Divorce and Bankruptcy: When Does One Specialist Need Another?

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FAMILY LAW AND BANKRUPTCY

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I. APPLICABLE LAW. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made substantial substantive changes in bankruptcy law, some of which relate specifically to family obligations. The provisions having nothing to do with family law may still have an affect on cases that also have family law implications. This outline addresses only family law issues, and many of those issues apply both before and after the 2005 amendments. Most provisions of the 2005 Act apply to cases filed on or after October 17, 2005, although a few provisions applied upon enactment, April 20, 2005. Since many cases involve plans that are in effect for up to five years, or longer in the case of some chapter 11 cases, the law in effect prior to the 2005 Act continues to apply to those cases.

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

A. Bankruptcy Estate. The filing of a bankruptcy petition creates an estate, which includes all assets owned by the debtor, certain assets acquired by the debtor within 180 days of filing, certain assets transferred by the debtor before bankruptcy and recovered by the trustee in bankruptcy or by the debtor as debtor in possession, plus income on property of the estate. 11 U.S.C. § 541. A joint filing in a voluntary case (11 U.S.C. § 303 does not provide for a joint involuntary case) creates two estates, which are usually administered together. 11 U.S.C. § 302; Fed. R. Bankr. P. 1015. Whether debtors in a legal same sex marriage can file a joint case is an issue in developing law. *See In re Somers*, 448 B.R. 677 (Bankr. S.D.N.Y. 2011) (no cause to dismiss for legally married same sex couple); *In re Balas/Morales*, __ B.R. __, No. 11-bk-17831, 2011 WL 2312169 (Bankr. C.D. Cal. June 13, 2011) (filing allowed). *See also In re Goldstein*, 383 B.R. 496 (Bankr. C.D. Cal. 2007) (separate estates of divorcing ch. 11 debtors could hire separate divorce counsel and was in the best interest of the estates under § 327(e)); *In re Seligman*, 417 B.R. 171 (Bankr. E.D. N.Y. 2009) (joint case of chapter 13 debtors could be severed to allow one spouse to convert to chapter 7).

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

1. Debtor's interest in property. The estate has no greater interest in an asset than the debtor had. 11 U.S.C. § 541(d). *In re McCafferty*, 96 F.3d 192 (6th

Cir. 1996) (nonfiling former spouse's interest in debtor's pension plan was held by him in trust and was not property of his estate); *Chiu v. Wong*, 16 F.3d 306 (8th Cir. 1994) (partnership funds converted by debtor's husband and traceable to debtor's homestead were placed in constructive trust in favor of debtor's husband's former partner, thus excluding them from her estate); *In re Callahan*, 419 B.R. 109 (Bankr. D. Mass. 2009) (IRS failed to overcome Mass. state law presumption of gift by debtor husband when property was titled in nondebtor wife's name); *In re Douglass*, 413 B.R. 573 (Bankr. W.D. Tex. 2009) (property placed in debtor's name by wife was gift, and she had no equitable lien); *In re Stone*, 401 B.R. 897 (Bankr. W.D. Ky. 2009) (divorce retainer was property of debtor's estate even if paid by third party and must be disclosed; fees disgorged); *In re Aulicino*, 400 B.R. 175 (Bankr. E.D. Pa. 2008) (debtor's former husband's sole possession of house awarded to him in divorce was notice to BFP, and likewise trustee, so deed giving him full ownership was not recorded and trustee could not use strong arm powers to bring into estate); *In re Balzano*, 399 B.R. 428 (Bankr. D. Md. 2008) (estate had no interest in real estate titled in name of non-filing spouse); *In re Charlton,* 389 B.R. 97 (Bankr. N.D. Cal. 2008) (constructive trust of painting in debtor husband's possession did not arise until after bankruptcy and was subject to trustee's avoidance powers); *In re Flippin*, 334 B.R. 434 (Bankr. W.D. Ark. 2005) (debtor's dower interest in property owned by nonfiling spouse was property of estate but incapable of turnover); *see also In re Heck*, 355 B.R. 813 (Bankr. D. Kan. 2006) (engagement ring was conditional gift subject to return when marriage did not take place); *In re Stoltz*, 283 B.R. 842 (Bankr. D. Md. 2002) (same). *See also infra* regarding avoidable fraudulent transfers between spouses.

2. Debtor's interest in property subject to dissolution action pending when bankruptcy case filed. If a divorce or legal separation is pending when a bankruptcy petition is filed by one spouse, state law must be consulted to determine if each spouse has an equitable but contingent interest in property owned by the other or if the nonowner spouse has no interest in the other's property until judgment. Unless state law provides for an inchoate or contingent interest, the filing of a bankruptcy by an owning spouse cuts off the ownership rights of the non-owning spouse. *See, e.g., In re Skorich*, 482 F.3d 21 (1st Cir. 2007) (debtor's spouse's interest in funds held in escrow arose upon prepetition filing of divorce and was not a claim); *Culver v. Boozer*, 285 B.R. 163 (D. Md. 2002) (under Maryland law, neither nondebtor's interest in equitable property division, nor possession of untitled asset, was sufficient for property interest to arise); *In re Halverson*, 151 B.R. 358 (M.D. N.C. 1993) (absent levy, nonowner spouse has no interest in the other spouse's personal property before judgment); *In re Dzielak*, 435 B.R. 538 (Bankr. N.D. Ill. 2010) (under Illinois law, filing divorce action creates

right in other spouse's property); *In re Goss*, 413 B.R. 843 (Bankr. D. Or. 2009) (filing of dissolution action creates vested, inchoate claim in property of other spouse under Oregon law); *In re Charlton*, 389 B.R. 97 (Bankr. N.D. Cal. 2008) (award of painting by constructive trust entered by state court postpetition was ineffective to cut off trustee's rights); *In re DiGeronimo*, 354 B.R. 625 (Bankr. E.D. N.Y. 2006) (under N.Y. law, right to property division in divorce filed prior to bankruptcy gives rise to claim, not property interest); *In re Hoyo*, 340 B.R. 100 (Bankr. M.D. Fla. 2006) (settlement agreement not approved prepetition, so debtor's property was property of estate notwithstanding award to other spouse by agreement); *In re Anjum*, 288 B.R. 72 (Bankr. S.D. N.Y. 2003) (prepetition stipulation for property division not reduced to judgment before bankruptcy resulted in claim of nonfiling spouse but did not transfer property); *In re Greer*, 242 B.R. 389 (Bankr. N.D. Ohio 1999) (no interest in nonowning spouse until decree); *see also In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (debtor's former wife's claim subject to equitable subordination).

If state law provides that during the pendency of divorce, each spouse has a property interest in property of the other, state court must determine extent of interest. *See, e.g., In re Skorich*, 482 F.3d 21 (1st Cir. 2007) (under N.H. law, debtor's former wife had a property interest in escrow account, not a claim in his bankruptcy case); *Davis v. Cox*, 356 F.3d 76 (1st Cir. 2004) (under Maine law applicable to case regarding constructive and resulting trusts, pending divorce proceeding gave nondebtor wife interest in divisible assets); *In re White*, 212 B.R. 979 (B.A.P. 10th Cir. 1997) (under Wyoming law, filing of petition for divorce vests property rights in nonowning spouse); *In re Dzielak*, 435 B.R. 538 (Bankr. N.D. Ill. 2010) (Illinois statute gives non-owning spouse inchoate rights in other spouse's property upon filing a petition for dissolution); *but see In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991) (rights of nonowning spouse in pending divorce were similar to rights of beneficiary of constructive trust and were not subordinate to trustee's rights). *See also In re Schorr*, 299 B.R. 97 (Bankr. W.D. Pa. 2003) (nonfiling spouse who filed a divorce action prepetition had unquantified property division claim that was discharged; rejecting reasoning in *In re Scholl,* 234 B.R. 636 (Bankr. E.D. Pa. 1999), which had held that pending dissolution action did not give rise to a claim that could be discharged); *In re Radinick,* 419 B.R. 291 (Bankr. W.D. Pa. 2009) (debtor had vested interest in equitable distribution in pending divorce case under Pennsylvania law, which became property of her estate).

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

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

C. Support due debtor from prior spouse.

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

2. Child Support. Entitlement to child support is generally not property of the payee parent's bankruptcy estate, depending on state law. *In re McKain*, 325 B.R. 842 (Bankr. D. Neb. 2005) (child support is property of custodial parent under Nebraska law, and is property of the estate, but not under Wyoming law); *Hurlbut v. Scarbrough*, 957 P.2d 839 (Wy. 1998) (child support is children's money which parent administers in trust for child's benefit). *But*

see In re Harbour, 227 B.R. 131 (Bankr. S.D. Ohio 1998) (any child support ultimately ordered paid to debtor in pending state court paternity action, which was attributable to period after child's birth and before petition date, was estate property). In *In re Ehrhart*, 155 B.R. 458 (Bankr. E.D. Mich. 1993), the court discussed the debtor's former spouse's right to child support on behalf of the children, as opposed to a personal interest, but allowed her to recoup the property division she owed the debtor against the debtor's child support arrearage. *See also In re Edwards*, 255 B.R. 726 (Bankr. S.D. Ohio 2000) (child support arrearage was property of estate but was subject to Ohio exemption to the extent necessary for support); *In re Hopkins*, 177 B.R. 1 (Bankr. D. Me. 1995) (each child owed support was counted as a petitioning creditor for purpose of filing involuntary petition); *In re Jessell*, 359 B.R. 333 (Bankr. M.D. Fla. 2006) (debtor's right to refund of child support overpayments was property of his estate).

