S. District Court adopted reasoning of *Pauley v. Spong (In re Spong)*, 661 F.2d 6 (2nd Cir. 1981), and *Miller v. Gentry (In re Miller)*, 55 F.3d 1487 (10th Cir. 1995), that since determination of child's custody is essential to child's support, fees incurred and awarded should be considered DSO.

ii. ***Nonsupport debt incurred in divorce***

1. The 2005 amendments also eliminated the "balance of harm" analysis, existing under prior law, for determinations of dischargeability of nonsupport debt for the benefit of a spouse or former spouse;
2. Current law excepts from a chapter 7 discharge all nonsupport debt "to a spouse, former spouse, or child of the debtor . . . 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, or a determination made in accordance with State or territorial law by a governmental unit. (11 U.S.C. §523(a)(15) – See Appendix C)

Burckhalter v. Burckhalter (In re Burckhalter). 07-166-HRT (Bankr. D. Colo. 6/23/08) – Debtor, in chapter 7, asserted that since the separation agreement did not require indemnification of ex-spouse for payment of marital credit card, it was not a debt owed to former spouse under 11 U.S.C. §523(a)(15) and therefore dischargeable. Court looked first to Colorado law to see that his obligation to pay the debt was enforceable as a judgment or through contempt, and therefore was a “debt” as defined under bankruptcy law and non-dischargeable under 11 U.S.C. §523(a)(15). See also, *In re Wodark*, 425 B.R. 834 (10th Cir. B.A.P., March 22, 2010)

- iii. ***The exceptions to discharge under 11 U.S.C. §§ 523(a)(5) & (15) are self-executing*** and do not require judicial determination. (See 11 U.S.C. §523(c)(1); creditors claiming nondischargeability only under 11 U.S.C. §523(a)(2), (4), & (6) must request a judicial determination – Appendix C).

b. Chapter 13 discharge

- i. Generally, under 11 U.S.C. §1328(a), the debtor will be granted a discharge of all debts provided by the plan (Appendix C),
 - 1. So long as the debtor certifies that all domestic support obligations have been paid
 - 2. Except certain debts, including
 - (A) Secured debts, default of which was cured under the plan
 - (B) Debt incurred through fraud, defalcation by a fiduciary, embezzlement, or larceny
 - (C) Criminal restitution
 - (D) Student loans
 - 3. Notably not excepted from discharge, in a chapter 13 case, are nonsupport debts incurred in divorce. (11 U.S.C. §1328(a)(2))
- ii. As in chapter 7, exceptions to discharge are self-executing and do not require a judicial determination in a chapter 13 case.
- iii. How does dischargeability of debt in nature of support arise and get determined?

1. Code requires creditors challenging discharge under 11 USC §§ 523(a)(2), (4), & (6) to bring an adversary to obtain a judgment of non-dischargeability (11 USC §523(c)(1)); such complaints must be filed within 60 days of the first date set for meeting of creditors (F.R.B.P 4007(c))
2. A complaint to determine dischargeability of debts, other than those under §523(a)(2), (4), & (6), may be filed at any time, by either the debtor or the creditor. (F.R.B.P. 4007(a) & (b))
3. The determination of dischargeability of a debt in the bankruptcy court must be by an adversary proceeding (F.R.B.P. 4007 & 7001(6)) *In re Donson*, 434 B.R. 471 (Bankr. S.D. Tex., June 28, 2010) – Debtor’s assertion that Ex-husband’s priority claim was dischargeable and not in nature of support needed to be determined in an adversary action.

c. Jurisdiction of the bankruptcy court

- i. **Concurrent Jurisdiction of Bankruptcy court and State court.** The jurisdiction of the bankruptcy court to determine dischargeability of support and nonsupport debt is concurrent with that of the state court. *Eden v. Robert A. Chapski Ltd*, 405 F.3d 582 (7th Cir. 2005) Bankruptcy filed while divorce action pending; divorce court subsequently ruled that pre-petition orders for debtor to pay ex-spouse’s attorney’s fees were non-dischargeable, being *in the nature of support*.
- ii. **Rooker-Feldman doctrine.** “Federal courts are prohibited from exercising appellate jurisdiction over state court judgments. *Campbell v. City of Spencer*, 682 F. 3d 1278, 1281 (10th Cir. 2012).” *Flanders v Flanders*, 13-1456 ABC (98-24779 ABC) (Bankr. D. Colo. 2014) – Bankruptcy court declined to review or reverse state divorce court’s orders dividing marital property.
- iii. **Domestic Relations Exception to Federal Jurisdiction.** *Ankenbrandt v. Richards*, 504 U.S. 689, 701-02, 112 S. Ct. 2206, 119 L.Ed.2d 468 (1992) quoted in concurrence/dissent of *Busch v Hancock*, 369 B.R. 614, 628 (10th Cir. BAP 2007): “We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vincula*, or to one from bed and board.”

d. Res judicata and Collateral Estoppel arise in the context of bankruptcy court’s determination of issues and claims decided by state courts.

- i. Res judicata (Claim preclusion) – “Claim preclusion generally refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been

advanced in an earlier suit.” *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984)

- ii. Collateral estoppel (Issue preclusion) – Issue preclusion pertains to the effect of a prior judgment in barring relitigation of an issue that has been actually litigated and decided. *Migra*, 465 U.S. at 77 n.1
- iii. When a federal court is determining whether to give preclusive effect to a state court judgment, the federal court must look to the law of the state respecting preclusion. *Migra*, 465 U.S. at 81.

II. Property of the Bankruptcy Estate

- a. **11 U.S.C. §541:** The filing of a bankruptcy case creates the bankruptcy estate, which includes “all legal or equitable interests of the debtor in property, as of the date of filing (11 U.S.C. §541(a) – Appendix D).
 - i. As of the date of filing of a bankruptcy petition, the bankruptcy court has absolute authority and jurisdiction to determine what property belongs to the estate. 28 U.S.C. §1471(e)
 - 1. *In re Ebel*, 144 B.R. 510 (D. Colo. 1992) -
 - 2. *In re Gardner*, 913 F.2d 1515 (10th Cir. 1990)
 - 3. *Central Virginia Community College v Katz*, 546 U.S. 356, 363-364, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006)
 - ii. A debtor’s property rights are created and defined by the law of the state in which the property is located. *Travelers Cas. & Sur. Co. v. Pacific Gas and Elec. Co.*, ___ U.S. ___, 127 S. Ct. 1199, 1205 (2007)
 - iii. As of the filing of a dissolution of marriage action, each party’s interests in marital property vest, and are analogous to those of one party who can establish a resulting trust in the property of the other party. *In re Questions Submitted by the U.S. District Court, for the District of Colorado*, 184 Colo. 1, 517 P.2d 1331, 1335 (1974)
- b. **Bankruptcy Before Divorce:** If the bankruptcy case is filed prior to the commencement of the dissolution action, the bankruptcy estate will include all legal or equitable interests of the debtor in property; but will not include any interest in the separate property interests of his spouse.
- c. **Divorce Before Bankruptcy:** If the bankruptcy case is filed, after a dissolution action has been filed, the bankruptcy estate will include all legal or equitable interests of the debtor in property, including the debtor’s vested interest in marital property.
 - i. **Trustee in bankruptcy succeeds to a debtor’s right to assert** or waive the attorney-client privilege. *In re Inv. Bankers, Inc.*, 30 B.R. 883 (Bankr. D. Colo. 1983).
 - ii. **A privilege may be waived by authorized parties.**
A trustee in bankruptcy for a corporation stands in the shoes of the board

of directors and therefore has the power, in the exercise of his discretion, to waive the privilege under § **13-90-107** that the work product of a certified public accountant is nondiscoverable without the client's consent. *Weck v. District Court*, **161 Colo. 384, 422 P.2d 46** (1967).

