Consumer Track

Intersection of Bankruptcy and Divorce: When Worlds Collide

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WHEN WORLDS COLLIDE:
THE INTERSECTION OF BANKRUPTCY AND DIVORCE

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I. Special Provisions of the Bankruptcy Code Dealing with Bankruptcy and Divorce:

1. **The Automatic Stay:** Although 11 U.S.C. § 362(a) contains a broad stay of proceedings affecting a debtor or property of the estate, 11 U.S.C. § 362(b)(2) provides an *exception* to the automatic stay for many events that occur in the context of a divorce proceeding, such as:
   - **a.** Proceedings to establish of paternity, or to establish or modify an order for domestic support obligations, or concerning child custody or visitation, or for dissolution of the marriage, or regarding domestic violence, *see* § 362(b)(2)(A);
   - **b.** Collection of a domestic support obligation from property that is *not* property of the estate, *see* § 362(b)(2)(B);
   - **c.** Withholding of income that *is* property of the debtor or property of the estate, for payment of a domestic support obligation under a judicial or administrative order or statute, *see* § 362(b)(2)(C);
   - **d.** Withholding, suspension or restruction of a driver's license, professional or occupational license, or state law recreational license, as specified in section 466(a)(16) of the Social Security Act, *see* § 362(b)(2)(D);
   - **e.** The reporting to certain consumer reporting agencies of overdue support owed by a parent, *see* § 362(b)(2)(E);
   - **f.** The interception of tax refunds as provided under the Social Security Act or State Law, *see* § 362(b)(2)(F); and
   - **g.** The enforcement of a medical obligation specified under the Social Security Act, *see* § 362(b)(2)(G).

2. **Domestic Support Obligation:** In 2005, the definition of "domestic support obligation" ("**DSO**") was added to the definitional section of the bankruptcy code at 11 U.S.C. § 101(14A). Basically, a DSO is a debt that is:

a. owed to (or recoverable by) a spouse, former spouse, or child of the debtor or such childes parent, legal guardian or responsible relative, or a governmental unit, *see* §101(14A)(A);

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, *see* §101(14A)(B);

c. established before, on, or after the date of the order for relief in bankruptcy, by applicable provisions of a separation agreement, divorce decree, or property settlement agreement, or by a court order, or by a determination made in accordance with applicable nonbankruptcy law by a governmental unit, *see* § 101(14A)(C); and

d. not assigned to a nongovernmental entity, unless the obligation is assigned voluntarily by the spouse, former spouse, child, or such child's parent, legal guardian, or responsible relative for purposes of collecting the debt *see* § 101(14A)(D).

3. **Preference Defense for DSOs:** 11 U.S.C. § 547(c)(7) provides that a trustee cannot avoid a transfer under 11 U.S.C. § 547 to the extent that transfer was a *bona fide* payment of a debt for a DSO.

4. **General Bankruptcy Concepts Apply to Situations Involving Bankruptcy and Divorce**: General bankruptcy concepts such as property of the estate, nondischargeability of debt, and fraudulent transfers--to name a few--apply to bankruptcy cases that involve divorce, just as those concepts apply to bankruptcy cases that do not involve divorce.

5. ***See* Judge McGarity's attached comprehensive outline on Family Law and Bankruptcy** for a discussion of the issues and cases that address the intersection of bankruptcy and divorce.

II. Sample Fact Patterns

1. **Basic Scenario:** Homer and Marge are engineers and have been married for 25 years; they have three children; Bart age 20, Lisa age 18, and Maggie age 15.

Marge works as an engineer and is the managing member of a large engineering firm; Polynomial P.C. Homer put his engineering career on hold to be the primary caregiver for the couple's children, but he recently went back to work as now works as a consulting design engineer.

Marge's current salary is $250,000 per year, and Homer's is $55,000 per year.

The couple owns a $450,000 home as tenants by the entireties which is subject to a $210,000 mortgage that they both signed. Homer is the 100% member of Homer LLC, but Marge contributed $250,000 to that LLC so that the LLC could

purchase a vacation home valued at $650,000 and subject to a $400,000 mortgage.

Marge has $700,000 in her 401k account, and Homer has $60,000 in various qualified retirement devices.

The couple have four joint credit card debts on which they both signed the credit card application: the aggregate balance on the four cards is $15,000.

Four months ago Marge personally guaranteed the sizable capital debts held by Polynomial. Homer objected to Marge taking this risk, but Marge ignored him, which placed a great strain upon the marriage. To make matters worse, Homer was just served with a lawsuit related to the design of an apparently defective pump motor that was installed in a local nuclear power plant: the pump appears to have failed and the nuclear power plant recently experienced a catastrophic loss of coolant.

a. Topics for discussion:

(1) Should Homer file divorce or bankruptcy first? Why?

(2) Pre-Bankruptcy planning?

a. Home is held in tenancy by entireties, can Homer and Marge pay off their credit cards (or other joint debts) before filing?

i. Would preference avoidance of payments to credit card companies resurrect joint debt or debt only on behalf of debtor?

ii. What is the impact of an indemnity and hold harmless in the divorce decree?

2. Scenario Evolution One: It turns out that improper maintenance, and not Homer's design of the pumps, were to blame for the meltdown, and Homer is free from liability in connection with the pumps. To celebrate, Marge and Homer grab a quick meal at Moe's Tavern. On their way home from Moe's, the car Marge is driving strikes and kills Dr. Hibbert. The estate of Dr. Hibbert has filed a $3million lawsuit against Marge.

Homer and Marge find they cannot reconcile their differences in light of the external stresses on their relationship and both file for divorce. Homer hires divorce counsel, but Marge does not. Marge and Homer enter into a Marital Settlement Agreement which awards Homer the family home, his 100% membership interest in Homer, LLC (the entity that owns the vacation home), and a one-half interest in Marge's 401k. Marge also agrees to assume financial responsibility for Homer's divorce counsel.

After the dissolution of marriage is final, Marge files a chapter 7 bankruptcy.

a. Topics for discussion:

(1) Fraudulent Transfer implications regarding the divorce
(2) Actual v. constructively fraudulent transfer
(3) Implications of Marge's *pro se* representation on fraudulent transfer analysis
(4) 523 analysis the debt owed to Homer's divorce attorney.

3. Scenario Evolution Two: As part of the Marital Settlement Agreement between Homer and Marge, Marge agreed to indemnify and hold Homer harmless from the couple's joint credit card debt. One week after Marge received her chapter 7 discharge, all four credit card companies called Homer notifying him of the contractual default and demanding payment in full.

a. Topics for discussion:

(1) Does Homer need relief from the automatic stay in order to sue Marge in state court to enforce the indemnity and hold harmless provision of the Marital Settlement Agreement?
(2) Is the indemnity and/or hold harmless nondischargeable per 11 U.S.C § 523 (a)(5) or (a)(15)?
(3) Can the indemnity/hold harmless be avoided in Marge's bankruptcy?

4. Scenario Evolution Three: Bart is finishing his junior year at University of Minnesota, Lisa is a senior at a local private high school, and Maggie is a sophomore at the same high school. Marge and Homer have been paying Bart's college tuition for the past three years. Lisa has been accepted to the University of Iowa, and the couple have already paid a sizeable down payment as to her fall tuition. Under the Marital Settlement Agreement Marge assumed sole responsibility for tuition obligations for both Bart and Lisa, with the couple to share educational financial responsibility for Maggie.

a. Topics for discussion

(1) Avoidable transfer implications for Maggie's high school tuition under 11 U.S.C. § 547 and/or § 548
(2) Avoidable transfer implications for down payment on Lisa's tuition under 11 U.S.C. § 547 and/or § 548
(3) Avoidable transfer implications for Bart's college tuition under 11 U.S.C. § 547 and/or §548.
(4) If Marge's obligation to pay tuition for Bart and/or Lisa is avoided as a fraudulent transfer or a preferential transfer, what are the ramifications for Marge under 11 U.S.C. §523(a)(5) and/or § 523 (a)(15)?

FAMILY LAW AND BANKRUPTCY

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U.S. Bankruptcy Judge
Eastern District of Wisconsin

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I. APPLICABLE LAW.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made substantial substantive changes in bankruptcy law, some of which relate specifically to family obligations. The provisions having nothing to do with family law may still have an affect on cases that also have family law implications. This outline addresses only family law issues, and many of those issues apply both before and after the 2005 amendments. Most provisions of the 2005 Act apply to cases filed on or after October 17, 2005, although a few provisions applied upon enactment, April 20, 2005. Also, the user is encouraged to research recent legal developments and the current applicability of cases cited.

II. PROPERTY OF THE BANKRUPTCY ESTATE OF DEBTOR WHO IS A PARTY IN AN ACTION FOR DISSOLUTION OF MARRIAGE.

A. **Bankruptcy Estate.** The filing of a bankruptcy petition creates an estate, which includes all assets owned by the debtor, certain assets acquired by the debtor within 180 days of filing, certain assets transferred by the debtor before bankruptcy and recovered by the trustee in bankruptcy or by the debtor as debtor in possession, plus income on property of the estate. 11 U.S.C. § 541. A joint filing in a voluntary case (11 U.S.C. § 303 does not provide for a joint involuntary case) creates two estates, which are usually administered together. 11 U.S.C. § 302; Fed. R. Bankr. P. 1015. Debtors in a legal same sex marriage can file a joint case. *See U.S. v. Windsor*, 570 U.S. 12, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) (finding unconstitutional for federal law purposes § 3 of the Defense of Marriage Act (1996), P.L. 104-199, 110 Stat. 2419, codified at 1 U.S.C. § 7, which had prohibited federal recognition of same sex marriages that were valid in the states that allow them); *In re Matson*, 509 B.R. 860 (Bankr. E.D. Wis. 2014). *See also, In re Rice*, 521 B.R. 405 (Bankr. N.D. Ga. 2014) (one spouse acting under power of attorney for other spouse must so indicate on schedules; ratification by nonsigning spouse precluded dismissal).

B. **Debtor's Solely Owned Property Included.** The estate consists of all legal or equitable interests of the debtor in solely owned property of any kind as of the commencement of the case. 11 U.S.C. § 541(a)(1).

1. **Debtor's interest in property.** The estate has no greater interest in an asset than the debtor had. 11 U.S.C. § 541(d). *In re McCafferty*, 96 F.3d 192 (6th Cir. 1996) (nonfiling former spouse's interest in debtor's pension plan was held by him in trust and was not property of his estate); *Chiu v. Wong*, 16 F.3d 306 (8th Cir. 1994) (partnership funds converted by debtor's husband and traceable to debtor's homestead were placed in constructive trust in favor of debtor's husband's former partner, thus excluding them

from her estate); *In re Douglass*, 413 B.R. 573 (Bankr. W.D. Tex. 2009) (property placed in debtor's name by wife was gift, and she had no equitable lien); *In re Stone*, 401 B.R. 897 (Bankr. W.D. Ky. 2009) (divorce retainer was property of debtor's estate even if paid by third party and must be disclosed; fees disgorged); *In re Balzano*, 399 B.R. 428 (Bankr. D. Md. 2008) (estate had no interest in real estate titled in name of nonfiling spouse); *In re Charlton*, 389 B.R. 97 (Bankr. N.D. Cal. 2008) (award of painting by constructive trust entered by state court postpetition was ineffective to cut off trustee's rights); *In re Flippin*, 334 B.R. 434 (Bankr. W.D. Ark. 2005) (debtor's dower interest in property owned by nonfiling spouse was property of estate but incapable of turnover); *see also, In re Heck*, 355 B.R. 813 (Bankr. D. Kan. 2006) (engagement ring was conditional gift subject to return when marriage did not take place); *In re Stoltz*, 283 B.R. 842 (Bankr. D. Md. 2002) (same). *See also, infra*, regarding avoidable fraudulent transfers between spouses.

2. **Debtor's interest in property subject to dissolution action pending when bankruptcy case filed.** If a divorce or legal separation is pending when a bankruptcy petition is filed by one spouse, state law must be consulted to determine if each spouse has an equitable but contingent interest in property owned by the other or if the nonowner spouse has no interest in the other's property until judgment. Unless state law provides for an inchoate or contingent interest, the filing of a bankruptcy by an owning spouse cuts off the ownership rights of the non-owning spouse. *See, e.g., In re Skorich*, 482 F.3d 21 (1st Cir. 2007) (debtor's spouse's interest in funds held in escrow arose upon prepetition filing of divorce and entry of temporary order, applying New Hampshire law, and was not a claim); *Davis v. Cox*, 356 F.3d 76 (1st Cir. 2004) (under Maine law applicable to case regarding constructive and resulting trusts, pending divorce proceeding gave nondebtor wife interest in divisible assets); *In re White*, 212 B.R. 979 (B.A.P. 10th Cir. 1997) (under Wyoming law, filing of petition for divorce vests property rights in nonowning spouse); *In re Swarup*, 521 B.R. 382 (Bankr. M.D. Fla. 2014) (pending divorce, Indiana law gave debtor sufficient interest in accounts that could be claimed exempt under Florida law); *In re Dzielak*, 435 B.R. 538 (Bankr. N.D. Ill. 2010) (Illinois statute gives non-owning spouse inchoate rights in other spouse's property upon filing a petition for dissolution).

In contrast, *see In re Ruitenberg*, 745 F.3d 647 (3d Cir. 2014) (right to property division in pending divorce was contingent claim, not property interest); *Culver v. Boozer*, 285 B.R. 163 (D. Md. 2002) (under Maryland law, neither nondebtor's interest in equitable property division, nor possession of untitled asset, was sufficient for property interest to arise); and *In re DiGeronimo*, 354 B.R. 625 (Bankr. E.D. N.Y. 2006) (under N.Y. law, right to property division in divorce filed prior to bankruptcy gives rise to claim, not property interest). *See also, In re Halverson*, 151 B.R. 358 (M.D. N.C. 1993) (absent levy, nonowner spouse has no interest in the other

spouse's personal property before judgment); *In re Goss*, 413 B.R. 843 (Bankr. D. Or. 2009) (filing of dissolution action creates vested, inchoate claim in property of other spouse under Oregon law); *In re Hoyo*, 340 B.R. 100 (Bankr. M.D. Fla. 2006) (settlement agreement was not approved prepetition, so debtor's property was property of estate notwithstanding award to other spouse by agreement); *In re Anjum*, 288 B.R. 72 (Bankr. S.D. N.Y. 2003) (prepetition stipulation for property division not reduced to judgment before bankruptcy resulted in claim of nonfiling spouse but did not transfer property); *In re Greer*, 242 B.R. 389 (Bankr. N.D. Ohio 1999) (no interest in nonowning spouse until decree). Thus, the result of whether a pending divorce creates a claim or property interest in the other spouse's assets depends heavily on state law. *See also, In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (debtor's former wife's claim subject to equitable subordination).

See also, In re Schorr, 299 B.R. 97 (Bankr. W.D. Pa. 2003) (nonfiling spouse who filed a divorce action prepetition had unquantified property division claim that was discharged; rejecting reasoning in *In re Scholl*, 234 B.R. 636 (Bankr. E.D. Pa. 1999), which had held that pending dissolution action did not give rise to a claim that could be discharged); *In re Radinick*, 419 B.R. 291 (Bankr. W.D. Pa. 2009) (debtor had vested interest in equitable distribution in pending divorce case under Pennsylvania law, which became property of her estate).

See also, infra, regarding filing of claim, trustee's transfer avoidance powers, and automatic stay.

3. **Pre-bankruptcy Property Division.** The debtor's right to receive the other spouse's property pursuant to a property division is property of the debtor's estate, 11 U.S.C. § 541(a)(5)(B), but property awarded to the debtor's former spouse pursuant to a prepetition decree is not. *See In re Gallo*, 573 F.3d 433 (7th Cir. 2009) (equalizing obligation due debtor was property of estate); *Musso v. Ostashko*, 468 F.3d 99 (2d Cir. 2006) (failure to docket divorce decree before debtor filed bankruptcy resulted in property awarded to nonfiling spouse being included in debtor's estate); *Forant v. Brochu*, 320 B.R. 784 (D. Vt. 2005) (award of portion of retirement account to debtor's former spouse vested prepetition so account was not property of estate); *In re Ripberger*, 520 B.R. 572 (Bankr. E.D. Ky. 2014) (debtor's former wife had claim but not ownership interest in property awarded to debtor prepetition but not yet transferred); *In re Flammer*, 150 B.R. 474 (Bankr. M.D. Fla. 1993) (equitable title to real estate passed to debtor's former spouse upon entry of prepetition divorce decree); *Grassmueck v. Food Indus. Credit Union,* 127 B.R. 869 (Bankr. D. Or. 1991) (bankruptcy estate had bare legal title to car awarded to debtor's former spouse in divorce prior to filing); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991) (rights of nonowning spouse in pending divorce are similar to rights of beneficiary of constructive trust and were not subordinate to trustee's

rights); *see also, In re Peel*, 725 F.3d 696 (7th Cir. 2013) (annuity awarded debtor with obligation to pay former wife amount equal to payments remained property of debtor's estate; former wife had postpetition claim against debtor personally but should not have received postpetition annuity payments from estate).

C. **Support Due Debtor from Prior Spouse.**

1. **Spousal support.** The debtor's right to receive past due spousal support may be property of the estate, depending on state law. *See In re Mehlhaff*, 491 B.R. 898 (B.A.P. 8th Cir. 2013) (prepetition past due alimony was property of estate subject to turnover); *In re Thurston*, 255 B.R. 725 (Bankr. S.D. Ohio 2000) (right to receive past due maintenance and maintenance due within 180 days of filing is property of estate; debtor failed to prove right to exemption); *In re Anders*, 151 B.R. 543 (Bankr. D. Nev. 1993) (chapter 7 debtor's right to receive prepetition spousal support arrearage and the right to receive spousal support within 180 days of filing, but not child support, was property of the estate). *Contra In re Wise*, 346 F.3d 1239 (10th Cir. 2003) (right to receive spousal support is not property right under Colorado law); *In re Jeter*, 257 B.R. 907 (B.A.P. 8th Cir. 2001) (postpetition alimony payments were not property of estate); *In re Mitchem*, 309 B.R. 574 (Bankr. W.D. Mo. 2004) (same). *See also,* Christopher Celentino, *Divorce and Bankruptcy: Spousal Support as Property of the Estate*, 28 Cal. Bankr. J. 542 (2006).

2. **Child Support.** Entitlement to child support is generally not property of the payee parent's bankruptcy estate, depending on state law. *In re McKain*, 325 B.R. 842 (Bankr. D. Neb. 2005) (child support is property of custodial parent under Nebraska law, and is property of the estate, but not under Wyoming law); *Hurlbut v. Scarbrough*, 957 P.2d 839 (Wy. 1998) (child support is children's money which parent administers in trust for child's benefit). *But see, In re Harbour*, 227 B.R. 131 (Bankr. S.D. Ohio 1998) (any child support ultimately ordered paid to debtor in pending state court paternity action, which was attributable to period after child's birth and before petition date, was estate property). In *In re Ehrhart*, 155 B.R. 458 (Bankr. E.D. Mich. 1993), the court discussed the debtor's former spouse's right to child support on behalf of the children, as opposed to a personal interest, but allowed her to recoup the property division she owed the debtor against the debtor's child support arrearage. *See also, In re Edwards*, 255 B.R. 726 (Bankr. S.D. Ohio 2000) (child support arrearage was property of estate but was subject to Ohio exemption to the extent necessary for support); *In re Hopkins*, 177 B.R. 1 (Bankr. D. Me. 1995) (each child owed support was counted as a petitioning creditor for purpose of filing involuntary petition); *In re Jessell*, 359 B.R. 333 (Bankr. M.D. Fla. 2006) (debtor's right to refund of child support overpayments was property of his estate).

D. **Debtor's Interest in Co-Owned Assets.** Partial ownership of a single asset, such as an asset owned in joint tenancy, is included in the estate. *See In re Reed*, 940 F.2d 1317 (9th Cir. 1991); *In re Ball*, 362 B.R. 711 (Bankr. N.D. W. Va. 2007). *See also*, *In re Benner*, 253 B.R. 719 (Bankr. W.D. Va. 2000) (interpreting West Virginia law, death of joint tenant postpetition brought entire asset into debtor's estate); *In re Cloe*, 336 B.R. 762 (Bankr. C.D. Ill. 2006) (Illinois law interpreted to determine estate's interest in joint checking account); *In re Kellman*, 248 B.R. 430 (Bankr. M.D. Fla. 1999) (Florida law re joint bank account). *Cf. In re Turville*, 363 B.R. 167 (Bankr. D. Mont. 2007) (failure to record decree ordering debtor to transfer interest in real estate to former spouse resulted in property remaining in his estate). See infra regarding rights of co-owners upon sale by trustee.

E. **Joint Tax Refund.** Inclusion in debtor's estate depends on ownership rights under state law. *See, e.g., In re Lee*, 508 B.R. 399 (S.D. Ind. 2014) ("separate filing" rule applied, reversing bankruptcy court's use of 50/50 rule); *In re Edwards*, 400 B.R. 345 (D. Conn. 2008) (under Connecticut law, interests in joint tax refund determined by respective spouse's withholding); *In re Newman*, 487 B.R. 193 (B.A.P. 9th Cir. 2013) (both spouse's shares of community property tax refund subject to turnover in filing spouse's estate); *In re Crowson*, 431 B.R. 484 (B.A.P. 10th Cir. 2010) (interpreting Wyoming law, estate's and nonfiling spouse's portions calculated based on spouses' withholding, eligibility for certain components, and percentage of total income); *In re Carlson*, 394 B.R. 491 (B.A.P. 8th Cir. 2008) (under Minnesota law, non-earning spouse had no interest in joint tax return and could not claim exemption in half); *In re Law*, 336 B.R. 780 (B.A.P. 8th Cir. 2006) (child tax credit was property of estate); *In re Kleinfeldt*, 287 B.R. 291 (B.A.P. 10th Cir. 2002) (nondebtor spouse with no earnings had no interest in joint tax refund); *In re Ruhl*, 474 B.R. 596 (Bankr. N.D. Ill. 2012) (joint tax refund allocated entirely to husband as only he had earnings; interpreting Illinois law); *In re Duerte*, 492 B.R. 100 (Bankr. E.D. N.Y. 2011) ("separate filings rule"; applying New York law); *In re Newcomb*, 483 B.R. 554 (Bankr. M.D. Fla. 2012) (tax refund could be owned as tenants by the entirety under Florida law); *In re Hraga*, 467 B.R. 527 (Bankr. N.D. Ga. 2011) (under Georgia law, income tax refund was in the estate of only the husband as he was the only earner); *In re McKain*, 455 B.R. 674 (Bankr. E.D. Tenn. 2011) (tax refund was owned equally, under Tennessee law, absent evidence of separate ownership); *In re Palmer*, 449 B.R. 621 (Bankr. D. Mont. 2011) (formula for calculating spouses' respective shares under Montana law); *In re Rice*, 442 B.R. 140 (Bankr. M.D. Fla. 2010) (spouses' interests determined by contribution under Florida law); *In re Glenn*, 430 B.R. 56 (Bankr. N.D. N.Y. 2010) (50/50 rule applied, using New York law); *In re Garbett*, 410 B.R. 280 (Bankr. E.D. Tenn. 2009) (50/50 rule applied under Tennessee law); *In re Trickett*, 391 B.R. 657 (Bankr. D. Mass. 2008) (presumption of equal ownership under Massachusetts law); *In re Gartman*, 372 B.R. 790 (Bankr. D. S.C. 2007) (income and withholding allocated between spouses to determine respective interests); *In re Marciano*, 372 B.R. 211 (Bankr. S.D. N.Y. 2007) (presumption of equal ownership could be rebutted with evidence of spouses' conduct); *In re Lock*, 329 B.R. 856 (Bankr. S.D. Ill. 2005) (refund belonged entirely to wage earning spouse); *In re Innis*, 331 B.R. 784 (Bankr. C.D. Ill. 2005) (presumption of equal ownership absent court order or

marital agreement); *In re Smith*, 310 B.R. 320 (Bankr. N.D. Ohio 2004) (nondebtor spouse who had no earnings did not have property interest in refund); *In re Barrow*, 306 B.R. 28 (Bankr. W.D. N.Y. 2004) (nondebtor spouse failed to overcome presumption of equal ownership of joint tax refund despite having no earned income). *Compare In re Morine*, 391 B.R. 480 (Bankr. M.D. Fla. 2008) (nondebtor spouse without earnings had no interest in joint tax refund that had not been received and therefore was not deposited in tenancy by the entireties account), with *In re Freeman*, 387 B.R. 871 (Bankr. M.D. Fla. 2008) (anticipated joint tax refund could be owned as tenants by the entireties), both applying Florida law. *See also, Hundley v. Marsh*, 944 N.E.2d 127 (Mass. 2011) (under Mass. law, proper method to allocate joint tax refund in context of bankruptcy is separate filings rule), *answering question certified by, In re Hundley*, 603 F.3d 95 (1st Cir. 2010); Nate Hull and Nichola M. McGrath, *Determining the Proper Allocation of Joint Tax Refunds*, ABI Journal 58 (April 2012); Janice G. Marsh, *First Circuit Adopts the "Separate Filings Rule" in Allocating a Refund Between a Debtor and a Nondebtor Spouse*, 27 NABTalk 30 (Fall 2011).

F. **Community Property.** The estate includes all community property under the debtor's sole, equal or joint management and control. 11 U.S.C. § 541(a)(2)(A); *In re Herter*, 464 B.R. 22 (Bankr. D. Idaho 2011), *aff'd,* 2013 WL 588145 (D. Idaho); *In re Newman*, 487 B.R. 193 (B.A.P 9th Cir. 2013); *In re Victor*, 341 B.R. 775 (Bankr. D. N.M. 2006); *In re Brassett*, 332 B.R. 748 (Bankr. M.D. La. 2005); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002); *In re Burke*, 150 B.R. 660 (Bankr. E.D. Tex. 1993); *In re Kido*, 142 B.R. 924 (Bankr. D. Idaho 1992); *In re Fingado*, 113 B.R. 37 (Bankr. D. N.M. 1990), *aff'd*, 995 F.2d 175 (10th Cir. 1993). *See also, In re Landsinger*, 490 B.R. 827 (Bankr. W.D. Wis. 2012) (debtor husband could claim exemption in marital property portion of asset that could be traced); *In re Cecconi*, 366 B.R. 83 (Bankr. N.D. Cal. 2007) (asset titled in both names proved to be separate property of nonfiling spouse); *In re McCarron*, 155 B.R. 14 (Bankr. D. Idaho 1993) (party claiming asset is transmuted from community property to separate property must prove by clear and convincing evidence). The estate also includes community property assets not under the debtor's management and control (*i.e.,* Wisconsin marital property titled in the name of the nondebtor spouse) that are liable for a claim against the debtor or a claim against the debtor and the debtor's spouse to the extent those assets are so liable. 11 U.S.C. § 541(a)(2)(B); *see In re Miller*, 517 B.R. 145 (D. Ariz. 2014) (Ariz. law applied regarding judgment lien for liability on husband's guarantee; trustee took California property free of lien); *In re Petersen*, 437 B.R. 858 (D. Ariz. 2010) (nonfiling spouse holding community property was subject to turnover action by trustee, but he was allowed equitable recoupment for property ordered by state court to be paid to him by debtor prepetition). This property must be included in the debtor's schedules, and all creditors holding community claims must also be listed. 11 U.S.C. §§ 101(7), 342(a); *see In re Trammell*, 399 B.R. 177 (Bankr. N.D. Tex. 2007) (car titled in nonfiling spouse's name was "sole management community property" and was not in debtor spouse's estate).

G. **Tenancy by the Entireties.** Whether an asset owned as tenants by the entireties is included in the estate of a spouse, or the estate holds merely the debtor's survivorship interest, depends on state law, and whether a joint case was filed. State law generally provides such property can be recovered only by joint creditors. *See, e.g., In re Bamman*, 239 B.R. 560 (Bankr. W.D. Mo. 1999) (once entireties asset is liquidated, proceeds go to joint creditors and then to estate or nonfiling spouse, according to their interests). Property owned by a debtor and his/her spouse as tenants by the entireties is not available to satisfy claims against only one spouse. *See* 11 U.S.C. § 522(b)(3)(B) and infra regarding exemption of property owned by tenants by the entireties. Such property may be administered by the trustee as long as there are joint creditors at filing. *See, e.g., In re Ballard*, 65 F.3d 367 (4th Cir. 1995); *Matter of Paeplow*, 972 F.2d 730 (7th Cir. 1992); *Matter of Hunter*, 970 F.2d 299 (7th Cir. 1992); *In re Persky*, 893 F.2d 15 (2d Cir. 1989); *see also, In re Cordova*, 73 F.3d 38 (4th Cir. 1996) (divorce decree terminating co-ownership of home released the debtor from the unique feature of tenancy by the entirety); *In re Etoll*, 425 B.R. 743 (Bankr. D. N.J. 2010) (filing by one spouse converted tenancy by the entireties property to tenancy in common property with right of survivorship, which only existed until debtor died; interpreting New Jersey law); *In re Owens*, 400 B.R. 447 (Bankr. W.D. Pa. 2009) (after sale by trustee, proceeds distributed pursuant to § 726, not only to joint creditors; bankruptcy law pre-empted state creditor recovery rules); *In re Davis*, 403 B.R. 914 (Bankr. M.D. Fla. 2009) (separate judgments against spouses did not merge to qualify as joint creditor); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007) (transfer of entireties property to debtor's spouse avoided by trustee did not revert to tenancy by the entireties); *In re Stacy*, 223 B.R. 132 (N.D. Ill. 1998) (fraudulent transfer avoided when solely owned property was changed to tenancy by the entireties); *In re Daughtry*, 221 B.R. 889 (Bankr. M.D. Fla. 1997) (nonfiling spouse's consent to sale conveyed property to trustee and destroyed entireties characteristics, which allowed proceeds to be distributed to all creditors, not just joint creditors of debtor and spouse); *see also, In re DelCorso*, 382 B.R. 240 (Bankr. E.D. Pa. 2007) (attorney sanctioned for recommending debtor fraudulently transfer solely owned property into tenancy by the entireties and failing to disclose); Sommer & McGarity, *Collier Family Law and the Bankruptcy Code* ¶ 2.02[2][c].

H. **Property Acquired Within 180 Days of Filing.** Estate also includes property acquired on account of the death of another person and by property settlement agreement with the debtor's spouse, or interlocutory or final divorce decree, within 180 days after filing. 11 U.S.C. § 541(a)(5)(B). *See, supra*, regarding past due support as property of the estate. In *In re Radinick*, 419 B.R. 291 (Bankr. W.D. Pa. 2009), the debtor became entitled to a portion of her former spouse's retirement plan, which was a type that was not excluded as property of the estate, more that 180 days after filing. However, under Pennsylvania law, because the dissolution action was filed within the 180 days after filing, she had an unliquidated interest in that asset when the action was commenced, and her share became property of her estate. The court distinguished other cases where state law provided that a spouse received a property interest in the other spouse's assets only at the time of final judgment.

I. **Income.** Income on estate property and avoided transfers are included in the estate, but with certain exceptions, earned income of an individual debtor is not. *See* 11 U.S.C. § 541(a)(4), (6). Earned income of a chapter 12 and 13 debtor continues to be property of the estate, at least to the extent needed to fund a plan. 11 U.S.C. §§ 1207(a)(2), 1306(a)(2). *See, infra,* re Chapter 13 issues. Earned income of an individual chapter 11 debtor filing under BAPCPA is property of the estate. 11 U.S.C. § 1115(a)(2). A spouse in a community property state has an ownership interest in the other spouse's earned income. *In re Reiter*, 126 B.R. 961 (Bankr. W.D. Tex. 1991) (debtor acquired community property interest in spouse's income during pendency of ch. 13 plan so nondebtor spouse's income became property of the estate under § 1306(a)(1) and was under the jurisdiction of the bankruptcy court before plan was confirmed, thereby preventing levy). *But see, In re Nahat*, 278 B.R. 108 (Bankr. N.D. Tex. 2002) (nondebtor spouse's earnings were "special community property" under Texas law and were not property of the estate because they were not subject to the debtor's management and control or to recovery for his debts); *In re Markowicz*, 150 B.R. 461 (Bankr. D. Nev. 1993) (after confirmation, debtor's spouse's income was not property of the estate).

J. **Personal vs. Entity Ownership.** If a party to a divorce owns stock in a corporation that becomes a debtor, even 100% of the stock, the divorce is unaffected by the bankruptcy. The stock could be transferred to the nonowner spouse without violating the bankruptcy court's jurisdiction or the automatic stay. On the other hand, if one spouse is a sole proprietor instead of a stockholder, all of that spouse's property is included in the bankruptcy estate. *See, e.g., In re Berlin*, 151 B.R. 719 (Bankr. W.D. Pa. 1993) (interest of a debtor in a partnership is estate property, but property of partnership is not); *Matter of Lundell Farms*, 86 B.R. 582, 590 (Bankr. W.D. Wis. 1988) (property owned by debtor partnership was not marital property even though partnership interest was).

