Mr. and Mrs. Smith Meet Bankruptcy

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I. THE CHAPTER 7 TRUSTEE'S LIQUIDATION OF JOINTLY HELD ASSETS WHERE THERE IS A NON DEBTOR SPOUSE

A. Sale of Assets Pursuant to 11 U.S.C. § 363(h)

Upon the filing of a Chapter 7, the trustee investigates the assets set forth in the schedules filed. If the trustee determines there are assets with equity available to liquidate for the benefit of creditors, the trustee will convert the non-exempt property of the estate to cash through various methods, including sale of property. The Trustee is authorized to seek to liquidate assets that are jointly held by a debtor and a nondebtor spouse under certain circumstances and pursuant to specific procedures set forth in the Bankruptcy Code.

1) 11 U.S.C. § 704. ***Duties of trustee***

(a) The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
(2) be accountable for all property received;

. . .

2) 11 U.S.C. § 363. ***Use, sale, or lease of property***

. . .

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;
(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

B. Relevant Case Law

1) *Calumet Farm, Inc. v. Black Chip Stables, et al. (In re Calumet Farm, Inc.)*, 150 B.R. 664 (Bankr. E.D. Ken. Dec. 23, 1992).

A Chapter 11 Debtor brought an adversary proceeding seeking permission to sell a thoroughbred stallion free and clear of interests of co-owners. In 1981, the co-owners purchased the stallion for $35,000.00. Four years later, the co-owners entered into a Syndicate Agreement with the Debtor, dividing the ownership of the stallion into 40 shares, each representing an undivided 1/40 interest in the stallion. The co-owners agreed to retain 20 of the shares and agreed to sell the other 20 shares to the Debtor for $6,000,000.00 payable: (1) in cash, (2) with breeding seasons to the Debtor's stallions plus a share in one stallion, and (3) by notes payable to individual partners of the co-owner. In the next few years, the stallion was consistently over bred.

Prior to the commencement of the bankruptcy case, an international bloodstock agency valued the Debtor's 20 shares in the stallion at $2.5 million to $3 million. During the bankruptcy several witnesses (bloodstock agents), testified that the sale of the whole horse would produce significantly more for the estate than merely selling the Debtor's 20 shares in the horse. Other witnesses (also bloodstock agents), however, testified that more purchasers would be interested in purchasing individual shares of the stallion than would be interested in purchasing the entire horse, because relatively few purchasers would have the financial wherewithal and be willing to assume the risk involved with purchasing the entire horse. Each of the witnesses estimated varying values for the sale of the whole horse, with a range of anywhere from $3.2 million to $7 million. The co-owners asserted that a sale of the whole horse, rather than permitting them to retain their 20 shares, would deprive them of a stream of income averaging $600,000.00 per year during the remaining eight-year useful life of the stallion. The co-owners also asserted that they would incur substantial federal and state tax liabilities on their share of the sale proceeds.

The bankruptcy court held that the evidence established that the partition "in kind" of the racing stallion, in which the Chapter 11 estate owned 20 of 40 equal fractional interests, would be impracticable, and thus, a sale free and clear of the co-owners' interests was warranted, so long as the sales price was at least $6,358,206.00. The court rejected the co-owners' argument that partition of the stallion was practicable, because "ownership" of the stallion had been divided into fractional interests denominated as shares. The court concluded that the remedy of partition is applicable only if the "ownership" interests in the property have been divided and a co-owner desires to divide the property itself, thereby terminating the joint tenancy. The court illustrated this concept with the more common co-ownership by a husband and wife in a family residence, indicating that the fact that title to property shows that the couple own as joint tenants does not mean that the house and lot is capable of partition. Finally, the court concluded that it was possible to calculate a minimum sales price at which *the benefit to the estate outweighed the detriment to the co-owners*. That sales price was established as $6,358,206.00.

2) *Garner v. Strauss (In re Garner)*, 952 F.2d 232 (8th Cir. Dec. 26, 1991).

As tenant by the entirety, a Debtor and his non-debtor spouse owned a total of 6700 shares of stock in two different companies. The Trustee filed a Complaint for turnover of property, seeking possession of shares of stock held by the Debtor and non-debtor spouse as tenants by the entirety. The Bankruptcy Court determined that the stock should be included in the estate. The District Court reversed and remanded, and the Debtor appealed.

On appeal, the Eighth Circuit held that the definition of property pursuant to Section 541 of the Code is broad enough to include an individual debtor's interest in property held as a tenant by entirety when only one spouse is in bankruptcy. Also, the Eighth Circuit held that the Debtor was not entitled to exempt from property of the estate personal property held in tenancy by the entirety, under Bankruptcy Code provision exempting any entirety interest to the extent that such interest is exempt from process under applicable nonbankruptcy law.

The court further held that partition of the stock was not impracticable. As the stock had been liquidated by the Trustee, the Eighth Circuit ordered that one-half of the sale proceeds be turned over to the non-debtor spouse, pursuant to Section 363(h)(1) of the Code. The court concluded that creditors could pursue whatever actions they possessed against the non-debtor spouse after the Trustee turned over one-half of the sale proceeds. The court indicated that it would have acted under Section 363(j) had it been impracticable to partition the stock. Section 363(j) provides for a reduction of the sale proceeds in the amount of the transaction costs, not including the trustee's compensation, while Section 363(h)(1) does not.

II. THE CHAPTER 7 TRUSTEE'S ADMINISTRATION OF EXEMPT PROPERTY FOR THE BENEFIT OF A HOLDER OF A DOMESTIC SUPPORT OBLIGATION

A. Domestic Support Obligations

1) What is A Domestic Support Obligation?

a) Definition- A "domestic support obligation" is defined in 11 U.S. C. Section 101(14A), which provides,

> . . .
>
> (14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--
>
> (A) owed to or recoverable by--
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt. 11 U.S.C. § 101(14A)

2) Domestic Support Obligations Are Entitled to Higher Priority

Section 507(a)(1) provides a first priority for certain domestic support obligations. Section 507(a)(1) was enacted in 2005. It replaced former section 507(a)(7), which created a seventh priority in favor of certain claims for alimony, maintenance and support. Prior to the Bankruptcy Reform Act of 1994, the Bankruptcy Code did not provide any priority status to domestic support obligations. Domestic support obligation claims, were not subject to discharge but they were not given any payment priority with respect to distributions of property of the estate. The 2005 Act both broadened the scope of the priority and elevated it from seventh priority to a first priority status[1].

I. 11 U.S.C. §507(a)(1)(A) grants first priority to qualifying domestic support obligations owed to a spouse, former spouse or child of the debtor. To qualify for the higher priority in section 507(a)(1)(A), the claim must, as of the petition date, be owed to a spouse, former spouse or child of the debtor, or such child's parent, legal guardian or responsible relative. It does not matter whether the claim was filed by such a person or whether it was filed on behalf of such person by a governmental unit. The key is the party to whom the claim is owed. If it is owed to the individual, rather than the governmental unit through assignment, the claim will be entitled to the higher priority.

II. 11 U.S.C. §507(a)(1)(B) grants second priority to qualifying domestic support obligations that have been assigned to a governmental unit. This includes DSOs that as of the date the bankruptcy was filed, were assigned to a governmental unit- but not ones assigned voluntarily by the claimant for purposes of collecting the debt.

III. 11 U.S.C. §507(a)(1)(C) provides that both 507(a)(1)(A) and (B) are subordinate to administrative expenses of a trustee incurred in administering assets that are used to pay domestic support obligations.[2] This particular priority applies to certain administrative expenses incurred by a trustee in administering assets that are ultimately used to pay domestic support obligations. The qualifying administrative expenses are set forth in section 503(b) and include costs of preserving the estate [503(b)(1)(A)], compensation awarded under section 330 [503(b)(2)] and fees and mileage under chapter 119 of title 28 [503(b)(6)]. If an administrative expense falls into one of these three categories, and if it was incurred by the trustee in administering assets used toward the payment of domestic support obligations, the trustee will be entitled to be reimbursed ahead of the holders of priority claims under sections 507(a)(1)(A) and (B). The purpose of this special priority is to provide the trustee with an incentive to administer assets that could be used for payment of domestic support obligations and to protect trustees who do so.

[1] See *4-507 Collier on Bankruptcy-15th Edition Rev.,* (2007) P 507.02A

[2] This priority is available not only to trustees in chapter 7 case but to trustees in chapter 11, chapter 12 and chapter 13 cases as well.

3) Domestic Support Obligations Are Not Dischargeable

11 U.S.C. § 523 *Exceptions to discharge* provides,

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this does not discharge an individual debtor from any debt--
> . . .
>
> (5) for a domestic support obligation;[3]

B. Exemptions And Domestic Support Obligations

1) Bankruptcy Rule 4003 *Claim of Exemptions*

Pursuant to Bankr. Rule 4003 (a), A debtor must list property claimed as exempt under 11 U.S.C. § 522 on their schedule of assets. Section (b) of this Rule provides that "a party in interest" may file an objection to the list of property claimed as exempt within 30 days after the 341 meeting of creditors is held or within 3 days after any amendment to the list is filed, whichever is late, with the burden of proof on the objecting party.

