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DETERMINING IF THE CLAIM OR OBLIGATION IS A DOMESTIC SUPPORT OBLIGATION (DSO)

Materials by Ellen Ray[1]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made it much harder to discharge, under any chapter, debts that fall under the definition of a Domestic Support Obligation. **Section 101(14A)** was added to create one definition of a "DSO" which is used throughout the Bankruptcy Code.

Since both **Sections 523(a)(5) and 523(a)(15)** rely on it, the first step in figuring out whether a debt owed by the debtor is a Domestic Support Obligation should always be to refer to the statute that defines a DSO for purposes of dichargeability; if a debt meets the requirements of Section 101(14A) it will be considered to be nondischargeable in a Chapter 7, 11 or 12 Bankruptcy without looking at any other factors that might have been relevant before "BAPCPA" including whether the debt was called support in the order or agreement made but may be dischargeable in a Chapter 13 case if it falls under Section 523(a)(15). *In re Forgette,* 379 B.R. 623 (Bankr W.D. Va., 2007).

Section 101(14A) defines "domestic support obligation" as follows:

> 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—
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> (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

[1] I would like to acknowledge the assistance of both David Cox and Hannah W. Hutman in the preparation of these materials in that large portions of the materials provided here were extracted from materials prepared by both of them for past presentations.

(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.

CHAPTER 13 PLAN TREATMENT OF DSO DEBTS

If a Debt falls under the definition of a "DSO" per Section 523(a)(5) the debt will not be dischargeable and the following analysis will apply in a Chapter 13 case:

a. **If a DSO then it is a Priority Debt.** Section 523(a)(5).

b. **If it is a Priority Debt then it must be Paid in Full.** § 1322(a)(2).

c. **If not Paid in Full then No Chapter 13 Discharge** § 1328(a).

d. **Even if Not DSO, Confirmation Still Requires Plan in Good Faith.** Section 1325(a)(3) requires plan be filed in good faith.

CHAPTER 13 DETERMINATION OF WHETHER DOMESTIC DEBT FALLS UNDER SECITON 523(a)5 OR SECTION 523(a)(15)

"BAPCPA" made changes to the Chapter 13 "Super Discharge" provisions of Section 1328 of the Bankruptcy Code but did not include Section 523(a)(15) in the list of Sections of 523 that cannot receive a discharge in a Chapter 13. So, if the debt falls under Section (a)(15) of the Bankruptcy Code it is dischargeable in a Chapter 13 case, *In re Forgette,* 379 B.R. 623 (Bankr W.D. Va. 2007), as long as the case does not receive a Hardship Discharge under Sections 1328(b) & (c). Therefore, because Chapter 7 offers no chance of getting a discharge from any debt incurred incident to a divorce or domestic proceeding as defined by Section 101(14A), it is important to understand how Chapter 13 differs from Chapter 7 in ways that may offer some debtors relief from debts incurred incident to a divorce that fall under Section 523(a)(15) and also to analyze all debt not clearly support and so debt that might be discharged in a Chapter 13 case.

1. **Determining Whether an Obligation is a DSO.** Often it is clear that a debt is in the nature of support because it is clearly labeled as child support or spousal support and meets all the obvious requirements of Section 101(14A)(A). But even when the wording of the Order or Agreement does not make it clear, 101(14A)(B) can still be found to apply to a debt which at first glance may seem to fall outside of Section 523(a)(5) because the debt is "in the nature of alimony, maintenance or support.…". It is these types of debts that are most often the subject of litigation in a Chapter 13 case.

Before looking at the actual factors to consider for a determination of what debt is "in the nature of support" it is helpful to be aware of the following:

a. **Fact Specific Analysis.** The Court must determine whether the payment of a debt is in the nature of alimony, maintenance, or support, which is a fact specific analysis. *In re Johnson,* 397 B.R. 289 (Bankr. M.D.N.C. 2008); *In re Austin,* 271 B.R. 97, 106 (Bankr. E.D. Va. 2001).

b. **Burden of Proof.** The party seeking priority has the burden of persuading the Court that the obligation meets the requirements of a DSO. *In re Ludwig,* 502 B.R. 466 (Bankr. W.D. Va., 2013). The complaining spouse has the burden to demonstrate that the obligation at issue is in the nature of alimony, maintenance or support.

c. **Federal Law Question.** Federal bankruptcy law, not state law, determines whether a debt is in the nature of support. *Johnson,* 397 B.R.289 (2008) at 296, (citing *In re Strickland,* 90 F.3d 444, 446 (11th Cir. 1996) (a debt may be in the "nature of support" even though it would not legally qualify as support under state law).

d. **Direct Payment to Spouse or Ex-Spouse Not Required.** The obligation in question need not be paid to the DSO creditor directly. It may simply be "recoverable by" the DSO creditor through, for example, a hold harmless provision established to protect that creditor. *Johnson* at 296.

e. **The Intent of the Parties Controls.** The Court must determine whether the parties intended the obligation as alimony, support or maintenance at the time the separation agreement was executed at the time the agreement was executed. *Ludwig* at 468 (citing *Tilley v. Jessee,* 789 F.2d 1077, 1078 (4th Cir. 1986) and *Ludwig* at 469.

f. **Consider All Relevant Evidence.** The use of the factors below does not preclude consideration of other factors. *In re Johnson,*397 B.R. at 296-97. Courts should consider all relevant evidence and may look beyond the agreement or divorce decree to determine the true nature of the payments or debt owed by the debtor.

2. Factors to Consider in determining whether a debt is "in the nature of" support:

a. Description. The label used for the debt at issue. Although significant, labels used by the state court are not controlling;

i. Context. The Court should be cognizant of the context in which the obligation arises under the agreement.

ii. **Label Significant But Not Controlling.** The court must not rely on the label used by the parties or the state court, but must look beyond the label to examine whether the debt actually is in the nature of support or alimony.

iii. **Lump Sum or Periodic Payments.** The method of payment is also probative of whether the debt is in the nature of support. Whether the payment is to be made in a lump sum or over a period of time.

iv. **Payee**. Whether the payment is to be made directly to the spouse or to a third party are relevant considerations.

v. **Tax Treatment.** The tax treatment accorded to the debt may also be significant.

vi. **Questions to Consider.** Did the parties waive spousal support or child support? What section of the agreement does the obligation arise from? "Existing Debts of the Parties?" "Division of Property?" *Ludwig* at 469.

vii. **Find the Purpose.** Was the purpose of the obligation to provide for the common necessities of the spouse or to provide the parties with an equitable division of the marital debts? *Ludwig* at 469.

viii. **Obligation Maintains a Residence.** Some Courts view an obligation that is essential to enable a party to protect a residence is a support obligation. *Johnson* at 299.

ix. **Be Mindful of Party Admissions**. In *Ludwig*, the non-filing creditor spouse conceded that she chose to have the Debtor pay his portion of the marital debt instead of collecting child support or spousal support.

x. **Be Prepared.** Provide evidence for all factors or the Court may not consider them.

b. Financial Situation. The needs of the parties including the income at the time the obligation was created. Relevant factors include the following. *Austin* at 105-109.

i. **Employment History.** The prior work experience and abilities of the parties.

ii. **Health and Opportunities.** Their physical health, potential earning power and business opportunities,

iii. **Need.** The probable need of the parties in the future.

iv. **Stability.** The stability of the parties' income at the time of the agreement.

v. **Custody Situation.** Whether one spouse has custody of minor children from the marriage.

The ability of the debtor to pay the obligation at the time of the filing of the bankruptcy petition or the dischargeability to complaint is no longer a consideration of the court after BAPCPA. *Lustgarten v. Vann,* 2014 WL 505257 (Bankr. D. Conn 2014).

c. **Function of Obligation**. The function served by the obligation at the time of the agreement (i.e. daily necessities); and

i. **Past or Future.** Whether the obligation is for a past or future obligation.

ii. **Allocates Debt or Property.** Whether the obligation allocates debt or divides property.

iii. **Provides Necessities.** Whether the agreement served to provide such daily necessities as food, clothing, shelter, and transportation.

iv. **Balance Incomes.** Whether the award was intended to balance a disparity in incomes.

v. **Other Support Alone Sufficient.** Whether, without the obligation at issue, the separate support award would have been sufficient.

vi. **Find the Purpose.** Was the purpose of the obligation to provide for the common necessities of the spouse or to provide the parties with an equitable division of the marital debts? *Ludwig* at 469.

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d. **Evidence of Overbearing.** Whether there is any evidence of overbearing at the time of the agreement that should cause the court to question the intent of a spouse.

i. Legal Representation. Whether both parties were represented by an attorney.

ii. **Unbalanced**. Whether the terms of the agreement grossly favor one spouse over the other or leave one spouse with virtually no income.

iii. **Testimony**. The statements of the spouses in court.

iv. **Capacity and Experience**. The age, health, intelligence and experience of the spouses.

v. **Bargaining Positions**. The bargaining positions of the parties.

vi. **Misrepresentations.** Whether there were any misrepresentations.

vii. **Knowledge of the Parties**. Whether the creditor spouse had knowledge of the debtor spouses' weakness or inability to fulfill the terms of the agreement.

3. **Breaking Down Each Component of the DSO Test.** Each of the four factors must be considered if evidence is available.

   a. **Language of Agreement.** The Court must address the actual language and substance of the agreement. *In re Austin*, 271 B.R. 97 (Bankr. E.D.Va., 2001).

      i. **Context.** The Court should be cognizant of the context in which the obligation arises under the agreement.

      ii. **Label Significant But Not Controlling.** The court must not rely on the label used by the parties or the state court, but must look beyond the label to examine whether the debt actually is in the nature of support or alimony.

      iii. **Lump Sum or Periodic Payments.** The method of payment is also probative of whether the debt is in the nature of support. Whether the payment is to be made in a lump sum or over a period of time.

      iv. **Payee**. Whether the payment is to be made directly to the spouse or to a third party are relevant considerations.

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x. **Be Prepared.** Provide evidence for all factors or the Court may not consider them.