K. **Co-Owner's Rights *vis a vis* Trustee or Debtor in Possession.**

1. **Sale of Entire Asset.**

a. Fractional Interests. The bankruptcy trustee of a debtor owning a fractional interest in an asset can only sell entire asset under certain conditions, *i.e.,* partition is impracticable, sale of the fractional interest alone would realize less than the estate's interest in the proceeds, the benefit to the estate outweighs the detriment to the co-owner, and the asset is not used in the production of certain types of energy. 11 U.S.C. § 363(h); *see, e.g., Matter of Thaw*, 769 F.3d 366 (5th Cir. 2014) (trustee's sale, notwithstanding nonfiling spouse's homestead rights, did not violate Takings Clause of Fifth Amendment); *Matter of Kim*, 748 F.3d 647 (5th Cir. 2014) (same); *In re Garner*, 952 F.2d 232 (8th Cir. 1991); *In re Persky*, 893 F.2d 15 (2d Cir. 1989); *In re Grabowski*, 137 B.R. 1 (S.D. N.Y.), *aff'd*, 970 F.2d 896 (2d Cir. 1992); *In re DeRee*, 403 B.R. 514 (Bankr. S.D. Ohio 2009); *In re Gabel*, 353 B.R. 295 (Bankr. D. Kan. 2006); *In re*

Swiontek, 376 B.R. 851 (Bankr. N.D. Ill. 2007). *See also, In re Wolk*, 451 B.R. 468 (B.A.P. 8th Cir. 2011), aff'd. 686 F.3d 938 (8th Cir. 2012) (interest of co-owner outweighed interest of estate because equity in asset was attributable to her financial contribution, and she had a history of depression). The co-owner is entitled to his or her interest in the proceeds of sale. *In re Ball*, 362 B.R. 711 (Bankr. N.D. W. Va. 2007) (one half payable immediately; no escrow of nondebtor's share was ordered as trustee's right to recover from nondebtor not established prior to sale); *In re Shelton*, 334 B.R. 174 (Bankr. D. Md. 2005) (adjustments in distribution of proceeds for contributions by nondebtor co-owner). *Cf. In re Whaley*, 353 B.R. 209 (Bankr. E.D. Tenn. 2006) (possessory interest of debtor's wife could not defeat trustee's right to sell); *In re Harlin*, 325 B.R. 184 (Bankr. E.D. Mich. 2005) (sale denied because property was owned as tenants by the entireties, and there was only one minor joint creditor; nondebtor spouse's interest outweighed creditor's); *In re Johnson*, 51 B.R. 439 (Bankr. E.D. Pa. 1985) (stay was lifted to allow state court to determine relative rights of spouses in co-owned property, and the request of one debtor to sell was denied until determination was made); *In re Langlands*, 385 B.R. 32 (Bankr. N.D. N.Y. 2008) (co-owner entitled to notice of sale). *See also, In re Carmichael*, 439 B.R. 884 (Bankr. D. Kan. 2010) (trustee not allowed to sell debtor's co-owned exempt property to realize estate's interest in avoided lien); *In re Mitchell*, 344 B.R. 171 (Bankr. M.D. Fla. 2006) (trustee not allowed to sell exempt tenancy by the entireties interest of debtor in real estate owned in joint tenancy with spouse's son); *In re Wrublik*, 312 B.R. 284 (Bankr. D. Md. 2004) (chapter 13 debtor did not have power to sell both spouses' interests in jointly owned property). *In re Sontag*, 151 B.R. 664 (Bankr. E.D. N.Y. 1993) (nondebtor spouse occupying homestead owned with the debtor as tenant in common was liable to the trustee for failure to maintain property). Note that 11 U.S.C. § 363(h) does not allow the trustee to sell the debtor's property subject to the life estate of another. *In re Hajjar*, 385 B.R. 482 (Bankr. D. Mass. 2008).

Failure to clear title after a divorce causes particular problems as the trustee can usually exercise powers of a hypothetical BFP under 11 U.S.C. § 544 to enforce record title. *In re Claussen*, 387 B.R. 249 Bankr. D. S.D. 2007) (unrecorded divorce decree ineffective to transfer property); *In re Robinson*, 346 B.R. 172 (Bankr. E.D. Va. 2006) (trustee could sell house still titled to debtor and former spouse notwithstanding award to nondebtor in divorce decree); *In re Kelley*, 304 B.R. 331 (Bankr. E.D. Tenn. 2003) (trustee's power to sell superceded rights of debtor's former spouse, who was awarded house in unrecorded divorce judgment). *But see, In re Trout*, 146 B.R. 823 (Bankr. D.N.D. 1992), aff'd, 2 F.3d 1154 (8th Cir. 1993)

(trustee as hypothetical BFP could not sell house in which the debtor's former spouse had sole occupancy and paid all expenses for 14 years, even though record title was still in names of debtor and former spouse); *In re Weisman*, 5 F.3d 417 (9th Cir. 1993) (similar facts).

Bankruptcy Code does not explicitly grant a nondebtor co-owner the power to sell an estate's and co-owner's interests in jointly held property. *In re Lowery*, 203 B.R. 587 (Bankr. D. Md. 1996).

b. Community Property. Most community property of spouses is entirely in the bankruptcy estate of either spouse. 11 U.S.C. § 541(a)(2); *In re Martell*, 349 B.R. 233 (Bankr. D. Idaho 2005); *In re Victor*, 341 B.R. 775 (Bankr. D. N.M. 2006); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002). Accordingly, the sale of such an asset by the trustee usually does not involve a co-owner. However, common law forms of co-ownership may also occur in community property states, and a single asset may have components of value that are both separate and community property. Assets held in joint tenancy may actually be community property. *See In re Fingado*, 955 F.2d 31 (10th Cir. 1992) (certifying question to N.M. S. Ct). The New Mexico Supreme Court held that community property ownership is presumed for assets held in joint tenancy. *Swink v. Fingado*, 850 P.2d 978 (N.M. 1993). Therefore, the 10th Circuit Court of Appeals held that the bankruptcy court, at 113 B.R. 37 (Bankr. D. N.M. 1990), had properly held that the debtor's homestead, owned in joint tenancy with his nondebtor spouse, was entirely includable in his bankruptcy estate. *In re Fingado*, 995 F.2d 175 (10th Cir. 1993). The considerations of 11 U.S.C. § 363(h) did not apply, and the nondebtor spouse was not entitled to half of the proceeds. *See also*, Wis. Stat. § 766.60(4) (regarding classification of Wisconsin marital property titled as joint tenants or tenants in common).

2. **Co-Owner has Right to Purchase.** The co-owner of an asset being sold in its entirety by the bankruptcy trustee can purchase the estate's interest in the asset for the price at which the sale is to be consummated, *i.e.,* the price bid by a third party. 11 U.S.C. § 363(i); *In re Brollier*, 165 B.R. 286 (Bankr. W.D. Okla. 1994); *In re Waxman*, 128 B.R. 49 (Bankr. E.D. N.Y. 1991). If the asset is community property, the debtor's spouse also has the right to purchase the asset but has no right to prevent the sale on account of equitable considerations. 11 U.S.C. § 363(i).

L. **Professional Degrees.** Professional degree and license are not property of the estate, even if value is divisible for divorce purposes. *Matter of Lynn*, 18 B.R. 501 (Bankr. D. Conn. 1982).

M. **ERISA Benefits and Spendthrift Trust Interests.** An interest that the debtor has in property that is subject to restrictions under nonbankruptcy law is not property of the debtor's estate. 11 U.S.C. § 541(c)(2); *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992) (ERISA qualified plan is not property of beneficiary's estate). Amendments to 11 U.S.C. § 541 by the 2005 Act provided additional protections for certain qualified plans by omitting them from property of the estate. *See* 11 U.S.C. § 541(b)(5)-(7), applicable to cases filed on or after October 17, 2005. When the nondebtor former spouse of a bankruptcy debtor has been awarded a portion of a plan for which the debtor is the nominal beneficiary, and if the plan is property of the estate, as was often the case under pre-2005 law, courts dealt with the situation in a variety of ways to protect the interests of the nondebtor. In some cases, the award of the interest, even if it had not yet been transferred at the time of filing the bankruptcy petition, excluded the plan from property of the estate. *See, e.g., In re Nelson*, 322 F.3d 541 (8th Cir. 2003) (debtor had interest in former spouse's ERISA qualified plan via QDRO that was excluded from estate); *In re Gendreau*, 122 F.3d 815 (9th Cir. 1997) (debtor's former wife's prepetition right to obtain QDRO gave her property right that was not cut off by former husband's bankruptcy); *In re Lalchandani*, 279 B.R. 880 (B.A.P. 1st Cir. 2002) (debtor's interest in former spouse's plan via QDRO excluded from her estate); *Holland v. Knoll*, 202 B.R. 646 (D. Mass. 1996) (former husband of debtor had vested property interest in debtor's pension fund); *Walston v. Walston*, 190 B.R. 66 (E.D. N.C. 1995) (debtor's former wife's interest in debtor's military pension was in nature of "property right," not a claim that could be discharged); *Brown v. Pitzer*, 249 B.R. 303 (S.D. Ind. 2000) (portion of debtor's non-ERISA-qualified plan awarded to debtor's spouse prepetition, but not yet transferred, was not in debtor's estate); *In re Metz*, 225 B.R. 173 (B.A.P. 9th Cir. 1998) (debtor's interest in former husband's non-ERISA- qualified plan awarded to her in divorce was not property of her estate because of spendthrift provision); *In re Remia*, 503 B.R. 6 (Bankr. D. Mass. 2013) (unqualified domestic relations order awarding debtor interest in former spouse's retirement fund gave her interest she could exempt); *In re Combs*, 435 B.R. 467 (Bankr. E.D. Mich. 2010) (debtor's former wife was entitled to QDRO giving her a share in his pension plan, so proceeds held in constructive trust until order entered; stay lifted to obtain order); *In re Carter-Bland*, 382 B.R. 743 (Bankr. S.D. Ohio 2008) (former spouse's share of debtor's ESOP was excluded from estate); *In re Nichols*, 305 B.R. 418 (Bankr. M.D. Pa. 2004) (nondebtor former spouse's share of debtor's military pension awarded nondebtor spouse in divorce was not included in debtor's estate); *In re Seddon*, 255 B.R. 815 (Bankr. W.D. N.C. 2000) (debtor's interest in former spouse's CSRS benefits obtained prepetition through QDRO were not property of debtor's estate); *In re McQuade*, 232 B.R. 810 (Bankr. M.D. Fla. 1999) (former spouse's interest in debtor's pension plan vested at time of divorce). Other courts treated the debtor's obligation to turn over the former spouse's portion of the pension as nondischargeable support (*In re Cuseo*, 242 B.R. 114 (Bankr. D. Conn. 1999)), defalcation in a fiduciary capacity (*In re Dahlin*, 94 B.R. 79 (Bankr. E.D. Va. 1988), aff'd, 911 F.2d 721 (4th Cir. 1990)), conversion (*In re Wood*, 96 B.R. 993 (B.A.P. 9th Cir. 1988)), or a postpetition obligation (*Bush v. Taylor*, 912 F.2d 989 (8th Cir.

1990)). On the other hand, such obligations were sometimes discharged as a property division, although subsequent developments in the law probably supercede these cases. *See In re Teichman*, 774 F.2d 1395 (9th Cir. 1985); *See also, In re Adams*, 241 B.R. 880 (Bankr. N.D. Ohio 1999) (obligation to turn over portion of 401(k) plan excepted from discharge under 11 U.S.C. § 523(a)(15)). *But see, Steele v. Heard*, 487 B.R. 302 (S.D. Ala. 2013) (divorce decree did not give debtor's former wife interest in pension, but debtor was required to make payments when he received it; obligation was for property division, not DSO, and could be discharged in chapter 13).

N. **Other.** Supplemental Security Income payments made to debtor in her capacity as representative payee of disabled minor child were not property of the estate, and therefore, SSA's withholding to compensate for prior overpayment did not violate the automatic stay. *In re Baker*, 214 B.R. 489 (Bankr. S.D. Ohio 1997).

III. EXEMPTIONS.

A. **Removal from Estate.** The debtor may remove from the estate property claimed as exempt under state law or, unless the state has opted out of the federal exemptions, under federal law. 11 U.S.C. § 522(b)(1); Rule 4003. The 730 day domicile rule established by BAPCPA, 11 U.S.C. § 522(b)(3), may result in conflicting exemption laws applicable to mobile debtors. *See, e.g., In re Connor*, 419 B.R. 304 (Bankr. E.D. N.C. 2009) (resident spouse was required to claim North Carolina exemptions, but the spouse that had not lived in North Carolina for 730 days and did not qualify for Florida exemptions, where she previously lived, was allowed to claim federal exemptions); *In re Zolnierowicz*, 380 B.R. 84 (Bankr. M.D. Fla. 2007) (730 day rule inapplicable to entireties exemption). *See also*, pre-BAPCPA cases *Seung v. Silverman*, 288 B.R. 174 (E.D. N.Y. 2003) (applying N.Y. law, joint debtors, one of whom lived in New Jersey, were limited to N.Y. exemptions); and *In re Andrews*, 225 B.R. 485 (Bankr. D. Idaho 1998) (estranged husband and wife who lived in separate states, but filed joint petition was limited to one set of exemptions).

BAPCPA placed restrictions on homestead acquired with fraudulently obtained funds within ten years of filing. *See* 11 U.S.C. § 522(o), (p); *but see, In re Davis*, 403 B.R. 914 (Bankr. M.D. Fla. 2009) (debtor could exempt homestead owned as tenancy by the entireties with nondebtor wife, even though debtor was prohibited from exempting the property under 11 U.S.C. § 522(o); separate judgments against spouses did not merge to qualify as joint creditor).

The debtor cannot claim an exemption for property in which the debtor has no interest or that is not property of the estate. *In re Caron*, 82 F.3d 7 (1st Cir. 1996) (debtor-wife, as named beneficiary under life insurance policy, could not claim exemption in cash surrender value of policy as her interest was only an expectancy); *In re Burgeson*, 504 B.R. 800 (Bankr. W.D. Pa. 2014) (debtor could not exempt anticipated portion of husband's pension plan under § 522(d)(10)(E) when it had not been awarded at filing; only section available to claim undetermined property

division was § 522(d)(5)); *In re Ellis*, 446 B.R. 22 (Bankr. D. Mass. 2011) (wife could not claim homestead exemption when she had no interest in property); *In re Toland*, 346 B.R. 444 (Bankr. N.D. Ohio 2006) (debtor had no interest in wife's car to claim exempt, even though he contributed to payments); *In re Bippert*, 311 B.R. 456 (Bankr. W.D. Tex. 2004) (under Tex. law, husband had no interest in wife's personal injury claim; exemption denied); *In re Lummer*, 219 B.R. 510 (Bankr. S.D. Ill. 1998) (debtor could exempt her portion of ex-husband's pension); *In re Page*, 171 B.R. 349 (Bankr. W.D. Wis. 1994) (in lien avoidance context, debtor was entitled to claim exemption in only her one half interest in check classified as marital (community) property); *In re Miller*, 167 B.R. 782 (Bankr. S.D. N.Y. 1994) (debtor-husband could not exempt car in debtor-wife's name); *In re Naydan*, 162 B.R. 204 (Bankr. W.D. Ark. 1993) (debtor denied exemption in former wife's share of pension benefits). *But see, In re Landsinger*, 490 B.R. 827 (Bankr. W.D. Wis. 2012) (debtor husband could claim exemption in marital property interest in asset that could be traced); *In re Carrell*, 186 B.R. 106 (Bankr. W.D. Mo. 1995) (exemption allowed even though debtor wife did not personally use tools of her and husband's business). *Cf. In re Barnhart*, 447 B.R. 551 (Bankr. S.D. Ohio 2011) (valuing dower interest; Ohio law).

Some states provide for exemption of divorce related benefits. *See, e.g., In re Miller*, 424 B.R. 171 (Bankr. M.D. Pa. 2010). *But see, In re Cordova*, 73 F.3d 38 (4th Cir. 1996) (postpetition entry of debtor-wife's divorce decree within 180 days of bankruptcy petition rendered inapplicable her exemption for marital property); *In re Diener*, 483 B.R. 196 (B.A.P. 9th Cir. 2012) (debtor's share of retirement account clearly awarded her as property division was not exemptible support under California law); *In re Aldrich*, 403 B.R. 766 (Bankr. M.D. Ga. 2009) (income and business interest established by divorce decree as support was no longer exempt for adult debtor); *In re Hice*, 223 B.R. 155 (Bankr. N.D. Ill. 1998) (malpractice claim for failure to protect debtor's right to alimony, maintenance or support was not itself a right to "alimony, support or separate maintenance," within meaning of state exemption law); *In re Rutter*, 204 B.R. 57 (Bankr. D. Or. 1997) (chapter 7 debtors not entitled to exemption in Earned Income Credit portion of their federal tax refund; EIC not regarded as child support).

There is a special provision for exemption for assets owned as tenants by the entireties, which affects how the proceeds of such property is distributed. *See* 11 U.S.C. § 522(b)(2)(B). *In re Brannon*, 476 F.3d 170 (3rd Cir. 2007) (debtors holding property as tenancy by the entireties may not only claim tenancy by the entireties exemption but may divide value as they agree and use other exemption provisions; interpreting Pennsylvania law); *In re Cordova*, 177 B.R. 527 (E.D. Va. 1995), *aff'd*, 73 F.3d 38 (4th Cir. 1996) (entireties exemption lost for property acquired in fee simple in divorce decree within 180 days of filing); *In re Adams*, 506 B.R. 688 (Bankr. E.D. N.C. 2014) (only real estate held in tenancy by entireties under N.C. law; debtor's one half share of postpetition rents had to be turned over to trustee); *In re Ascuntar*, 487 B.R. 319 (Bankr. S.D. Fla. 2013) (right to receive refund on joint tax return did not qualify for entireties exemption because spouses had different interests in refund; interpreting Florida law); *In re McKain*, 455 B.R.

674 (Bankr. E.D. Tenn. 2011) (asset acquired as joint tenancy property before marriage did not become tenancy by the entireties after marriage, applying Virginia law; tenancy by the entireties exemption not available); *In re Bradby*, 455 B.R. 476 (Bankr. E.D. Va. 2011) (chapter 13 debtor allowed tenancy by the entireties exemption even after husband's death); *In re Pyatte*, 440 B.R. 893 (Bankr. M.D. Fla. 2010) (entire assets owned as tenants by the entireties, not debtor's one half interest, may also be claimed exempt under state statute); *In re Davis*, 403 B.R. 914 (Bankr. M.D. Fla. 2009) (debtor could exempt homestead owned as tenancy by the entireties with nondebtor wife, even though debtor was prohibited from exempting the property under 11 U.S.C. § 522(o); separate judgments against spouses did not merge to qualify as joint creditor); *In re Guzior*, 347 B.R. 237 (Bankr. E.D. Mich. 2006) (trustee could administer value of tenancy by the entireties property in excess of amount of claims of joint creditors). *But see, In re Adams*, 389 B.R. 762 (Bankr. M.D. Fla. 2007) (attorney/debtor denied exemption in stock in professional corporation because he could not own it as tenant by the entireties with non-attorney wife); *In re Stewart*, 373 B.R. 736 (Bankr. M.D. Fla. 2007) (entireties exemption lost because debtors tried to manipulate system by filing chapter 7 cases three days apart); *In re DelCorso*, 382 B.R. 240 (Bankr. E.D. Pa. 2007) (exemption lost for fraudulently putting solely owned property into tenancy by the entireties). It is not clear how this exemption might be affected by new 11 U.S.C. § 522(c)(1) (liability of exempt property for support debts, notwithstanding applicable non-bankruptcy laws to the contrary). *Cf. In re Moulterie*, 398 B.R. 501 (Bankr. E.D. N.Y. 2008) (while any claim that spouse had for unpaid "domestic support obligations" might warrant offset against whatever distribution debtor might otherwise receive on account of his homestead exemption, it did not provide basis for disallowing debtor's homestead exemption).

Community property assets create special issues because all community property interests of both spouses is in the estate of the filing spouse, but a debtor is allowed to claim exempt only "the debtor's interest" in particular assets. *See* 11 U.C.C. § 522(b). See discussion under homestead exemptions, infra.

B. **Homestead Exemption.** A debtor's right to claim a homestead exemption, or what constitutes an exempt homestead, is generally determined by state law. *See In re Belcher*, 551 F.3d 688 (7th Cir. 2008) (applying Illinois property law, not divorce or probate rights, husband whose name was not on title could not claim homestead exemption in proceeds); *In re Pugh*, 522 B.R. 277 (Bankr. S.D. Cal. 2014) (debtor allowed family unit homestead exemption instead of single person exemption, even though child did not live with him full time); *In re Walton*, 503 B.R. 159 (Bankr. S.D. Fla. 2013) (debtor was not required to claim benefit of homestead exemption in property owned by codebtor wife, so enhanced personal property exemption allowed; interpreting Florida law); *In re Scotti*, 456 B.R. 760 (Bankr. D. S.C. 2011) (debtor must have ownership to claim exemption under S.C. law); *but see, In re Bradigan*, 501 B.R. 151 (Bankr. W.D. N.Y. 2013) (nonfiling spouse's homestead interest in entireties property affected value of debtor's homestead exemption). State law analysis of whether a particular piece of real estate is the debtor's homestead must take place even if the federal exemptions are claimed, although 11

U.S.C. § 522(d)(1) refers to an exemption in the debtor's or debtor's dependent's "residence." Generally, a debtor can claim a homestead exemption in property he cannot occupy because of a pending divorce. *Matter of Neis*, 723 F.2d 584 (7th Cir. 1983) (under Wisconsin law a debtor has right to homestead exemption in property which he left because of pending divorce); *In re Roberts*, 219 B.R. 235 (B.A.P. 8th Cir. 1998) (separated debtors could claim Nebraska homestead exemption based solely on their marital status, even though neither qualified as "head of household"); *In re Goulakos*, 456 B.R. 729 (Bankr. D. Mass. 2011) (debtor could claim homestead exemption in her interest in house occupied by estranged husband); *In re Minton*, 402 B.R. 380 (Bankr. M.D. Fla. 2008) (debtor did not abandon homestead when she left to avoid domestic violence); *In re Moulterie*, 398 B.R. 501 (Bankr. E.D. N.Y. 2008) (presence of debtor's estranged wife, and his continued interest as title holder, was sufficient to claim homestead exemption under New York law); *In re Lindquist*, 395 B.R. 707 (Bankr. D. Or. 2008) (Oregon homestead law protects interests of both the owner spouse and the occupant spouse); *In re Gunnison*, 397 B.R. 186 (Bankr. D. Mass. 2008) (interpreting Massachusetts law, debtor husband's later claim of homestead exemption extinguished debtor wife's earlier claim; married parties could not claim separate properties); *In re Taylor*, 280 B.R. 294 (Bankr. D. Mass. 2002) (leaving marital home marital discord to live with father did not constitute abandonment of homestead); *In re Webber*, 278 B.R. 294 (Bankr. D. Mass. 2002) (homestead exemption not lost because debtor ordered by court to leave family home). *But see, In re Fink*, 417 B.R. 786 (Bankr. E.D. Wis. 2009) (security interest in former homestead awarded debtor's former wife eight years earlier did not qualify for Wisconsin homestead exemption); *In re Holman*, 286 B.R. 882 (Bankr. D. Minn. 2002) (debtor had no present intent to return to home); *In re Roberts*, 280 B.R. 540 (Bankr. D. Mass. 2001) (debtor failed to establish requisite "intent to occupy" marital residence); *In re Weza*, 248 B.R. 470 (Bankr. D. N.H. 2000) (debtor could not claim Massachusetts homestead exemption, where estranged wife resided, when he resided in New Hampshire); *In re Moneer*, 188 B.R. 25 (Bankr. N.D. Ill. 1995) (debtor abandoned homestead shortly before divorce); *In re Nerios*, 171 B.R. 224 (Bankr. N.D. Tex. 1994) (spouses could not claim two homes on adjoining lots where they resided separately because of marital discord).

In some states, proceeds of the sale of a homestead remain exempt, usually for a period of time before reinvestment. *In re Graziadei*, 32 F.3d 1408 (9th Cir. 1994) (proceeds from an exempt homestead remained exempt under Nevada law); *In re Jefferies*, 468 B.R. 373 (B.A.P. 9th Cir. 2012) (equalizing proceeds for transfer of homestead to former spouse pursuant to divorce decree did not meet Washington law requirement for exemption of proceeds from "voluntary" transfer); *In re Garcia*, 499 B.R. 506 (Bankr. N.D. Tex. 2013) (exemption in proceeds lost when not reinvested); *In re Dubravsky*, 374 B.R. 467 (Bankr. D. N.H. 2007) (exemption in proceeds of former marital home allowed under N.H. law); *In re Kalynych*, 284 B.R. 149 (Bankr. M.D. Fla. 2002) (debtor could claim exemption in proceeds of sale or refinance of home of debtor and former wife, provided he could prove intent to reinvest); *In re Dixon*, 327 B.R. 421 (Bankr. E.D. Mo. 2005) (must be link between obligation of former spouse to pay debtor under divorce decree and

homestead claim in proceeds of obligation); *In re Lewis*, 216 B.R. 644 (Bankr. N.D. Okla. 1998) (debtor could claim lien as exempt under Okla. law); *In re Bumpass*, 196 B.R. 780 (Bankr. E.D. Tenn. 1996) (debtor-ex-wife was entitled to exempt her right to payment under divorce decree of one half of the equity in the former marital residence from the bankruptcy estate as personal property); *In re Maylin*, 155 B.R. 605 (Bankr. D. Me. 1993) (under Maine law, debtor could exempt proceeds from homestead sold pursuant to divorce decree).

Not all states allow a homestead exemption in proceeds. *In re Belcher*, 551 F.3d 688 (7th Cir. 2008) (exemption in proceeds not allowed, applying Illinois law); *In re Johnson*, 375 F.3d 668 (8th Cir. 2004) (debtor could not claim homestead exemption in lien interest in homestead awarded former wife); *In re Gerrald*, 57 F.3d 652 (8th Cir. 1995) (agreement with debtor's former spouse to sell parties' former homestead extinguished debtor's homestead exemption); *In re Reinders*, 138 B.R. 937 (Bankr. N.D. Iowa 1992) (debtor's homestead exemption extinguished prepetition when the divorce court ordered its sale and distribution of proceeds to debtor's former husband's parents).

In *In re Homan*, 112 B.R. 356 (B.A.P. 9th Cir. 1989), the nondebtor spouse was not entitled to claim state homestead exemption in house she lived in because it was community property, which put it entirely in the debtor's estate, and only the debtor could claim exemptions. *See also, In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002) (same); *but see, In re Hendrick*, 45 B.R. 965 (Bankr. M.D. La. 1985) (nondebtor former spouse was allowed state exemptions). When only one spouse files and community property is in the estate, an exemption may be allowed in the entire asset because the debtor's interest is undivided in the entire asset. *See In re Griffith*, 449 B.R. 909 (Bankr. W.D. Wis. 2011) (exemption in entire assets allowed when debtor used federal exemptions); *In re Vanderhei*, 449 B.R. 359 (Bankr. W.D. Wis. 2011) (exemption in entire assets allowed when debtor used Wisconsin exemptions); *In re Xiong*, No. 05-43121, 2006 WL 1277129, 2006 Bankr. LEXIS 717 (Bankr. E.D. Wis. May 3, 2006) (exemption of nondivisible asset allowed). *But see, In re Wald*, No. 11-53644, 2012 WL 2049429, 2012 Bankr. LEXIS 2552 (Bankr. W.D. Tex. June 6, 2012) (Only debtor's one half interest in community property homestead allowed exempt).

C. **Objections to Exemptions.** Objections to a debtor's claimed exemptions must be filed within 30 days after the conclusion of the meeting of creditors or within 30 days after the filing of an amendment to the claimed exemptions. Rule 4003(b). Failure to object within the time limit results in allowance of the exemption. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644 (1992). This allowance applies even if property claimed is not property of the estate. *In re Zimmer*, 154 B.R. 705 (Bankr. S.D. Ohio 1993) (late objection resulted in wife's claim of exemption to husband's tax refund being allowed even though she had no interest in it). Objecting party bears the burden of proving grounds for the objection, such as the debtor's intent to abandon the homestead. *In re Jones*, 193 B.R. 503 (Bankr. E.D. Ark. 1995). Generally, debtors can convert non-exempt property into exempt property before filing. However, indicia of fraudulent use of an exemption may include

conduct intentionally designed to materially mislead or deceive creditors about debtor's position, use of credit to buy exempt property, conversion of very great amount of property, and conveyance for less than adequate consideration. *In re Cataldo*, 224 B.R. 426 (B.A.P. 9th Cir. 1998).

D. **Exempt Assets Recoverable for Support Claims.** Exempt property is subject to recovery for tax and spousal support claims. 11 U.S.C. § 522(c); *In re O'Brien*, 367 B.R. 240 (Bankr. D. Mass. 2007); *In re Slater*, 188 B.R. 852 (Bankr. E.D. Wash. 1995). Under pre-BAPCPA law, this exception to a claim of exemption did not create a recovery right that did not otherwise exist under state law. *In re Davis*, 170 F.3d 475 (5th Cir. 1999). However, Davis was overruled by the 2005 Act, which provides that the support (DSO) creditor may recover from exempt assets, even if such a right does not exist under state law. It is not yet clear how this provision might affect recovery from tenancy by the entireties property held by a liable debtor and nonliable spouse. The support creditor may wish to file an adversary proceeding in bankruptcy court for a declaratory determination as to recovery from a particular exempt asset, as collection may be more difficult if state courts have to apply federal law. However, it is probably not appropriate for a bankruptcy trustee to administer estate property for only the DSO creditor. *See In re Vandeventer*, 368 B.R. 50 (Bankr. C.D. Ill. 2007); *In re Quezada*, 368 B.R. 44 (Bankr. S.D. Fla. 2007); *In re Ruppel*, 368 B.R. 42 (Bankr. D. Or. 2007); *In re Covington*, 368 B.R. 38 (Bankr. E.D. Cal. 2006). *See also*, Alan M. Ahart, *The Liability of Property Exempted in Bankruptcy for Pre-Petition Domestic Support Obligations After BAPCPA: Debtors Beware*, 81 Am. Bankr. L.J. 233 (2007).

E. Section 522(g) provides that a debtor may claim an exemption in property recovered by the trustee as an avoidable transfer, provided the transfer was not voluntary and not concealed, and the debtor could have avoided the transfer under sec. 522(h) had the trustee not done so. *See In re Krouse*, 513 B.R. 598 (Bankr. D. Kan. 2014) (undisclosed prepetition payment to deceased husband's creditors with otherwise exempt life insurance proceeds was without consideration and fraudulent transfer; no exemption under sec. 522(g) for voluntary transfer).

IV. JURISDICTION OVER PROPERTY OF THE ESTATE AND SPOUSES' PROPERTY

A. **Determining Spouses' Rights in Property.** Bankruptcy court has jurisdiction over all aspects of property of the estate, including the power to adjudicate the rights of the spouses to property. *In re Sokoloff*, 200 B.R. 300 (Bankr. E.D. Pa. 1996). However, most bankruptcy courts will not do so but will abstain. *In re Jacobs*, 401 B.R. 202 (Bankr. D. Md. 2008); *Matter of Levine*, 84 B.R. 22 (Bankr. S.D. N.Y. 1988); *See also, In re Abrams*, 12 B.R. 300 (Bankr. D. P.R. 1981) (bankruptcy court declined to exercise jurisdiction over marital status, even though it had jurisdiction over property). The bankruptcy court does not have the right to determine the spouses' rights in assets that are not property of the estate, *i.e.,* exempt property that is no longer property of the estate and property owned by the nondebtor spouse. *In re Graziadei*, 32 F.3d 1408 (9th Cir. 1994); *In re Neal*, 302 B.R. 275 (B.A.P. 8th Cir.

2003); *Marriage of Seligman*, 18 Cal. Rptr.2d 209 (Ct. App. 1993); *In re Dally*, 202 B.R. 724 (Bankr. N.D. Ill. 1996). *See also, In re Burnett*, 408 B.R. 233 (B.A.P. 8th Cir. 2009), *aff'd in part, rev'd in part*, 646 F.3d 575 (8th Cir. 2011) (bankruptcy court properly refused to exercise jurisdiction to determine interest on support arrearage paid through completed plan); *In re Hurt*, 389 B.R. 551 (Bankr. W.D. Tenn. 2008) (bankruptcy court had no jurisdiction to modify child support in claim); *In re Vick*, 327 B.R. 477 (Bankr. M.D. Fla. 2005) (bankruptcy court had no authority to modify debtor's support obligations). The "domestic relations exception" to federal jurisdiction applies only to divorce, alimony, and custody. *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S. Ct. 2206 (1992). *See infra* regarding application of the automatic stay with respect to property division and other family court matters.

