The Intersection of Bankruptcy and Family Law

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I. Introduction.

Financial difficulties are commonplace in divorce. It is not unusual for the financial stresses of divorce to lead to bankruptcy for one or both parties, or for insolvency and the need for bankruptcy relief to be the precursor to divorce. Empirical studies of the reasons that individuals file for bankruptcy relief demonstrate that a frequent contributing cause, if not the primary cause, is related to a recent or anticipated divorce or other domestic breakup. *See*, *i.e.*, Sullivan, Warren and Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (1989). The financial difficulties caused by the breakdown of a family relationship contributed to the National Bankruptcy Review Commission's observation: "For generations, Americans have experienced divorces, illnesses and uninsured medical costs, and job layoffs. However, never before have so many families faced these setbacks with so much consumer debt." *Report of the National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Year*s (October 20, 1997). The prevalence of divorce and its related issues in conjunction with bankruptcies filed by individuals is seen in the multitude of motions and adversary proceedings filed in bankruptcy courts, raising such issues as how the automatic stay triggered by a bankruptcy filing affects pending divorce and other domestic relations proceedings in state courts; whether the debts related to a marital dissolution are dischargeable in a bankruptcy case; whether and how a debtor may pay some or all of those debts, including support obligations, in an individual reorganization bankruptcy case; and how professional fees incurred in the divorce proceedings are affected by the bankruptcy. Moreover, broad jurisdictional issues arise, including questions of shared and exclusive subject matter jurisdiction between the state and bankruptcy courts.

On April 20,2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The 2005 Act made many changes to bankruptcy law, one of the most significant affecting dischargeability of debts and the way family court practitioners should approach property settlements. Occasionally, family law (particularly divorce or separation) issues intersect with bankruptcy laws, sometimes creating competing public policy considerations and legal conflicts that can provide, as the case may be, nondischargeable and enforceable obligations or a debtor escaping liability for a claim related to a co-parent or former spouse.

II. The Automatic Stay.

Once a bankruptcy petition is filed, an automatic stay is triggered prohibiting garnishment or collection efforts by creditors. Acts taken in family court that violate the stay are void (or, at least voidable). *See 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"). What can and cannot be done during divorce proceedings once a bankruptcy is filed by a spouse is governed by Section 362 of the Bankruptcy Code. 11 U.S.C. § 362.

Specifically, Section 362(a) lists actions that are prohibited during the pendency of a bankruptcy case. Exceptions to the automatic stay are listed in subsection (b) of Section 362 of the Bankruptcy Code. 11 U.S.C. § 362(b). Before proceeding in any action subject to the automatic stay, the party first would have to seek an order for relief from the automatic stay. Pre-BAPCPA, certain actions were excepted from the automatic stay, including the commencement or continuation of actions for establishment of paternity, establishment or modification of orders for alimony, maintenance, or child support, and collection of alimony, maintenance, or support from property other than property of the estate. Under the 2005 Act, division of property that is property of the bankruptcy estate is stayed.

The following are not stayed: actions for establishment and modification of domestic support obligations (362(b)(2)(A)(ii)); actions concerning child custody or visitation (362(b)(2)(A)(iii)); actions for divorce (except for the division of property) (362(b)(2)(A)(iv)); actions regarding domestic violence (362(b)(2)(A)(v)); actions for collection of domestic support obligations from property that is not property of the estate(362(b)(2)(B)); and withholding of income that is property of the estate for the payment of domestic support (362(b)(2)(C)).

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, and requires modification of the stay. 11 U.S.C. § 362(b)(2)(A)(iv). 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).

B. Exceptions.

Relating to divorce proceedings, as codified in Section 362(b) of the bankruptcy code, the automatic stay does not apply to:

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

(2) under subsection (a)-

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

(I) for the establishment of paternity;

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

(iii) concerning child custody or visitation;

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

(v) regarding domestic violence;

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

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

administrative order or a statute;

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

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

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

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

* * *

(9) under subsection (a), of-

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

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

(C) a demand for tax returns; or

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

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

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other

plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer-

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

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title; but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title

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). 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 nonpayment of child support).