4. Specific Application of the Factors Listed above:

a. Obligation to Pay Mortgage or Other Specified Debts.

i. Obligations to make former wife's car and mortgage payments – Held DSOs. Here, both the Chapter 13 debtor's obligation to continue making the monthly mortgage payments on the parties' former marital residence, and the debtor's obligation for his ex-wife's car payments, were domestic support obligations, even though these obligations were not stated in the "Child Support" and "Alimony" sections of the parties' "Complete Custody & Property Settlement Agreement." *In re Krueger*, 457 B.R. 465 (Bankr. D. S.C., Sept. 19, 2011).

ii. **Debtor's agreement to pay mortgage debt—Held DSO.** The Chapter 13 debtor's agreement, in his separation agreement with his former wife, to assume sole responsibility for the second mortgage debt on the parties' marital residence constituted a nondischargeable domestic support obligation, rather than a dischargeable property settlement, where both the debtor and his former wife knew that she would be unable to afford to remain living on the marital property with the parties' daughter, as provided for in the agreement, unless the debtor assumed the second mortgage debt, and the debtor testified that he was willing to do whatever it took to get out of the marriage. *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C., Feb. 27, 2008).

iii. **Obligation to pay credit card debts and lump sum—Held Property Settlement.** The decree required the debtor to continue to pay certain credit card accounts, pay one-half of the former wife's attorney's fees, and execute a note payable to the former wife in the amount of $70,000. Factors supporting this determination, the court said, were that (1) during the

divorce proceedings, the former wife's attorney stated that the agreement was a matter of debt allocation; (2) the obligations were lump-sum obligations payable over time that were not terminable upon any event; (3) at the time of the decree and during the marriage, the former wife had stable gainful employment and generally earned more than the debtor; (4) the record in the divorce proceedings revealed that the $70,000 debt was intended to compensate the former wife for a second mortgage taken during the marriage on a home she brought to the marriage, but the record gave little insight into the intent beyond mere allocation of debt; and (5) nothing in the record of the divorce proceedings evidenced that the intent of that obligation was to establish an award of alimony, maintenance or support to allow the former wife to remain in her house or meet basic needs. While the former wife testified in the bankruptcy proceedings that she needed the money to maintain her household, any funds received by the former wife would assist her with her debts and expenses, as was true of any payment awarded in a divorce decree. *In re Poole*, 383, B.R. 308 (Bankr. D. S.C., Oct. 9, 2007).

iv. **Payment of mortgage debt—Held Property Settlement.** The Bankruptcy Court for the Eastern District of North Carolina (Bankruptcy Judge A. Thomas Small) held that the debtor's former wife, who had the burden of proof, failed to establish that the debtor's obligation, in his divorce decree, to pay a debt secured by a lien on the parties' former marital residence was in the nature of support, rather than a property settlement, where the obligation did not terminate upon the wife's remarriage, and it was not clear that the wife had been dependent upon the debtor, as both parties had been employed, and the debtor's income was not significantly greater than the wife's. Although the decree stated that, in case of bankruptcy, the obligations of both parties were to be treated as support, the court said it was not bound by the labels used by the parties. *In re Sewell*, Case No. 07-00777-5-ATS (Bankr. E.D. N.C., Jan. 3, 2008).

v. **Debtor's obligation to pay for former wife's medical procedure – Held Property Settlement.** The debtor's obligation, under the "divorce agreement," to pay for his former wife's cosmetic surgery was not a domestic support obligation, but rather a general unsecured claim. *In re Peterson*, 2012 WL 5985269 (Bankr. E.D.N.C., Nov. 29, 2012).

vi. **"Equitable division" award—Held Property Settlement.** The family court's "equitable distribution" of $12,876 to the debtor's former wife was not intended to be in the nature of alimony, maintenance or support, as it was labeled as a final settlement of marital property, it was payable in a lump sum, and it did not terminate upon any future event or change in circumstances. *In re Rhodes*, Case No. 08-03606-HB (Bankr. D. S.C., Oct. 31, 2008).

vii. **Debtor's right to receive 60% of marital assets—Held property Settlement.** Denying the debtor's claim of exemption under Code § 522(d)(10)(D), the Bankruptcy Court for the Western District of Pennsylvania (Bankruptcy Judge Warren W. Bentz) held that the debtor's right, under her dissolution of marriage decree, to receive 60% of the marital assets was a property settlement, rather than "alimony, support, or separate maintenance." Applying the same standards as those governing an inquiry under Code § 523(a)(5), the court said that the marital agreement in this case was not ambiguous and clearly reflected the intent of the parties. The labels given to the spouse's obligation in the agreement and the substantive characteristics left no doubt, the court said, that the division of assets was intended as a property settlement. *In re Korwin*, 379 B.R. 80 (Bankr. W.D. Pa., Dec. 10, 2007).

viii. **Monthly payment for seven years – Held Property Settlement.** The debtor's agreement, in his marital separation agreement with his former wife, to pay her $150 per month for seven years was a division of property rather than the payment of support. The fact that the payment was for a set number years, and did not utilize a contingency, such as the wife's death or remarriage, to terminate the obligation suggested that the payment was intended to provide a certain amount of money to the wife, rather than to provide for her ongoing support until she no longer required such support. Moreover, the sum of $150 per month over seven years equaled $12,600, which was almost half of the $29,000 contained in the debtor's retirement account, and this, combined with the wife's own testimony that she accepted the $150 per month in lieu of obtaining a portion of the debtor's retirement account and alimony, persuaded the court that the parties primarily intended this monthly payment to compensate the wife for her share of the debtor's retirement account. *In re Bolar*, Case No. 08-10350-WHD (Bankr. N.D. Ga., Nov. 5, 2008).

ix. **Debt Owed to Trust – Held DSO.** Where debtor had been ordered to make payments to his ex-wife's trust in lieu of alimony and it was understood by both parties at the time of the agreement that the payments were to be for the wife's future support, the payments were found to be "in the nature of support" and so not dischargeable. *Hundt v. Ventrone (In re Ventrone)*, No. 21-11643, Adv. Proc. Nos 22-00005, 22-00026 (Bankr. E.D. Pa. Jan 2023).

x. **Debtor's obligation to repay her ex-spouse for child support payments made in error – Held NOT DSO.** Where debtor owed her ex-husband $55,000 in child support payments made by him before it was determined that he was not the father of her children, the debt was determined to not be a DSO and so was not entitled to be paid as a priority debt. *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010).

b. Spouse's Attorney Fees can also be found to be "in the nature of support" if the debt meets enough of the factors listed above:

i. **Award of attorney's fees payable directly to attorney – Held DSO.** When a debt alleged to constitute a domestic support obligation arises from a court order, the issue is whether the court issuing the order intended for the obligation to be in the nature of support. *In re Baker*, 2012 WL 6186683 (Bankr. E.D. N.C., Dec. 12, 2012). Here, the state court intended an attorney's fee award to the Chapter 13 debtor's former husband in post-divorce litigation regarding the custody of the parties' minor children to be in the nature of maintenance and support for the children, and therefore was a domestic support obligation, although the debtor was directed to make this payment directly to the attorney. The state court also awarded child support to the former husband, the attorney's fee award was intended to compensate the husband for legal fees that he incurred due to the debtor's egregious conduct, and the husband did not have the means to pay the attorney's fee, so that requiring the husband to pay the fee would adversely affect his ability to provide for the children. *In re Edinger*, 518 B.R. 859 (Bankr. E.D. N.C., Oct. 16, 2014). See also *In re Boiler,* 393 B.R. 569 (Bankr. E.D. Tenn. 2008); *In re Hayden,* 456 B.R. 378 (Bankr. S.D. Ind. 2011); *In re Westerfield,* 403 B.R. 545 (Bankr. E.D. Tenn. 2009); *Wodark v. Wodark (In re Wodark)* 425 B.R. 834 (10th Cir. BAP 2010)

ii. **Attorney's fees awarded to debtor's former wife – Held DSO.** $35,000 in attorney's fees awarded to the debtor's former wife in the debtor's state court proceeding to set aside the parties' "divorce agreement," which established the debtor's child support obligations and other matters, constituted a domestic support obligation, as the state court made the award after determining that the former wife had "insufficient funds to pay her own attorney's fees." Even if all of the attorney's fees did not directly relate to the enforcement of child support, the entire fee award was nevertheless in the nature of support because the state court intended for the fees themselves to be for support. *In re Peterson*, 2012 WL 5985269 (Bankr. E.D. N.C., Nov. 29, 2012). See also *in re Tarone,* 434 B.R. 41 (EDNY 2010); *In re Rogowski,* 462 B.R. 435 (EDNY 2011).

iii. **Standing by Attorney Awarded Fees in Divorce.** An attorney who represented the Chapter 13 debtor's former wife in connection with the spouses' divorce proceedings had standing to bring an adversary proceeding for a determination that an attorney's fee award entered by the state divorce court in favor of the former wife was nondischargeable as a domestic support obligation, where, pursuant to the express terms of the spouses' divorce decree, the amounts awarded were payable by the debtor, in monthly installments, directly to the attorney. *In re Collins*, 500 B.R. 747 (E.D. Va., Oct. 29, 2013). See also *In re Andrews,* 434 B.R. 541 (Bankr. W.D. Ark. 2010); *Marshall v. Marshall (In re Marshall),* 489 B.R. 630 (Bankr. S.D. Ga. 2013); *McNeil v. Drazen,* 499 B.R. 484 (D. Md. 2013).

In making a determination of whether the attorney fees awarded to ex-spouse were in fact "in the nature of support" and so should be considered nondischargeable as a DSO, "The matters for evidentiary hearing include (but are not limited to) the divorce decree, the separation agreement, Crowne's [the attorney owed the fees] written engagement terms (if any), the intent of the parties regarding support and their financial condition at the time of their divorce, and the scope of services rendered in respect of the Fee Awards". *In re O'Brien* 339 B.R. 529 (Bankr. D. Mass. 2006).

c. Support and Custody of Child -- Debts Owed to Court Appointed Representative and Guardian ad Litem.

i. **Fee owed to guardian ad litem appointed for debtor's children – Held DSO.** $4,370 in fees owed by the debtor to the guardian ad litem appointed for the debtor's minor children in a custody, visitation, and child support modification action was nondischargeable as a domestic support obligation. *In re Espinosa*, 2012 WL 1951107 (Bankr. N.D. Ga., Feb. 1, 2012).

ii. **Guardian ad litem's fee—Held DSO.** A fee of $1,850 awarded by the state court to the court-appointed guardian ad litem for the Chapter 13 debtor's minor child was a domestic support obligation under Code § 523(a)(5). *In re Rose*, 2008 WL 4205364 (Bankr. E.D. Tenn., Sept. 10, 2008).

iii. **An Attorney Fee award payable directly to attorney appointed to represent the best interests of the divorcing parties – Held DSO.** Attorney's fees awarded to an attorney appointed to represent the debtor's children in prepetition divorce proceedings qualified as a domestic support obligation, even though the fees were payable directly to the attorney, rather than to the children. *McNeil v. Drazin*, 499 B.R. 484 (D. Md., Oct. 10, 2013), appeal dismissed, *McNeil v. Markuski*, Case No. 13-2269 (4th Cir., March 27, 2014).

iv. **Other opinions holding the Guardian ad Litem fee awards are in the nature of support.** *In re Soffee*, 337 BR 837, 840 (Bankr. E.D. Va. 2004); *In re Blaemire*, 229, BR 665, 668 (Bankr. D. Md. 1999); *Cannon v. Rackley (In re Rackley),* 502 B.R. 615 (Bankr. N.D. Ga. 2013)

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5. Parties May Not Contract Away Right to Discharge in the Event Obligation Not Deemed a DSO.

a. A provision in the debtor's marital settlement agreement, stating that "[t]o the extent of any obligation contained herein is discharged in bankruptcy and the non-

bankrupt party is held liable for said debt, the non-bankrupt party shall have the right to petition a court of competent jurisdiction for spousal support in an amount sufficient to cover any amounts so discharged," was an invalid prepetition waiver of discharge. The debtor's former spouse could not use this provision to try and have a court retroactively grant spousal support once the debtor had obtained a bankruptcy discharge. *In re Wood*, 2012 WL 14270 (Bankr. E.D. N.C., Jan. 4, 2012).

b. State courts may have some concurrent jurisdiction with regard to the dischargeability of debts but they do not have the authority to label a debt as non-dischargeable before the filling of a bankruptcy case by one of the parties. *Roest v. Roest (In re Roest)*, 569 B.R. 277 (Bankr. W.D. Mich. 2017).