2) 11 U.S.C. § 522 *Exemptions* provides,

> . . .
>
> (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title [11 USCS § 502] as if such debt had arisen, before the commencement of the case, except—
>
> (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5).

[3] For purposes of 11 USC § 523(a)(5), and under *Calhoun* test that is applied by courts in Sixth Circuit, attorney fee awards constitute "support"; specifically, award of attorney fees in divorce judgment is usually found to be in nature of support and thus nondischargeable in bankruptcy proceeding. Ker v Ker (In re Ker), 365 BR 807 (S.D. Ohio Bankr 2007)

C. Duty of a Trustee To Provide Notice To The Holder of A Domestic Support Obligation

1) Applicable Code Section

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) in 11 U.S.C. § 704(10) and 11 U.S.C. § 1302(b)(6) requires the chapter 7 trustee to provide written notice to the holder of a domestic support obligation claim, and the applicable State Child Support Enforcement Agency established by §§ 464 and 466 of the Social Security Act. The trustee must provide a notice at the time of filing and a second notice at the time of discharge.

11 U.S.C. § 704 *Duties of Trustee* provides,

> (a) The trustee shall-
> . . .
> (10) if respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);
> . . .
>
> (c)(1) In a case described in subsection (a)(10) to which subsection (a)(10) applies, the trustee shall--
> (A) (i) provide written notice to the holder of the claim described in subsection (a)(10) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title;
> (ii) include in the notice provided under clause (iii) the address and telephone number of such State child support enforcement agency; and
> (iii) include in the notice provided under clause (i) an explanation of the rights of such holder to payment of such claim under this chapter ;
> (B) (i) provide written notice to such State child support e nforcement agency of such claim; and
> (ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and
> (C) at such time as the debtor is granted a discharge under section 727, provide written notice to such holder and to such State child support enforcement agency of--
> (i) the granting of the discharge;
> (ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and
(iv) the name of each creditor that holds a claim that--
(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or
(II) was reaffirmed by the debtor under section 524(c).
(2) (A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.
(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

2) Sample Notice To Holder of Domestic Support Obligation [4]

- Neither the applicable code section governing notice to the holder of a DSO nor the sample Notice indicate that the holder of a DSO may attempt to liquidate exemptions through the bankruptcy process.

D. Relevant Case Law

1) *In re Covington*, 368 B.R. 38 (Bankr. E.D. Cal. Sept. 22, 2006).

A Chapter 7 petition was filed by joint debtors. The Debtor- Husband claimed exemptions in a $1,000.00 bank deposit and a vehicle. The local child support enforcement agency was the holder of a domestic support obligation for past due child support for the Debtor-Husband's daughter, in the total amount of $38,211.59 (" the DSO"). The Trustee objected to the Debtor's exemptions in his bank deposits and vehicle, and requested disallowance of the exemptions in their entirety. The Trustee also sought to liquidate the property for the benefit of the DSO. The court held that Section 522(c)(1) of the U.S. Bankruptcy Code ("Code"), does not provide for disallowance of the Debtor's claimed exemptions. The court further concluded that the disallowance of an exemption is not a predicate to the enforcement of a domestic support obligation. Also, the court held that pursuant to Section 704(c)(1)(A), a trustee is only entitled to liquidate *property* of the estate, and exempt property is removed from the estate.

[4] See the sample DSO Notice attached to these materials as provided by the U.S. Department of Justice at *http://www.usdoj.gov/ust/eo/bapcpa/ds/index.htm*

The court, however, concluded that Section 522(c)(1) provides that property exempted by the Debtor can be recovered by the DSO. Finally, the court suggested that it would make more sense to have the DSO seek enforcement of the obligation in a non-bankruptcy forum.

2) *In re Ruppel*, 368 B.R. 42 (Bankr. D. Or. Jan. 9, 2007).

The Debtor filed a Chapter 7 petition and claimed an exemption in certain property. His ex-wife was the holder of the domestic support obligation ("the DSO"). The Trustee in this chapter 7 case filed an objection to exemptions claimed by the Debtor in his property to the extent of the amount of the DSO held by Debtor's ex-wife. The court held that exempt property does not lose its exempt status under Section 522(c)(1) of the Code, and is not property of the estate subject to the Trustee's administration. Moreover, the court concluded that while BAPCPA enhanced the rights of a domestic support holder, it does not give the trustee authority to liquidate exempt property for the benefit of a domestic support claimant. Finally, the court note that Section 362(b)(2)(B) of the Code provides for levies by domestic support holders without violation of the automatic stay. The court indicated, however, that nothing in the liquidation framework under the Code, authorizes the Trustee to collect money that is not property of the estate.

3) *In re Quezada*, 368 B.R. 44 (Bankr. S.D. Fla. Feb. 7, 2007).

The Debtor included a "family support obligation" in his Schedule F in the approximate amount of $20,000.00 owed to his ex-wife, and a child support obligation in his Schedule E also in the approximate amount of $20,000.00 for back child support to the New York Scu. The Debtor also claimed a homestead exemption in his residence in Miami, Florida, which had $334,000.00 in equity. The Trustee objected to the Debtor's homestead exemption, and sought the authority to sell residence for the benefit of the domestic support holder. The Trustee cited both Sections 522(c)(1) and 507(a)(1)(C) to support his exemption objection.

The court concluded that the Trustee's argument was "colorable but not convincing," indicating that Section 507 only provides the priorities for distribution of property of the estate and does not give the Trustee the authority to liquidate exempt property. Moreover, the court concluded that exemptions are allowed to help provide debtors with a "fresh start." The court further concluded that pursuant to Section 704(a)(1), the Trustee is limited to collecting and reducing to money and property of the estate. BAPCPA only amended Section 704 to require the Trustee to provide written notice to holders of domestic support obligations.

The *Quezada* court also concluded that 522(c)(1) entitles a domestic support holder to execute against exempt assets even when exempt under state law, because it is hard for a creditor to seek relief in state court. The court, however, suggested that nothing prevents a bankruptcy court from asserting jurisdiction under Section 1334(b) of the Code if a DSO seeks to assert a claim against exempt property in bankruptcy.

4) *In re Vandeventer*, 368 B.R. 50 (Bankr. C.D. Ill. April 20, 2007).

The Debtor owed child support maintenance obligations for his sixteen year old daughter, and scheduled his ex-wife as holding an unsecured priority claim of $ 2,180 for child support and maintenance. The Debtor owned two pieces of real estate- the marital residence and his new residence. The Debtor's interest in the marital residence, however, was to be transferred to his ex-wife by quit-claim deed per a court order. The Debtor claimed an exemption in his new residence as his homestead. The homestead has equity of $4,450.00.

The Trustee objected to the Debtor's exemptions in a Harley-Davidson motorcycle and a pick-up truck, pursuant to Section 522(c)(1). The Debtor claimed a partial exemption in both assets pursuant to a wildcard exemption and an automobile exemption.

Relying on the *Covington*, *Ruppel*, and *Quezada* courts as persuasive authority, the court held that while Congress gave DSO claims the highest priority in the amended Section 507(a)(1), it was harder to find support for the proposition that Congress intended exempted property to administered by the Trustee. The court concluded that administration of exempted property by the Trustee conflicts with the basic concept of exemptions.

5) *In re Duggan*, 2007 Bankr. LEXIS 2750 (Bankr. M.D. Fla. Aug. 15, 2007).

Joint debtors filed a voluntary Chapter 7 petition. Both debtors scheduled domestic support obligations creditors ("DSO creditors") with substantial claims. The joint debtors had equity in their home worth $133,000.00. The Trustee gave timely notice to DSO creditors pursuant to Section 704(c)(1)(A) of the Code. Asserting that there were not any non-exempt assets to distribute to for the general benefit of creditors, and objected to the debtors' exemption in their residence on behalf of the DSO creditors.

The court held that although the DSO creditors are entitled to the highest priority, the amendments to Section 522 under BAPCPA, do not grant any new powers to the Trustee to object to or liquidate exempt property. Rather, Section 522(c)(1) of the Bankruptcy Code at best, gives DSO Creditors, and only DSO Creditors, the right to seek the liquidation of otherwise exempt property to pay their claims.

6) *In re Waters*, 2007 *Bankr. LEXIS 2184* (Bankr. M.D. Ala. June 25, 2007).

The Debtor claimed an exemption in an IRA. The Trustee objected to the exemption to liquidate it for the benefit of the DSO. The Trustee did not dispute that the Debtor could claim her IRA as exempt pursuant to 11 U.S.C. § 522(b) and under a former Alabama exemption statute. The Trustee, however, contended that 11 U.S.C. § 522(c)(1) overrode the debtor's right to exempt property where there were creditors who held domestic support obligation claims.