D. Duration.

The stay continues until property is no longer property of the estate, until the case is closed or dismissed, or the debtor is discharged. 11 U.S.C. § 362(c). What is and is not property of the bankruptcy estate interfaces with the division of marital property. The difficulties that may be presented by this interface are illustrated by the following: Suppose the spouses own property held under state law as tenants by entirety or as community property. To what extent does that property come into the bankruptcy estate and does the

stay apply to that property? The broad reach of § 541(a) brings the debtor's interest in such property into the bankruptcy estate. Therefore, any effort by the nonbankruptcy party to divide or obtain that property is covered by the automatic stay. Relief from the stay should be sought before proceeding in state court.

E. Relief from Stay.

The 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 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).

Legislative history for § 362(d)(1) indicates that cause may be found when the moving party seeks "to permit an action to proceed to completion in another tribunal," or where there is a "lack of any connection with or interference with the pending bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess 343 to 344 (1977). An example found in the House Report was a divorce or child custody proceeding in state court and that justification has now been specifically stated in the 2005 Amendments. In matters involving domestic relations, it may take little showing of "cause," with the bankruptcy court quickly granting the requested relief. For example, in *Allen v. Allen*, 275 F.3d 1160, 1163, Bankr. L. Rep. (CCH) P 78574 (9th Cir. 2002) (quoting H.R. Rep. No. 103-835, at 54 (1994)), the court held that the debtor's former wife did not have to make a showing of good cause to obtain some relief from the stay when she was seeking relief to permit her to pursue a modification of her maintenance award in the state court. Under pre-2005 § 362(b)(2)(A)(ii), this type of state-court proceeding was exempt from the automatic stay, and the bankruptcy court had failed to evaluate the requested relief under that exception. The appellate court pointed out that this exception from the stay was added in the 1994 amendments to the Code, "to provide greater protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of a debtor in bankruptcy." *Allen* at 1163. As indicated previously, there may no longer be a need for formal relief from the stay for most domestic relations matters, in light of the 2005 Amendments to § 362(b)(2).

The 2005 Amendments amended § 362(b)(2) to specifically provide for an exception from the stay to permit commencement or continuation of civil actions "for the dissolution of a marriage," with the stay still applying "to the extent that such proceeding seeks to determine the division of property that is property of the estate." Stay relief, therefore, is

clearly no longer needed simply for the purpose of obtaining a divorce, but is needed if a property division is necessary.

Since family law matters have historically been reserved to the state courts, "[i]t is appropriate for bankruptcy courts to avoid invasions into family law matters 'out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.'" *In re Mac Donald*, 755 F.2d 715, 717, Bankr. L. Rep. (CCH) P 70312 (9th Cir. 1985) (quoting *In re Graham*, 14 B.R. 246, 248 (Bankr. W.D. Ky. 1981)); *see, e.g., In re Combs*, 435 B.R. 467 (Bankr. E.D. Mich. 2010) (stay relief granted to allow state court to determine entry of domestic relations order concerning share of debtor's pension benefits). This deference is easily justified for the dissolution of a marriage, as well as for custody and support determinations, but as we will see in other discussions about property of the bankruptcy estate, this deference to state courts in deciding divisions of marital property may come into conflict with the bankruptcy court's jurisdiction over property of the bankruptcy estate. Even under the 2005 Amendments to § 362(b)(2), there still may need to be relief from the stay when property of the bankruptcy estate is involved, but cause may be shown in an appropriate case.