- iii. **Trustee intervened in *Todd v Todd*, 291 P. 2d 386, 133 Colo. 1 (Colo. 1955)** This court recognized that “the Trustee in Bankruptcy has the status of a lien creditor as of ‘the date of bankruptcy’ and ‘shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon * * *.’ Consequently the Trustee, as of the date of the bankruptcy, is vested with all the rights, remedies and powers of a judgment creditor then holding an execution duly returned and unsatisfied.” 291 P. 2d at 387 Prior to permanent orders in divorce, an involuntary bankruptcy was commenced against the husband. The bankruptcy trustee filed for partition of the marital home and that claim was determined by the divorce court. The court found that the wife was entitled to her ½ interest in the property, plus her homestead rights, and not vested with any other rights superior to the bankruptcy trustee. The court ordered the property sold & proceeds divided accordingly. Wife appealed and the Supreme court affirmed the judgment of the trial court.
- iv. **Non-filing spouse in pending dissolution sought relief from stay for divorce action to proceed.** *In re Dryja*, 425 B.R. 608 (Bankr. D. Colo. 2010) The issue before the court was “whether a bankruptcy court should grant stay relief to allow a divorce court to continue with its action to divide marital property when some of the property presently titled in the non-debtor spouse's name may be subject to an avoidance action on the basis of a fraudulent transfer theory.” The court balanced the prerogatives of the bankruptcy court, to determine property of the bankruptcy estate, and of the dissolution court, to determine an equitable division of marital property, against interests of the trustee and other parties interested in the property of the debtor. Reasoning that division of property by the state court does not necessarily preclude the trustee, creditors, and other interested parties from pursuing their rights to property, after the divorce court’s division, the court granted the motion for relief.
- d. **The property of the bankruptcy estate also includes property recoverable by the trustee** pursuant to the provisions of 11 U.S.C. §§ 547, 548, & 544 (preferential transfers, fraudulent conveyances, and transfers avoidable by the trustee under “strong arm” powers as a lien creditor or successor to certain creditors and purchases).
 - i. *In re Beverly*, 374 B.R. 221 (9th Cir. BAP 2007) Beverly, a lawyer, anticipating a large judgment against him for malpractice, entered into a

marital settlement agreement by which he traded his interest in \$1 million of nonexempt funds in exchange for his wife's \$1.1 million exempt retirement fund. Thus, he and his wife attempted to leave him without nonexempt properties with which to pay the judgment. On appeal to the BAP, the bankruptcy court's determination that such planning could neither be avoided in bankruptcy nor lead to denial of discharge was reversed. The court found that putting non-exempt assets beyond the reach of the judgment creditors was an explicit element in marital settlement negotiations. Upon learning that the terms of the settlement left Beverly without assets from which the judgment could be satisfied, an involuntary petition in bankruptcy was filed.

- ii. *In re Fordu*, 201 F.3d 693 (6th Cir. 1999) Court of Appeals upheld the 6th Circuit BAP and reversed the bankruptcy court's summary judgment dismissing the Trustee's complaint seeking avoidance of a divorce settlement agreement whereby the debtor exchanged his interest in the marital home and wife's lottery winnings for assets of significantly less value.

- e. **The property of the bankruptcy estate also includes any property to which the debtor becomes entitled, within 180 days of the filing of the petition, through a property settlement in a divorce or legal separation.** (11 U.S.C. § 541(a)(5) – See Appendix D)

III. Automatic Stay (Appendix B)

a. Actions that are affected

- i. commencement or continuation, ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title (11 USC §362(a)(1))
- ii. the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title (11 USC §362(a)(2))
- iii. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate (11 USC §362(a)(3))
- iv. any act to create, perfect, or enforce any lien against property of the estate (11 USC §362(a)(4))

- b. **“The automatic stay under 11 U.S.C. §362(a) should be broadly construed in favor of the Debtor and exceptions thereto should be applied narrowly.”** *In re Gazzo*, 505 B.R. 28 (Bankr. D. Colo. 2014) – Defendants, ex-spouse of Debtor and her counsel, brought contempt action v Debtor in domestic court for non-

payment of DSOs. On the eve of the contempt hearing in domestic court, Debtor filed chapter 11; and, simultaneously, he filed a motion to hold proceeding in abeyance and to vacate hearing in domestic court. Applying *In re Weis* 232 P.3d 789 (Colo. 2010), the bankruptcy court held that the contempt proceeding, being remedial in nature, was not a criminal proceeding, excepted from the auto stay, and the creditor could not turn it into a criminal proceeding by merely seeking punitive sanctions. Further applying *In re Weis*, the court held that absent a specific finding of the availability of non-estate funds to pay a DSO, the exception for payment out of non-estate property doesn't apply. Finally, the bankruptcy court held that order for costs as DSO was not an establishment or modification of a DSO, but as the domestic court's order clearly stated, it was intended as an order to collection a DSO from non-estate property.

c. Actions that are not affected

- i. the commencement or continuation of a civil action or proceeding
 1. for the establishment of paternity
 2. for the establishment or modification of an order for domestic support obligations
 3. concerning child custody or visitation
 4. for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
 5. regarding domestic violence (11 U.S.C. § 362(b)(2)(A))
- ii. the collection of a domestic support obligation from property that is not property of the estate
- iii. the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute
- iv. the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act
- v. the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act
- vi. the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or
- vii. the enforcement of a medical obligation, as specified under title IV of the Social Security Act (11 U.S.C. §362(b)(2)(B) to (G))
- viii. Actions by debtor against non-debtor entities

1. Such actions may continue without seeking relief from stay from the bankruptcy court. *Chausee v. Lyngholm (In re Lyngholm)*, 24 F.3d 89, 91 (10th Circuit 1994)
2. However, the Colorado Court of Appeals has held that the automatic stay bars a debtor's appeal. *Way Architects, P.C. v. Rockrimmon Elderly Housing LP*, 140 P.3d 12, 13 -14 (Colo. App. 2005)

IV. Timing of Bankruptcy and Dissolution action

- a. Filing of bankruptcy petition **determines debt** that is affected
- b. Filing of bankruptcy petition **determines property** that is affected.
- c. Scenarios to illustrate timing issues:
 - i. Lots of marital debt, one party files, before dissolution petition
 - ii. Lots of valuable assets, one party files, before dissolution petition
 - iii. Parties cooperate and file joint bankruptcy, before dissolution petition
 - iv. Parties together have income that would force chapter 13 – opportunities for cooperation

Appendix A – Selected Definitions

Excerpt from:

United States Statutes

Title 11. BANKRUPTCY

Chapter 1. GENERAL PROVISIONS

Current through P.L. 113-125

§ 101. Definitions

In this title the following definitions shall apply:

* * *

(5) The term "claim" means-

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

* * *

(10) The term "creditor" means-

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

* * *

(12) The term "debt" means liability on a claim.