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

E. Joint tax refund. Inclusion in debtor's estate depends on ownership rights under state law. *In re Crowson*, 431 B.R. 484 (B.A.P. 10th Cir. 2010) (interpreting Wyoming law, estate's and non-filing spouse's portions calculated based on spouses' withholding, eligibility for certain components, and percentage of total income); *In re Carlson*, 394 B.R. 491 (B.A.P. 8th Cir. 2008) (under Minnesota law, non-earning spouse had no interest in joint tax return and could not claim exemption in half); *In re Kleinfeldt*, 287 B.R. 291 (B.A.P. 10th Cir. 2002) (nondebtor spouse with no earnings had no interest in joint tax refund); *In re Palmer*, __ B.R. __, No. 10-60099, 2011 WL 890690 (Bankr. D. Mont. March 11, 2011) (formula for calculating spouses' respective shares under Montana law); *In re Rice*, 442 B.R. 140 (Bankr. M.D. Fla. 2010) (spouses' interests determined by contribution under Florida law); *In re Glenn*, 430 B.R. 56 (Bankr. N.D. N.Y. 2010) (50/50 rule applied, using New York law); *In re Garbett*, 410 B.R. 280 (Bankr. E.D. Tenn. 2009) (50/50 ruled applied under Tennesee law); *In re Edwards*, 400 B.R. 345 (D. Conn. 2008) (under Connecticut law, interests in joint tax refund determined by respective spouse's withholding); *In re Trickett*, 391 B.R. 657 (Bankr. D. Mass. 2008) (presumption of

equal ownership under Massachusetts law); *In re Gartman,* 372 B.R. 790 (Bankr. D. S.C. 2007) (income and withholding allocated between spouses to determine respective interests); *In re Marciano*, 372 B.R. 211 (Bankr. S.D. N.Y. 2007) (presumption of equal ownership could be rebutted with evidence of spouses' conduct); *In re Lock*, 329 B.R. 856 (Bankr. S.D. Ill. 2005) (refund belonged entirely to wage earning spouse); *In re Innis*, 331 B.R.784 (Bankr. C.D. Ill. 2005) (presumption of equal ownership absent court order or marital agreement); *In re Smith*, 310 B.R. 320 (Bankr. N.D. Ohio 2004) (nondebtor spouse who had no earnings did not have property interest in refund); *In re Barrow*, 306 B.R. 28 (Bankr. W.D. N.Y. 2004) (nondebtor spouse failed to overcome presumption of equal ownership of joint tax refund despite having no earned income). *See also In re Law*, 336 B.R. 780 (B.A.P. 8th Cir. 2006) (child tax credit was property of estate). *Compare In re Morine*, 391 B.R. 480 (Bankr. M.D. Fla. 2008) (nondebtor spouse without earnings had no interest in joint tax refund that had not been received and deposited in tenancy by the entireties account), *with In re Freeman*, 387 B.R. 871 (Bankr. M.D. Fla. 2008) (anticipated joint tax refund could be owned as tenants by the entireties), both applying Florida law. *See also Hundley v. Marsh*, 944 N.E.2d 127 (Mass. 2011) (under Mass. law, proper method to allocate joint tax refund in context of bankruptcy is separate filings rule).

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

G. Tenancy by the Entireties. Whether asset owned as tenants by the entireties is included in the estate of a spouse, or the estate holds merely the debtor's survivorship interest, depends on state law, usually relating to whether a joint case was filed and whether there are joint creditors. Property owned by a debtor and his/her spouse as tenants by the entireties is not available to satisfy claims against only one spouse. *See*11 U.S.C. § 522(b)(2)(B) and *infra* regarding exemption of property owned by tenants by the entireties. Such property may be administered by the trustee as long as there are joint creditors at filing. *See, e.g., In re Ballard*, 65 F.3d 367 (4th Cir. 1995); *Matter of Paeplow*, 972 F.2d 730 (7th Cir. 1992); *Matter of Hunter*, 970 F.2d 299 (7th Cir. 1992); *In re Persky*, 893 F.2d 15 (2d Cir. 1989); *see also In re Cordova*, 73 F.3d 38 (4th Cir. 1996) (divorce decree terminating co-ownership of home released the debtor from the unique feature of tenancy by the entirety); *In re Owens*, 400 B.R. 447 (Bankr. W.D. Pa. 2009) (after sale by trustee, proceeds distributed pursuant to § 726, not only to joint creditors); *In re Davis*, 403 B.R. 914 (Bankr. M.D. Fla. 2009) (separate judgments against spouses did not merge to qualify as joint creditor); *In re Stacy*, 223 B.R. 132 (N.D. Ill. 1998) (fraudulent transfer of solely owned property to tenancy by the entireties); *In re Daughtry*, 221 B.R. 889 (Bankr. M.D. Fla. 1997) (non-filing spouse's consent to sale conveyed property to trustee and destroyed entireties characteristics, which allowed proceeds to be distributed to all creditors, not just joint creditors of debtor and spouse); *see also* Sommer & McGarity, *Collier Family Law and the Bankruptcy Code* ¶ 2.02[2][c]. *Cf. In re DelCorso*, 382 B.R. 240 (Bankr. E.D. Pa. 2007) (attorney sanctioned for recommending debtor fraudulently transfer solely owned property into tenancy by the entireties and failing to disclose).

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

I. Income. Income on estate property and avoided transfers are included in the estate, but with certain exceptions, earned income of an individual debtor is not. *See* 11 U.S.C. § 541(a)(4), (6). Earned income of a chapter 12 and 13 debtor continues to be property of the estate, at least to the extent needed to fund a plan. 11 U.S.C. §§ 1207(a)(2), 1306(a)(2). *See infra* re Chapter 13 issues. Earned income of an

individual chapter 11 debtor filing under BAPCPA is property of the estate. 11 U.S.C. § 1115(a)(2). A spouse in a community property state has an ownership interest in the other spouse's earned income. *In re Reiter*, 126 B.R. 961 (Bankr. W.D. Tex. 1991) (debtor acquired community property interest in spouse's income during pendency of ch. 13 plan so nondebtor spouse's income became property of the estate under § 1306(a)(1) and was under the jurisdiction of the bankruptcy court before plan was confirmed, thereby preventing levy). *But see In re Nahat,* 278 B.R. 108 (Bankr. N.D. Tex. 2002) (nondebtor spouse's earnings were "special community property" under Texas law and were not property of the estate because they were not subject to the debtor's management and control or to recovery for his debts); *In re Markowicz*, 150 B.R. 461 (Bankr. D. Nev. 1993) (after confirmation, debtor's spouse's income was not property of the estate).

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

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

1. Sale of Entire Asset.

a. Fractional Interests. The bankruptcy trustee of a debtor owning a fractional interest in an asset can only sell entire asset under certain conditions, i.e., partition is impracticable, sale of the fractional interest alone would realize less than the estate's interest in the proceeds, the benefit to the estate outweighs the detriment to the co-owner, and the asset is not used in the production of certain types of energy. 11 U.S.C. § 363(h); *see, e.g., In re Garner*, 952 F.2d 232 (8th Cir. 1991); *In re Persky*, 893 F.2d 15 (2d Cir. 1989); *In re Grabowski*, 137 B.R. 1 (S.D. N.Y.), *aff'd*, 970 F.2d 896 (2d Cir. 1992); *In re DeRee*, 403 B.R. 514 (Bankr. S.D. Ohio 2009); *In re Gabel*, 353 B.R. 295 (Bankr. D. Kan. 2006); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007). The co-owner is entitled to his or her interest in the proceeds of sale. *In re Ball*, 362 B.R. 711 (Bankr. N.D. W. Va. 2007) (one half payable immediately; no escrow of nondebtor's share was ordered as trustee's right to recover from nondebtor not

established prior to sale); *In re Shelton*, 334 B.R. 174 (Bankr. D. Md. 2005) (adjustments in distribution of proceeds for contributions by nondebtor co-owner). *Cf. In re Whaley*, 353 B.R. 209 (Bankr. E.D. Tenn. 2006) (possessory interest of debtor's wife could not defeat trustee's right to sell); *In re Harlin*, 325 B.R. 184 (Bankr. E.D. Mich. 2005) (sale denied because property was owned as tenants by the entireties, and there was only one minor joint creditor; nondebtor spouse's interest outweighed creditor's); *In re Johnson*, 51 B.R. 439 (Bankr. E.D. Pa. 1985) (stay was lifted to allow state court to determine relative rights of spouses in co-owned property, and the request of one debtor to sell was denied until determination was made); *In re Langlands,* 385 B.R. 32 (Bankr. N.D. N.Y. 2008) (co-owner entitled to notice of sale); *In re Sontag*, 151 B.R. 664 (Bankr. E.D. N.Y. 1993) (nondebtor spouse occupying homestead owned with the debtor as tenant in common was liable to the trustee for failure to maintain property). Note that 11 U.S.C. § 363(h) does not allow the trustee to sell the debtor's property subject to the life estate of another. *In re Hajjar*, 385 B.R. 482 (Bankr. D. Mass. 2008).