F. Actions in Violation of the Automatic Stay.

An action taken in violation of the automatic stay has consequences that may include damages, as well as lack of validity of the action taken. Whether the suspect action is void or voidable is a crucial question. If void, the result would generally be that the action was totally ineffective unless the automatic stay is subsequently annulled. If voidable, the result generally would be that the action is nevertheless effective unless the bankruptcy court subsequently rules otherwise. *See* Hon. Eugene R. Wedoff, Circuit Splits 2004, *A Discussion of Bankruptcy Issues Currently in Dispute Among the Courts of Appeals*, Norton Bankruptcy Law Adviser (Oct. 2004). The majority view is that such an action is void. *In re Soares*, 107 F.3d 969, 976, 37 Collier Bankr. Cas. 2d (MB) 1281, Bankr. L. Rep. (CCH) P 77333 (1st Cir. 1997); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994); *In re Graves*, 33 F.3d 242, 248 (3d Cir. 1994); *In re Schwartz*, 954 F.2d 569, 571, 22 Bankr. Ct. Dec. (CRR) 845, 26 Collier Bankr. Cas. 2d (MB) 649, Bankr. L. Rep. (CCH) P 74539, 92-1 U.S. Tax Cas. (CCH) P 50069, 69 A.F.T.R.2d 92-548 (9th Cir. 1992); *U.S. v. White*, 466 F.3d 1241, 47 Bankr. Ct. Dec. (CRR) 58, Bankr. L. Rep. (CCH) P 80741, 2006-2 U.S. Tax Cas. (CCH) P 50559, 98 A.F.T.R.2d 2006-7183 (11th Cir. 2006). The minority view is that such an action is merely voidable, although that result may depend upon the particular facts of the case and whether the purported violation of the automatic stay was a knowing *one. Matthews v. Rosene*, 739 F.2d 249, 252, Bankr. L. Rep. (CCH) P 69953 (7th Cir. 1984). If a creditor knowingly violated the automatic stay, that creditor may be subject to sanctions, and further may be liable to the

debtor or to the bankruptcy estate for damages under § 362(k).

The Fifth Circuit has consistently held actions taken in violation of the automatic stay voidable, reasoning that the bankruptcy court retains the right to retroactively lift the stay. See, e.g., *Chapman v. Bituminous Ins. Co.*, 345 F.3d 338, 344 (5th Cir. 2003).

III. Jurisdiction Over Property of the Estate and Spouses' Property.

A. Legal and Equitable Interests of Debtor.

Code § 541(a)(1) brings into the bankruptcy estate, subject to the exceptions or exclusions found in § 541(b) or (c), "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." Commencement is equivalent to the date of filing. Some examples, other than the obvious legal interests that a debtor may hold, of what this may include are: contingent interests; causes of action that the debtor may hold, whether a suit has been filed or not; accounts receivable and other debts owing to the debtor; contract rights; licenses; intellectual property rights; redemption rights; unmatured life and other insurance rights; some interests in trust property; tax benefits; and various tenancy interests such as tenancy by entirety. *See* Holleran *et.al*., Bankruptcy Code Manual § 541.1.9 (2007 ed).

B. Exclusions from Property of the Bankruptcy Estate.

Given the broad reach of Code § 541(a), most of the debtor's property interests come automatically into the bankruptcy estate immediately upon the filing of the case. Thereafter, certain property may be exempt from the estate, essentially revesting in the debtor if the exemption claim is valid and allowed. Code § 541(b) excludes certain property from property of the estate and, unlike exemptions, these exclusions never become property of the bankruptcy estate. If the debtor has no legal or equitable interest in certain property, § 541(b)(1) would exclude it as property over which the debtor "may exercise [power] solely for the benefit of an entity other than the debtor." Moreover, Code § 541(c)(2) excludes certain trust properties, such as spendthrift trusts and ERISA-qualified retirement plans, provided that there is a valid "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law." This exclusion may certainly benefit a former spouse or a child, if the debtor's actual beneficiary of those excluded assets is the recipient of support or other domestic relations obligations. In order to be an excluded spendthrift trust, the trust must be recognized under applicable state law. Not all states recognize such trusts. As to ERISA-qualified retirement plans, the Supreme Court held, in *Patterson v. Shumate*, 504 U.S. 753 (1992), that the phrase "applicable nonbankruptcy law" included federal as well as state law. Therefore, an

anti-alienation provision in an ERISA-qualified plan constitutes a restriction on transfer that is enforceable for purposes of § 541(c)(2).

C. Determining Spouses' Rights in Property.

The 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). Most bankruptcy courts, however, 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).

D. Marital Property.

There is a potential for conflicts between the concepts of property of the bankruptcy estate and marital property, especially since § 541(a) is so broad in its reach, broad enough to take into the bankruptcy estate some co-tenancy interests that may disturb the interests of the other co-tenant. For that property that does become part of the bankruptcy estate, the bankruptcy court's jurisdiction is also broad, often permitting the bankruptcy court to adjudicate rights of other parties not in bankruptcy. A good example, is Code § 363(h), which authorizes the bankruptcy court, under defined circumstances, to approve a sale of "both the [bankruptcy] estate's interest" as well as "the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety." Code § 363(l) has additional protections for those holding community property interests with the debtor or spouses, giving them a right to purchase the property.