B. **Debtor's Property Rights During Pendency of Divorce.** *See supra* regarding what property is property of the estate of the filing spouse when divorce is not final at time of filing. State court has jurisdiction over nonfiling spouse's property and exempt property, and bankruptcy court has jurisdiction over property of the estate. *See In re Neal*, 302 B.R. 275 (B.A.P. 8th Cir. 2003).

C. **Distribution of Property.** If a dissolution action was filed before the bankruptcy and is still pending, the state court no longer has jurisdiction over property of the estate. *Medrano Diaz v. Vazquez-Botet*, 204 B.R. 842 (D. P.R. 1996), *aff'd*, 121 F.3d 695 (1st Cir. 1997); In re Teel, 34 B.R. 762 (B.A.P. 9th Cir. 1983); *In re Raboin*, 135 B.R. 682 (Bankr. D. Kan. 1991); *Matter of Palmer*, 78 B.R. 402 (Bankr. E.D. N.Y. 1987). The bankruptcy court has jurisdiction over the distribution of property even if it has abstained to allow the state court to determine the rights of the spouses to a property division. *See In re Dzielak*, 435 B.R. 538 (Bankr. N.D. Ill. 2010); *In re Sparks*, 181 B.R. 341 (Bankr. N.D. Ill. 1995); *In re Davis*, 133 B.R. 593 (Bankr. E.D. Va. 1991) (trustee could represent the estate's interest in property division to be determined in state court). *But see, In re Schweikart*, 154 B.R. 616 (Bankr. D. R.I. 1993). In *Schweikart*, the court lifted the stay to allow the debtor's former spouse to continue proceedings in state court to determine the debtor's interest in the marital domicile and to determine the dischargeability of certain debts. Reasons included protracted prior litigation in state court, that court's familiarity with the case, its expertise in family matters and the fact that determinations required interpretation of a previous family court order.

V. **ABSTENTION.** 11 U.S.C. § 305; 28 U.S.C. § 1334(c).

A. The bankruptcy court may abstain in the interest of comity with state courts. 28 U.S.C. § 1334(c)(1). *In re Stabler*, 418 B.R. 764 (B.A.P. 8th Cir. 2009) (abstention appropriate when state court had devoted considerable time to dispute between former spouses and it had concurrent jurisdiction over matter); *In re Taub*, 413 B.R. 81 (Bankr. E.D. N.Y. 2009) (court abstained in proceeding brought by debtor's former wife to recover property allegedly fraudulently transferred by debtor); *In re Kirby*, 403 B.R. 169 (Bankr. D. Mass. 2009) (court abstained from determining debtor's continuing interest in marital home due to ambiguity of divorce decree);

In re Jacobs, 401 B.R. 202 (Bankr. D. Md. 2008) (factors applied in determining whether to abstain); *In re Osting*, 337 B.R. 297 (Bankr. N.D. Ohio 2005) (abstention proper when debtor was trying to avoid transfer made by divorce court of exempt property); *In re Leucht*, 221 B.R. 1009 (Bankr. M.D. Fla. 1998) (not proper for bankruptcy court to determine nonfiling spouse's rights in exempt property). In *In re Branham*, 149 B.R. 406 (Bankr. W.D. Va. 1992), the court held that abstention from the entire case was appropriate when the sole reason for filing was the debtor's attempt to avoid the effects of his divorce. *See also, In re Laine*, 383 B.R. 166 (Bankr. D. Kan. 2008) (chapter 7 case dismissed for bad faith when only creditor was debtor's former wife and he had substantial income); *In re Moog*, 159 B.R. 357 (Bankr. S.D. Fla. 1993) (dismissal for a bad faith filing was more appropriate than abstention because abstention required consideration of best interests of debtor).

B. The bankruptcy court shall abstain if there would be no jurisdiction in federal court absent the bankruptcy filing and the dispute can be timely adjudicated in a state forum. Abstention does not limit the operation of the stay with respect to property of the estate. 28 U.S.C. § 1334(c)(2). Even though the state and federal courts had concurrent jurisdiction to decide the dischargeability of an obligation under 11 U.S.C. § 523(a)(5), courts in *In re Roberson*, 187 B.R. 159 (Bankr. E.D. Va. 1995), and *In re Mills*, 163 B.R. 198 (Bankr. D. Kan. 1994), held that discretionary abstention was not proper since the only issue was one of bankruptcy law. Discretionary abstention and mandatory abstention were held not proper even though interpretation of a marital settlement agreement was necessary to determine property of the estate in *In re Weinberg*, 153 B.R. 286 (Bankr. D. S.D. 1993). *See also, In re Rose*, 151 B.R. 128 (Bankr. N.D. Ohio 1993) (court had no "related to" jurisdiction to interpret settlement agreement since result would have no impact on debtor's estate).

C. Discretionary abstention may be proper even in a core proceeding. *In re Mitchell*, 132 B.R. 585 (S.D. Ind. 1991). One court set forth a nonexclusive list of criteria used to consider whether discretionary abstention would be proper: (1) the effect or lack of effect on the efficient administration of the estate if a court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of nondebtor parties; and (13) any unusual or other significant factors. *Matter of Tremaine*, 188 B.R. 380, 385 (Bankr. S.D. Ohio 1995) (citing *In re Nationwide Roofing & Sheet Metal, Inc.*, 130 B.R. 768 (Bankr. S.D. Ohio 1991)). *See also, In re Bennett*, 376

B.R. 918 (Bankr. W.D. Wis. 2007) (bankruptcy court abstained from interpreting marital settlement agreement and debtor's management of marital property; stay lifted also); *Matter of Fussell*, 303 B.R. 539 (Bankr. S.D. Ga. 2003) (bankruptcy court abstained from determining if debtor's post-divorce, prebankruptcy charges on joint credit cards were in the nature of support as liabilities were incurred after court approved separation agreement). *But see, In re Blixseth*, 463 B.R. 896 (Bankr. D. Mont. 2012) (vague statement concerning continuing jurisdiction of family court was insufficient for court to abstain); *In re Dreier*, 438 B.R. 449 (Bankr. S.D. N.Y. 2010) (court did not abstain when motion by debtor's former wife was untimely and was brought only after bankruptcy judge expressed doubts about her position regarding acceleration of payments due under marital settlement agreement); *In re Taub*, 413 B.R. 69 (Bankr. E.D. N.Y. 2009) (court did not abstain when state court did not provide forum for specific bankruptcy relief).

D. Bankruptcy court could resolve property division. *In re Sokoloff*, 200 B.R. 300 (Bankr. E.D. Pa. 1996). Most bankruptcy courts refuse to do so.

E. Bankruptcy court cannot determine amount of support. *In re Ward*, 188 B.R. 1002 (Bankr. M.D. Ala. 1995). Because state court appellate proceedings had not established the amount of divorce decree debts, the bankruptcy court abstained from determining the dischargeability of the debt owed to chapter 7 debtor's former wife. *Matter of Tremaine*, 188 B.R. 380 (Bankr. S.D. Ohio 1995); *cf. In re Baker*, 195 B.R. 883 (Bankr. S.D. Ohio 1996) (state court had already determined property interests involved, so abstention was not appropriate).

F. Guardianship issues shall be determined by state court. *Mazur v. Woodson*, 932 F. Supp. 144 (E. D. Va. 1996).

VI. REMAND/REMOVAL TO STATE COURT

A. The bankruptcy court may remand a matter to state court upon its own motion, *In re Black & White Cab Co.*, 202 B.R. 977 (Bankr. E.D. Ark. 1996), or that of an interested party on "any equitable ground." 28 U.S.C. § 1452; *In re Traylor*, 202 B.R. 790 (Bankr. M.D. Ala. 1995). If the delay resulting from remand to state court would impact the handling and administration of the bankruptcy estate, the district or bankruptcy court has "related to" jurisdiction. *ABF Capital Mgmt. v. Askin Capital Mgmt., L.P.*, 957 F. Supp. 1308 (S.D.N.Y. 1997).

B. Factors considered by courts deciding whether or not to remand a case are similar to those used to determine abstention. *See Jackson Nat'l Life Ins. Co. v. Greycliff Partners, Ltd.*, 960 F. Supp. 186 (E.D. Wis. 1997) (complete diversity precludes remand to state court); *In re Black & White Cab Co.*, 202 B.R. 977 (Bankr. E.D. Ark. 1996); *Matter of Roper*, 203 B.R. 326 (Bankr. N.D. Ala. 1996).

VII. AUTOMATIC STAY.

A. **Stay of Actions to Recover Claims or Property.** The filing of a bankruptcy operates as a stay against all acts to acquire property of the debtor or to recover a

claim against the debtor that arose prepetition. The 2005 Act expanded exceptions so most family law matters are excepted from the stay, except matters relating to property division. See infra regarding family related exceptions. The stay is still in effect even though a case is later dismissed. *In re Stancil*, 473 B.R. 478 (Bankr. D. D.C. 2012) (foreclosure judgment void in violation of stay, even though joint debtor's case dismissed because parties were not married). Acts to recover property of the estate for a nondischargeable debt or a postpetition debt are also stayed.

Acts taken in family court that violate the stay are void. *See In re Edwards*, 214 B.R. 613 (B.A.P. 9th Cir. 1997) (ex-wife's recordation of lis pendens was part of her continuing attempts to collect on divorce-related obligation and, as such, violated automatic stay); *In re Willard*, 15 B.R. 898 (B.A.P. 9th Cir. 1981) (state court dissolution judgment made final in violation of stay was void to extent it transferred property of estate, but nondebtor wife could enforce it as to property that was no longer property of estate); *In re Coats*, 509 B.R. 836 (Bankr. W.D. Mich. 2014) (property settlement entered into in violation of stay "voidable"); *In re Nalley*, 507 B.R. 411 (Bankr. S.D. Ga. 2014) (postpetition property settlement void ab initio); *In re Okke*, 513 B.R. 896 (Bankr. W.D. Mich. 2014) (debtor's former wife's refusal to turn over property awarded debtor prepetition violated stay, warranting substantial attorney's fees); *In re Young*, 497 B.R. 904 (Bankr. W.D. Ark. 2013) (debtor's former wife violated stay; but incarcerated debtor could not prove more than nominal damages); *In re Herter*, 464 B.R. 22 (Bankr. D. Idaho 2011), aff'd, 2013 WL 588145 (D. Idaho Feb. 13, 2013) (MSA and transfer after filing was void in violation of stay; trustee received wife's share of real estate free of post petition lien); *In re Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010) (post-nuptial agreement entered into after ch. 13 confirmation, which required transfer of property of the estate, violated stay); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002) (state court property division awarding property of the estate to nonfiling spouse was void); *See also, In re Cini*, 492 B.R. 291 (Bankr. D. Mont. 2013) (attorney sanctioned for attempting, without stay relief, to collect fees ordered paid by state court); *In re Hall-Walker*, 445 B.R. 873 (Bankr. N.D. Ill. 2011) (attorney for debtor's former husband sanctioned for bringing contempt action in state court to remove former husband's name from mortgage); *In re Balzano*, 399 B.R. 428 (Bankr. D. Md. 2008) (stay did not apply to real estate titled only in name of debtor's nonfiling spouse). *But see, In re Lee*, 465 B.R. 469 (Bankr. W.D. Ky. 2012) (waiting almost two years to file motion for sanctions for acts taken in family court in violation of the stay constituted laches).

The nondebtor spouse cannot invoke the stay to avoid effects of state court property division. *Lopez v. Lopez*, 478 N.W.2d 706 (Mich. App. 1991).

B. **Exceptions.** For cases filed on or after October 17, 2005, the exceptions listed in 11 U.S.C. § 362(b)(2) include actions to establish paternity, to establish or modify support, to collect domestic support obligations from property that is not property of the estate, concerning child custody and visitation, concerning domestic violence, to withhold income, including income that is property of the estate, for payment of a domestic support obligation, concerning certain licenses, and the

reporting of overdue support for certain purposes. 11 U.S.C. § 362(b)(2). Obtaining a property division continues to require modification of the stay. 11 U.S.C. § 362(b)(2)(A)(iv). *See In re Marino*, 437 B.R. 676 (B.A.P. 8th Cir. 2010) (action under Minnesota Domestic Abuse Act preventing debtor from entering his former home did not violate stay); *In re Gazzo*, 505 B.R. 28 (Bankr. D. Colo. 2014) (creditor failed to show there was property that was not property of the estate; action to appoint receiver for debtor's property was not excepted from stay); *In re Kallabat*, 482 B.R. 563 (Bankr. E.D. Mich. 2012) (continuing to go forward with divorce trial one day after debtor filed bankruptcy was excepted from stay, except for property division, resulting in sanctions for attorney); *In re Angelo*, 480 B.R. 70 (Bankr. D. Mass. 2012) (although it was not expressly stated payment to former spouse was to come from pension that was not property of estate, bankruptcy judge held that family court was aware of this restriction without relief from stay); *In re Peterson*, 410 B.R. 133 (Bankr. D. Conn. 2009) (no relief from stay necessary to set DSO or deduct from earnings); *In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (no stay violation for recovery of postpetition support from wages as these were not property of estate after confirmation of plan); *In re Levenstein*, 371 B.R. 45 (Bankr. S.D. N.Y. 2007) (debtor's interest in real estate titled solely in name of nondebtor wife was sufficient to invoke stay while divorce was pending; N.Y. law); *In re O'Brien*, 367 B.R. 240 (Bankr. D. Mass. 2007) (attorney's fees categorized as DSO could be recovered from exempt retirement accounts without regard to stay); *In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (action by debtor's former husband to reduce his maintenance obligation to recover amount of debts assumed by debtor in divorce decree, and subsequently discharged, violated stay because it attempted to effect improper setoff of discharged debts); *In re Ladak*, 205 B.R. 709 (Bankr. D. Vt. 1997) (attempted modification of property settlement in divorce decree violated stay). *See also, infra* regarding modification of support. While withholding of income for payment of a domestic support obligation is an exception to the stay, an order compelling payment of a support obligation from assets other than income may be a stay violation.

An act excepted from the stay may still violate other court orders. *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (income withholding by state for child support did not violate stay but was improper as violation of order confirming plan that provided for support arrearage).

C. **Contempt or Criminal Action in State Court.** If incarceration is used to compel debtor to pay support from property of the estate, especially if support arrearage will be paid through a plan, the action violates the stay. *In re Johnston*, 308 B.R. 469 (Bankr. D. Ariz. 2003), *aff'd in part, rev'd in part*, 321 B.R. 262 (D. Ariz. 2005), *aff'd in part, rev'd in part*, 595 F.3d 937 (9th Cir. 2010); *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), *aff'd*, 384 Fed. Appx. 882 (11th Cir. 2010); *In re DeSouza*, 493 B.R. 669 (B.A.P. 1st Cir. 2013); *In re Farmer*, 150 B.R. 68 (Bankr. N.D. Ala. 1991); *In re Suarez*, 149 B.R. 193 (Bankr. D. N.M. 1993). Both the DSO creditor and his or her attorney may be subject to sanctions for violating the stay in bringing the action in state court, or for failing to take corrective action once the party or attorney is aware of the violation. *See, e.g., In re Repine*, 536 F.3d 512 (5th

Cir. 2008); *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), *aff'd,* 384 Fed. Appx. 882 (11th Cir. 2010); *In re Bailey*, 428 B.R. 694 (Bankr. N.D. W. Va. 2010). *But see, In re Rucker*, 458 B.R. 287 (Bankr. D. S.C. 2011) (debtor incarcerated prepetition; chapter 13 eligibility unlikely); *Matter of Rogers*, 164 B.R. 382 (Bankr. N.D. Ga. 1994) (no violation for failure of creditor to act affirmatively as debtor's incarceration was the act of state court, not the creditor).

The court in *In re O'Brien*, 153 B.R. 305 (D. Or. 1993), held that a contempt action was not stayed for violation of an order to sign mortgages entered into before the bankruptcy. This is probably distinguishable from an order for payment.

The Ninth Circuit has determined that the stay does not enjoin state criminal prosecutions, even if the underlying purpose of the criminal proceedings is debt collection. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (criminal prosecution for non- payment of child support). In *In re Maloney*, 204 B.R. 671 (Bankr. E.D.N.Y. 1996), the automatic stay was not violated by a state court commitment order requiring a chapter 7 debtor to remain incarcerated for 90 days for failing to comply with the terms of a prior state court contempt order requiring him to make payments to his former wife as an equitable distribution of marital property. The commitment order was of a punitive, criminal nature, and there was no provision for release if paid. *See also, In re Rook*, 102 B.R. 490 (Bankr. E.D. Va. 1989), *aff'd*, 929 F.2d 694 (4th Cir. 1991) (incarceration to compel payment violates stay but incarceration to vindicate the dignity of the court does not); *In re Storozhenko*, 459 B.R. 697 (Bankr. E.D. Mich. 2011) (criminal and civil contempt distinguished); *accord In re Rollins*, 243 B.R. 540 (N.D. Ga. 1997); *Stovall v. Stovall*, 126 B.R. 814 (N.D. Ga. 1990); *In re Allison*, 182 B.R. 881 (Bankr. N.D. Ala. 1995). *Compare In re Vines*, 224 B.R. 491 (Bankr. M.D. Ala. 1998) (municipal court did not violate automatic stay by remitting debtor to jail for refusing to comply with orders requiring her to cease harassing her former spouse and his new wife), with *In re Pearce*, 400 B.R. 126 (Bankr. N.D. Iowa 2009) (creditor's contacts with criminal authorities to urge prosecution for theft by contractor for purpose of debt collection was not protected by stay exception for governmental action). The *Storozhenko* court held the complainant's motivation in seeking criminal contempt was irrelevant.

In *In re Kearns*, 161 B.R. 701 (D. Kan. 1993), *modified*, 168 B.R. 423 (D. Kan. 1994), the record was unclear as to whether the stay was violated by a contempt order in state court against the debtor, but the state court judge was entitled to judicial immunity from sanctions.

D. **Duration.** Stay continues until property is no longer property of the estate, until case is closed or dismissed, or debtor is discharged. 11 U.S.C. § 362(c). In a chapter 7, stay is in effect about three months. In chapters 12 and 13, it is in effect until the plan is completed, generally between 36 and 60 months in duration. In a chapter 11, the stay is in effect until the plan is confirmed. After the stay expires or is terminated, the discharge injunction under § 524(a) applies.

E. **Relief from Stay.** Stay regarding property may be lifted for cause, including allowing state court to adjudicate rights of the spouses in property, even though distribution of property of the estate is under the jurisdiction of the bankruptcy court. 11 U.S.C. § 362(d); *In re Robbins*, 964 F.2d 342 (4th Cir. 1992); *In re Roberge*, 188 B.R. 366 (E.D. Va. 1995), *aff'd*, 95 F.3d 42 (4th Cir. 1996); *In re Dryja*, 425 B.R. 608 (Bankr. D. Colo. 2010); *In re Claughton*, 140 B.R. 861 (Bankr. W.D. N.C. 1992), *aff'd*, 33 F.3d 4 (4th Cir. 1994).

In deciding whether to modify the stay to allow the property division to go forward, the court will consider the effect on the estate. *See In re Guzman*, 513 B.R. 202 (Bankr. D. P.R. 2014) (modifying stay to allow pending divorce and property division to go forward would partially resolve disputes and would not prejudice creditors); *In re Anderson*, 463 B.R. 871 (Bankr. N.D. Ill. 2011) (GAL granted relief from stay to collect DSO fees from property that was not property of the estate); *In re Secrest*, 453 B.R. 623 (Bankr. E.D. Va. 2011) (no cause to lift stay when property could be more efficiently administered through sale by trustee rather than by property division in state court); *In re Taub*, 413 B.R. 55 (Bankr. E.D. N.Y. 2009) (stay lifted to allow state court to determine spouses' rights in property, which would resolve certain issues relevant to ch. 11 plan confirmation); *Matter of Trout*, 414 B.R. 916 (Bankr. S.D. Ga. 2009) (stay lifted to allow enforcement of state law remedies against debtor employed by entity controlled by debtor); *In re Goss*, 413 B.R. 843 (Bankr. D. Or. 2009) (stay not lifted for debtor's former wife to enforce property division when it would defeat debtor's means to effectuate chapter 13 plan and there was equity in property on which she held lien); *In re Jacobson*, 231 B.R. 763 (Bankr. D. Ariz. 1999) (stay lifted so nondebtor spouse of chapter 13 debtor could continue action to enforce support obligation and preserve right to collect interest, but not to collect arrearage, which was to be paid through plan; plan to be modified because earnings were still property of estate); *In re Sokoloff*, 200 B.R. 300 (Bankr. E.D. Pa. 1996) (stay lifted so wife could enforce her right to support and to litigate issues of the parties' marital relationship or custody of their children; but stay not lifted with regard to issues of wife's attorney's fees, equitable distribution, or other aspects of the state court action); *In re Davis*, 133 B.R. 593 (Bankr. E.D. Va. 1991) (stay was lifted so state court could adjudicate rights of parties in property; trustee could intervene in state court action to protect the estate's interests); *See also, In re Dzielak*, 435 B.R. 538 (Bankr. N.D. Ill. 2010) (trustee could represent estate's interest in divorce action).

F. **Co-debtor Stay.** The chapter 13 codebtor stay, which protects nonfiling codebtors, was not changed by the 2005 Act. 11 U.S.C. § 1301. A creditor is stayed from commencing or continuing a civil action to collect a consumer debt from a codebtor who is liable on a debt or who has secured a debt of the debtor. Thus, a chapter 13 debtor's former wife, whom the debtor had agreed in a prepetition divorce decree to hold harmless from a certain debt for which only she was personally liable, could not be a "codebtor" within meaning of § 1301 because the debtor was not also liable to the creditor. *In re Jett*, 198 B.R. 489 (Bankr. E.D. Ky. 1996).

The codebtor stay applies only to consumer debts, and federal tax liability is not consumer debt. *In re Dye*, 190 B.R. 566 (Bankr. N.D. Ill. 1995).

G. **Filing Fee.** A motion for relief from stay requires a $176 filing fee. No fee is required for a stipulation for relief. Child support creditors who file the appropriate form, AO Form B281, are exempt from the fee. Appendix to 28 U.S.C. § 1930(b), Bankruptcy Court Miscellaneous Fee Schedule Item 20.

VIII. PROPERTY DIVISION vs. SUPPORT

A. **Section 523(a)(5).** Section 523(a)(5) applicable to cases filed before October 17, 2005.

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> * * *
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that —
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5) (2004).

See generally, Sommer & McGarity, *Collier Family Law and the Bankruptcy Code*, ch. 6 (Matthew Bender 1991, supp. ann.).

B. **BAPCPA Provisions.** For cases filed on or after October 17, 2005, reference must be made to the definition of Domestic Support Obligation (DSO), 11 U.S.C. § 101(14A):

> The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable

nonbankruptcy law notwithstanding any other provision of this title, that is –

(A) owed to or recoverable by–

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

(ii) a governmental unit;

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

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

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

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

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

11 U.S.C. § 101(14A) (2005).

This definition applies to a number of provisions in the bankruptcy code, protecting such obligations from discharge, lien avoidance, or preference recovery, and it has application to a number of provisions relating to claim priority, plan confirmation, and eligibility for discharge upon completion of a plan. This definition widens the type of obligations previously relating to 11 U.S.C. § 523(a)(5) in that it applies to claims arising before, on, and after filing and to all government support claims. *See also, In re Wright*, 438 B.R. 550 (Bankr. M.D.N.C. 2010) (interest on overdue DSO was also DSO).

C. **Property Division under 11 U.S.C. § 523(a)(15).** Before BAPCPA amendments were enacted, an obligation to divide propertywas dischargeable, unless the creditor timely filed an adversary proceeding in the bankruptcy court under 11 U.S.C. § 523(a)(15), created by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, applicable to cases filed on or after October 22, 1994; Fed R. Bankr. P. 4007. The

statute provided for discharge if the debtor could not pay the non-support obligation, and there was a balancing test if the debtor could make the payments. Standards for the tests under the prior statute are not included in this outline, but they apply to cases filed before October 17, 2005. *See, e.g., In re Marble*, 426 B.R. 316 (B.A.P. 8th Cir. 2010) (case filed three days before effective date of BAPCPA).

Property division debts continue to be dischargeable upon completion of a chapter 13 plan and obtaining a discharge. *See* 11 U.S.C. § 1328(a); *In re Cooke*, 455 B.R. 503 (Bankr. W.D. Va. 2011) (property division obligation found dischargeable, even though obligation was found nondischargeable under previous version of sec. 523(a)(15) in prior chapter 7 case). Therefore, the same standards used before the 2005 amendments in determining the nature of an obligation apply in the chapter 13 context. *See also, infra* regarding chapter 13 issues. Thus, principles applied to whether an obligation would be support or property division in cases to which the BAPCPA amendments do not apply may still be useful in determining whether debts can be discharged in a chapter 13 case or whether claims are entitled to priority.

For cases to which the BAPCPA amendments apply, 11 U.S.C. § 523(a)(15) excepts debts from discharge that are not DSOs but that arise in connection with a divorce decree, separation agreement, or similar court order. *See also, Matter of Kinkade*, 707 F.3d 546 (5th Cir. 2013) (premarriage debt was addressed by divorce decree and therefore fell under nondischargeability provision of sec. 523(a)(15)); *In re Gunness*, 505 B.R. 1 (B.A.P. 9th Cir. 2014) (debtor's obligation to husband's former wife for fraudulent transfer made to her at time of husband's divorce did not qualify for nondischargeability under either §§ 523(a)(5) or (15)). Thus, except in a chapter 13 case, all debts that arise in the domestic relations context are not discharged. *See* 11 U.S.C. § 1328(a).

D. **Federal Question.** Determination of whether a provision in decree or agreement is property division or for support is a federal, rather than a state, question. *Matter of Swate*, 99 F.3d 1282 (5th Cir. 1996); *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008); *In re Brown*, 288 B.R. 707 (Bankr. W.D. Pa. 2003). The court may nevertheless be guided and informed by state law. *In re Catron*, 164 B.R. 912 (E.D. Va. 1994), *aff'd*, 43 F.3d 1465 (4th Cir. 1994). *See also, Matter of Dennis*, 25 F.3d 274 (5th Cir. 1994) (debtor's former wife could take different positions regarding same obligation in state and federal courts). Dischargeability is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

E. **Concurrent Jurisdiction to Determine Dischargeability.** State and federal courts have concurrent jurisdiction to determine whether particular debts, other than those under 11 U.S.C. § 523(a)(2), (4), and (6), are subject to or excepted from the debtor's discharge. 11 U.S.C. § 523(c). *See, e.g., Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005); *In re Stabler*, 418 B.R. 764 (B.A.P. 8th Cir. 2009); *In re Lewis*, 423 B.R. 742 (Bankr. W.D. Mich. 2010); *In re Monsour*, 372 B.R. 272 (Bankr. W.D. Va. 2007); *See also, In re Swartling*, 337 B.R. 569 (Bankr. E.D. Va.

2005) (bankruptcy court bound by state court's determination of nondischargeability; state court immune from liability for finding); *In re McGregor*, 233 B.R. 406 (Bankr. S.D. Ohio 1999) (state court had concurrent jurisdiction to decide exception to discharge under § 523(a)(3) when debtor former wife omitted former husband from schedules). A state court deciding a bankruptcy issue must apply bankruptcy law. *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984).

F. **Burden of Proof.** Burden of proof is on the party objecting to the dischargeability of the debt under 11 U.S.C. § 523(a)(5). *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990); *In re Kerzner*, 250 B.R. 487 (Bankr. S.D.N.Y. 2000), *aff'd*, 259 B.R. 253 (S.D.N.Y. 2001). Burden of proof is by a preponderance of the evidence. *In re Hayden*, 456 B.R. 378 (Bankr. S.D. Ind. 2011); *In re Merrill*, 246 B.R. 906 (Bankr. N.D. Okla. 2000), *aff'd*, 252 B.R. 497 (B.A.P. 10th Cir. 2000); *In re Ferebee*, 129 B.R. 71 (Bankr. E.D. Va. 1991) (citing *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654 (1991)). Exceptions to discharge are liberally construed in favor of the debtor, but exceptions are less favored in the domestic relations context. *Matter of Crosswhite*, 148 F.3d 879, 881-82 (7th Cir. 1998).

G. **Evidence.** A court may look beyond the language of the decree to determine the nature of the obligation. *See In re Brody*, 3 F.3d 35 (2d Cir. 1993); *In re Goin*, 808 F.2d 1391 (10th Cir. 1987); *In re Seixas*, 239 B.R. 398 (B.A.P. 9th Cir. 1999); *In re Adams*, 200 B.R. 630 (N.D. Ill. 1996); *See also, In re Krein*, 230 B.R. 379 (Bankr. N.D. Iowa 1999) (court considered post-divorce "side agreements" as having been made in connection with divorce decree). Most courts require that once the plaintiff has presented evidence that the obligation is actually in the nature of support, the burden of going forward shifts to the debtor to provide evidence that the obligation is not support, but the ultimate burden of proof is on the creditor. *See, e.g., Matter of Fussell*, 303 B.R. 539 (Bankr. S.D. Ga. 2003). Other jurisdictions prohibit the admission of extrinsic evidence once the plaintiff has proved the obligation qualifies as support. *See In re Van Aken*, 320 B.R. 620 (B.A.P. 6th Cir. 2005) (citing *In re Sorah*, 163 F.3d 397 (6th Cir. 1998)).

H. **Third Party Obligee.** Some courts have held that the obligation may be to a third party for the benefit of the spouse or child entitled to support, rather than directly to the spouse, former spouse or child. *In re Leibowitz*, 217 F.3d 799 (9th Cir. 2000) (AFDC reimbursement); *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983) (obligation to pay debts to third parties constituted support of joint obligor); *In re Kassicieh*, 467 B.R. 445 (Bankr. S.D. Ohio 2012) (GAL fees were DSO); *In re Stevens*, 436 B.R. 107 (Bankr. W.D. Wis. 2010) (reimbursement to county for GAL fees was DSO); *In re Hamblen*, 233 B.R. 430 (Bankr. W.D. Mo. 1999) (marital debts payable to third party were support); *In re Frye*, 231 B.R. 71 (Bankr. E.D. Mo. 1999) (obligation to attorney who represented wife was for her support); *In re Harr*, 224 B.R. 718 (Bankr. E.D. Mo. 1998) (grandmother's legal fees were support for child); *In re Schwartz*, 217 B.R. 533 (Bankr. E.D. Tex. 1998) (aunt's expenses for necessaries provided to debtor's child); *In re Staggs*, 203 B.R. 712 (Bankr. W.D. Mo. 1996) (guardian ad litem). Assigned debts lose support status except in certain circumstances, such as assignment for collection only. *See In re McIntyre*, 328 B.R.

356 (Bankr. D. Mass. 2005) (death of spouse did not constitute assignment for nondischargeability purposes, disagreeing with cases to the contrary); *In re Prettyman*, 117 B.R. 503 (Bankr. W.D. Mo. 1990) (substitution of personal representative of deceased former spouse of debtor did not constitute an assignment of nondischargeable child support, but children were proper parties to enforce, not former spouse's estate).

The 2005 amendment defining DSO provides that a support obligation to a governmental unit is not discharged. *See* 11 U.S.C. § 101(14A); *In re Schauer*, 391 B.R. 430 (Bankr. E.D. Wis. 2008) (overpayment of state child care subsidy was DSO excepted from discharge). There is a disagreement among courts whether an obligation to refund overpayments of what would initially have been characterized as a DSO is also a DSO. One distinction may be whether the obligation is to a governmental entity because of wrongful payment to an individual not entitled in the first place, as opposed to a legal obligation to repay governmental support, in which case only the latter may be categorized as a DSO. Also, reimbursement to an individual who paid another but was not actually awarded support is not a DSO. *Compare Wisconsin Dept. of Workforce Dev. v. Ratliff*, 390 B.R. 607 (E.D. Wis. 2008) (refund of overpaid food stamp benefits was DSO), with *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010) (refund of overpaid child support was not DSO). *See also, In re Kloeppner*, 460 B.R. 759 (D. Minn. 2011) (reimbursement to person found not to be father of debtor's child was dischargeable non-DSO); *In re Hickey*, 473 B.R. 361 (Bankr. D. Or. 2012) (overpaid public assistance benefits caused by debtor's failure to report income was not DSO); *In re Knott*, 482 B.R. 852 (Bankr. N.D. Ga. 2012) (overpayment of child support while debtor's former husband had custody was DSO priority claim); *In re Taylor*, 455 B.R. 799 (Bankr. D. N.M. 2011), *aff'd*, 737 F.3d 670 (10th Cir. 2013) (refund of spousal support was not DSO); *In re Anderson*, 439 B.R. 206 (Bankr. M.D. Ala. 2010) (food stamp overpayment was DSO).