Failure to clear title after a divorce causes particular problems as the trustee can usually exercise powers of a hypothetical BFP under 11 U.S.C. § 544 to enforce record title. *In re Claussen*, 387 B.R. 249 Bankr. D. S.D. 2007) (unrecorded divorce decree ineffective to transfer property); *In re Robinson*, 346 B.R. 172 (Bankr. E.D. Va. 2006) (trustee could sell house still titled to debtor and former spouse notwithstanding award to nondebtor in divorce decree); *In re Kelley*, 304 B.R. 331 (Bankr. E.D. Tenn. 2003) (trustee's power to sell superceded rights of debtor's former spouse, who was awarded house in unrecorded divorce judgment). *But see In re Trout*, 146 B.R. 823 (Bankr. D.N.D. 1992), *aff'd*, 2 F.3d 1154 (8th Cir. 1993) (trustee as hypothetical BFP could not sell house in which the debtor's former spouse had sole occupancy and paid all expenses for 14 years, even though record title was still in names of debtor and former spouse); *In re Weisman*, 5 F.3d 417 (9th Cir. 1993) (similar facts).

Bankruptcy Code does not explicitly grant a nondebtor co-owner the power to sell an estate's and co-owner's interests in jointly held property. *In re Lowery*, 203 B.R. 587 (Bankr. D. Md. 1996). *See also In re Mitchell*, 344 B.R. 171 (Bankr. M.D. Fla. 2006) (trustee not allowed to sell exempt tenancy by the entireties interest of debtor in real estate owned in joint tenancy with spouse's son); *In re Wrublik*, 312 B.R. 284 (Bankr. D. Md. 2004) (chapter 13 debtor did not have power to sell both spouses' interests in jointly owned property).

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

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

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

M. ERISA Benefits and Spendthrift Trust Interests. An interest that the debtor has in property that is subject to restrictions under nonbankruptcy law is not property of the debtor's estate. 11 U.S.C. § 541(c)(2); *Patterson v. Shumate,* 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (ERISA qualified plan is not property of beneficiary's estate). Amendments to 11 U.S.C. § 541 by the 2005 Act provided additional protections for certain qualified plans by omitting them from property of the estate. *See* 11 U.S.C. § 541(b)(5)-(7), applicable to cases filed on or after

October 17, 2005. When the nondebtor former spouse of a bankruptcy debtor has been awarded a portion of a plan for which the debtor is the nominal beneficiary, and if the plan is property of the estate, as was often the case under pre-2005 law, courts dealt with the situation in a variety of ways to protect the interests of the nondebtor. In some cases, the award of the interest, even if it had not yet been transferred at the time of filing the bankruptcy petition, excluded the plan from property of the estate. *See, e.g., In re Nelson*, 322 F.3d 541 (8th Cir. 2003) (debtor had interest in former spouse's ERISA qualified plan that was excluded from estate); *In re Gendreau*, 122 F.3d 815 (9th Cir. 1997) (debtor's former wife's prepetition right to obtain QDRO gave her property right that was not cut off by former husband's bankruptcy); *Holland v. Knoll*, 202 B.R. 646 (D. Mass. 1996) (former husband of debtor had vested property interest in debtor's pension fund); *Walston v. Walston*, 190 B.R. 66 (E.D. N.C. 1995) (debtor's former wife's interest in debtor's military pension was in nature of "property right," not a claim that could be discharged); *Brown v. Pitzer*, 249 B.R. 303 (S.D. Ind. 2000) (portion of debtor's non-ERISA-qualified plan awarded to debtor's spouse prepetition, but not yet transferred, was not in debtor's estate); *In re Metz*, 225 B.R. 173 (B.A.P. 9th Cir. 1998) (debtor's interest in former husband's non-ERISA-qualified plan awarded to her in divorce was not property of her estate because of spendthrift provision); *In re Carter-Bland*, 382 B.R. 743 (Bankr. S.D. Ohio 2008) (former spouse's share of debtor's ESOP was excluded from estate); *In re Nichols*, 305 B.R. 418 (Bankr. M.D. Pa. 2004) (nondebtor former spouse's share of debtor's military pension awarded nondebtor spouse in divorce was not included in debtor's estate); *In re Seddon*, 255 B.R. 815 (Bankr. W.D. N.C. 2000) (debtor's interest in former spouse's CSRS benefits obtained prepetition through QDRO were not property of debtor's estate); *In re McQuade*, 232 B.R. 810 (Bankr. M.D. Fla. 1999) (former spouse's interest in debtor's pension plan vested at time of divorce). Other courts treated the debtor's obligation to turn over the former spouse's portion of the pension as nondischargeable support (*In re Cuseo*, 242 B.R. 114 (Bankr. D. Conn. 1999)), defalcation in a fiduciary capacity (*In re Dahlin*, 94 B.R. 79 (Bankr. E.D. Va. 1988), *aff'd*, 911 F.2d 721 (4th Cir. 1990)), conversion (*In re Wood*, 96 B.R. 993 (B.A.P. 9th Cir. 1988)), or a postpetition obligation (*Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990)). On the other hand, such obligations were sometimes discharged as a property division, although subsequent developments in the law probably supercede these cases. *See In re Teichman*, 774 F.2d 1395 (9th Cir. 1985); *see also In re Adams*, 241 B.R. 880 (Bankr. N.D. Ohio 1999) (obligation to turn over portion of 401(k) plan excepted from discharge under 11 U.S.C. § 523(a)(15)).

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

III. EXEMPTIONS.

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

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

The debtor cannot claim an exemption on property in which the debtor has no interest or that is not property of the estate. *In re Caron*, 82 F.3d 7 (1st Cir. 1996) (debtor-wife, as named beneficiary under life insurance policy, could not claim exemption in cash surrender value of policy as her interest was only an expectancy); *In re Toland*, 346 B.R. 444 (Bankr. N.D. Ohio 2006) (debtor had no interest in wife's car to claim exempt, even though he contributed to payments); *In re Bippert*, 311 B.R. 456 (Bankr. W.D. Tex. 2004) (under Tex. law, husband had no interest in wife's personal injury claim, and he was denied exemption); *In re Lummer*, 219 B.R. 510 (Bankr. S.D. Ill. 1998) (debtor could exempt her portion of ex-husband's pension); *In re Page*, 171 B.R. 349 (Bankr. W.D. Wis. 1994) (in lien avoidance context, debtor was entitled to claim exemption in only her one half interest in check classified as marital (community) property); *In re Miller*, 167 B.R. 782 (Bankr. S.D. N.Y. 1994) (debtor-husband could not exempt car in debtor-wife's name); *In re Naydan*, 162 B.R. 204 (Bankr. W.D. Ark. 1993) (debtor denied exemption in former wife's share of pension benefits); *but see In re Carrell*, 186 B.R. 106 (Bankr. W.D. Mo. 1995) (exemption allowed even though debtor wife did not personally use tools of her and husband's business).

Some states provide for exemption of divorce related benefits. *But see In re*

Cordova, 73 F.3d 38 (4th Cir. 1996) (postpetition entry of debtor-wife's divorce decree within 180 days of bankruptcy petition rendered inapplicable her exemption for marital property); *In re Aldrich*, 403 B.R. 766 (Bankr. M.D. Ga. 2009) (income and business interest established by divorce decree as support was no longer exempt for adult debtor); *In re Hice*, 223 B.R. 155 (Bankr. N.D. Ill. 1998) (malpractice claim for failure to protect debtor's right to alimony, maintenance or support was not itself a right to "alimony, support or separate maintenance," within meaning of state exemption law); *In re Rutter*, 204 B.R. 57 (Bankr. D. Or. 1997) (chapter 7 debtors not entitled to exemption in Earned Income Credit portion of their federal tax refund; EIC not regarded as child support).

There is a special provision for exemption for assets owned as tenants by the entireties, which affects how the proceeds of such property is distributed. *See* 11 U.S.C. § 522(b)(2)(B); *In re Pyatte*, 440 B.R. 893 (Bankr. M.D. Fla. 2010) (entire assets owned as tenants by the entireties, not debtor's one half interest, may also be claimed exempt under state statute); *In re Davis*, 403 B.R. 914 (Bankr. M.D. Fla. 2009) (debtor could exempt homestead owned as tenancy by the entireties with nondebtor wife, even though debtor was prohibited from exempting the property under 11 U.S.C. § 522(o); separate judgments against spouses did not merge to qualify as joint creditor); *In re Guzior*, 347 B.R. 237 (Bankr. E.D. Mich. 2006) (trustee could administer value of tenancy by the entireties property in excess of amount of claims of joint creditors). *But see In re Adams*, 389 B.R. 762 (Bankr. M.D. Fla. 2007) (attorney/debtor denied exemption in stock in professional corporation because he could not own it as tenant by the entireties with non-attorney wife); *In re Stewart*, 373 B.R. 736 (Bankr. M.D. Fla. 2007) (entireties exemption lost because debtors tried to manipulate system by filing chapter 7 cases three days apart); *In re Cordova*, 177 B.R. 527 (E.D. Va. 1995), *aff'd*, 73 F.3d 38 (4th Cir. 1996) (entireties exemption lost for property acquired in fee simple in divorce decree within 180 days of filing); *In re DelCorso*, 382 B.R. 240 (Bankr. E.D. Pa. 2007) (exemption lost for fraudulently putting solely owned property into tenancy by the entireties). It is not clear how this exemption might be affected by new 11 U.S.C. § 522(c)(1) (liability of exempt property for support debts, notwithstanding applicable non-bankruptcy laws to the contrary). *Cf. In re Moulterie*, 398 B.R. 501 (Bankr. E.D. N.Y. 2008) (while any claim that spouse had for unpaid "domestic support obligations" might warrant offset against whatever distribution debtor might otherwise receive on account of his homestead exemption, it did not provide basis for disallowing debtor's homestead exemption).