A spouse or former spouse of a debtor in bankruptcy must exercise care to assure that the bankruptcy court is aware of the interests of the nondebtor, and must timely move for any relief, such as relief from the automatic stay, that would permit state court proceedings to continue. This caution is enhanced if the bankruptcy estate is one with significant assets in which the nondebtor spouse claims an interest. If the state domestic relations court has already begun to protect the spouse's interest, it may be possible for that spouse to contend that the debtor's interests have been restricted prior to the bankruptcy filing, for example, by creation of a constructive trust against the property. *Marital Property*, 9 Norton Bankr. L. & Prac. 3d § 175:32

E. Debtor's Property Rights During Pendency of Divorce.

The state court has jurisdiction over the 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).

F. Distribution of Property.

If a divorce 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). Also, the bankruptcy court may abstain in the interest of comity with state courts. 28 U.S.C. § 1334(c)(1). 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).

IV. Property of the Bankruptcy Estate of a Divorcing Debtor.

Upon the filing of a bankruptcy under any chapter of the Code, a bankruptcy estate is created, and § 541(a) describes what automatically comes into that estate, giving the bankruptcy court exclusive *in rem* jurisdiction over that property. 28 U.S.C. § 1334(e). It is a broad inclusion, with exceptions or exclusions found in § 541(b) and (c). Section 541's operative scheme may be summarized as follows: Any and all property rights of the debtor at the time of the commencement of the case become part of the estate, and remain property of the estate unless specifically removed from the estate. The fact that § 541(a) establishes federal law as to what comes into the bankruptcy estate does not mean that state law is unimportant. "Property interests are created and defined by state law." *Butner v. U.S.*, 440 U.S. 48, 55 (1979). The reality is that the bankruptcy court must look to applicable state law for its definitions of what constitutes the debtor's interest in certain kinds of property.

A. Determined as of the Date of Filing Bankruptcy.

Generally, the property of the estate for bankruptcy purposes is determined as of the date of filing bankruptcy. 11 U.S.C. § 541. Property of the estate is very broad and includes every type of legal and equitable interest that the debtor has in every type of property. It also includes community property of the debtor and the debtor's spouse that is under the sole, equal, or joint management and control of the debtor, or subject to a claim against the debtor or the debtor and his or her spouse.

B. Bankruptcy Estate.

The bankruptcy estate 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 creates two estates, which are usually administered together. 11 U.S.C. § 302. See *In re MortgageAmerica Corp*., 714 F.2d 1266, 1274 (5th Cir. 1983).

C. 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. 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). Hon. Margaret Dee McGarity, *The Intersection of Divorce and Bankruptcy*, 101515 ABI-CLE 459, October 15, 2015 (herein Judge McGarity, *Intersection of Divorce and Bankruptcy*).

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

D. 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*. *See also* Christopher Celentino, *Divorce and Bankruptcy: Spousal Support as Property of the Estate*, 28 Cal. Bankr. J. 542 (2006). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

E. 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. Judge McGarity, *Intersection of Divorce and Bankruptcy*.

F. Community Property.

Code § 541(a)(2) provides that the following comes into the bankruptcy estate:

> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is-
>
> (A) under the sole, equal, or joint management and control of the debtor; or
>
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

This section is supported by the definition of a "community claim" in Code § 101(7), as a "claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable." Therefore, whether only one of the community property owners or both of them file for bankruptcy relief, if that property is liable for a claim against either or both of them, and if the expansive control requirements of subsection (A) are met, the property comes into the debtor's bankruptcy estate and will be administered in the bankruptcy for the benefit of creditors. Of course, what is or is not community property is determined by the applicable state law, and it generally includes that property acquired during a marriage.

Obviously, this Code section reaches beyond the impact § 541(a) has on the other types of property, including other tenancy interests such as tenancy by entirety, to bring

into the bankruptcy estate property beyond the debtor's sole interest or control. A practical impact of this provision could be that the bankruptcy court might give relief from the automatic stay to permit a divorce proceeding to go forward but retain exclusive jurisdiction over the community property, thereby making it difficult, if not impossible, for the divorce court to deal with that property. *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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

G. Property Acquired Within 180 Days of Filing.

Although most property of the bankruptcy estate is determined as of the commencement of the bankruptcy case, § 541(a)(5), (6), and (7) describe some property acquired after the bankruptcy filing that comes automatically into the estate. Within 180 days of that filing, if the debtor acquires or becomes entitled to acquire an interest by "bequest, devise, or inheritance," or "as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree," or "as a beneficiary of a life insurance policy or a death benefit plan," those after-acquired interests belong to the bankruptcy estate, unless the debtor is otherwise entitled to exempt or exclude them.