AUTOMATIC STAY ISSUES WHEN PURSUING DIVORCE ACTIONS IN STATE COURT

Prepared by Ellen Ray*
*with assistance from materials generously gifted by David Cox

One of the strongest sections of the U.S. Bankruptcy Code is 11 USC Section 362. It is "one of the fundamental debtor protections provided by the bankruptcy laws." S. Rep. No. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A. N. 5787, 5840. It is widely accepted that without a broad protection from collection of debt and protection of assets during a bankruptcy case it is very difficult for a debtor to get a true fresh start; "in addition to protecting the relative position of creditors, is to shield the debtor from financial pressure during the pendency of the bankruptcy proceeding." *Winters by & Through McMahon v. George Mason Bank,* 94 F. 3d 139, 133 (4th Cir. 1996) (citing *In re Stringer,* 847 F. 2d 549 (9th Cir 1988). The automatic stay gives a debtor breathing room from creditor collection efforts and prevents an unfair race to the courthouse by certain creditors *In re Topfer v.Topfer (In re Topfer)* 587 B.R. 622 (Bankr. M.D. Pa 2018) citing *In re Thomas,* 529 B.R. 628, 635 (Bankr W.D. Pa. 2015); *also see In re Elrod,* 523 B.R. 790, 795-796 (Bankr. W.D.Tenn 2015). The *Topfer* decision has a very clear and detailed analysis of the factors to consider in a motion for Removal and Remand to a state court.

Therefore, when Congress carved out several exceptions to what was stayed by the automatic stay, it is clear that it meant these exceptions to be construed narrowly to apply to only the very specific situations laid out below. See *In re Stringer, 847 F.2d at 552.*

A. The Relevant BAPCPA Code Sections

11 USC § 362. Automatic stay
…(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;
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> (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….

B. Custody, Visitation & Divorce Actions Not Stayed. Section 362(b)(2) makes clear that certain actions unrelated to the bankruptcy, like child custody, visitation, and divorce actions not seeking to divide property; are not stayed by a bankruptcy filing.

C. Collection Of DSO Not Stayed. Section 362(b)(2)(C) also excepts from the automatic stay all actions to collect a DSO from the Debtor's income (even if it is property of the Estate). However, Section 362(b)(2)(C), being construed very narrowly, should not be construed to allow collection against property of the estate and a contempt action filed in state court which asks the court to jail the debtor/defendant if he or she does not comply with a collection order probably oversteps the exceptions allowed in the statute since a request is being made to take action against the debtor's person.

Section 362(b)(1)(C) excepts from stay the garnishment of chapter 13 debtor's wages for past due DSO payments. See *In re Penarein,* 424 B.R. 868, 880 (Bankr. D. Kan. 2010)

On March 20, 2023, the U.S. District Court for the Western District of Virginia affirmed the lower court's decision in *Evans v. Evans. Evans v. Evans (In re Evans),* Civil Action No. 5:22-cv-00026, 2023 U.S. Dist. LEXIS 46397 (W.D. Va. Mar. 20, 2023). The District Court affirmed Judge Connelly's decision from the Western District of Virginia finding Mrs. Evans in contempt for violating the automatic stay by her filing of a motion for contempt in state court against her husband, a debtor in a confirmed chapter 13 plan. Mrs. Evans argued that she had acted on the advice of her bankruptcy counsel who told her that Section 362(b)(2)(C) allowed her to proceed with the contempt complaint in state court which sought to enforce the collection of her DSO claim against property that was not property of the estate but which also asked for jail time to be ordered if her former husband did not comply with the underlying "collection" order entered by the state court. The opinion offers a very good analysis of Section 362(b)(2)(C) and compares it to other sections of 362. Other sections of 362 offer exceptions to the stay which refer to "enforcement" of the action while Section 362(b)(2)(B) does not use the word "enforcement" but instead only refers to "collection" as excepted from the stay. *Id,* at *15-16.

D. Property of the Estate. DSO creditors cannot attempt to collect against "property of the estate" which is still exclusively determined by the bankruptcy court. For

example, attempting to seize a prepetition nonexempt bank account of a Debtor in a chapter 7 would require stay relief. By contrast, the continued collection of child support through an income deduction order is specifically excepted from the automatic stay.

Interests in an Employee Retirement Income Security Act of 1974 ("ERISA") qualified retirement plan is excluded from the property of the bankruptcy estate under 11 U.S.C. Section 541(c)(2). The U.S. Supreme Court upheld the exclusion in the case of *Patterson v. Shumate,* 504 U.S. 753 (1992). See Section 29 U.S.C. Section 105(d)(1) also known as the anti-alienation clause in the ERISA statute.

Although it should be noted that, if the debtor has been awarded but not received the distribution at the time the bankruptcy is filed, the interest in the retirement account may not be excluded from property of the estate or able to be exempted under ERISA exemption See *In re Nelson,* 274 B.R. 789, (BAP 8th Cir 2002) finding that the interest was not part of the estate and *In re Lelchandani,* 279 B.R. 880 (B.A.P. 1st Cir. July 2, 2022).

E. All the Exceptions. The automatic stay does not apply to:

1. Actions to establish **paternity**. § 362(b)(2)(A)(i).
2. Actions for the establishment or modification of **alimony, maintenance or support** (now defined as "domestic support obligations" in § 101 (14A)). §362(b)(2)(A)(ii).
3. Actions concerning child **custody or visitation**. §362(b)(2)(A)(iii).
4. Actions for the **dissolution of a marriage**, except to the extent that such actions seek to determine the division of property that is property of the estate. § 362(b)(2)(A)(iv). Many people had probably assumed they were not stayed, though in fact they usually were, as legal proceedings that could have been commenced prior to petition. There will be fewer void divorces and technically bigamous marriages. See Consumer Bankruptcy Law and Practice / Guide to 2005 Act, §9.4 Henry Sommer and John Rao (2005) p. 80.
5. Actions regarding **domestic violence**. § 362(b)(2)(A)(v).
6. The "**collection**" of a "domestic support obligation" from property that is **not property of the estate**. § 362(b)(2)(B).
7. Actions with respect to the **withholding of income** that is property of the estate or property of the Debtor for payment of a DSO under a judicial or administrative order or a statute. § 362(b)(2)(C).
8. 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. § 362(b)(2)(D).
9. 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. § 362(b)(2)(E).
10. 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. § 362(b)(2)(F).

11. The enforcement of a **medical obligation** as specified under title IV of the Social Security Act. § 362(b)(2)(G).

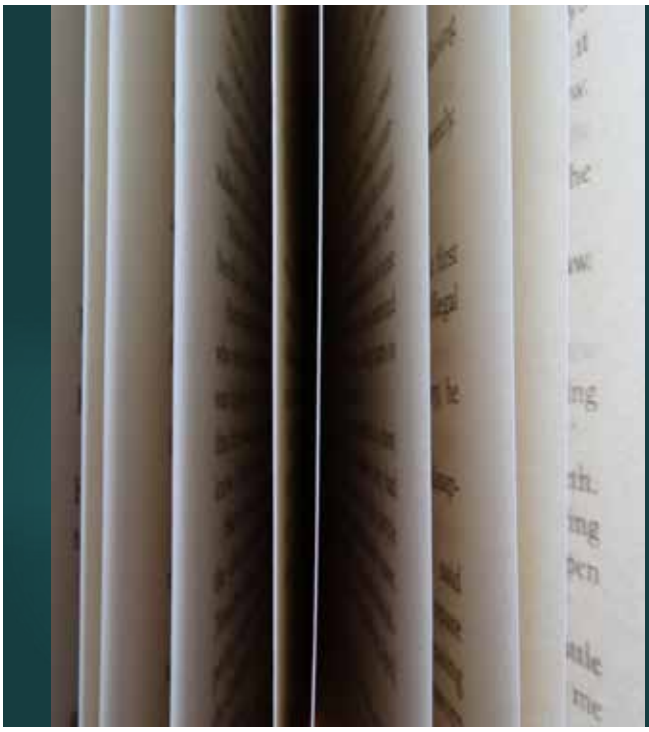
F. But Don't Get Too Complacent! This does not mean that a DSO creditor may completely ignore a bankruptcy filing. That creditor remains bound by any confirmation order entered and would be advised to make sure that in any proceeding a Proof of Claim is filed timely.

G. Any Doubt? Better to get Relief than to have to Explain Yourself Later. A recurring thought provoked by most of the cases involving violations of the Automatic Stay, especially when there is evidence that a bankruptcy attorney was consulted, is that is clearly easier and less expensive to file a motion for relief if there is any doubt at all whether the action will violate the stay rather than have to defend the possible violation later. The question always seems to exist between the lines of the fact patterns: "Why did they not just get a comfort order if they truly believed their actions would be given the okay by the bankruptcy court?" The lesson most of these cases teaches is that it is never a good idea to land your client in the bankruptcy court, trying to explain why they did not just ask for permission in the first place if they are not using the defense that they just did not know about the bankruptcy case or the existence of Section 362!

Section 362(k) authorizes a bankruptcy court to award a debtor action damages, including costs and attorney's fees, for a creditors good faith violation of the stay and punitive damages in addition to the actual damages in cases where the court determines that there was a willful violation of the stay. Knowledge of the bankruptcy filing is one factor to consider when deciding whether there has been a willful violation of the stay but more factors than just knowledge of the case will probably be needed for punitive damages to be awarded. See *Evans v. Evans,(In re Evens),* Civil Action No. 5-22-cv-00026, 2023 U.S. Dist. LEXIS 46397 (W.D. Va. Mar. 20, 2023.