* * *

(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is-

(A) owed to or recoverable by-

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Appendix B – Automatic Stay

Excerpt from:

United States Statutes

Title 11. BANKRUPTCY

Chapter 3. CASE ADMINISTRATION

Subchapter IV. ADMINISTRATIVE POWERS

Current through P.L. 113-125

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of-

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2)

the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay-

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)-

(A) of the commencement or continuation of a civil action or proceeding-

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(c) Except as provided in subsections (d), (e), (f), and (h) of this section-

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of-

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if-

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later-

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that-

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

Appendix C

Exceptions to Discharge

Excerpt from:

United States Statutes

Title 11. BANKRUPTCY

Chapter 5. CREDITORS, THE DEBTOR, AND THE ESTATE

Subchapter II. DEBTOR'S DUTIES AND BENEFITS

Current through P.L. 113-125

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(5) for a domestic support obligation;

(15)

to a spouse, former spouse, or child of the debtor and 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, or a determination made in accordance with State or territorial law by a governmental unit;

Excerpt from:

United States Statutes

Title 11. BANKRUPTCY

Chapter 13. ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME

Subchapter II. THE PLAN

Current through P.L. 113-125

§ 1328. Discharge

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt-

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

Appendix D - Property of the Estate

Excerpt from:

United States Statutes

Title 11. BANKRUPTCY

Chapter 5. CREDITORS, THE DEBTOR, AND THE ESTATE

Subchapter III. The Estate

§541

(a) The commencement of a case under section [301](#), [302](#), or [303](#) of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section [329 \(b\)](#), [363 \(n\)](#), [543](#), [550](#), [553](#), or [723](#) of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section [510 \(c\)](#) or [551](#) of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

THE AMERICAN JUDGES ASSOCIATION, THE AMERICAN JUDGES FOUNDATION
JOINED BY THE COLORADO JUDICIARY

THE 51ST ANNUAL CONFERENCE

October 3-8, 2010
Westin Tabor Center, Denver, Colorado

BANKRUPTCY - IMPACT ON CIVIL LITIGATION

- I. Bankruptcy Issues in State Court
John C. Smiley and Theodore J. Hartl
- II. Impact of Federal Bankruptcy on State Civil Proceedings
A. Bruce Campbell

Bankruptcy Issues in State Court

John C. Smiley
Theodore J. Hartl
Lindquist & Vennum, PLLP
600 17th Street, Suite 1800 South
Denver, CO 80202
contact: thartl@lindquist.com

The following materials are intended as a brief introduction to common bankruptcy issues that arise in state trial and appellate courts. Additional bankruptcy topics beyond these common issues may be added through future judicial conferences and materials, with the potential for compiling a more comprehensive and practical reference guide. Commercial references and publications are also available through the American Bankruptcy Institute, including:

Bankruptcy Issues for State Trial Court Judges (3rd ed. 2005, M. Culhane and M. White eds.), available at
http://www.abiworld.org/source/orders/index.cfm?task=3&SKU=05_022

When Worlds Collide: Bankruptcy and Its Impact on Domestic Relations and Family Law (3d ed. 2005, M. Culhane and M. White eds.), available at
http://www.abiworld.org/source/orders/index.cfm?task=3&SKU=05_029

Hon. Judith K. Fitzgerald, *We All Live in a Yellow Submarine: BAPCPA's Impact on Family Law Matters*, 31 S. Ill. U. L.J. 563 (Spring, 2007)

Anthony M. Sabino, *Violence of Action: The Bankruptcy Code, Domestic Relations Law, and the New War with State Probate Law*, 19 Quinnipiac Prob. L.J. 264 (2006).

I. Automatic Stay; 11 U.S.C. § 362

A. *General Scope, Purpose and Effect.*

“The automatic stay provision of the Bankruptcy Code, § 362(a), has been described as ‘one of the fundamental debtor protections provided by the bankruptcy laws.’ *Midlantic Nat’l Bank v. New Jersey Dep’t of Envir. Protection*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, p. 54 (1978); H.R.Rep. No. 95-595, p. 340 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5840, 5963, 6296). “The scope of the automatic stay is extremely broad,” *In re Sullivan*, 357 B.R. 847, 853 (Bankr. D. Colo. 2006), and it “covers all proceedings against a debtor, including arbitrations, license revocations, administrative proceedings and judicial proceedings.” *Safety Nat’l Cas. Corp. v. Kaiser Aluminum & Chemical Corp. (In re Kaiser Aluminum Corp.)*, 303 B.R. 299, 303 (D. Del. 2003). Virtually anything that “was or could have been commenced” against the debtor or against the debtor’s property before the bankruptcy filing date is subject to the automatic stay. See 11 U.S.C. § 362(a).

The stay applies only to the debtors themselves in Chapter 7 (“straight” liquidation cases) and to debtors in possession in Chapter 11 (reorganization cases). But both Chapter 12 (for “family farmers” seeking to reorganize) and Chapter 13 (individual “wage earner” reorganization) provide for co-debtor stays as to the collection of “consumer debts” – debts that were “incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8); see 11 U.S.C. §§ 1201 and 1301. The co-debtor stay protects others who, although they have not filed for bankruptcy protection themselves, are liable on consumer debts with the individual debtor. The co-debtor stay thus precludes “indirect pressure from a creditor” that may result from collection action against the debtor’s friends or relatives who may have co-signed the debtor’s obligations. See *In re Caln*, 347 B.R. 428, 431 (Bankr. N.D. Fla. 2006).

The automatic stay generally serves two purposes: (1) “to give a debtor ‘a breathing spell from his [or her] creditors’ during which the debtor can ‘attempt a repayment . . . plan, or simply . . . be relieved of the financial pressures that drove him [or her] into bankruptcy.’” *Sherman v. S.E.C. (In re Sherman)*, 491 F.3d 948, 971 (10th Cir. 2007) (quoting H.R. Rep. No. 95-595, at 340 (1977), as reprinted in 1978 U.S.C.A.N. 5963, 6296-97); and (2) “to protect creditors by providing ‘an orderly liquidation procedure under which all creditors are treated equally’ rather than a ‘race of diligence by creditors for the debtor’s assets’” *Id.*; see *Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 755-56 (9th Cir. 1995) (recognizing that stay “provides debtors with protection against hungry creditors” and “assures creditors that the debtor’s other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor’s assets”).

In Colorado, actions taken in violation of the automatic stay are void, not merely voidable. See *Ellis v. Consolidated Diesel Electric Corp.*, 894 F.2d 371, 372 (10th Cir. 1990). That is not the case in other districts. See *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (stay violations are not void, but simply voidable).

B. Exceptions, Termination and Duration.

Despite the broad scope of the stay, the Bankruptcy Code carves out a number of specific statutory exceptions. If a statutory exception to the automatic stay applies, no Bankruptcy Court order is required for the commencement or continuation of the action against the debtor. See *Hutchison v. Birmingham (In re Hutchison)*, 270 B.R. 429, 436 (Bankr. E.D. Mich. 2001). Notable and common exceptions to the stay include:

- Criminal proceedings
- Civil proceedings to establish paternity, to establish or modify domestic support obligations (discussed more fully in Section III, below), concerning child custody or visitation, and for a decree of dissolution (that does not affect division of property of the bankruptcy estate)

- Acts to perfect, maintain or continue liens and security interests, such as filing continuation statements under the Uniform Commercial Code or perfection of mechanics' liens under state law
- Tax audits and tax assessments of governmental units
- Acts by commercial landlords to obtain possession under a lease that terminated by its own terms either before the bankruptcy filing date or during the bankruptcy case

Absent a statutory exception, a creditor may seek relief from stay in Bankruptcy Court under 11 U.S.C. § 362(d). Relief from stay is requested by motion and notice to parties in the bankruptcy case, and they are cursory, summary proceedings. See *G&B Aircraft Mgmt. v. Smoot (In re Utah Aircraft Alliance)*, 342 B.R. 327, 332 (B.A.P. 10th Cir. 2006). The merits of the parties' claims and defenses generally are not litigated to judgment. *U.S. Bank, NA v. Roberts (In re Roberts)*, 367 B.R. 677, 686-87 (Bankr. D. Colo. 2007). Unless the Bankruptcy Court grants relief from, modifies, or otherwise annuls or terminates the automatic stay, the stay continues under § 362(c)(2) until the earlier of: (1) the date that the bankruptcy case is closed; (2) the date that the bankruptcy case is dismissed; or (3) the date that discharge is entered.¹ As to acts against property, though, the stay continues until the property is no longer property of the bankruptcy estate. 11 U.S.C. § 362(c)(1). The Bankruptcy Code expressly authorizes a creditor to seek an order from the Bankruptcy Court "confirming that the automatic stay has been terminated." 11 U.S.C. § 362(j).

