BANKRUPTCY AND FAMILY LAW

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I. INTRODUCTION

When family law mixes with bankruptcy law, the already tense situation of a divorce or suit affecting the parent-child relationship rises to a new level. Former husband and wife forge a new and no less amicable relationship as debtor and creditor. The debtor spouse may stop child support or other promised payments to the nondebtor spouse. Bankruptcy law and its procedural rules which, at least temporarily, shield the debtor spouse from legal action, often leave the nondebtor spouse at wits end. Moreover, counsel for the nondebtor spouse may find his or her livelihood dragged into the quagmire with retainer or fees already received the subject of attack.

This article seeks to provide the nonbankruptcy practitioner with a basic roadmap of how a bankruptcy filing impacts a family law case. The article provides an outline of the basic purpose and scope of bankruptcy law, the direct consequences of a bankruptcy filing on a family law case, and an outline of a basic course of action for the nondebtor spouse in the event of a bankruptcy filing. After review of the basic issues, the paper will discuss more advanced legal strategies which may be useful in cases involving substantial assets and/or fraud. Finally, the paper will address drafting decrees and agreements incident to divorce in anticipation of a bankruptcy filing.

II. IMMEDIATE CONSEQUENCES OF A BANKRUPTCY FILING ON A FAMILY LAW CASE

The filing of a petition for bankruptcy creates: (1) an automatic stay; and (2) the bankruptcy estate. As set forth below, these two results of a bankruptcy filing dramatically affect a family law case.

A. The Automatic Stay

Upon the filing of a bankruptcy petition, without further notice, an automatic stay is immediately created. 11 U.S.C. § 362.[1] In nontechnical terms, the automatic stay is the mother of all temporary injunctions. The automatic stay precludes a nondebtor spouse from continuing or taking any actions against the debtor spouse and his property. The automatic stay remains in place until one of the following events: (1) the case is closed; (2) the case is dismissed; (3) the debtor is discharged; or (4) a court order terminates or modifies the stay. 11 U.S.C. § 362(c), (d), (e) and (f). Intentional violations of the automatic stay are sanctionable. 11 U.S.C. § 362(h). The Fifth Circuit considers actions taken in violation of the stay voidable rather than void. *See, Sikes v. Global Marine*, 881 F.2d 176 (5th Cir. 1989). However, the Texas Supreme Court in *Howell v. Thompson*, 839 S.W.2d 92 (Tex. 1992) has held that acts taken by state courts in violation of the stay are void. *See also, Thomas v. Miller*, 906 S.W.2d 260 (Tex.App.--Texarkana 1995, no writ). Accordingly, if a judicial determination from a Texas state court is necessary and the automatic stay affects that determination, seek relief from the automatic stay. [2]

The automatic stay affects a family law case differently depending on the stage of the family law proceedings.

i. BANKRUPTCY FILING BEFORE DIVORCE FILING

If the debtor spouse files bankruptcy prior to the filing of the divorce action by either spouse, the bankruptcy filing will preclude the filing of a divorce action by the nondebtor spouse. This is due to the division of the marital estate pursuant to a divorce proceeding. Tex. Fam. Code § 7.001. However, a debtor spouse is technically not prohibited from filing for divorce while the stay is in place. *See, McMillan v. MBank Fort Worth, N.A.*, 4 F.3d 362 (5th Cir. 1993) (debtor not bound by automatic stay); *Freeman v. Commissioner of Internal Revenue*, 799 F.2d 1091 (5th Cir. 1986) (same). As a practical matter, the debtor who wants to file for divorce should be prepared to consent to relief from the stay for the nondebtor spouse, as it is unlikely that the state court will allow only one side to present its case. If the nondebtor spouse wants to proceed with a divorce action, she must obtain relief from the automatic stay as provided in 11 U.S.C. § 362(d). *See, e.g., White v. White (In re White)*, 851 F.2d 170 (6th Cir. 1988). As discussed more fully *infra*, while relief from the stay is likely, the bankruptcy court has broad authority to structure the scope of relief from the automatic stay so as to limit the authority of the state court to proceed with the divorce action. For example, bankruptcy courts will often allow the state court to render judgment, but require that the bankruptcy case govern enforcement of the judgment. *See, e.g. In re Palmer*, 78 B.R. 402, 406 (Bankr. E.D. N.Y. 1987). *See, Pope v. Wagner (In re Pope)*, 209 B.R. 1015 (Bankr. N.D. Ga. 1997) (bankruptcy court must accord full faith and credit to judgment of state court that stay not applicable under 11 U.S.C. § 365(b)(2)).

ii. BANKRUPTCY FILING DURING DIVORCE ACTION

The bankruptcy filing by a spouse during the course of an already filed divorce action will immediately bring the divorce action to a halt. *In re White*, 851 F.2d at 171. Again, the non-debtor spouse must seek relief in the bankruptcy court to continue litigating the divorce action. As discussed *infra*, bankruptcy judges usually will grant relief from the stay as they have little desire to handle a domestic relations case. *In re White*, 851 F.2d at 172-173 (bankruptcy court wise to defer to the divorce court's expertise on the question of characterization of property). As noted above, the bankruptcy court, however, is likely to require that enforcement actions occur in the bankruptcy case.

iii. BANKRUPTCY FILING AFTER DIVORCE ACTION IS COMPLETED

A bankruptcy filing by one spouse after divorce will prevent the nondebtor spouse from seeking judicial enforcement of the divorce decree and/or any agreement incident to divorce against the debtor spouse outside the bankruptcy court without relief from the automatic stay. Thus, if monetary obligations from the property division remain unpaid at the time of filing, the non-debtor spouse must pursue her claim in the bankruptcy court by: (1) filing of a Proof of Claim; (2) prosecuting non-dischargeability action; and (3) seeking relief from the automatic stay to pursue enforcement in state court. However, recent amendments to Section 362 of the Bankruptcy Code provide that the nondebtor spouse (or other dependent of the debtor) may seek to enforce future or past-due support obligations owed by the debtor, i.e., alimony or child support, without the need to seek relief from the stay; provided, however, the nondebtor spouse proceeds against property which is not property of the bankruptcy estate. 11 U.S.C. § 362(b)(2).[3] Nevertheless, this begs the question: what is property of the estate? The answer to this question is discussed below after a brief public service announcement.

iv. A REMINDER TO COUNSEL

The foregoing discussion has focused on the impact of the automatic stay on the nondebtor spouse. In the spirit of service to the bar, this paper will digress to remind practitioners of the impact of the automatic stay on their own actions. The following story should serve as a reminder to counsel.

The debtor filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code. The debtor scheduled her debt to her former domestic relations lawyer as an unsecured claim. In a telephone conversation, the debtor informed her domestic relations lawyer that she filed a Chapter 13 petition. In addition, the domestic relations lawyer received notice from the court of the debtor's Chapter 13 filing.

After the petition date, the debtor requested that her domestic relations lawyer represent her in negotiating a settlement of a debt imposed on her by her divorce decree. The debtor agreed to pay her domestic relations lawyer for postpetition services rendered as such services were incurred. The domestic relations lawyer also maintained that she and the debtor entered into a postpetition oral contract which required the debtor to pay prepetition fees. The domestic relations lawyer sent the debtor bills for the prepetition fees.

Although the domestic relations lawyer performed postpetition legal services for the debtor, the dollar amount of such services was de minimis, totaling $75. The debtor made postpetition payments to her domestic relations lawyer in the amount of $450.

The debtor then sued her domestic relations lawyer for the return of the $375 collected in violation of the automatic stay. The debtor also sought the award of attorneys' fees in the amount of $875. The debtor also alleged damages in the amount of $2,500 for emotional distress. In addition, the debtor sought punitive damages in the amount of $5,000.

The bankruptcy court found that the domestic relations lawyer willfully violated the automatic stay. The bankruptcy court rejected the domestic relations lawyer's argument that the agreement to repay the prepetition debt did not violate the stay Instead, the bankruptcy court found such agreement violated the discharge injunction of Section 524.[4] The bankruptcy court awarded the debtor $375 of damages, the amount collected from the debtor in violation of the automatic stay. The bankruptcy court awarded the debtor additional damages in the amount of $562.50 for attorneys' fees. Further, the court awarded punitive damages to the debtor in the amount of $250.00. Thus, the court awarded the debtor $1,187.50 because counsel tried to collect fees of approximately $2,600.

The moral to the story: If your client files bankruptcy, do not try to collect your outstanding fees. *See Meis-Nachtrab v. Griffin (In re Meis-Nachtrab)*, 190 B.R. 302 (Bankr. N.D. Ohio 1995).

B. The Bankruptcy Estate

i. THE ESTATE

The filing of a bankruptcy petition creates an estate. The estate includes all of the debtor's legal and equitable interest in property as of the commencement of the case, 11 U.S.C. § 541(a)(1), subject to the debtor's right to exempt property from the estate pursuant to 11 U.S.C. § 522. Further, while most property acquired by a debtor after the bankruptcy petition's filing is not property of the estate, certain "windfalls" that the debtor acquires or becomes entitled to acquire within 180 days after the filing of the bankruptcy petition such as: (1) by bequest, devise or inheritance; (2) a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final decree; or (3) benefits of a life insurance policy or death benefit plan, are property of the estate. 11 U.S.C. § 541(a)(5). Property of the estate also includes proceeds, products, offspring, rents or profits from property of the estate, except earnings from services performed by an individual debtor after commencement of the case. 11 U.S.C. § 541(a)(6) In addition, property of the estate includes any interest in property that the estate acquires after commencement of the case, i.e., through a legal action such as an avoidance lawsuit. 11 U.S.C. § 541(a)(7).[5]

As the estate is a statutory successor to the debtor, the filing of a petition, as a general proposition, marks the creation of the estate. 11 U.S.C. § 541(a). The concept of an "interest" for purposes of section 541 includes title or fee, if in a nontechnical sense the debtor owns the property; a limited or life estate; a leasehold interest; a contract right; a lien, a possessory right or any other kind of interest that derives from the

debtor's relationship to property. By operation of law, the estate takes over the debtor's position with respect to all property, both exempt and nonexempt. However, an individual debtor is entitled to exempt certain property. 11 U.S.C. § 522(b).

In the case of ongoing divorce actions, family law practitioners will want to take note that property of the estate also includes community property over which the debtor has any legal management power or control, or that is subject to the claims of the debtor's creditors. 11 U.S.C. § 541(a)(2). On the other hand, once a divorce is concluded and the community property interest of the parties has been divided, community property interest of the parties should terminate. Hence, separate property of the nondebtor divorced spouse should not be held to be property of the estate. See *In re Robertson (Anderson v. Connie)* 203 F.3d 855 (5th Cir. 2000)(Louisiana law applied). Under Texas law, debts contracted during the marriage are presumed to be on the credit of the community and are joint community obligations unless the creditor agreed to look solely to the separate estate. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975). Thus, if the parties are not divorced and community creditors exist, the entire interest of both spouses in that property, and not merely the debtor's interest, becomes part of the bankruptcy estate of the first spouse to file bankruptcy. 11 U.S.C. § 541(a)(2)(B).[6] The family practitioner should be aware that property of the estate will include any unused retainer held by either the debtor or nondebtor spouse's counsel if it is paid from community funds. Likewise, counsel for the nondebtor spouse must advise her client that all bank accounts created with community funds are likely property of the bankruptcy estate. Accordingly, any action taken to use or transfer such property can expose the counsel or nondebtor spouse to liability to the bankruptcy estate (or debtor-in-possession) for such funds.

However, there is an important exception from property of the estate - an individual's post-petition earnings are not part of the estate. 11 U.S.C. § 541(a)(6).[7] Thus, in Chapter 7 and 11, a debtor's postpetition earnings and property acquired after filing remain available to the party seeking to enforce support claims pursuant to 11 U.S.C. § 362(b)(2) without relief from the automatic stay.

There are two other exceptions to the rule that all prepetition property interests of the debtor at bankruptcy pass to the bankruptcy estate. First, any power that the debtor can exercise only for someone else's benefit, i.e., power of appointment under a will that prohibits appointments to the debtor himself or to his estate, is excluded from the estate. 11 U.S.C. § 541(b)(1). Second, under 11 U.S.C. § 541(c)(2), a spend-thrift trust, precluding the debtor's ability to transfer his beneficial interest in a trust, is not property of the bankruptcy estate, if the spend-thrift restriction is enforceable under applicable nonbankruptcy law. This includes not only traditional spend-thrift trusts under state law, but also the debtor's interests in an ERISA qualified pension plan. *Patterson v. Shumate*, 504 U.S. 753 (1992).

ii. EXEMPT PROPERTY

One way the bankruptcy provides a debtor a fresh start is through its exemption provisions. 11 U.S.C. § 522(b) authorizes an individual debtor to exempt certain property — that is to take from the estate free from general unsecured claims. Thereafter prepetition unsecured creditors other than taxing agencies holding nondischargeable claims and claimants for spousal or child support usually cannot reach property claimed as exempt. 11 U.S.C. § 522(c). Further, exempt property is not ordinarily available to pay any part of the administrative expenses of the case. 11 U.S.C. § 522(k). However, purchase money liens on exempt property which existed prior to filing are enforceable. 11 U.S.C. § 522(c).