H. BAPCPA Cases -- In re O'Brien, 339 B.R. 529 (Bankr. D. Mass. 2006). The Court held that the automatic stay not applicable where party is collecting DSO from non-estate property and bankruptcy discharge does not discharge individual Debtor from debt for DSO.

I. Is Violation of the Stay Void or Voidable? It is clear that a violation of the automatic stay may lead to sanctions or other monetary awards in the bankruptcy case but what is the status of the result of the violation? The minority view of the Federal Courts is that the acts are voidable, depending on the facts of the case and whether the violation is found to be intentional. The majority view of the Federal Circuits is that the acts that violated the stay are void. *U.S. v. White,* 466 F. 3d 1241 (11th Cir. 2006).



INTERPLAY BETWEEN PROPERTY OF THE ESTATE, EXEMPTIONS AND DIVORCE

American Bankruptcy Institute – April 22, 2023

RANDY NUSSBAUM

SACKS TIERNEY

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INTRODUCTION

During my 42 years practicing law, I have determined that if you want to terrorize a divorce lawyer, mention her client is contemplating bankruptcy. Similarly, if a bankruptcy lawyer is advised that his clients are considering a divorce, that lawyer will oftentimes lose all interest in the ongoing representation. This reaction is not just related to the variety of conflict issues that may arise when the topics of bankruptcy and divorce surface in the same proceeding, but because most practitioners understand that a panoply of procedural and substantive obstacles will need to be addressed in such circumstances.

This presentation will focus on substantive issues that need to be considered by bankruptcy lawyers for cases in which they are representing one, or in certain instances, both spouses seeking a divorce.

DOES THE DIVORCE PROCEEDING HAVE IMPACT ON PROPERTY OF THE BANKRUPTCY ESTATE?

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As a preliminary matter, this is being written by an Arizona practitioner based upon Arizona community property law and Arizona having opted out of federal exemptions. This is a crucial distinction because a number of issues arise when federal exemptions apply. However, many of the principles are applicable to other community property states as well.

Determining what falls within the purview of property of the bankruptcy estate is normally controlled by 11 U.S.C. § 541 and/or 11 U.S.C. § 1306. In certain instances, state law may determine what property is excluded from the bankruptcy estate, but as a general proposition, there is a fair amount of uniformity throughout the country in the definition of what constitutes property of the bankruptcy estate.

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If only one spouse files for bankruptcy protection (keeping in mind that the bankruptcy estate includes all community property), community property that would be property of the bankruptcy estate if the couple was happily married, is still community property for purposes of the Bankruptcy Code. This is the case even if upon initiating divorce proceedings, the spouses have informally divided up the property. This is a crucial understanding for two distinct reasons:

1. The spouse filing for bankruptcy would normally have had time to engage in some basic planning to try to protect as much of the property being retained as possible; and

2. If the non-filing spouse is not advised in advance of the bankruptcy filing and does not take any steps to protect his/her share of the assets, the non-filing spouse could find himself/herself caught totally off guard and subject to a turnover order which could have been avoided if that spouse had been given notice.

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Please note that the situation just described occurs prior to a formal order from the domestic relations court dividing up the family's assets. Unfortunately, often little attention is paid to this concern when one spouse is filing for bankruptcy, which oftentimes leads to rather tragic unintended consequences as to a non-filing party. *See, In re McCoy, 11* B.R. 276 (9th Cir. BAP 1990) (where community assets had not been divided prior to the debtor spouse's petition being filed and it was found that the non-debtor spouse's community interest was subject to claims from the debtor spouse's post-separation creditors).

CLAIMING EXEMPTIONS AND PLANNING

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In Arizona, when only one spouse files for bankruptcy protection, it is customary to file a "dummy exemption schedule" for the non-filing spouse to eliminate any confusion as to how exemptions are being claimed. This is especially necessary in states which allow a married couple to stack their individual exemptions (often except for the homestead exemption). In friendly situations, the two spouses can decide how to assert the joint exemption in a way most advantageous for both spouses, but when a divorce is pending, it is not unusual for the parties to quarrel as to claiming exemptions.

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From practical experience, I have learned that one debtor cannot stack the exemption rights of the non-filing spouse without his or her consent. This can lead to rather unfortunate outcomes in two different ways.

First, a non-filing spouse can refuse to allow the other spouse the right to stack exemptions even though the non-filing spouse may not have any need to claim that exemption. This strategy is malicious and counterproductive but does occur.

Second, and more commonly, a non-filing spouse may refuse to consent to a stacking of the exemptions even if the non-filing spouse is trying to protect an asset of inconsequential value. For example, if the filing spouse has a vehicle worth $30,000, whereas the non-filing spouse is driving an old junker worth no more than $1,200, common sense dictates that the spouses would agree to stack their exemptions into one $30,000 vehicle and then negotiate

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a settlement with the bankruptcy trustee to retain ownership of the $1,200 older car. But, if the non-filing spouse refuses to allow the other spouse to stack the exemptions, the filing spouse would consequently leave $15,000 of equity exposed in the car [please note that this example is under Arizona law where, except for handicapped vehicles, each spouse can claim a $15,000 exemption in one vehicle].

The first two sections of this presentation delineate when spouses cooperating can create a "win/win" result for both spouses, but if the spouses do not want to work together, several outcomes exist which can create havoc for either spouse.

Another important example relates to alimony. Arizona law provides absolute protection to alimony and child support being paid (or already paid). Many other states have similar exemptions. At one time the statute in Arizona governing domestic support obligations was not so broad, but in recent years (it is the national trend) the exemption has

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has been expanded to even include past due support and support that has already been deposited by the recipient. This provides cooperative spouses with a variety of options regarding asset protection. Unprotected money in the hands of one spouse is entitled to exemption protection upon receipt by the other, as long as the payment is in the form of some form of support, since it is absolutely protected. Presumably, the same is true in other states and to some extent under the federal exemptions.

As an example, if a man on the verge of bankruptcy has $10,000 in his bank account but owes his ex-wife for either child support or spousal maintenance, by paying his ex-wife past due support, that money is transformed into an exempt asset in the hands of his spouse. More importantly, if the payment is past due and the payment is being made pursuant to a court order, the Bankruptcy Code provides that the payment is not a preference. See, 11 U.S.C. § 547(c)(7).

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The exact same strategy can be used in instances where the recipient of the support is on the verge of bankruptcy. By ensuring that the payment being received is in the form of support, a party seeking bankruptcy protection can shield monies that otherwise may be vulnerable. This allows that individual to potentially create a nest egg similar to what some clients do with social security.

Few bankruptcy trustees or judges would question the strategy because normally the amount at stake is not worth fighting over and the spouse receiving the support needs it or would not have been awarded it. But what about situations in which one party owns a sizeable amount of non-exempt assets, is subject to potential collection efforts, and needs to file for bankruptcy? In that case, what options are available to that individual if he or she is legitimately liable to an ex-spouse for either spousal maintenance and/or child support?

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In that situation, since many individuals owing support want to make sure the support is paid, why couldn't the spouse filing for bankruptcy pledge his assets to the other spouse as security for future support? Doing so is not unusual in the context of a domestic relations settlement, and it is a prudent practice for the party owed the support to try to secure as much of a future payment as possible. If the arrangement is negotiated at arm's length and is for fair consideration, there is no fundamental problem with this type of arrangement. *See, In re Ottaviano*, 63 B.R. 338 (Bkrtcy. D. Conn. 1986) (holding that a pre-petition division of nonexempt community property in lieu of periodic alimony payments by debtor spouse was for a reasonably equivalent exchange of value and therefore not subject to a fraudulent transfer claim initiated by the debtor's bankruptcy trustee).

My office researched this issue and were surprised to discover that we found no definitive case law to exist in the Ninth Circuit. If the transaction was a sham or entered into for the specific purpose of avoiding or defrauding creditors, presumably a challenge could

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be mounted under 11 U.S.C. § 548. *In re Holloway,* 955 F.2d 1008 (5th Cir. 1992) (transfer of security interest to non-debtor spouse was fraudulent); *In re Kaczorowski,* 87 B.R. 1 (Bkrtcy. D. Conn. 1988) (reasonably equivalent value was not received by debtor for pre-petition transfer of debtor's one-half interest in family residence to non-debtor spouse). However, when the transaction really has been negotiated to ensure that the recipient party is protected, this strategy appears to be viable in most instances.

So, what happens if one party goes overboard in the planning? The quintessential example of what occurs is *In re Beverly,* 374 B.R. 221 (9th Cir. BAP 2007) *affirmed* 551 F.3d 1092 (9th Cir. 2008). *In re Beverly* involved a lawyer who exchanged a number of communications with his wife in which he painstakingly spelled out his efforts to avoid paying his creditors by conveying non-exempt assets to his non-filing spouse and retaining otherwise exempt assets in his name. The court ruled that the division of property was not

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equitable and denied the debtor's discharge along with granting other relief. What remains unknown is what the court would have done if an actual determination had determined that the division was fair and equitable. One suspects that in light of the husband's clear intent to avoid paying his creditors, the trier of fact could still have found that the transfer was an improper one and set the transfer aside. However, under those circumstances, the court may not have denied the debtor his discharge.

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DEALING WITH DEBT

When one spouse files for bankruptcy protection, the ultimate discharge includes not just that spouse's sole and separate obligations, but community obligations as well. As a matter of law, in such instances the non-filing spouse is not liable in a sole and separate capacity. This is fair and makes sense since the non-filing spouse did not sign on the obligation or engage in the activity resulting in the claim.

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Comprehending this aspect of the law is important because when one spouse primarily has incurred the debt, having that spouse file for bankruptcy while the couple is still married could very well allow the other spouse to avoid having to file for bankruptcy. This leads to the following question: If as part of a property settlement agreement issued prior to the divorce being finalized the non-filing spouse receives community property, will that property be immune from claims of the bankruptcy trustee?