C. Stay of Debtor's Claims Against Others.

The automatic stay applies to claims against a debtor in bankruptcy, but what about a debtor's claims against other, non-debtor entities? Rule 6009 of the Federal Rules of Bankruptcy

¹ Upon entry of discharge, the stay is converted by statute into a permanent discharge injunction barring the collection of dischargeable debts. See *United States v. White*, 466 F.3d 1241, 1246 (11th Cir. 2006); *Ciccimaro v. Emore (In re Ciccimaro)*, 364 B.R. 184, 189 (Bankr. E.D. Pa. 2007). Discharge is discussed in Section II of these materials.

Procedure provides that “[w]ith or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf [sic] of the estate before any tribunal.” Fed. R. Bankr. P. 6009. But the rule “does not trump the code’s automatic stay. It simply clarifies that the trustee or debtor in possession has standing to, and may, litigate appropriate actions on behalf of the estate without prior approval of the bankruptcy court.” *Parker v. Bain*, 68 F.3d 1131, 1136 (9th Cir. 1995). The federal circuits diverge as to whether a debtor may continue to prosecute a claim on appeal without obtaining relief from the automatic stay, with the United States Court of Appeals for the Tenth Circuit concluding that “a trustee/debtor in possession may file an action or continue an action without court relief of the stay.” *Chaussee v. Lyngholm (In re Lyngholm)*, 24 F.3d 89, 91 (10th Cir. 1994); *see also Autoskill, Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1486 (10th Cir.), *cert. denied*, 510 U.S. 916 (1993).

The Court of Appeals in Colorado has not follow the Tenth Circuit, however, instead siding with other federal circuit courts in concluding that the automatic stay bars a debtor’s appeal. *Way Architects, P.C. v. Rockrimmon Elderly Housing LP*, 140 P.3d 12, 13-14 (Colo. App. 2005); *Curragh v. Queensland Mining Ltd. v. Dresser Indus.*, 55 P.3d 235, 238-39 (Colo. App. 2002). Thus, state court decisions in Colorado dictate that an order from the Bankruptcy Court is required for a trustee or debtor in possession to pursue its claims in other courts.

II. Discharge and Dischargeability; 11 U.S.C. §§ 523 and 524

A. *Discharge: What and Who.*

A discharge in bankruptcy “gives the debtor a ‘fresh start’ by releasing him, or her, or it from further liability for old debts.” *Central Virginia Comm. College v. Katz*, 546 U.S. 356, 364 (2006). Each chapter of the Bankruptcy Code contains a specific provision governing discharge. See 11 U.S.C. §§ 727, 944; 1141, 1228; 1328. Section 524, however, contains the basic effects of discharge. 11 U.S.C. § 524(a).

A bankruptcy discharge is a permanent injunction that voids any judgment, no matter when obtained, and it precludes any collection action as to prepetition debts to the extent of the personal liability of the debtor. 11 U.S.C. § 524(a). A discharge does not wipe out or eliminate the debt, but only relieves the debtor from personal liability. See *Johnson v. Home State Bank*, 501 U.S. 78, 84-85 (1991).

In Chapter 7, only an individual may receive a discharge. See 11 U.S.C. § 727(a)(1). Corporations and business entities liquidating in Chapter 7 do not receive bankruptcy discharges, but they may receive a discharge upon confirmation of a Chapter 11 plan of reorganization. See 11 U.S.C. § 1141.² A discharge in a Chapter 7 case typically enters “forthwith” within a few months of commencement of the case, after expiration of rule-based deadlines allowing creditors to file objections. See Fed. R. Bankr. P. 4004(c). For individuals in Chapter 11, Chapter 12 and Chapter 13 cases, entry of discharge is deferred until the debtor completes all payments under a plan, which is typically several years after the filing of the bankruptcy petition.

Only the debtor receiving a discharge benefits from it – the “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for,

² If a corporation or business entity confirms a liquidating Chapter 11 plan, it does not receive a discharge. 11 U.S.C. § 1141(d)(3).

such debt.” 11 U.S.C. § 524(e). If a judgment against a debtor is a necessary predicate for pursuing the liability of another entity (such as an insurance carrier), the debtor’s discharge does not preclude that action, provided no effort is made to collect the debt as a personal liability of the discharged debtor. *See Reyes v. McCarley*, 107 P.3d 1137, 1139 (Colo. App. 2004); *see also In re Farley*, 194 B.R. 553, 555 (Bankr. S.D.N.Y. 1996).

B. Exceptions to Discharge and Dischargeability.

The Bankruptcy Code excepts from discharge some nineteen categories of debts. Among those are debts incurred by fraud, theft and intentional torts. *See* 11 U.S.C. § 523(a)(2) and (a)(4) and (a)(6). A creditor seeking to except a particular debt from discharge must seek a determination of dischargeability from the Bankruptcy Court by filing a complaint and commencing separate litigation (an “adversary proceeding”) within the bankruptcy case. For most types of debts, a creditor may seek that determination “at any time” under Rule 4007 of the Federal Rules of Bankruptcy Procedure – even after the bankruptcy case is closed. *See* Fed. R. Bankr. P. 4007(b).

For some debts, however, those generally based on a debtor’s fraud, theft or intentional torts, a creditor must be diligent and commence dischargeability litigation within 60 days of the first date set for the initial meeting of creditors. Fed. R. Bankr. P. 4007(c); *see* 11 U.S.C. § 523(c).

Other than those creditor-specific exceptions to discharge, a debtor’s discharge may be denied entirely before entry for certain “bad acts.” 11 U.S.C. § 727(d). Likewise, a debtor may affirmatively waive his or her discharge in the bankruptcy case, or may have it revoked as to all creditors. *See id.* The denial, revocation and waiver of discharge all have the same basic effect – no debt is discharged at all.

III. Domestic Matters; 11 U.S.C. §§ 101(14A); 362(b)(2); 523(a)(5) and (a)(15)

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), created a new, defined set of "domestic support obligations" under the Bankruptcy Code. Under BAPCPA,

The term 'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief³ in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –

(A) owed to or recoverable by--

- (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
- (ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

- (i) a separation agreement, divorce decree, or property settlement agreement;
- (ii) an order of a court of record; or
- (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A). Despite the "domestic relations exception" to federal jurisdiction generally, *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (noting that domestic relations

³ An "order for relief" in a voluntary bankruptcy case is simply the commencement of the case by the filing of a voluntary petition. 11 U.S.C. § 301(b).

exception “divests federal courts of power to issue divorce, alimony, and child custody decrees”), Bankruptcy Courts retain jurisdiction and control when domestic matters involve property of the bankruptcy estate.

Upon filing of a bankruptcy petition, a separate bankruptcy estate is created consisting of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541. Although property interests are affected and adjusted under the Bankruptcy Code, the underlying property interests themselves are defined and created by state law. *Travelers Cas. & Sur. Co. v. Pacific Gas and Elec. Co.*, ___ U.S. ___, 127 S. Ct. 1199, 1205 (2007).