H. 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). 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

I. Fractional Interests.

The bankruptcy trustee of a debtor owning a fractional interest in an asset can only sell the 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). Most community property of spouses is entirely in the bankruptcy estate of either spouse. 11 U.S.C. § 541(a)(2).

J. 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).

K. ERISA Benefits.

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).

V. 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. 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).

B. Homestead Exemption.

A debtor's right to claim a homestead exemption is generally determined by state law. *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, including Texas, proceeds of the sale of a homestead remain exempt, usually for a period of time before reinvestment. *In re Garcia*, 499 B.R. 506 (Bankr. N.D. Tex. 2013) (exemption in proceeds lost when not timely reinvested).

VI. Property Division vs. Support.

A. BAPCPA Provisions.

11 USC §523(a)(5) provides that "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 . . . for a domestic support obligation. . . ." 11 USC §101(14A) defines "domestic support obligation" as:

> 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.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*. In other words, domestic support obligations in the nature of support are not dischargeable. This applies regardless of how the agreement or court order designates the obligation. The courts will look at what the obligation actually is for to determine whether or not it is dischargeable. They are not bound by how the agreement or underlying order characterized it.

The more challenging element of Code § 523(a)(5)'s exception from discharge is the requirement that the obligation actually be "in the nature of alimony, maintenance or support." This remains true under both the preamended section and the amended section's reference to domestic support obligation. The latter term is one that requires in subsection (B) of the definition that it be in the "nature of alimony, maintenance, or support," and § 101(14A)'s definition adds to that "without regard to whether such debt is expressly so designated." All this addition seems to do is validate that judicial decisions under the former § 523(a)(5) were correct when they concluded that the labels put on the obligation by the parties did not control the actual nature of the obligation. *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (Case law construing former § 523(a)(5) is applied to determination of domestic support obligation.). *See also In re Phegley*, 443 B.R. 154, 157, 64 Collier Bankr. Cas. 2d (MB) 1672 (B.A.P. 8th Cir. 2011) (Amended § 523(a)(5) and (15) "did not change the standard of whether an obligation is in the nature of support.").

For example, if a state court orders one spouse to pay the other's attorney fees or mortgage payments, if the bankruptcy court determines that award is "in the nature of support," the obligation will not be discharged. Conversely, even if the state court order or

divorce agreement characterizes an obligation as "support," if the bankruptcy court determines it really is not "in the nature of support," the obligation will be discharged. Whether an obligation is "in the nature of support" is interpreted broadly by some courts to prevent the discharge of those obligations when inappropriate.

Thus, in most instances, child support or spousal support will not be discharged. This includes both arrears and future obligations. Obligations relating to the distribution of marital assets typically will be discharged. Attorney fees ordered to be paid by one spouse to another may or may not be discharged, depending on whether or not the bankruptcy court determines the obligation is "in the nature of support." This is a very fact-specific and case-specific inquiry. If the right to collect an alimony obligation has been assigned to another, the alimony obligation can be discharged in bankruptcy.

Under § 523(a)(5), instead of excepting from discharge child or spousal support, including debts in the nature of child or spousal support, Congress created and precisely defined a category of debt called "domestic support obligations,"which still are excluded from discharge. The 2005 Act excepts from discharge obligations that are owed to a spouse or former spouse; child or such child's parent, legal guardian, or responsible relative; or a governmental unit, that are in the nature of alimony, maintenance, or support of such spouse, former spouse, or child. The new law includes in the definition of "domestic support obligation"an element requiring that it be "owed and recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian or responsible relative; or a governmental unit." Also, to be excepted from discharge, the obligation must be "in the nature of alimony, maintenance or support." With the addition of the term "domestic support obligation"and the removal of the balancing test of 11 U.S.C. § 523(a)(15), the 2005 Act significantly changed the law relating to dischargeability of marital obligations. 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). 11 USC §523(a)(5) provides that "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 . . . for a domestic support obligation. . . ."