See also, infra, regarding attorneys' fees and guardian ad litem fees awarded in dissolution action.

I. **Factors to Consider.** Various factors are considered by courts to determine whether an obligation is actually in the nature of support. *See, generally,* Sommer & McGarity, *Collier Family Law and the Bankruptcy Code*, ch. 6 (Matthew Bender 1991, supp. ann.). These issues will usually arise in chapter 13 cases after BAPCPA, or in the context of claim priority. Factors include:

1. Whether there was a maintenance award entered by the state court. *See, e.g., In re Hamblen*, 233 B.R. 430 (Bankr. W.D. Mo. 1999) (obligation to pay marital debts was awarded in lieu of maintenance); *Matter of Lanting*, 198 B.R. 817 (Bankr. N.D. Ala. 1996). If maintenance is denied, unless there is another obligation in lieu of maintenance, the financial obligation is not for support.

2. Whether there was a need for support at the time of the decree; whether the support award would have been inadequate absent the obligation in question. Factors such as age, health, work skills and educational levels of the parties indicate relative needs. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001) (wife would need at least a portion of obligation for support); *In re Mills*, 313 B.R. 395 (Bankr. W.D. Pa. 2004) (relevant time for inquiry is time of divorce, not time of bankruptcy); *In re Jennings*, 306 B.R. 672 (Bankr. D. Or. 2004) (obligation discharged despite designation of support when debtor's former wife had no need for support); *In re Sargis*, 197 B.R. 681 (Bankr. D. Colo. 1996) (wife's age, experience, income generating ability considered).

3. Whether it was the intent of the parties, or the court in entering its decree, that the provision provide support and whether the provision functioned as support at the time of the divorce. *Matter of Evert*, 342 F.3d 358 (5th Cir. 2003) (same factors used to determine actual support applied in exemption context); *In re Young*, 35 F.3d 499 (10th Cir. 1994) (bifurcated test - intent and substance of payment); *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990) (intent based on the language and substance of agreement or decree, the parties' financial condition, and the function served by the obligation).

   Intent is a question of fact. *In re Morel*, 983 F.2d 104 (8th Cir. 1992). Most courts hold that the bankruptcy court is not bound by labels the parties place on a provision, but what the parties label an obligation may be evidence of intent. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001) (case remanded to determine state court's intent); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (label not determinative); *In re Jennings*, 306 B.R. 672 (Bankr. D. Or. 2004) (obligation discharged despite designation of support when debtor's former wife had no need for support); *In re Mannix*, 303 B.R. 587 (Bankr. M.D. Pa. 2003) (court's intent, not parties', was determinative); *In re Froncillo*, 296 B.R. 138 (Bankr. W.D. Pa. 2003) (label not controlling); *In re Hopson*, 218 B.R. 993 (Bankr. N.D. Ga. 1998) (court looked beyond agreement's explicit provisions to parties' intent). *But see, In re Sorah*, 163 F.3d 397 (6th Cir. 1998) (deference must be given to state court's characterization of obligation, if obligation is consistent with "state law indicia" of support); *In re Weaver*, 316 B.R. 705 (Bankr. W.D. Wis. 2004) (clause evidenced intent for support despite waiver of maintenance). Some courts have held that once intent is established, no further inquiry is needed. *In re Newton*, 230 B.R. 234 (Bankr. D. Conn. 1999); *See also, In re Zuccarell*, 181 B.R. 42 (Bankr. N. D. Ohio 1995) (debtor's obligation to pay marital debts was not support for nondebtor former spouse when nondebtor was ordered to pay debtor support).

4. Whether debtor's obligation terminates upon death or remarriage of the spouse or at a certain age of the children or any other contingency, such as a change in circumstances. *In re Sorah*, 163 F.3d 397 (6th Cir. 1998); *Matter of Nowak*, 183 B.R. 568 (Bankr. D. Neb. 1995). *Cf. In re Bieluch*, 219 B.R.

14 (Bankr. D. Conn. 1998), *aff'd,* 216 F.3d 1071 (2d Cir. 2000) (support obligations that would continue despite wife's remarriage or death pursuant to divorce decree were dischargeable after ex-wife's remarriage or death). *But see, In re Ehlers*, 189 B.R. 835 (Bankr. N.D. Ala. 1995) (past-due child support remains obligation even though children reached age of majority).

5. Whether the payments are made periodically over an extended period or in a lump sum. *In re Reines*, 142 F.3d 970 (7th Cir. 1998) (lump sum discharged); *Ackley v. Ackley*, 187 B.R. 24 (N.D. Ga. 1995) (same); *In re Henrie*, 235 B.R. 113 (Bankr. M.D. Fla. 1999) (same); *In re Degraffenreid*, 101 B.R. 688 (Bankr. E.D. Okla. 1988) (same); *but see, In re Smith*, 263 B.R. 910 (Bankr. M.D. Fla. 2001) (lump sum not discharged); *In re Newton*, 230 B.R. 234 (Bankr. D. Conn. 1999) (same); *In re Nix*, 185 B.R. 929 (Bankr. N.D. Ga. 1994) (same).

6. The duration of the marriage. *See In re Foege*, 195 B.R. 815 (Bankr. M.D. Fla. 1996); *In re Semler*, 147 B.R. 137 (Bankr. N.D. Ohio 1992). In most states, a long marriage is more likely to entitle the lesser earning spouse to maintenance.

7. The financial resources of each spouse, including income from employment or elsewhere. *See In re Gionis*, 170 B.R. 675 (B.A.P. 9th Cir. 1994), *aff'd*, 92 F.3d 1192 (9th Cir. 1996); *In re Gibbons*, 160 B.R. 473 (Bankr. D. R.I. 1993); *In re Messnick*, 104 B.R. 89 (Bankr. E.D. Wis. 1989).

8. Whether the payment was fashioned in order to balance disparate incomes of the parties. *See In re MacGibbon*, 383 B.R. 749 (Bankr. W.D. Wash. 2008) (additional support that balanced incomes found nondischargeable); *In re Brown*, 288 B.R. 707 (Bankr. W.D. Pa. 2003) (obligation needed to balance incomes of parties); *In re Rosenblatt*, 176 B.R. 76 (Bankr. S.D. Fla. 1994) (substantial difference in income); *In re Fagan*, 144 B.R. 204 (Bankr. D. Mass. 1992) (parties' incomes were approximately equal).

9. Whether the creditor spouse relinquished rights of support in exchange for the obligation in question. *See, e.g., In re Werthen*, 282 B.R. 553 (B.A.P. 1st Cir. 2002), *aff'd*, 329 F.3d 269 (1st Cir. 2003); *In re Zaino*, 316 B.R. 1 (Bankr. D. R.I. 2004); *In re Hamblen*, 233 B.R. 430 (Bankr. W.D. Mo. 1999); *In re Pollock*, 150 B.R. 584 (Bankr. M.D. Pa. 1992).

10. Whether there were minor children in the care of the creditor/payee spouse. *See In re Reines*, 142 F.3d 970 (7th Cir. 1998) (factor weighing in debtor's favor was that parties' children no longer needed support); *In re Brown*, 288 B.R. 707 (Bankr. W.D. Pa. 2003) (former wife had custody of two minor children).

11. The standard of living of the parties during their marriage. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001); *In re Catron*, 164 B.R. 908

(Bankr. E.D. Va. 1992), *aff'd*, 43 F.3d 1465 (4th Cir. 1994). *See also, In re Efron*, 495 B.R. 166 (Bankr. D. P.R. 2013) ($50,000 per month was DSO).

12. The circumstances contributing to the estrangement of the parties. *See In re Edwards*, 172 B.R. 505 (Bankr. D. Conn. 1994) (discussion of fault as a factor). This will not apply in most states and in most cases, although economic wrongdoing may be considered.

13. Whether the debt is for a past or for a future obligation. *See In re Nero*, 323 B.R. 33 (Bankr. D. Conn. 2005) ("lump sum alimony" was actually property division to compensate debtor's spouse for loan to debtor's restaurant); *In re Neal*, 179 B.R. 234 (Bankr. D. Idaho 1995) (compensation for spouse's contribution to debtor's education was discharged because it related to past obligations, not future support). *But see, In re Norbut*, 387 B.R. 199 (Bankr. S.D. Ohio 2008) (debtor's obligation to repay former spouse's pension benefits received by her in error was for his support and not discharged).

14. Tax treatment of the payment by the debtor/payor spouse. *See, e.g., In re Robb*, 23 F.3d 895 (4th Cir. 1994); *In re Sampson*, 997 F.2d 717 (10th Cir. 1993); *Matter of Davidson*, 947 F.2d 1294 (5th Cir. 1991); *In re Sillins*, 264 B.R. 894 (Bankr. N.D. Ill. 2001) (tax treatment was evidence but was not conclusive as to classification as support). *But see, Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986) (support not intended because agreement did not allow payments to be deducted); *In re Cox*, 292 B.R. 141 (Bankr. E.D. Tex. 2003) (quasi-estoppel applied to prevent husband from asserting obligation was not support when he had deducted payments as alimony). *See also, In re Bailey*, 285 B.R. 15 (Bankr. N.D. Okla. 2002) (neither party considered tax consequences so no estoppel); *In re Kelley*, 216 B.R. 806 (Bankr. E.D. Tenn. 1998) (debtor not barred by doctrine of quasi-estoppel from arguing that debt was not in nature of support, even though he had repeatedly claimed "alimony" deduction for prior payments of same obligation on tax returns).

J. Examples.

1. **Mortgage Payments on Homestead.** Payments made to provide a home for a former spouse and/or minor children are usually nondischargeable support. *In re Benson*, 441 Fed. Appx. 650 (11th Cir. 2011) (not published); *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990); *In re Schultz*, 204 B.R. 275 (D. Mass. 1996); *Kubera v. Kubera*, 200 B.R. 13 (W.D. N.Y. 1996); *In re Thomas*, 511 B.R. 89 (B.A.P. 6th Cir. 2014); *In re Tatge*, 212 B.R. 604 (B.A.P. 8th Cir. 1997); *In re Hayden*, 456 B.R. 378 (Bankr. S.D. Ind. 2011) (mortgage payments on house awarded debtor's former spouse were DSO); *In re Krueger*, 457 B.R. 465 (Bankr. D. S.C. 2011) (mortgage payment was DSO); *In re DeBerry*, 429 B.R. 532 (Bankr. M.D. N.C. 2010) (proceeds from sale of marital residence were DSO as they were in lieu of support); *In re King*, 461 B.R. 789 (Bankr. D. Alaska 2010) (state court had found

debtor's former spouse needed payments to keep her house; "[a]ssistance in the provision of shelter is support or maintenance" (cite omitted)); *In re Westerfield*, 403 B.R. 545 (Bankr. E.D. Tenn. 2009) (obligation to pay mortgage on former marital home was DSO); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (mortgage payment qualified as DSO).

Payments on a former marital residence are not necessarily for support. *See Matter of Brown*, 488 B.R. 810 (Bankr. S.D. Ga. 2013) (hold harmless obligation to former spouse to make payments on former marital home were nondischargeable divorce related obligation but not DSO); *In re Anthony*, 453 B.R. 782 (Bankr. D. N.J. 2011) (condo fees were not DSO); *In re Nelson*, 451 B.R. 918 (Bankr. D. Or. 2011) (hold harmless on joint mortgage debt was not DSO); *In re Lewis*, 423 B.R. 742 (Bankr. W.D. Mich. 2010) (temporary order to make mortgage payments was not in nature of support); *In re Mannix*, 303 B.R. 587 (Bankr. M.D. Pa. 2003) (debtor's mortgage obligation was property division, not support, and was dischargeable); *In re Horner*, 222 B.R. 918 (S.D. Ga. 1998) (same); *In re D'Atria*, 128 B.R. 71 (Bankr. S.D. N.Y. 1991) (same).

2. **Income Property.** *In re Tadisch*, 220 B.R. 371 (Bankr. E.D. Wis. 1998) (agreement to convey land to children was nondischargeable); *In re Dressler*, 194 B.R. 290 (Bankr. D. R.I. 1996) (agreement to hold wife harmless on rental property mortgage not excepted from discharge); *In re Green*, 81 B.R. 704 (Bankr. S.D. Fla. 1987) (agreement to transfer commercial real estate free of liens was related to support and was nondischargeable). Need for income would be the determining factor.

3. **Credit Cards.** *In re Francis*, 505 B.R. 914 (B.A.P. 9th Cir. 2014) (distinguished hold harmless from indemnification; implied indemnity not discharged); *In re McLain*, 241 B.R. 415 (B.A.P. 8th Cir. 1999) (joint credit card debt nondischargeable); *In re Lewis*, 423 B.R. 742 (Bankr. W.D. Mich. 2010) (temporary order to pay credit card debts was not for support); *In re Polishuk*, 243 B.R. 408 (Bankr. N.D. Okla. 1999) (hold harmless on credit card debt excepted from discharge); *In re Williams*, 189 B.R. 678 (Bankr. N.D. Ohio 1995) (credit card obligation nondischargeable because parties intended to create support obligation). *But see, In re Busby*, 423 B.R. 876 (Bankr. E.D. Mo. 2010) (MSA provided for payment of credit card debts from proceeds of sale of house, and to the extent there was no alternative means to pay, liability of debtor was not for support); *In re Waltner*, 271 B.R. 170 (Bankr. W.D. Mo. 2001) (credit card debt discharged); *In re Stone*, 199 B.R. 753 (Bankr. N.D. Ala. 1996) (credit card debts do not fall within § 523(a)(5) exception, but they are nondischargeable under pre-BAPCPA § 523(a)(15)). They would also be excepted from discharge under post-BAPCPA provision of § 523(a)(15).

4. **Hold Harmless Provision on Joint Debts.** *Matter of Coil*, 680 F.2d 1170 (7th Cir. 1982) (hold harmless agreement for marital debts was

nondischargeable); *In re Marble*, 419 B.R. 407 (Bankr. E.D. Mo. 2009), aff'd, 426 B.R. 316 (B.A.P. 8th Cir. 2010) (marital settlement agreement that made no other provision for maintenance resulted in hold harmless agreement in the nature of support; pre-BAPCPA case); *In re Gambale*, 512 B.R. 117 (Bankr. D. N.H. 2014) (furnace expense was DSO; payment for other joint debts was not); *In re Georgi*, 459 B.R. 716 (Bankr. E.D. Wis. 2011) (lack of hold harmless provision was not fatal to finding of nondischargeability); *In re Hayden*, 456 B.R. 378 (Bankr. S.D. Ind. 2011) (joint debts of business assigned to husband in divorce not ripe for adjudication of dischargeability); *In re Dean*, 277 B.R. 381 (Bankr. C.D. Ill. 2002) (payment of tax due on joint return was support); *In re Slygh*, 244 B.R. 410 (Bankr. N.D. Ohio 2000) (hold harmless was nondischargeable support because of debtor's income potential). *See also, In re Porretto*, 481 B.R. 874 (Bankr. S.D. Tex. 2012) (obligation to indemnify spouse for joint debt matured before actual payment by her). Other courts have held that attempted collection is necessary before contingent obligation arises. *See infra* regarding miscellaneous obligations to third parties.

Creditor of joint debts is not the proper party to enforce debt that is not discharged under divorce obligation that has hold harmless provision as the debt must be one owed to a spouse, former spouse, or child of the debtor. Former spouse's recourse is to enforce obligation in state court. *In re Reinhardt*, 478 B.R. 455 (Bankr. M.D. Fla. 2012).

5. **Car Payments.** *In re Krueger*, 457 B.R. 465 (Bankr. D. S.C. 2011) (car payments for former spouse were DSO); *Matter of Bell*, 189 B.R. 543 (Bankr. N.D. Ga. 1995); *In re Larson*, 169 B.R. 945 (Bankr. D. N.D. 1994); *In re Drennan*, 161 B.R. 661 (Bankr. E.D. Ark. 1993) (car payments nondischargeable as support). *But see, In re Zalenski*, 153 B.R. 1 (Bankr. D. Me. 1993); *In re Kessler*, 122 B.R. 240 (Bankr. M.D. Pa. 1990) (car payments dischargeable).

6. **Medical Expenses.** An obligation to pay medical expenses of children or a former spouse will usually be considered support. *Matter of Seibert*, 914 F.2d 102 (7th Cir. 1990) (expenses of pregnancy nondischargeable); *In re Moeder*, 220 B.R. 52 (B.A.P. 8th Cir. 1998) (child's medical and psychologist expenses nondischargeable); *In re McLain*, 241 B.R. 415 (B.A.P. 8th Cir. 1999) (health insurance premiums and medical expenses of children nondischargeable); *In re Marquis*, 203 B.R. 844 (Bankr. D. Me. 1997) (medical and counseling expenses of former spouse nondischargeable); *Matter of Olson*, 200 B.R. 40 (Bankr. D. Neb. 1996) (past and future medical expenses, which stemmed from debtor's alleged physical abuse of ex-wife, nondischargeable); *In re Azia*, 159 B.R. 71 (Bankr. D. Mass. 1993) (obligation to pay medical and dental expenses was nondischargeable even though payment was made to third party; dependents received benefit so there was no assignment); *In re Northcutt*, 158 B.R. 658 (Bankr. N.D. Ohio 1993) (health insurance premiums). *But*

see, In re Beach, 220 B.R. 651 (Bankr. D. N.D. 1998) (hospital obligation of former wife discharged, which enabled debtor to pay other support obligations).

7. **Contributions to Spouse's Education.** *Sylvester v. Sylvester*, 865 F.2d 1164 (10th Cir. 1989) (payments to compensate for assisting debtor in obtaining medical degree nondischargeable); *In re Friedrich*, 158 B.R. 675 (Bankr. N.D. Ohio 1993) (obligation to pay education expenses for former wife nondischargeable support); *In re Grasmann*, 156 B.R. 903 (Bankr. E.D. N.Y. 1992) (enhancement of husband's earning ability nondischargeable); *Stranathan v. Stowell*, 15 B.R. 223 (Bankr. D. Neb. 1981) (lump sum payment to wife for her time and financial contribution to husband's professional education was nondischargeable). *But see, In re Neal*, 179 B.R. 234 (Bankr. D. Idaho 1995) (award based on former spouse's contribution to debtor's attending medical school was discharged because it related to past obligations, not future support).

8. **Current Needs.** The court need not consider the present needs of the objecting spouse but can consider needs only at the time of divorce. *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990); *Sylvester v. Sylvester*, 865 F.2d 1164 (10th Cir. 1989).

9. **Child Support.** *In re Seixas*, 239 B.R. 398 (B.A.P. 9th Cir. 1999) (provision in settlement agreement to pay private school tuition or to pay college expenses of a child over the age of majority was nondischargeable even though under state law the support obligation ceased when child turned eighteen); *In re Smith*, 180 B.R. 648 (D. Utah 1995) (claim of private child support collection service was nondischargeable because arrangement was a contingent fee, not assignment); *In re Schumacher*, 495 B.R. 735 (Bankr. W.D. Tex. 2013) (court ordered obligation to pay children's college related expenses reasonable in sec. 707(b)(3) context, and filing was not abusive); *In re Maiorino*, 435 B.R. 806 (Bankr. D. Mass. 2010) (obligation in marital settlement agreement to pay children's college expenses was DSO); *In re Shaw*, 299 B.R.107 (Bankr. W.D. Pa. 2003) (college expenses were support); *In re Cunningham*, 294 B.R. 724 (Bankr. C.D. Ill. 2003) (arrearage obligation continued to be nondischargeable child support even though children had reached age of majority); *In re Kriss*, 217 B.R. 147 (Bankr. S.D.N.Y. 1998) (child care and medical obligations constituted nondischargeable child support); *In re Fritz*, 227 B.R. 700 (Bankr. S.D. Ind. 1997) (obligation to pay for costs of children's private school were in nature of nondischargeable support); *In re Bullock*, 199 B.R. 54 (Bankr. W.D. Mo. 1996) (child support obligation assigned to state agency nondischargeable); *In re Prager*, 181 B.R. 917 (Bankr. W.D. Tenn. 1995) (continuing child support as long as children were full time students and under age of 22 was nondischargeable); *Matter of Bush*, 154 B.R. 69 (Bankr. S.D. Ohio 1993) (obligation to pay college expenses for children of chapter 13 debtor were

nondischargeable); *In re Smith*, 139 B.R. 864 (Bankr. N.D. Ohio 1992) (retroactive child support is nondischargeable).

10. **Future Support.** Unmatured support claims are not collectible from the estate. 11 U.S.C. § 502(b)(5); *United States v. Sutton*, 786 F.2d 1305 (5th Cir. 1986) (debtor could not provide for current support for former spouse in chapter 11 plan); *In re Bradley*, 185 B.R. 7 (Bankr. W.D. N.Y. 1995); In re Kelly, 169 B.R. 721 (Bankr. D. Kan. 1994). *But see, In re Cox*, 200 B.R. 706 (Bankr. N.D. Ga. 1996) (future support lien survived bankruptcy under § 506(b) exception).

11. **Miscellaneous.** An agreement by the debtor to reimburse former spouse for debtor's share of income tax debt was excepted from discharge under 11 U.S.C. § 523(a)(14) in In re Barton, 321 B.R. 877 (Bankr. N.D. Ohio 2005). Payments of a portion of the former spouse's income tax refund and one half of the cash value of the debtor's life insurance policy was nondischargeable support in *In re Drennan*, 161 B.R. 661 (Bankr. E.D. Ark. 1993). *See also, In re Marble*, 426 B.R. 316 (B.A.P. 8th Cir. 2010) (indemnity agreement); *Fraser v. Fraser*, 196 B.R. 371 (E.D. Tex. 1996) (indemnity obligation); *In re Hughes*, 164 B.R. 923 (E.D. Va. 1994) (life insurance); *In re Ashby*, 485 B.R. 567 (Bankr. W.D. Ky. 2013) (obligation to employ former wife as "consultant" in debtor's business at set salary was DSO); *In re Weed*, 479 B.R. 533 (Bankr. D. Minn. 2012) (fees awarded debtor's child's mother under Hague Convention on the Civil Aspects of International Child Abduction were DSO); *In re Louttit*, 473 B.R. 663 (Bankr. W.D. Pa. 2012) (fees awarded under Uniform Child Custody Jurisdiction Act were DSO); *In re Cook*, 473 B.R. 468 (Bankr. M.D. Fla. 2012) (affidavit of support for immigration of debtor's former wife was DSO); *In re Throgmartin*, 462 B.R. 836 (Bankr. M.D. Fla. 2012) (installment payments, adjusted for taxes, were DSO); *In re Martinez*, 230 B.R 314 (Bankr. W.D. Tex. 1999) (life insurance premiums on debtor's life nondischargeable); *In re Custer*, 208 B.R. 675 (Bankr. N.D. Ohio 1997) (stock buyout); *In re Sweck*, 174 B.R. 532 (Bankr. D. R.I. 1994) (yacht mortgage, life insurance); *In re Pinkstaff*, 163 B.R. 504 (Bankr. N.D. Ohio 1994) (water bill). *See also, In re Smith*, 586 F.3d 69 (1st Cir. 2009) ($50 per day late fee for unpaid support was sanction and not DSO); *Tucker v. Oliver*, 423 B.R. 378 (W.D. Okla. 2010) (debt to debtors' former daughter-in-law in unsuccessful visitation litigation was not DSO as to children); *In re Wehr*, 292 B.R. 390 (Bankr. D. N.D. 2003) (life insurance was to secure note, not for support).

12. **Attorney's Fees.**

    a. For Debtor's Spouse in Dissolution Action. The same factors used in weighing whether an obligation is property division or support are applied to an obligation pay attorney's fees for a former spouse. The debt may be nondischargeable even if paid to someone other

than the former spouse, including the former spouse's attorney, even if the third party has released the former spouse from liability. *In re Kline*, 65 F.3d 749 (8th Cir. 1995); *See also, In re Collins*, 500 B.R. 747 (E.D. Va. 2013) (former wife's attorney had standing to bring adversary proceeding against debtor even though wife had discharged obligation in her prior chapter 7); *In re Marshall*, 489 B.R. 630 (Bankr. S.D. Ga. 2013) (debtor's former wife's attorney's fees were DSO and priority claim in chapter 13); *In re Louttit*, 473 B.R. 663 (Bankr. W.D. Pa. 2012) (fees awarded debtor's former spouse under UCCJA were DSO); *In re Hutton*, 463 B.R. 819, 827 (Bankr. W.D. Tex. 2011) (fees "recoverable by" spouse satisfied DSO requirement for payment to spouse); *In re Rogowski*, 462 B.R. 435 (Bankr. E.D. N.Y. 2011) (former spouse's attorney's fees were DSO, even though order made them payable directly to attorney); *In re Johnson*, 445 B.R. 50 (Bankr. D. Mass. 2011) (fees awarded former spouse in defending custody dispute were DSO); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010); *In re Tarone*, 434 B.R. 41 (Bankr. E.D. N.Y. 2010) (fact that fees were for debtor's former wife's benefit was sufficient to meet requirement that they be payable to her); *In re Blackwell*, 432 B.R. 856 (Bankr. M.D. Fla. 2010) (obligation to former spouse's attorney in dissolution action awarded under the same standards as support and was DSO); *In re Papi*, 427 B.R. 457 (Bankr. N.D. Ill. 2010) (attorney had standing to bring action in bankruptcy court as debtor's former spouse was still liable); *In re Sullivan*, 423 B.R. 881 (Bankr. E.D. Mo. 2010) (award of attorney's fees in custody dispute to mother of debtor's children was DSO); *In re Wisniewski*, 109 B.R. 926 (Bankr. E.D. Wis. 1990) (attorney fees intended to be support even though attorney had forgiven remaining amount due from debtor's former spouse). *See also, In re Maddigan*, 312 F.3d 589 (2d Cir. 2002) (attorney's fees for unmarried mother of debtor's child in custody dispute were excepted from discharge as support for child); *In re Wilson*, 380 B.R. 49 (Bankr. M.D. Fla. 2006) (same). *But see, In re Orzel*, 386 B.R. 210 (Bankr. N.D. Ind. 2008) (fees ordered to be paid directly to attorney for debtor's former spouse were not a priority claim as DSO; disagreeing with *Kline* rationale).

b. Standing. Early cases did not allow a direct claim by an attorney for the former spouse. *In re Dollaga*, 260 B.R. 493 (B.A.P. 9th Cir. 2001) (law firm lacked standing); *Matter of Sanders*, 236 B.R. 107 (Bankr. S.D. Ga. 1999) (law firm lacked standing); *In re Beach*, 203 B.R. 676 (Bankr. N.D. Ill 1997) (attorney lacked standing); *In re Harris*, 203 B.R. 558 (Bankr. D. Del. 1996) (law firm lacked standing). The case of *In re Kline*, 65 F.3d 749 (8th Cir. 1995) rendered earlier cases holding lack of standing for spouse's attorneys in the Sixth Circuit obsolete. *But see, In re Soderlund*, 197 B.R. 742 (Bankr. D. Mass. 1996) (law firm allowed to bring

adversary proceeding). More recent cases have emphasized the nature of the obligation and allowed such actions. *See, e.g., In re Micek*, 473 B.R. 185 (Bankr. E.D. Ky. 2012); *In re Hying*, 477 B.R. 731 (Bankr. E.D. Wis. 2012) (payment to attorney for former spouse in litigation concerning child's "general welfare" was DSO); *In re Rogowski*, 462 BR. 435 (Bankr. E.D. N.Y. 2011) (ch. 13 claim filed by former spouse's attorney allowed as DSO); *In re Morris*, 454 B.R. 660 (Bankr. N.D. Tex. 2011) (fees not discharged even though awarded directly to attorney for former spouse); *In re Blackwell*, 432 B.R. 856 (Bankr. M.D. Fla. 2010) (fee owed former spouse's attorney was DSO); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010) (absent evidence to the contrary, court presumed liability of debtor's former spouse to attorney if debtor did not pay). *But cf. In re Murphy*, 473 B.R. 197 (Bankr. E.D. Mich. 2011) (debtor's former wife had discharged debt to her own attorney in prior chapter 7 and would not have adverse consequences if debtor discharged debt; discharge allowed).

The court in *In re Brooks*, 371 B.R. 761 (Bankr. N.D. Tex. 2007), interpreted the definition of DSO in post-BAPCPA case and held that law firm that was awarded fees on behalf of debtor's former spouse in divorce action could not enforce provision because it was not a party by whom debts were "recoverable." *Contra In re Hutton*, 463 B.R. 819, 827 (Bankr. W.D. Tex. 2011). The court in *In re Cordova*, 439 B.R. 756 (Bankr. D. Colo. 2010), also interpreted the definition of a DSO and held that the child and family investigator appointed in a custody dispute, who had assigned the debt for collection only, was not a party that could do so without losing DSO status. 11 U.S.C. § 101(14A)(D). While a post-BAPCPA award of attorney fees that is not for support would usually not be subject to discharge under 11 U.S.C. § 523(a)(15), it would be in a chapter 13 case. *See, e.g., In re Kennedy*, 442 B.R. 399 (Bankr. W.D. Pa. 2010); *In re Prensky*, 416 B.R. 406 (Bankr. D. N.J. 2009) (BAPCPA was intended to enhance protection of dependents, not limit it; fees owed directly to former wife's divorce attorneys were not DSO).

c. Cases Not Allowing a Discharge of Attorney's Fees. If a spouse is required to pay the other spouse's attorney's fees incident to divorce, and the requirement is based on need, it is usually considered support and is nondischargeable. *See, e.g., In re Strickland*, 90 F.3d 444 (11th Cir. 1996); *In re Kline*, 65 F.3d 749 (8th Cir. 1995); *In re Akamine*, 217 B.R. 104 (S.D.N.Y. 1998); *In re Phegley*, 443 B.R. 154 (B.A.P. 8th Cir. 2011); *In re Hutton*, 463 B.R. 819 (Bankr. W.D. Tex. 2011); *In re Kennedy*, 442 B.R. 399 (Bankr. W.D. Pa. 2010). In *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002), the court held fees payable to attorneys who represented the mother of debtor's child in custody proceedings were excepted from discharge

as support for the child, even though no attorney was appointed for the child. *See also, In re Wilson*, 380 B.R. 49 (Bankr. M.D. Fla. 2006) (same); *cf. In re Gruber*, 436 B.R. 39 (Bankr. N.D. Ohio 2010) (attorney fees awarded debtor's former spouse were on account of debtor's behavior, but since that behavior distracted her from caring for her children, they were DSO). If state law requires a showing of need for attorney's fees to be ordered, then without further evidence in the bankruptcy court, fees will be nondischargeable support. For cases filed after BAPCPA applies, the obligation would be a DSO.

Attorney's fees maybe nondischargeable as support even though both property division and support are at issue. *See, e.g., Matter of Joseph*, 16 F.3d 86 (5th Cir. 1994). Fees associated with custody or visitation matters are usually considered support, *e.g., In re Strickland*, 90 F.3d 444 (11th Cir. 1996); *In re Jones*, 9 F.3d 878 (10th Cir. 1993); *Macy v. Macy*, 200 B.R. 467 (D. Mass. 1996), *aff'd,* 114 F.3d 1 (1st Cir. 1997). *See also, In re Weed*, 479 B.R. 533 (Bankr. D. Minn. 2012) (attorney's fees awarded under Hague Convention to mother of debtor's child were DSO); *In re Hying*, 477 B.R. 731 (Bankr. E.D. Wis. 2012) (payment to attorney for former spouse in litigation concerning child's "general welfare" was DSO); *In re Hendricks*, 248 B.R. 652 (Bankr. M.D. Fla. 2000) (debtor could not discharge ex- wife's attorney's fees in post-divorce custody dispute even though he paid no alimony); *In re Mobley*, 238 B.R. 486 (Bankr. M.D. Fla. 1998) (attorney's fees awarded debtor's former wife in custody dispute even though debtor was custodial parent); *In re Farrell*, 133 B.R. 145 (Bankr. S.D. Ind. 1991) (attorney's fees awarded in custody dispute were nondischargeable even though they were in part awarded to punish the debtor for misconduct).

d. Cases Allowing Discharge of Attorney's Fees or Finding non-DSO. Cases filed before the BAPCPA amendment to 11 U.S.C. § 523(a)(15) made a non-support award of attorney's fees dischargeable. *See Estate of Mayer v. Hawe*, 303 B.R. 375 (E.D. Wis. 2003) (attorney's fees incurred in custody dispute involving adult disabled child were not for support); *Carlin-Blume v. Carlin*, 314 B.R. 286 (S.D. N.Y. 2004); *In re Kennedy*, 442 B.R. 399 (Bankr. W.D. Pa. 2010) (evidence of support function lacking); *In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009) (attorney's fees awarded ch. 13 debtor's former spouse were not DSO as they were based on "bad faith litigation misconduct" and were not entitled to priority status); *In re Woods*, 309 B.R. 22 (Bankr. W.D. Mo. 2004); *In re Smolenski*, 210 B.R. 780 (Bankr. N.D. Ill. 1997) (order for payment of former spouse's attorney's fees not entered before bankruptcy); *In re Schroeder*, 25 B.R. 190 (Bankr. N.D. Ill. 1982)

(attorney's fees ordered on wife's behalf were considered dischargeable property division because at the time of the divorce, the wife was employed and the debtor was not, she had waived maintenance and was receiving only nominal child support). Section 523(a)(15) obligation would be subject to discharge upon completion of a chapter 13 case. *See infra* regarding chapter 13 issues.