Once again, there is a dearth of case law on this issue, but if a division of assets is at arm's length, one would ask why wouldn't this strategy work? For example, if the husband had incurred $100,000 of credit card debt (which under Arizona law would normally be community debt) and prior to bankruptcy had exchanged $100,000 of non-exempt assets in return for keeping $100,000 of exempt assets as part of a property settlement agreement, if the assets conveyed to the wife are no longer part of the community property estate, this strategy may

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work. Of course, a lot depends upon whether the parties can engage in an absolute divestment of the community's assets prior to the divorce being entered and whether there is a finding by the bankruptcy court that there was an actual intent to hinder, delay or defraud creditors and that fair consideration was provided. *See, In re Roosevelt,* 87 F.3d 311 (9th Cir. 1996) (overruled on other grounds) (where a creditor commenced an adversary proceeding seeking denial of discharge under 11 U.S.C. **§** 727 and the court found that the debtor spouse's pre-petition transmutation of the debtor's community property interest in his homestead through a marital separation agreement with his non-debtor wife was not done with the intent to hinder, defraud or delay).

In many instances, even if the law is not clear, it may make sense to consider such tactics as long as the clients understand that in certain instances, the spouse filing for bankruptcy could be facing potential denial of discharge as in the *In re Beverly case.*

MISCELLANEOUS ISSUES

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Be aware of the bankruptcy trustee's ability to access even exempt assets to pay a support claim. One reason why the spouses would normally want to cooperate prior to bankruptcy is to avoid this result.

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Spouses must be careful not to engage in preferential transfers. This would commonly occur in a case in which one spouse may have legitimately owed the other spouse non-support money and then repays that debt within one year of bankruptcy. Except for certain payments made pursuant to a domestic relations order, the payment would be preferential.

Be careful not to confuse a property settlement with a spousal maintenance award. A property settlement is not exempt and such a transfer can result in the receiving spouse having to turn that property over to a bankruptcy trustee if that spouse decides to file for bankruptcy. Or, in other instances, if the payment from one spouse to the other is not identified as either spousal maintenance or property settlement, and if the conveying spouse then files for bankruptcy, the transfer is subject to being set aside as a preference as well. *In re Grassmueck,* 127 B.R. 869 (Bkrtcy. D. Or. 1991).

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CONCLUSION

The purpose of this presentation was to simply highlight a variety of issues that arise when individuals are undergoing the dual trauma of bankruptcy and divorce.

Particularly, practitioners and their clients should be reminded that, as with most things, joint cooperation and planning can maximize the favorable results of a bankruptcy.

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Your Presenter

For more than 42 years, Randy Nussbaum has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction, litigation matters, and real estate matters.

Randy is a Certified Bankruptcy Specialist (Arizona Board of Legal Specialization) and a Certified Business Bankruptcy Specialist (American Board of Certification).

Randy has presented at American Bankruptcy Institute programs annually since 2011.

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AMERICAN BANKRUPTCY INSTITUTE
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Topic:

INTERPLAY BETWEEN PROPERTY OF THE ESTATE, EXEMPTIONS AND DIVORCE

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INTERPLAY BETWEEN PROPERTY OF THE ESTATE, EXEMPTIONS AND DIVORCE

During my 42 years of practicing law, I have determined that if you want to terrorize a divorce lawyer, mention to that lawyer that his client is contemplating bankruptcy. Invariably, the attorney will start to shake and turn pale. Similarly, if a bankruptcy lawyer is advised that his clients are considering a divorce, that lawyer will oftentimes lose all interest in the ongoing representation. This reaction is not just related to the variety of conflict issues that may arise when the topics of bankruptcy and divorce surface in the same proceeding, but because most practitioners understand that a panoply of procedural and substantive obstacles will need to be addressed in such circumstances.

This article will primarily focus on substantive issues which need to be considered by bankruptcy lawyers in cases in which they are representing one, or in certain instances, both spouses seeking a divorce[1].

The first issue addressed is how property of the bankruptcy estate is impacted by the initiation of divorce proceedings.

I. DOES THE DIVORCE PROCEEDING HAVE IMPACT ON PROPERTY OF THE BANKRUPTCY ESTATE?

As a preliminary matter, this is being written by an Arizona practitioner based upon Arizona community property law and Arizona having opted out of federal exemptions. This is a crucial distinction because a number of issues arise when federal exemptions apply. However, many of the principles are applicable to other community property states as well.

[1] Needless to say, I do not recommend normally representing both spouses in such situations without a comprehensive conflict waiver and separate determination that it is in both spouses' best interest to retain one bankruptcy lawyer.

Determining what falls within the purview of property of the bankruptcy estate is normally controlled by 11 U.S.C. § 541 and/or 11 U.S.C. § 1306. In certain instances, state law may determine what property is excluded from the bankruptcy estate, but as a general proposition, there is a fair amount of uniformity throughout the country in the definition of what constitutes property of the bankruptcy estate.

If only one spouse files for bankruptcy protection (keeping in mind that the bankruptcy estate includes all community property), community property that would be property of the bankruptcy estate if the couple was happily married, is still community property for purposes of the Bankruptcy Code. This is the case even if upon initiating divorce proceedings, the spouses have informally divided up the property. This is a crucial understanding for two distinct reasons:

1. The spouse filing for bankruptcy would normally have had time to engage in some basic planning to try to protect as much of the property being retained as possible; and

2. If the non-filing spouse is not advised in advance of the bankruptcy filing and does not take any steps to protect his/her share of the assets, the non-filing spouse could find himself/herself caught totally off guard and subject to a turnover order which could have been avoided if that spouse had been given notice.

Please note that the situation just described occurs prior to a formal order from the domestic relations court dividing up the family's assets. Unfortunately, often little attention is paid to this concern when one spouse is filing for bankruptcy, which oftentimes leads to rather tragic unintended consequences as to a non-filing party. *See, In re McCoy, 11* B.R. 276 (9th Cir. BAP 1990) (where community assets had not been divided prior to the debtor spouse's petition being filed and it was found that the non-debtor spouse's community interest was subject to claims from the debtor spouse's post-separation creditors).

II. CLAIMING EXEMPTIONS AND PLANNING

In Arizona, when only one spouse files for bankruptcy protection, it is customary to file a "dummy exemption schedule" for the non-filing spouse to eliminate any confusion as to how exemptions are being claimed. This is especially necessary in states which allow a married couple to stack their individual exemptions (often except for the homestead exemption). In friendly situations, the two spouses can decide how to assert the joint exemption in a way most advantageous for both spouses, but when a divorce is pending, it is not unusual for the parties to quarrel as to claiming exemptions.

From practical experience, I have learned that one debtor cannot stack the exemption rights of the non-filing spouse without that spouse's consent. This can lead to rather unfortunate outcomes in two different ways. First, a non-filing spouse can refuse to allow the other spouse the right to stack exemptions even though the non-filing spouse may not have any need to claim that exemption. This strategy is malicious and counterproductive but does occur.

Second, and more commonly, a non-filing spouse may refuse to consent to a stacking of the exemptions even if the non-filing spouse is trying to protect an asset of inconsequential value. For example, if the filing spouse has a vehicle worth $30,000, whereas the non-filing spouse is driving an old junker worth no more than $1,200, common sense dictates that the spouses would agree to stack their exemptions into one $30,000 vehicle and then negotiate a settlement with the bankruptcy trustee to retain ownership of the $1,200 older car. But, if the non-filing spouse refuses to allow the other spouse to stack the exemptions, the filing spouse would consequently leave 15,000 of equity exposed in his car[2].

Already, the first two sections of this outline delineate when spouses cooperating can create a "win/win" result for both spouses, but if the spouses do not want to work together, several outcomes exist which can create havoc for either spouse.

Another important example relates to alimony. For example, Arizona law provides absolute protection to alimony and child support being paid (or already paid). Many

[2] Please note that this example is under Arizona where, except for handicapped vehicles, each spouse can claim a $15,000 exemption in one vehicle.

other states have similar exemptions. At one time the statute in Arizona governing domestic support obligations was not so broad, but in recent years, and it is the national trend, the exemption has been expanded to even include past due support and support which has already been deposited by the recipient. This provides cooperative spouses with an amazing variety of options regarding asset protection. Unprotected money in the hands of one spouse is entitled to exemption protection upon receipt by the other, as long as the payment is in the form of some form of support, since it is absolutely protected. Presumably, the same is true in other states and to some extent under the federal exemptions.

As a simple example, if a man on the verge of bankruptcy has $10,000 in his bank account, but owes his ex-wife for either child support or spousal maintenance, by paying his ex-wife past due support, that money is transformed into an exempt asset in the hands of his spouse. Even more importantly, if the payment is past due and the payment is being made pursuant to a court order, the Bankruptcy Code provides that the payment is not a preference. See, 11 U.S.C. § 547(c)(7).

The exact same strategy can be used in instances where the recipient of the support is on the verge of bankruptcy. By ensuring that the payment being received is in the form of support, a party seeking bankruptcy protection can shield monies which otherwise may be vulnerable. This allows that individual to potentially create a nest egg similar to what some clients do with social security.

Few bankruptcy trustees or judges would question the strategy just outlined, especially because normally the amount at stake is simply not worth fighting over and invariably the spouse receiving the support needs it or would not have been awarded it in the first place. But what about situations in which one party owns a sizeable amount of non-exempt assets, is subject to potential collection efforts, and needs to file for bankruptcy? In that case, what options are available to that individual if he is legitimately liable to an ex-spouse for either spousal maintenance and/or child support?

In that situation, since many individuals owing support want to make sure the support is paid, why couldn't the spouse filing for bankruptcy pledge his assets to the other spouse as security for future support? Doing so is not unusual in the context of a domestic relations settlement and it is actually a prudent practice for the party owed the

support to try to secure as much of a future payment as possible. If the arrangement is negotiated at arm's length and is for fair consideration, there is no fundamental problem with this type of arrangement. *See, In re Ottaviano,* 63 B.R. 338 (Bkrtcy. D. Conn. 1986) (holding that a pre-petition division of nonexempt community property in lieu of periodic alimony payments by debtor spouse was for a reasonably equivalent exchange of value and therefore not subject to a fraudulent transfer claim initiated by the debtor's bankruptcy trustee).

My office has researched this issue and was surprised to discover that we found no definitive case law to exist in the Ninth Circuit. If the transaction was a sham or entered into for the specific purpose of avoiding or defrauding creditors, presumably a challenge could be mounted under 11 U.S.C. § 548. *In re Holloway,* 955 F.2d 1008 (5th Cir. 1992) (transfer of security interest to non-debtor spouse was fraudulent); *In re Kaczorowski,* 87 B.R. 1 (Bkrtcy. D. Conn. 1988) (reasonably equivalent value was not received by debtor for pre-petition transfer of debtor's one-half interest in family residence to non-debtor spouse). However, when the transaction really has been negotiated to ensure that the recipient party is protected, this strategy appears to be viable in most instances.