Under the Bankruptcy Code, the debtor has a choice between a specified list of federal exemptions and the exemptions provided by state law. Any state is granted the power to "opt out" of the federal exemption alternative pursuant to 11 U.S.C. § 522(b)(1) and thus limit its domiciliaries to state-created exemptions in their bankruptcies. Since Texas has not opted out, the federal and state exemptions are available to Texas debtors. Given Texas' extremely generous exemptions pursuant to Texas Property Code Chapters 41 and 42, most debtors in Texas utilize state law exemptions; however, in limited circumstances — particularly where the debtor's assets are of limited value or are primarily cash or cash equivalents — the federal exemptions may provide greater protection.[8] Nevertheless, the debtor must choose between state or federal exemption schemes and cannot mix the two. Spouses who are joint debtors or whose cases are jointly administered must make the same choice or they will be deemed to have elected the federal scheme. 11 U.S.C. § 522(b).

11 U.S.C. § 522(l) implemented by Bankruptcy Rule 4003 governs the procedure for obtaining exemptions. Normally the debtor's schedules his Chapter 13 statement must specify the items claimed as exempt. *See* Bankr. R. 1007 and 4003. A dependent, which may include an estranged or former spouse with children, however, can claim exemptions if the debtor fails to do so. Counsel for nondebtor spouses will want to note that they must timely file any objections to exemptions within thirty days of the date originally scheduled for the meeting of creditors under 11 U.S.C. § 341(a); otherwise, the debtor's claimed exemptions are automatically allowed. 11 U.S.C. § 522(l); *See Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (exemption, even though not authorized under law, is allowed absent timely objection).

III. WHAT TO DO AFTER A BANKRUPTCY FILING

Having reviewed the immediate implications of a bankruptcy filing, this paper comes to the nuts and

bolts section for family law practitioners: "What does the nondebtor spouse do after the bankruptcy filing of the debtor spouse?"[9] In part, the stage of the family law case dictates the actions of the nondebtor spouse. The majority of bankruptcy cases require the nondebtor spouse to take one or more of the following basic actions: (1) file a Proof of Claim; (2) file notice of intervention as child support creditor; (3) seek modification of the automatic stay; and (4) prosecute nondischargeability actions.

A. Filing a Proof of Claim

This is the simplest, least expensive action any nondebtor spouse can take in response to her spouse's bankruptcy filing. Typically, the court will include a Proof of Claim form in a notice of bankruptcy filing. Official Bankruptcy Form 10. The deadline for filing a Proof of Claim differs depending on the chapter under which the debtor has filed and the local rules. *See*, Bankr. R. 3002. The practical rule is to file a Proof of Claim as soon as possible. Do not wait for the deadline, do not wait for notice from the court to file a Proof of Claim, and above all, do not wait for the debtor spouse to advise when to file a Proof of Claim.[10]

Often it is difficult to determine the exact nature and extent of the amount of a Proof of Claim early in the debtor's case. This is especially true when the divorce case is still pending. In such a case, the creditor should file a Proof of Claim in an undetermined amount. So long as the creditor identifies the potential grounds and priority status of a claim against the debtor spouse, even if the amounts are unspecified, she can amend the Proof of Claim within a reasonable period of time after precise amounts are known. *Cf. Highlands Insurance Co. v. Alliance Operating Corp. (In re Alliance Operating Corp.)*, 60 F.3d 1174, 1175 (5th Cir. 1995) (amendments which seek to reclassify as opposed to supplement the amount of a claim not permitted after bar date). However, in the absence of a timely filed Proof of Claim, a creditor shall not receive any distribution from estate property, until all other creditors are paid in full; nevertheless, the claim will be discharged for purposes of the debtor's fresh start.

A spouse or ex-spouse may have secured claims (claims secured by a lien against property), unsecured priority claims (for unpaid support or maintenance) and general unsecured claims. Even if the exact amounts of these claims are not identified, each of the type of claims should be so identified on the Proof of Claim. The claimant may accomplish this by checking the appropriate boxes and filling in the appropriate space with "determined." Nevertheless, the claimant must exercise reasonable diligence, as a proof of claim is filed under penalty of perjury. In the event the precise amount and nature of a claim is known, as in the case when the divorce has been completed, proofs of claim should be completed in detail, both as to class and amount. It is also important to attach supporting documentation to the Proof of Claim such as the Divorce Decree, the agreement incident to divorce, or temporary support orders.

By filing a Proof of Claim, the nondebtor spouse shall receive any distribution which she is legally entitled from the bankruptcy estate, regardless of whether such claims are later determined to be nondischargeable under applicable law.[11] Filing of the Proof of Claim also assures the nondebtor spouse that she has the right to be heard in any phase of the case. In filing a Proof of Claim, it is important to serve a copy of the Proof of Claim on the debtor, the debtor's counsel, any trustee appointed in the case, and any such trustee's counsel to ensure that all parties are on notice of its filing.

The nondebtor spouse should also be sure that creditors to whom she is also liable, file their proofs of claim. This ensures the debtor's assets, if any exist, will go to pay such claims. In the event creditors do not file such proofs of claim, the nondebtor spouse may file a proof of claim on their behalf within thirty (30) days after the general bar date for claims established by the court. Bankr. R. 3005(a).

B. Appearance Before Court on Child Support

Although not included in the Bankruptcy Code, the Bankruptcy Reform Act of 1994 (P.L. 103-349), Section 304(g) now provides that a child support creditor or her representative may appear before the Bankruptcy Court without the need to meet any local rule requirement for attorney appearance. This may be done by filing a form detailing the child support debt. A proposed form is provided in Appendix B.[12] Filing this notice with the Bankruptcy Court ensures that a child support creditor or her attorney will have the right to appear before the Bankruptcy Court to be heard on any phase of the bankruptcy case. To verify its efficacy, the practitioner should serve a copy on the debtor, debtor's counsel, the United States Trustee and any appointed trustee in the case.

C. Lifting the Automatic Stay

As noted above, one of the immediate impacts of a bankruptcy filing on the family law case is the imposition of the automatic stay pursuant to 11 U.S.C. § 362. As also noted, the automatic stay remains in place unless the debtor's case is dismissed, the debtor is discharged under the appropriate provisions of Bankruptcy Code, or the stay is modified. Nevertheless, neither the language of the automatic stay provision set forth in 11 U.S.C. § 362 nor the policy underlying that provision relegates the nondebtor spouse to an immutable world of limbo. *In re Claughton*, 140 B.R. 861, 867 (Bankr. W.D.N.C. 1992),

aff'd, 172 B.R. 12 (Bankr. W.D.N.C. 1993), *aff'd*, *Claughton v. Mixson*, 33 F. 3d 4 (4th Cir. 1994). Recognizing that some actions are better suited to resolution outside the bankruptcy forum, Congress specifically granted the bankruptcy court the power to modify the automatic stay in order to allow litigation to go forward in another forum. *Id*. In particular, 11 U.S.C. § 362(d) provides:

> On request of a party in interest and after notice and hearing, the court shall grant relief from the stay provided under [§362(a)], such as by terminating, annulling, modifying or conditioning the stay (1) for cause . . . .

11 U.S.C. § 362(d)(1) (emphasis added).

To determine whether "cause" exists to allow litigation to go forward in a nonbankruptcy forum, the court must evaluate the following factors, any one of which can form the proper foundation for lifting the automatic stay for cause:

1. The modification of the automatic stay allowing litigation to conclude in a different forum will promote judicial economy:
2. The issues in the pending litigation will involve issues of state law so that the expertise of the bankruptcy court is unnecessary;
3. The estate can properly be protected; or
4. The hardships incurred by the Movant for relief from the stay are outweigh prejudice to the debtor.

See e.g. In Re Claughton, 140 B.R. at 867-868; *In re McDonald*, 755 F.2d 715, 717 (9th Cir. 1985) (judicial economy and state law issues); *In re Peterson*, 116 B.R. 247 (D.Colo. 1990) (hardship).

The United States Supreme Court has recognized that divorce and custody are particularly apt for resolution by state courts as "`[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the law of the states and not to the law of the United States' . . . state family and family-property law must do `major damage' to `clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). Similarly, the federal courts of appeal have recognized the appropriateness of modifying the automatic stay to allow divorce proceedings to continue in state courts. *See In re McDonald*, 755 F.2d 715, 717 (9th Cir. 1985) ("[i]t is appropriate for the bankruptcy court to avoid incursions into family law matters [including property distribution] out of consideration of court economy, judicial restraint, and deference to our state court brethren and in their established expertise in such matters."). *Accord, Robbins v. Robbins (In re Robbins)*, 764 F.2d 342, 346 (4th Cir. 1992); *White v. White (In re White)*, 851 F.2d 170, 173 (6th Cir. 1985). Bankruptcy courts have also consistently and routinely noted that "a property settlement involves an inquiry into factors regularly considered by state courts in divorce proceedings, an inquiry which . . . is best left to state courts." *In re Heslar*, 16 B.R. 329, 333 (Bankr. W.D. Mich. 1981). One bankruptcy judge has even noted that in the case of divorce and custody proceedings "relief [from the automatic stay] should be freely given . . . to such matters, since they usually impinge upon the debtor's economic affairs only to a relatively slight degree." *In re Simpson*, 140 B.R. 857, 859 (Bankr. E.D. Pa. 1992). Thus, if the nondebtor spouse requests relief from the automatic stay to pursue a divorce action, bankruptcy courts most likely will grant such relief. However, the practitioner should anticipate that such relief will be conditioned upon the enforcement of the judgment before the bankruptcy court. This is particularly the case with an enforcement action against nonexempt property.

As discussed, *supra*, recent changes in the bankruptcy code relieve the nondebtor spouse of the need to seek relief from the automatic stay in order to pursue or continue an action to (1) establish paternity; (2) establish or modify an order for alimony, maintenance or support; or (3) collect alimony, maintenance or support from property that is not property of the estate. 11 U.S.C. § 362(b)(2). Thus, in Chapter 7 and 11 proceedings, the debtor spouse's postpetition earnings may be pursued without modification of the automatic stay for purposes of collecting support for the nondebtor spouse or children of the marriage. In addition, once the period to object to the debtor's claimed exemptions has passed, the nondebtor spouse may, to the extent permitted by state law, pursue support claims against otherwise exempt property. However, in Chapter 13 proceedings, a debtor's postpetition earnings are property of the estate. 11 U.S.C. § 1306(a)(2). Accordingly, relief from the stay will have to be sought to bring postpetition enforcement actions against a Chapter 13 debtor's postpetition earnings.

D. Nondischargeability Actions

Next nondebtor spouses should determine whether it is necessary to commence a proceeding for determination of dischargeability in a spouse's or ex-spouse's bankruptcy proceeding. Despite the underlying policy of the Bankruptcy Code to provide a fresh start for the bankrupt, support and maintenance obligations are always nondischargeable. In Chapter 7, 11 and 12 cases other debts arising from divorce decrees may also be nondischargeable. The grounds for nondischargeability of obligations typically arising from a family law case are specified in 11 U.S.C. § 523(a)(5) and (a)(15).

11 U.S.C. § 523(a)(5) provides that a discharge under §§ 727, 1141, 1228(a) 1128(b) or 1328(b) does not discharge an individual debtor from any debt:

> [T]o a spouse, former spouse or child of the debtor, for alimony to, maintenance for, or support of such spouse or child in connection with a separation agreement, divorce decree, or other order of court at record, or property settlement agreement, but not to the extent that --
>
> (A) such debt is assigned when another entity, voluntarily, by operation of law, or otherwise (other than debts . . . assigned to the federal government or to a state or any political subdivision of such state); or
>
> (B) such debt includes a liability designated as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance or support.

Recently, Congress also provided a new exception to discharge under § 523(a)(15)[13] which provides that a debt is not dischargeable if the debt is:

> [N]ot of the kind described in [§ 523(a)(5)] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with state or territorial law by a governmental unit less
>
> (A) The debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for payment of expenditures necessary for the continuation, reservation and operation of such business; or
>
> (B) Discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor; . . .

The § 523(a)(15) nondischargeability provision is a viable option in Chapter 7, Chapter 11, and Chapter 12 proceedings. However, § 523(a)(15) usually does not apply to a Chapter 13 case. 11 U.S.C. §1328(a)(2); *See In re Auld*, 187 B.R. 351, 352 (Bankr. D. Kan. 1995). An exception to this rule occurs when a Chapter 13 debtor seeks a § 1328(b) hardship discharge, then a creditor may use § 523(a)(15) as sword against the debtor and file a complaint for nondischargeability. *In re Auld*, 187 B.R. at 352.

§ 523(a)(15) offers nondebtor spouses an additional protection from an ex-spouse's bankruptcy filing, however, as discussed below, this protection is limited. This section of the article will discuss the procedure associated with pursuing a nondischargeability action as well as the key issues that have arisen in the case law interpreting each of the above family law specific nondischargeability provisions.

i. PROCEDURE FOR DETERMINING NONDISCHARGEABILITY

Ordinarily, a bankruptcy judge determines the nondischargeability of a particular claim. It is possible, however, to pursue a declaration that support obligations are nondischargeable in state court. In the bankruptcy court, an action to determine the dischargeability of a debt is an adversary proceeding. Bankr. R. 7001(6). As such, the procedural rules for such a proceeding is governed by Part VII of the Bankruptcy Rules together with specific provisions of Bankr. R. 4007.