The court in *In re Lowther*, 321 F.3d 946 (10th Cir. 2002), held attorney's fees awarded the debtor's former husband in custody dispute were discharged because of "unusual circumstance" that debtor was primary custodial parent and a finding of exception to discharge would have adversely affected her ability to support children. *See also, In re Jones*, 9 F.3d 878, 881 (10th Cir. 1993) ("'support' encompasses the issue of custody absent unusual circumstances").

e. For Debtor's Spouse in Bankruptcy Court Action. Attorney's fees are usually not allowed the prevailing party in bankruptcy court proceedings, even if the creditor is the debtor's former spouse. *In re Anderson*, 300 B.R. 831 (Bankr. W.D. N.Y. 2003); *In re Nichols*, 221 B.R. 275 (Bankr. N.D. Okla. 1998). However, in *Matter of Scannell*, 60 B.R. 562 (Bankr. W.D. Wis. 1986), and *In re Teter*, 14 B.R. 434 (Bankr. N.D. Tex. 1981), the bankruptcy courts awarded attorney's fees in the § 523(a)(5) actions based on state statutes authorizing award of attorney's fees in family law or contract matters. *See also, In re Busch*, 369 B.R. 614 (B.A.P. 10th Cir. 2007); *In re Golio*, 393 B.R. 56 (Bankr. E.D. N.Y. 2008). The reasoning of the earlier cases was criticized in *In re Colbert*, 185 B.R. 247 (Bankr. M.D. Tenn. 1995), and *In re Barbre*, 91 B.R. 846 (Bankr. S.D. Ill. 1988). *But see*, *In re Carson*, 510 B.R. 627 (Bankr. E.D. Cal. 2014) (fees in bankruptcy proceeding awarded pursuant to California Family Code).

f. Other Costs. Other costs of the nondebtor spouse assesse against the debtor in the divorce action, such as an accountant and investigator, may also be nondischargeable. *In re Chang*, 163 F.3d 1138 (9th Cir. 1998) (health care professionals in custody dispute paid by unwed father of debtor's child in excess of his share); *In re Miller*, 169 B.R. 715 (D. Kan. 1994), *aff'd*, 55 F.3d 1487 (10th Cir. 1995) (psychologist); *In re Laing*, 187 B.R. 531 (Bankr. W.D. Va. 1995) (psychologist and GAL). *But see, In re Chase*, 372 B.R. 125 (Bankr. S.D. N.Y. 2007) (support issue not raised by psychiatrist in custody dispute).

g. Debtor's Attorney's Fees. The debtor's own attorney's fees are dischargeable. *Matter of Rios*, 901 F.2d 71 (7th Cir. 1990). The

debtor's attorney's fees in custody and child support dispute were dischargeable. *See also, In re Langman*, 465 B.R. 395 (Bankr. D. N.J. 2012); *In re Young*, 425 B.R. 811 (Bankr. E.D. Tex. 2010); *In re Klein*, 197 B.R. 760 (Bankr. E.D. N.Y. 1996). *See also, In re Pass*, 258 B.R. 170 (Bankr. E.D. Tenn. 2001) (debtor's divorce attorney's fees were not secured by lien on property division received by debtor); *see also, In re Brady-Zell*, 756 F.3d 69 (1st Cir. 2014) (debtor's intent not to pay her own attorney not proved).

But cf. Matter of Bucciarelli, 429 B.R. 372 (Bankr. N.D. Ga. 2010) (debtor's divorce attorney's fees excepted from discharge for fraudulently inducing the attorney to continue working on divorce case while intending to discharge them in bankruptcy after divorce); *In re Hill*, 425 B.R. 766 (Bankr. W.D. N.C. 2010) (fraudulent representation to attorneys representing debtors prepetition in breach of contract action by debtor husband not found); *In re Chase*, 372 B.R. 133 (Bankr. S.D. N.Y. 2007) (attorney did not prove debtor made false representation of intent to pay for divorce services). *See also, In re Young*, 425 B.R. 811 (Bankr. E.D. Tex. 2010) (debtor's divorce attorney's claim was time barred and was not DSO).

h. Attorney's Charging Lien. Public policy generally precludes the enforcement of charging liens against child support. *Marriage of Etcheverry,* 921 P.2d 82 (Colo. App. 1996); *Hoover-Reynolds v. Superior Court,* 58 Cal. Rptr.2d 173 (Ct. App. 1996). Enforceability is mixed with respect to other spousal obligations. *See In re Benbow*, 496 B.R. 605 (Bankr. D. Colo. 2013) (attorney's statutory charging lien on debtor's real property was not subject to avoidance, but judgment lien for same obligation was); *In re DeWolfe*, 494 B.R. 193 (Bankr. W.D. N.Y. 2013) (attorneys' charging lien not allowed as no separate fund was created; interpreting New York law); *In re Rodvik*, 367 B.R. 148 (Bankr. D. Alaska 2007) (lien was against divorce judgment, not debtor's asset); *In re Pass*, 258 B.R. 170 (Bankr. E.D. Tenn. 2001) (debtor's divorce attorney's fees were not secured by lien on property division received by debtor); *In re Daley*, 222 B.R. 44 (Bankr. S.D.N.Y. 1998) (firm with charging lien is not subrogated to former spouse's claim against debtor where her claim was satisfied from proceeds of action which attorney commenced for debtor); *In re Coleman*, 192 B.R. 268 (Bankr. M.D. Fla. 1995) (attorney fee award in a prepetition dissolution order was not a final judgment that could create a lien against a chapter 7 debtor's property). *But cf. In re Haacke*, 465 B.R. 564 (Bankr. D. Mont. 2011) (undetermined attorney's charging lien had to be provided for in ch. 13 plan); *In re Murray*, 442 B.R. 831 (Bankr. M.D. Fla. 2010) (attorney's charging lien not avoidable "judicial lien"); *In re Edl*, 207 B.R. 611 (Bankr. W.D. Wis. 1997) (equitable attorney's lien in divorce proceeds was not avoidable).

IX. MISCELLANEOUS SUPPORT OBLIGATIONS

A. **Mother's Expenses.** Costs incurred by woman giving birth to the debtor's child are usually nondischargeable. *In re Kemp*, 232 F.3d 652 (8th Cir. 2000); *Matter of Seibert*, 914 F.2d 102 (7th Cir. 1990); *In re McCord*, 151 B.R. 915 (Bankr. E.D. Mo. 1993) (birthing expenses and expenses incurred in establishing paternity were nondischargeable); *In re Balthazor*, 36 B.R. 656 (Bankr. E.D. Wis. 1984) (debtor father's obligation for hospital expenses for birth of his child nondischargeable).

B. **Palimony.** "Palimony" obligation is dischargeable. *In re Doyle*, 70 B.R. 106 (B.A.P. 9th Cir. 1986). A similar agreement was found nondischargeable in another case because the debtor made a fraudulent conveyance with actual intent to hinder, defraud or delay the creditor. *In re Marcus*, 45 B.R. 338 (Bankr. S.D. N.Y. 1984). There is no current case law concerning the status of a maintenance obligation as a DSO between former legally married same sex spouses.

C. **Attorney's Fees Incurred in Enforcing Custody and Visitation.** Attorney's fees incurred by the nondebtor spouse in collecting child support arrearages are clearly related to support and are nondischargeable. *See, e.g., In re Brazier*, 85 B.R. 601 (Bankr. N.D. Ala. 1987). Some courts have held that attorney's fees imposed in litigating custody or denial of visitation are also nondischargeable. *In re Sullivan*, 423 B.R. 881 (Bankr. E.D. Mo. 2010) (award of attorney's fees to mother of debtor's children in custody dispute was DSO). Other courts, notably in older cases, have held that fees owed the debtor's spouse or former spouse are dischargeable when only noneconomic matters such as custody and visitation are at issue. *See In re Zentz*, 157 B.R. 145 (Bankr. W.D. Mo. 1993), *aff'd*, 81 F.3d 166 (8th Cir. 1996) (former wife's conduct in concealing child, for which attorney's fees were awarded, were not excepted as willful and malicious injury because of inadequate record of basis for award). Most states' standards for awarding attorney's fees to the opposing party in a custody dispute would probably be based on need and would meet the definition of a DSO. *See, e.g., In re Louttit*, 473 B.R. 663 (Bankr. W.D. Pa. 2012) (fees awarded under UCCJA were DSO); *See also, In re Wilson*, 380 B.R. 49 (Bankr. M.D. Fla. 2006). Attorney's fees assessed against the debtor for nondebtor unmarried mother of debtor's child in paternity and custody matters have been held nondischargeable. *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002). The debtor's own attorney fees in an action to establish paternity of her child are dischargeable. *Matter of Rios*, 901 F.2d 71 (7th Cir. 1990). Likewise, the debtor's own attorney's fees in custody and child support action are dischargeable. *In re Lindberg*, 92 B.R. 481 (Bankr. D. Colo. 1988). *See supra* regarding the dischargeability of attorney's fees.

D. **Guardian ad Litem.** Most courts find guardian ad litem fees nondischargeable. *In re Chang*, 163 F.3d 1138 (9th Cir. 1998) (debts for professional fees and expenses arising from child custody proceeding were in nature of child support); *Matter of Dvorak*, 986 F.2d 940 (5th Cir. 1993) (debtor's obligation to pay attorney fees incurred by her daughter's guardian ad litem in state court custody litigation was nondischargeable); *In re Peters*, 964 F.2d 166 (2d Cir. 1992) (fees owed to attorney

for his representation of debtor's son were in nature of support and were nondischargeable); *Levin v. Greco*, 415 B.R. 663 (N.D. Ill. 2009) ("child representative" fees were DSO; nature of the obligation rather than payee was determinative); *In re Miller*, 169 B.R. 715 (D. Kan. 1994), *aff'd*, 55 F.3d 1487 (10th Cir. 1995) (fees incurred during divorce proceeding for guardian ad litem to represent children's interests and for mental health professional to evaluate children and family were nondischargeable); *In re Rackley*, 502 B.R. 615 (Bankr. N.D. Ga. 2013) (protecting the child's interests in custody battle is in nature of support); *In re Kassicieh*, 467 B.R. 445 (Bankr. S.D. Ohio 2012) (GAL fees were DSO); *In re Anderson*, 463 B.R. 871 (Bankr. N.D. Ill. 2011) (stay lifted for GAL to collect nondischargeable fee from debtor's postpetition wages); *In re Stevens*, 436 B.R. 107 (Bankr. W.D. Wis. 2010) (reimbursement to county for GAL fees in paternity action was DSO); *In re Levin*, 306 B.R. 158 (Bankr. D. Md. 2004) (state statutory scheme for child support that excludes GAL fees was not binding for dischargeability purposes); *In re Ross*, 247 B.R. 333 (Bankr. M.D. Fla. 2000) (obligation to pay fees of guardian ad litem appointed to represent interests of minor children during divorce case nondischargeable); *In re Lockwood*, 148 B.R. 45 (Bankr. E.D. Wis. 1992) (children are entitled to more than economic support, including having representation in the divorce action); *In re Glynn*, 138 B.R. 360 (Bankr. D. Conn. 1992) (criticizes *Linn*, *infra*). *Cf. In re Sullivan*, 234 B.R. 244 (Bankr. D. Conn 1999) (GAL fees involving custody dispute over debtor's grandchildren discharged because they did not involve "child of the debtor"); *contra In re Defilippi*, 430 B.R. 1 (Bankr. D. Me. 2010) (debt to guardian ad litem was DSO because child that grandparents/debtors obtained custody of was considered a "child of the debtor"). *See also, In re Bobinski*, 517 B.R. 900 (Bankr. N.D. Ind. 2014) (GAL is not a spouse, former spouse or child of the debtor, which under the "plain meaning rule," took GAL out of the definition of DSO); *In re Cordova*, 439 B.R. 756 (Bankr. D. Colo. 2010) (child and family investigator appointed in a custody dispute, who had assigned the debt for collection only, was not a party that could do so without losing DSO status under § 101(a)(14A)(D)).

Some courts, primarily in older cases, have held that guardian ad litem fees in a custody dispute that have nothing to do with support of the child are dischargeable. *In re Lanza*, 100 B.R. 100 (Bankr. M.D. Fla. 1989) (purpose of guardian ad litem's appointment was to represent child's interests in custody dispute, rather than for any issues involving support or maintenance of child); *See also, In re Linn*, 38 B.R. 762 (B.A.P. 9th Cir. 1984) (debt for guardian ad litem and psychiatrist in custody dispute were discharged, apparently because only the debtor was ordered to pay and the former spouse would not be liable); *In re Uriarte*, 215 B.R. 669 (Bankr. D.N.J. 1997) (debt to guardian ad litem discharged because it arose in connection with appointment of a "guardian," who has no duty to support child with his own funds).

E. **Parental Liability.** Damages assessed against parents on account of child's delinquent acts were dischargeable. *Matter of Miller*, 196 B.R. 334 (Bankr. E.D. La. 1996); *In re Erfourth*, 126 B.R. 736 (Bankr. W.D. Mich. 1991).

F. **Postpetition Debt.** A mortgage debt in existence at time of petition was not discharged as to the debtor's former wife because debtor's obligation under terms of post-discharge dissolution order to make payment to former wife was entirely separate indebtedness, which arose postpetition. *In re Degner*, 227 B.R. 822 (Bankr. S.D. Ind. 1997). The obligation to the mortgage creditor would be discharged.

G. **Obligations to Third Parties.** The definition of a DSO expands the parties eligible to enforce a support obligation. For a property division, section 523(a)(15) applies only to obligations between spouses, former spouses, and children of the debtor. For examples under the prior statute, *see In re Bartholomew*, 226 B.R. 849 (Bankr. S.D. Ohio 1998) (debtor's obligation to former mother-in-law discharged), *In re Hutchins*, 193 B.R. 51 (Bankr. N. D. Ala. 1995) (parties were never married), and *In re Finaly*, 190 B.R. 312 (Bankr. S.D. Ohio 1995) (former spouse could not bring action on behalf of her parents). *See also, In re Forgette*, 379 B.R. 621 (Bankr. W.D. Va. 2007) (no hold harmless provision in decree, but debtor's former spouse had not yet been required to pay joint debt assigned the debtor); *In re Stegall*, 188 B.R. 597 (Bankr. W.D. Mo. 1995) (no new obligation arose when debtor was assigned debts because settlement agreement did not include hold harmless or indemnification for debts assigned to either party). *But see, In re Gibson*, 219 B.R. 195 (B.A.P. 6th Cir. 1998) (debtor's obligation to pay joint marital debt to third party, which he assumed prepetition pursuant to separation agreement, excepted from discharge even though agreement lacked hold harmless language); *In re Jaeger-Jacobs*, 490 B.R. 352 (Bankr. E.D. Wis. 2013) (same); *In re Georgi*, 459 B.R. 716 (Bankr. E.D. Wis. 2011) (same); *In re Schmitt*, 197 B.R. 312 (Bankr. W.D. Ark. 1996) (court order to pay was equivalent to hold harmless); *In re Speaks*, 193 B.R. 436 (Bankr. E.D. Va. 1995) (hold harmless inferred). *Cf. In re Porretto*, 481 B.R. 874 (Bankr. S.D. Tex. 2012) (obligation matured prior to payment by ex-wife; hold-harmless obligation proper subject for turnover claim by trustee). *See also,* section regarding direct obligation of debtor to former spouse's attorneys.

X. MODIFICATION OF DECREE OR SUPPORT

A. **Automatic Stay.** Under the Bankruptcy Reform Act of 1994, Pub. L. No. 134-394 (effective for cases filed after October 22, 1994) and under the 2005 Act, effective for cases filed on or after October 17, 2005, actions to establish support or modify support are excepted from the automatic stay. Amendments in the 2005 Act are more expansive in exceptions in that collection may continue from income withholding, even if the debtor's income is property of the estate. *See supra* regarding automatic stay.

B. **Change of Circumstances.** Bankruptcy of the payor spouse leaving the payee spouse solely liable for joint debts may constitute a change in circumstances warranting modification of maintenance provisions, and most courts will allow modification. *In re Siragusa*, 27 F.3d 406 (9th Cir. 1994) (alimony modification did not violate discharge injunction); *In re Henderson*, 324 B.R. 302 (Bankr. W.D. Ky. 2005) (discharge of credit card debt resulting in state court's award of maintenance

did not violate Rooker-Feldman doctrine or constitute circumvention of discharge); *Siragusa v. Siragusa*, 843 P.2d 807 (Nev. 1992) (husband's property settlement obligation that had been discharged in bankruptcy could be considered as "changed circumstance" in ruling on motion for modification of alimony); *Marriage of Trickey*, 589 N.W.2d 753 (Iowa App. 1998) (under Iowa law, change of circumstances must be outside the reasonable contemplation of parties at time of divorce to support modification of alimony, and bankruptcy did not meet test); *Ward v. Ward*, 409 S.E.2d 518 (Ga. 1991) (decrease in former husband's child support obligation was supported by his need to assume entire bank obligation as a result of former wife's bankruptcy and by doubling of her income); *Marriage of Jones*, 788 P.2d 1351 (Mont. 1990) (modification was allowed, but other changes besides the payor's bankruptcy were present); *Marriage of Myers*, 773 P.2d 118 (Wash. App. 1989) (court could consider creditor collection efforts against ex-wife for debts ex-husband was obligated by dissolution decree to pay but which he discharged in bankruptcy; facts supported upward modification of maintenance); *Ganyo v. Engen*, 446 N.W.2d 683 (Minn. App. 1989) (dissolution decree provided for reevaluation of maintenance if debtor spouse filed for bankruptcy; evidence supported finding cause to modify award as to amount and duration); *Eckert v. Eckert*, 424 N.W.2d 759 (Wis. App. 1988) (changed circumstances existed by evidence that former husband obtained discharge in bankruptcy which prevented former wife from receiving her share of marital estate as contemplated in divorce judgment); *Hopkins v. Hopkins*, 487 A.2d 500 (R.I. 1985) (waiver of alimony conditioned on payment of debts; support increase allowed); *Marriage of Clements*, 184 Cal. Rptr. 756 (App.1982) (alimony reduced on account of payee's bankruptcy). It appears that the state court can modify support after payor's bankruptcy if the court looks at the totality of the circumstances and is not attempting to order payment of a discharged debt.

C. **Circumventing Discharge.** State court proceedings cannot be used for the sole purpose of forcing the debtor to pay otherwise dischargeable debts. *In re Heilman*, 430 B.R. 213 (B.A.P. 9th Cir. 2010); *In re Tostige*, 283 B.R. 462 (Bankr. E.D. Mich. 2002); *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kan. 1997); *In re Freels*, 79 B.R. 358 (Bankr. E.D. Tenn. 1987); *Matter of Thayer*, 24 B.R. 491 (Bankr. W.D. Wis. 1982); *Benavidez v. Benavidez*, 660 P.2d 1017 (N.M. 1983). *See also, In re Hamilton*, 540 F.3d 367 (6th Cir. 2008) (state court order to indemnify former spouse on joint debt that had been determined discharged in bankruptcy court was void); *In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (debtor's husband's attempt to reduce maintenance to setoff debtor's discharged property division obligation was violation of stay). *But see, Ward v. Ward*, 409 S.E.2d 518 (Ga. 1991) (spouse who willfully refused to pay a debt that was later discharged in bankruptcy could be found in criminal, not civil, contempt).

D. **Property Division.** Modification of property division is not allowed. *In re Zick*, 123 B.R. 825 (Bankr. E.D. Wis. 1990); *Grassmueck v. Food Indus. Credit Union*, 127 B.R. 869 (Bankr. D. Or. 1991); *Strohmier v. Strohmier*, 839 N.E.2d 234 (Ind. App. 2005); *Spankowski v. Spankowski*, 493 N.W.2d 737 (Wis. App. 1992); *Coakley v. Coakley*, 400 N.W.2d 436 (Minn. App. 1987); *Fitzgerald v. Fitzgerald*,

481 A.2d 1044 (Vt. 1984). *See also, In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (debtor's husband's attempt to reduce maintenance to setoff debtor's discharged property division obligation was violation of stay); *In re Fluke*, 305 B.R. 635 (Bankr. D. Del. 2004) (attempt to modify property division violated discharge injunction); *In re Tostige*, 283 B.R. 462 (Bankr. E.D. Mich. 2002) (attempt to modify property division violated discharge injunction).

E. **Level of Support-Jurisdiction.** The bankruptcy court has no jurisdiction to set or modify the amount of spousal or child support. *In re Brennick*, 208 B.R. 613 (Bankr. D.N.H. 1997); *Matter of Rogers*, 164 B.R. 382 (Bankr. N.D. Ga. 1994). *Cf. In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (bankruptcy court did not violate Rooker-Feldman or Younger doctrines by allowing only part of state DSO claim with apparent clerical error, but this did not constitute an adjudication of the correct amount, which should be decided by state court).

XI. OBJECTIONS TO DISCHARGE UNDER 11 U.S.C. § 523(a)(2), (4) & (6).

A. **Fraud.** A debt arising in a marital settlement agreement may be nondischargeable if incurred by fraud. 11 U.S.C. § 523(a)(2). Procedural rules and time limits for such objections must be followed. Bankruptcy Rules 4004, 4007. *See Sanford Inst. for Savs. v. Gallo*, 156 F.3d 71 (1st Cir. 1998) (justifiable reliance standard); *In re Lang*, 293 B.R. 501 (B.A.P. 10th Cir. 2003) (fraud related to paternity); *In re Giddens*, 514 B.R. 542 (Bankr. N.D. Ill. 2014) (debtor had no intention of performing when he made agreement with former wife for payment of $200,000; excepted from discharge); *In re Lyons*, 454 B.R. 174 (Bankr. D. Kan. 2011) (fraud found in debtor's failing to inform former husband that she no longer qualified for maintenance); *In re Travis*, 364 B.R. 285 (Bankr. N.D. Ohio 2006) (fraud in obtaining credit cards in former husband's name); *In re Cooke*, 335 B.R. 269 (Bankr. D. Conn. 2005) (debtor must have known there was insufficient equity in property to pay former wife from proceeds of sale as promised); *In re Zaino*, 316 B.R. 1 (Bankr. D. R.I. 2004) (concealed assets related to support); *In re Ingalls*, 297 B.R. 543 (Bankr. C.D. Ill. 2003) (obligations assumed without intent to pay were nondischargeable); *In re Dixon*, 280 B.R. 755 (Bankr. M.D. Ga. 2002) (time-barred fraud complaint allowed under 11 U.S.C. § 523(a)(3)); *In re Hallagan*, 241 B.R. 544 (Bankr. N.D. Ohio 1999) (failure to comply with state court orders was evidence of debtor's fraud); *In re Paneras*, 195 B.R. 395 (Bankr. N.D. Ill. 1996) (fraud in incurring joint debt). *But see, Corso v. Walker*, 449 B.R. 838 (W.D. Pa. 2011) (fraud not proved because as manager of family finances, debtor was authorized to sign husband's name to obligations); *In re Stanifer*, 236 B.R. 709 (B.A.P. 9th Cir. 1999) (forensic psychologist failed to prove fraud in inducement to provide services in custody case); *In re Taylor*, 455 B.R. 799 (Bankr. D. N.M. 2011), aff'd, 737 F.3d 670 (10th Cir. 2013) (fraud not found in debtor's cohabiting, resulting in cessation of right to support; former husband stated claim as nonsupport divorce related debt for overpayment); *In re Graham*, 194 B.R. 369 (Bankr. E.D. Pa. 1996) (debtor did not materially misrepresent stability of marriage when he obtained loans from former in- laws); *In re Kruszynski*, 150 B.R. 209 (Bankr. N.D. Ill. 1993) (former wife was allowed after bar date to amend pleadings alleging

nondischargeability under § 523(a)(5) to add a second count of fraud under § 523(a)(2)(A); relation back applied because both counts arose in the divorce action); *In re Shreffler*, 319 B.R. 113 (Bankr. W.D. Pa. 2004) (timing of bankruptcy close to marital agreement is not *per se* fraud); *Matter of Butler*, 277 B.R. 843 (Bankr. M.D. Ga. 2002) (fraud in entering marital settlement agreement not proven); *In re Ellerman*, 135 B.R. 308 (Bankr. N.D. Ill. 1992) (former wife could not show that husband's deceit resulted in financial loss, only that she would have requested more had she known); *In re D'Atria*, 128 B.R. 71 (Bankr. S.D. N.Y. 1991) (failure to fulfill requirements of property settlement did not, without more, prove fraud in entering the agreement). Fraud must be plead with particularity. *In re Demas*, 150 B.R. 323 (Bankr. S.D. N.Y. 1993); *See also, In re Brady-Zell*, 756 F.3d 69 (1st Cir. 2014) (debtor's intent not to pay her own attorney not proved); *Matter of Bucciarelli*, 429 B.R. 372 (Bankr. N.D. Ga. 2010) (debtor's divorce attorney's fees excepted from discharge for fraudulently inducing the attorney to continue working on divorce case while intending to discharge them in bankruptcy after divorce).

B. **Willful and Malicious Injury.** A debt may also be excepted from discharge for willful and malicious injury to property of another, such as conversion. 11 U.S.C. § 523(a)(6). *See Matter of Rose*, 934 F.2d 901 (7th Cir. 1991) (debtor's unauthorized taking of cash from joint safe deposit box and resulting obligation in divorce were nondischargeable); *In re Suarez*, 400 B.R. 732 (B.A.P. 9th Cir. 2009) (judgment for harassment of new wife of debtor's former husband was nondischargeable even without compensatory damage award); *In re Nyuyen Vu*, 497 B.R. 462 (Bankr. E.D. Pa. 2013) (wrongfully convincing wife to allow husband to title property in his name when purchase was with her money stated claim under Pennsylvania law for constructive trust/unjust enrichment); *In re Chlarson*, 501 B.R. 857 (Bankr. C.D. Cal. 2013) (killing former wife's cat was willful and malicious injury; arbitrator's award given preclusive effect); *In re Roodhof*, 491 B.R. 679 (Bankr. M.D. Pa. 2013) (destruction of estranged spouse's property was willful and malicious); *In re Shankle*, 476 B.R. 908 (Bankr. N.D. Miss. 2012) (deliberate failure to turn over accounts intended to cause former wife economic injury); *In re Alessi*, 405 B.R. 65 (Bankr. W.D. N.Y. 2009) (dissipation of funds earmarked for former spouse in divorce judgment excepted from discharge under § 523(a)(6)); *In re Hamilton*, 390 B.R. 618 (Bankr. E.D. Ark. 2008), *aff'd*, 400 B.R. 696 (E.D. Ark. 2009) (failing to care for horses in debtor's possession which were awarded to former spouse was willful and malicious; discharge also denied); *In re Petty*, 333 B.R. 472 (Bankr. M.D. Fla. 2005) (treble damages awarded against debtor in state court civil judgment for conversion of former wife's share of military pension excepted from discharge); *In re Gray*, 322 B.R. 682 (Bankr. N.D. Ala. 2005) (damages awarded for sexual abuse of debtor's daughter excepted from discharge as to both wife and daughter); *In re Hixson*, 252 B.R. 195 (Bankr. E.D. Okla. 2000) (adversary proceeding unrelated to divorce could be brought by debtor's former wife for assault by debtor/former husband); *In re Shteysel*, 221 B.R. 486 (Bankr. E.D. Wis. 1998) (debtor-husband's transfer of marital property to son shortly after served with divorce papers was willful and malicious); *In re Garza*, 217 B.R. 197 (Bankr. N.D. Tex. 1998) (debtor willfully and fraudulently refused to deliver property awarded

to former spouse); *In re Arlington*, 192 B.R. 494 (Bankr. N.D. Ill. 1996) (attorney fee award within exception for willful and malicious injury); *In re Sateren*, 183 B.R. 576 (Bankr. D. N.D. 1995) (debtor's sale and conversion of proceeds of cattle and grain awarded former spouse was willful and malicious); *In re Wells*, 160 B.R. 726 (Bankr. N.D.N.Y. 1993) (former wife's embezzlement or conversion of the proceeds of the sale of the marital residence made obligation nondischargeable). *But see, In re Patch*, 526 F.3d 1176 (8th Cir. 2008) (debtor's leaving three year old son with boyfriend who had previously abused and eventually murdered him did not rise to level of willful and malicious); *In re Baiardi*, 493 B.R. 497 (Bankr. E.D. Mich. 2013) (debtor's failure to cooperate with receiver for sale of house, and resulting contempt sanctions, did not show intent to harm former husband); *In re Reichardt*, 380 B.R. 596 (Bankr. M.D. Fla. 2006) (debtor's former wife failed to prove obligation was for willful and malicious injury when judgment was for division of marital estate); *In re White*, 363 B.R. 157 (Bankr. D. Idaho 2007) (gelding of horse eventually awarded to debtor's former husband was not willful and malicious injury as she had equal right to manage and control community property in her possession); *In re Wright*, 184 B.R. 318 (Bankr. N.D. Ill. 1995) (award to former spouse for debtor's dissipation of assets was not a legal wrong equivalent to willful and malicious standard); *In re Zentz*, 157 B.R. 145 (Bankr. W.D. Mo. 1993), *aff'd,* 81 F.3d 166 (8th Cir. 1996) (attorney's fees awarded to former husband on account of former wife's concealment of child were not excepted from discharge as a willful and malicious injury). *See also, In re Moffitt*, 252 B.R. 916 (B.A.P. 6th Cir. 2000) (prior action for damages to debtor's former spouse unrelated to divorce entitled to issue preclusion and found excepted from discharge for willful and malicious injury).

C. **Defalcation.** A divorce related debt may also be excepted from discharge for defalcation in a fiduciary capacity. For example, in *In re Lam*, 364 B.R. 379 (Bankr. N.D. Cal. 2007), the debtor had used community property to pay child support to a former spouse when he had separate property available for that purpose, and California law provided a remedy for reimbursement of community property. The state court had granted judgment to the debtor's former wife under the California statute, and the bankruptcy court held the debt excepted under 11 U.S.C. § 523(a)(4). On the other hand, in *In re Mele*, 501 B.R. 357 (B.A.P. 9th Cir. 2013), the B.A.P. reversed the bankruptcy court's holding that the chapter 13 debtor's former wife's claim for an unequal property division awarded to her on account of the dissipation of community property during marriage did not meet the requirement of an express or technical trust, distinguishing California law on management of community property. Also, the intent required by Bullock was not in the state court findings. *See also, In re Humphries*, 516 B.R. 856 (Bankr. N.D. Miss. 2014) (divorce decree does not create trust relationship, but portion of obligation related to debtor's embezzlement from previously jointly owned business was excepted from discharge under sec. 523(a)(4)); *In re Jacobson*, 433 B.R. 183 (Bankr. S.D. Tex. 2010) (Texas statutory trust in favor of spouse later awarded property that had been in possession of other spouse did not give rise to defalcation); *In re Lewis*, 359 B.R. 732 (Bankr. E.D. Mo. 2007) (trust relationship not proved); *In re Hughes*, 354 B.R. 820 (Bankr. S.D. Tex. 2006) (trust must be

express or imposed by statute or common law, not by wrongdoing; not proved); *In re Green*, 352 B.R. 771 (Bankr. W.D. La. 2005) (defalcation of former wife's community share of retirement pay proved); *cf.* pension cases, *supra.* As in *Mele*, older cases must be analyzed applying the standards in *Bullock v. BankChampaign*, N.A., U.S.__, 133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013).

XII. PREVIOUSLY LITIGATED ISSUES - ISSUE AND CLAIM PRECLUSION

A. **Claim Preclusion.** If divorce has been completed, the bankruptcy court cannot change the adjudicated rights of the parties. *Adams v. Adams*, 738 F.3d 861 (7th Cir. 2013) (claim for credit for payment of property division determined by divorce court as without merit could not be challenged in federal court); *In re Comer*, 723 F.2d 737 (9th Cir. 1984) (amount of support arrearage set by family court could not be attacked in bankruptcy court); *In re Johnson*, 473 B.R. 447 (Bankr. D. Utah 2012) (divorce judgment finding the parties had been married precluded debtor from challenging legality of marriage; creditor qualified as "former spouse"); *In re Tarone*, 434 B.R. 41 (Bankr. E.D. N.Y. 2010) (attorney's fees awarded to debtor's former spouse pursuant to divorce was *res judicata* in bankruptcy case); *In re Kearney*, 433 B.R. 640 (Bankr. S.D. Tex. 2010) (state court's determination that sanctions arose as continuation of divorce entitled to claim preclusion in bankruptcy court); *In re Perry*, 254 B.R. 675 (Bankr. E.D. Va. 2000) (administrative support order precluded bankruptcy court from determining amount of AFDC reimbursement owed); *In re Ennis*, 178 B.R. 177 (Bankr. W. D. Mo. 1995) (validity of prior divorce could not be relitigated because issue of wife's mental capacity could have been raised in state court but was not); *In re Zrubek*, 149 B.R. 631 (Bankr. D. Mont. 1993) (award of portion of debtor's military retirement pay to debtor's former spouse was *res judicata* even if the divorce court had no statutory authority at that time to do so).