So what happens if one party goes overboard in the planning? The quintessential example of what occurs in that situation can be found in the *In re Beverly* decision. *In re Beverly,* 374 B.R. 221 (9th Cir. BAP 2007) *affirmed* 551 F.3d 1092 (9th Cir. 2008). *In re Beverly* involved a lawyer who exchanged a number of communications with his wife in which he painstakingly spelled out his efforts to avoid paying his creditors by conveying non-exempt assets to his non-filing spouse and retaining otherwise exempt assets in his name. The court ruled that the division of property was not equitable and denied the debtor's discharge along with granting other relief. What remains unknown is what the court would have done if a factual determination had determined that the division was fair and equitable. One suspects that in light of the husband's clear intent to avoid paying his creditors, the trier of fact could still have found that the transfer was an improper one and set the transfer aside. However, under those circumstances, the court may not have denied the debtor his discharge.

III. DEALING WITH DEBT

When one spouse files for bankruptcy protection, the ultimate discharge includes not just that spouse's sole and separate obligations, but community obligations as well. As a matter of law, in such instances the non-filing spouse is not liable in a sole and separate capacity. This is fair and makes sense since if the non-filing spouse did not sign on the obligation or engage in the activity resulting in the claim.

Comprehending this aspect of the law is important because when one spouse primarily has incurred the debt, having that spouse file for bankruptcy while the couple is still married could very well allow the other spouse to avoid having to file for bankruptcy. This leads to the following question: If as part of a property settlement agreement issued prior to the divorce being finalized the non-filing spouse receives community property, will that property be immune from claims of the bankruptcy trustee?

Once again, there is a dearth of case law on this issue, but if a division of assets is at arm's length, one would ask why wouldn't this strategy work? For example, if the husband had incurred $100,000 of credit card debt (which under Arizona law would normally be community debt) and prior to bankruptcy had exchanged $100,000 of non-exempt assets in return for keeping $100,000 of exempt assets as part of a property settlement agreement, if the assets conveyed to the wife are no longer part of the community property estate, this strategy may work. Of course, a lot depends upon whether the parties can engage in an absolute divestment of the community's assets prior to the divorce being entered and whether there is a finding by the bankruptcy court that there was an actual intent to hinder, delay or defraud creditors and that fair consideration was provided. *See, In re Roosevelt,* 87 F.3d 311 (9th Cir. 1996) (overruled on other grounds) (where a creditor commenced an adversary proceeding seeking denial of discharge under 11 U.S.C. **§** 727 and the court found that the debtor spouse's pre-petition transmutation of the debtor's community property interest in his homestead through a marital separation agreement with his non-debtor wife was not done with the intent to hinder, defraud or delay).

In many instances, even if the law is not clear, it may make sense to consider such tactics as long as the clients understand that in certain instances, the spouse filing for bankruptcy could be facing potential denial of discharge as in the *In re Beverly case*.

IV. OTHER MISCELLANEOUS ISSUES

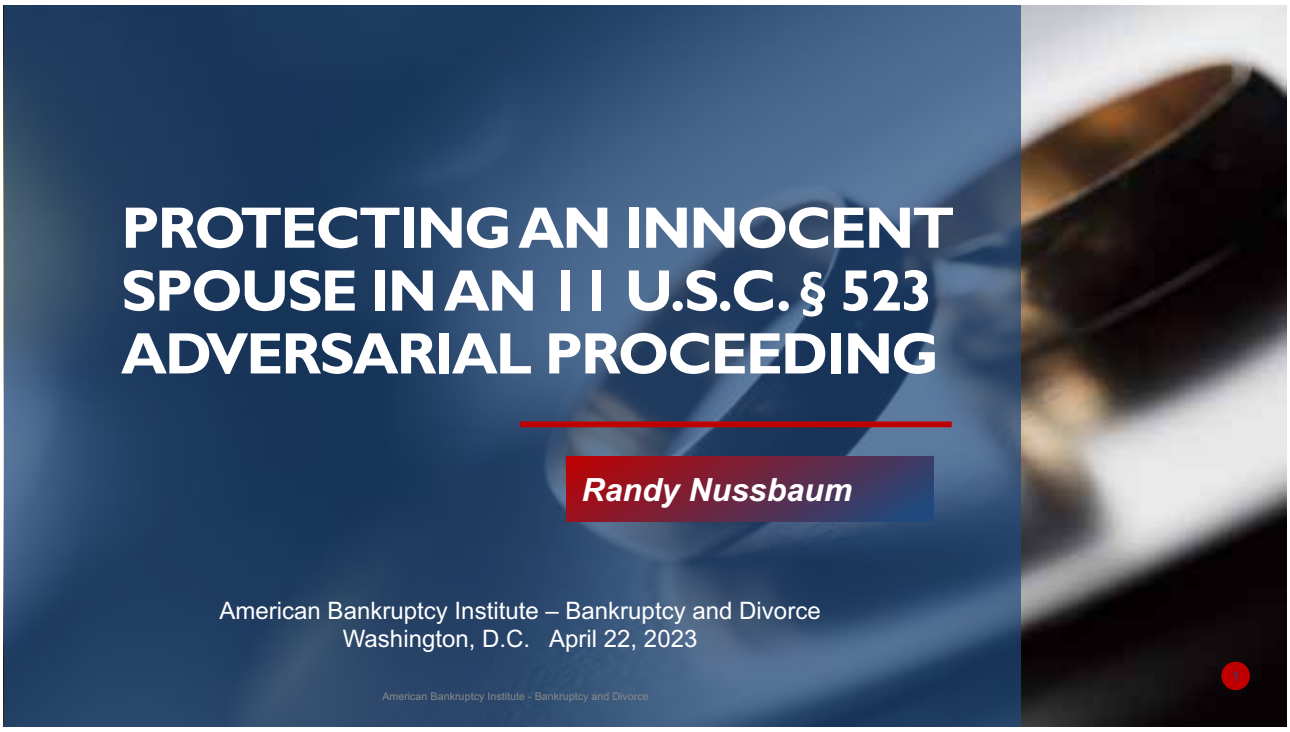
You need to be aware of the bankruptcy trustee's ability to access even exempt assets to pay a support claim. One reason why the spouses would normally want to cooperate prior to bankruptcy is to avoid this result.

Spouses must be careful not to engage in preferential transfers. This would commonly occur in a case in which one spouse may have legitimately owed the other spouse non-support money and then repays that debt within one year of bankruptcy. Except for certain payments made pursuant to a domestic relations order, the payment would be preferential.

Be careful not to confuse a property settlement with a spousal maintenance award. A property settlement is not exempt and such a transfer can result in the receiving spouse having to turn that property over to a bankruptcy trustee if that spouse decides to file for bankruptcy. Or, in other instances, if the payment from one spouse to the other is not identified as either spousal maintenance or property settlement, and if the conveying spouse then files for bankruptcy, the transfer is subject to being set aside as a preference as well. *In re Grassmueck,* 127 B.R. 869 (Bkrtcy. D. Or. 1991).

V. CONCLUSION

The purpose of this outline was not to be a definitive treatise on this subject. Instead, it was simply to highlight a variety of issues that arise when individuals are undergoing the dual trauma of bankruptcy and divorce. Particularly, practitioners and their clients should be reminded that as with most things, joint cooperation and planning can maximize the favorable results of a bankruptcy.



INNOCENT SPOUSE LIABILITY

The issue of an innocent spouse liability in a § 523 bankruptcy adversarial proceeding rises in three different contexts. The following three questions must be asked:

1) Is the debt a community obligation so that liability will be extended to the community in community property states?

2) When will the wrongful acts be imputed to the "innocent spouse?"

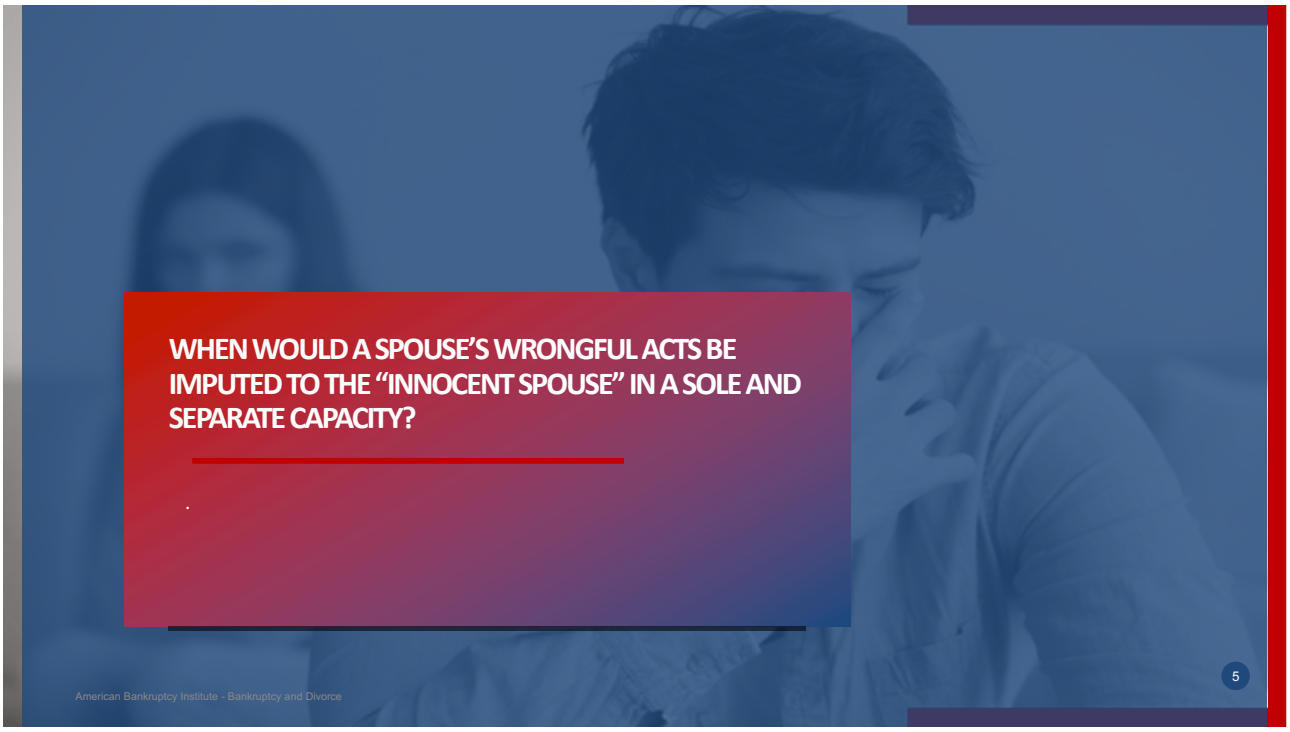
3) Will a community debt follow the "innocent spouse" once that party divorces the wrongdoing spouse?