B. Homestead Exemption. A debtor's right to claim a homestead exemption, or what constitutes an exempt homestead, is generally determined by state law. *See In re Belcher*, 551 F.3d 688 (7th Cir. 2008) (applying Illinois property law, not divorce or probate rights, husband whose name was not on title could not claim homestead exemption in proceeds). State law analysis of whether a particular piece of real estate

is the debtor's homestead must take place even if the federal exemptions are claimed, although 11 U.S.C. § 522(d)(1) refers to an exemption in the debtor's or debtor's dependent's "residence." Generally, a debtor can claim a homestead exemption in property he cannot occupy because of a pending divorce. *Matter of Neis*, 723 F.2d 584 (7th Cir. 1983) (under Wisconsin law a debtor has right to homestead exemption in property which he left because of pending divorce); *In re Roberts*, 219 B.R. 235 (B.A.P. 8th Cir. 1998) (separated debtors could claim Nebraska homestead exemption based solely on their marital status, even though neither qualified as "head of household"); *In re Minton*, 402 B.R. 380 (Bankr. M.D. Fla. 2008) (debtor did not abandon homestead when she left to avoid domestic violence); *In re Moulterie*, 398 B.R. 501 (Bankr. E.D. N.Y. 2008) (presence of debtor's estranged wife, and his continued interest as title holder, was sufficient to claim homestead exemption under New York law); *In re Lindquist*, 395 B.R. 707 (Bankr. D. Or. 2008) (Oregon homestead law protects interests of both the owner spouse and the occupant spouse); *In re Gunnison*, 397 B.R. 186 (Bankr. D. Mass. 2008) (interpreting Massachusetts law, debtor husband's later claim of homestead exemption extinguished debtor wife's earlier claim; married parties could not claim separate properties); *In re Taylor*, 280 B.R. 294 (Bankr. D. Mass. 2002) (leaving marital home marital discord to live with father did not constitute abandonment of homestead); *In re Webber*, 278 B.R. 294 (Bankr. D. Mass. 2002) (homestead exemption not lost because debtor ordered by court to leave family home). *But see In re Fink*, 417 B.R. 786 (Bankr. E.D. Wis. 2009) (security interest in former homestead awarded debtor's former wife eight years earlier did not qualify for Wisconsin homestead exemption); *In re Holman*, 286 B.R. 882 (Bankr. D. Minn. 2002) (debtor had no present intent to return to home); *In re Roberts*, 280 B.R. 540 (Bankr. D. Mass. 2001) (debtor failed to establish requisite "intent to occupy" marital residence); *In re Weza,* 248 B.R. 470 (Bankr. D. N.H. 2000) (debtor could not claim Massachusetts homestead exemption, where estranged wife resided, when he resided in New Hampshire); *In re Moneer*, 188 B.R. 25 (Bankr. N.D. Ill. 1995) (debtor abandoned homestead shortly before divorce); *In re Nerios*, 171 B.R. 224 (Bankr. N.D. Tex. 1994) (spouses could not claim two homes on adjoining lots where they resided separately because of marital discord).

In some states, proceeds of the sale of a homestead remain exempt, usually for a period of time before reinvestment. *In re Graziadei*, 32 F.3d 1408 (9th Cir. 1994) (proceeds from an exempt homestead remained exempt under Nevada law); *In re Dubravsky*, 374 B.R. 467 (Bankr. D. N.H. 2007) (exemption in proceeds of former marital home allowed under N.H. law); *In re Kalynych*, 284 B.R. 149 (Bankr. M.D. Fla. 2002) (debtor could claim exemption in proceeds of sale or refinance of home of debtor and former wife, provided he could prove intent to reinvest); *In re Dixon*, 327 B.R. 421 (Bankr. E.D. Mo. 2005) (must be link between obligation of former spouse to pay debtor under divorce decree and homestead claim in proceeds of obligation); *In re Lewis*, 216 B.R. 644 (Bankr. N.D. Okla. 1998) (debtor could claim lien as exempt under Okla. law); *In re Bumpass*, 196 B.R. 780 (Bankr. E.D. Tenn.

1996) (debtor-ex-wife was entitled to exempt her right to payment under divorce decree of ½ of the equity in the former marital residence from the bankruptcy estate as personal property); *In re Maylin*, 155 B.R. 605 (Bankr. D. Me. 1993) (under Maine law, debtor could exempt proceeds from homestead sold pursuant to divorce decree); *In re Nabbefeld*, 76 B.R. 132 (Bankr. E.D. Wis. 1987) (debtor could claim homestead exemption in lien against former marital residence).

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

In *In re Homan*, 112 B.R. 356 (B.A.P. 9th Cir. 1989), the nondebtor spouse was not entitled to claim state homestead exemption in house she lived in because it was community property, which put it entirely in the debtor's estate, and only the debtor could claim exemptions. *See also In re Morgan,* 286 B.R. 678 (Bankr. E.D. Wis. 2002) (same); *but see In re Hendrick*, 45 B.R. 965 (Bankr. M.D. La. 1985) (nondebtor former spouse was allowed state exemptions).

C. Objections to Exemptions. Objections to a debtor's claimed exemptions must be filed within 30 days after the conclusion of the meeting of creditors or within 30 days after the filing of an amendment to the claimed exemptions. Rule 4003(b). Failure to object within the time limit results in allowance of the exemption. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992). This allowance applies even if property claimed is not property of the estate. *In re Zimmer*, 154 B.R. 705 (Bankr. S.D. Ohio 1993) (late objection resulted in wife's claim of exemption to husband's tax refund being allowed even though she had no interest in it). Objecting party bears the burden of proving grounds for the objection, such as the debtor's intent to abandon the homestead. *In re Jones*, 193 B.R. 503 (Bankr. E.D. Ark. 1995). Generally, debtors can convert non-exempt property into exempt property before filing. However, indicia of fraudulent use of an exemption may include conduct intentionally designed to materially mislead or deceive creditors about debtor's position, use of credit to buy exempt property, conversion of very great amount of property, and conveyance for less than adequate consideration. *In re Cataldo*, 224 B.R. 426 (B.A.P. 9th Cir. 1998).

D. Exempt Assets Recoverable for Support Claims. Exempt property is subject to recovery for tax and spousal support claims. 11 U.S.C. § 522(c); *In re O'Brien*, 367

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

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

A. Determining Spouses' Rights in Property. Bankruptcy court has jurisdiction over all aspects of property of the estate, including the power to adjudicate the rights of the spouses to property. *In re Sokoloff*, 200 B.R. 300 (Bankr. E.D. Pa. 1996). However, most bankruptcy courts will not do so but will abstain. *Matter of Levine*, 84 B.R. 22 (Bankr. S.D. N.Y. 1988); *see also In re Abrams*, 12 B.R. 300 (Bankr. D. P.R. 1981) (bankruptcy court declined to exercise jurisdiction over marital status, even though it had jurisdiction over property). The bankruptcy court does not have the right to determine the spouses' rights in assets that are not property of the estate, i.e., exempt property that is no longer property of the estate or property owned by the nondebtor spouse. *In re Graziadei*, 32 F.3d 1408 (9th Cir. 1994); *In re Neal*, 302 B.R. 275 (B.A.P. 8th Cir. 2003); *Marriage of Seligman*, 18 Cal. Rptr.2d 209 (Ct. App. 1993); *In re Dally*, 202 B.R. 724 (Bankr. N.D. Ill. 1996). *See also In re Burnett*, 408 B.R. 233 (B.A.P. 8th Cir. 2009) (bankruptcy court properly refused to exercise jurisdiction to determine interest on support arrearage paid through completed plan); *In re Hurt*, 389 B.R. 551 (Bankr. W.D. Tenn. 2008) (bankruptcy court had no jurisdiction to modify child support in claim); *In re Vick*, 327 B.R. 477 (Bankr. M.D. Fla. 2005) (bankruptcy court had no authority to modify debtor's support obligations). The "domestic relations exception" to federal jurisdiction applies only to divorce, alimony, and custody. *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). *See supra* regarding application of the automatic stay with respect to property division and other family court matters.