In *In re Rosenbaum*, 150 B.R. 990 (Bankr. E.D. Tenn. 1992), aff'd, 150 B.R. 994 (E.D. Tenn. 1993), the court held that the debtor could have raised the bankruptcy as a defense in an action to enforce a divorce obligation in state court and did not do so and was bound by *res judicata* as to its enforceability. The previous court determination challenged may also have been in the bankruptcy court. *See In re Cooke*, 455 B.R. 503 (Bankr. W.D. Va. 2011) (finding in previous case that husband's obligation was a nonsupport obligation was binding in wife's later chapter 13 case). In *In re Phillips*, 175 B.R. 901 (Bankr. E. D. Tex. 1994), the debtor's former spouse was bound by confirmed plan even though the divorce was filed postpetition because some of her claims were based on prepetition conduct. *See also, Matter of Swate*, 99 F.3d 1282 (5th Cir. 1996) (bankruptcy court's determination that debt was nondischargeable alimony was *res judicata* as to later state court proceeding, which reduced alimony obligation to a lump-sum payment).

B. **Issue Preclusion.** Facts or issues determined in another court may be binding on the bankruptcy court if the elements of collateral estoppel, or issue preclusion, are present, provided the prior court had jurisdiction to decide the matter. *See, e.g., In re Lyons*, 454 B.R. 174 (Bankr. D. Kan. 2011) (state court finding that debtor

fraudulently failed to notify former spouse that she no longer qualified for maintenance was entitled to issue preclusion in bankruptcy nondischargeability proceedings); *see also, In re Chlarson*, 501 B.R. 857 (Bankr. C.D. Cal. 2013) (killing former wife's cat was willful and malicious injury; arbitrator's award given preclusive effect). The prior determination may also have been made in the same court. In *In re Chase*, 392 B.R. 72 (Bankr. S.D. N.Y. 2008), the court held in an adversary proceeding it was bound to its earlier determination in an automatic stay proceeding that an obligation was in the nature of support. Although the state court has concurrent jurisdiction to determine whether a divorce obligation is for support or property division, that jurisdiction does not arise before a bankruptcy case is filed. For example, in *In re Tatge*, 212 B.R. 604 (B.A.P. 8th Cir. 1997), the pre-bankruptcy settlement agreement stated the debtor's obligation to make mortgage payments for his former wife could be discharged, but neither she nor the bankruptcy court was bound by that determination as the matter was not properly before the state court at the time. In *In re Freeman*, 165 B.R. 307 (Bankr. S.D. Fla. 1994), the court held that the provision in the settlement agreement that the debtor's obligation was nondischargeable was unenforceable because it did not constitute a valid waiver of discharge under 11 U.S.C. § 727(a)(10), and no court has jurisdiction to make such a finding before a bankruptcy is filed. Also, the bankruptcy court in *In re Monsour*, 372 B.R. 272 (Bankr. W.D. Va. 2007), held that after the debtor's bankruptcy, the state court had jurisdiction to overrule the debtor's argument that an obligation for a lump sum award to his former spouse was discharged, thereby binding the bankruptcy court to the classification as support.

Generally, issue preclusion rules of the first jurisdiction in which the issue was decided must be applied. *See In re Stage*, 321 B.R. 486 (B.A.P. 8th Cir. 2005). With some minor differences, most courts will apply the doctrine if a finding in one court is binding on a subsequent court when the parties are the same, the issues are the same, the issue was actually litigated, and the finding was necessary to the result. *See In re Ellsworth*, 2014 WL 172414 (Bankr. D. Utah Jan 13, 2014) (annulled marriage did not qualify plaintiff as former spouse under Utah law, so debtor's obligation was not a nondischargeable debt under 11 U.S.C. § 523(a)(15)); *In re Hartnett*, 330 B.R. 823 (Bankr. S.D. Fla. 2005) (no collateral estoppel where paternity was established by default and not actually litigated; DNA showed debt was for support of child who was not the debtor's); *In re Battaglia*, 321 B.R. 67 (Bankr. M.D. Fla. 2005) (family court record insufficient to apply collateral estoppel); *In re Zambre*, 306 B.R. 428 (Bankr. D. Mass. 2004) (state court's previous determination that debtor had no interest in homestead precluded determination of lien avoidance motion); *In re Lepar*, 272 B.R. 758 (Bankr. M.D. Fla. 2001) (state court determination that debtor could not claim homestead exemption with respect to former husband's judgment lien could not be challenged in bankruptcy court); *In re Adkins*, 191 B.R. 941 (Bankr. M.D. Fla. 1996) (bankruptcy court collaterally estopped from determining the dischargeability of a dissolution award to a chapter 7 debtor's ex-husband because same issue had been ruled on by state court that ordered a Qualified Domestic Relations Order to enforce the award); *In re Clegg*, 189 B.R. 818 (Bankr. N.D. Okla. 1995) (issue preclusion

applied to state court determination that attorney fees were in nature of support); *In re Rabeiro*, 151 B.R. 965 (Bankr. M.D. Fla. 1993) (nondebtor former spouse was bound by state court determination that obligation was property division); *In re Reid*, 149 B.R. 669 (Bankr. D. Kan. 1992) (finding in divorce judgment that debtor had disposed of marital assets by traveling and gambling was entitled to collateral estoppel effect in § 523(a)(6) action).

The parties can stipulate to facts that are binding on subsequent court. *See, e.g., Klingman v. Levinson*, 114 F.3d 620 (7th Cir. 1997); *In re Dunkley*, 221 B.R. 207 (Bankr. N.D. Ill. 1998) (chapter 13 debtor estopped from contending that unpaid debt to former spouse was dischargeable where, in adversary proceeding in prior chapter 7 case, debtor stipulated to entry of nondischargeable judgment); *In re Carter*, 138 B.R. 356 (Bankr. D. Conn. 1992) (marital settlement agreement approved by court satisfied "actually litigated" requirement). *But see, In re Hopson*, 216 B.R. 297 (Bankr. N.D. Ga. 1997) (agreement to settle contempt issue did not prevent later nondischargeability proceeding).

The same standards must be used in state and bankruptcy courts if issue preclusion applies. *In re Vigil*, 250 B.R. 394 (Bankr. D. N.M. 2000) (determination that obligation was support in stay proceeding not binding in adversary proceeding on same issue because motion for relief from stay was summary proceeding without full adjudication); *In re D, S & S Enters., Inc.*, 155 B.R. 691 (Bankr. W.D. Pa. 1993) (characterization in divorce of transfers from debtor corporation to husband as loans or compensation was not binding on bankruptcy court). Likewise, in *Matter of Dennis*, 25 F.3d 274 (5th Cir. 1994), collateral estoppel did not apply to an obligation characterized as property division under Texas law (which did not at the time provide for alimony) and was found to be support under bankruptcy law. *See also, In re Kritt*, 190 B.R. 382 (B.A.P. 9th Cir. 1995) (holding that court must look beyond language of the decree to the intent of the parties and the substance of the obligation).

C. **Judicial Estoppel.** Under certain circumstances, parties will be precluded from taking inconsistent positions on the same issue in separate but related actions. *See In re Kane*, 628 F.3d 631 (3rd Cir. 2010) (POC allowed and judicial estoppel not applied because debtor's former spouse sufficiently disclosed her claim against him in her prior case); *Palm v. Palm*, 142 B.R. 976 (D. Wyo. 1991), *aff'd*, 972 F.2d 356 (10th Cir. 1992) (record was inadequate to show that the debtor's former wife took inconsistent positions on an identical issue, but it is not inconsistent for a provision to be property division under state law but in the nature of support for nondischargeability purposes); *In re McGunn*, 284 B.R. 855 (Bankr. N.D. Ill. 2002) (debtor judicially estopped from asserting obligation was property division when he testified it was maintenance at time of divorce); *In re Falk*, 88 B.R. 957 (Bankr. D. Minn. 1988), *aff'd*, 98 B.R. 472 (D. Minn. 1989) (debtor estopped from asserting that marital settlement agreement that he entered into voluntarily was a fraudulent transfer).

D. **Rooker-Feldman Doctrine.** Other than the United States Supreme Court, a federal court is without jurisdiction to act as an appeals court to a state court of competent jurisdiction. *See, e.g., Schmitt v. Schmitt*, 324 F.3d 484 (7th Cir. 2003); *In re Johnson*, 473 B.R. 447 (Bankr. D. Utah 2012) (R/F applied to divorce judgment that stated parties were married, even though state marriage law might have been violated); *In re MacGibbon*, 383 B.R. 749 (Bankr. W.D. Wash. 2008) (R/F doctrine precluded bankruptcy review of maintenance order); *In re Williams*, 398 B.R. 464 (Bankr. N.D. Ohio 2008) (bankruptcy court could not determine fairness of assignment of debts by divorce court); *In re Burns*, 306 B.R. 274 (Bankr. E.D. Mo. 2004) (R/F doctrine applied when state court had decided debt discharged, and adversary proceeding in bankruptcy court would not lie). *Cf. In re Estate of Royal*, 289 B.R. 913 (Bankr. N.D. Ill. 2003) (R/F doctrine binding on bankruptcy trustee). Thus, if another court has jurisdiction and decides a matter, or any matter "inextricably intertwined" with that matter, the subsequent court lacks subject matter jurisdiction. *See In re Glass*, 240 B.R. 782 (Bankr. M.D. Fla. 1999) (bankruptcy court bound by state court determination of applicability of stay; debtor charged with criminal failure to support). However, if the state court entered an order in violation of the stay or discharge injunction, the order is void, and R/F does not apply. *In re Hamilton*, 540 F.3d 367 (6th Cir. 2008); *See also, In re Angelo*, 480 B.R. 70 (Bankr. D. Mass. 2012) (bankruptcy court should consider whether state court finding concerning application of the automatic stay was correct). Additionally, some federal courts have nonetheless recognized specific statutory provisions that permit federal courts with original jurisdiction to entertain a collateral attack for certain federal questions litigated in state courts, most notably where the federal courts had exclusive jurisdiction over the federal question in the first place. *E.g., In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000).

If the trustee is not a party in the earlier matter, the doctrine generally will not apply. *Matter of Bledsoe*, 569 F.3d 1106 (9th Cir. 2009) (state court property division without evidence of fraud or collusion established reasonably equivalent value; R/F did not apply to trustee); *Matter of Erlewine*, 349 F.3d 205 (5th Cir. 2003) (contested divorce resulting in unequal division of community property was valid as a matter of law; R/F doctrine, issue and claim preclusion did not apply to trustee).

XIII. CHAPTER 12 AND 13 CONSIDERATIONS

A. General Provisions.

1. **Estate Property.** Estate includes 11 U.S.C. § 541 property owned by the debtor on the date of filing, including certain property held by a nondebtor spouse in a community property state, plus any such property acquired while the plan is in effect, plus earnings for services performed by the debtor before the case is closed, dismissed or converted. 11 U.S.C. §§ 1207(a)(2), 1306(a)(2). Property vests at confirmation unless otherwise ordered. 11 U.S.C. § 1327(b). Order of confirmation can provide that all earnings of the debtor and/or other property continue to be property of the estate even after confirmation, bringing any dispute concerning such income into the

bankruptcy court. *See In re Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010) (post-nuptial agreement that required transfer of property of estate, including debtor's earnings to be paid for support, violated stay); *In re Dahlgren*, 418 B.R. 852 (Bankr. D. N.J. 2009) (debtor's plan, in case filed on eve of partition of tenants in common property owned with debtor's former domestic partner, could not treat co-owner's interest as a claim). *See also, In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (wages vested upon confirmation and were not protected by automatic stay as to postpetition support due). *See also, In re Brinkley*, 323 B.R. 685 (Bankr. W.D. Ark. 2005) (interpreting §§ 541, 1306, and 348, life insurance proceeds acquired by one joint debtor upon death of the other during ch. 13 was not property of estate upon conversion to ch. 7).

2. **Eligibility.** A chapter 13 debtor must be an individual, or an individual and his or her spouse, with regular income and not more than $383,175 in non- contingent, liquidated, unsecured debts and not more than $1,149,525 in non-contingent, liquidated, secured debts. 11 U.S.C. § 109(e). A chapter 12 debtor must be a "family farmer," also with regular income. 11 U.S.C. §§ 101(18),(19), 109(f). For a chapter 12 case filed on or after October 17, 2005, a "family fisherman" may also qualify as a chapter 12 debtor. 11 U.S.C. § 101(19A), (19B). There is a split among courts whether if both spouses would individually qualify, they may file a joint case even if their aggregate debts exceed debt limits. *In re Miller*, 493 B.R. 55 (Bankr. N.D. Ill. 2013) (no); *In re Hannon*, 455 B.R. 814 (Bankr. S.D. Fla. 2011); *In re Werts*, 410 B.R. 677 (Bankr. D. Kan. 2009) (yes). *See also, In re Loomis*, 487 B.R. 296 (Bankr. N.D. Okla. 2013) (debtor's sole source of income was girlfriend, who had not committed to pay plan payments); *In re Lovell*, 444 B.R. 367 (Bankr. E.D. Mich. 2011) (chapter 13 debtor who depended on husband's income, when he had also filed a chapter 13 case, did not qualify as having regular income).

   If one spouse in a joint case wishes to convert to chapter 7, the case can be severed. *In re Seligman*, 417 B.R. 171 (Bankr. E.D. N.Y. 2009).

3. **Community Claims.** A community claim, defined in 11 U.S.C. § 101(7), incurred by the debtor's nonfiling spouse must be included in the determination of eligibility. *In re Monroe*, 282 B.R. 219 (Bankr. D. Ariz. 2002) (tort committed by nondebtor husband was a community claim in debtor wife's chapter 13 case and made her ineligible). *See also, In re Glance*, 487 F.3d 317 (6th Cir. 2007) (mortgage debt on joint property for which only the nondebtor spouse was personally liable was included by applicability of 11 U.S.C. § 102 to determine eligibility); *Matter of Nikoloutsos*, 199 F.3d 233 (5th Cir. 2000) (judgment for assault awarded debtor's former spouse made him ineligible for chapter 13).

   If, hypothetically, some kind of community property would be available under state law to satisfy a creditor's claim, then it meets the definition of

community claim. *See, e.g., In re Field*, 440 B.R. 191 (Bankr. D. Nev. 2009). The term "creditor" also includes an entity that has a community claim. 11 U.S.C. § 101(10). *See also, In re Whitus*, 240 B.R. 705 (Bankr. W.D. Tex. 1999) (IRS claim for which only nonfiling spouse was personally liable, is entitled to community property available under state law rules, plus one half of all community property, even if not available under state law rules).

4. **Good Faith.** If a case is not filed in good faith, or if conversion to another chapter is not in good faith, the case may be dismissed or conversion not allowed as confirmation would be impossible. *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S. Ct. 1105 (2007). *See also, In re Alakozai*, 499 B.R. 698 (B.A.P. 9th Cir. 2013) (debtor wife bound by in rem relief in husband's prior case); *In re Hopper*, 474 B.R. 872 (Bankr. E.D. Ark. 2012) (filing chapter 13 case on eve of contempt hearing in divorce court for purpose of avoiding family court ordered obligation, plus lack of full disclosure, was not in good faith); *In re Grafton*, 421 B.R. 765 (Bankr. N.D. Miss. 2009) (treatment of property division claim of former spouse in plan was not in good faith); *In re Hofer*, 437 B.R. 680 (Bankr. D. Minn. 2010) (chapter 13 case filed in impermissible attempt to modify dissolution decree; confirmation denied, case dismissed); *Matter of Melcher*, 416 B.R. 666 (Bankr. D. Neb. 2009) (treatment of former wife's claim was not in good faith); *In re Selinsky*, 365 B.R. 260 (Bankr. S.D. Fla. 2007) ("tag team" filing by husband and wife was bad faith); *In re Pakuris*, 262 B.R. 330 (Bankr. E.D. Pa. 2001) (conversion from ch. 7 to ch. 13 not allowed because debtor's only purpose was to regain control over property division litigation that had been settled by ch. 7 trustee); *In re Nahat*, 315 B.R. 368 (Bankr. N.D. Tex. 2004) (separate cases filed by spouses with respect to the same property not in bad faith); *In re Feldman*, 309 B.R. 422 (Bankr. E.D. N.Y. 2004) (court had no *in rem* jurisdiction over nonfiling spouse's interest in property to grant prospective relief). *See also, In re Mattick*, 496 B.R. 792 (Bankr. W.D.N.C. 2013).

5. **Automatic Stay.** Stay remains in effect until discharge is granted. 11 U.S.C. § 362(c)(2)(C). *But see,* 11 U.S.C. § 362(c)(3) and (4), applicable to cases filed on or after October 17, 2005, regarding the automatic stay for debtors filing serial cases. Discharge is issued after ch. 13 plan payments are completed or the debtor receives a "hardship" discharge. 11 U.S.C. §§ 1228(a), (b), 1328(a), (b). Upon confirmation, most courts have held that property of the estate vests in the debtor, 11 U.S.C. §§ 1227(b), 1327(b), unless the order of confirmation provides otherwise, and the spouse can then proceed against the debtor's non-estate property. *See* 11 U.S.C. § 362(b)(2)(B). For this reason, many debtors owing support prefer to provide in the plan that property does not vest until completion of the plan and discharge. This protects postpetition income and property acquired by the debtor. *See, e.g., In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (wages vested upon confirmation and were not protected by automatic stay

as to postpetition support due). *In Matter of James*, 150 B.R. 479 (Bankr. M.D. Ga. 1993), the court refused to lift the stay to allow the nondebtor spouse to enforce collection of support arrearage, pending amendment of debtor's plan to provide for such arrearage. *Accord In re Fullwood*, 171 B.R. 424 (Bankr. S.D. Ga. 1994) (similar facts). *See also, In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (income withholding by state for child support did not violate stay but was improper as violation of order confirming plan that provided for support arrearage).

Co-debtor stay applies when both the debtor and another person, usually the spouse, are liable on a consumer debt. 11 U.S.C. § 1301. Both the debtor and another must be personally liable on the debt; that is, the nondebtor party must have agreed to pay the debt and not merely have put up property as security. *In re Jett,* 198 B.R. 489 (Bankr. E.D. Ky. 1996) (co-debtor stay did not apply to debt for which only the debtor's former spouse was liable and for which debtor had agreed to hold her harmless). *Cf. In re Lemma*, 393 B.R. 299 (Bankr. E.D. N.Y. 2008) (co-debtor stay applied even though automatic stay did not because of serial filings; BAPCPA did not amend section 1301).

A claim against the debtor includes a claim against debtor's property, 11 U.S.C. § 102(2), and the stay would apply to marital property even if both spouses are not personally liable. *See In re Passmore*, 156 B.R. 595 (Bankr. E.D. Wis. 1993); *but see, Matter of Greene*, 157 B.R. 496 (Bankr. S.D. Ga. 1993) (co-debtor stay under § 1301 did not prevent the IRS from recovering from nondebtor spouse's income).

6. **Income of Nondebtor Spouse.** Income of the nondebtor spouse must be disclosed, even if the debtor has no interest in the income, to allow the court to determine if the plan meets disposable income and good faith tests. *See, e.g., In re Kulakowski*, 735 F.3d 1296 (11th Cir. 2013). Combined income also determines the length of the plan. *See* 11 U.S.C. § 1322(d); Official Form 6, Schedule I, Form B22C. *In re Harman*, 435 B.R. 596 (B.A.P. 8th Cir. 2010) (joint debtors' income combined even though they lived separately); *In re Miller*, 493 B.R. 55 (Bankr. N.D. Ill. 2013 (spouses' combined income considered; citing split of authority); *In re Stansell*, 395 B.R. 457 (Bankr. D. Idaho 2008) (deceased wife's income received in six months before filing included to determine commitment period); *In re Mullins*, 360 B.R. 493 (Bankr. W.D. Va. 2007) (sufficient income of debtor's spouse, who committed to making payments, was regular income to unemployed debtor); *In re Baldino*, 369 B.R. 858 (Bankr. M.D. Pa. 2007) (income of nonfiling spouse must be included to extent contributed to household expenses); *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006) (same). *But see, In re Dye*, 495 B.R. 699 (Bankr. E.D. Va. 2013) (Social Security income of nonfiling spouse not counted for PDI).

Similarly, in *In re Antoine*, 208 B.R. 17 (Bankr. E.D.N.Y. 1997), the court determined that an unemployed debtor with no sources of income was nevertheless an "individual with regular income," because wife made a commitment to devote her entire salary in support of the debtor's plan. *See also, In re Murphy*, 226 B.R. 601 (Bankr. M.D. Tenn. 1998) (unconditional written commitment to make plan payments by debtor's "significant other" constituted "regular income"). *But see, In re Jordan*, 226 B.R. 117 (Bankr. D. Mont. 1998) (debtor who was completely dependent on gratuitous support payments provided by live-in boyfriend was not "individual with regular income" eligible to file for chapter 13 relief).

Under BAPCPA amendments, the debtor's CMI, or the CMI of the debtor and debtor's spouse in a joint case, plus regular contributions by a nonfiling spouse determine the "applicable commitment period" under the means test. 11 U.S.C. §§ 101(10A), 1322(d), 1325(b)(4). *See also*, 11 U.S.C. §§ 707(b)(2)(A) and 1325(b) regarding payment requirements under BAPCPA means test, allowable expenses, and exclusion of DSO payments. *But see, In re Brooks*, 498 B.R. 856 (Bankr. C.D. Ill. 2013) (for child support payments to be excluded, they must be reasonable). The contribution to household expenses by a nondebtor spouse may affect the means test and required contributions to a plan. Pursuant to the "marital adjustment," funds not contributed by the nonfiling spouse are deducted from the debtor's CMI. *See, e.g., In re Abisso*, 490 B.R. 464 (Bankr. D. Mass. 2013) (nonfiling spouse's income not contributed to household expenses not in debtor's CMI; three year ACP allowed); *In re Toxvard*, 485 B.R. 423 (Bankr. D. Colo. 2013) (payments by nonfiling spouse for mortgage on house owned solely by him in which both resided was not included in her income and not allowed as an expense; agreeing with *Shahan* and distinguishing *Vollen*); *In re Sturm*, 483 B.R. 312 (Bankr. N.D. Ohio 2012) (same); *In re Persaud*, 486 B.R. 251 (Bankr. E.D. N.Y. 2013) (payment by nonfiling spouse for private school tuition for debtor's children was included in her CMI; lack of control was not "special circumstance"); *In re Rable*, 445 B.R. 826 (Bankr. N.D. Ohio 2011) (mortgage payments made by debtor's spouse for joint residence did not reduce CMI under marital adjustment); *In re Vollen*, 426 B.R. 359 (Bankr. D. Kan. 2010) (if nonfiling spouse's income not regularly contributed to household expenses, it should not be included in calculating debtor's disposable income); *In re Shahan,* 367 B.R. 732 (Bankr. D. Kan. 2007) (same); *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006) (same); *In re Beasley*, 342 B.R. 280 (Bankr. C.D. Ill. 2006) (same). *See also, In re Harman*, 435 B.R. 596 (B.A.P. 8th Cir. 2010) (spouses' incomes had to be disclosed even though they had separate residences); *In re Waechter*, 439 B.R. 253 (Bankr. D. Mass. 2010) (pre-marital agreement that gave nonfiling spouse a "free ride" on household expenses resulted in plan being rejected for bad faith); *In re Stocker*, 399 B.R. 522 (Bankr. M.D. Fla. 2008) (antenuptial agreement that restricted nondebtor spouse's responsibility for household expenses was not a "special circumstance" that could be considered as part of the means test).

Contribution to household expenses by a non-spouse are also counted, but not that person's entire income. *In re Roll*, 400 B.R. 674 (Bankr. W.D. Wis. 2008); *In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007). *See also, In re Crego*, 387 B.R. 225 (Bankr. E.D. Wis. 2008) (additional expense of living separately allowed as "special circumstance").

Household size is a factor in determining whether debtors are below or above median income. In determining household size for means test, recent case law has tended to apply an economic approach rather than "heads on beds" or "census" approach. *See, e.g., Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012) (utilizing fractional economic approach); *In re Ford*, 509 B.R. 695 (Bankr. D. Idaho 2014) (analyzing dependency of related and unrelated children in household); *In re Skiles*, 504 B.R. 871 (Bankr. N.D. Ohio 2014) (custody arrangement applied to count debtor's two children as one person in determining applicable commitment period); *In re Morrison*, 443 B.R. 378 (Bankr. M.D. N.C. 2011) (finding size of household determined by including individuals who operate as single economic unit with debtor). *But see, In re Epperson*, 409 B.R. 503 (Bankr. D. Ariz. 2009) ("heads on beds" determines household size; criticizing cases focusing on support provided); *In re Herbert*, 405 B.R. 165 (Bankr. W.D. N.C. 2008) (all members of household, including ones debtor is not obligated to support, are included in calculating means test); *Cf. In re Fleishman*, 372 B.R. 64 (Bankr. D. Or. 2007) (unborn child cannot be counted in household size); *In re Pampas*, 369 B.R. 290 (Bankr. M.D. La. 2007) (same).

If the debtor has a community property interest in spouse's income, one court held that the nondebtor spouse's income becomes property of the estate under § 1306(a)(1), at least until confirmation. *In re Reiter*, 126 B.R. 961 (Bankr. W.D. Tex. 1991); *See also, In re Markowicz*, 150 B.R. 461 (Bankr. D. Nev. 1993) (after confirmation nondebtor spouse's income was not property of the estate); *but see, In re Nahat*, 278 B.R. 108 (Bankr. N.D. Tex. 2002) (under Texas law, nondebtor spouse's earnings are "special community property" and are not property of the estate).

7. **Plan Confirmation, Modification.** To be confirmed, a plan, among other things, must be feasible, must be proposed in good faith, and if objected to, must commit all of the debtor's disposable income (remaining after basic expenses) to the plan over its term. It must pay creditors at least as much as they would receive in a Chapter 7, including 100% payment on priority claims. DSO claims must be paid in full, unless the creditor agrees otherwise, except that government DSO's can be paid less than in full with a five year commitment period. Non-DSO claims arising from divorce decree can be discharged. 11 U.S.C. §§ 1322(a)(2), 1325; *see In re Larson-Asplund*, 519 B.R. 682 (Bankr. E.D. Mich. 2014) (plan proposed by discharge-ineligible debtor mainly to avoid marital obligation was not in good faith); *In re Eckerstorfer*, 508 B.R. 90 (Bankr. E.D. Wis. 2014) (debtor could not satisfy DSO for maintenance arrears by paying joint tax liability

instead, over objection of former spouse); *Matter of Pylant*, 467 B.R. 246 (Bankr. M.D. Ga. 2012) (obligation to provide former spouse with replacement house was DSO that could not be discharged in debtor's chapter 13 case); *In re DeBerry*, 429 B.R. 532 (Bankr. M.D. N.C. 2010) (proceeds from sale of marital residence were DSO priority claim in chapter 13 case as they were in lieu of support; balance of obligations were not); *In re Westerfield*, 403 B.R. 545 (Bankr. E.D. Tenn. 2009) (obligation to pay mortgage on former marital home was DSO; confirmation of plan identifying debt as § 523(a)(15) not binding); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (obligation to pay second mortgage on house awarded debtor's former wife was DSO); *In re Williams*, 387 B.R. 211 (Bankr. N.D. Ill. 2008) (DSO claim must be paid 100%); *In re Kelly*, 378 B.R. 769 (Bankr. M.D. Pa. 2007) (prepetition transfer of assets into joint tenancy with spouse, which was probably avoidable, would increase hypothetical chapter 7 distribution, so plan did not meet best interests test); *In re Dorf*, 219 B.R. 498 (Bankr. N.D. Ill. 1998) (debtor, who could not maintain proposed plan payments to former spouse for maintenance arrears as well as postpetition payments as they came due, was financially unable to produce confirmable plan); *In re Davis*, 172 B.R. 696 (Bankr. S.D. Ga. 1993) (plan filed in good faith even though it affected obligations under divorce decree). Standards for modification of a plan are the same as for confirmation, with certain exceptions. 11 U.S.C. §§ 1323, 1329.

If BAPCPA applies, the debtor must be current in postpetition DSO payments for a plan to be confirmed. 11 U.S.C. §§ 1225(a)(7), 1325(a)(8). Other BAPCPA amendments may affect plan provisions. *See, e.g., In re Vagi*, 351 B.R. 881 (Bankr. N.D. Ohio 2006) (car purchased for use of debtor's spouse qualified for protection of "hanging paragraph" of 11 U.S.C. § 1325(a), acknowledging contrary authority).

A chapter 13 case filed solely to circumvent the requirements of a dissolution decree may be subject to dismissal for bad faith. *In re Hopper*, 474 B.R. 872 (Bankr. E.D. Ark. 2012) (filing chapter 13 case on eve of contempt hearing in divorce court for purpose of avoiding family court ordered obligation, plus lack of full disclosure, was not in good faith); *In re Fleury*, 294 B.R. 1 (Bankr. D. Mass 2003) (case dismissed when debtor dissipated over $350,000, and only significant debt was to former husband); *In re Lewis*, 227 B.R. 886 (Bankr. W.D. Ark. 1998) (plan filed solely to attempt to circumvent divorce court orders was filed in bad faith); *In re Maras*, 226 B.R. 696 (Bankr. N.D. Okla. 1998) (plan not proposed in good faith where debtor's sole motivation was to avoid paying former wife); *In re Green*, 214 B.R. 503 (Bankr. N.D. Ala. 1997) (dismissal warranted where debtor filed successive chapter 13 petitions with child support obligation constituting vast majority of claims). *Cf. In re Mattick*, 496 B.R. 792 (Bankr. W.D. N.C. 2013) (voluntary dismissal not allowed in case filed in bad faith after former spouse moved to convert to chapter 7). *But see, In re Lindquist*, 349 B.R. 246 (Bankr. D. Or. 2006) (bad faith allegations by

former wife of debtor not proven); *In re Brugger*, 254 B.R. 321 (Bankr. M.D. Pa. 2000) (case not filed in bad faith when plan did not provide for payment of property division debt, but debtor did not meet test of paying creditors more than they would receive in chapter 7); *In re Nelson*, 189 B.R. 748 (Bankr. D. Minn. 1995) (debtor's voluntary conduct in marrying a disabled person and purchasing an expensive vehicle did not constitute cause for plan modification). *Cf. In re Dean*, 317 B.R. 482 (Bankr. W.D. Pa. 2004) (debtor could not reject prepetition contract assigning right to receive alimony in exchange for lump sum payment).

8. **Objections to Confirmation.** Since a property division may be discharged upon completion of a chapter 13 plan, and the claim may be paid less that the full amount as a nonpriority claim if the plan so provides, a creditor who believes an obligation is for support and not property division may wish to object to confirmation before such a plan is confirmed. *See, e.g., In re King*, 461 B.R. 789 (Bankr. D. Alaska 2010) (obligation was DSO; case dismissed because no feasible plan could be confirmed); *In re Nelson*, 451 B.R. 918 (Bankr. D. Or. 2011) (debt determined not DSO; plan confirmable); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010) (attorney for debtor's former spouse awarded fees pursuant to divorce had standing to object to confirmation of plan that proposed payment as non-DSO); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (obligation to pay second mortgage on house awarded debtor's former wife was DSO); *In re Boller*, 393 B.R. 569 (Bankr. E.D. Tenn. 2008) (obligation was for property division, not support, and was not entitled to priority status).

   Failure to object to confirmation may result in *res judicata* as to matters set forth in the plan. 11 U.S.C. § 1327. *See, e.g., In re Burnett*, 646 F.3d 575 (8th Cir. 2011) (provision in plan allowing debtor's former spouse to return to state court to determine interest on past due child support was *res judicata* and prohibited her from pursuing interest on past due maintenance).

   Other causes to object to confirmation may also apply, such as lack of good faith, failure to commit all disposable income to the plan, or failure to provide as much to the plan as would be available under chapter 7. See 11 U.S.C. §§ 1322, 1325; *In re Poole*, 383 B.R. 308 (Bankr. D. S.C. 2007).