The court utilized a three step analysis to consider the Trustee's exemption objection: (1) Whether the subject property was property under Section 541 of the Code; (2) Whether the property was exempt under 522(b) of the Code; and (3) Whether property, which is properly exempt under Section 522(b) and state law is overridden by Section 522(c). After determining that the IRA was property of the estate and exempt, the court focused on the third inquiry.

The court held that, "Section 522(c)(1) does nothing more than remove the bar of section 522(c), which provides that property which is exempt from the estate is not liable to the claims of creditors even after the bankruptcy case is closed. This means that the holders of DSO claims are not barred by Federal bankruptcy law from pursuing exempt property after the case is over . . . [T]he section 522(c) bar contains an exception for two narrowly defined classes of creditors. These are section 523(a)(1) claims for certain taxes, and section 523(a)(5) for DSO claims. Congress has given these two narrowly defined classes of creditors a green light to pursue exempt property after the debtor receives his discharge."

Following discussion of the rights of DSO claimants to pursue exempt property after discharge, the court overruled the Trustee's objection.

7) *In re Bozeman*, 376 B.R. 813 (Bankr. W.D. Ken. Oct. 29, 2007).

The Debtor had two former spouses. The Debtor's former spouses objected to the exemptions claimed by the Debtor. The Court held that the Debtor is entitled to claim exemptions, and that right was not curtailed by BAPCPA. The exemption objections by the Debtor's former spouses were overruled, but the court concluded that pursuant to Section 522(c)(1) the former spouses were not barred from pursuing the exempt assets to satisfy their claims.

HYPOTHETICAL

Mr. Debtor has a fondness for children and has always been a child at heart. It was only natural, therefore, for him to enter into a business venture in the fair and carnival industry. Mr. Debtor and his business partner created Amusement, Inc. which provided rides and concession stand services to various fairs and carnivals around the U.S. Amusement, Inc. would also employ and provide the staff to take tickets, operate the various rides owned by Amusement, Inc. and to work the concession stands supplied to each fair/carnival. The business was solely a cash business, as is customary in the carnival industry. Mr. Debtor's business partner, a former accountant, took primary responsibility for managing the books and finances of Amusement, Inc. Therefore, Mr. Debtor had virtually no idea how much money was coming in or going out of the business. Mr. Debtor's role was to be on site at the carnivals and to assist with staff management and hiring issues. Mr. Debtor personally guaranteed the business loans used to fund the purchase of the rides and concession stands and to assist in the payment of staff wages. While overseeing the various carnivals, Mr. Debtor met his current wife, a ticket taker for the Tilt-A-Whirl owned by Amusement, Inc. Eventually, Mr. Debtor's relationship with the ticket taker developed into something more serious, infuriating his spouse at the time and ultimately leading to a divorce from his first spouse. Mr. Debtor and the ticket taker were married shortly thereafter. Mr. Debtor has five children with his ex-spouse and she has custody of the children. He is required to make monthly support payments to her.

Mr. Debtor's new spouse took on a more significant role within his company after they got married and she enjoyed an increase in her salary. While the business appeared to be thriving, Mr. Debtor and his new spouse rewarded themselves by purchasing various items including a funnel cake concession stand titled in both of their names, a pure bred stallion with a winning blood line, and some stock in a successful carnival ride manufacturer. They also purchased a new house together and were fortunate to be able to make a significant down-payment at closing.

Unfortunately, Mr. Debtor's business partner became lackadaisical in his management of the business finances. In addition, the business partner allegedly made unauthorized overpayments to himself, but because it was primarily a cash business, nothing could ever be proven. At the same time, the carnival business began to suffer from the downward turn in the economy. Ticket and concession stand sales plummeted and fewer fairs and carnivals were being held. The economy and the business partner's alleged mismanagement of the finances ultimately led to the demise of Amusement, Inc. Mr. Debtor was left with some liability for the business loans he guaranteed even after the liquidation of the assets held by the business. He has some medical bills resulting from a freak accident he suffered at home. He also accumulated significant credit card debt from his uninhibited spending on lavish dinners, excessive parties and high end vacations he paid for during his pursuit of his current wife. He has been unable to find employment for quite some time because his experience is limited to the carnival industry. As a result of his misfortunes, Mr. Debtor has also fallen behind on his support payments to his ex-spouse. Mr. Debtor was forced to file an individual chapter 7 bankruptcy. His spouse, now gainfully employed, did not file for bankruptcy. Virtually all of the debt is Mr. Debtor's individually. His schedules set forth the following list of assets:

Asset	Value	Ownership Int.	Liens	Exemption	Equity
Real Prop.	$400,000	Jointly with Spouse	$300,000	$5,000	$95,000
Concession Stand	$20,000	Jointly with Spouse	$10,000	$1,000	$9,000
Stallion	$25,000	Jointly with Spouse	------	$5,000	$20,000
Stock	$5,000	Jointly with Spouse	------	$5,000	--------
Car	$1,000	Sole	------	$1,000	--------
Tools	$500	Sole	------	$500	--------

DISCUSSION POINTS:

1. The Trustee's liquidation of jointly held assets

- The Trustee's liquidation analysis.
- What can the Trustee liquidate?
- How does the Trustee liquidate jointly held assets?
  -Applicable code sections
- What rights does the nondebtor spouse have in the liquidation process?
- Would the analysis in *Calument*, a Chapter 11 case, be any different if the debtor filed a Chapter 7 petition and the case trustee pursued liquidation?
- Is a sale pursuant to Section 363(h) of the Code a taking under the U.S. Constitution? (*Calumet Farms* court concluded that the coerced sale of the interests of the co-owners is not a taking of property without due process of the law, because the parties agreed to it when they entered the Syndicate Agreement).
- What other factors, if any, should be considered when evaluating the detriment to co-owners. *See In re Persky*, 893 F.2d 15 (2d Cir. 1989) (considering non-economic factors). (*Calumet Farms* court considered one of the co-owners professed affection for the stallion, but concluded that that factor was not persuasive as the stallion was over bred consistently. The court was persuaded that the co-owners were more interested in the stallion as a money maker than a companion).
- Would the analysis in *Calumet* and *Garner* change under BAPCPA?
- Would the analysis in *Garner* be different if the debtor and non-debtor owned the property to be sold pursuant to a *tenancy by partnership*? (Partnership is not a form of ownership under Section 363 (h) of the Code. The trustee can only sell the Debtor's interest in the partnership itself. *See In re Wickham*, 127 B.R. 9 (Bankr. E.D. Va. 1990) and *In re Funneman*, 155 B.R. 197 29 Collier Bankr. Cas. 2d (MB) 52 (Bankr. S.D. Ill. 1993).

2. Liquidation of exempt assets to pay domestic support obligations

- What affect did practitioners anticipate BAPCPA would have on liquidation of exempt assets to pay DSO?
- Interpreting the applicable code sections. The difference in how they read and how the courts apply them.
- Is bankruptcy the last chance for the holder of a DSO?
- Who provides the DSO with notice of ability to pursue exempt assets? What could the Notice required to be provided by the Trustee include?
- Who wins when the Trustee and the holder of a DSO attempt to liquidate exemptions through the bankruptcy?
- What if a governmental unit attempts to enforce the DSO, does the outcome change?
- No Asset vs Asset cases. Would the courts rule differently if it were a "no asset" case?

FAMILY LAW AND BANKRUPTCY REFORM

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made vast changes in consumer law that effect far more than individual debtors, their creditors, and their respective bankruptcy attorneys and trustees. Family practitioners should also be aware of some of the changes as they may affect parties whose rights and obligations exist or will be created pursuant to an action affecting the family, usually because of a dissolution of marriage or other action involving the support of children. Bankruptcy practitioners accustomed to dealing with family obligations in a certain way will also have to change, because that landscape is not what it used to be. Family obligations will be much more difficult to avoid than they were in the past.

This article is intended to be something of a map for those trying to navigate through the family courts before the parties reach the bankruptcy court, and for those trying to get through the bankruptcy thicket once those parties arrive. Anyone looking for an overview of the Act as a whole may wish to look elsewhere and is urged to do so. Changes in bankruptcy law that are not specific to family matters, such as the establishment of the means test for chapter 7 debtors, means test relating to a chapter 13 plan, additional debts not subject to discharge, credit counseling, restrictions on serial filing, new homestead exemption rules, or the increase in time between allowable chapter 7 discharges, may nevertheless affect a case in which a family issue arises. Also, although the law went into effect on October 17, 2005, and most of its provisions apply to cases filed on or after that date, some provisions became effective earlier, and many cases filed before that date to which prior law applies remain pending.