COMMUNITY OBLIGATION

This is a threshold State Law issue. In most community property states, one spouse can unilaterally obligate the community assets. If the debt is not of a community nature, neither the community property nor the sole and separate property of the innocent spouse is liable for a guilty spouse's sole and separate debt. Sole and separate debts are the exception, not the rule.

In most instances, the actions of one spouse will bind the community both as a matter of law and precedent. An "innocent spouse" will face serious financial ramifications when a non-dischargeable debt is a community one. In most instances, a married couple's assets are almost always characterized as community property. An innocent spouse should expect to be financially affected by community-category debt obligations.

In non-community property states, state law will determine when the debts of one spouse may bind an "innocent" spouse as well.



WRONGFUL ACTS

The United States Supreme Court recently reviewed the question of whether an individual spouse who had no knowledge of any relevant alleged fraud may discharge a debt in bankruptcy for money obtained through fraud by her spouse and business partner. The debtor and her business partner were unmarried when the events occurred causing the claim, but they married before being sued and then filed a joint bankruptcy case. *Bartenwerfer v. Buckley*, 143 S. Ct. 665 (2023).

The Bankruptcy Court had initially entered a nondischargeable judgment against David Bartenwerfer (husband), and bound Kate Bartenwerfer (wife) because in its view, the fraud was imputed to the wife, and therefore, the debt was non-dischargeable as to her as well.

After an appeal and judgment on remand, the Bankruptcy Court determined that § 523(a)(2)(A) applies only to a debtor who (at the least) knew or should have known (i.e., scienter) of the fraud. The Bankruptcy Appellate Panel upheld this finding in the wife's favor and discharged her debt. *See In re Bartenwerfer*, No. AP 13-03185, 2017 WL 6553392, at *1 (B.A.P. 9th Cir. Dec. 22, 2017).

WRONGFUL ACTS (CONT.)

The Ninth Circuit reversed. It held that fraud imputed against a debtor is nondischargeable "regardless of her knowledge of the fraud." *See In re Bartenwerfer,* 860 F. App'x 544 (9th Cir. 2021). The Court promoted the proposition that partners cannot escape pecuniary responsibility when one partner makes false or fraudulent misrepresentations, especially when both partners appropriated the benefits of the fraudulent conduct.

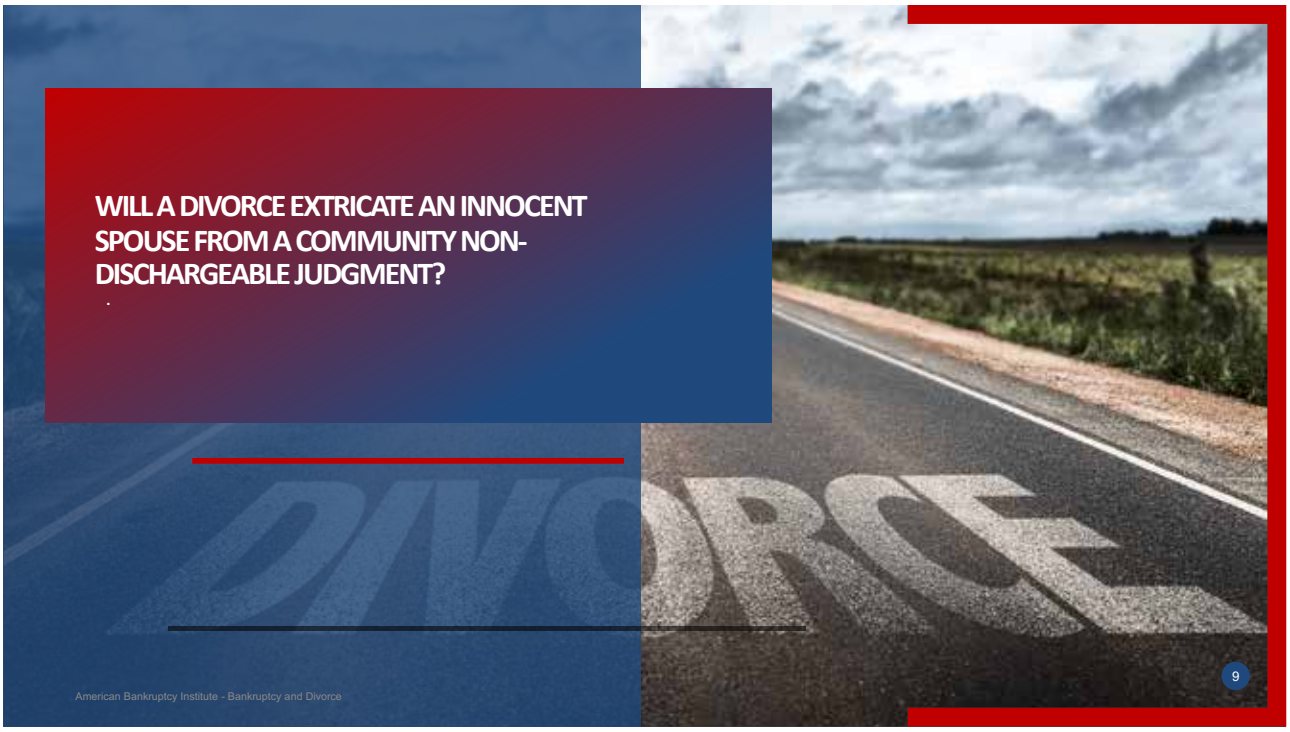
On February 22, 2023, the U.S. Supreme Court decided *Bartenwerfer v. Buckley*, No. 21-908, affirming the Ninth Circuit and holding that 11 U.S.C. § 523(a)(2)(A), which bars debtors from discharging any debt obtained by fraud, applies even to debtors who are liable for fraud they did not personally commit.

Bartenwerfer should be compared to two Arizona bankruptcy decisions on this issue. Those cases, *In re LeSueur*, 53 B.R. 414 (Bankr. D. Ariz 1985) and *In re Rollinson*, 322 B.R. 879 (2005), featured dicta stating that an "innocent spouse" could be not held liable in a sole and separate capacity

WRONGFUL ACTS (CONT.)

in the absence of evidence of the innocent spouse's knowledge of the fraud or participation in the fraud. One can now assume that such dicta is now totally superfluous.

This controversy is important in situations in which an innocent spouse has sole and separate property. Case law under pre-*Bartenwerfer* framework left unclear (due to circuit split) whether lack of knowledge by the innocent spouse prevented the creditor from procuring a nondischargeable judgment against that spouse in a sole and separate capacity.



DIVORCE

In re Rollinson specifically left unresolved the issue of what recourse a creditor has against an "innocent spouse" whose community property is liable for a community judgment once that spouse is divorced.

In a posted, but unpublished, opinion, Judge Dan Collins from Arizona directly broached this issue and concluded that once divorced, the innocent spouse should no longer be liable for that indebtedness.

That case, *In re Mangold*, Case No: 2:12-bk-16858, was a Chapter 7 case involving the common situation in which the wrongful conduct of one spouse resulted in a non-dischargeable judgment against the wrongful spouse and the community as well. Ms. Mangold, the innocent spouse, argued to the Bankruptcy Court that if she were to divorce her wrongdoing husband, since post-dissolution she would not have any community property, the judgment would no longer be enforceable as to her.

DIVORCE (CONT.)

Judge Collins determined that *Community Guardian Bank v. Hamlin*, 182 Ariz. 627, 631-32 (App. 1995) was inapplicable to the case at point, even though that decision had held that upon dissolution of the marriage, both spouses became liable for the debts of the community. He found it unpersuasive since *Hamlin* was not a bankruptcy case nor did either spouse in *Hamlin* obtain a bankruptcy discharge. So, in one broad sweep, Judge Collins, in an unpublished opinion, rendered a determination, if followed by other bankruptcy courts, would have freed innocent spouses from community obligations upon divorcing.

Now, because of *Bartenwerfer*, any confusion as to the "innocent" spouse's culpability even upon divorcing the actual fraudulent actor is no longer at issue if an agency relationship is established among the spouses. That spouse will be liable under § 523(a)(2)(A) and such liability will follow that spouse even once divorced.

INNOCENT SPOUSE REPRESENTATION

If Congress were to determine that the current wording of the statute is leading to inequitable results, the statute could be amended to require that the actual debtor engage in the actionable fraud. Interestingly enough, this actually was the case at one time under an earlier version of the pertinent statute.

Alternatively, the lawyer defending the "innocent" spouse will now have to find a way of extricating the innocent spouse under state law principles. Doing so will probably be very difficult since under most states' community property laws , one spouse can bind the community.

Maybe the solution is to ask a state court trier of fact to render a specific finding that the "innocent" spouse is only liable under community property law but otherwise would not be culpable under agency principles.

FUTURE OF INNOCENT SPOUSES

Bartenwerfer should sensitize a spouse to the importance of separating herself/himself from a wrongdoing spouse. Specifically knowing that trying to hide behind the argument that the "innocent" spouse is an innocent bystander will likely be futile.

The "innocent" spouse needs to immediately do what she/he can do to isolate herself/himself from that conduct. Simultaneously, that party needs to try to build a record conclusively demonstrating the "innocent" spouse refused to accept the wrongful bounty and specifically took all action possible to stop the wrongful conduct. Otherwise, the sins of the wrongdoer will probably be visited upon the "innocent" spouse.

YOUR PRESENTER

For more than 42 years, Randy Nussbaum has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction, and litigation matters.

Randy is a Certified Bankruptcy Specialist (Arizona Board of Legal Specialization) and a Certified Business Bankruptcy Specialist (American Board of Certification). Randy has presented at American Bankruptcy Institute programs annually since 2011.

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American Bankruptcy Institute - Bankruptcy and Divorce

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AMERICAN BANKRUPTCY INSTITUTE
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Topic:

PROTECTING AN INNOCENT SPOUSE IN AN 11 U.S.C. § 523 ADVERSARIAL PROCEEDING

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PROTECTING AN INNOCENT SPOUSE IN AN 11 U.S.C. § 523 ADVERSARIAL PROCEEDING

The issue of an innocent spouse liability in a § 523 bankruptcy adversarial proceeding rises in three different contexts. The following three questions must be asked:

1) Is the debt a community obligation so that liability will be extended to the community in community property states?
2) When will the wrongful acts be imputed to the "innocent spouse?"
3) Will a community debt follow the "innocent spouse" once that party divorces the wrongdoing spouse?

I. When is the debt a community obligation?

This is a threshold State Law issue to be evaluated under the appropriate applicable state law. In most community property states, one spouse can unilaterally obligate the community assets. If, on the other hand, the debt is not of a community nature, neither the community property nor the sole and separate property of the innocent spouse is liable for a guilty spouse's sole and separate debt. Not surprisingly, purely sole and separate debts are the exception, not the rule.