B. Debtor's Property Rights During Pendency of Divorce. *See supra* regarding what

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

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

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

A. The bankruptcy court may abstain in the interest of comity with state courts. 28 U.S.C. § 1334(c)(1). *In re Stabler*, 418 B.R. 764 (B.A.P. 8th Cir. 2009) (abstention appropriate when state court had devoted considerable time to dispute between former spouses and it had concurrent jurisdiction over matter); *In re Taub*, 413 B.R. 81 (Bankr. E.D. N.Y. 2009) (court abstained in proceeding brought by debtor's former wife to recover property allegedly fraudulently transferred by debtor); *In re Kirby*, 403 B.R. 169 (Bankr. D. Mass. 2009) (court abstained from determining debtor's continuing interest in marital home due to ambiguity of divorce decree); *In re Osting*, 337 B.R. 297 (Bankr. N.D. Ohio 2005) (abstention proper when debtor was trying to avoid transfer made by divorce court of exempt property); *In re Leucht*, 221 B.R. 1009 (Bankr. M.D. Fla. 1998) (not proper for bankruptcy court to determine nonfiling spouse's rights in exempt property). In *In re Branham*, 149 B.R. 406 (Bankr. W.D. Va. 1992), the court held that abstention from the entire case was appropriate when the sole reason for filing was the debtor's attempt to avoid the effects of his divorce. *See also In re Laine*, 383 B.R. 166 (Bankr. D. Kan. 2008) (chapter 7 case dismissed for bad faith when only creditor was debtor's former wife and he had substantial income); *In re Moog*, 159 B.R. 357 (Bankr. S.D. Fla. 1993) (dismissal for a bad faith filing was more appropriate than abstention because abstention required consideration of best interests of debtor).

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

C. Discretionary abstention may be proper even in a core proceeding. *In re Mitchell*, 132 B.R. 585 (S.D. Ind. 1991). One court set forth a nonexclusive list of criteria used to consider whether discretionary abstention would be proper: (1) the effect or lack of effect on the efficient administration of the estate if a court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of nondebtor parties; and (13) any unusual or other significant factors. *Matter of Tremaine*, 188 B.R. 380, 385 (Bankr. S.D. Ohio 1995) (citing *In re Nationwide Roofing & Sheet Metal, Inc.*, 130 B.R. 768 (Bankr. S.D. Ohio 1991)). *See also In re Bennett*, 376 B.R. 918 (Bankr. W.D. Wis. 2007) (bankruptcy court abstained from interpreting marital settlement agreement and debtor's management of marital property; stay lifted also); *In re Fussell*, 303 B.R. 539 (Bankr. S.D. Ga. 2003) (bankruptcy court abstained from determining if debtor's post-divorce, prebankruptcy charges on joint credit cards were in the nature of support as liabilities were incurred after court approved separation agreement). *But see In re Dreier*, 438 B.R. 449 (Bankr. S.D. N.Y. 2010) (court did not abstain when motion by debtor's former wife was untimely and was brought only after bankruptcy judge expressed doubts about her position regarding acceleration of payments due under marital settlement agreement); *In re Taub*, 413 B.R. 69 (Bankr. E.D. N.Y. 2009) (court did not abstain when state court did not provide forum for specific

bankruptcy relief).

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

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

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

VI. REMAND/REMOVAL TO STATE COURT

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

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

VII. AUTOMATIC STAY.

A. Stay of Actions to Recover Claims or Property. The filing of a bankruptcy operates as a stay against all acts to acquire property of the debtor or to recover a claim against the debtor that arose prepetition. The 2005 Act expanded exceptions so most family law matters are excepted from the stay, except matters relating to property division. *See infra* regarding family related exceptions. Cases involving bankruptcies before the 2005 Act applied may still be relevant as to property division matters. Acts to recover property of the estate for a nondischargeable debt are also stayed. *See, e.g., In re Edwards*, 214 B.R. 613 (B.A.P. 9th Cir. 1997) (ex-wife's recordation of lis pendens was part of her continuing attempts to collect on divorce-related obligation

and, as such, violated automatic stay); *In re Willard*, 15 B.R. 898 (B.A.P. 9th Cir. 1981) (state court dissolution judgment made final in violation of the stay was void to the extent it transferred property of the estate, but nondebtor wife could enforce it as to property that was no longer property of the estate); *In re Hall-Walker*, 445 B.R. 873 (Bankr. N.D. Ill. 2011) (attorney for debtor's former husband sanctioned for bringing contempt action in state court to remove former husband's name from mortgage); *In re Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010) (post-nuptial agreement entered into after ch. 13 confirmation, which required transfer of property of the estate, violated stay); *In re Aulicino*, 400 B.R. 175 (Bankr. E.D. Pa. 2008) (stay lifted for debtor's former husband to enforce property division because trustee could not avoid transfer as hypothetical BFP); *In re Balzano*, 399 B.R. 428 (Bankr. D. Md. 2008) (stay did not apply to real estate titled only in name of debtor's non-filing spouse).

B. Exceptions. For cases filed on or after October 17, 2005, the exceptions listed in 11 U.S.C. § 362(b)(2) include actions to establish paternity, to establish or modify support, to collect domestic support obligations from property that is not property of the estate, concerning child custody and visitation, concerning domestic violence, to withhold income, including income that is property of the estate, for payment of a domestic support obligation, concerning certain licenses, and the reporting of overdue support for certain purposes . 11 U.S.C. § 362(b)(2). Obtaining a property division continues to require modification of the stay. 11 U.S.C. § 362(b)(2)(A)(iv). *In re Marino*, 437 B.R. 676 (B.A.P. 8th Cir. 2010) (action under Minnesota Domestic Abuse Act preventing debtor from entering his former home did not violate stay); *In re Peterson*, 410 B.R. 133 (Bankr. D. Conn. 2009) (no relief from stay necessary to set DSO or deduct from earnings); *In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (no stay violation for recovery of postpetition support from wages as these were not property of estate after confirmation of plan); *In re Levenstein*, 371 B.R. 45 (Bankr. S.D. N.Y. 2007) (debtor's interest in real estate titled solely in name of nondebtor wife was sufficient to invoke stay while divorce was pending; N.Y. law); *In re O'Brien*, 367 B.R. 240 (Bankr. D. Mass. 2007) (attorney's fees categorized as DSO could be recovered from exempt retirement accounts without regard to stay); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (income withholding by state for child support did not violate stay but was improper as violation of order confirming plan that provided for support arrearage); *In re Ladak*, 205 B.R. 709 (Bankr. D. Vt. 1997) (attempted modification of property settlement in divorce decree violated stay); *In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (action by the debtor's former husband to reduce his maintenance obligation to recover the amount of debts assumed by the debtor in the divorce decree, and subsequently discharged, violated the stay because it attempted to effect an improper setoff of discharged debts). *See also infra* regarding modification of support. While withholding of income for payment of a domestic support obligation is an exception to the stay, an order compelling payment of a support obligation from assets other

than income may be a stay violation. *See In re Trout*, 414 B.R. 916 (Bankr. S.D. Ga. 2009) (stay lifted to allow enforcement of state law remedies against debtor employed by entity controlled by debtor).

C. Contempt Action in State Court. If incarceration is used to compel debtor to pay support from property of the estate, action violates stay. *In re Johnston*, 321 B.R. 262 (D. Ariz. 2005); *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), *aff'd,* 384 Fed. Appx. 882 (11th Cir. 2010); *In re Farmer*, 150 B.R. 68 (Bankr. N.D. Ala. 1991); *In re Suarez*, 149 B.R. 193 (Bankr. D. N.M. 1993). Both the DSO creditor and his or her attorney may be subject to sanctions for violating the stay in bringing the action in state court, or for failing to take corrective action once the party or attorney is aware of the violation. *See, e.g., In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), *aff'd*, 384 Fed. Appx. 882 (11th Cir. 2010). *But see Matter of Rogers,* 164 B.R. 382 (Bankr. N.D. Ga. 1994) (no violation for failure of creditor to act affirmatively as debtor's incarceration was the act of state court, not the creditor).

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

The Ninth Circuit has determined that the stay does not enjoin state criminal prosecutions, even if the underlying purpose of the criminal proceedings is debt collection. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (criminal prosecution for non-payment of child support). In *In re Maloney*, 204 B.R. 671 (Bankr. E.D.N.Y. 1996), the automatic stay was not violated by a state court commitment order requiring a chapter 7 debtor to remain incarcerated for 90 days for failing to comply with the terms of a prior state court contempt order requiring him to make payments to his former wife as an equitable distribution of marital property. The commitment order was of a punitive, criminal nature. *See also In re Rook*, 102 B.R. 490 (Bankr. E.D. Va. 1989), *aff'd*, 929 F.2d 694 (4th Cir. 1991) (incarceration to compel payment violates stay but incarceration to vindicate the dignity of the court does not); *accord Stovall v. Stovall*, 126 B.R. 814 (N.D. Ga. 1990)*; In re Allison*, 182 B.R. 881 (Bankr. N.D. Ala. 1995). *Compare In re Vines*, 224 B.R. 491 (Bankr. M.D. Ala. 1998) (municipal court did not violate automatic stay by remitting debtor to jail for refusing to comply with orders requiring her to cease harassing her former spouse and his new wife), *with In re Pearce*, 400 B.R. 126 (Bankr. N.D. Iowa 2009) (creditor's contacts with criminal authorities to urge prosecution for theft by contractor for purpose of debt collection was not protected by stay exception for governmental action).