Dischargeability of Family Obligations

Bankruptcy law has for many years made a distinction with respect to obligations arising in a divorce decree, separation agreement, or family related court order, that is not necessarily recognized in the family law context in which the obligations arose; that is, whether a particular obligation is for support of dependants or for division of property. Family lawyers and family courts tend to look at a decree or settlement agreement in its entirety, with interrelated rights and obligations that divide the parties' property and debts and provide for support of children and former spouses who need and are entitled to it. An award of more property may result in lower support payments, and vice versa. However, under the old law, when the bankruptcy of an obligated party intervened before all economic obligations were satisfied, bankruptcy law made the distinction between support or property division for particular obligations, often independently of other obligations within the same decree or agreement. An obligation held to be support was not subject to discharge under 11 U.S.C. § 523(a)(5), and an obligation held not to be for support, i.e., property division, was subject to discharge, unless certain procedural and substantive requirements under 11 U.S.C. § 523(a)(15) were met. There were certain support obligations due governmental entities which were excepted from discharge under 11 U.S.C. § 523(a)(18). The new law greatly diminishes the need for such distinctions.

There is a new definition at 11 U.S.C. § 101(14A) for "domestic support obligation."[1] This term includes all obligations in the nature of support that can arise under a divorce decree,

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

(A) owed to or recoverable by–

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

(ii) a governmental unit;

settlement agreement, or other court or administrative order involving support, and it has a number of important implications for both the family and bankruptcy law practitioner. The first is new 11 U.S.C. § 523(a)(5), which states that a domestic support obligation is excepted from discharge under chapters 7, 11, and 12, and from the hardship discharge under chapters 12 and 13. The concept of support obligations being excepted from discharge is not new. However, section 523(a)(15)[2] now makes obligations to a spouse, former spouse, or child of the debtor arising in connection with a divorce or separation agreement that are not domestic support orders excepted from discharge as well. These two provisions cover, as near as we can tell, all economic obligations that arise by decree or by law relating to the dissolution of marriage or the support of dependants. It is no longer as important to try to make property division obligations look like support, because now property division obligations are usually not subject to discharge, although they may be discharged in a chapter 13 case. Whereas the old 11 U.S.C. § 523(a)(15) required the filing of an adversary proceeding, and a determination of the debtor's ability to pay a property division debt and may have required an equitable balancing test, new 11 U.S.C. §

> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of–
> > (i) a separation agreement, divorce decree, or property settlement agreement;
> > (ii) an order of a court of record; or
> > (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
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> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

[2] Exceptions from discharge include any debt "to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other

523(a)(15) makes property division automatically excepted from discharge whenever this section applies. The elimination of the reference to 11 U.S.C. § 523(a)(15) from 11 U.S.C. § 523(c) means that no adversary proceeding is necessary. In addition, 11 U.S.C. § 523(a)(18) was repealed as it is now encompassed in the nondischargeability provision of 11 U.S.C. § 523(a)(5), and *all* governmental support obligations, even those not arising under or collectible under the Social Security Act, are now excepted from discharge. For example, in *In re Baldwin*, 337 B.R. 592 (Bankr. N.D. Tex. 2006), the debtors' child was found delinquent and placed outside the home, with the parents ordered to reimburse the county for her support. Since the obligation was not to a "spouse, former spouse, or child of the debtor," the debt was discharged. Section 523(a)(18) was not addressed, but this would not be an obligation collectible under the Social Security Act. With the new definition of "domestic support obligation," such a debt would probably not be discharged.

Before family lawyers become too complacent about the structure of their agreements or judgments, it must be noted that the dischargeability of property division debts survives in chapter 13. Section 523(a)(15) obligations are not among the exceptions to a chapter 13 discharge under 11 U.S.C. § 1328(a). Thus, those creating these obligations in the first instance should still be aware of the property division vs. support dichotomy. Pre-BAPCPA law should be consulted for how bankruptcy cases have analyzed settlement agreements and divorce decrees in making this distinction. If the obligor is able to have a plan confirmed and to make all payments under the plan, the family obligation that is not in the nature of support will be discharged to the extent it is not paid.

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order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. § 523(a)(15).

To further complicate matters, requirements for confirming a chapter 13 plan have changed with respect to family obligations, as have requirements for discharge. These changes are described in more detail below in a separate section.

The effect of the exceptions to discharge of debts arising under a divorce decree can be far reaching. For example, a hold harmless provision relating to payment of joint debts may result in changing dischargeable debts, the most common being credit cards and medical obligations, into nondischargeable debts to the former spouse.[3] Moreover, the obligated spouse will have lost the ability to argue that payment of certain debts is not fair in light of changed circumstances.

Enhanced Collection Procedures for Domestic Support Obligations

Domestic support obligations may be satisfied from the debtor's exempt property, notwithstanding any nonbankruptcy law to the contrary. 11 U.S.C. § 522(c)(1). Prior law did not protect exempt property from recovery for such debts, but typically it would be necessary to enforce the support obligation under state law.[4] Under this new provision, if state law does not provide for such recovery, it might be possible for the DSO creditor to recover from exempt property following the bankruptcy. Although it might be economical for the creditor to have a bankruptcy trustee liquidate exempt property, courts considering this issue have generally determined that this provision does not confer on the trustee the right or obligation to administer

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3 On the other hand, leaving out a hold harmless provision could have the opposite consequence. In *In re Forgette*, 379 B.R. 623 (Bankr. W.D. Va. 2007), the debtor's former wife was assigned the joint debt secured by her car, but the debtor was not ordered to hold her harmless on that debt. Thus, the unpaid car payment was not a debt owed to her and could not be a domestic support obligation.

4 *See, e.g., In re Davis*, 170 F.3d 475 (5th Cir. 1999), cert. den. 528 U.S. 822, 120 S.Ct. 67, 145 L.Ed. 57 (1999) (support creditor had no access to exempt homestead property of debtor); *see also In re Elmasri*, 369 B.R. 96 (Bankr. E.D. N.Y. 2007) (pre-BAPCPA case; bankruptcy law conferred no rights in excess of state law for collection of support).

property that is no longer property of the estate on account of the debtor's exemption claim.[5] Also, it may not be appropriate under the statutory bankruptcy distribution scheme for the trustee to administer certain property for only one creditor. Marshaling of assets issues might arise if one creditor has access to exempt property, and other creditors have only access to property of the estate, and it might result in a conflict of interest for the trustee.

There is longstanding authority for the trustee to administer an asset that because of its value has both an exempt and non-exempt value component. The exempt proceeds are then returned to the debtor. It has not yet been determined how a non-debtor DSO creditor might reach these proceeds before distribution of the debtor's exempt amount.

There may be practical problems in enforcing collection in state courts when the right to do so is contrary to state exemption law. For example, some states provide that certain exempt assets, such as retirement benefits, are subject to collection for support debts, but it would be novel for a support creditor of one spouse to recover from the debtor's interest in assets held in tenancy by the entireties with the debtor's nonliable spouse.[6] State courts would be required to apply federal law, and some may be reluctant to do so. Since the creditor's substantive rights arise under Title 11, bankruptcy courts and state courts have concurrent jurisdiction to enforce the applicable provisions. A support creditors may wish to file an adversary proceeding in bankruptcy court to obtain a judgment that a particular exempt asset is subject to recovery for a

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5 *In re Vandeventer,* 368 B.R. 50 (Bankr. C.D. Ill. 2007); *In re Quezada*, 368 B.R. 44, (Bankr. S.D. Fla. 2007); *In re Ruppel* 368 B.R.42 (Bankr. D. Ore. 2007); *In re Covington*, 368 B.R.38 (Bankr. E.D. Cal. 2006). A contrary view is taken by Dennis G. Bezanson and Gary B. Rudolph, *"The Super-Priority" of a "Domestic Support Obligation" ("DSO"): The Trustee as Liquidator of Exempt Property for the Benefit of DSO Claimants; and Other DSO Issues,* Vol. 22, No. 1 NABTalk 20 (Spring 2006).

6 *See* Alan M. Ahart, *The Liability of Property Exempted in Bankruptcy for Pre-Petition Domestic Support obligations After BAPCPA: Debtors Beware*, 81 Am. Bankr. L.J., 233, 238-52 (Issue 3, 2007).

domestic support obligation. Execution on an asset usually takes place pursuant to state law proceedings, so it may then be necessary to record the federal judgment in the state court judgment system. Depending on state court procedures, the creditor would then be able to obtain a lien or execute on the asset.

Protected Transfers Which Satisfy Domestic Support Obligations

Prior law protected support payments from recovery by trustees as preferences, and this is still the case. 11 U.S.C. § 547(c)(7). However, protections are expanded because the definition of "domestic support obligation" also includes obligations to governmental entities. This means that if a payment or transfer is made by the debtor prepetition, and the obligation satisfied is a domestic support obligation, the trustee cannot recover the payment from the transferee for distribution to other creditors. A property division payment may still be recoverable, and it may be necessary for a bankruptcy court to determine whether an ambiguous obligation meets the definition of domestic support obligation. If the prepetition transfer would qualify as a fraudulent transfer, of course, it would be recoverable by the trustee even if the recipient might otherwise be entitled to support by the debtor. *See* 11 U.S.C. §§ 544, 548.