But, as a practical matter, since in most instances the actions of one spouse will bind the community both as a matter of law and precedent, an "innocent spouse" will face serious financial ramifications from a finding that a nondischargeable debt is a community one. This is the case because in most instances, a married couple's assets are almost always characterized as community property, so an innocent spouse should expect to be financially affected by community-category debt obligations.

In non-community property states, state law will determine when the debts of one spouse may bind an "innocent" spouse as well.

II. When would a spouse's wrongful acts be imputed to the "innocent spouse" in a sole and separate capacity?

The United States Supreme Court has recently addressed this issue in Bartenwerfer v. Buckley, 143 S. Ct. 665 (2023).

Bartenwerfer v. Buckley presented to the Supreme Court the question of whether an individual spouse (debtor, Kate Bartenwerfer) who had no knowledge of any relevant alleged fraud may discharge a debt in bankruptcy for money obtained through fraud by her spouse and business partner, David Bartenwerfer. The debtor and her business partner were unmarried when the events occurred leading up to the claim, but they married before being sued and then filed a joint bankruptcy case.

The Bankruptcy Court initially entered a nondischargeable judgment against David Bartenwerfer, and bound Kate Bartenwerfer thereby because in its view, the fraud was imputed to Kate Bartenwerfer and therefore the debt was non-dischargeable as to her as well. However, after an appeal and judgment on remand, the Bankruptcy Court determined that § 523(a)(2)(A) applies only to a debtor who (at the least) knew or should have known (i.e., scienter) of the fraud. The Bankruptcy Appellate Panel upheld this finding in her favor and discharged her debt. *See* In re Bartenwerfer, No. AP 13-03185, 2017 WL 6553392, at *1 (B.A.P. 9th Cir. Dec. 22, 2017).

However, the Ninth Circuit reversed. *See* In re Bartenwerfer, 860 F. App'x 544 (9th Cir. 2021). It held that fraud imputed against a debtor is nondischargeable "regardless of her knowledge of the fraud." Id. at 547. The Court promoted the proposition that partners cannot escape pecuniary responsibility when one partner makes false or fraudulent misrepresentations, especially when both partners appropriated the fruits of the fraudulent conduct.

The Supreme Court's review of Bartenwerfer took on this issue directly as the Petitioner (Kate Bartenwerfer) argued expressly that the Ninth Circuit reached the wrong decision because of its reliance on an incorrect interpretation of Strang, a precedential Supreme Court case. Strang v. Bradner, 114 U.S. 555, 561 (1885).

Significantly, the Supreme Court had stated that "liability for the fraud of another cannot be barred from discharge under § 523(a)(2)(A) without at least a minimal level of scienter on the part of the debtor." Field v. Mans, 516 U.S. 59, 60 (1995). Kate Bartenwerfer's argument to the Supreme Court finessed that the Strang decision "is inapposite because the opinion assumes away and does not analyze the issue of dischargeability, focusing instead on the underlying imputation of liability between the partners." Strang, 114 U.S. at 556-60. Strang was also superseded by statute in various respects as well as by subsequent case law. Field, 516 U.S. 59 (1991); *see also* Bullock v. BankChampaign, N.A., 569 U.S. 267 (2013).

Buckley's arguments focused on the Bankruptcy Code's desire to ensure that creditor's interests are protected and are more important than the Code's intention to grant a debtor a fresh start.

Though this case did not involve a couple whom was married at the time of the alleged wrongful acts, the Supreme Court review clarified the law conclusively, although the concurring opinions left open the issue of whether this case will be controlling in situations "involving fraud by a person bearing no agency or partnership relationship to the debtor."

The Supreme Court focused on the precise wording of § 523(a)(2)(A) which omits any requirement that the target debtor actually committed the fraud. Instead, the Court was comfortable relying upon pertinent state law to determine whether a party possessed the required culpability to be liable for the fraud. If a party was liable as an agent, the Supreme Court ruled such is sufficient in the absence of any proof that the "innocent" party actually engaged in the fraudulent activity.

Bartenwerfer should be compared to two Arizona bankruptcy decisions on this issue. Those cases, In re LeSueur, 53 B.R.414 (Bankr. D. Ariz 1985) and In re Rollinson, 322 B.R. 879 (2005), featured dicta stating that an "innocent spouse" could be not held liable in a sole and separate capacity in the absence of evidence of the innocent spouse's knowledge of the fraud or participation in the fraud. One can now assume that such dicta is now totally superfluous.

This controversy is primarily important in situations in which an innocent spouse has sole and separate property. Case law under pre-Bartenwerfer framework left unclear (due to circuit split) whether lack of knowledge by the innocent spouse prevented the creditor from procuring a non-dischargeable judgment against that spouse in a sole and separate capacity. If the "innocent" spouse was not liable, the creditor could not collect against that spouse's sole and separate property.

III. Will a divorce extricate an innocent spouse from a community non-dischargeable judgment?

In re Rollinson specifically left unresolved the issue of what recourse a creditor has against an "innocent spouse" whose community property is liable for a community judgment once that spouse is divorced.

In a posted, but unpublished, opinion, Judge Dan Collins from Arizona directly broached this issue and concluded that once divorced, the innocent spouse should no longer be liable for that indebtedness.

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IV. Representation of "innocent" spouses in the future.

If Congress were to determine that the current wording of the statute is leading to inequitable results, the statute could be amended to require that the actual debtor engage in the actionable fraud. Interestingly enough, this actually was the case at one time under an earlier version of the pertinent statute.

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Maybe the solution is to ask a state court trier of fact to render a specific finding that the "innocent" spouse is only liable under community property law but otherwise would not otherwise be culpable under agency principles.

V. The future for "innocent" spouses.

First of all, Bartenwerfer should sensitize a spouse to the importance of separating herself/himself from a wrongdoing spouse. Specifically knowing that trying to hide behind the argument that the "innocent" spouse is an innocent bystander will likely be futile. Instead, the "innocent" spouse needs to immediately do what she/he can do to isolate herself/himself from that conduct. Simultaneously, that party needs to try to build a record conclusively demonstrating the "innocent" spouse refused to accept the wrongful bounty and specifically took all action possible to stop the wrongful conduct. Otherwise, the sins of the wrongdoer will probably be visited upon the "innocent" spouse.

Faculty

Hon. Rebecca B. Connelly is a U.S. Bankruptcy Judge for the Western District of Virginia in Harrisonburg, appointed in July 2012. Before joining the bench, she was the Standing Chapter 13 Trustee and Chapter 12 Trustee for the Western District of Virginia, and prior to that was in private practice in Virginia and in Washington, D.C. Judge Connelly is chair of the Judicial Conference Advisory Committee on the Federal Rules of Bankruptcy Procedure. As a member of the National Conference of Bankruptcy Judges, she formerly chaired the NCBJ Federal Rules Advisory Committee. Judge Connelly is an adjunct professor of law at Washington and Lee University School of Law (teaching bankruptcy). She also is a conferee in the National Bankruptcy Conference and a frequent speaker for Virginia CLE, an author of two chapters of Bankruptcy Practice in Virginia (2004, reprinted 2008, and revised and reprinted 2016), and an active member of ABI since 1994. Judge Connelly has served as a contributing editor and a features author for the *ABI Journal*, and she has been a member of ABI's Consumer Bankruptcy Committee, as well as a speaker at its Annual Spring Meeting, Winter Leadership Conference, and regional conferences, including Views from the Bench. She also serves on the advisory board and volunteers for Credit Abuse Resistance Education. Judge Connelly formerly served on the board and as a volunteer for Rockbridge Area Hospice. She received her B.A. in 1985 from the University of Maryland and her J.D. in 1988 from Washington & Lee University School of Law.

Randy Nussbaum is an attorney with Sacks Tierney P.A. in Scottsdale, Ariz., and has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction and litigation matters for more than 42 years. He has represented secured and unsecured creditors, surety companies, creditors' committees, lessors, professional athletes, doctors, lawyers, and trustees in chapter 5, 7, 11 and 13 proceedings, including adversary actions (bankruptcy litigation). The cases have involved such diverse matters as real estate, construction, manufacturing, trucking, asset-based lending, bankruptcy related to divorce, and high-value and complex individual bankruptcies. Mr. Nussbaum is a Certified Bankruptcy Specialist by the Arizona Board of Legal Specialization and is Board Certified in Business Bankruptcy Law by the American Board of Certification. He has been named to the *Super Lawyers* "Top 50" list of Arizona attorneys multiple times and has been listed in *The Best Lawyers in America* annually since 2010; he was selected as its "Lawyer of the Year" (Scottsdale) for Bankruptcy and Creditor Debtor Rights in 2019 and for Bankruptcy Litigation in 2021. Mr. Nussbaum is a 1990 graduate of Scottsdale Leadership and has volunteered for the organization for nearly 30 years, serves on its advisory board, and is a recipient of the prestigious Frank W. Hodges Alumni Achievement Award. He also served as a Sterling Awards Jurist for the Scottsdale Chamber of Commerce and received the Chamber's Volunteer of the Year Award for 2017. In 2018, he was inducted into the Scottsdale History Hall of Fame. Mr. Nussbaum received his B.A. *cum laude* and in 1977 his J.D. in 1980 from Arizona State University, graduating in the top 25 percent of his class.

Ellen P. Ray is a sole practitioner with Ellen P. Ray, Esq., Main Street Law Offices in Richmond Va., and has focused on consumer bankruptcy representation in chapter 7 and 13 matters since 1996. Before that, she was the attorney for the Richmond City Department of Social Services for two years and had worked in the field of domestic relations and guardian *ad litem* representation of children since graduating from law school. Ms. Ray has handled, sometimes with the assistance of an associ-

ate, more than 5,700 consumer bankruptcy cases since 1996. She is admitted to practice in the U.S. Bankruptcy Courts for the Eastern and Western Districts of Virginia, the U.S. District Court for the Eastern District of Virginia, and in all courts in the Commonwealth of Virginia. Ms. Ray is a member of the Virginia State Bar, ABI, Richmond Bar Association and the National Association of Chapter 13 Trustees (NACTT), and she has been a member of National Association of Consumer Bankruptcy Attorneys (NACBA) and National Association of Bankruptcy Trustees (NABT) in past years. She received her B.A. in history and political science in 1984 from North Texas State University (now University of North Texas), then attended several semesters at the College of William Mary doing post-graduate work while working for Legislative Services at the Virginia State Capital before entering law school in the fall of 1987. She received her J.D. from Marshall Wythe School of Law at the College of William and Mary in 1990.