Either the debtor or a creditor can institute an action by filing a dischargeability complaint. While there is no time limit to bringing a nondischargeability action under § 523(a)(5), proceedings to determine dischargeability under § 523(a)(15) must be brought within 60 days after the first day scheduled for the initial meeting of creditors pursuant to 11 U.S.C. § 341[14], unless the time is otherwise extended by the court.[15] 11 U.S.C. § 523(c)(1) and Bankr. R. 4007. As discussed more fully below, because a fact issue usually exists as to whether a judgment is "actually in the nature of alimony, maintenance or support," the practical effect of the time limitation to bring an action under § 523(a)(15), means that in most Chapter 7, 11 and 12 cases that it is necessary to bring an action within 60 days of the first date scheduled for the creditors' meeting. This is particularly true in Texas where alimony can only be provided by judicial decree in limited circumstances.[16] The practitioner should note the "malpractice trap" that the Bankruptcy Code sets by this relatively short statute of limitations. Accordingly, the family law practitioner, upon being advised of an ex-spouse's bankruptcy filing, should immediately make certain his nondebtor-spouse client is aware of this quick timetable. Missing the deadline means that if the debt is not actually a support-type obligation, it is discharged even though it may fall within the exception provided by 11 U.S.C. § 523(a)(15). 11 U.S.C. § 523(c)(1).

Upon a determination that a nondebtor spouse's claims are nondischargeable, the nondebtor spouse may continue to pursue her claims against the debtor despite his bankruptcy filing. Thus, if the debtor emerges from bankruptcy debt-free, save and except the nondebtor spouse's claims, future acquisitions of property may be executed upon, postpetition bank accounts may be garnished and other actions associated with judgment collection and decree enforcement may be taken.

ii. NONDISCHARGEABILITY OF SUPPORT OBLIGATIONS

a. Child Support

Child support obligations will not be discharged in bankruptcy. However, it is essential to understand that federal bankruptcy law and not state law determines what constitutes support for a child. *See, e.g., In re Paneras*, 195 B.R. 395, 400 (Bankr. N.D. Ill. 1996); *Bonheur v. Bonheur (In re Bonheur)*, 148 B.R. 379, 382 (Bankr. E.D.N.Y. 1992). This has both its advantages and disadvantages, which, of course, will depend upon whether you represent the debtor or nondebtor spouse. This article will discuss the advantages and disadvantages of the issue from the perspective of the nondebtor spouse.

The advantage to having federal law apply comes from the fact that bankruptcy courts have given the term "child support" broad construction. For example, bankruptcy courts have held that a debtor's agreement to pay for four years of college for his child was in the nature of child support and thus nondischargeable. *See, e.g., In re Brown*, 74 B.R. 968 (Bankr. E.D. Conn. 1987) (the debtor's obligation to pay for a child's higher education was nondischargeable despite fact that debtor was no longer obligated to support the child under state law.); *In re Proctor*, 42 B.R. 537 (Bankr. E.D. Mo. 1984). Thus even in Texas, where court-ordered child support obligations usually end when a child turns 18 or graduates from high school, a properly drafted property settlement containing an agreement for payment of a child's higher education may preclude the debtor spouse from discharging this obligation. However, to avoid discharge, the obligation should clearly benefit the child. *In re Brown*, 74 B.R. at 973.[17]

Another advantage of having the determination under federal law is that a valid property settlement agreement renders a contractual support obligation nondischargeable in bankruptcy, even where the court has decreased the court-ordered support obligation. For example, in *Ruhe v. Rowland*, 706 S.W.2d 709 (Tex. App.--Dallas 1986, no writ), the husband contractually agreed to pay $750 per month in support. Later, the husband had his court-ordered support obligation reduced to $350. When the husband was sued in contract for the difference, this resulting judgment was held to be nondischargeable. *Id*.

A disadvantage comes from the fact that the bankruptcy court may look beyond the language of the decree or property settlement to determine if the obligation is, in reality, one for support of the child. For example, in *In re Rhodes*, 44 B.R. 79 (Bankr. D. N.M. 1984), the court found that lump-sum payment that denominated as child support was in reality compensation for a spouse's share of the community estate, and hence dischargeable. Thus, to avoid discharge problems related to child support provisions, it is important to ensure that decrees or stipulations provide that payments are in monthly installments as opposed to lump-sum payments, and clearly designate child support payments as such. On the other hand, if you represent the debtor spouse, do not give up until you have reviewed the divorce decree and property settlement agreement that a debt merely denominated his child support is nondischargeable.

Practitioners should note that the discussion above has been focused on analysis of the dischargeability of obligations created by an original divorce decree. The analysis as to the dischargeability of obligations arising under a judgment relating solely to child support, including the award of attorneys' fees, is much less complex under current case law in the Fifth Circuit. See, e.g. *In re Hudson*, 107 F.3d 355, 357 (5th Cir. 1997)(because the ultimate purpose of a proceed on child support is to provide support for the child, attorneys' fees awarded in connection with such a proceeding are in the nature of child support, and thus nondischargeable). Thus, when state court judgment in a modification proceeding awarded both child support and attorneys' fees to the non-debtor spouse, the bankruptcy court found as a matter of law the attorneys fee award was nondischargeable pursuant to 11 U.S.C. § 523(a)(5). *In re Fulton (Whipple v. Fulton)*, 236 B.R. 626 (Bankr.E.D.Tex. 1999; *accord In re Dvorak (Dvorak v. Carlson)*, 986 F.2d 940, 941(5th Cir. 1993).

b. Spousal Support Obligations

As with child support, the question of whether a debt actually constitutes alimony, maintenance or support, and is therefore nondischargeable, is a question of federal bankruptcy law, and not state law. *In re Biggs*, 907 F.2d 503 (5th Cir. 1990); *In re Paneras*, 195 B.R. 395, 400 (Bankr. N.D. Ill. 1996). Bankruptcy courts frequently have found payments ordered to former spouses to be nondischargeable, even in Texas, which until recently had no court ordered alimony provisions.[18] Thus, a debt or obligation awarded pursuant to a decree of divorce may be categorized as alimony support or maintenance by the bankruptcy court if the court finds the intent of the accord or agreement to be support. *See, e.g., In re Davidson*, 947 F.2d 294, 1296 (5th Cir. 1991); *In re Nunnally*, 506 F.2d 1024, 1027 (5th Cir. 1975); *but see In re Fox*, 5 B.R. 317, 320 (Bankr. N.D. Tex. 1980).

While state law does not govern the determination of nondischargeability, it may serve as a guide to determine the nature of an obligation. *Champion v. Champion (In re Champion)*, 189 B.R. 516 (Bankr. D.N.M. 1995). Thus, the mere fact that an obligation is designated as alimony does not necessarily mean that it is alimony if a decree or property settlement agreement designates payments as alimony. *Smith v. Smith (In re Smith)*, 97 B.R. 326 (Bankr. N.D. 1989). However, if the debtor spouse treats such payments as alimony for tax purposes, the debtor spouse will be estopped from seeking to disclose the obligation. *In re Davidson*, 947 F.2d 1294, 1296. Moreover, the assumption of marital debts may be support even if a decree or agreement provides for express support

elsewhere. *Chapman v. Chapman (In re Chapman)*, 187 B.R. 573 (Bankr. N.D. Ohio 1995); *See also Kubik v. Kubik (In re Kubik)*, 215 B.R. 595 (Bankr. D. N.D. 1997) (husband's obligation to pay obligations related to marital homestead nondischargeable support in light of award of marital resident to nondebtor spouse for purposes of raising minor children). Instead, the bankruptcy court will separately examine each obligation. *See, e.g. Sanders v. Lanare (In re Sanders)*, 187 B.R. 588 (Bankr. N.D. Ohio 1995).

As noted at the beginning of this section, the nondischargeability actions are an exception to the bankruptcy code's general policy of providing a fresh start to debtors. Thus, the burden of proof rests on the nondebtor spouse to establish that the debt in question is actually in the nature of alimony maintenance or support for the purpose of nondischargeablility. *Bell v. Bell (In re Bell)*, 189 B.R. 543 (Bankr. N.D. Ga. 1995). *See generally, Grogan v. Garner*, 498 U.S. 279 (1991) (creditor seeking determination that debt is nondischargeable has the burden of proof by preponderance of the evidence). However, bankruptcy courts have differed on how § 523(a)(5) will be construed. *See In re Champion*, 189 B.R. at 520 (support under § 523 construed broadly) *compare with In re Bell*, 189 B.R. at 547 (section 523 construed narrowly).

Bankruptcy courts, under the guidance of the various circuit courts of appeals, have developed a list of evidentiary factors whereby they determine the intent of the parties and then the state court determines whether the nature of the obligation is actually alimony, maintenance or support. These factors include:

(a) The length of the marriage;
(b) Whether there are minor children in the care of the creditor spouse;
(c) The parties' standard of living during the marriage;
(d) Whether the creditor spouse had shown, at the time of the divorce, a need for support, in other words, whether the former spouse was shown at the time of the divorce to be at a disadvantage or a dependent in a dependant position in relation to the debtor during the marriage;
(e) The financial resources of each spouse, including income from employment or elsewhere;
(f) Where the payments were made periodically, or over an extended period, or in a lump sum;
(g) Whether payments were fashioned to balance at this proportion of income of the parties;
(h) The ages, health, work skills and educational levels of the parties; and
(i) Whether the terms of the agreement indicated the agreement was for support rather than property division.

See, e.g. In re Billingsly, 93 B.R. 476 (Bankr. N.D. Tex. 1987); *In re Benich v. Benich (In re Benich)*, 811 F.2d 943 (5th Cir. 1987); *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975). In the case of a contested divorce the bankruptcy court will examine the intent of the family law court as well as the evidence adduced in support of the decree. *In re Chapman*, 189 B.R. at 518 (interpreting Texas decree). To determine the "true" nature of payments, courts have examined whether payments to provide alimony continue when the recipient dies or remarries and whether the obligation is to be paid in installments. *In re Ingram*, 5 B.R. 232 (Bankr. N.D. Ga. 1980). (If the obligation continues regardless of remarriage or death, courts often find that the debt is dischargeable. *See In re Kaufman*, 115 B.R. 435 (Bankr. E.D.N.Y. 1990). Furthermore, at least one court has noted that if the property settlement awards virtually all the property to one spouse, and also provides for periodic payments to that spouse, such payment must be in the nature of support. *In re Smith*, 97 B.R. at 329.

One important issue which has arisen in connection with the issue of whether obligations to the nondebtor spouse under a divorce decree or property settlement are actually in the nature of support has been the award of attorneys' fees to the nondebtor spouse. Several bankruptcy courts have considered whether attorneys' fees pursuant to a divorce decree awarded directly to the nondebtor spouse's law firm are in fact entitled to discharge because such a debt is not a debt owing to "a spouse, former spouse, or child of the debtor" as required by the express language of § 523(a)(5). The Fifth Circuit held in *Joseph v. J. Huey O'Toole, P.C. (In re Joseph)*, 16 F.3rd 86 (5th Cir. 1994), that a debtor's obligation to pay his wife's attorneys' fees was a nondischargeable debt so long as it was in the nature of alimony, maintenance or support. Similarly, the Eighth Circuit reversing the district court, ruled that a debt for attorneys' fees payable directly to the attorney, rather than the wife, was nondischargeable. *Holliday v. Kline (In re Kline)*, 65 F.3rd 749 (8th Cir. 1995) (if obligation meets qualifications as support, it is nondischargeable even if payable directly to attorney). However, other courts have not been as kind to counsel. *See Hartley v. Townsend (In re Townsend)*, 177 B.R. 902, 904 (Bankr. E.D. Mo. 1995) (court awards of attorneys' fees directly to the attorney, and not to the "spouse, former spouse or child" are dischargeable debts); *Newmark v. Newmark (In re Newmark)* 177 B.R. 286 (Bankr. E.D. Mo. 1995) (same). Accordingly, counsel should be aware that the award of attorneys' fees directly to the law firm may create an issue regarding dischargeability in a subsequent bankruptcy filing. This is particularly true in light of the United States Supreme Court's

interpretation of the Bankruptcy Code according to its plain language. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

iii. NONDISCHARGEABILITY OF OTHER OBLIGATIONS AWARDED IN DIVORCE DECREE

a. 11 U.S.C. § 523(a)(15)

In a recent amendment to the Bankruptcy Code, Congress added a new exception proscribing the discharge of certain debts awarded in a divorce decree or separation agreement, even though these debts are not in the nature of alimony, maintenance, or support.[19]

Under 11 U.S.C. § 523(a)(15), debts other than alimony, maintenance or support obligations are also nondischargeable in Chapter 7, 11 and 12 cases unless (a) the debtor lacks the ability to pay such debt from future income; or (b) the discharge of such debt will result in a benefit to the debtor that outweighs the detrimental consequences to the spouse, former spouse or child of the debtor. The goal of this Bankruptcy Code section is to protect spouses who have agreed to lower alimony, maintenance or support payments or have agreed to property settlements on the basis of "hold-harmless" clauses regarding debts incurred during the course of the marriage. *See* 140 Cong. Rec. H10752, H10770 (daily ex. Oct. 4, 1994) (statement of Chairman Brooks).