9. **Claims - Support Priority.** To receive distributions from a plan trustee, the creditor must timely file a proof of claim. Fed. R. Bankr. P. 3002. If the creditor fails to do so, the debtor (or trustee) may file a claim on the creditor's behalf. Fed. R. Bankr. P. 3004. The debtor may wish to do so to allow plan payments to reduce nondischargeable support debts, rather than have those debts remain at completion of the plan. For cases filed before October 17, 2005, support debts had seventh priority for payment under prior 11 U.S.C. § 507(a)(7), unless assigned. For cases filed on or after October 17, 2005, a DSO is entitled to first priority, subject to trustee's fees and expenses incurred in connection with paying the DSO. 11 U.S.C.

§ 507(a)(1). DSO claimants who are not governmental entities, *i.e.,* custodial parents, have priority over governmental DSO claimants. *Id.* Priority claims must be paid in full, unless creditor otherwise consents, 11 U.S.C. §§ 1222(a)(2), 1322(a)(2), except for governmental support claims. If the plan provides that the governmental DSO claim is not paid in full, and the BAPCPA amendments apply, the debtor must commit to a five year plan. 11 U.S.C. § 1322(a)(4). *See also, In re Marshall*, 489 B.R. 630 (Bankr. S.D. Ga. 2013) (debtor's former wife's attorney's fees, assigned to debtor, were priority DSO); *In re Pfalzgraf*, 236 B.R. 390 (Bankr. E. D. Wis. 1999) (child support payable by nondebtor spouse was a community claim in debtor's chapter 13 case, but obligation was not entitled to priority because obligation was not for children of debtor); *In re Beverly*, 196 B.R. 128 (Bankr. W.D. Mo. 1996) (support enforced by state child support enforcement division was entitled to priority because agency collected support for payee, and rights had not been assigned). If a support is debt not paid by completion of the plan, either by agreement of the priority creditor, because in a pre-BAPCPA case the support is not a priority debt, or because the debt is payable to a governmental entity, the debt is not subject to a chapter 12 or 13 discharge. 11 U.S.C. §§ 1228(a)(2), 1328(a)(2). Likewise, interest accrued during the chapter 13 is not discharged, even if the claim is paid in full. *See In re Foross*, 242 B.R. 692 (B.A.P. 9th Cir. 1999). Current support is part of the debtor's expenses and is not to be paid through the plan.

A claim categorized as property division is not entitled to priority status. *In re Cooke*, 455 B.R. 503 (Bankr. W.D. Va. 2011); *In re Uzaldin*, 418 B.R. 166 (Bankr. E.D. Va. 2009); *In re White*, 408 B.R. 677 (Bankr. S.D. Tex. 2009);

In re Jennings, 306 B.R. 672 (Bankr. D. Or. 2004). *See also, In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009) (attorney's fees awarded ch. 13 debtor's former spouse were not DSO as they were based on "bad faith litigation misconduct" and were not entitled to priority status). If the plan is silent with respect to classifying a former spouse's claim, the former spouse/creditor may wish to file a claim designating the obligation as support priority. *See* Official Bankruptcy Form 10 Proof of Claim. If not objected to, the claim would be paid in full. If the plan and proof of claim are in conflict as to priority of the claim, it is necessary to know whether the plan or claim controls in the applicable jurisdiction and to bring the matter before the court, either as an objection to the claim by the debtor or as an objection to confirmation by the creditor. Other creditors may also object to the priority of a debt, since payment of 100% to a family creditor may reduce amounts payable to general unsecured debts.

Debtor's divorce attorney's fees, as opposed to the bankruptcy attorney's fees, may be an administrative expense payable through the plan, but only

if incurred postpetition and only to extent there is a benefit to the case. *See In re Powell*, 314 B.R. 567 (Bankr. N.D. Tex. 2004).

B. **Contents of Plan - Support Arrearage.** Early cases often would not allow payment of support arrearage in a plan. This has changed, particularly since the Bankruptcy Reform Act of 1994. *See* 11 U.S.C. §§ 503(b)(7), 1322(a)(2). Accordingly, making a support recipient a separate class of creditor does not discriminate unfairly against other unsecured claimants, provided separate classification is necessary to effectuate the plan. *In re Crawford*, 324 F.3d 539 (7th Cir. 2003); *In re Leser*, 939 F.2d 669 (8th Cir. 1991). *But cf. In re Burns*, 216 B.R. 945 (Bankr. S.D. Cal. 1998) (debtors' obligation to county on assigned child support claim, a nonpriority but nondischargeable debt, could not be placed in separate class from debtors' other general unsecured debt). Since the BAPCPA amendments, the priority status of DSO (custodial parent) and government DSO creditors removes this problem. *See also, In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (income withholding by state for child support did not violate stay but was improper as violation of order confirming plan that provided for support arrearage).

C. **Discharge.** Under BAPCPA, a debtor must certify that s/he is current in postpetition DSO payments to qualify for a discharge. 11 U.S.C. §§ 1228(a), 1328(a). Chapter 13 discharge, 11 U.S.C. § 1328, protects after-acquired community property pursuant to 11 U.S.C. § 524(a)(3). *In re Dyson*, 277 B.R. 84 (Bankr. M.D. La. 2002).

D. **Procedure.** Since a DSO is excepted from discharge under all chapters, and only chapter 13 allows for discharge of a property division under BAPCPA, the matter is most likely to arise in the context of plan confirmation or treatment of a claim. *See, e.g., In re King*, 461 B.R. 789 (Bankr. D. Alaska 2010) (debtor's former wife objected to confirmation of plan); *Kusek v. Kusek*, 461 B.R. 691 (B.A.P. 1st Cir. 2011) (dispute over DSO status of obligation arose originally upon debtor's objection to POC); *In re Anthony*, 453 B.R. 782 (Bankr. D. N.J. 2011) (same); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (same). Failure of a potential DSO creditor to object to confirmation of a plan that treats the debt as property division may face the claim preclusion effect of the order confirming the plan. *See In re Burnett*, 646 F.3d 575 (8th Cir. 2011) (*res judicata* effect of plan confirmation on former spouse's claim); *In re Hutchens*, 480 B.R. 374 (Bankr. M.D. Fla. 2012) (same); *But see, In re Phile*, 490 B.R. 250 (Bankr. S.D. Ohio 2011) (court required procedural protections of adversary proceeding to determine if plan provision classifying claim as non-DSO was valid). Similarly, if a proof of claim controls the classification of a debt, failure of the debtor to object to the claim may precluded him/her from challenging that classification after the plan is confirmed.

XIV. AVOIDABLE TRANSFERS

A. **Preferences.** 11 U.S.C. § 547. A preference is a pre-bankruptcy transfer of a debtor's interest in property made to or for the benefit of a creditor of an antecedent

debt, made while the debtor is insolvent, that allows a creditor to receive more than he/she would have received in a chapter 7. This could be payment, perfection of a security interest, obtaining a judgment lien or any other kind of transfer. If the debtor makes a transfer to his or her spouse or former spouse that would otherwise constitute a preference, the transfer cannot be recovered if the debt was for alimony, maintenance or support debt that arose in connection with a divorce decree, separation agreement or court order. It does not shield other types of debt that arise in that context, usually property division. *In re Paschall*, 408 B.R. 79 (E.D. Va. 2009) (buyout of prior marital agreement with transfer of real estate was a preference, and former spouse was insider because estranged parties were still married when transfer occurred); *In re Mantelli*, 149 B.R. 154 (B.A.P. 9th Cir. 1993) (payment to former wife in lieu of jail for civil contempt for destruction of her personal property was preference); *In re Rodriguez*, 465 B.R. 882 (Bankr. D. N.M. 2012) (whether loan from debtor's parents to keep debtor out of jail for contempt for failure to pay property division was a transfer of property of the debtor; summary judgment precluded); *Grassmueck v. Food Indus. Credit Union*, 127 B.R. 869 (Bankr. D. Or. 1991) (payments for car awarded debtor's spouse in the divorce within 90 days of filing were preferences). Depending on state law, the right to receive a property division may not be a claim or antecedent debt; it is an equitable interest. Therefore, the nondebtor's interest in escrowed funds from sale of property prepetition awarded in postpetition property division could not be avoided by trustee. *In re Skorich*, 482 F.3d 21 (1st Cir. 2007). *Accord In re Smith*, 321 B.R. 385 (Bankr. W.D. N.Y. 2005) (award of attorney's fees for one spouse out of property as part of property division was not for antecedent debt and was not a preference). *See also, In re Davis*, 319 B.R. 532 (Bankr. E.D. Mich. 2005) (trustee could not set aside preferential transfer of property debtor owned with nonfiling spouse as there were no joint creditors).

Preferences may also be transfers of community property to a third party by a debtor's spouse. Such transfers are avoidable and recoverable by the trustee if made to a non-insider within 90 days of filing or to an insider within one year of filing. *See* 11 U.S.C. § 101(31) (definition of insider). The definition has a nonexclusive list of insider relationships, but the court can examine business, professional and personal relationships to determine influence or control for insider status. If the transfer was involuntary (*i.e.,* garnishment) and the property would be exempt, the debtor may claim an exemption in the property recovered or may recover the property if the trustee elects not to do so. 11 U.S.C. § 522(g), (h).

Query: Is the *former* spouse or unmarried companion an insider, making the preference period one year? *See Matter of Holloway*, 955 F.2d 1008 (5th Cir. 1992) (yes, under the facts of case); *In re Paschall*, 408 B.R. 79 (E.D. Va. 2009) (yes, because parties were still married when transfer occurred); *In re Schuman*, 81 B.R. 583 (B.A.P. 9th Cir. 1987) (no, under the facts of case); *In re Tompkins*, 430 B.R. 453 (Bankr. W.D. Mich. 2010) (yes, wife's parents were insiders when property transferred before entry of judgment requiring transfer); *In re Busconi*, 177 B.R. 153 (Bankr. D. Mass. 1995) (no, under the facts of case). *See also, In re Grove-Merrit*, 406 B.R. 778 (Bankr. S.D. Ohio 2009) ("paramour" was insider for

fraudulent transfer purposes); *In re Farson*, 387 B.R. 784 (Bankr. D. Idaho 2008) (trustee presented no proof that debtor's boyfriend was insider before marriage); *In re Dupuis*, 265 B.R. 878 (Bankr. N.D. Ohio 2001) (hearing necessary to determine insider status of debtor's former husband who received transfer pursuant to divorce decree); *In re Demko*, 264 B.R. 404 (Bankr. W.D. Pa. 2001) (debtor's cohabitant was insider); *In re McIver*, 177 B.R. 366 (Bankr. N.D. Fla. 1995) (live-in girlfriend was an insider); *In re Tanner*, 145 B.R. 672 (Bankr. W.D. Wash. 1992) (debtor's former lesbian companion was an insider).

Section 304 of the Bankruptcy Reform Act of 1994, applicable to cases filed after October 22, 1994, amended 11 U.S.C. § 547(c) to provide that payments of alimony, maintenance, or support or payments actually in the nature of alimony, maintenance, or support are not subject to preference recovery, unless the right to recover such payments was assigned to another entity (as is necessary to receive welfare benefits). Property division payments may be recoverable.

B. Fraudulent Transfers. 11 U.S.C. §§ 544, 548, 550.

1. **Between Spouses in an Ongoing Marriage in Fraud of Creditors' Rights.** Transfers between spouses during an ongoing marriage will always be subject to scrutiny, especially as to the adequacy of consideration, concealment, retention of beneficial interest, impending recovery by a spouse's creditors, and other badges of fraud. *See, e.g., In re Jacobs*, 490 F.3d 913 (11th Cir. 2007); *Rosen v. Bezner*, 996 F.2d 1527 (3rd Cir. 1993); *Coleman v. Simpson*, 327 B.R. 753 (D. Md. 2005); *In re Gordon*, 509 B.R. 359 (Bankr. N.D. Okla. 2014); *In re McLean*, 498 B.R. 525 (Bankr. D. Md. 2013); *In re Schofield-Johnson*, LLC, 462 B.R. 539 (Bankr. M.D. N.C. 011); *In re Leonard*, 418 B.R. 477 (Bankr. S.D. Fla. 2009); In re Phillips, 379 B.R. 765 (Bankr. N.D. Ill. 2007); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007); *In re Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005); *In re Nam*, 257 B.R. 749 (Bankr. E.D. Pa. 2000); *In re Hicks*, 176 B.R. 466 (Bankr. W.D. Tenn. 1995). Any form of transfer, such as a change in how the property is held, or the recording of a mortgage (as occurred in *Unglaub*), may be avoided by the trustee. Under 11 U.S.C. § 544(a) a trustee has avoiding powers of a hypothetical lien creditor, execution creditor, or BFP. *See In re Aulicino*, 400 B.R. 175 (Bankr. E.D. Pa. 2008) (trustee could not qualify as BFP under Pennsylvania law because debtor's spouse lived in house transferred by unrecorded judgment); *In re Claussen*, 387 B.R. 249 (Bankr. D. S.D. 2007) (unrecorded divorce judgment that transferred property was ineffective as to trustee). A fraudulent transfer can be avoided under bankruptcy law, or under state law if there is an unsecured creditor who could avoid the transfer. *See* 11 U.S.C. §§ 548(a)(1), 544(b)(1). *See also, In re Young*, 238 B.R. 112 (B.A.P. 6th Cir. 1999) (dower rights and right to exemption were not revived when transfer to debtor's spouse avoided); *In re Leonard*, 418 B.R. 477 (Bankr. S.D. Fla. 2009) (after avoiding transfer to debtor's wife, trustee could sell interests of both debtor and wife); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007) (avoided

transfer did not revert to tenancy by the entireties property). The trustee has the burden of proof, which may be by a preponderance of the evidence or by clear and convincing evidence, depending on whether the state or federal statutes are used, although the burden of producing evidence may shift once a prima facie case for fraudulent transfer is established. *See, e.g., Matter of Duncan*, 562 F.3d 688 (5th Cir. 2009); *In re Prichard*, 361 B.R. 11 (Bankr. D. Mass. 2007); *In re Hefner*, 262 B.R. 61 (Bankr. M.D. Pa. 2001).

Transfers between spouses may arise in many contexts. *See, e.g., United States v. Loftis*, 607 F.3d 173 (5th Cir. 2010) (partition of community property with wife waiving future interest in husband's future earned income in exchange for real estate lacked consideration, especially in light of husband's imminent incarceration); *Frierdich v. Mottaz*, 294 F.3d 864 (7th Cir. 2002) (transfer pursuant to prenuptial agreement was ineffective as stock was not delivered and debtor maintained control); *Matter of Hinsley*, 201 F.3d 638 (5th Cir. 2000) (partition of community property allegedly pursuant to divorce that did not occur was fraudulent; value of property assigned to each spouse not supported, fraudulent intent found, and turnover to trustee ordered); *In re Craig*, 144 F.3d 587 (8th Cir. 1998) (debtor made indirect fraudulent transfer to wife when he directed that his loan proceeds be used to pay for residence titled in wife's name); *Howison v. Hanley*, 141 F.3d 384 (1st Cir. 1998) (debtor's transfer of joint tenancy interest to wife for no consideration resulted in loss of exemption); *In re Gutpelet*, 137 F.3d 748 (3d Cir. 1998) (avoidable transfer found and exemption lost where husband transferred legal title in solely owned property to debtor without consideration; debtor mortgaged property and transferred title to herself and husband as tenants in the entirety and subsequently sold property to third party); *In re Rauh*, 119 F.3d 46 (1st Cir. 1997) (assignment of debtor's partner's note and debtor's interest in tenancy by the entirety home to debtor's wife was fraudulent); *Klingman v. Levinson*, 114 F.3d 620 (7th Cir. 1997) (assignment of beneficial interest in land trust to wife was a fraudulent conveyance; both spouses intended to protect their family home from the husband's creditors when they executed the assignment); *In re Futoran*, 76 F.3d 265 (9th Cir. 1996) (debtor's scheme to buy out his monthly obligation to former wife with nonexempt property was to detriment of creditors); *Abramowitz v. Palmer*, 999 F.2d 1274 (8th Cir. 1993) (constructive trust also placed on nondebtor spouse's interest in fraudulently acquired home); *Matter of Holloway*, 955 F.2d 1008 (5th Cir. 1992) (transfer of security interest to former wife was fraudulent even though debtor's wife had previously made unsecured loans); *Matter of Perez*, 954 F.2d 1026 (5th Cir. 1992) (debtor's transfer of one half of tax refund to wife was fraudulent, given premarital agreement to keep property separate; discharge denied); *In re Davis*, 911 F.2d 560 (11th Cir. 1990) (transfer of assets to debtor's wife was fraudulent even though re-transferred to debtor prepetition); *In re Greenfield*, 273 B.R. 128 (E.D. Mich. 2002) (release of dower for interest in property as tenant by the entireties did not constitute consideration); *In re Pappas*, 239 B.R. 448

(E.D. N.Y. 1999) (remedy for transfer of debtor's interest in tenancy by the entireties property to wife was one half of proceeds when sold by wife); *In re McGavin*, 220 B.R. 125 (D. Utah 1998), *aff'd*, 189 F.3d 1215 (10th Cir. 1999) (court imposed constructive and resulting trusts on assets transferred to spouse and family trust); *In re Paul*, 217 B.R. 336 (S.D. Fla. 1997) (debtor used her own money to pay debt owed by husband alone, which was fraudulent as to debtor); *In re Griffin*, 319 B.R. 609 (B.A.P. 8th Cir. 2005) (unrecorded transfer by prenuptial agreement not valid, interpreting Arkansas law); *In re Beery*, 452 B.R. 825 (Bankr. D. N.M. 2011) (postpetition transfer of property of estate to debtor's wife was avoided); *In re Clarkston*, 387 B.R. 882 (Bankr. S.D. Fla. 2008) (debtor's former wife received credit for proceeds of sale of avoidable transferred property returned to debtor); *In re Tomlinson*, 347 B.R. 639 (Bankr. E.D. Tenn. 2006) (nondebtor wife's unrecorded lien on debtor's aircraft ineffective as to trustee; alleged ownership required fact determination); *In re Leucht*, 221 B.R. 1003 (Bankr. M.D. Fla. 1998) (transfer of possession of assets to former spouse was fraudulent regardless of whether debtor intended to transfer ownership interest); *In re Bryant*, 221 B.R. 262 (Bankr. D. Colo. 1998) (as result of debtor's fraudulent transfer of one half interest in homestead to husband, she lost right to claim an exemption); *In re Briglevich*, 147 B.R. 1015 (Bankr. N.D. Ga. 1992) (spouse's previous contributions to improvement of debtor's solely owned asset was not present consideration); *Matter of Kaczorowski*, 87 B.R. 1 (Bankr. D. Conn. 1988) (transfers to spouse as "lump-sum alimony" without consideration when the parties did not actually separate or divorce was a fraudulent conveyance).

The value of consideration must be measured from creditor's standpoint, not debtor's, so love and support are not consideration. *In re Kelsey*, 270 B.R. 776 (B.A.P. 10th Cir. 2001). *See also, In re Richardson*, 268 B.R. 331 (Bankr. D. Conn. 2001) (alleged desire for fairness or for estate planning was not consideration for transfer); *In re Glazer*, 239 B.R. 352 (Bankr. N.D. Ohio 1999) (transfer of real estate to debtor's wife was avoided when she failed to establish her release of claim for domestic abuse had value); *In re Bouldin*, 196 B.R. 202 (Bankr. N.D. Ga. 1996) (transfer for "love and affection" presumed fraudulent). *But see, In re Taylor*, 133 F.3d 1336 (10th Cir. 1998) (transfer for estate planning purposes was not fraudulent); *In re Akanmu*, 502 B.R. 124 (Bankr. E.D. N.Y. 2013) (tuition prepayment was supported by consideration for educating debtor's children; avoidance not allowed); *In re Gonzalez*, 342 B.R. 165 (Bankr. S.D. N.Y. 2006) (payment of mortgage as support for child of which he was not adjudicated father was for fair consideration).

If a transfer of the debtor's property within one year of filing is found to be with the intent to hinder, delay or defraud creditors, not only may the transfer be avoided, the debtor/transferor may be denied an exemption claim or even a discharge. 11 U.S.C. § 727(a)(2)(A). *See, e.g., In re Thunberg*,

641 F.3d 559 (1st Cir. 2011) (discharge revoked for, among other things, debtor's failure to disclose acceleration of divorce obligations of former spouse and misrepresenting that marital obligations were subject to liens); *In re Coady*, 588 F.3d 1312 (11th Cir. 2009) (debtor denied discharge for concealing equitable interest in spouse's business); *Matter of Perez*, 954 F.2d 1026 (5th Cir. 1992) (debtor's transfer of one half of tax refund to wife was fraudulent, given premarital agreement to keep property separate; discharge denied); *Hines v. Marchetti*, 436 B.R. 159 (M.D. Ala. 2010) (fraud inferred, discharge denied, even though transfer was before arbitrator set liability); *In re Barry*, 451 B.R. 654 (B.A.P. 1st Cir. 2011 (only husband's discharge denied even though debtor wife participated in transfer to related entity because objecting creditor was only husband's creditor); *In re Gibson*, 433 B.R. 868 (Bankr. D. Okla. 2010) (debtor could not claim exemption in property transferred to nondebtor wife as it was no longer in his estate); *In re Matus*, 303 B.R. 660 (Bankr. N.D. Ga. 2004) (transfer of property to debtor's spouse concealed until discovered by trustee; discharge denied despite return of property); *In re Boba*, 280 B.R. 430 (Bankr. N.D. Ill. 2002) (transfer at divorce while retaining beneficial interest was fraudulent; discharge denied); *In re Gipe*, 157 B.R. 171 (Bankr. M.D. Fla. 1993) (avoidance of transfer also warranted denial of discharge).

2. **Transfers at Divorce.** Awarding property of one spouse to the other in connection with a divorce decree, either by agreement or contested, is a transfer which may in some cases be fraudulent as to creditors. *Matter of Erlewine*, 349 F.3d 205 (5th Cir. 2003) (contested divorce resulting in unequal division of community property was valid as a matter of law; however, Rooker-Feldman doctrine, issue and claim preclusion did not apply to trustee); *Matter of Hinsley*, 201 F.3d 638 (5th Cir. 2000) (intangible benefits do not constitute reasonably equivalent value; prepetition partition of community property avoided even though divorce contemplated at time of agreement); *In re Fordu*, 201 F.3d 693 (6th Cir. 1999) (debtor had interest in lottery proceeds assigned to estranged wife by marital settlement agreement that could be set aside by trustee); *In re Antex, Inc.*, 397 B.R. 168 (B.A.P. 1st Cir. 2008) (transfer of debtor corporation's property to principal's former wife avoided; corporate veil pierced); *In re Beverly*, 374 B.R. 221 (B.A.P. 9th Cir. 2007), *aff'd*, 551 F.3d 1092 (9th Cir. 2008) (settlement that awarded exempt assets to debtor and nonexempt asset to nondebtor found fraudulent); *In re Neal*, 461 B.R. 426 (Bankr. N.D. Ohio 2011), *rev'd in part*, 478 B.R. 261 (B.A.P. 6th Cir. 2012), *rev'd reinstating bankruptcy court decision*, 541 Fed. Appx. 609 (6th Cir. 2013) (debtor's agreement to property division that favored former husband in exchange for avoiding litigation was not reasonable equivalent value); *In re Zerbo*, 397 B.R. 642 (Bankr. E.D. N.Y. 2008) (transfers pursuant to noncollusive marital settlement agreement not avoided); *In re Perts*, 384 B.R. 418 (Bankr. E.D. Va. 2008) (transfer to former spouse pursuant to marital settlement agreement fell outside reasonable range); *In re B.L. Jennings, Inc.*, 373 B.R. 742 (Bankr. M.D. Fla. 2007) (former spouse's complicity in

fraudulent transfer supported conspiracy claim); *In re Hill*, 342 B.R. 183 (Bankr. D. N.J. 2006) (debtor's marital settlement agreement transferred property to former spouse with actual intent to defraud creditors); *In re Boba*, 280 B.R. 430 (Bankr. N.D. Ill. 2002) (transfer at divorce while retaining beneficial interest was fraudulent; discharge denied); *In re Lankry*, 263 B.R. 638 (Bankr. M.D. Fla. 2001) (unjustified, unequal division of marital assets or liabilities at dissolution might be avoidable; summary judgment denied); *In re Pilavis*, 233 B.R. 1 (Bankr. D. Mass. 1999) (marital settlement agreement lacked indicia of arms length transaction); *In re Falk*, 88 B.R. 957 (Bankr. D. Minn. 1988), *aff'd*, 98 B.R. 472 (D. Minn. 1989) (chapter 11 debtor attempted to set aside transfer of property to ex-wife in divorce; he was estopped from asserting that his voluntary marital settlement agreement was a fraudulent conveyance; debtor was also denied discharge); *In re Clausen*, 44 B.R. 41 (Bankr. D. Minn. 1984) (allowing the debtor's spouse to receive all property of the parties by default constituted a fraudulent conveyance). *But see, In re Bledsoe*, 350 B.R. 513 (Bankr. D. Or. 2006), aff'd, 569 F.3d 1106 (9th Cir. 2009) (state court property division without evidence of fraud or collusion established reasonably equivalent value).

Subsequent transferees of fraudulently transferred assets may also be liable. 11 U.S.C. § 550. *In re Akin*, 366 B.R. 619 (Bankr. N.D. Miss. 2007); *In re Knippen*, 355 B.R. 710 (Bankr. N.D. Ill. 2006). *See also, In re Krouse*, 513 B.R. 598 (Bankr. D. Kan. 2014) (undisclosed prepetition payment to deceased husband's creditors with otherwise exempt life insurance proceeds was without consideration and fraudulent transfer; no exemption under sec. 522(g) for voluntary transfer). *But see, In re Meredith*, 527 F.3d 372 (4th Cir. 2008) (wife as nominal transferee of CPA practice was not liable as no beneficial interest transferred).

The court in *In re Roosevelt*, 176 B.R. 534 (B.A.P. 9th Cir. 1995), *aff'd*, 87 F.3d 311 (9th Cir. 1996), amended by 98 F.3d 1169 (9th Cir. 1996), distinguished between the transfer to the debtor's spouse, which took place by agreement more than one year before filing (Note: sec. 548(a)(1) now allows avoidance of transfers within two years of filing) with actual intent to hinder, delay or defraud creditors, and the recorded deed perfecting the transfer, which occurred within a year of filing. There was no finding of continuing concealment. *See also, Frierdich v. Mottaz*, 294 F.3d 864 (7th Cir. 2002) (transfer occurred when proceeds of stock sale transmitted to debtor's wife, not when prenuptial agreement signed requiring transfer); *In re Roosevelt*, 220 F.3d 1032 (9th Cir. 2000) (debtor's wife gave no consideration by simply agreeing to transfer to debtor whatever interest she had in his professional education).

In *In re Carmean*, 153 B.R. 985 (Bankr. S.D. Ohio 1993), a former spouse of the debtor was prohibited by spousal privilege from testifying concerning

communications between the spouses relating to an alleged fraudulent conveyance to the debtor's parents.

3. **Between Spouses Not in Fraud of Creditors' Rights.** Most marital settlement agreements in connection with the dissolution of the debtor's marriage are negotiated in good faith from adversary positions, and these are not subject to avoidance. *Matter of Duncan*, 562 F.3d 688 (5th Cir. 2009) (transfer satisfied legitimate debts from wife's separate property); *Matter of Erlewine*, 349 F.3d 205 (5th Cir. 2003) (unequal division of property that was "fully litigated, without any suggestion of collusion, sandbagging, or indeed any irregularity" would not be set aside); *In re Taylor*, 133 F.3d 1336 (10th Cir. 1998) (transfer for estate planning purposes was not fraudulent); *In re Rauh*, 119 F.3d 46 (1st Cir. 1997) (debtor's wife's withdrawals from a joint bank account did not result in fraudulent transfer); *In re Beaudoin*, 388 B.R. 6 (D. Conn. 2008) (finding of wrongful intent not clearly erroneous); *In re Fasolak*, 381 B.R. 781 (Bankr. M.D. Fla. 2007) (transfers to debtor's wife found not fraudulent because made after debtor retired, turned 70, and was becoming forgetful); *In re Lodi*, 375 B.R. 33 (Bankr. D. Mass. 2007) (uneven allocation of loan proceeds justified); *In re Boyer*, 367 B.R. 34 (Bankr. D. Conn. 2007), *aff'd*, 384 B.R. 44 (D. Conn. 2008) (intent to defraud not proved); *In re Ducate*, 369 B.R. 251 (Bankr. D. S.C. 2007) (transfer of funds to household account in spouse's name was not fraudulent); *In re Difabio*, 363 B.R. 343 (D. Conn. 2007) (debtor's deposit of paychecks in wife's account was part of longstanding custom, debtor had no bank account, and money was used for ordinary expenses of both spouses; not fraudulent); *In re Bledsoe*, 350 B.R. 513 (Bankr. D. Or. 2006), aff'd, 569 F.3d 1106 (9th Cir. 2009) (state court property division without evidence of fraud or collusion established reasonably equivalent value); *In re Wingate*, 377 B.R. 687 (Bankr. M.D. Fla. 2006) (under Florida law, transfer of exempt entireties property to one spouse cannot be fraudulent); *In re Carbaat*, 357 B.R. 553 (Bankr. N.D. Cal. 2006) (trustee failed to meet burden of proof under either bankruptcy or California statute); *In re Arbaney*, 345 B.R. 293 (Bankr. D. Colo. 2006) (transfer was part of several transactions intended to pay creditors; no fraudulent intent); *In re Montalvo*, 333 B.R. 145 (Bankr. W.D. Ky. 2005) (debtor's transfer of funds to wife, by writing checks on his bank account and giving her cash for payment of household expenses, was not fraudulent); *In re Rodgers*, 315 B.R. 522 (Bankr. D. N.D. 2004) (transfers at divorce found not to be in fraud of creditors); *In re Gathman*, 312 B.R. 893 (Bankr. C.D. Ill. 2004) (no misrepresentation in convincing former wife to enter into second mortgage on her homestead to pay debts former husband was solely responsible for); *In re Bergman*, 293 B.R. 580 (Bankr. W.D. N.Y. 2003) (transfer of debtor's interest in homestead in exchange for investing in debtor's business was not fraudulent); *In re True*, 285 B.R. 405 (Bankr. W.D. Mo. 2002) (debtor not insolvent when gift was made); *In re Stewart,* 280 B.R. 268 (Bankr. M.D. Fla. 2001) (trustee failed to meet burden of proof that increase in debtor's spouse's funds was traceable to debtor); *In re Boyd*, 264 B.R. 62 (Bankr. D.

Conn. 2001) (reconciliation attempt was consideration for transfer); *In re Hope,* 231 B.R. 403 (Bankr. D. D.C. 1999) (noncollusive agreement to divide property was within range of what would have been equitable under state law and was not avoidable); *Matter of Weis*, 92 B.R. 816 (Bankr. W.D. Wis. 1988) (property transferred would have been exempt so it could not have been transferred with intent to hinder, delay and defraud creditors); *In re Sorlucco,* 68 B.R. 748 (Bankr. D. N.H. 1986) (agreement fell within "reasonable range" of what the court would have ordered if property division was litigated and would not be set aside).

Certain acts that appear to be transfers may not be. *Bressner v. Ambroziak*, 379 F.3d 478 (7th Cir. 2004) (one spouse working in the other spouse's business for minimal compensation is not making a fraudulent transfer); *Worster v. Gauvreau*, 381 B.R. 10 (D. Me. 2008) (transfer of real estate from husband and wife to husband alone increased debtor's assets, so discharge was not denied); *In re Costas*, 346 B.R. 198 (B.A.P. 9th Cir. 2006), aff'd, 555 F.3d 790 (9th Cir. 2009) (prepetition disclaimer of inheritance is not a transfer); *In re Rowe,* 452 B.R. 591 (B.A.P. 6th Cir. 2011) (borrower's wife was sufficiently identified in mortgage documents that lien on her interest in property could not be avoided); *In re Kellman,* 248 B.R. 430 (Bankr. M.D. Fla. 1999) (removing debtor's wife's name from joint account was not a transfer as she was never intended to have an interest); *Matter of Grady,* 128 B.R. 462 (Bankr. E.D. Wis. 1991) (wife received her own individual property in the divorce, and since the debtor husband had no interest, there was no transfer to be fraudulent); *In re Pietri,* 59 B.R. 68 (Bankr. M.D. La. 1986) (spouse has no property interest in future accumulations of community property, and marital agreement giving up those rights was not a conveyance). *But see, In re Coady,* 588 F.3d 1312 (11th Cir. 2009) (debtor denied discharge for concealing equitable interest in spouse's business); *In re Schmidt*, 362 B.R. 318 (Bankr. W.D. Tex. 2007) (postpetition disclaimer of prepetition inheritance avoided).