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

D. Duration. Stay continues until property is no longer property of the estate, until case is closed or dismissed, or debtor is discharged. 11 U.S.C. § 362(c). In a Chapter 7, stay is in effect about three months. In Chapters 12 and 13, it is in effect until the plan is completed, typically three years, or up to five years for cause with court order. In a Chapter 11, stay is in effect until the plan is confirmed. After the stay expires or is terminated, the discharge injunction under § 524(a) applies.

E. Relief from Stay. Stay regarding property may be lifted for cause, including allowing state court to adjudicate rights of the spouses in property, even though distribution of property of the estate is under the jurisdiction of the bankruptcy court. 11 U.S.C. § 362(d); *In re Claughton*, 140 B.R. 861 (Bankr. W.D. N.C. 1992), *aff'd*, 33 F.3d 4 (4th Cir. 1994); *In re Roberge*, 188 B.R. 366 (E.D. Va. 1995), *aff'd*, 95 F.3d 42 (4th Cir. 1996); *In re Robbins*, 964 F.2d 342 (4th Cir. 1992); *In re Dryja*, 425 B.R. 608 (Bankr. D. Colo. 2010) (stay lifted to allow state court to proceed with property division); *In re Taub* 413 B.R. 55 (Bankr. E.D. N.Y. 2009) (stay lifted to allow state court to determine spouses' rights in property, which would resolve certain issues relevant to ch. 11 plan confirmation); *In re Goss*, 413 B.R. 843 (Bankr. D. Ore. 2009) (stay not lifted for debtor's former wife to enforce property division when it would defeat debtor's means to effectuate chapter 13 plan and there was equity in property on which she held lien); *In re Trout*, 414 B.R. 916 (Bankr. S.D. Ga. 2009) (cause existed to lift stay for support creditor to exercise state law remedies against obviously solvent debtor); *In re Jacobson*, 231 B.R. 763 (Bankr. D. Ariz. 1999) (stay lifted so nondebtor spouse of chapter 13 debtor could continue action to enforce support obligation and preserve right to collect interest, but not to collect arrearage, which was to be paid through plan; plan to be modified because earnings were still property of estate); *In re Sokoloff*, 200 B.R. 300 (Bankr. E.D. Pa. 1996) (stay lifted so wife could enforce her right to support and to litigate issues of the parties' marital relationship or custody of their children; but stay not lifted with regard to issues of wife's attorney's fees, equitable distribution, or other aspects of the state court action); *In re Davis*, 133 B.R. 593 (Bankr. E.D. Va. 1991) (stay was lifted so state court could adjudicate rights of parties in property; the trustee could intervene in state court action to protect the estate's interests). The nondebtor spouse cannot invoke the stay to avoid effects of state court property division. *Lopez v. Lopez*, 478 N.W.2d 706 (Mich. App. 1991).

F. Co-debtor Stay. The chapter 13 codebtor stay, which protects non-filing co-debtors, was not changed by the 2005 Act. 11 U.S.C. § 1301. It applies only to consumer debts, and federal tax liability is not consumer debt. *In re Dye*, 190 B.R. 566 (Bankr. N.D. Ill. 1995). A chapter 13 debtor's former wife, whom the debtor had agreed in a prepetition divorce decree to hold harmless from a certain debt for which only she was personally liable, could not be a "codebtor" within meaning of § 1301 because the debtor was not also liable to the creditor. *In re Jett*, 198 B.R. 489 (Bankr. E.D. Ky. 1996).

G. Filing fee. A motion for relief from stay has a $150 filing fee. No fee is required for a stipulation for relief. Child support creditors who file the appropriate form, AO Form B281, are exempt from the fee. Appendix to 28 U.S.C. § 1930(b), Bankruptcy Court Miscellaneous Fee Schedule Item 20.

VIII. PROPERTY DIVISION vs. SUPPORT

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

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

* * *

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that —

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5) (2004).

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

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

The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
(A) owed to or recoverable by–
(i) a spouse, former spouse, or child of the debtor or such child's parent, legal

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

11 U.S.C. § 101(14A) (2005).

This definition applies to a number of provisions in the bankruptcy code, protecting such obligations from discharge, lien avoidance, or preference recovery, and it has application to a number of provisions relating to claim priority, plan confirmation, and eligibility for discharge upon completion of a plan. This definition widens the type of obligations previously relating to 11 U.S.C. § 523(a)(5) in that it applies to claims arising before, on, and after filing and to all government support claims.

C. Property Division under 11 U.S.C. § 523(a)(15). Before BAPCPA amendments were enacted, an obligation to divide property was dischargeable, unless the creditor timely filed an adversary proceeding in the bankruptcy court under 11 U.S.C. § 523(a)(15), created by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, applicable to cases filed on or after October 22, 1994; Fed R. Bankr. P. 4007. The statute provided for discharge if the debtor could not pay the non-support obligation, and there was a balancing test if the debtor could make the payments. Standards for the tests under the prior statute are not included in this outline, but they apply to cases filed before October 17, 2005. *See, e.g., In re Marble*, 426 B.R. 316 (B.A.P. 8th Cir. 2010) (case filed three days before effective date of BAPCPA).

Property division debts continue to be dischargeable upon completion of a chapter 13 plan. Therefore, the same standards used before the 2005 amendments in determining the nature of an obligation apply in the chapter 13 context. *See also infra* regarding chapter 13 issues. Thus, principles applied to whether an obligation would be support or property division in cases to which the BAPCPA amendments do not apply may still be useful in determining whether debts can be discharged in a chapter 13 case or whether claims are entitled to priority

For cases to which the BAPCPA amendments apply, 11 U.S.C. § 523(a)(15) excepts debts from discharge that are not DSOs but that arise in connection with a divorce decree, separation agreement, or similar court order. Thus, except in a chapter 13 case, all debts that arise in the domestic relations context are not discharged. *See, e.g., In re Marble*, 426 B.R. 316 (B.A.P. 8th Cir. 2010) (hold harmless provision in MSA for indemnification of business debt excepted); *In re Wodark*, 425 B.R. 834 (B.A.P. 10th Cir. 2010) (debt to third party not discharged under § 523(a)(15) even without hold harmless provision); *In re Kearney*, 433 B.R.640 (Bankr. S.D. Tex. 2010) (sanctions for contempt in divorce action were not for support but were excepted from discharge); *In re Ginzl*, 430 B.R. 702 (Bankr. M.D. Fla. 2010); *In re Blackburn*, 412 B.R. 710 (Bankr. W.D. Pa. 2009); *In re Golio*, 393 B.R. 56 (Bankr. E.D. N.Y. 2008); *In re Schweitzer*, 370 B.R. 145 (Bankr. S.D. Ohio 2007).

D. Federal Question. Determination of whether a provision in decree or agreement is property division or for support is a federal, rather than a state, question. *Matter of Swate*, 99 F.3d 1282 (5th Cir. 1996); *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984); *In re Brown*, 288 B.R. 707 (Bankr. W.D. Pa. 2003). The court may nevertheless be guided and informed by state law. *In re Catron*, 164 B.R. 912 (E.D. Va. 1994), *aff'd*, 43 F.3d 1465 (4th Cir. 1994); *Matter of Chambers*, 36 B.R. 42 (Bankr. W.D. Wis. 1984). *See also Matter of Dennis*, 25 F.3d 274 (5th Cir. 1994) (debtor's former wife could take different positions regarding same obligation in state and federal courts). Dischargeability is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

E. Concurrent Jurisdiction to Determine Dischargeability. State and federal courts have concurrent jurisdiction to determine whether particular debts, other than those under 11 U.S.C. § 523(a)(2), (4), and (6), are subject to or excepted from the debtor's discharge. 11 U.S.C. § 523(c). *See, e.g., Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005); *In re Stabler*, 418 B.R. 764 (B.A.P. 8th Cir. 2009); *In re Lewis*, 423 B.R. 742 (Bankr. W.D. Mich. 2010); *In re Monsour*, 372 B.R. 272 (Bankr. W.D. Va. 2007); *see also In re Swartling*, 337 B.R. 569 (Bankr. E.D. Va. 2005) (bankruptcy court bound by state court's determination of nondischargeability; state court immune from liability for finding); *In re McGregor*, 233 B.R. 406 (Bankr. S.D. Ohio 1999) (state court had concurrent jurisdiction to decide exception to discharge under 11 U.S.C. § 523(a)(3) when debtor former wife omitted former husband from schedules). A state court deciding a bankruptcy issue must apply bankruptcy law. *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984).

F. Burden of Proof. Burden of proof is on the party objecting to the dischargeability of the debt under 11 U.S.C. § 523(a)(5). *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990); *In re Horner*, 222 B.R. 918 (S.D. Ga. 1998); *Fraser v. Fraser*, 196 B.R. 371 (E.D. Tex. 1996); *In re Kerzner*, 250 B.R. 487 (Bankr. S.D.N.Y. 2000), *aff'd*, 259 B.R. 253 (S.D.N.Y. 2001). Burden of proof is by a preponderance of the evidence. *In re Merrill*, 246 B.R. 906 (Bankr. N.D. Okla. 2000), *aff'd*, 252 B.R. 497 (B.A.P. 10th Cir.