Importantly, unlike § 523(a)(5) actions, which state courts may hear, only the bankruptcy courts can hear § 523(a)(15) actions. 11 U.S.C. § 523(c)(1); *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996); *Collins v. Hesson (In re Hesson)*, 190 B.R. 229, 236 (Bankr. D. Md. 1996). Further, as previously noted, the action must begin within sixty days of the first date set for the meeting of creditors under 11 U.S.C. § 341(a). *In re Smither*, 194 B.R. at 107. The "exceptions" to the discharge exception provided in 11 U.S.C. § 523(a)(15)(A) and (B) force the Bankruptcy Court to address the competing equities of the debtor and nondebtor spouse. One bankruptcy court has noted this section will require bankruptcy courts to "revisit, in excruciating detail, the anger, bitterness and pain the debtor and the debtor's spouse have felt and now feel. *Silvers v. Silvers (In re Silvers)*, 187 B.R. 648 (Bankr. W.D. Mo. 1995). *See also, In re Hesson* 190 B.R. at 236 (with the advent of § 523(a)(15), bankruptcy courts are thrust into the business of domestic relations, a practice previously condemned).

One battleground in the bankruptcy courts is the burden of proof under 11 U.S.C. § 523(a)(15). A majority of courts interpreting this section have placed the burden of establishing nondischargeability on the spouse, while placing the burden of establishing the exception under 11 U.S.C. § 523(a)(15)(A) or (B) on the debtor. *See In re Morris*, 193 B.R. 949, 952 (Bankr. S.D. Cal. 1996); *Hill v. Hill (In re Hill)*, 184 B.R. 750 (Bankr. N.D. Ill. 1985) (debtor bears the burden of proof to show that exceptions under subparagraphs (A) and (B) of Section 523(a)(15) apply); *Accord Phillips v. Phillips (In re Phillips)*, 187 B.R. 363, 368 (Bankr. M.D. Fla. 1995). Texas bankruptcy courts have followed this procedure. *Garza v. Garza (In re Garza)*, 217 B.R. 197 (Bankr. N.D. Tex. 1998); *Lengyel v. Lengyel (In re Lengyel)*, 212 B.R. 840 (Bankr. S.D. Tex. 1997); *Gamble v. Gamble (In re Gamble)*, 196 B.R. 54 (Bankr. N.D. Tex. 1996), *aff'd, Matter of Gamble*, 143 F.3d 223 (5th Cir. 1998). On the other hand, some courts have held, based primarily on the fresh-start policy behind the Bankruptcy Code, that the nondebtor spouse bears the burden of proof to establish that the debt is nondischargeable. *In re Paneras*, 195 B.R. 395, 400 (Bankr. N.D. Ill. 1996); *In re Dressler*, 194 B.R. 290, 296 (Bankr. D.R.I. 1996). However, once the nondebtor spouse has made the initial showing that the obligation at issue is a claim based on an award made in a divorce proceeding, the debtor bears the burden of going forward, but not the burden of proof, to show his qualifications for discharge under § 523(a)(15)(A) or (B). *In re Smither*, 194 B.R. at 107. *In re Silvers*, 187 B.R. at 649. However, at least one court has held that the nondebtor spouse has the burden to establish that the debtor is able to pay the debts and that the discharge will be too detrimental to the nondebtor spouse. *Kessler v. Butler (In re Butler)*, 186 B.R. 371 (Bankr. D. Vt. 1995) (debtor spouse bears burden of proof to establish debtor is able to pay debt despite bankruptcy and discharge would create greater harm to debtor than a nondebtor spouse); *see In re Dressler*, 194 B.R. at 303. Notably, the *Butler* opinion calls for interpretation of the statute as a "reversal of exceptions to the exception" *Id*.

Once the Court has determined who has the burden of proof, the trial will focus on the debtor spouse's ability to pay such obligations and the relative harm to each spouse caused by granting or denying the debtor's discharge. In the instance where the debtor spouse is unemployed or underemployed to no fault of his own, courts are likely to grant the exception under 523(a)(15)(A) has been met. *See Woodworth v. Woodworth (In re Woodworth)*, 187 B.R. 174 (Bankr. N.D. Ohio, 1995) (where debtor has shown that despite lack of employment, he has sought temporary work, and debtor would have to expend funds reasonably necessary for his maintenance and support in order to pay subject debts, debtor has met requirements of § 523(a)(15)(A)). However, in the absence of evidence of the debtor's complete inability to pay the debt as a result of unemployment or disability, many bankruptcy courts have drafted case law and have analyzed Chapter 13 proceedings using the "disposable income" test of 11 U.S.C. §13.25(b)(2).[20] *In re Paneras*, 195 B.R. 395 (Bankr. N.D. Ill. 1996); *In re Huddelston*, 194 B.R. 681, 685 (Bankr. N.D. Ga. 1996); *In re Dressler*, 194 B.R. at 304; *In re Morris*, 193 B.R. at 953; *Hill v. Hill (In re Hill)*, 184 B.R. 750 (Bankr. N.D. Ill. 1995). This analysis includes examining the amount and terms of the debt that the creditor claims is nondischargeable and the

debtor's current income and property compared to his reasonable and necessary expenses. *In re Smither*, 194 B.R. at 108. If the court concludes that the debtor has no "disposable income" to fund payments of an obligation, the debtor prevails and the debt is discharged despite § 523(a)(15). *In re Hesson*, 190 B.R. at 237. Fortunately, for practitioners, if courts continue to use a disposable income test under § 523(a)(15)(A), an extensive body of case law exists and analysis will become vastly more simple.[21]

In addition to the disposable income test, courts may consider other factors such as the debtor's opportunity for more lucrative employment, the debtor's future debt burden, and the debtor's past performance on the debt in question. *In re Huddelston*, 194 B.R. at 688. In situations where either or both of the parties have remarried, the court may include the new spouse(s)' income in disposable income. *In re Smither*, 194 B.R. at 108. Furthermore, many recent cases have begun to examine whether the expenses used to derive disposable income are reasonably necessary. *In re Smither*, 194 B.R. at 108; *In re Slover*, 191 B.R. 886, 892 (Bankr. E.D. Ok. 1996).

A second issue that the bankruptcy courts must address under § 523(a)(15) is at what time must it make the financial analysis required under § 523(a)(15). *See In re Hesson*, 190 B.R. at 238. At present, bankruptcy courts are split on this issue as well. At least one court has decided that for purposes of the affirmative defenses under § 523(a)(15)(A) and (B) the measuring point is the date of filing of the adversary complaint. *Carroll v. Carroll (In re Carroll)*, 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995); *Hill v. Hill (In re Hill)*, 84 B.R. at 754. On the other hand, the *Hesson* court deemed the measuring point for the affirmative defense at the time of trial. 190 B.R. at 238; *Accord In re Jodoin*, 209 B.R. 132, 142 (9th Cir. BAP 1997); *In re Paneras*, 195 B.R. at 405; *In re Smither*, 194 B.R. at 107; *In re Dressler*, 194 B.R. at 301; *In re Morris*, 193 B.R. at 952; *Belcher v. Owens (In re Owens)*, 191 B.R. 669, 674 (Bankr. E.D. Ky 1996). Finally, some courts have chosen to examine the ability to pay over time rather than using a specific reference point. *See In re Taylor*, 191 B.R. 760, 766-67 (Bankr. N.D. Ill. 1996), *aff'd*, *Taylor v. Taylor*, 199 B.R. 37 (Bankr. N.D. Ill. 1996); *In re Craig*, 196 B.R. 305, 310 (Bankr. E.D. Va. 1996); *Matter of McGinnis*, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996).

Pursuant to the hardship exception under 11 U.S.C. § 523(a)(15)(B), the court will consider not only whether the nondebtor spouse can pay the debts, but whether the creditor can collect the debt from the nondebtor spouse. *In re Hesson*, 190 B.R. at 239-41. Accordingly, in the situation where the debtor spouse owes the nondebtor spouse money, as opposed to a third party, a discharge is likely in the absence of a showing of compelling need by the nondebtor spouse. *In re Huddelston*, 194 B.R. at 688; *In re Dressler*, 194 B.R. at 305; *In re Smither*, 194 B.R. at 110; *In re Hesson*, 190 B.R. at 241. Furthermore, in situations where the nondebtor spouse has only nonexempt property, courts have been inclined to find that the debtor has met the exception under 11 U.S.C. § 523(a)(15)(B). *In re Woodworth*, 187 B.R. at 177-78.

Another issue which adversaries have litigated under § 523(a)(15), is whether the nondebtor spouse is entitled to an award of attorneys' fees. *In re Colbert*, 185 B.R. 247 (Bankr. N.D. Tenn. 1995). The nondebtor spouse sought an award of attorneys' fees incurred in a dischargeability proceeding in the bankruptcy court, under a Tennessee statute. The bankruptcy court, however, found no authority under the Bankruptcy Code to award fees to a prevailing creditor in a nondischargeability action. 185 B.R. at 249. However, the bankruptcy court opined that the nondebtor spouse could petition the state court for an award of fees and a determination of nondischargeability of such fees under § 523(a)(5) and Tennessee law. 185 B.R. at 250, n.4. Unfortunately, this case does not answer the question of whether divorce settlements or accords, which contain a provision for the award of attorneys' fees associated with its enforcement would entitle the nondebtor spouse to an award of attorneys' fees incurred in connection with prosecuting a nondischargeability action. *Cf. Teter v. Teter (In re Teter)*, 14 B.R. 434 (Bankr. N.D. Tex. 1981) (awarding attorney's fees on nondischargeability action to enforce alimony agreement). In *In re Macy*, the court held that the creditor's attorney fees in a § 523(a)(5) action enforcing the debtor's liability for nondischargeable support were not dischargeable. *In re Macy*, 192 B.R. 802, 806 (Bankr. D.Mass. 1996), *aff'd as modified*, *Macy v. Macy*, 192 B.R. 802 (Bankr. D.Mass. 1996), *aff'd*, 114 F.3d 1 (1st Cir. 1997).

Another unresolved issue under 11 U.S.C. § 523(a)(15) is whether a debt can be partially discharged or modified. *In re Smither*, 194 B.R. at 109. The *Smither* court held that courts may grant partial discharges and modifications of § 523(a)(15) debt if it is paid over a reasonable amount of time. Denying these alternatives would contradict § 523(a)(15)'s legislative history and policy. *In re Smither*, 194 B.R. at 109.

b. 11 U.S.C. § 523(a)(14)

Although there is no case law on point, the author believes that it may be possible to use the provisions of § 523(a)(14) to declare a debtor's obligations to indemnify the nondebtor spouse from certain income tax obligations as nondischargeable pursuant to § 523(a)(14). Section 523(a)(14) provides that a debt incurred to pay a tax to the United States that would be nondischargeable pursuant to § 523(a)(1) is itself nondischargeable. The legislative history regarding the enactment of § 523(a)(14) indicated its anticipation of Internal Revenue Service rulings allowing credit card payment of taxes. Congress designed this provision to facilitate individuals charging taxes on their credit cards. However, the language of the statute is not this narrow and the plain meaning of the provisions of

§ 523(a)(14) provide a well-reasoned argument that an obligation to hold harmless a nondebtor spouse from income tax obligations is in fact an obligation incurred by the nondebtor spouse to pay a tax to the United States. Thus, if the obligations to the United States are nondischargeable,[22] the obligations to the nondebtor spouse should likewise be nondischargeable.

IV. ADVANCED BANKRUPTCY ISSUES

The next section of this article will explore what many family law practitioners may consider as more bankruptcy than they really want to know. The first four parts of this discussion will focus on strategies which are appropriate for a nondebtor spouse facing complex bankruptcy/family law situations especially when there are substantial assets at stake or when a suspicion of serious fraud by the debtor spouse exists: (1) seeking an appointment of a bankruptcy trustee, (2) converting the case from one chapter to another, (3) seeking dismissal of a bankruptcy case, and (4) filing an involuntary bankruptcy proceeding. The last part of the discussion will look at how a debtor spouse can use a bankruptcy filing to unwind a "bad deal" in a divorce case.

A. Appointment of a Trustee

As discussed above, many times a debtor with substantial assets and liabilities will file a bankruptcy proceeding under Chapter 11 to avoid losing control of his assets and operation of his business while he seeks to restructure debt obligations. Unlike Chapter 7, 12 or 13, the initial filing of a Chapter 11 case does not give rise to an appointment of a court ordered trustee. Instead, the debtor remains a "debtor-in-possession" and retains control of his property and may continue to operate its business. *See* 11 U.S.C. §§ 1107 and 1108. This situation need not maintain the status quo. Creditors may seek the appointment of a trustee any time after the commencement of the case before confirmation of a plan under 11 U.S.C. § 1104. Section 1104 requires that the court to appoint a trustee:

a. For a cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor . . . either before or after the commencement of the case . . . or
b. If such appointment is in the interest of creditors, any equity security holders, and other interests of the estate . . . .

11 U.S.C. § 1104(a). Thus in a case where a nondebtor spouse can develop evidence that the debtor spouse has mismanaged his assets prior to the filing, or is mismanaging his assets during the Chapter 11 proceedings, either dishonestly and fraudulently or just through gross incompetence, the court may seek the appointment of an independent trustee. In a case where true fraud or dishonesty exist, or the debtor is just plainly incapable of managing his own affairs, the appointment of an independent trustee may serve to protect the value of the debtor's property.

However, a creditor can gain a strategic advantage by filing a motion for appointment of a trustee. This is because the debtor will be faced with the risk of losing control of his assets, and thus, he may become more conciliatory in negotiating a resolution of the parties' claims. When pursuing this type strategy, however, one must be sure that legitimate grounds exist for the appointment of a trustee. *See* Bankr. R. 9011 (incorporating Fed. R. Civ. Proc. 11). In addition, creditor must be prepared to accept the fact that if the trustee is appointed, he will act for the benefit of all creditors of the estate, and not merely the creditor who seeks appointment of a trustee.