The timing of a petition for dissolution of marriage controls when property interests vest under Colorado law; before the commencement of a dissolution action, a spouse’s interest in marital property is inchoate. *See Shearton Serv. Corp. v. Johnson*, 5 P.3d 395, 397 (Colo. App. 2000); *In re Questions Submitted by United States District Court*, 517 P.2d 1331, 1332 (1974). Timing thus affects property interests for purposes of a bankruptcy filing by one of the parties to a dissolution proceeding. Section 541(d) of the Bankruptcy Code expressly excludes from property of the bankruptcy estate any property in which the debtor holds only bare legal title with no equitable interest. So for example, if a debtor has been ordered to execute a quit claim deed conveying real property to his or her spouse pursuant to orders in a dissolution action, but files bankruptcy before following through, the bare legal title to real property is not property of the bankruptcy estate at all.

As to collection of “domestic support obligations,” the Bankruptcy Code also affords those creditors (ex-spouses, children, etc.) the right to collect from property that otherwise would be exempt. *See* 11 U.S.C. § 522(c)(1). *See In re Vandeventer*, 368 B.R. 50, 54 (Bankr. C.D. Ill.

2007) (BAPCPA amendments allow creditor holding domestic support obligation right to collect on otherwise exempt assets, but do not afford bankruptcy trustee independent right to object to claimed exemptions and administer property for domestic support obligation creditor).

A. Automatic Stay and Exceptions in Domestic Matters.

BAPCPA includes a laundry list of domestic matters that are expressly excluded from the operation of the automatic stay. So, there is no automatic stay:

- (A) of the commencement or continuation of a civil action or proceeding--
 - (i) for the establishment of paternity;
 - (ii) for the establishment or modification of an order for domestic support obligations;
 - (iii) concerning child custody or visitation;
 - (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
 - (v) regarding domestic violence;
- (B) of the collection of a domestic support obligation from property that is not property of the estate;
- (C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
- (D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;
- (E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;
- (F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

11 U.S.C. § 362(b)(2). Pending proceedings involving any of the foregoing matters are unaffected by one party's intervening bankruptcy petition.

It is perhaps easier to remember, in any event, the two instances where the automatic stay *does apply* in domestic relations matters and where relief from the automatic stay is necessary.

First, the stay continues as to a division of property that is, or may be, property of the bankruptcy estate. Relief from the stay must be obtained before proceeding in a dissolution action to fully and finally divide marital property if one party is a debtor in an intervening bankruptcy case filed before final orders have entered. *Second*, to the extent that a former spouse seeks to collect a domestic support obligation from property of the bankruptcy estate, relief from stay is required. In the context of domestic matters, bankruptcy courts often do not hesitate in concluding that "cause" exists for relief from the automatic stay under § 362(d) for the parties to finalize all aspects of a pending dissolution proceeding.

B. Discharge Exceptions as to Marital Debts.

Section 523(a)(5) excepts from a debtor's discharge any debt for any "domestic support obligation." In addition to those statutorily defined debts, § 523(a)(15) operates to exclude from discharge any debt

to a spouse, former spouse, or child of the debtor and not of the kind described in [Section 523(a)](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, or a determination made in accordance with State or territorial law by a governmental unit.

11 U.S.C. § 523(a)(15). BAPCPA eliminated portions of § 523(a)(15), which previously allowed a former spouse to seek an equitable balancing of hardship to determine whether certain

non-support, divorce related debts were dischargeable. Under current law, both § 523(a)(5) and (a)(15) of the Bankruptcy Code favor enforcement of *all* obligations arising from a marital relationship (including spousal and child support, property divisions and related debts) over an individual's fresh start in bankruptcy. See *Davis v. Hosterman (In re Hosterman)*, No. 07-1082, 2007 WL 2973592 (Bankr. N.D. Okla. Oct. 9, 2007). In addition, state courts now have concurrent jurisdiction to determine the dischargeability of all domestic support obligations, including those under § 523(a)(15). Before enactment of BAPCPA, only the Bankruptcy Court could assess whether debts falling under § 523(a)(15) were dischargeable. See 11 U.S.C. § 523(c); *In re Smither*, 194 B.R. 102, 106 (Bankr. W.D. Ky. 1996) (construing prior law).

IV. Jurisdiction and Miscellaneous Issues: 28 U.S.C. § 1334(b)

The Bankruptcy Court is unit of the federal district court. 28 U.S.C. § 151. Under 28 U.S.C. § 157, the federal district court “may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for that district.” 28 U.S.C. § 157(a). Some federal district courts refer matters to their bankruptcy courts by standing order or other procedure, but the United States District Court for the District of Colorado has promulgated a local civil rule that automatically refers all bankruptcy matters to the Bankruptcy Court. See D.C.COLO.LCivR 84.1.

Through referral from the United States District Court, the Bankruptcy Court maintains exclusive jurisdiction over all of a debtor’s property and thus property of the bankruptcy estate. 28 U.S.C. § 1334(e); *Central Virginia*, 546 U.S. at 363-64. Certain debts excepted from discharge may only be excepted by an order from the Bankruptcy Court, effectively conferring exclusive jurisdiction for the determination of the dischargeability those types of debt. 11 U.S.C. 523(c).⁴ But for other matters related to bankruptcy cases, such as construing a discharge order and determining whether a particular debt is subject to a discharge that has entered previously, state courts have concurrent jurisdiction. 28 U.S.C. § 1334(b); see also *McWherter v. Fischer*, 126 P.3d 330, 331 (Colo. App. 2005) (concluding that affirmative defenses of bankruptcy discharge under Colo. R. Civ. P. 8 is waivable); but see *Hamilton v. Herr (In re Hamilton)*, No. 07-6269, 2008 WL 3905437, (6th Cir. Aug. 26, 2008) (noting that § 524 discharge injunction was meant to effectuate discharge without further action and to make pleading affirmative defense of bankruptcy discharge unnecessary).

⁴ These types of debt are those premised on: fraud, 11 U.S.C. § 523(a)(2); larceny, embezzlement or fraud in a fiduciary capacity, 11 U.S.C. § 523(a)(4); or willful and malicious injuries, 11 U.S.C. § 523(a)(6).

IMPACT OF FEDERAL BANKRUPTCY ON STATE CIVIL PROCEEDINGS

A. Bruce Campbell
Bankruptcy Judge, District of Colorado

1. Statutory Framework

A. Title 11, U.S.C. - the Bankruptcy Code

- (i) Chapters 1, 3, and 5 - generally applicable to entire Code
- (ii) Other Chapters: 7 ("straight" liquidation); 9 (municipalities); 11 (reorganization); 12 (farmers); 13 (individuals with regular income); 15 (cross border)

B. Title 28, U.S.C. - the courts and bankruptcy

Jurisdiction, venue, removal, appeals, preclusion, etc.