2000); *In re Ferebee*, 129 B.R. 71 (Bankr. E.D. Va. 1991) (citing *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654 (1991)). Exceptions to discharge are liberally construed in favor of the debtor, but exceptions are less favored in the domestic relations context. *Matter of Crosswhite*, 148 F.3d 879, 881-82 (7th Cir. 1998); *In re Joffrion*, 240 B.R. 630 (M.D. Ala. 1999).

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

H. Third Party Obligee. Some courts have held that the obligation may be to a third party for the benefit of the spouse or child entitled to support, rather than directly to the spouse, former spouse or child. *In re Leibowitz*, 217 F.3d 799 (9th Cir. 2000) (AFDC reimbursement); *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983) (obligation to pay debts to third parties constituted support of joint obligor); *In re Stevens*, 436 B.R. 107 (Bankr. W.D. Wis. 2010) (reimbursement to county for GAL fees was DSO); *In re Hamblen*, 233 B.R. 430 (Bankr. W.D. Mo. 1999) (marital debts payable to third party were support); *In re Frye*, 231 B.R. 71 (Bankr. E.D. Mo. 1999) (obligation to attorney who represented wife); *In re Harr*, 224 B.R. 718 (Bankr. E.D. Mo. 1998) (grandmother's legal fees); *In re Schwartz*, 217 B.R. 533 (Bankr. E.D. Tex. 1998) (aunt's expenses for necessaries provided to debtor's child); *In re Staggs*, 203 B.R. 712 (Bankr. W.D. Mo. 1996) (guardian ad litem). *But see In re McIntyre*, 328 B.R. 356 (Bankr. D. Mass. 2005) (death of spouse did not constitute assignment for nondischargeability purposes, disagreeing with cases to the contrary); *In re Prettyman*, 117 B.R. 503 (Bankr. W.D. Mo. 1990) (substitution of personal representative of deceased former spouse of debtor did not constitute an assignment of nondischargeable child support, but children were proper parties to enforce, not former spouse's estate).

The 2005 amendment defining DSO provides that a support obligation to a governmental unit is not discharged. *See* 11 U.S.C. § 101(14A); *In re Schauer*, 391 B.R. 430 (Bankr. E.D. Wis. 2008) (overpayment of state child care subsidy was DSO excepted from discharge).

There is a disagreement among courts whether an obligation to refund overpayments of what would initially have been characterized as a DSO is also a DSO. *Compare Wisconsin Dept. of Workforce Dev. v. Ratliff*, 390 B.R. 607 (E.D. Wis. 2008) (refund of overpaid food stamp benefits was DSO), *with In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010) (refund of overpaid child support was not DSO).

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

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

1. Whether there was an alimony award entered by the state court. *See In re Lanting*, 198 B.R. 817 (Bankr. N.D. Ala. 1996).

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

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

   Intent is a question of fact. *In re Morel*, 983 F.2d 104 (8th Cir. 1992). Most courts hold that the bankruptcy court is not bound by labels the parties place on a provision, but what the parties label an obligation may be evidence of intent. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001) (case

remanded to determine state court's intent); *In re Jennings*, 306 B.R. 672 (Bankr. D. Or. 2004) (obligation discharged despite designation of support when debtor's former wife had no need for support); *In re Mannix*, 303 B.R. 587 (Bankr. M.D. Pa. 2003) (court's intent, not parties', was determinative); *In re Froncillo*, 296 B.R. 138 (Bankr. W.D. Pa. 2003) (label not controlling); *In re Hopson*, 218 B.R. 993 (Bankr. N.D. Ga. 1998) (court looked beyond agreement's explicit provisions to parties' intent). *But see In re Sorah*, 163 F.3d 397 (6th Cir. 1998) (deference must be given to state court's characterization of obligation, if obligation is consistent with "state law indicia" of support); *In re Weaver*, 316 B.R. 705 (Bankr. W.D. Wis. 2004) (clause evidenced intent for support despite waiver of maintenance). Some courts have held that once intent is established, no further inquiry is needed. *In re Newton*, 230 B.R. 234 (Bankr. D. Conn. 1999).

4. Whether debtor's obligation terminates upon death or remarriage of the spouse or at a certain age of the children or any other contingency, such as a change in circumstances. *In re Sorah*, 163 F.3d 397 (6th Cir. 1998); *Matter of Nowak*, 183 B.R. 568 (Bankr. D. Neb. 1995). *Cf. In re Bieluch*, 219 B.R. 14 (Bankr. D. Conn. 1998), *aff'd*, 216 F.3d 1071 (2d Cir. 2000) (support obligations that would continue despite wife's remarriage or death pursuant to divorce decree were dischargeable after ex-wife's remarriage or death). *But see In re Ehlers*, 189 B.R. 835 (Bankr. N.D. Ala. 1995) (past-due child support remains obligation even though children reached age of majority).

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

6. The duration of the marriage. *See In re Foege*, 195 B.R. 815 (Bankr. M.D. Fla. 1996)*; In re Semler*, 147 B.R. 137 (Bankr. N.D. Ohio 1992).

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

8. Whether the payment was fashioned in order to balance disparate incomes of the parties. *See In re MacGibbon*, 383 B.R. 749 (Bankr. W.D. Wash. 2008)

(additional support that balanced incomes found nondischargeable); *In re Brown*, 288 B.R. 707 (Bankr. W.D. Pa. 2003) (obligation needed to balance incomes of parties); *In re Rosenblatt*, 176 B.R. 76 (Bankr. S.D. Fla. 1994) (substantial difference in income); *In re Fagan*, 144 B.R. 204 (Bankr. D. Mass. 1992) (parties' incomes were approximately equal).

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

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

11. The standard of living of the parties during their marriage. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001); *In re Catron*, 164 B.R. 908 (Bankr. E.D. Va. 1992), *aff'd*, 43 F.3d 1465 (4th Cir. 1994).

12. The circumstances contributing to the estrangement of the parties. *See In re Edwards*, 172 B.R. 505 (Bankr. D. Conn. 1994) (discussion of fault as a factor). This will not apply in most states and in most cases, although economic wrongdoing may be considered. *See, e.g., In re Zaino*, 316 B.R. 1 (Bankr. D. R.I. 2004) (concealment of assets in connection with divorce action).

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

14. Tax treatment of the payment by the debtor/payor spouse. *See, e.g., In re Robb*, 23 F.3d 895 (4th Cir. 1994); *In re Sampson*, 997 F.2d 717 (10th Cir. 1993); *Matter of Davidson*, 947 F.2d 1294 (5th Cir. 1991); *In re Sillins*, 264 B.R. 894 (Bankr. N.D. Ill. 2001) (tax treatment was evidence but was not conclusive as to classification as support). *But see Tilley v. Jessee*, 789 F.2d

1074 (4th Cir. 1986) (support not intended because agreement did not allow payments to be deducted); *In re Cox*, 292 B.R. 141 (Bankr. E.D. Tex. 2003) (quasi-estoppel applied to prevent husband from asserting obligation was not support when he had deducted payments as alimony). *See also In re Bailey*, 285 B.R. 15 (Bankr. N.D. Okla. 2002) (neither party considered tax consequences so no estoppel); *In re Kelley*, 216 B.R. 806 (Bankr. E.D. Tenn. 1998) (debtor not barred by doctrine of quasi-estoppel from arguing that debt was not in nature of support, even though he had repeatedly claimed "alimony" deduction for prior payments of same obligation on tax returns).

J. Examples:

1. Mortgage Payments on Homestead. Payments made to provide a home for a former spouse and/or minor children are usually nondischargeable support. *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990); *In re Schultz*, 204 B.R. 275 (D. Mass. 1996); *Kubera v. Kubera*, 200 B.R. 13 (W.D. N.Y. 1996); *In re Tatge*, 212 B.R. 604 (B.A.P. 8th Cir. 1997); *In re Deberry*, 429 B.R. 532 (Bankr. M.D. N.C. 2010) (proceeds from sale of marital residence were DSO as they were in lieu of support); *In re Westerfield*, 403 B.R. 545 (Bankr. E.D. Tenn. 2009) (obligation to pay mortgage on former marital home was DSO); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (payment qualified as DSO); *In re Cotten*, 318 B.R. 583 (Bankr. W.D. Okla. 2004); *In re Waters*, 292 B.R. 907 (Bankr. C.D. Ill. 2003); *In re Martinez*, 230 B.R. 314 (Bankr. W.D. Tex. 1999); *In re Kubik*, 215 B.R. 595 (Bankr. D.N.D. 1997); *In re Wheeler*, 122 B.R. 645 (Bankr. D. R.I. 1991) (mortgage obligation was in lieu of child support). *But see In re Lewis*, 423 B.R. 742 (Bankr. W.D. Mich. 2010) (temporary order to make mortgage payments was not in nature of support); *In re Mannix*, 303 B.R. 587 (Bankr. M.D. Pa. 2003) (debtor's mortgage obligation was property division, not support, and was dischargeable); *In re Horner*, 222 B.R. 918 (S.D. Ga. 1998) (same); *In re D'Atria*, 128 B.R. 71 (Bankr. S.D. N.Y. 1991) (same).