B. <u>Substance of the Obligation Controls</u>.

Beginning with the premise that federal law ultimately controls, the courts have consistently said such things as, while labels may be a factor in the determination of dischargeability, the bankruptcy court should principally look to the substance of the underlying agreement or other document rather than stop at the labels alone. *In re Brody*, 3 F.3d 35 (2d Cir. 1993); *In re Gianakas*, 917 F.2d 759, 20 Bankr. Ct. Dec. (CRR) 1861, 23 Collier

Bankr. Cas. 2d (MB) 1510, Bankr. L. Rep. (CCH) P 73666 (3d Cir. 1990). While the labels given by a state court are not controlling, they may be influential and support the other indicia of the obligation's true nature. The bankruptcy court should look at a range of factors, "including the language used by the divorce court and whether the award seems designed to assuage need, as discerned from the structure of the award and the financial circumstances of the recipients." *In re Werthen*, 329 F.3d 269, 273, Bankr. L. Rep. (CCH) P 78856 (1st Cir. 2003); Matter of Long, 794 F.2d 928, Bankr. L. Rep. (CCH) P 71212 (4th Cir. 1986) (a state court jury's labeling of an obligation as alimony was a significant factor); *In re Petty*, 333 B.R. 472 (Bankr. M.D. Fla. 2005) (The divorce judge's specific denial of the request for alimony was indicative of that judge's determination that no support was needed.).

The substance of the obligation is the predominate factor, even though the label may say "property settlement." *Matter of Benich*, 811 F.2d 943, Bankr. L. Rep. (CCH) P 71748 (5th Cir. 1987) (although labeled as property settlement, the bankruptcy court properly and fully examined the agreement to determine whether periodic payments to the former spouse actually constituted alimony or support).

While not called upon to retry a divorce, the bankruptcy court may be required to look to some extent at the circumstances behind what may or may not be labeled as a support obligation. *In re Diers*, 7 B.R. 18, 6 Bankr. Ct. Dec. (CRR) 983, 2 Collier Bankr. Cas. 2d (MB) 1330 (Bankr. S.D. Ohio 1980). But at the same time, the bankruptcy court's examination may be curtailed by specific factual findings that had been made by the domestic-relations court. In other words, preclusion concepts may bar the bankruptcy court from taking another look at facts that have been previously determined. Since the bankruptcy court is looking at the substance and purpose served by the obligation at issue, a principal factor in that analysis seems to be the intent of the parties or of the state court as expressed in whatever agreement or order initiated the obligation. As some courts express it, the initial inquiry under § 523(a)(5) should be into what was the intent of the state court, if that intent can be discerned. *In re Cooper*, 91 Fed. Appx. 713 (2d Cir. 2004) ("The relevant inquiry is as to the intent of the state court at the time it issued the award.").

C. Property Division Under 11 U.S.C. § 523(a)(15).

BAPCPA did away with the "balance of harm"analysis under the prior version of 11 U.S.C. § 523(a)(15). Current law excepts all property division and nonsupport orders for the benefit of the spouse—such as hold harmless orders—from discharge in a Chapter 7 case. As is the case for domestic support obligations, the 2005 Act does not require an adversary proceeding for a determination of dischargeability of property division debt. It is worth

noting, however, that property division and hold harmless orders are dischargeable in Chapter 13 proceedings. 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). Dischargeability is a core proceeding. 28 U.S.C. § 157(b)(2)(I). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

F. 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. Judge McGarity, *Intersection of Divorce and Bankruptcy*. Factors listed by Judge McGarity 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 non-debtor 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.

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).

VII. 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).

VIII. 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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., 133 S.Ct. 1754, 185 L.Ed. 2d 922 (2013). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

IX. 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 non-debtor 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

3. <u>Community Claims</u>.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

4. <u>Good Faith</u>.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

6. 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). H.R. Rep. No. 109-31 at § 211. For cases discussing interest on domestic support obligations, *see In re Burnett*, 646 F.3d 575, 65 Collier Bankr. Cas. 2d (MB) 1651, Bankr. L. Rep. (CCH) P 82041 (8th Cir. 2011); In re Wright, 438 B.R. 550, 552, Bankr. L. Rep. (CCH) P 81879 (Bankr. M.D. N.C. 2010). 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. Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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.