C. 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") - "means testing"

2. Bankruptcy Court Jurisdiction (Attachment A: 28 U.S.C. §§ 1334 and 157)

A. Where the Bankruptcy Court now fits in the federal court structure - 1984 Bankruptcy Reform and Federal Judgeship Act

- (i) The Article III U.S. District Courts are the "Bankruptcy Courts"
- (ii) The Article I Bankruptcy Courts, to which all bankruptcy matters are referred by the U.S. District Courts under a standing order in each U.S. District Court, are "adjuncts" of the U.S. District Courts
- (iii) Exclusive and concurrent jurisdiction
 - (a) The bankruptcy "case" - exclusive jurisdiction
 - (b) Proceedings within a bankruptcy case - concurrent jurisdiction

B. Mandatory and Discretionary Abstention

- (i) Discretionary - "in the interest of comity with state courts or respect for state law," the bankruptcy court may abstain from hearing any proceeding within a bankruptcy case
- (ii) Mandatory - on specified conditions, the bankruptcy court must abstain from hearing "related to" (historic plenary) proceedings, i.e. pending state law claims, not subject to non-bankruptcy federal jurisdiction, that can be timely adjudicated in state court)

3. The Automatic Stay of Section 362(a) and Twenty-Eight Exceptions of Section 362(b) (Attachment B)

A. What generally is stayed?

- (i) acts or proceedings against the debtor or the debtor's property on pre-petition claims; set-off of pre-petition debt against a claim of the debtor
- (ii) acts or proceedings to obtain possession of, to encumber, or otherwise to interfere with property of the bankruptcy estate

B. Exceptions to the automatic stay relating to common state court proceedings:

- (i) criminal proceedings against the debtor (section 362(b)(1))
- (ii) most dissolution-related proceedings, (other than division of property that is property of the bankruptcy estate), including paternity, alimony and child support, custody, visitation, dissolution of marriage, collection of domestic support (other than from bankruptcy estate property), and domestic violence matters (section 362(b)(2))
- (iii) exercise of police or regulatory power of any "governmental unit" (section 362(b)(4))
- (iv) tax collection, except against bankruptcy estate property (section 362(b)(9))
- (v) eviction proceedings on terminated non-residential leases and residential leases where an order of possession predates the bankruptcy petition (section 362(b)(10) and (22))

C. Relief from the Automatic Stay - Section 362(d)

The automatic stay can be lifted on application of a party in interest "for cause" or if the bankruptcy estate has no stake in the property in issue.

D. Duration of the Automatic Stay - Section 362(e)

- (i) Upon entry of a discharge the stay ends concerning actions against the debtor; the discharge takes over for the stay.
- (ii) The stay ends against property of the bankruptcy estate upon abandonment by the bankruptcy trustee or closing of bankruptcy case.

4. Removal of State Court Civil Litigation Related to a Bankruptcy Case
(Attachment C: 28 U.S.C. § 1452)

- A. "Any claim or cause of action in a civil action" may be removed to the bankruptcy court in the federal district where the civil action is pending if the bankruptcy court had concurrent jurisdiction under 28 U.S.C. § 1334.
- B. Removal deadlines, found in Bankruptcy Rule 9027, vary from those in the general removal statutes, i.e. 28 U.S.C. §§ 1441-47.
- C. Removal is effective upon filing of the notice of removal in state court.
- D. Civil actions by governmental units to enforce police or regulatory power are not subject to removal.
- E. The bankruptcy court may remand "on any equitable ground."

5. Preclusion

- A. 28 U.S.C. § 1738 requires federal courts to give full faith and credit to proceedings of state courts and precludes collateral attack in federal court on state court rulings.
- B. Preclusion concerns relitigation of claims (*res judicata*) and relitigation of issues (collateral estoppel).
- C. Rules for application of *res judicata* and collateral estoppel vary somewhat by jurisdiction. Generally, federal courts choose the preclusion rules of the forum whose prior ruling is being subjected to collateral attack.

- D. Colorado's appellate preclusion precedents vary markedly in some respects from some other fora concerning, for example, "finality" and "necessity." See *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005) and *Schultz v. Boston Stanton*, 198 P.3d 1253 (Colo. App. 2008). For a recent effort of a bankruptcy court applying Colorado preclusion rules, see *Purse v. Purse*, Adv Proc. No. 09-1135 (12-15-09). (Attachment D)

ATTACHMENT A

District Courts; Jurisdiction

28 USC § 1334. Bankruptcy cases and proceedings

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
- (b) Except as provided in subsection (c)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
- (c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
- (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.
- (d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.
- (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—
 - (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
 - (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327,

28 USC § 157. Procedures

- (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
- (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
- (2) Core proceedings include, but are not limited to—
 - (A) matters concerning the administration of the estate;
 - (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
 - (C) counterclaims by the estate against persons filing claims against the estate;
 - (D) orders in respect to obtaining credit;
 - (E) orders to turn over property of the estate;
 - (F) proceedings to determine, avoid, or recover preferences;
 - (G) motions to terminate, annul, or modify the automatic stay;
 - (H) proceedings to determine, avoid, or recover fraudulent conveyances;
 - (I) determinations as to the dischargeability of particular debts;

- (J) objections to discharges;
 - (K) determinations of the validity, extent, or priority of liens;
 - (L) confirmations of plans;
 - (M) orders approving the use or lease of property, including the use of cash collateral;
 - (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
 - (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
 - (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.
- (3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.
- (4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).
- (5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.
- (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
- (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.
- (d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.
- (e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

ATTACHMENT B

11 USC § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
- (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

- (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
- (2) under subsection (a) —
 - (A) of the commencement or continuation of a civil action or proceeding —
 - (i) for the establishment of paternity;
 - (ii) for the establishment or modification of an order for domestic support obligations; or
 - (iii) concerning child custody or visitation;
 - (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
 - (v) regarding domestic violence;
 - (B) of the collection of a domestic support obligation from property that is not property of the estate;
 - (C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
 - (D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;
 - (E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;
 - (F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or
 - (G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;
- (3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(5) [Deleted by Act Oct. 21, 1998]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract; or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).[]

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding

and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended

before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section; of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

• • • •

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

• • • •

ATTACHMENT C

28 USC § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

(1) **WHERE FILED; FORM AND CONTENT.** A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice

to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

(2) **TIME FOR FILING; CIVIL ACTION INITIATED BEFORE COMMENCEMENT OF THE CASE UNDER THE CODE.** If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) **TIME FOR FILING; CIVIL ACTION INITIATED AFTER COMMENCEMENT OF THE CASE UNDER THE CODE.** If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) **NOTICE.** Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.

(c) **FILING IN NON-BANKRUPTCY COURT.** Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(d) **REMAND.** A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.

(e) PROCEDURE AFTER REMOVAL.

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 10 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

(f) **PROCESS AFTER REMOVAL.** If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(g) **APPLICABILITY OF PART VII.** The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the notice of removal, whichever period is longest.

(h) **RECORD SUPPLIED.** When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed.

(i) **ATTACHMENT OR SEQUESTRATION; SECURITIES.** When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

ATTACHMENT D

Case:09-01135-ABC Doc#:31 Filed:12/15/09 Entered:12/15/09 15:19:28 Page 1 of 7

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable A. Bruce Campbell

In re:)	
)	
DANIEL R. PURSE and)	Case No. 08-28878 ABC
ANNE W. PURSE,)	Chapter 11
Debtors.)	
_____)	
DON PURSE,)	
Plaintiff,)	
)	
v.)	
)	Adversary Pro. No. 09-01135-ABC
DANIEL A. PURSE and)	
ANNE W. PURSE,)	
Defendants.)	

ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND (2) DENYING PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

Before the Court are the parties' Cross-Motions for Summary Judgment and the Responses thereto.