Priorities for Claims for Domestic Support Obligations

Distributions by trustees under the bankruptcy code are made according to priorities set forth in 11 U.S.C. § 507. Domestic support obligations in existence as of the date of filing receive first priority; that is, a plan or distributions in liquidation must pay all claims of a higher priority in full, then provide for lower priority claims until all funds are exhausted.[7] DSO claims

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[7] The timing of payments to DSO creditors under chapter 12 and 13 plans is frequently a matter of local practice. Administrative expense claims and adequate protection payments to secured creditors can be paid along with payments to other creditors, presumably including priority DSO claims. *See In re Sanders*, 341 B.R. 47 (Bankr. N.D. Ala. 2006) (debtor's attorney could be paid before DSO claim paid, even though DSO claim must be paid in full); *see also In*

are entitled to first priority whether the proof of claim is filed by the support claimant or by a governmental entity on the claimant's behalf, provided that payment to the governmental entity will be distributed according to applicable nonbankruptcy law, presumably to the individual entitled to support.[8] Governmental domestic support obligations are paid next. To the extent a trustee is entitled to or incurs allowed professional fees and expenses for recovering funds to pay domestic support obligations, these administration expenses are paid before the domestic support obligation is paid. To the extent that expenses are not related to recovery of funds paid to the support creditor, such as expenses for an unsuccessful fraudulent transfer adversary proceeding or for general expenses, such as tax return preparation, the trustee's expenses might not be compensable.

The enhanced priority of both individual and governmental support claims underscores the need for the creditor to file a proof of claim. Except for certain instances involving chapter 11 debtors, anyone wishing to receive a distribution of property of the estate must file a timely proof of claim, even though the debt may not be subject to discharge. Fed. R. Bankr. P. 3002, 3003. If the creditor fails to do so, the trustee or the debtor may file the proof of claim on the creditor's behalf. Fed. R. Bankr. P. 3004. For example, a support obligor who files a chapter 13 case may wish to file a claim on behalf of the creditor; otherwise, the debtor will make payments

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re Kuppin, 335 B.R. 675 (S.D. Ohio 2005) (Anti-Injunction Act precluded debtor's former wife from requiring IRS to turn over tax refund even though her claim was entitled to higher priority under former law and under debtor's chapter 11 plan); *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006) (local rule gives super-priority status to adequate protection payments to secured creditors).

8 *See, e.g., In re Williams*, No. 07-B-03241 (Bankr., N.D. Ill. March 17, 2008, Schmetterer, J.). The claim of the Illinois Department of Healthcare and Family Services filed on behalf of the custodial parent was entitled to first priority and payment in full, and the debtor's plan could not be confirmed.

under the plan that go to pay lower priority dischargeable debts, and at the end of the plan, the support debt is still owed, with interest.

Interest on Claims

Most unsecured claims are not entitled to interest. 11 U.S.C. § 502(b)(2). However, if domestic support obligations accrue interest under state law, the plan may provide for the payment of interest, provided the debtor has sufficient disposable income to pay all claims in full. 11 U.S.C. §§ 1222(b)(11), 1322(b)(10). Even if interest is not paid on the support claim, and the claimant is entitled to interest under state law, the interest is not subject to discharge at the conclusion of the plan.

Automatic Stay; Exceptions

Exceptions to application of the automatic stay have been expanded as they relate to family court proceedings. Exceptions to the stay for commencement or continuation of a civil action now include:

1. The establishment of paternity;
2. The establishment or modification of a domestic support obligation;
3. Any action concerning child custody or visitation;
4. The dissolution of marriage, except to the extent the proceeding seeks to determine the division of property that is property of the estate. A motion for relief from the stay will still be necessary to determine the parties' rights in property of the estate, which will in some cases, depending on state law, set the amount of the nonfiling spouse's claim. The bankruptcy court has no jurisdiction over abandoned and exempt property that is no longer property of the estate, or over property of the nondebtor spouse;

5. An action regarding domestic violence;

6. Collection of a domestic support obligation from property that is not property of the estate. Earned income of the debtor in a chapter 7 case is not property of the estate, but earned income of a chapter 12 or 13 debtor is. 11 U.S.C. §§ 541(a)(6), 1207(a)(2), 1306(a)(2). A new section makes earned income of an individual chapter 11 debtor property of the estate. 11 U.S.C. § 1115(a)(2). Prior law required relief from the stay to continue wage orders for current support payable by a chapter 12 or 13 debtor, but this will no longer be required; see (7) below;

7. Withholding of income that is property of the estate or property of the debtor, established under a judicial or administrative order or statute; note, however, that a postpetition order by a state court that would require payment of support from sources other than income withholding may violate the stay.

8. Withholding, suspension, or restriction of a driver's license, professional, occupational, or recreational license, under state law, as provided under the Social Security Act. Apparently, this means that some of the tools available to collect support from recalcitrant obligors are not restricted, even if it means the debtor will be unable to fund a plan because s/he is prohibited from driving or engaging in a licensed occupation.

9. Reporting of overdue support by a parent to a consumer reporting agency as specified in the Social Security Act;

10. Interception of tax refunds for overdue support, as provided by the Social Security Act or analogous state law;

11. Enforcement of a medical obligation, as provided by the Social Security Act.

The application of the automatic stay with respect to a debt or secured property has been sharply curtailed by the new Act, particularly with respect to bankruptcy filers who have had one or more cases pending within the year before filing the current case. In general, if one case was pending within a year of filing the current case, the stay expires after 30 days unless the debtor moves to extend it; if there has been more than one case pending within a year of filing the current case, there is no stay, but the debtor may file a motion to impose it. *See* 11 U.S.C. § 362(c)(3) and (4). The ambiguity of these subsections has been a fruitful source of litigation and variation in interpretation and local practices. Most courts have held that the expiration or non-application of the stay relates only to property of the debtor and not property of the estate.[9]

The co-debtor stay was not modified by BAPCPA, so the stay would be in effect with respect to a co-obligor, whether or not that party has filed a bankruptcy case, even if the debtor has had a prior case pending within one year of the current case. 11 U.S.C. § 1201, 1301. If spouses file a joint case, the stay may expire or not apply as to one spouse, but not the other.[10]

Plan Confirmation and Discharge Requirements

Chapter 11, 12, and 13 cases require plans, subject to rules to obtain confirmation, to pay the debtor's creditors, and the new Act has a number of provisions that reflect Congress' policy that domestic support orders be paid by the individuals that file under these chapters. The priority of domestic support obligation claims is outlined above, and all priority claims must be paid in full during the course of the plan, unless the creditor agrees otherwise. 11 U.S.C. §§ 1129(a)(9)(B), 1222(a)(2), 1322(a)(2). In addition, to achieve confirmation of a plan, individuals

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9 *See, e.g., In re Moon,* 339 B.R. 668 (Bankr. N.D. Ohio 2006); *In re Jones,* 339 B.R. 360 (Bankr. E.D. N.C. 2006); *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006).

10 *In re Parker*, 336 B.R. 678 (Bankr. S. D. N.Y. 2006); *see also In re Anderson*, 341 B.R. 365 (Bankr. D. D.C. 2006) (co-debtor stay not implicated when debtor's husband had been only owner of foreclosed real estate and only obligor on note).

filing under all three chapters must certify that postpetition obligations for support are current. 11 U.S.C. §§ 1129(a)(14), 1225(a)(7), 1325(a)(8). Otherwise, a plan cannot be confirmed. The inability to confirm a plan subjects the case to possible dismissal, thus depriving the debtor of the protection of the bankruptcy court. *See* 11 U.S.C. §§ 1112(b), 1208(c), 1307(c).

Domestic support obligations are not subject to discharge under any chapter. All chapters other than chapter 13 provide that debts excepted under 11 U.S.C. § 523 are not subject to discharge. Nonsupport domestic related debts described in 11 U.S.C. § 523(a)(15) (property division debts) are not among the exceptions to discharge under 11 U.S.C. § 1328(a)(2), so these can be discharged upon completion of a chapter 13 plan and discharge.

If the debtor under chapters 12 or 13 has domestic support obligations assigned to a governmental unit, the debtor need not pay those claims in full under the plan. However, the claims are not subject to discharge upon completion of the plan, 11 U.S.C. §§ 1228(a)(2), 1328(a)(2), and the debtor must commit to a five year plan. 11 U.S.C. §§ 1222(a)(4), 1322(a)(4).

A debtor proposing a plan must commit all disposable income to the plan if there is an objection by the trustee or interested party.[11] There is a complicated formula for determining allowable expenses in arriving at disposable income of a debtor whose income exceeds the median income applicable to the debtor, similar to the means test under chapter 7. 11 U.S.C. § 1325(b). However, a domestic support obligation is an allowable expense and the amount

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11 While this statement is true for debtors whose income is below the median income for his/her/their state and family size, it may not necessarily be the case for debtors above the median income amount. *See, e.g. In re Barr*, 341 B.R. 181 (Bankr. M.D. N.C. 2006) (above median income debtors could use IRS expenses to determine how much to commit to plan, resulting in excess income being retained); *see also In re Fuller,* 346 B.R. 472(Bankr. S.D. Ill. 2006) (analyzing chapter 13 means test and statutory requirements for above and below median income debtors; collecting cases); *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006) ("current monthly income" distinguished from "projected disposable income").

necessary to pay the obligation is deducted before arriving at the applicable amount the debtor will have to pay into the plan.