B. 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).

X. 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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. 2011); *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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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 arm's 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

XI. 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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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).

Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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 undivided100% of property). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

XII. 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. Judge McGarity, *Intersection of Divorce and Bankruptcy*.

B. <u>Obligations to Pay Joint Debts of Former Spouses</u>.

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. Judge McGarity, *Intersection of Divorce and Bankruptcy*.

C. <u>Future Support</u>.

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).

D. <u>Priority Claims</u>.

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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

E. 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); *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). Judge McGarity, *Intersection of Divorce and Bankruptcy*.

XIII. Practice Strategies.

When drafting temporary orders, separation agreements and final decrees of divorce, it is important to be aware of the effect of the orders in a subsequent bankruptcy. The following points of law should be taken into account in the divorce court orders.

- Maintenance and child support payments and arrears are exempt from property of the estate, if court-ordered.

- Similarly, payments of maintenance and child support and payments on arrears are deductible in the determination of disposable income, if court-ordered.

- Clear distinctions need to be made between maintenance and support obligations, on one hand, and payments on debt and for division of property, on the other, although the bankruptcy court may not honor such determinations made by the state court.

- Domestic support obligations, owed to or recoverable by a spouse, former spouse, child or such child's parent, legal guardian, or responsible adult, in the nature of alimony, maintenance, or support, are nondischargeable in bankruptcy. It therefore

is important when drafting separation agreements to identify clearly the nature of the debt, describe its purpose, and provide for enforcement by the spouse.

- Obligations owed to a spouse, former spouse, or child, other than domestic support obligations, are nondischargeable in Chapter 7 but are dischargeable in Chapter 13. Thus, provisions for one spouse to pay the other spouse's attorney fees or the other spouse's share of fees for other professionals should make the obligation in favor of and enforceable by the other spouse and describe the purpose of the obligation—that is, why it should be considered to be in the nature of support.

- Hold harmless obligations with collateral in the hands of the obligor also should be considered. For example, a party could require execution of a deed of trust on real property, the release of which is preconditioned on payoff of hold harmless obligations. Moreover, if the client anticipates filing bankruptcy, that client's attorney should avoid agreements that include hold harmless (indemnification) provisions regarding marital debt.

- The state court may determine dischargeability. The practitioner should consider negotiating for dischargeability or nondischargeability, or asking the domestic court to rule on dischargeability, using federal law. For example, the separation agreement could specify that in light of wife's and son's economic circumstances, by undertaking to pay son's education loan (cosigned by both parents), husband's promise is a child support obligation and, as such, is intended by the parties to be nondischargeable in bankruptcy. The crucial issue in determining whether an obligation is a support obligation is the function intended to be served, and that should be the focus of drafting language that would survive a challenge in bankruptcy court.

- The bankruptcy court can avoid preferential transfers made within ninety days of the bankruptcy filing (or within one year, if to an insider), and fraudulent transfers made within four years. Therefore, the practitioner should avoid requirements for payments to unsecured creditors (including attorneys) prior to bankruptcy filing (ninety days for most; one year for insiders). Also, the trustee will scrutinize settlement terms to determine whether the debtor receives appropriate values for what was given to the debtor's ex-spouse.

- The bankruptcy estate includes any interest in property to which the debtor becomes entitled within 180 days after the filing of the petition, including through a property settlement in a divorce or legal separation. Thus, it is important to consider

the timing of filing the divorce vis-à-vis a potential bankruptcy.

- The trustee in bankruptcy, at the commencement of the case, has the rights and powers of the holder of a judicial lien against property of the estate. Thus, it is important to file a notice of lis pendens on marital property that is not titled to the client. After final orders, immediately perfect transfers of marital property to avoid the ex-spouse/debtor having legal title to property that was supposed to have been transferred to the client.

- Creditors, whose personal property collateral is security for a loan, may pursue their rights to collateral under nonbankruptcy law, unless the debtor either reaffirms the debt or redeems the collateral. After final orders, the spouse to whom the property is awarded should immediately seek refinancing of autos and other personal property collateral for cosigned loans.

- Bankruptcy processes are time-sensitive, often with short deadlines. The attorney must react promptly to notices and file proofs of claim, objections to confirmation, or adversary proceedings, as appropriate.