I. Background

This adversary proceeding concerns the dischargeability of a debt arising from prior litigation in the District Court for the City and County of Denver ("State Court") in which Plaintiff Don Purse ("Don") asserted claims against his brother, Defendant Daniel A. Purse ("Dan") for: (1) breach of Dan's fiduciary duty as manager and controlling member of a limited liability company ("LLC") to provide an accounting under C.R.S. § 7-80-404(1)(a)(2004); and (2) failure properly to distribute LLC assets upon dissolution under C.R.S. §§ 7-80-804 and 806. The State Court lawsuit arose from a dispute regarding the purchase, management, and disposition of the assets of an LLC of which Dan was a 90% owner and Don was a 10% owner. After a bench trial in which both parties fully participated and were represented by counsel, the State Court ruled in favor of Don and against Dan, entering detailed findings of fact in support of its conclusion that Dan's conduct was a breach of his duties as "trustee" and fiduciary as well as a breach of his obligation of reasonable care, good faith, and fair dealing with respect to the operation of the LLC. The State Court entered judgment against Dan in the amount of \$135,197.25 as of November 1, 2008. In addition, after finding that Dan's defense was groundless and frivolous pursuant to C.R.S. § 13-17-102, the Court entered an award of attorneys' fees in the amount of \$19,157.50. Neither party appealed any portion of the judgment, and it is now final.

In the Complaint now pending before this Court, Don asks the Court to determine that the

judgment against Dah is nondischargeable under 11 U.S.C. § 523(a). He claims the debt is excepted from discharge because it was obtained by false pretenses, false representation and/or actual fraud pursuant to § 523(a)(2); because it was a debt for willful and malicious injury pursuant to § 523(a)(6); and because it was a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, pursuant to § 523(a)(4). Don also seeks statutory recovery of stolen property, treble damages, and attorneys' fees pursuant to C.R.S. § 18-4-405, the imposition of a constructive or resulting trust, the imposition of an equitable lien, and/or an accounting. Anne W. Purse is named as a co-defendant in this litigation notwithstanding the fact that she was not a party in the State Court case. She owes no debt to Don and was named in this suit only in connection with Plaintiff's effort to impress a trust or lien on property in which she allegedly has an interest.

All parties argue that the preclusive effect of the State Court judgment entitles them to summary judgment. In Defendants' Motion for Summary Judgment, they contend that all of Plaintiff's claims, other than the claim for non-dischargeability under § 523(a)(4), are barred by the doctrine of *res judicata*. Plaintiff's Motion for Partial Summary Judgment asserts that the doctrine of *collateral estoppel* precludes relitigation of any of the issues determined in the State Court proceeding, and that the State Court's findings are sufficient to establish all of the elements of Plaintiff's claims for non-dischargeability under §§ 523(a)(2), (4), and (6).

II. Undisputed Facts

The State Court's findings of fact, as set forth fully in Exhibit A to Plaintiff's Motion for Partial Summary Judgment are not disputed and are incorporated herein by reference. (See Ex. A to Pl. Mot. for Partial Summ. J., [hereinafter "Ex. A"] at 2-12.) The amount and method of calculation of the judgment, interest, and attorney's fees are also not disputed and are incorporated as well. (See Ex. A at 17-18 and Ex. B to Pl. Mot. for Partial Summ. J., [hereinafter "Ex. B"] at 17-18.)

III. Discussion

A. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334; 28 U.S.C. § 157(a) and (b)(2)(I); and D.C.COLO.LCivR. 84.1. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

B. Summary Judgment Standards

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for

trial as to those dispositive matters for which they carry the burden of proof. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The nonmoving party may not rest on its pleadings, but must set forth specific facts. *Id.* When applying this standard, the court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.* 475 U.S. 574, 106 S.Ct. 1348 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288 (10th Cir. 1991).

C. Defendants' Motion for Summary Judgment - *Res Judicata*

"Federal courts must give to state court judgments 'the same full faith and credit . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.'" *Fox v. Maulding*, 112 F.3d 453, 456 (10th Cir. 1997) (citing 28 U.S.C. § 1738). Therefore, in order to determine the preclusive effect of a state judgment, a federal court must look to the law of the court issuing the judgment. *Id.*¹

Under Colorado law, in order for Defendants to show that Don's claims are barred by *res judicata*, they must show "(1) finality of the first judgment; (2) identity of [the] subject matter; (3) identity of claims for relief; and (4) identity or privity between parties to the actions." *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo.1999). *Res judicata* not only bars relitigation of claims and defenses actually decided, but also any matters that could have been raised in the first proceeding but were not. *Id.* "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions out of which the action arose." *Stone v. Dept. of Aviation*, 453 F.3d 1271, 1279 (10th Cir. 2006)(quoting RESTATEMENT (SECOND) OF JUDGMENTS §24(1)); *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 109 P.3d 604, 609 (Colo. 2005).

The prior suit between these same parties ended with a final judgment on the merits in favor of Don and against Dan, and the subject matter in both cases is the same: Dan's conduct and obligations in regard to the management and dissolution of the LLC owned by him and Don. By application of *res judicata*, the prior judgment conclusively established the amount of the debt owed by Dan to Don arising from this transaction. That debt has been fixed, and neither party may relitigate any claim, nor assert any new claim, in order to increase or decrease the amount owed on the debt. Thus, Plaintiff's claims are barred to the extent that they dispute or seek to change the amount of the debt owed by Dan to Don or seek the imposition of additional damages or new remedies related to such debt. Defendants' Motion for Summary Judgment will be granted to this extent.

Don concedes in his Response to Defendants' Motion for Summary Judgment that the only basis for maintaining Anne W. Purse as a defendant in this case is that Mrs. Purse must be

¹Full faith and credit applies to both claim preclusion (*res judicata*) and issue preclusion (collateral estoppel). *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 663-64 (1998); *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 n.6, 102 S.Ct. 1883, 1889 (1982).

named as a party defendant to the extent that she claims an interest in assets upon which Don seeks the imposition of a constructive trust in his seventh claim for relief. However, Anne W. Purse is a privy of her husband, Dan, for purposes of application of *res judicata* in the instant litigation. Don's claim to her interest in property is merely a demand for an additional remedy on a claim that was, or could have been, litigated by Don against Dan in the State Court suit. As noted in the Restatement, "A judgment in an action that determines interests in real or personal property . . . [w]ith respect to the property involved in the action . . . [h]as preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself." RESTATEMENT (SECOND) JUDGMENTS § 43 (1982). In this case, Anne W. Purse is alleged to be a successor in interest to Dan, in that, according to Don's Response, she is a transferee of the funds received through Dan's purported breaches of duty, upon which the State Court action was commenced and judgment entered. Thus, she obtains the benefit of *res judicata*, and no claim against her in regard to such funds can now be commenced.² Accordingly, there remains no basis for any claim against Mrs. Purse, and she will be dismissed as a defendant from this adversary proceeding.

Plaintiff's requests for a determination of nondischargeability against Dan under § 523, however, are not barred by *res judicata*. In *Brown v. Felsen*, 442 U.S. 127 (1979), the United States Supreme Court determined that "neither the interests served by *res judicata*, the process of orderly adjudication in the state courts, nor the policies of the Bankruptcy Act, would be well served by foreclosing a creditor in a bankruptcy proceeding from submitting additional evidence" to prove that a debt was nondischargeable. 442 U.S. at 132. In nondischargeability proceedings in the bankruptcy court, the dischargeability claim arises, not to collaterally attack the validity of the underlying debt, but rather "to meet . . . the new defense of bankruptcy which [the debtor] has interposed between [the creditor] and the sum determined to be due him." *Id.* at 133.

Therefore, only to the extent that Plaintiff's claims relate to questions of dischargeability under Title 11, they are not barred by *res judicata*. Defendants' Motion for Summary Judgment will be denied to this extent.