Failure to make current payments of domestic support obligations during the pendency of a plan has been added as grounds to dismiss or convert the case. 11 U.S.C. §§ 1112(b)(4)(P), 1208(c)(10), 1307(c)(11).

Requirements for complying with a chapter 13 plan may also involve a debtor's current spouse, whether or not that spouse wishes to participate in the bankruptcy process. For example, the "applicable commitment period," the time necessary to make payments under a plan to obtain a discharge, requires combining the income from all sources of both the debtor and the debtor's spouse. If their income exceeds the means test, an amount that varies depending on state of residence and family size, the plan must be in effect for five years, unless 100% of claims are paid sooner. 11 U.S.C. § 1322(d), 1325(b); *see also* 11 U.S.C. § 707(b)(6) and (7) (median income determined by family size or fewer individuals).

Certain protections for the debtor's dependants are built into the chapter 13 means test. The debtor can deduct up to $1,500 per year per child for expenses related to public or private school, provided they are reasonable, necessary, documented, and not covered by other categories of expenses. What is reasonable will undoubtedly be developed as experience under the new law increases, but this might for certain debtors include such expenses as tuition, school trips, activity fees, band instrument rental, and athletic equipment.

A chapter 12 or 13 discharge is only granted after the debtor has made all payments under the plan, and 11 U.S.C. § 1141(d)(5) now provides that this is the case for individual chapter 11 debtors as well. Before receiving a discharge, the chapter 12 or 13 debtor must certify that all

postpetition domestic support obligations are current. 11 U.S.C. §§ 1228(a), 1328(a). A similar certification is not required under chapter 11.

Determination of Whether Claim is Domestic Support Obligation

Because of the implications in a chapter 13 case with respect to whether a family related obligation is a domestic support obligation, or another type of family related obligation described in 11 U.S.C. § 523(a)(15), it may be advisable to bring the matter before the bankruptcy court early in the case. In the past, this was typically done by adversary proceeding and may still be approached in this manner. *See* Fed. R. Bankr. P. 7001(6). Since section 523(a)(5) and (15) debts are not within the strictures of section 523(c), there is no longer a time limit set by the Rules, but delay could cause problems in plan administration if payments are well underway, and the order of confirmation may have the effect of determining how the claim is classified.

For cases to which BAPCPA applies, determination of whether an obligation is a domestic support obligation is more likely to come up in other procedural contexts in a chapter 13 case. For example, if the plan proposes to classify the claim as other than first priority, it may be appropriate for a family obligation creditor to object to confirmation. This is how the matter came before the court in *In re Johnson*, 2008 WL 553221 (Bankr. M.D. N.C.). The debtors' plan classified the debtor husband's obligation to pay a debt securing the homestead occupied by his former wife and child as an unsecured nonpriority debt, and no payments were provided for by the plan. The former wife objected to confirmation. The court analyzed the intent of the parties and the function of the obligation, using principles historically applied to determine whether a debt was in the nature of support or property division, and held the debt was a domestic support obligation. As such, it had to be paid in full and was entitled to priority, and confirmation was denied. If the creditor had not objected to confirmation, the order of confirmation might have

made the plan's characterization of the debt immune from collateral attack if she tried to collect it at a later date.

The family obligation creditor may wish to analyze whether all of the debtor's disposable income is committed to the plan, which also requires scrutiny of allowable expenses. An overriding consideration in most instances, however, is whether the treatment of other creditors enhances the support creditor's ability to recover the claim. In other words, by reducing what is paid to other creditors, the ability of the debtor to pay support claims increases. Also, the continued application of the automatic stay and plan provisions for payment of secured and other priority creditors may help the debtor stay in business or retain income producing property. In essence, sometimes it may be in the creditor's best interest to consent to treatment under a plan that does not provide for full payment.

Filing a claim that designates the claim as first priority will usually raise the issue of whether a claim is a domestic support obligation. If the plan is silent as to classification, or consistent in designating the claim as entitled to priority, it will probably be determinative. If the plan and claim are inconsistent as to priority, the trustee may bring an objection to either the plan or the claim to obtain authority for payment. On the other hand, in some jurisdictions it is well settled whether the plan or claim control how a particular obligation will be paid, and the issue might not reach the attention of the bankruptcy court.

In certain circumstances, the debtor may be inclined to provide for priority treatment in a plan, or not to object to priority treatment of a claim, as the effect may be to direct funds to a former spouse rather than to other creditors. This course of action could be beneficial to the debtor's children and to his or her relationship with the former spouse. Other creditors may then wish to object to the claim or plan provision to increase payout to those creditors.

Trustee's Duties

All trustees under all chapters are required to notify creditors holding domestic support obligation claims of their right to seek the services of the state child support agency established under the Social Security Act, including the address and telephone number of the agency, to assist the claimant in collection of the obligation during and after the case. Chapter 7 trustees also provide an explanation of the creditor's rights to payment of the claim under that chapter. The child support agency is also given notice of the filing. Local rules or practice may require that the debtor bring such creditors to the attention of the trustee. The notice regarding the support agency is required even if the beneficiary of the support order is not a child, and the agency would have no available services. A support creditor's rights are numerous, and the notice under chapter 7 is unlikely to be complete.

When the time comes to enter a discharge, and presumably the debtor has certified that s/he is current in domestic support obligation payments, trustees under all chapters are required to again give notice to domestic support obligation creditors and the child support agency established under the Social Security Act that the discharge has been granted, the last recent known address of the debtor, the last recent known name and address of the debtor's employer, and the name of any creditor whose debt was not discharged under certain sections and the name of any creditor whose debt was reaffirmed. Presumably, this information would be useful in enforcing a continuing obligation, and it might alert the creditor to the existence of a valuable asset, such as an expensive car for which the debt was reaffirmed. The holder of the claim is entitled to request the debtor's address of these reaffirmed or nondischarged creditors, and the creditors are authorized to disclose the debtor's address without liability.

Protection of Retirement Savings; Other Expenses

An obvious policy under the Act relates to protection of retirement income. Section 541 was amended to provide that property of the estate does not include contributions made by either the employer or employee to an ERISA qualified employee benefit plan, a qualifying deferred compensation plan, tax deferred annuity, or health insurance plan. 11 U.S.C. § 541(b)(7). Qualified education individual retirement accounts and tuition credit accounts established before a certain time period before filing, and for certain designated beneficiaries, are also excluded. 11 U.S.C. §§ 541(b)(5), (6), (e).

The means test under chapter 7 provides for allowable expenses designed to protect the family. 11 U.S.C. § 707(b)(2). These were devised primarily by the IRS in the context of collection of back taxes.[12] They include reasonably necessary health insurance, disability insurance, and health savings account expenses. Expenses are allowed for protection from family violence, as provided under § 309 of the Family Violence Prevention and Services Act[13] or other applicable law, and these expenses may be kept confidential. Expenses for priority support claims are allowable, and expenses for the care of elderly, chronically ill or disabled household or family members are allowed, notwithstanding that the debtor may not be legally obligated to support such individuals. As with the chapter 13 means test, $1,500 per year per child is allowed for school expenses.

It should be noted that the amount of secured debts that the debtor would have to pay under a chapter 13 plan is also allowed to determine whether the debtor would be able to make payments to unsecured creditors under the required formula. 11 U.S.C. § 707(b)(2)(A)(iii). Whether the debtor has manipulated this amount to qualify for a chapter 7 case might be a factor

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12 Most bankruptcy courts have websites with a list of allowable living expenses or a link to such information on the U.S. Trustee's website. *See, e.g.,* www.wieb.uscourts.gov.

in determining whether granting relief would be an abuse of the code under section 707(b)(3), such as the purchase of an expensive car with a high monthly payment. *See also* 11 U.S.C. § 707(b)(1), (6), (7) (standing to bring motion to dismiss for abusive chapter 7 filing based on income of debtor).

Increased Accountability of Attorneys; Debt Relief Agencies

Section 319 of the Act states that it is the sense of Congress that Fed. R. Bankr. P. 9011 be modified to include a requirement that all signed and unsigned documents in a bankruptcy case that are submitted to a court or trustee be submitted only after the debtor or *debtor's attorney* has made a reasonable inquiry to verify that the information is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, presumably for all chapters under the code. This is also codified in 11 U.S.C. § 707(b), applicable only to chapter 7 cases, and the debtor's attorney may be liable to the trustee for reasonable attorney's fees and costs for bringing the motion, if there has been a violation of Rule 9011 in filing the case.