Once the court appoints a trustee, the nondebtor spouse can increase the likelihood of the trustee's success in the case by assisting the trustee. The trustee receives compensation when he liquidates assets of the estate. With the exception of cash in the bank, the trustee must sell assets to pay himself and creditors. Thus, the more information as to the location of assets, the value of assets, and the potential buyers of assets, that the nondebtor spouse can make available to the trustee, the greater likelihood of distribution to the nondebtor spouse and other creditors.

B. Conversion of the Case

Although a debtor who voluntarily files a bankruptcy petition chooses the chapter of the Bankruptcy Code under which he initially files his case, the case need not remain under the same chapter. As noted throughout this paper, the chapter under which the bankruptcy case proceeds may dramatically impact the rights of the nondebtor spouse creditor. Generally, the nondebtor spouse may want to seek conversion of a case under Chapter 11, 12 or 13, wherein the debtor retains control of his assets, to Chapter 7 where a trustee is appointed to liquidate the debtor's nonexempt property. The standard for conversion under each of these chapters differs. The final result is the appointment of a trustee although, as discussed below, strategic as well as result oriented reasons may exist to seek this type of relief.

i. CONVERSION FROM CHAPTER 11 TO CHAPTER 7

11 U.S.C. § 1112(b) governs when a case under Chapter 11 may be converted to one under Chapter 7. A party may request a conversion of the case to Chapter 7 for cause which includes, but is not limited to, the following reasons:

i. Continuing loss to or diminution of the estate in absence of a reasonable likelihood of rehabilitation;
ii. Inability to effectuate a plan;

iii. Unreasonable delay by the debtor that is prejudicial to creditors;
iv. Failure to propose a plan under §1121 of [the Bankruptcy Code] within any time fixed by the court;
v. Denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or modification of the plan;
vi. Revocation of an Order of Confirmation under § 1144 of [the Bankruptcy Code], and denial of confirmation of another plan or a modified plan under §1129 of [the Bankruptcy Code];
vii. Inability to effectuate substantial consummation of a confirmed plan;
viii. Material default by a debtor with respect to a confirmed plan;
ix. Termination of a plan by reason of an occurrence of a condition specified in the plan; or
x. Nonpayment of any fees under Chapter 123 of Title 28.

11 U.S.C. § 1112(b). The foregoing list is not exclusive, and other reasons may exist for converting a case. Common reasons not listed above include the debtor's failure to file timely operating reports required by the United States Trustee's Office as well as the grounds discussed above for appointment of a Chapter 11 Trustee.

As discussed in the context of seeking appointment of a Chapter 11 Trustee, in certain instances, the filing of the motion to convert the case to Chapter 7 may have a strategic purpose to extract concessions from the debtor. For example, it is not uncommon for a debtor faced with a motion to convert to agree to deadlines for filing and confirming a plan of reorganization. These in turn can bring the real result desired by the nondebtor spouse: resolution.

ii. CONVERSION FROM CHAPTER 13 TO CHAPTER 7

Conversion of a case from Chapter 13 to Chapter 7 is governed by 11 U.S.C. § 1307. As with the Chapter 11 cases, the court may convert a case to Chapter 7 for cause including the following reasons:

(a) Unreasonable delay by the debtor that is prejudicial to creditor;
(b) Nonpayment of fees and charges required under Chapter 123 of Title 28;
(c) Failure to file a plan timely under §1321 of [the Bankruptcy Code];
(d) Failure to commence making timely payments under §1326 of [the Bankruptcy Code];
(e) Denial of confirmation under §1325 of [the Bankruptcy Code] and denial of a request for additional time for filing another plan or modification of a plan;
(f) Material default by the debtor with respect to a term of a confirmed plan;
(g) Revocation of the Order of Confirmation under §1330 of [the Bankruptcy Code], and denial of confirmation of a modified plan under §1329 of [the Bankruptcy Code]; or
(h) Termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than conclusion of payments under the plan.

As noted above, an interested party may seek conversion of a case from Chapter 13 to Chapter 7 based on a true need to prevent fraud or to draft a new and better strategy. In particular, conversion of the case from Chapter 13 to Chapter 7 triggers an opportunity for the nondebtor spouse to pursue nondischargeability of property settlement obligations under §532(a)(15), which are otherwise dischargeable under Chapter 13. Accordingly, a debtor with significant property settlement obligations is usually highly motivated to perform his obligations under Chapter 13 to avoid conversion to Chapter 7.

iii. CONVERSION FROM CHAPTER 12 TO CHAPTER 7

As noted earlier in the paper, Chapter 12 is a provision for the rehabilitation/reorganization of family farmer debt. Converting a case from Chapter 12 to Chapter 7 is governed by 11 U.S.C. §1208 and is extremely limited. Conversion can only be sought under §1208 upon a showing of fraud by debtor in connection with his bankruptcy case. 11 U.S.C. § 1208(d).

A. Dismissal

As an alternative to an appointment of a trustee for conversion of the case, a nondebtor spouse may simply seek dismissal of the debtor spouse's bankruptcy. However, this is often a difficult way to proceed, particularly if the debtor spouse needs bankruptcy relief because of other claims asserted against him by creditors. In the case of Chapter 11 and Chapter 13 cases, the basis for conversion of the case to Chapter 7 also applies to dismissal of the case. 11 U.S.C. §§ 1104 and 1307. In deciding whether to convert or dismiss a case, the court will typically inquire as to the prejudice to creditors if the case is dismissed as opposed to converted to Chapter 7. In considering such matters, the court will consider factors such as the length of time the case has been pending, the delays imposed on creditors by the debtor's bankruptcy filing, and the availability of assets for payment of creditors, the availability of assets for payment of continued administration under Chapter 7. In Chapter 12 proceedings, dismissal is the only relief available to creditors for a debtor's delay in moving his case to confirmation. 11 U.S.C. § 1208(c).

B. Involuntary Bankruptcy

Although the situations will be rare, there may be certain instances in which the nondebtor spouse (or dependent children) may wish to place her former spouse into bankruptcy. *See In re Hopkins*, 177 B.R. 1 (Bankr. D. Me. 1995) (court holds ex-spouse and three minor children constitute four petitioning creditors for purpose of involuntary bankruptcy petition). The nondebtor spouse will often make this decision for reasons similar for seeking appointment of a state court receiver for the debtor spouse's assets. However, the automatic stay and the ability of a bankruptcy trustee to avoid and recover certain transfers may make an involuntary bankruptcy proceeding a more desirable remedy. Typically these reasons would include the following:

(a) The debtors removing property from its business or otherwise reducing assets which would normally be available to the nondebtor spouse for payment of her claims;

(b) A highly leverage debtor is being controlled by his bank or is otherwise taking actions solely for the benefit of his bank creditor;

(c) The debtor is making selective payments to certain creditors while avoiding his obligations to the nondebtor spouse. The filing of the bankruptcy can trap preferential payments within ninety (90) days from the date of filing the involuntary bankruptcy petition; or

(d) Incompetent management by the debtor of his financial affairs. An involuntary bankruptcy petition offers the petitioner the opportunity to gain control of the debtor's assets and business operations through a trustee who may be able to restore, or at least maintain, the financial value of such assets.

It should be noted that involuntarily bankruptcy proceedings are a rare event. Consultation with a bankruptcy expert is essential well in advance of implementing such a strategy. The following is a basic discussion of how an involuntarily bankruptcy proceeding works.

Section 303(b)(1) requires three or more creditors holding unsecured claims, in the aggregate of $10,000, to commence an involuntary bankruptcy, unless the debtor has fewer than twelve total creditors, in which case only one unsecured creditor with a claim of at least $10,000 is required to file an involuntary bankruptcy petition. 11 U.S.C. § 303(b)(1). Petitioning creditors should undertake a reasonable investigation to determine the number of creditors of the debtor, prior to filing. When in doubt, it is wise to have more than three petitioning creditors.

Unlike a voluntary bankruptcy, upon filing an involuntary bankruptcy, an order of relief is not immediately entered. Instead, the debtor has one foot in bankruptcy and one foot out of bankruptcy, until such time as the court adjudicates the debtor as bankrupt, and enters an order for relief. 11 U.S.C. §303(h). However, the debtor is under the jurisdiction of the bankruptcy court. The automatic stay is imposed immediately upon filing of the involuntary bankruptcy petition. 11 U.S.C. § 362(a). This is a very significant event as the automatic stay prevents any individual creditors from seizing the assets of the debtor for their own benefit. Instead, the debtor's assets are preserved for the benefit of all creditors.

Although the filing of an involuntary petition invokes the automatic stay, unless the court orders otherwise, the debtor may continue to operate his business affairs and continue to use, acquire and dispose of property as if an involuntary case had not been commenced. 11 U.S.C. § 303(f). Accordingly, if the involuntary petition has been commenced under Chapter 7 of the Bankruptcy Code, petitioning creditors should also contemplate moving the bankruptcy court for the appointment of an interim trustee to preserve property of the estate and to prevent loss of the estate. 11 U.S.C. § 303(g). Then, the debtor's alternatives are limited to turning over his property to the trustee or posting a bond in a sufficient amount and under court-approved conditions for regaining control of his property. 11 U.S.C. § 303(g).

In order to secure an order for relief declaring an involuntary bankruptcy debtor bankrupt, the petitioning creditors must show that the debtor does not generally pay its debts as they become due. 11 U.S.C. § 303(h). Accordingly, prior to filing, petitioning creditors must be sure they have an understanding of the debtor's financial situation and his dealings with creditors. Courts have looked at various factors to determine whether a debtor is paying its debts as they generally become due, including (1) the number of debts; (2) the amount of delinquency; (3) the amount of material nonpayment; and (4) the nature of the debtor's misconduct of his financial affairs. *See, e.g. In re Westside Community Hospital, Inc.*, 112 B.R. 243, 256 (Bankr. N.D. Ill. 1990); *In re All Media Properties, Inc.*, 5 B.R. 126 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981).

Petitioning creditors must exercise caution in pursuing an involuntary bankruptcy. If the debtor defeats an involuntary bankruptcy petition, meaning that the debtor has successfully shown that it is generally paying its debts as they become due, petitioning creditors may be liable for all costs and attorneys' fees incurred by the debtor to defend the involuntary bankruptcy petition. 11 U.S.C. § 303(i)(1). In addition, if the court finds that the petition was filed in bad faith, the court may award damages proximately caused by the filing of the involuntary petition and

punitive damages. 11 U.S.C. § 303(i)(2). Accordingly, while an involuntary bankruptcy petition is a very powerful weapon, it exposes the petitioning creditor to significant risks. Only when a creditor has performed significant due diligence regarding the debtor and the status of debtor's financial affairs should it pursue an involuntary petition.

V. DRAFTING IN CONTEMPLATION OF BANKRUPTCY

Having discussed the impact of a bankruptcy filing on a family law case, the actions the nondebtor spouse and her counsel must undertake in response to a bankruptcy filing, and some advance bankruptcy strategies, this Article will now address what, if anything, the non debtor spouse can do prior to a bankruptcy filing, in terms of drafting divorce decrees, agreements incident to divorce, and other family court judgments to avoid or at least simplify matters in the event of a bankruptcy filing during or after a divorce proceeding.

A. Agreements Regarding the Automatic Stay

As a starting point, counsel should recognize and understand that the enforceability of any agreement in anticipation of bankruptcy is a risky proposition. Bankruptcy courts often refuse to enforce agreements which attempt to impact or preclude enforcement of the automatic stay as a matter of public policy. *See, e.g., In re Sky Group Int'l, Inc.*, 108 B.R. 86 (Bankr. W.D. Pa. 1989). Nevertheless, other courts have recognized and enforced pre-bankruptcy agreements. *See In re Citadel Properties, Inc.*, 86 B.R. 275 (Bankr. N.D. Fla. 1987) (upholding pre-bankruptcy waiver of automatic stay by debtor). Accordingly, family law practitioners may contemplate including waivers of the automatic stay by debtors in connection with agreements incident to divorce. This is particularly true if the nondebtor spouse retains liens against property. Simply put, these provisions provide that if the debtor spouse seeks protection under the bankruptcy code, he waives protection of the automatic stay and consents to the entry of any order granting the nondebtor spouse relief from the stay to permit enforcement of the terms of the decree or agreement incident to divorce. In addition to such a waiver, if a family law practitioner anticipates a bankruptcy filing, she may want to seek stipulations from the potential debtor spouse to support a motion for relief from stay such as: (1) the debtor spouse cannot provide adequate protection of the nondebtor spouse's collateral; or (2) that the nondebtor spouse's collateral is not necessary to any potential reorganization by the debtor spouse. Several courts have held that in the absence of evidence that the creditors obtained the stipulations by coercion, fraud or mutual mistake of material facts by the parties, the stipulations are binding on the debtor. *See In re Orange Park South Partnership*, 79 B.R. 79 (Bankr. N.D. Fla. 1978); *In re Aurora Investments, Inc.*, 134 B.R. 892 (Bankr. N.D. Fla. 1991). Nevertheless, the victory may be fleeting as it may still be necessary to go to the bankruptcy court to enforce the agreement.