D. Plaintiff's Motion for Partial Summary Judgment - Collateral Estoppel

Collateral estoppel, where applicable, precludes relitigation of issues decided by another court. Collateral estoppel may preclude relitigation of the factual bases for a non-dischargeability claim if elements of the claim for non-dischargeability are identical to elements actually litigated and determined in the prior action. *Grogan v. Garner*, 498 U.S. 279, 284, 111 S.Ct. 654, 658 (1991). As with *res judicata*, the collateral estoppel effect of a prior judgment is determined by the law of the forum in which the prior judgment was rendered. *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1332 (1985).

²See RESTATEMENT (SECOND) JUDGMENTS § 44 (1982) ("A successor in interest of property that is the subject of a pending action to which his transferor is a party is bound by and entitled to the benefits of the rules of *res judicata* to the same extent as his transferor . . .").

Colorado law provides that collateral estoppel bars relitigation of an issue if four elements are shown. These four elements are:

- (1) The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) The party against whom estoppel was sought was a party to or was in privity with a party to the prior proceeding; (3) There was a final judgment on the merits in the prior proceeding; (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.

Bebo Constr. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78, 84-85 (Colo. 1999) (quoting *Michaelson v. Michaelson*, 884 P.2d 695, 700-01 (Colo. 1994)). The burden to demonstrate the existence of the four elements of collateral estoppel rests with the party seeking preclusion. *Id.* at 85.

Don and Dan were parties to the prior proceeding, both had a full and fair opportunity to litigate the issues, and a final judgment was entered in that case.³ Thus, collateral estoppel will prevent the parties from relitigating any factual issue that was actually and necessarily determined in the prior trial in State Court.

1. Section 523(a)(2)

To establish that Dan cannot discharge his debt under § 523(a)(2)(A), Don must show that, "[t]he debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was reasonable; and the debtor's representation caused the creditor to sustain a loss." *In re Riebesell*, - F.3d -, 2009 WL 3448743 at *4 (10th Cir. 2009) (quoting *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996)). Don fails to point to any specific finding of the State Court that Dan made a representation or representations to him with the intent to deceive, or that Don relied on such representations, and this Court cannot divine such determinations from the State Court's order. Accordingly, Don cannot establish the absence of any genuine issue of material fact in regard to his assertion of nondischargeability under section 523(a)(2).

2. Section 523(a)(6)

"Under § 523(a)(6), a debtor is denied discharge from liabilities arising out of 'willful and malicious injury' to another or another's property. The Supreme Court has held the quoted phrase encompasses 'only acts done with the actual intent to cause injury.'" *Via Christi Reg'l Med. Ctr. v. Englehart (In re Englehart)*, 229 F.3d 1163, 2000 WL 1275614 at *1 (10th Cir. 2000) (unpublished opinion) (quoting *Kawaauhau v. Gelger*, 523 U.S. 57, 61 (1998)).

³Under Colorado law, contrary to the rule under federal law and most other states, a judgment is not final for collateral estoppel purposes until there is no longer an opportunity for appellate review of the judgment. *Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005).

In the matter now before the Court, Don asserts that the State Court's order establishes the elements necessary to demonstrate nondischargeability under section 523(a)(6), but again fails to apply the State Court's facts and conclusions to the section 523(a)(6) standard to show actual intent to cause injury. Accordingly, Don has failed to demonstrate the absence of any genuine issue of material fact as to whether Dan should be denied discharge on the basis that his liability arises from "willful and malicious injury" to Don.

3. Section 523(a)(4)

Section 524(a)(4) prevents a discharge of any debt or fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The existence of a fiduciary duty under section 523(a)(4) is determined under federal law, but state law is relevant to this inquiry. *Fowler Bros. v. Young (In Re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996). In this case, under the Tenth Circuit's case law, to find that a fiduciary relationship existed under section 523(a)(4), the Court must find that the money or property on which the debt at issue was based was entrusted to Dan, giving rise, therefore, to an express or technical trust. *Id.* The Court must also find that the fiduciary relationship between the parties existed prior to the creation of Dan's debt to Don. *Id.* at 1372.

To succeed on a claim for "embezzlement" under § 523(a)(4), Don must show that he entrusted property to Dan that Dan misappropriated with fraudulent intent. *Tilley v. Lynch (In re Tilley)*, 286 B.R. 782, 789 (Bankr. D. Colo. 2002). To establish "larceny" under this section, Don must show that Dan took Don's property with intent to convert it to Dan's use and with the intent to permanently deprive Don of the property. *Id.* Don points to no findings by the State Court which would establish the "fraudulent intent," "intent to convert," or "intent to permanently deprive" elements which would be necessary to show larceny or embezzlement under section 523(a)(4).

The State Court undertook to determine whether Dan had breached his duties under the Colorado's version of the Uniform Limited Liability Company Act. In that regard the Court found both that: (1) under § 7-80-404 of the 2004 version of the Act, Dan had breached his duties to hold as a trustee for the LLC any profit derived by Dan in the conduct of the LLC business; and that (2) under § 7-80-406 of the 2001 version of the Act, Dan had breached his obligations to perform his duties as a manager in good faith and with reasonable care. (Ex. A at 15-16.)⁴

The State Court entered judgment against Dan in favor of Don on the basis of both C.R.S. § 7-80-408 (2004) and C.R.S. § 7-80-408 (2004), finding that Dan's conduct was "both a breach of [Dan's] duties as trustee and fiduciary, and his obligation of reasonable care and good faith fair dealing, with respect to the operation of the . . . LLC." (Ex. A at 15).

Issues that were actually litigated and decided, but which were not necessary to the final outcome of the case do not meet the "necessarily adjudicated" element of collateral estoppel. *Bebo Constr. Co.*, 990 P.2d at 86. The Colorado Court of Appeals has adopted the Restatement's position that a "trial court judgment based on determinations of multiple issues, any of which

⁴ Because it was making alternative findings that Dan was liable under whichever statute was applied, the Court stated that it did not need to "resolve which iteration of the Act is applicable." (Ex. A. at 12.)

Case:09-01135-ABC Doc#:31 Filed:12/15/09 Entered:12/15/09 15:19:28 Page 7 of 7

standing independently would be sufficient to support the result, is not conclusive with respect to any of the issues standing alone." *Schultz v. Boston Stanton*, 198 P.3d 1253, 1258 (Colo. App. 2008); RESTATEMENT (SECOND) OF JUDGMENTS §27, cmt. I. Thus, where a trial court makes alternative conclusions, it cannot be said, under Colorado law, that its determination of any particular conclusion was necessary or essential to the judgment. *See id.*

Because the State Court made alternative conclusions in entering judgment in favor of Don, it cannot be concluded under Colorado law that a finding that Dan breached his fiduciary duty to Don was necessary or essential to the judgment for purposes of Don's § 523(a)(4) nondischargeability claim. Accordingly, there is no preclusive effect accorded to the State Court's alternative determination that Dan violated his fiduciary duties to Don. Don has failed to demonstrate the absence of any genuine issue of material fact on his claim that discharge of Dan's debt should be denied under this section.

IV. Conclusion and Orders

In accordance with the foregoing, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is GRANTED to the extent that Plaintiff seeks additional damages or remedies with respect to the State Court judgment, and it is GRANTED to the extent that it seeks to dismiss Anne W. Purse as a defendant from this action. It is

FURTHER ORDERED that Defendants' Motion for Summary Judgment is DENIED to the extent that it seeks dismissal of Plaintiff's requests for determination of nondischargeability pursuant to 11 U.S.C. §§ 523(a)(2), (4), and (6). It is

FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

DATED: December 15th, 2009.

BY THE COURT:


A. Bruce Campbell, Judge