Attorneys who represent individuals with respect to bankruptcy matters may be subject to penalties and loss of fees if they fail to meet the requirements for a "debt relief agency," defined as 11 U.S.C. § 101(12A). The term includes "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration." 11 U.S.C. § 101(12A). "Assisted person" is defined at 11 U.S.C. § 101(3) as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." The term "bankruptcy assistance" is very broad and could include many types of advice and assistance given to many clients in a variety of contexts, not

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13 Such expenses may include counseling, shelter, legal advocacy, or other related services to victims or their children. *See* 42 U.S.C. § 10421.

solely in connection with the filing of a bankruptcy case for the client.[14] Presumably, this provision applies to an actual case, or one intended to be filed, not the hypothetical questions of clients. However, it may include advice to seek bankruptcy relief or advice concerning a former spouse's potential or actual bankruptcy filing. Once the attorney (or anyone else) is determined to be a "debt relief agency," s/he must make detailed disclosures to the assisted person. 11 U.S.C. §§ 527, 528. Failure to do so may result in loss of fees and other penalties. 11 U.S.C. § 526(c). There are also certain prohibited acts, including a prohibition against advising an assisted person to incur debt in contemplation of filing a case or for the purpose of paying an attorney or bankruptcy petition preparer in connection with a case. 11 U.S.C. § 526(a)(4).

Conclusion

Most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect on October 17, 2005, although some became effective upon enactment. The changes in bankruptcy law are huge, and they may have many unanticipated and unintended ramifications. Case law is developing quickly, and because of the ambiguity of much of the language of the statute, interpretations by courts are highly divergent. Similarly, local rules and practices are developing independently. The increased liabilities of attorneys merit special attention for those practicing in this area, even tangentially and unintentionally, and specialized counsel may be more important than ever.

BIBLIOGRAPHY

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14 "The term 'bankruptcy assistance' means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. § 101(4A).

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SAMPLE INITIAL LETTER TO HOLDER OF CLAIM FOR A DOMESTIC SUPPORT OBLIGATION

Chapter 7

[Name and Address of Holder of Claim for a Domestic Support Obligation]

In re: [Name of Debtor]
Bankruptcy Case Number: [xx-xxxxx]

Dear [Name of Holder of Claim]:

I am the chapter 7 trustee in the case of [Name of Debtor] filed on [Date of Filing] in the United States Bankruptcy Court for the _____ District of _____. Information provided to me indicates you may be owed money by the debtor for a domestic support obligation. If this domestic support obligation includes child support, you have the right to ask your State child support enforcement agency to assist you in collecting this child support during and after the bankruptcy case. The name, address, and telephone number of the agency in your State are listed below:

[Name, Address and Telephone Number of Child Support Enforcement Agency]

If this letter has reached you, but you have moved to another State, you may wish to visit the Internet web site of the United States Trustee Program at http://www.usdoj.gov/ust/eo/bapcpa/ds/index.htm for a complete listing of State child support enforcement agencies. Please also notify my office of your new address.

If funds are available for distribution in this bankruptcy case, you may file a proof of claim for all domestic support obligation amounts (child support, spousal support, alimony, maintenance, etc.) you were owed by [Name of Debtor] when this case was filed on [Date of Filing]. By law, all such domestic support claims will be given first priority and will be paid ahead of all other creditors, except for certain administrative expenses. If you receive a notice from the court that this case will have money to be distributed, you should file a proof of claim before the deadline stated in the notice. This will maximize your chances of being paid at least a portion of your domestic support obligation claim.

[Name of Debtor] may receive a discharge from other debts and may not owe other creditors any more money at the end of this case. Domestic support obligations are not subject to discharge, and [Name of Debtor] will still owe you any domestic support obligation that remains unpaid at the end of this case.

If [Name of Debtor] successfully completes this bankruptcy case and receives a discharge from other debts, I will send you another letter with additional information that may assist you in collecting on any domestic support obligation you are still owed.

Sincerely yours,

Chapter 7 Trustee

SAMPLE INITIAL LETTER TO HOLDER OF CLAIM FOR A DOMESTIC SUPPORT OBLIGATION

Chapter 12 or 13

[Name and Address of Holder of Claim for a Domestic Support Obligation]

In re: [Name of Debtor]
Bankruptcy Case Number: [xx-xxxxx]

Dear [Name of Holder of Claim]:

I am the chapter [12 or 13] trustee in the case of [Name of Debtor] filed on [Date of Filing] in the United States Bankruptcy Court for the_____District of_____. Information provided to me indicates you may be owed money by the debtor for a domestic support obligation. If this domestic support obligation includes child support, you have the right to ask your State child support enforcement agency to assist you in collecting this child support during and after the bankruptcy case. The name, address, and telephone number of the agency in your State are listed below:

[Name, Address, and Telephone Number of State Child Support Enforcement Agency]

If this letter has reached you, but you have moved to another State, you may wish to visit the Internet web site of the United States Trustee Program at http://www.usdoj.gov/ust/eo/bapcpa/ds/index.htm for a complete listing of State child support enforcement agencies. Please also notify my office of your new address.

If [Name of Debtor] successfully completes this bankruptcy case and receives a discharge from other debts, I will send you another letter with additional information that may assist you in collecting on any domestic support obligation you are still owed.

Sincerely yours,

Chapter 12 or 13 Trustee

SAMPLE INITIAL LETTER TO
STATE CHILD SUPPORT ENFORCEMENT AGENCY REGARDING
A CLAIM FOR A DOMESTIC SUPPORT OBLIGATION

Chapter 7, 12, or 13

[Name and Address of State Agency]

Attention: Bankruptcy Reporting Contact

Re: Domestic Support Obligation Owed to [Name of Person Owed Support]
By [Name of Debtor, Bankruptcy Case No. xx-xxxxx,
Social Security Number xxx-xx-xxxx]

Dear Bankruptcy Reporting Contact:

I am the chapter [7, 12, or 13] trustee in the case of [Name of Debtor] filed on [Date of Filing] in the United States Bankruptcy Court for the_____ District of _____. Please be advised that information provided to me in this case lists the following person as having a claim for a domestic support obligation against [Name of Debtor]:

[Name, Address, and Telephone Number of Holder of Claim)

In addition to contacting you, I have sent [Holder of Claim] a letter which explains that your agency may assist in collecting any child support claim due from [Name of Debtor].

If [Name of Debtor] successfully completes this bankruptcy case and receives a discharge from other debts, I will send you another letter providing additional information that may help your agency provide assistance to [Name of Holder of Claim] to collect on any domestic support obligation still owed.

Sincerely,

Chapter 7, 12, or 13 Trustee

SAMPLE DISCHARGE NOTIFICATION TO
HOLDER OF CLAIM FOR A DOMESTIC SUPPORT OBLIGATION

Chapter 7, 12, or 13

[Name and Address of Holder of Claim for a Domestic Support Obligation]

Re: [Name of Debtor]
Bankruptcy Case Number: [xx-xxxxx]

Dear [Name of Holder of Claim]:

Please be advised that [Name of Debtor] was granted a discharge in bankruptcy on [Date of Discharge]. The following information is being provided to assist in your efforts to collect any domestic support obligation which [Name of Debtor] may still owe you:

Last known address of the debtor:

Name of debtor's last known employer:

Address of debtor's last known employer:

I am also obligated to provide you the names of certain creditors whose debts were not discharged or reaffirmed. These creditors are as follows:

[Listing of Creditors]

These creditors may be a source of information regarding any future address for [Name of Debtor]. If you request information from these creditors, they are allowed by law to disclose to you the last known address for [Name of Debtor].

Sincerely,

Chapter 7, 12, or 13 Trustee

SAMPLE DISCHARGE NOTIFICATION TO
STATE CHILD SUPPORT ENFORCEMENT AGENCY REGARDING
A CLAIM FOR A DOMESTIC SUPPORT OBLIGATION

Chapter 7, 12, or 13

[Name and Address of State Agency]

Attention: Bankruptcy Reporting Contact

Re: Domestic Support Obligation Owed to [Name of Person Owed Support]
By [Name of Debtor, Bankruptcy Case No. xx-xxxxx,
Social Security Number xxx-xx-xxxx]

Dear Bankruptcy Reporting Contact:

Please be advised that [Name of Debtor] was granted a discharge in bankruptcy on [Date of Discharge]. The following information is being provided to assist in your efforts to collect any domestic support obligation which [Name of Debtor] may still owe to [Name of Person Owed Support]:

Last known address of the debtor:

Name of debtor's last known employer:

Address of debtor's last known employer:

I am also obligated to provide you the names of certain creditors whose debts were not discharged or reaffirmed. These creditors are as follows:

[Listing of Creditors]

These creditors may be a source of information regarding any future address for [Name of Debtor]. If you request information from these creditors, they are allowed by law to disclose to you the last known address for [Name of the Debtor].