B. Dischargeability Drafting

One avenue which the family law practitioner can traverse in pre-bankruptcy drafting is the issue of dischargeability of support obligations. In this author's opinion, the practitioners will not find success by placing simple declarations of nondischargeability in documents. But rather, divorce documentation will provide the greatest protection against bankruptcy discharge if there are references to the existence and importance of the factors related to nondischargeability under § 523(a)(5) set forth *supra* in Section IV.D.2.b. of this paper. Second, divorce documentation should include a statement of intent to provide for spousal and/or child support. Third, when possible, payment obligations should run to a spouse rather than to a third party creditors as § 523(a) expressly applies only to debts payable to a spouse, former spouse or dependent child of the debtor. 11 U.S.C. § 523(a)(5); *see In re Townsend*, 177 B.R. at 904. In the alternative, the decree or agreement incident to divorce should require the spouse charged with paying the marital obligation to indemnify and hold the other spouse harmless for payments made to the third party creditor as part of the support obligation. *Cf. Stegall v. Stegall (In re Stegall)*, 188 B.R. 597, 598 (Bankr. W.D. Mo. 1995)(no debt to former spouse exists as to marital debt as decree lacked hold harmless or indemnification provisions; therefore, discharge exception of § 523(a)(15) not applicable); *accord Salyers v. Richardson (In re Richardson)*, 212 B.R. 842 (Bankr. E.D. Ky. 1997). Fourth, when possible, terminate payments upon death or remarriage, as courts are more likely to find such payments in the nature of support.

C. Drafting to Prevent Dischargeability of Tax Obligations

As noted above, this author believes that the new amendments to the Bankruptcy Code have a limited potential to create a nondischargeable obligation with respect to payment of marital income tax obligations under Section 523(a)(14). An indemnification and hold harmless provision by one spouse to pay the community federal income tax obligations should be nondischargeable under § 523(a)(14) if the tax obligation itself if nondischargeable. As a general rule, federal income tax obligations due for the three years preceding the bankruptcy filing will be nondischargeable. *See* 11 U.S.C. § 507(a)(8) and § 523(a)(1). Accordingly, such a provision may afford the debtor spouse some limited protection.

D. Security Interests

Another means of protecting a nondebtor spouse from the impact of the debtor spouse's bankruptcy filing is by limiting the potential debtor spouse's

interest in property by the use of a security interest or lien in the personal property retained by the potential debtor spouse pending payment. While a detailed discussion of security interest under the Uniform Commercial Code is beyond the scope of this paper, the author would note that a family law practitioner who intends to help his client take a consensual lien against personal property under an agreement incident to divorce should review Article 9 of the Texas Business and Commerce Code which defines a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation." Tex. Bus. & Comm. Code § 1.201(37)(A). Generally, taking of a security interest has two components: (1) attachment and (2) perfection. Attachment occurs when (1) the collateral is placed in the possession of the secured party or an agreement is signed by the debtor describing the collateral which grants the security interest; (2) value has been given by the secured party to the debtor; and (3) the debtor has rights to the collateral. Tex. Bus. & Comm. Code § 9.203. Once a security interest has attached, the secured party can enforce same against the debtor. Perfection, on the other hand, allows the secured party to enforce its rights to the debtor's property to the exclusion of claims of creditors of the debtor. *See* Tex. Bus. & Comm. Code § 9.301. Typically, perfection occurs when the financing statement is filed with the Secretary of State and, in many instances, in the county in which the property is located. *See* Tex. Bus. & Comm. Code § 9.302. However, a secured party can perfect its security interest by possession of the collateral and, in certain instances, the secured party can only perfect its security interest by possession. Specifically, a creditor can only perfect security interests in money, instruments such as certificates of deposits, certificated stock, bonds and negotiable instruments by possession. Tex. Bus. & Comm. Code § 9.304. Perfection is critical because in the event of a bankruptcy filing, the bankruptcy trustee (or the debtor in possession) can avoid unperfected security interests and use the property for benefit of all creditors. 11 U.S.C. § 544.

VI. CONCLUSION

The interaction of bankruptcy and family law is a complex and difficult subject. Management of the situation requires a comprehensive understanding of both bankruptcy policy and its substantive provisions. Family law practitioners must be aware of a future bankruptcy proceeding in negotiating resolution on behalf of their clients. Only through careful analysis can the practitioner anticipate and guide the debtor or nondebtor spouse through the intricacies of the impact of a bankruptcy filing on his or her family law case.

APPENDIX A

APPENDIX A

I. BASIC GUIDE TO BANKRUPTCY

The following basic guide to bankruptcy discusses: (1) the policy behind bankruptcy law, (2) an outline of the structure of the Bankruptcy Code and rules of procedure, (3) the various Bankruptcy Code chapters under which cases can be filed, (4) the bankruptcy court's jurisdiction, and (5) the general administrative scheme of a bankruptcy case.

A. The Policy of Bankruptcy

Bankruptcy law can often be difficult and complex. An extensive statute, cross-referenced and loaded with defined terms, together with a set of equally complex procedural rules all affecting state-law rights require the bankruptcy practitioner to devote a substantial amount of time mastering the subject area. However, an understanding of the policy behind bankruptcy law can provide a great deal of insight to the family law practitioner on how bankruptcy works. Bankruptcy law has two fundamental purposes: (1) to provide the individual[23] debtor with a fresh start, free from the burden of debt accumulated prior to the bankruptcy filing; and (2) to provide an equality of distribution of the debtor's assets among legally similar creditors.

I. FRESH START

The "fresh start" concept is relatively straight forward. An honest debtor[24] who complies with the requirements of the Bankruptcy Code receives a discharge of liability for virtually all debts in existence at the time of filing, and in limited circumstances, for debts incurred after the filing. Generally, the debtor may retain a certain amount of exempt property to restart his life.[25] A discharge granted by the bankruptcy court:

i. voids any judgment obtained at any time, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under §§ 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

ii. operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

iii. operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in § 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under §§ 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of §§ 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 U.S.C. § 524(a). Discharge provides the debtor a "fresh start" free from creditors' claims. Discharge relegates creditors to recover their claims from the property of the bankruptcy estate.

While the scope of discharge is broad, three important limits to discharge exist. First, a discharge is limited to a debtor's personal liability. Thus, to the extent a debt is secured by a lien or other interest in property, the debt remains enforceable against the property, *see*, 11 U.S.C. § 524(e), unless the lien can be avoided under other provisions of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 522(f), 544 and 545. Second, the discharge is limited to the debtor. Thus, the debtor's bankruptcy filing does not affect the liability of the debtor's spouse (as well as the liability of other co-debtors and guarantors). 11 U.S.C. § 524(e). This is true even if the debtor has previously agreed to indemnify and hold the spouse harmless from such debts.[26] Third, the Bankruptcy Code limits the scope of discharge. Only the honest debtor can obtain a discharge, and even the honest debtor may not be able to claim that certain types of debt are dischargeable in bankruptcy. *See, e.g.*, 11 U.S.C. § 523(a)(5) and (a)(15) (limiting discharge of support obligations and other liabilities incurred in connection with divorce proceedings).

II. EQUALITY OF DISTRIBUTION

The second policy of bankruptcy law is to preserve the debtor's assets for equitable distribution to similarly situated creditors. In the absence of bankruptcy, a debtor who cannot pay all of his or her debts is subject to repeated "attack" by creditors using state law remedies to collect their claims, i.e., garnishment, attachment, and sequestration. Generally, creditors' claims have one of three positions in bankruptcy: (1) secured claim, (2) priority unsecured claim, or (3) nonpriority, general unsecured claim. In the absence of bankruptcy, secured creditors foreclose their liens. The debtor's remaining unencumbered assets go to the diligent unsecured creditor who races to the courthouse first, or to those creditors whom the debtor chooses to pay first for moral, social or other reasons. Commensurate with this over-arching policy, bankruptcy law also prevents the unequitable dismemberment of the debtor's assets through a combination of the automatic stay, 11 U.S.C. § 362, and transfer avoidance and recovery provisions, 11 U.S.C. §§ 549-550. Moreover, the Bankruptcy Code also proscribes a system of priority for distribution of the value of the debtor's nonexempt property to creditors.[27] 11 U.S.C. § 507. Of particular import to family law

practitioners is the priority established for support obligations pursuant to 11 U.S.C. § 523(a)(5) discussed *infra* in Section IV.D.[28]

B. The Statute and the Rules

i. THE STATUTE

The Bankruptcy Code is Title 11 of the United States Code and it contains eight chapters:

Chapter	Description
1	General Provisions
3	Case Administration
5	Creditors, Debtors and the Estate
7	Liquidation
9	Adjustment of Debts of the Municipality
11	Reorganization
12	Adjustment of Debts of a Family Farmer with Regular Annual Income
13	Adjustment of Debts of an Individual with Regular Annual Income

In addition, the practitioner should also be aware that various provisions of Title 18 of the United States Code regarding federal crimes and criminal procedure, Title 26 of the United States Code regarding federal tax law and Title 28 of the United States Code regarding jurisdiction and judicial procedure also impact bankruptcy practice.

ii. THE RULES

In addition to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure promulgated by the Supreme Court, also regulate bankruptcy practice. The Federal Rules of Bankruptcy Procedure incorporate the Federal Rules of Civil Procedure. There are nine parts to the Bankruptcy Rules

Part	Description
I	Commencement of Case; Proceedings Relating to Petition and Order for Relief
II	Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants
III	Claims and Distribution to Creditors and Equity Interest Holders; Plans
IV	The Debtor: Duties and Benefits
V	Court and Clerks
VI	Collection and Liquidation of the Estate
VII	Adversary Proceedings
VIII	Appeals to District Court or Bankruptcy Appellate Panel
IX	General Provisions

As in state court, the practitioner should also review local rules of bankruptcy procedure as well as any "special" requirements imposed by a particular judge to proceedings in his or her court.

iii. PRACTITIONER'S NOTE: NOTICE AND HEARING

One aspect of bankruptcy practice "hidden" in the Bankruptcy Code and its procedural rules is the concept of bankruptcy court approval of certain actions after "notice and hearing." *See, e.g.*, 11 U.S.C. § 363(b) (sale of property of estate). Under 11. U.S.C. § 102(1) the phrase "after notice and hearing:"

> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for hearing as is appropriate in the particular circumstances; but
>
> (B) authorize an act without an actual hearing if such notice is given properly and if--
>
> (i) such a hearing is not timely requested by a party in interest; or
>
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorize such an act

11 U.S.C. § 102(1) (emphasis added). Importantly, Section 102 empowers the court to authorize action without a hearing, unless an opposing party objects. Bankruptcy courts in Texas have established a procedure for allowing for the use of a "negative notice period." After an appropriate number of days notice to parties in interest, the court will sign an order authorizing the act in the absence of an objection. *See, e.g.* Local Bankruptcy Rule of Procedure 9007 for Northern District of Texas (20 day notice for most motions). Accordingly, the nonbankruptcy practitioner must carefully review the bankruptcy pleadings upon receipt and take note of the time to respond to ensure that if any action proposed by the debtor spouse or his trustee is opposed, a timely response is filed and a hearing is set.

C. Chapter Filings

As noted above, the Bankruptcy Code contains various chapters. Chapters 1, 3, and 5 generally apply to all cases. The operative bankruptcy chapters under which an individual debtor typically files are Chapters 7, 11 and 13.[29] The chapter under which a debtor files has a direct impact on his creditors' rights and remedies. A brief description of each of the available chapters follows.

CHAPTER 7 – LIQUIDATION

A case under Chapter 7 of the Bankruptcy Code is a liquidation bankruptcy. Under Chapter 7, a debtor places all of its property in the hands of a private trustee subject to proper exemption of some or all of the property. The trustee is charged with liquidating nonexempt property, examining the debtor's transactions prior to bankruptcy, and prosecuting avoidance actions (i.e., preference claims and fraudulent transfers) to recover assets for the bankruptcy estate. 11 U.S.C. § 704. Having reduced the debtor's non-exempt property to cash and recovered any

avoided transfers, the trustee distributes the estate pursuant to the priority scheme proscribed by 11 U.S.C. § 507.[30] In the event an insufficient amount exists to pay in full a particular class of creditors, a pro-rata distribution is made and junior classes go unpaid. The debtor, on the other hand, may keep his exempt property and receives a discharge to obtain the "fresh start." 11 U.S.C. § 727.

CHAPTER 11 - REORGANIZATION

Chapter 11 of the Bankruptcy Code typically provides corporations and partnerships with an opportunity to reorganize their financial affairs and restructure their debt obligations. The Supreme Court, however, has expressly held that individual debtors may also file bankruptcy under Chapter 11, whether or not the debtor is engaged in business. *Toibb v. Radloff,* 501 U.S. 157. The advantage to a Chapter 11 filing is the debtor's ability to remain in possession of his property and continue operating his business. 11 U.S.C. §§ 1107 and 1108. As a practical matter, a Chapter 11 proceeding is only appropriate in individual cases where substantial assets are at stake because such proceedings are complex and expensive. Often a debtor will file under Chapter 11 to retain control. However, as noted below, a debtor of modest means can obtain similar results by reorganizing under Chapter 13.

Chapter 11 serves as a business reorganization tool. The goal of a Chapter 11 case is to reorganize a debtor's financial affairs through confirmation of a reorganization plan. Generally, the debtor itself (as "debtor-in-possession") is in charge of the reorganization and remains in control of its assets, unless creditors or the parties seek appointment of a trustee. *See* 11 U.S.C. §§ 1101, 1107 and 1108. Usually a debtor prepares a plan providing for a schedule of payments to creditors. The debtor may accomplish this by selling assets, restructuring the terms of debt, including the maturity date, interest rate and/or payment terms, and seeking consent of creditors to accept less than full payment on their claims. In a business case, creditors may also receive equity in the reorganized business.