For a marital settlement agreement to be valid, of course, it cannot be a sham or collusive. *Matter of Hinsley*, 201 F.3d 638 (5th Cir. 2000) (partition of community property allegedly pursuant to divorce that did not occur was fraudulent; value of property assigned to each spouse not supported, fraudulent intent found, and turnover to trustee ordered); *Schaudt v. United States*, 2013 WL 951138 (N.D. Ill. March 11, 2013) (unpublished) (fraudulent conveyance of house done to avoid taxes; debtor's participation in fraud created new debt); *In re Stinson*, 364 B.R. 278 (Bankr. W.D. Ky. 2007) (one-sided marital settlement agreement, without more, failed to show intent to hinder, delay or defraud creditors); *In re Hope*, 231 B.R. 403 (Bankr. D. D.C. 1999) (trustee's power to avoid a fraudulent transfer could not reach any transfer under parties' initial agreement, but could reach any fraudulent transfer under their separation agreement, assuming that transfer of equity then occurred); *In re Fair*, 142 B.R. 628 (Bankr. E.D. N.Y. 1992)

(transfer in exchange for wife's waiver of maintenance was fair consideration).

4. **To Third Parties in Fraud of Spouse's Rights.** Transfer may be fraudulent if made to defraud the other spouse rather than third party creditors. *E.g., In re Marlar*, 267 F.3d 749 (8th Cir. 2001) (premarriage transfer of land to son, recorded immediately before creditors entered judgment, was avoidable by trustee even though not avoidable as to former wife); *In re Straub*, 192 B.R. 522 (Bankr. D. N.D. 1996) (property settlement debt to former wife nondischargeable because debtor gave interest in land to parents but continued to enjoy benefits of ownership).

5. **Statute of Limitations.** When statute of limitations generally applicable to fraudulent transfer claim has not already expired when debtor-transferor files for relief, limitations period is extended, as to claims asserted by chapter 7 trustee in exercise of his strong-arm powers, to a date up to two years after filing. 11 U.S.C. § 546; *In re Dergance*, 218 B.R. 432 (Bankr. N.D. Ill. 1998). BAPCPA amendments extended the look-back period to transfers that occurred up to two years (previously one year) prepetition. 11 U.S.C. § 548(a)(1). *See In re Lyon*, 360 B.R. 749 (Bankr. E.D. N.C. 2007); *In re Ramsurat*, 361 B.R. 246 (Bankr. M.D. Fla. 2006).

XV. AVOIDANCE OF LIENS CREATED INCIDENT TO A DECREE OF DISSOLUTION

A. **In General.** A debtor may avoid (remove) a judicial lien that impairs an exemption, other than a lien that secures an obligation of support described below, and may avoid a nonpossessory, nonpurchase money security interest in certain items of exempt property, *i.e.,* household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments or jewelry held primarily for personal use, tools of the trade and health aids. 11 U.S.C. § 522(f). Lien avoidance under sec. 522(f) is requested by motion. Bankr. Rule 4003(d); *In re Citrone*, 159 B.R. 144 (Bankr. S.D. N.Y. 1993). Judicial liens cannot be avoided if they secure a debt for alimony, maintenance or support, or a debt that is actually in the nature of alimony, maintenance or support, unless the debt is assigned to another entity. *See In re Phillips*, 520 B.R. 853 (Bankr. D. N.M. 2014) (judicial lien securing property division provision was avoidable); *In re Johnson*, 445 B.R. 50 (Bankr. D. Mass. 2011); *In re Allen*, 217 B.R. 247 (Bankr. S.D. Ill. 1998); *In re Nevettie*, 227 B.R. 724 (Bankr. E.D. Mo. 1998); *See also, In re Smith*, 586 F.3d 69 (1st Cir. 2009) (penalty imposed by state court for failure to pay maintenance was punitive and not DSO; lien avoidable). The lien of a third party creditor can only be avoided on the debtor's interest in property. *See In re White*, 460 B.R. 744 (B.A.P. 8th Cir. 2011) (liens avoided in former spouses' separate cases); *In re Mandehzadeh*, 515 B.R. 300 (Bankr. E.D. Va. 2014) (lien avoidance not allowed on nonfiling spouse's interest in entireties property); *In re Raskin*, 505 B.R. 684 (Bankr. D. Md. 2014) (avoidance limited on tenancy by entireties property held with nonfiling spouse who previously filed and claimed exemption); *In re Allan*,

431 B.R. 580 (Bankr. M.D. Pa. 2010) (lien on entireties property avoided in case filed only by judgment debtor husband; interpreting Pennsylvania law); *In re Denillo*, 309 B.R. 866 (Bankr. W.D. Pa. 2004) (only portion of judicial lien which impaired debtor's exemption could be avoided); *In re Cronkhite*, 290 B.R. 181 (Bankr. D. Mass. 2003) (debtor could not avoid lien on former husband's share of property she received in divorce). Statutory liens, such as tax liens, are not avoidable under this section. *See, e.g.,* Wis. Stat. § 49.854 (liens for public support payments).

B. **Security Interest vs. Judicial Lien.** Cases decided before *Farrey v. Sanderfoot,* 500 U.S. 291, 111 S. Ct. 1825 (1991), often held that if the divorce decree creating the lien which attaches to property awarded to one spouse was entered by agreement of the parties, the lien meets the definition of security interest under 11 U.S.C. § 101. Thus, the resulting lien, incorporated in the judgment of dissolution, cannot be avoided. *See, e.g., Matter of Rosen*, 34 B.R. 648 (Bankr. E.D. Wis. 1983); *See also, In re Thompson,* 240 B.R. 776 (B.A.P. 10th Cir. 1999); *Naqvi v. Fisher,* 192 B.R. 591 (D. N.H. 1995) (same result after *Sanderfoot*). However, a lien arising under decree which incorporates a settlement agreement derives its validity from the decree and is more appropriately defined as a judicial lien. *See In re Huskey,* 183 B.R. 218 (Bankr. S.D. Cal. 1995); *In re Wells,* 139 B.R. 255 (Bankr. D. N.M. 1992).

C. **"Fixing" of Judicial Lien.** A lien on exempt property awarded one spouse in a contested divorce decree in favor of the other spouse cannot be avoided, provided the lien had attached before the debtor received the asset. *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S. Ct. 1825 (1991); *See also, In re White*, 408 B.R. 677 (Bankr. S.D. Tex. 2009) (debtor could not avoid lien, even though unperfected, because he acquired the property subject to the lien); *In re Ashcraft*, 415 B.R. 428 (Bankr. D. Idaho 2008) (lien attached before divorce and was not avoidable); *In re Levi*, 183 B.R. 468 (Bankr. N.D. Tex. 1995) (lien cannot be avoided on former community property since the lien and former spouse's sole ownership arise at the same time); *In re Buffington*, 167 B.R. 833 (Bankr. E.D. Tex. 1994) (spouse's interests were "reordered" under Texas law, and lienholder/spouse was entitled to have stay lifted to foreclose only on the one half community property interest that she conveyed). If the debtor owned the property prior to the divorce and the nondebtor spouse did not acquire an interest in the property during marriage, and the court imposed a lien to effectuate a property division, the lien is avoidable. *In re Parrish*, 144 B.R. 349 (Bankr. W.D. Tex. 1992), aff'd, 7 F.3d 76 (5th Cir. 1993) (lien imposed on debtor's separate property at divorce to reimburse community was avoidable). *Cf. In re Stoneking*, 225 B.R. 690 (B.A.P. 9th Cir. 1998) (debtor held community property before lien attached, so lien avoidable). *But cf. In re Farrar*, 219 B.R. 48 (Bankr. D. Vt. 1998) (lien not avoidable because under state law debtor's ownership of homestead was interrupted by divorce, which swept every asset of both parties into a marital estate).

D. **Pre-Existing Interest.** If the nondebtor, lienholder spouse had an interest in the property awarded to the debtor in the dissolution decree subject to the lien, the

debtor would not have owned the property free of the lien, and the lien will be unavoidable. *Farrey v. Sanderfoot, supra.* One court found that under Indiana law, the fact that premarriage property is still subject to division was sufficient to find that the debtor's former spouse had a pre-existing interest before the lien attached, making the lien unavoidable. *In re Haynes*, 157 B.R. 646 (Bankr. S.D. Ind. 1992). *See also, In re Brasslett*, 233 B.R. 177 (Bankr. D. Me. 1999); *In re Byler*, 160 B.R. 178 (Bankr. N.D. Okla. 1993); *In re Yerrington*, 144 B.R. 96 (B.A.P. 9th Cir. 1992), aff'd, 19 F.3d 32 (9th Cir. 1994); *In re Simons*, 193 B.R. 48 (Bankr. W.D. Okla. 1996) (for lien to be avoidable, debtor must hold interest in newly created estate prior to the fixing of the lien); *In re Warfield*, 157 B.R. 651 (Bankr. S.D. Ind. 1993) (*Sanderfoot* rationale also applied to pension plans); *In re Fischer*, 129 B.R. 285 (Bankr. M.D. Fla. 1991) (under facts of that case, court was not imposing a judicial lien at divorce but was recognizing pre-existing equitable lien). A lien on former community property is similarly unavoidable. *In re Catli*, 999 F.2d 1405 (9th Cir. 1993); *In re Finch*, 130 B.R. 753 (S.D. Tex. 1991); *In re Norton*, 180 B.R. 168 (Bankr. E.D. Tex. 1995); *cf. In re Donovan*, 137 B.R. 547 (Bankr. S.D. Fla. 1992) (debtor could not avoid lien on interest in property she received from former husband subject to lien of former husband's attorney).

Query: What if the judgment ordered one party to execute a mortgage as a condition to being awarded the property after a contested trial? *See In re Haynes,* 157 B.R. 646 (Bankr. S.D. Ind. 1992); *In re Shestko-Montiel,* 125 B.R. 801 (Bankr. D. Ariz. 1991) (execution of a mortgage under threat of contempt would be nonconsensual and would be a judicial lien). What if the spouse awarded the asset was given a choice of signing the mortgage or having the property sold immediately?

E. **Postpetition Obligation.** Decree that places timing of property division after date of filing can be treated as a postpetition obligation and not discharged. *In re Montgomery,* 128 B.R. 780, 782 (Bankr. W.D. Mo. 1991) (citing *Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990)) (debtor's former spouse also had unavoidable lien for property division). Sanctions for prepetition conduct not determined by state court until after filing may still be a prepetition obligation. *In re Papi*, 427 B.R. 457 (Bankr. N.D. Ill. 2010).

F. **Impairment of Interest.** In *In re Reinders*, 138 B.R. 937 (Bankr. N.D. Iowa 1992), the court found that the prepetition order of the divorce court that the debtor's house be sold at a later date and the proceeds paid to the debtor's former husband's parents extinguished the debtor's homestead exemption, and their lien could not be avoided. *Cf. In re Miller*, 299 F.3d 183 (3d Cir. 2002) (only one half of mortgage lien was allocable to debtor for purposes of determining whether lien impaired exemption); *In re Lehman*, 223 B.R. 32 (Bankr. N.D. Ga. 1998), *aff'd*, 205 F.3d 1255 (11th Cir. 2000) (calculating extent to which judgment lien impaired debtor's homestead exemption in property co-owned with nondebtor); *In re Levinson*, 372 B.R. 582 (Bankr. E.D. N.Y. 2007), *aff'd*, 395 B.R. 554 (E.D.N.Y. 2008) (entireties property owned with nonfiling spouse had to be valued at 100% to determine whether exemption was impaired because debtor owned undivided 100% of property).

G. **BAPCPA Protections.** The Bankruptcy Reform Act of 1994, Pub. L. No. 134-394 (effective for cases filed after October 22, 1994), modified 11 U.S.C. § 522(f)(1) to provide that a judicial lien securing a debt for alimony, maintenance, or support cannot be avoided. The Act also established a formula for determining whether the debtor's exemption is impaired. 11 U.S.C. § 522(f)(2).

H. **Tenancy by the Entireties Property.** State law must be consulted to determine the debtor's interest in tenancy by the entireties property in order to determine whether the judicial lien is subject to avoidance under 11 U.S.C. § 522(f). This issue may arise during a continuing marriage when the lien is unrelated to a divorce. See *In re Uttermohlen*, 506 B.R. 142 (M.D. Fla. 2012) (joint tax refund of debtor and nondebtor spouse could be exempted by husband where there were no joint creditors and only debtor had earnings; evidence insufficient to show debtor and spouse did not intend to own as tenants by the entireties); *In re Naples*, 521 B.R. 715 (Bankr. W.D. N.Y. 2014) (valuation of entireties property reduced by nonfiling spouse's interest); *In re Yotis*, 518 B.R. 481 (Bankr. N.D. Ill. 2014) (lien could be avoided as to property currently held as tenants by the entireties, but avoidance did not prevent attachment if debtor acquired full interest in the future); *In re Tramer*, 476 B.R. 217 (Bankr. E.D. Va. 2011) (lien avoidance denied because lien did not attach to entireties property); *In re Pierre*, 468 B.R. 419 (Bankr. M.D. Fla. 2012) (lien avoidance not allowed when entireties co-owner is not also a debtor); *In re Heaney*, 453 B.R. 42 (Bankr. E.D. N.Y. 2011) (full value of property used for debtor's exemption in determining avoidable amount); *In re Erdmann*, 446 B.R. 861 (Bankr. N.D. Ill. 2011) (since one spouse did not qualify for discharge, one owner of tenancy by the entireties property was not allowed to strip lien as to a partial interest); *In re Coley*, 437 B.R. 779 (Bankr. E.D. Pa. 2010) (value of property divided in half to determine how much of lien could be avoided).

XVI. CLAIMS

A. **Property Division Claim of Spouse or Former Spouse.** The nondebtor former spouse of the debtor who is subject to an economic obligation in a decree of dissolution has a claim in the debtor's bankruptcy estate, and the debtor's spouse may have a claim for property division if division has not taken place. *See* Bankruptcy Rule 3001, *et seq.; Perlow v. Perlow*, 128 B.R. 412 (E.D. N.C. 1991) (nondebtor spouse had a general unsecured claim for property division; right to specific property was cut off even though the property was exempt and revested in the debtor); *In re Rul-Lan*, 186 B.R. 938 (Bankr. W.D. Mo. 1995) (monetary award to debtor's spouse arose prepetition, even though divorce judgment was entered postpetition, because it was to compensate the spouse for share of assets squandered by debtor prepetition); *In re Briglevich*, 147 B.R. 1015 (Bankr. N.D. Ga. 1992) (creditors' interests in the debtor's bankruptcy estate superceded nondebtor spouse's interest in property division; stay lifted to allow debtor's spouse to return to state court to have amount of her claim determined). *But see, In re Compagnone*, 239 B.R. 841 (Bankr. D. Mass. 1999) (no claim until final judgment); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991) (nondebtor's equitable interest in assets on account of pending divorce was not property of estate and she had no "claim,"

therefore, the value of her interest was nondischargeable); *In re Peterson*, 133 B.R. 508 (Bankr. W.D. Mo. 1991) (proceeds from sale of a marital asset were in constructive trust and not part of debtor's estate, so nondebtor spouse's interest was not a dischargeable "claim"). *Cf. In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (all of former wife's claims subordinated because of her conduct). *See supra* regarding property of the bankruptcy estate.

B. **Failure to File and Late Filed Claims.** Failure to file a claim means the creditor will receive no distribution from the bankruptcy estate, but the creditor may be able to collect from other property if the debt is nondischargeable. *See In re Ginzl*, 430 B.R. 702 (Bankr. M.D. Fla. 2010). *But cf. In re Phillips*, 372 B.R. 97 (Bankr. S.D. Fla. 2007) (former wife's adversary complaint was valid informal proof of claim in the amount of dissolution debt owed by debtor); *In re Montgomery*, 305 B.R. 721 (Bankr. W.D. Mo. 2004) (other pleadings in case construed as "informal proof of claim"; standards described). Waiver of personal liability of the debtor does not preclude the creditor spouse from filing a claim in the estate. *In re McFarland*, 126 B.R. 885 (Bankr. S.D. Ohio 1991). If a nondischargeable claim is not filed in a chapter 13, the creditor may have to wait until the plan is complete before collecting. The debtor's former spouse in *In re Phillips*, 175 B.R. 901 (Bankr. E.D. Tex. 1994), was bound by terms of confirmed chapter 11 plan on claims based on prepetition conduct, even though divorce was commenced postpetition, and she failed to file a claim. Excusable neglect standard applies only in chapter 11. *Jones v. Arross,* 9 F.3d 79 (10th Cir. 1993). Creditor should file a claim in any asset case.

C. **Obligations to Pay Joint Debts of Former Spouses.** Former spouse may have a claim for payment of joint debt that the debtor was ordered to pay. A claim may be filed on behalf of a creditor. Bankr. Rules 3003(c)(1), 3004; *see also, In re Ludwig*, 502 B.R. 466 (Bankr. W.D. Va. 2013) (no indication obligation to pay joint debts was for support; claim of former spouse denied priority); *In re Cooper*, 83 B.R. 544 (Bankr. C.D. Ill. 1988) (former wife of debtor was subrogated for nondischargeability but not priority status of taxing authority for payment of tax that debtor was ordered to pay). In *In re Spirtos*, 154 B.R. 550 (B.A.P. 9th Cir. 1993), aff'd, 56 F.3d 1007 (9th Cir. 1995), the debtor was obligated under the marital settlement agreement to pay one half of a judgment against her former husband. The claim in her estate was enforceable even though the former husband had breached other provisions in the agreement.

If the debtor is obligated to pay a joint debt, but the divorce decree does not contain an obligation to pay the spouse, the claim may not be enforceable. *See supra* regarding hold harmless provisions.

D. **Reaffirmation Agreements.** An agreement to reaffirm a divorce obligation cannot be made before bankruptcy. *In re Adkins/Cantrell*, 151 B.R. 458 (Bankr. M.D. Tenn. 1992). Any such agreement must comply with statutory requirements for reaffirmation agreements. 11 U.S.C. § 524(c),(d); *In re Ellis*, 103 B.R. 977 (Bankr. N.D. Ill. 1989).

E. **Future Support.** Right to unmatured future support is not a claim. 11 U.S.C. § 502(b)(5); *In re Bradley*, 185 B.R. 7 (Bankr. W.D. N.Y. 1995); *In re Kelly*, 169 B.R. 721 (Bankr. D. Kan. 1994); *In re Benefield*, 102 B.R. 157 (Bankr. E.D. Ark. 1989). *But see, In re Cox,* 200 B.R. 706 (Bankr. N.D. Ga. 1996) (lien securing unmatured support passed through bankruptcy).

F. **Government Claims.** The Bankruptcy Reform Act of 1994, applicable to cases filed after October 22, 1994, amended § 502(b) to provide that claims of governmental units, including support claims, are timely if filed within 180 days of filing or such later time that the Rules provide. For cases filed on or after October 17, 2005, a government claim related to support may be classified as a DSO and as such is entitled to priority and exception from discharge. *See In re Rivera*, 511 B.R. 643 (B.A.P. 9th Cir. 2014) (support for incarcerated minor son was DSO). If a plan does not provide for full payment of a government DSO, the applicable commitment period is five years. 11 U.S.C. § 1322(a)(4). *See supra* regarding repayment of wrongfully received government benefits.

G. **Child Support Creditors.** Child support creditors or their representatives can appear "without charge" and without meeting local rules for attorney appearances as long as a form is filed showing information about the debt. AO Form B281. Adversary proceedings and motions for relief from the stay can be filed without fee by child support creditors. Appendix to 28 U.S.C. § 1930(6), (20). It appears that other proceedings may be filed without fee by child support creditors, even if unrelated to child support. *See* Official Form 17 Notice of Appeal.

H. **Priority Claims.** Pre-BAPCPA 11 U.S.C. § 507(a)(7) granted priority status to claims for debts to a spouse, former spouse, or child of the debtor for support debts, unless the debt was assigned to another entity. *See, e.g., In re Chang*, 163 F.3d 1138 (9th Cir. 1998) (priority status for debtor's share of GAL fees and other professional expenses incurred in connection with custody dispute were priority); *In re Ludwig*, 502 B.R. 466 (Bankr. W.D. Va. 2013) (no indication of support purpose; former spouse's claim denied priority); *In re Fisette*, 459 B.R. 898 (Bankr. D. S.C. 2011) (DSO claim made individual chapter 11 plan unfeasible); *In re Clark*, 441 B.R. 752 (Bankr. M.D. N.C. 2011) (claimant has burden of proof as to priority; burden not met); *In re Foster*, 292 B.R 221 (Bankr. M.D. Fla. 2003) (former spouse's attorney's fees owed by debtor were priority); *In re Pearce*, 245 B.R. 578 (Bankr. S.D. Ill. 2000) (plumbing and tax bills were nonpriority property division; back support payments were priority support); *In re Polishuk*, 243 B.R. 408 (Bankr. N.D. Okla. 1999) (hold harmless on credit card debt was priority claim); *In re Crosby*, 229 B.R. 679 (Bankr. E.D. Va. 1998) (post-secondary educational expenses were priority child support). *But cf. In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (all former wife's claims, including priority child support claims, equitably subordinated to other creditors because of her wrongful conduct); *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010) (ex-husband's reimbursement claim for overpayment not priority because he was not father of wife's children); *In re Pfalzgraf*, 236 B.R. 390 (Bankr. E.D. Wis. 1999) (claims for child support owed by debtor's spouse were community claims but were not

entitled to priority); *In re Lutzke*, 223 B.R. 552 (Bankr. D. Or. 1998) (debtor's former husband's claim for overpayment of child support not entitled to priority because amount not necessary for children's support). *See also, In re Knott*, 482 B.R. 852 (Bankr. N.D. Ga. 2012) (overpayment of child support while debtor's former husband while former husband had custody was DSO priority claim). There is conflicting authority on the classification of overpayment of support debts; *see supra* regarding DSO classification.

BAPCPA made DSO claims first priority, subject to the trustee's expenses in recovering funds to pay these claims. Individual DSO claimants' claims supercede government DSO claims, and government DSO claims are not necessarily paid in full in a chapter 13 plan under certain circumstances. *See* 11 U.S.C. §§ 507(a)(1), 1322(a)(4). *See also, In re Smith*, 398 B.R. 715 (B.A.P. 1st Cir. 2008), *aff'd*, 586 F.3d 69 (1st Cir. 2009) (sanction for failure to make support payments was not DSO and was not entitled to priority status); *In re Siegel*, 414 B.R. 79 (Bankr. E.D. N.C. 2009) (hold harmless provision to pay home equity line of credit was not DSO).

I. **Community Claims.** Any creditor entitled under state law to recover any community property that is property of the estate meets the definition of a "community claim," whether or not such property exists. 11 U.S.C. § 101(7). For example, a premarriage creditor of a nondebtor spouse is entitled under Wisconsin law to recover marital property that would have been the property of the nondebtor but for the marriage. Wis. Stat. § 766.55(c)1; *see also, In re Monroe*, 282 B.R. 219 (Bankr. D. Ariz. 2002) (tort committed by nondebtor husband resulted in community claim in debtor wife's chapter 13 case, applying Arizona law for tort recovery). As such property, if it existed, could be property of the estate, that creditor has a community claim and is entitled to notice and to file a claim in the bankruptcy of the debtor spouse. 11 U.S.C. § 342(a); *cf. In re Pfalzgraf*, 236 B.R. 390 (Bankr. E.D. Wis. 1999) (claims for child support owed by debtor's spouse were community claims but were not entitled to priority); *In re Sweitzer*, 111 B.R. 792 (Bankr. W.D. Wis. 1990) (in community property states, creditors of nondebtor spouse must receive such notice as is appropriate of bankruptcy case; appropriate notice is provided when creditors of nondebtor spouse receive notice equivalent to that provided to creditors of debtor spouse).

J. **Imputed Culpability for Nondischargeable Debt.** Unless spouses are both involved in a business activity, fraud by one spouse is not imputed to the other spouse, but active participation in a fraud may be determined on a case by case basis. *See, e.g., In re Carp*, 340 F.3d 15 (1st Cir. 2003); *In re Daviscourt*, 353 B.R. 674 (B.A.P. 10th Cir. 2006); *In re Sammons*, 508 B.R. 426 (Bankr. D. Alaska 2014); *In re Budnick*, 469 B.R. 158 (Bankr. D. Conn. 2012); *In re Williams*, 466 B.R. 95 (Bankr. S.D. Tex. 2011); *In re Treadwell*, 459 B.R. 394 (Bankr. W.D. Mo. 2011); *In re Borshow*, 454 B.R. 374 (Bankr. W.D. Tex. 2011); *In re Rodenbaugh*, 431 B.R. 473 (Bankr. E.D. Mo. 2010); *In re Crumley*, 428 B.R. 349 (Bankr. N.D. Tex. 2010); *In re Lewis*, 424 B.R. 455 (Bankr. E.D. Mo. 2010); *In re Cooper*, 399 B.R. 637 (Bankr. E.D. Ark. 2009); *In re Antonious*, 358 B.R. 172 (Bankr. E.D. Pa. 2006). *See also, In re Shart*, 505 B.R. 13 (Bankr. C.D. Cal. 2014) (discussing history of

imputed nondischargeability for bankruptcy purposes and refusing to find wife's debt nondischargeable when she became business partner after fraud occurred).

XVII. DISMISSAL UNDER 11 U.S.C. § 707(b) OR FOR BAD FAITH

A. **11 U.S.C. § 707(b).** For cases to which BAPCPA applies, a debtor's spouse's income is disclosed, but there may be a "marital adjustment" for such income that is not contributed for household expenses of the debtor or dependents. 11 U.S.C. §§ 101(10A), 707(b)(2). It may also be a factor in determining whether the chapter 7 filing is an abuse of the bankruptcy code under the totality of the circumstances test of 11 U.S.C. § 707(b)(3). *See In re Schumacher*, 495 B.R. 735 (Bankr. W.D. Tex. 2013) (court ordered obligation to pay children's college related expenses reasonable in sec. 707(b)(3) context, and filing was not abusive); *Bankruptcy Administrator v. Gregory*, 471 B.R. 823 (Bankr. E. D. N.C. 2012) (money spent by nonfiling spouse for repairs on former residence to ready it for sale were not counted as debtor's income); *In re Sturm*, 483 B.R. 312 (Bankr. N.D. Ohio 2012) (debtor could not claim standard mortgage deduction when payment was made by nonfiling spouse for house titled in his name; chapter 7 presumptively abusive); *In re Martellini*, 482 B.R. 537 (Bankr. D. S.C. 2012) (nonfiling spouse's contribution to unreasonably lavish lifestyle constituted abuse); *In re Rable*, 445 B.R. 826 (Bankr. N.D. Ohio 2011) (nondebtor's payments on mortgages added to debtor's CMI and resulted in presumption of abuse); *In re Stampley*, 437 B.R. 825 (Bankr. E.D. Mich. 2010) (nonfiling spouse allocated expenses in proportion to debtor's and nondebtor's relative incomes); *In re Boatright*, 414 B.R. 526 (Bankr. W.D. Mo. 2009) (case not dismissed because nondebtor allocated his income to a rap music venture rather than household and such allocation was out of debtor's control); *In re Taylor*, 417 B.R. 762 (Bankr. N.D. Ohio 2009) (debtor's desire to discharge debt resulting from divorce, and new wife's mortgage, were not "special circumstances"); *In re Harter*, 397 B.R. 860 (Bankr. N.D. Ohio 2008) (finding debtor's reliance on nondebtor spouse's substantial income warranted dismissal of case); *In re Crego*, 387 B.R. 225 (Bankr. E.D. Wis. 2008) (expenses incurred by debtors maintaining separate households pending divorce constituted "special circumstances" under § 707(b)(2)(B)(I)); *In re Castle*, 362 B.R. 846 (Bankr. N.D. Ohio 2006) (fact that debtor/wife's child support was included in income for ch. 7 means test, but was excluded under ch. 13 means test, with effect that creditors would receive nothing under ch. 13 plan, did not lead to "absurd result" or "special circumstances" that would prevent dismissal of ch. 7 case under § 707(b)); *In re Welch*, 347 B.R. 247 (Bankr. W.D. Mich. 2006) (pre-BAPCPA standard of "substantial abuse" analyzed with respect to nonfiling spouse's income; collecting cases).

In determining household size for means test, recent case law has tended to apply an economic approach rather than "heads on beds" or "census" approach. *See, e.g., Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012); *In re Morrison*, 443 B.R. 378 (Bankr. M.D. N.C. 2011).

B. **Bad Faith Dismissal.** Although BAPCPA changed the standard of "substantial abuse" to "abuse" under 11 U.S.C. § 707(b)(3), cases decided under the earlier version of the statute may be instructive in determining whether abuse exists in a chapter 7 case. Cases filed under other chapters may also be subject to dismissal on the grounds of bad faith, or may result in denial of a discharge or an exception to the discharge of a debt on account of the debtor's conduct. *See In re Mickler*, 344 B.R. 817 (W.D. Ky. 2006) (chapter 11 filed in bad faith for purpose of avoiding obligations to former spouse); *In re Schumacher*, 495 B.R. 735 (Bankr. W.D. Tex. 2013) (court ordered obligation to pay children's college related expenses reasonable in sec. 707(b)(3) context, and filing was not abusive; absence of legal obligation might render such payments abusive); *In re Loper*, 447 B.R. 466 (Bankr. D. S.C. 2011) (reinstatement of chapter 13 case not warranted because of debtor's use of bankruptcy filings to thwart enforcement of divorce obligations); *In re Uzaldin*, 418 B.R. 166 (Bankr. E.D. Va. 2009) (OTSC issued why order of confirmation of chapter 13 plan should not be vacated or case dismissed for use of bankruptcy process to avoid equitable distribution award to former spouse); *In re Urban*, 432 B.R. 302 (Bankr. D. Wyo. 2010) (debtor could not deduct payments of child support for children of nonfiling spouse as expense on means test because she was not legally obligated to support them); *In re Laine*, 383 B.R. 166 (Bankr. D. Kan. 2008) (chapter 7 filed solely to frustrate attempts of former spouse to enforce divorce decree); *In re Mondore*, 326 B.R. 214 (Bankr. W.D. N.Y. 2005) (debtor denied discharge for omitting assets on schedules he had liquidated to maintain in matrimonial action; court cautioned debtors to be especially diligent in disclosing assets when there is an "ex" involved); *Matter of Chadwick*, 296 B.R. 876 (Bankr. S.D. Ga. 2003) (chapter 11 case dismissed for bad faith in that only purpose was to avoid divorce obligation). *Cf. In re Traub*, 140 B.R. 286 (Bankr. D. N.M. 1992) (obligation to former spouse was consumer debt for purpose of motion to dismiss under § 707(b)).

C. **11 U.S.C. § 707(c) Dismissal by Victim of the Debtor's Criminal Act.**

(1) In this subsection –

(A) the term "crime of violence" has the meaning given such term in section 16 of title 18; and

(B) the term "drug trafficking crime" has the meaning given such term in section 924(c)(2) of title 18.

(2) Except as provided in paragraph (3), after notice and a hearing, the court, on a motion by the victim of a crime of violence or a drug trafficking crime, may when it is in the best interest of the victim dismiss a voluntary case filed under this chapter by a debtor who is an individual if such individual was convicted of such crime.

> (3) The court may not dismiss a case under paragraph (2) if the debtor establishes by a preponderance of the evidence that the filing of a case under this chapter is necessary to satisfy a claim for a domestic support obligation.

XVIII. ETHICS

Ethical pitfalls in representing both spouses when one may have a claim in bankruptcy against the other is demonstrated in *In re Vann*, 136 B.R. 863 (D. Colo. 1992), *aff'd*, 986 F.2d 1431 (10th Cir. 1993). *See also, In re EWC, Inc.*, 138 B.R. 276 (Bankr. W.D. Okla. 1992) (concurrent representation of debtor in bankruptcy and debtor's sole shareholder in divorce is not per se conflict, but it warranted setting aside appointment and denial of all fees); *Mathias v. Mathias*, 525 N.W.2d 81 (Wis. App. 1994) (attorney who represented spouses in estate planning was per se disqualified from representing wife in divorce); *Williams v. Waldman*, 836 P.2d 614 (Nev. 1992) (attorney/client relationship with wife was established by husband/attorney who drafted documents in divorce).

An attorney may also have irreconcilable conflicts when representing spouses or former spouses whose interests are in conflict with the trustee. *In In re Morey*, 416 B.R. 364 (Bankr. D. Mass. 2009), the debtor had transferred real estate to her former husband pursuant to a prepetition marital settlement agreement, and the trustee sought to avoid the transfer. The debtor's attorney was engaged to represent the former husband, and the debtor waived any conflict. However, the court disqualified the attorney and held that the attorney could not properly represent the debtor in her duty to cooperate with the trustee and also represent the target of the trustee's avoidance action.

An attorney always has ethical duties with respect to the court and opposing counsel. In *In re Hall-Walker*, 445 B.R. 873 (Bankr. N.D. Ill. 2011), the debtor was subject to a contempt action in state court while her chapter 13 case was pending. The state court action was a violation of the automatic stay, and the attorneys for the former spouse were subject to sanctions. The debtor's attorney negotiated a settlement, and the debtor approved it, but she changed her mind the following day. The court enforced the oral agreement between attorneys and did not allow litigation of the matter.

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