Sincerely,

Chapter 7, 12, or 13 Trustee

WHAT STOPS AND WHAT DOES NOT: THE AUTOMATIC STAY IN DOMESTIC RELATIONS MATTERS UNDER BAPCPA[1]

Prepared by Forrest L. Ingram
March 28, 2008

OUTLINE

I. Introduction

II. Hypotheticals and Questions

A. Hypothetical No. 1: The Smith Divorce and Bankruptcy

B. Questions about Hypothetical No. 1.

C. Hypothetical No. 2: The Jeff and Jill Domestic Relations Battle and Bankruptcy

D. Questions about Hypothetical No. 2.

1 The author gratefully acknowledges that much of the background material contained in this presentation derived from a paper prepared in August 2007 by co-panelist The Honorable Margaret Dee McGarity, entitled "Family Law and Bankruptcy Reform."

I. INTRODUCTION:

No one who has read a red-lined version of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") could miss the fact that Congress made extensive changes in bankruptcy law that heavily favor a non-filing former spouse or soon-to-be former spouse. Consumer bankruptcy practitioners who may represent one of the parties of a domestic relations dispute need to reflect on these changes before the next potential client walks through the door. The bankruptcy world according to BAPCPA is a different world than the one we inhabited on October 16, 2005.

Prior to October 17, 2005, for instance, bankruptcy law distinguished support and maintenance obligations arising in a divorce decree from property settlement obligations spelled out in the same decree. Support and maintenance were considered nondischarageable obligations under § 523(a)(5), but property settlement awards were dischargeable under certain circumstances, pursuant to § 523(a)(15), even though it became more and more difficult for the filing spouse to defend against an adversary brought by the estranged spouse to have a property-settlement obligation declared nondischargeable.

One way Congress tipped the scales in favor of the estranged spouse was by re-defining "domestic support obligation"[2] in § 101(14A). After October 17, 2005, this term includes all

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

(A) owed to or recoverable by–

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

(ii) a governmental unit;

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

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

obligations in the nature of support that can arise under a divorce decree, settlement agreement, or other court or administrative order involving support. Another action Congress took was to rewrite § 523(a)(5) to provide that a domestic support obligation is excepted from discharge except, strangely, under chapter 13. Finally, Congress also revised § 523(a)(15)[3] to except from discharge all obligations to a spouse, former spouse, or child of the debtor arising in connection with a divorce decree or separation agreement. Therefore, not only support and maintenance, but also property settlement obligations are excepted now from discharge (except in chapter 13).

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

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

11 U.S.C. § 101(14A).

[3]Exceptions from discharge include any debt "to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. § 523(a)(15).

II. HYPOTHETICALS AND QUESTIONS

Another result of BAPCPA's impact on domestic relations disputes concerns the automatic stay. What effect does new bankruptcy law, especially revised §§ 362(b)[4], have on an ongoing domestic relations battle? Perhaps the best way to sort through the changes is by analyzing "what happens if?" So, I will paint for you two hypothetical situations, one involving Mr. or Mrs. Smith (Bill and Jane) and the other involving Jeff Jones and the unmarried putative mother of his child (Jill). In each case, the parties are engaged in a domestic relations dispute, and one or both of them consider filing for bankruptcy. Each of the parties wants to know how BAPCPA would affect the conduct of the domestic relations battle.

A. HYPOTHETICAL NO. 1: THE SMITH DIVORCE AND BANKRUPTCY:

- The Smiths (Bill, 55, and Jane, 50) are divorcing after 30 years of marriage.
- 2 kids, 18 and 22 years old
- Chicago home owned in tenancy by the entireties, now worth $400,000
    - 1st mortgage $200,000
    - home equity loan of $70,000.
- Other real property jointly owned
    - No equity in either property
    - Total secured debt on all properties exceeds $1,400,000

4 There were no changes to 11 U.S.C. § 362(a) in BAPCPA that provided any additional rights to the debtor-spouse in a domestic relations dispute; but changes to 11 U.S.C. § 362(b) were substantial. Those changes made the automatic stay *non operable* with respect not only to paternity actions but also with respect to modifying domestic support obligations. Further, § 362(a) does not operate as a stay of child custody or visitation hearings, orders dissolving marriages, or actions relating to domestic violence. Nor does § 362(a) operate to stay the collection of support obligations that are not property of the estate, or the withholding of income that is property of the estate or property of the debtor, for payment of domestic support obligations. Under new § 362(b), actions for withholding, suspending, or restricting a driver's license or a professional or occupational license, may proceed against the debtor-spouse, as well as the interception of a tax refund and the enforcement of a medical obligation under the Social Security Act. The stay still operates, however, to prevent the determination of the division of property that is property of the bankruptcy estate.

- Each owns a car and is separately obligated to repay the respective loans.
- Bill's income is now about $3,000 per month.
- Jane's income is about $1,500 per month.
- They have joint credit card debt of $3,000 and other debt as follows:
    - Bill: $60,000
    - Jane: $50,000
- Lawsuits include:
    - Mortgage foreclosures
    - Collection suits by credit card companies
- Bill files for divorce. Jane does not contest it.
- They disagree on how to divide their financial obligations.
- Bill and Jane each ask their respective divorce attorneys whether bankruptcy would help them avoid their debts and protect their assets.
- The family law attorney calls you.

B. **QUESTIONS ABOUT HYPOTHETICAL NO. 1:**

(1) If the Smiths file a **joint chapter 7 bankruptcy** before the divorce decree is entered, how would the automatic stay help them?

Would the automatic stay prevent the mortgage company and the home equity lender from foreclosing on the marital home?

What about the other properties?

(2) Would unsecured judgment creditors be able to file memoranda of judgments against the Smiths' home?

If the judgment were just against Bill but not against Jane?

If only Bill filed for bankruptcy, could the unsecured creditors continue their suits against Jane? their collection efforts?

(3) If Bill files for chapter 7, would the automatic stay prevent the divorce court from ruling on the dissolution of marriage?

What if he filed for chapter 13?

What about Chapter 11?

(4) If the judge presiding over the Smith's divorce seems on the verge of entering a lopsided property settlement agreement in favor of one party, can the other stay entry of the order by the filing of a chapter 7, 11, or 13?

(5) If the divorce court is stayed from dividing the marital property, how does the property get divided?

(6) If Jane had filed the chapter 7, and the divorce court ultimately enters a decree requiring Bill to pay the children's college expenses as well as Jane's maintenance in amounts greater than Bill can afford, is Bill stayed by § 362(a) from asking the divorce court to modify the domestic support obligation?

(7) If Bill files a chapter 7 but the divorce court awards Jane support or maintenance, does the automatic stay prevent Jane from initiating state court actions to collect from Bill's post-petition income the amounts due under the order?

If Bill had filed a chapter 13 instead of a chapter 7, does the automatic stay prevent Jane from collecting the domestic support obligation from Bill's post-petition income?

What if Bill had filed an individual chapter 11?

(8) What if Jane had obtained a wage garnishment order for support prior to Bill's filing a chapter 13?

Would she need to get an order lifting the stay before she could proceed with the wage garnishment?

(9) If the divorce court, post-petition, entered a wage deduction order requiring payment of support from sources other than from the debtor's income, would such an order violate the automatic stay?

C. HYPOTHETICAL NO. 2: THE JEFF & JILL DOMESTIC RELATIONS BATTLE AND BANKRUPTCY:

- Jeff Jones, 23, is sued by his former his girlfriend Jill, 18, in a paternity suit.
    - Jeff has been out of work for three months
    - No savings
    - $60,000 in credit card debt.
    - Jeff got a bankruptcy discharge in 2007, and is thinking about doing it again.
    - Income: about $20,000.
- Jill is a nurse; makes $35,000 per year.
- Jill has asked the divorce court to make Jeff to pay her $1,000 per month in child support, once Jeff's status as father of Jill's child is determined..
- Jeff submitted his DNA for a paternity test.
    - Result: 99% likely that he is the father of Jill's child.

Further hypothetical twists: What if:

- Jill has begun acting erratically.
    - ticketed for drunk driving, she had her license suspended.
    - took cash advances from credit cards to support boyfriend's drug habit
- Jeff found out about this, and now that he knows he is the father, he wants to raise the child
- Jeff also wants to prevent Jill and her drugged boyfriend from having anything to do with the child, so he filed a motion for custody of the children.
- Jill contemplates filing for chapter 7 relief.

D. QUESTIONS ABOUT HYPOTHETICAL NO. 2.

(1) If, at the beginning, Jeff had filed for chapter 7, could he have succeeded in staying Jill's paternity suit?

(2) If, at the end, Jeff files a motion to obtain custody, while strictly limiting Jill's visitation rights, could Jill, by filing chapter 7, succeed in staying the action?

(3) Through her chapter 7, can Jill get her suspended driver's license reinstated?

(4) If Jill successfully defends against the custody motion and obtains a domestic relations order for overdue child support, can she or an agency of the state seize Jeff's tax refunds and apply them to the overdue support, under the Social Security Act or analogous state law.

(5) In chapter 7, can Jeff rely on the automatic stay to prevent his creditors from pursuing him in state court?

- if so, is there anything he must do, under the facts set forth above, to assure that creditors will be stayed from pursuing their claims against him?