Confirmation of a plan of reorganization provides the debtor with a discharge, provided the debtor continues to operate his or her business after confirmation of the plan. "Bad acts" by the debtor such as fraud on the creditors may invalidate the discharge 11 U.S.C. § 1141(d)(3)(C).[31] In addition, the non-dischargeability of particular types of debt, including support and indemnity obligations, may also be non-dischargeable despite the confirmation of a plan. 11 U.S.C. § 1141(d)(2).

Family law practitioners should be particularly wary of Chapter 11 proceedings, as they can create problems for the family law practitioner regarding the payment of fees, regardless of who the family law practitioner represents. This occurs because community property becomes property of the bankruptcy estate, thereby restricting its use by either spouse without bankruptcy court authority. Thus, counsel for both the debtor and nondebtor spouse must be careful to determine if they have been properly authorized to receive payments after the filing of the case. Failure to do so may result in the bankruptcy court ordering disgorgement of fees and preclude future payment. *See,* 11 U.S.C. §§ 549 and 550 (providing for avoidance and recovery of unauthorized postpetition transfers of property of the estate). Also, many Chapter 11 cases do not result in a confirmed plan, but instead are converted to Chapter 7. Chapter 7 administrative costs "prime" Chapter 11 administrative costs. Thus, family law counsel employed by a debtor in Chapter 11 who later finds that insufficient assets exist to pay Chapter 7 administration costs may have to forego fees and disgorge any payment received from the Chapter 7 Trustee. To avoid this problem, family law counsel must give careful attention to the financial situation of the client in a Chapter 11 proceeding.

CHAPTER 13 - DEBT ADJUSTMENT OF AN INDIVIDUAL WITH REGULAR INCOME

Chapter 13 is a simpler form of reorganization than Chapter 11. Congress designed Chapter 13 for individuals with relatively modest debt obligations. Only an individual with regular income who owes, on the date of filing of bankruptcy, non-contingent liquidated unsecured debts of less than $250,000 and non-contingent liquidated secured debts of less than $750,000 may be a debtor under Chapter 13. 11 U.S.C. § 109(e).[32] Chapter 13 allows a debtor to keep his property, including non-exempt property, reduce interest rates on debt, restructure payments on certain secured claims, cure delinquent mortgage payments over the length of the plan, pay out priority tax claims (such as income tax) over the length of the plan without interest or penalty. Additionally, Chapter 13 provides a broader scope of discharge by limiting the type of debts which are nondischargeable under 11 U.S.C. § 523(a).[33]

Under Chapter 13, the debtor proposes a plan under which he pays a portion of future earnings necessary for execution of the plan to a court-appointed trustee. Without the consent of the Chapter 13 trustee and the unsecured creditors, the debtor at the very least must commit his "disposable income" to the funding of a plan. 11 U.S.C. § 1325(b). Disposable income is income received by the debtor which is not reasonably necessary for the maintenance or support of the debtor or dependents of the debtor. 11 U.S.C. § 1325(b)(2). If the debtor operates a business, disposable income is that income which is necessary to continue, preserve, and operate the business. *Id.*

Chapter 13 proceedings require particular attention from the family law practitioner. Unlike Chapter 7 or 11 proceedings, a Chapter 13 debtor's spouse post-petition earnings are property of the

bankruptcy estate 11 U.S.C. § 1306. Accordingly, as is discussed *infra*, it is difficult to attach such assets for the support and maintenance of the nondebtor spouse or children of the marriage without seeking relief from the automatic stay. *See* 11 U.S.C. § 362(a). The debtor must carefully examine his reorganization plan and purported "disposable income" to ensure that the plan includes future child and spousal support payments. Otherwise, opposing counsel should challenge the plan's feasibility. If the plan does not properly designate past-due child and spousal support as a priority claim to be paid in full under the life of the plan, opposing counsel should object to its confirmation. *See* 11 U.S.C. §§ 507(a)(7) and 1322(a)(2). Once confirmed, the provisions of the plan bind the debtor and each creditor, whether or not the plan provides for the claim of such a creditor. 11 U.S.C. § 1327(a).

The family law practitioner should also be aware that the debtor's nonsupport obligations will be discharged upon completion of payments under a Chapter 13 plan notwithstanding 11 U.S.C. § 523(a)(15). Accordingly, under the proper circumstances, the debtor spouse may wish to consider a conversion of the debtor's Chapter 13 case to Chapter 7. Conversely, the debtor spouse filing bankruptcy may wish to seek qualification under Chapter 13 to discharge nonsupport obligations.

D. The Bankruptcy Court and Its Jurisdiction

THE COURT

The bankruptcy court is part of the federal court system. While a bankruptcy court is nominally an adjunct of the district court, the bankruptcy courts operate virtually independently of the district court. In accordance with 28 U.S.C. § 157, each district court, with the exception of Delaware, has ordered that any or all cases under, arising under, or related to the Bankruptcy Code are referred to the bankruptcy judge for that district. 28 U.S.C. § 157(a). Nevertheless, the district court retains the right to withdraw such case or proceeding either *sua sponte* or upon the motion of a party, and is required to do so if the resolution of the matter involves "consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d).

The courts of appeal for each circuit appoints bankruptcy judges for a term of fourteen-year terms. 28 U.S.C. § 152(a)(1). Bankruptcy judges are subject to removal during the term of their office "only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial counsel of the circuit." 28 U.S.C. § 152(e). In short, the bankruptcy court looks and acts very much like a district court, except that the bankruptcy court has a more limited jurisdiction.

ii. BANKRUPTCY COURT JURISDICTION

The Bankruptcy Court exercises jurisdiction over three different, but occasionally overlapping matters:[34] (1) cases pursuant 28 U.S.C. § 1334(a); (2) civil proceedings pursuant to 28 U.S.C. § 1334(b); and (3) property pursuant to 28 U.S.C. § 1334(d).

1. Jurisdiction Over Cases

28 U.S.C. § 1334(a) vests "original and exclusive jurisdiction of all cases under Title 11" in the bankruptcy court. The filing of the bankruptcy petition pursuant to 11 U.S.C. §§ 301 -304 commences a case under Title 11. The grant of exclusive jurisdiction to the bankruptcy court over a bankruptcy case precludes the filing of a bankruptcy petition in state court. The distinction between a case, on one hand, and civil proceedings, on the other, is important because the bankruptcy court's exclusive jurisdiction only relates to cases. The filing of the petition and proceedings on the petition itself, such as the trial of an involuntary bankruptcy petition or a motion to dismiss the petition, constitute part of the case. Beyond this, the meaning of "case" is debatable but has not been the subject of any significant development by the courts to date.

2. Jurisdiction Over Civil Proceedings

28 U.S.C. § 1334(b) provides bankruptcy courts with "original but not exclusive jurisdiction over all civil proceedings arising under Title 11, arising in or related to cases under Title 11." As jurisdiction over civil proceedings is nonexclusive, bankruptcy litigation often proceeds in other federal and state courts even though a bankruptcy court has jurisdiction to hear it. Particularly in the case of family law proceedings, the bankruptcy court may choose to abstain from hearing a particular proceeding, remand an action removed to it, or authorize an action originally filed in state court to proceed to judgment in that court.

The bankruptcy jurisdiction, although nonexclusive, is nevertheless paramount. The automatic stay imposed by a bankruptcy filing generally precludes litigation in other courts from proceeding without consent of the bankruptcy court. 11 U.S.C. § 362. Alternatively, a bankruptcy court may enjoin litigation in other courts pursuant to 11 U.S.C. § 105(a). Further, subject to the bankruptcy court's decision to abstain or remand such an action, parties to the litigation may remove to the bankruptcy court an action pending in another court prior to bankruptcy. 28 U.S.C. § 1452.

The Bankruptcy Code uses the term "proceeding" to refer to anything that occurs in a case. "Proceeding" used in its broadest sense encompasses contested matters, adversary proceedings, and any disputes related to administrative matters in a bankruptcy case. Bankruptcy court jurisdiction over civil proceedings is

divided into "core" and "non-core" proceedings. Core proceedings are proceedings in which bankruptcy judges may determine fact and law and enter appropriate final orders and judgments, so long as the reference of the case has not been withdrawn by the district court. Core proceedings are matters directly related to the administration of a debtor's bankruptcy estate, adjustment of debt obligations and adjustment of the debtor-creditor relationship. Core proceedings include, but are not limited to, allowance of claims against the estate, proceedings to determine, avoid, and recover preferences and fraudulent conveyances, dischargeability of the debtor and particular debts, determinations of validity, extent and priority of liens or other interest in property and other proceedings which affect the liquidation of the assets of the estate or adjustment of the debtor-creditor relationship. *See* 28 U.S.C. § 157(b)(2). However, Congress has expressly excluded proceedings related to determination of personal injury awards or wrongful death claims from the bankruptcy court's core judicial authority. 28 U.S.C. § 157(b)(2)(O).

Bankruptcy courts may also hear "related non-core" proceedings. *Cf. In re Gallucci*, 931 F.2d 738 (11th Cir. 1991) (bankruptcy court may not hear noncore, nonrelated matters). A proceeding "relates to" a bankruptcy case if its outcome affects the amount of property available for distribution of the allocation of property to creditors. *In re Emerald Acquisition Corp.*, 170 B.R. 632 (Bankr. N.D. Ill. 1994). In a noncore related case, absent the consent of the parties, the bankruptcy court must submit findings of fact and conclusions of law to the district court, which then enters judgment in the case. 28 U.S.C. § 157(c)(1) and (2). Case law has defined "related proceedings" as those proceedings that, in the absence of a petition in bankruptcy, the parties could bring in a state or district court. *See Moody v. Amoco Oil Company*, 734 F.2d 1200 (7th Cir. 1984) cert. den'd, 469 U.S. 982 (1984). *See also, In re Best Prod. Co., Inc.*, 168 B.R. 35 (Bankr. S.D. N.Y. 1994).

The bankruptcy judge determines whether a matter is core or noncore. *Eubanks v. Esenjay Petro. Corp.*, 152 B.R. 459 (E.D. La. 1993). The judge may make this determination on her own motion or upon the timely motion of a party. 28 U.S.C. § 157(b)(3). The bankruptcy judge's determination that a proceeding is core -- either express or implied from his entering a final order -- is presumably subject to review on appeal. However, unless the objecting party appeals the determination in a timely fashion and the court reverses its decision, the final judgment or order will bind the parties even though the matter may have been truly noncore. *See DuVoisin v. Foster (In re Southern Indust. Banking Corp.)*, 809 F.2d 329, 331 (6th Cir. 1987).

3. Jurisdiction Over Property

28 U.S.C. § 1334(e) grants the bankruptcy court exclusive jurisdiction over all property, wherever located, of the debtor and the estate as of the commencement of the case. This section makes clear that a bankruptcy proceeding constitutes, in large measure, an *in rem* action for the purposes of collection, liquidation, and distribution of an estate. To this end, the bankruptcy court has exclusive jurisdiction over virtually all the debtor's property interests, disputes, ownership or lien interests in that property and about its disposition. In general, the property is accorded the bankruptcy court's protection, even if it was subject to the jurisdiction of another court at the time the bankruptcy petition was filed. This jurisdictional provision directly affects any divorce action the nondebtor spouse may seek to commence or which is ongoing when the bankruptcy proceeding is filed. Absent abstention by the bankruptcy court of its exclusive jurisdiction over the debtor's property, the state court may not exercise jurisdiction over property of the debtor or property of the bankruptcy estate. *See e.g., In re Palmer*, 78 B.R. 402, 405-06 (Bankr. E.D.N.Y. 1987).

E. Bankruptcy Administration

One matter causing confusion and frustration to nonbankruptcy practitioners is the number of parties involved in the administration of the bankruptcy case. These parties include the bankruptcy judge, the United States Trustee's office, a panel or private trustee, the estate's professionals and, in limited circumstances, examiners. While a detailed discussion of the roles of each of these parties to a bankruptcy case would provide a topic for an entirely separate paper, a brief description is necessary for understanding the basics of bankruptcy.

i. THE BANKRUPTCY JUDGE

Although technically not an "administrator," the bankruptcy judge (as described above) presides over cases and proceedings before the bankruptcy court. The role of the bankruptcy judge is comparable to that of other judges, i.e., to act as a finder of fact and to make conclusions of law based on presentation of evidence and argument to the court. The absence of the bankruptcy judge in administration is a noteworthy development of modern bankruptcy. Prior to the enactment of the Bankruptcy Code, the bankruptcy judge not only exercised judicial decision-making authority, but also supervised the administration of bankruptcy cases. The dual-role of the bankruptcy judge was, in the opinion of many, the most glaring defect in the former bankruptcy system. The very nature of administrative duties imposed by the court under the Bankruptcy Act encouraged, if not required

informal contact among the bankruptcy judge, lawyers, and others participating in the bankruptcy administration. For this reason, the Bankruptcy Code separates the judicial and administrative functions. The United States Trustee's Office performs the administrative functions previously handled by bankruptcy judges.

ii. THE UNITED STATES TRUSTEE

The United States Trustee operates under the supervision of the United States Attorney General. The twenty-one regions, which consist of groups of federal judicial districts, comprise the United States Trustee system. 28 U.S.C. § 581(a). The Attorney General appoints a United States Trustee for each region to a five-year term. The Attorney General has general supervisory power over United States Trustee as well as the power of removal. 28 U.S.C. §§ 581(a) - (c) and 586(c). The United States Trustee for a given region has a staff of attorneys, accountants and other professionals who assist him in performing his statutory duties.

The United States Trustee has the initial responsibility of appointing individuals from the private sector who actually administer Chapter 7 bankruptcy cases. When no trustee from the private sector is available or desires to serve in a particular case, the United States Trustee staff member may act as trustee for that particular case. 11 U.S.C. § 701(a)(2). In Chapter 11 cases, the United States Trustee appoints a private trustee, if the court orders the appointment, and creditor committee(s) when appropriate. In Chapter 13 cases, the United States Trustee supervises the operations of the standing trustee appointed to administer such cases.

The United States Trustee is responsible for supervising the administration of all cases as well as the actions of private trustees who serve in any particular case. 28 U.S.C. §§ 586(a)(3) and 586(b). To fulfill this responsibility, the United States Trustee monitors: (1) applications for employment of professionals and their compensation and reimbursement for expenses, (2) plans filed in reorganization cases, and (3) disclosure statements in Chapter 11 cases. The United States Trustee ensures that the debtor files all required schedules, reports, and other papers in a timely and proper manner and that filing fees and other fees are paid. The Bankruptcy Code also authorizes the United States Trustee to report to the court his views concerning all matters of administration and to take any necessary steps to ensure that cases under the Bankruptcy Code proceed as expeditiously as possible. 28 U.S.C. § 586(a)(3)(A)-(H). However, the United States Trustee does not have his own enforcement powers. The United States Trustee cannot make orders in the sense that a court or even an administrative agency can make orders. Rather, the United States Trustee exercises his influence through his standing to file appropriate motions, complaints and objections that seek a ruling by the bankruptcy court. 11 U.S.C. § 307.

iii. PANEL OR PRIVATE TRUSTEES

In Chapter 7 cases, the panel or private trustee is the representative of the bankruptcy estate charged with the actual administration the estate's assets. 11 U.S.C. § 323. Promptly after a petition is filed, or an order for relief is entered in an involuntary case under Chapter 7, the United States Trustee appoints an interim trustee from a panel of private trustees maintained by the United States Trustee. Panel trustees are usually attorneys, accountants, or other persons who have met the Attorney General's education and business experience requirements. In any given case, a trustee may be appointed from outside the panel. However, any such trustee must post a sizeable bond to protect creditors and other parties relying on his performance from malfeasance.

At the meeting of creditors held pursuant to 11 U.S.C. § 341(a), if a quorum of creditors holding at least twenty percent (20%) of the amount of outstanding unsecured claims call for an election, properly qualified unsecured creditors may elect their own trustee by a majority vote. 11 U.S.C. § 702(c). An elected trustee need not be a member of the panel. However, due to the substantial effort needed to elect a trustee, it rarely happens. If no other trustee is elected, then the interim trustee serves as the permanent trustee for the Chapter 7 case. 11 U.S.C. § 702(d).

In Chapter 11 reorganization cases, a debtor-in-possession is the normal practice. On occasion creditors may move for the appointment of a Chapter 11 trustee until the time of confirmation of plan. *See*, 11 U.S.C. § 1104. In Chapter 13 cases, there is ordinarily a standing trustee in each district to whom all Chapter 13 cases are assigned as petitions are filed. The creditors do not have the opportunity to elect a trustee in a Chapter 13 case.

Panel trustees receive compensation for their services based on a percentage of distribution to creditors. *See* 11 U.S.C. § 326. Trustees are also reimbursed for their actual expenses. 11 U.S.C. § 330. All such fees and expenses are paid prior to any distribution to unsecured creditors. 11 U.S.C. § 507(a).

iv. THE ESTATE'S PROFESSIONALS

A private trustee (as well as a debtor-in-possession and a Chapter 11 creditors' committee) has the right to seek court authorization to employ attorneys, accountants and other professionals at the expense of the bankruptcy estate. *See*, 11 U.S.C. §§ 327(a), 1103(a) and 1107(a). Before professionals

render services, the court must authorize their employment and before receiving remuneration the court must review and authorize payment. *See*, 11 U.S.C. §§ 327-331

APPENDIX B

FORM: APPEARANCE OF CHILD SUPPORT CREDITOR OR REPRESENTATIVE*

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

In re

Bankruptcy Case No. _____

Debtor

Chapter _____

Address:
Social Security No(s).:
Employer's Tax Identification No(s). [if any]:

APPEARANCE OF CHILD SUPPORT CREDITOR*
OR REPRESENTATIVE

I certify under penalty of perjury that I am a child support creditor* of the above-named debtor, or the authorized representative of such child support creditor, with respect to the child support obligation which is set out below.

Name:
Organization:
Address:

Telephone Number:

X

Date

Child Support Creditor* or Authorized Representative

Summary of Child Support Obligation	
Amount in arrears:	If Child Support has been assigned:
$_____	Amount of Support which is owed under assignment:
Amount currently due per week or per month: on a continuing basis:	$_____
$_____ (per week) (per month)	Amount owed primary child support creditor (balance not assigned);
	$_____
Attach an itemized statement of account	

*Child support creditor includes both creditor or whom the debtor has a primary obligation to pay child support as well as any entity to whom such support has been assigned. If pursuant to Section 422(a)(26) of the Social Security Act or if such debt has been assigned to the Federal Government or to any State or political subdivision of a State.

*This form was issued by the Director of the Administrative Office of the United States Courts for use in bankruptcy cases. The reference to "child support creditor" at the bottom of the form would also include a governmental unit that is the primary child support creditor by law rather than by assignment. Sec. 11 U.S.C. § 523(a)(8).

ENDNOTES

1. **11 U.S.C. § 362 (a) provides as follows:**

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

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

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

    4. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

    5. any act to create, perfect, or enforce any lien against property of the estate;

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

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

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

    9. the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

2. One should not that a determination of whether the stay is applicable is within the purview of the state court's jurisdiction and a state court's decision that the stay is not applicable is not subject to review by a bankruptcy court.

3. As discussed *infra*, this provision may be of little comfort if the debtor files for relief under Chapter 13.

4. Section 524 of the Bankruptcy Code prohibits the enforcement of a reaffirmation agreement of a discharged debt without bankruptcy court approval in accordance with the procedures set forth therein. 11 U.S.C. § 524.

5. Importantly, property award to nondebtor spouse under a divorce decree which is not turned over to nondebtor spouse prior to filing, should not become part of bankruptcy estate. *In re Topper (Jones v. Topper)*, 212 B.R. 255 (Bankr.S.D.Tex. 1997) (stock award to wife under divorce decree not part of ex-husband debtor's estate).

6. For this reason, in the case of a severely financially distressed client, the family law practitioner may want to suggest the joint filing of a bankruptcy petition prior to initiation of a divorce proceeding rather than risk a mid-case filing.

7. This is only true in Chapter 7 and Chapter 11 cases. In Chapter 12 and 13 cases, the debtor's postpetition earnings and property acquired postpetition becomes the property of the estate. *See* 11 U.S.C. §§ 1207 and 1306.

8. For example, federal bankruptcy exemptions provide for a $15,000.00 homestead exemption and a "wild card" or "spill over" provision. *See*, 11 U.S.C. § 522(d)(1) and (5). Thus, a debtor who has not claimed a homestead exemption may exempt as much as $8,300.00 in cash.

9. This section is written from the perspective of the nondebtor spouse as it presumes the debtor spouse has engaged bankruptcy counsel. In the alternative, the reader may reflect upon this section of the paper as "what will the nondebtor spouse do after filing of the debtor spouse?"

10. If a bar date is missed, review *Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993) and its progeny to determine whether relief is available to file a late claim under *Pioneer's* excusable neglect standard.

11. Of course, any amount paid by the estate must be credited against her judgment. Conversely, an amount collected from the debtor spouse reduces the claim against the estate. However, the nondebtor spouse need not choose one source over the other, and if the claim is nondischargeable, the nondebtor spouse may pursue both avenues of recovery.

12. This form was created by Chief Bankruptcy Judge Robert C. McGuire of the United States Bankruptcy Court for the Northern District of Texas.

13. Section 523(a)(15) applies only to bankruptcy cases filed after October 22, 1994.

14. Pursuant to Bankruptcy Rule 2003(a), the initial meeting of creditors must be scheduled no sooner than twenty days and no more than forty days after the filing of the case in Chapter 11 and Chapter cases, no sooner than twenty and no more than thirty-five days after the Order for Relief in Chapter 12 cases and no sooner than twenty and no more than fifty days after the Order for Relief in Chapter 13 cases. The practitioner should be certain to note that even if an initial meeting of creditors under Section 341 of the Bankruptcy Code is rescheduled, the deadline for filing a nondischargeability complaint still runs from the originally scheduled date.

15. In a Chapter 13 bankruptcy, if the debtor moves for a hardship discharge under § 1328(b), the court shall fix the time to file the complaint to determine the dischargeability of any debt pursuant to § 523(c). *In re Auld*, 187 B.R. 351, 352 (Bankr. D.Kan. 1995).

16. *See* Texas Family code, Chapter 3, subsection g, §§ 3.9601-3.96011 (effective as to cases filed after September 1, 1995).

17. In the *Brown* case, the drafting was sufficient where it provided:

> [The Defendant husband] shall pay and provide for the college education or the post-high school education of the child.

In re Brown 74 B.R. at 972.

18. Recent changes in Texas Family Law Code provide for limited alimony opportunities effective as to cases filed after September 1, 1995. *See* note 22.

19. 11 U.S.C. § 523(a)(15) provides:

> [N]ot of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a government unit–unless
>
> > (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the

> debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

20. Section 1325 defines "disposable income" as income "not reasonably necessary to be expended – (A) for the maintenance of support of the debtor or a dependent of the debtor..." 11 U.S.C. § 1325.

21. For example, in Chapter 13 cases, it has been consistently held that § 1325(b) does not permit voluntary deductions for a savings account or deductions for a voluntary pension fund, retirement program, or employee stock purchase plan. *See, e.g., In re Harshburger,* 66 F.3rd 775 (6th Cir. 1995).

In *Garza*, Judge McGuire observed:

> ...the "disposable income" test that is delineated in Code § 1325 (b) provides an excellent starting point for measuring a debtor's ability to pay under § 523(a)(15)(B). *See,* 11 U.S.C. §1325(b)(2)(1994). *Some courts have been reluctant to use this test in the divorce situation where parties have been known to sacrifice their own financial well-being to spite their ex-spouse.* However, a proper application of the test should take into account the prospective income that the debtor should earn and the debtor's reasonable expenses...These types of adjustments are appropriate and should not cause courts to reject the disposable income test as an excellent reference point.

22. *See* 11 U.S.C. §§ 523(a)(1) and 507(a)(8).

23. This paper limits its scope to how an individual's bankruptcy impacts family law cases. Business bankruptcy has its own set of purposes and policies which do not normally impact family law cases.

24. A dishonest debtor may find his or her discharge denied or revoke pursuant to 11 U.S.C. §§ 727(a), 1121(d)(3), 1228(d) or 1328(e).

25. A Chapter 11 debtor may retain exempt property only with consent of the creditors unless unsecured creditors are paid in full. *See, e.g., In re Yasparro, 100 B.R. 91 (Bankr.M.D. Fla. 1989)(debtor cannot confirm plan retaining exempt property unless creditors consent or are paid in full in accordance with absolute priority rule).*

26. The indemnification claims of a spouse, however, may be nondischargeable in Chapter 7 and 11 cases. *See* 11 U.S.C. § 523(a)(14).

27. Under recent amendments to the Code, support and maintenance claims awarded in family law cases now have a superior priority than general unsecured claims and those of taxing authorities. *See,* 11 U.S.C. § 507(a)(7).

28. At the time this paper was being prepared, the House of Representatives had approved legislation moving support obligations from the seventh priority to the first priority. *See* H.R. No. 3150 (June 11, 1998).

29. Individuals who are family farmers can also file under Chapter 12.

30. Where a Chapter 7 filing involves both community and separate property, the trustee must divide the estate in four sub-estates and pay claims according to a complex disbursement plan set out in 11 U.S.C. §§507 and 726(a). These Bankruptcy Code sections provide a detailed methodology for categorizing both estate property claims as being either separate or community and specify which category of claims may be paid from a given category of funds. Nevertheless, the categorization of property as community or separate property is determined under state law. *See Butner v. United States,* 44 U.S. 48 (1979).

31. For a list of "bad acts" that prevent discharge see 11 U.S.C. §727(a).

32. Pursuant to 11 U.S.C. § 104, adjustments will be made to the dollar limitations of a debtor's filing under Chapter 13 to reflect changes in the consumer price index beginning April 1, 1998 and each 3-year interval ending thereafter. 11 U.S.C. § 104(b)(1).

33. In particular, family law practitioners will want to not that nonsupport obligations under a decree or incident to divorce can be discharged in a Chapter 13 case. *See* 11 U.S.C. § 1328.

34. Which 28 U.S.C. § 1334 speaks to the jurisdiction of the district court. Given that each district has referred bankruptcy matters to the bankruptcy court, this article will discuss the jurisdiction of the bankruptcy court.