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

3. Credit Cards. *In re McLain*, 241 B.R. 415 (B.A.P. 8th Cir. 1999) (joint credit card debt nondischargeable); *In re Lewis*, 423 B.R. 742 (Bankr. W.D. Mich. 2010) (temporary order to pay credit card debts was not for support); *In re Polishuk*, 243 B.R. 408 (Bankr. N.D. Okla. 1999) (hold harmless on credit

card debt excepted from discharge); *In re Williams*, 189 B.R. 678 (Bankr. N.D. Ohio 1995) (credit card obligation nondischargeable because parties intended to create support obligation). *But see In re Busby,* 423 B.R. 876 (Bankr. E.D. Mo. 2010) (MSA provided for payment of credit card debts from proceeds of sale of house, and to the extent there was no alternative means to pay, no liability of debtor to support claim); *In re Waltner*, 271 B.R. 170 (Bankr. W.D. Mo. 2001) (credit card debt discharged); *In re Stone*, 199 B.R. 753 (Bankr. N.D. Ala. 1996) (credit card debts do not fall within § 523(a)(5) exception, but they are nondischargeable under pre-BAPCPA § 523(a)(15)).

4. Other Marital Debts. *Matter of Coil*, 680 F.2d 1170 (7th Cir. 1982) (hold harmless agreement for marital debts was nondischargeable); *In re Marble*, 419 B.R. 407 (Bankr. E.D. Mo. 2009), *aff'd*, 426 B.R. 316 (B.A.P. 8th Cir. 2010) (marital settlement agreement that made no other provision for maintenance resulted in hold harmless agreement in the nature of support; pre-BAPCPA case); *In re McKinnis*, 287 B.R. 245 (Bankr. E.D. Mo. 2002) (various marital debts held to be for support); *In re Dean*, 277 B.R. 381 (Bankr. C.D. Ill. 2002) (payment of tax due on joint return was support); *In re Slygh*, 244 B.R. 410 (Bankr. N.D. Ohio 2000) (hold harmless was nondischargeable support because of debtor's income potential); *In re Hamblen*, 233 B.R. 430 (Bankr. W.D. Mo. 1999) (obligation to pay marital debts was awarded in lieu of maintenance); *In re Rooker*, 116 B.R. 415 (Bankr. M.D. Pa. 1990) (obligation to pay one half of marital debts was property division); *In re Zuccarell*, 181 B.R. 42 (Bankr. N. D. Ohio 1995) (debtor's obligation to pay marital debts was not support for nondebtor former spouse when nondebtor was ordered to pay debtor support).

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

6. Medical Expenses. *Matter of Seibert*, 914 F.2d 102 (7th Cir. 1990) (expenses of pregnancy nondischargeable); *In re Moeder*, 220 B.R. 52 (B.A.P. 8th Cir. 1998) (child's medical and psychologist expenses nondischargeable); *In re McLain*, 241 B.R. 415 (B.A.P. 8th Cir. 1999) (health insurance premiums and medical expenses of children nondischargeable); *In re Marquis*, 203 B.R. 844 (Bankr. D. Me. 1997) (medical and counseling expenses of former spouse nondischargeable); *Matter of Olson*, 200 B.R. 40 (Bankr. D. Neb. 1996) (past and future medical expenses, which stemmed from debtor's alleged physical abuse of ex-wife, nondischargeable); *In re Azia*, 159 B.R. 71 (Bankr. D.

Mass. 1993) (obligation to pay medical and dental expenses was nondischargeable even though payment was made to third party; dependents received benefit so there was no assignment); *In re Northcutt*, 158 B.R. 658 (Bankr. N.D. Ohio 1993) (health insurance premiums). *But see In re Beach*, 220 B.R. 651 (Bankr. D. N.D. 1998) (hospital obligation of former wife discharged, which enabled debtor to pay other support obligations).

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

8. Current Needs. The court need not consider the present needs of the objecting spouse but can consider needs only at the time of divorce. *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990); *Sylvester v. Sylvester*, 865 F.2d 1164 (10th Cir. 1989); *In re Soforenko*, 203 B.R. 853 (Bankr. D. Mass. 1997).

9. Child Support. *In re Seixas*, 239 B.R. 398 (B.A.P. 9th Cir. 1999) (provision in settlement agreement to pay private school tuition or to pay college expenses of a child over the age of majority was nondischargeable even though under state law the support obligation ceased when child turned eighteen); *In re Smith*, 180 B.R. 648 (D. Utah 1995) (claim of private child support collection service was nondischargeable because arrangement was a contingent fee, not assignment); *In re Maiorino*, 435 B.R. 806 (Bankr. D. Mass. 2010) (obligation in marital settlement agreement to pay children's college expenses was DSO); *In re Shaw*, 299 B.R.107 (Bankr. W.D. Pa. 2003) (college expenses were support); *In re Cunningham*, 294 B.R. 724 (Bankr. C.D. Ill. 2003) (arrearage obligation continued to be nondischargeable child support even though children had reached age of majority); *In re Kriss*, 217 B.R. 147 (Bankr. S.D.N.Y. 1998) (child care and medical obligations constituted nondischargeable child support); *In re Fritz*, 227 B.R. 700 (Bankr. S.D. Ind. 1997) (obligation to pay for costs of children's private school were in nature of nondischargeable support); *In re Bullock*, 199 B.R. 54 (Bankr. W.D. Mo. 1996) (child support obligation assigned to state agency nondischargeable); *In re Prager*, 181 B.R. 917

(Bankr. W.D. Tenn. 1995) (continuing child support as long as children were full time students and under age of 22 was nondischargeable); *Matter of Bush*, 154 B.R. 69 (Bankr. S.D. Ohio 1993) (college expenses for children of chapter 13 debtor were nondischargeable); *In re Smith*, 139 B.R. 864 (Bankr. N.D. Ohio 1992) (retroactive child support is nondischargeable).

Cf. In re Schauer, 391 B.R. 430 (Bankr. E.D. Wis. 2008) (child care benefit overpayment was DSO); *In re Baker,* 294 B.R. 281 (Bankr. N.D. Ohio 2002) (recovery of child support overpayment maintained its status as support); *but see In re Drinkard*, 245 B.R. 91 (Bankr. N.D. Tex. 2000) (recovery of child support overpayment was not support).

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

11. Miscellaneous. An agreement by the debtor to reimburse former spouse for debtor's share of income tax debt was excepted from discharge under 11 U.S.C. § 523(a)(14) in *In re Barton*, 321 B.R. 877 (Bankr. N.D. Ohio 2005). Payments of a portion of the former spouse's income tax refund and one half of the cash value of the debtor's life insurance policy was nondischargeable support in *In re Drennan*, 161 B.R. 661 (Bankr. E.D. Ark. 1993). *See also In re Marble*, 426 B.R. 316 (B.A.P. 8th Cir. 2010) (indemnity agreement); *Fraser v. Fraser*, 196 B.R. 371 (E.D. Tex. 1996) (indemnity obligation); *In re Hughes*, 164 B.R. 923 (E.D. Va. 1994) (life insurance); *In re Martinez*, 230 B.R 314 (Bankr. W.D. Tex. 1999) (life insurance premiums on debtor's life nondischargeable); *In re Custer*, 208 B.R. 675 (Bankr. N.D. Ohio 1997) (stock buyout); *In re Sweck*, 174 B.R. 532 (Bankr. D. R.I. 1994) (yacht mortgage, life insurance); *In re Pinkstaff*, 163 B.R. 504 (Bankr. N.D. Ohio 1994) (water bill). *See also In re* Smith, 586 F.3d 69 (1st Cir. 2009) ($50 per day late fee for unpaid support was not DSO); *Tucker v. Oliver*, 423 B.R. 378 (W.D. Ok. 2010) (debt to debtors' former daughter-in-law in unsuccessful visitation litigation was not DSO); *In re Wehr*, 292 B.R. 390 (Bankr. D. N.D. 2003) (life insurance was to secure note, not support).

12. Attorney's Fees.

    a. For Debtor's Spouse in Dissolution Action. The same factors used in weighing property division versus support apply in determining

whether an award of attorney's fees is nondischargeable. The debt may be nondischargeable even if paid to someone other than the former spouse, including the former spouse's attorney, even if the third party has released the former spouse from liability. *In re Kline*, 65 F.3d 749 (8th Cir. 1995); *In re Johnson*, 445 B.R. 50 (Bankr. D. Mass. 2011); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010); *In re Tarone*, 434 B.R. 41 (Bankr. E.D. N.Y. 2010); *In re Blackwell*, 432 B.R. 856 (Bankr. M.D. Fla. 2010) (obligation to former spouse's attorney in dissolution action was DSO); *In re Papi*, 427 B.R. 457 (Bankr. N.D. Ill. 2010) (attorney had standing to bring action in bankruptcy court as debtor's former spouse was still liable); *In re Sullivan*, 423 B.R. 881 (Bankr. E.D. Mo. 2010) (award of attorney's fees in custody dispute to mother of debtor's children was DSO); *In re Wisniewski*, 109 B.R. 926 (Bankr. E.D. Wis. 1990) (attorney fees intended to be support even though attorney had forgiven remaining amount due from debtor's former spouse). *See also In re Maddigan*, 312 F.3d 589 (2d Cir. 2002) (attorney's fees for unmarried mother of debtor's child in custody dispute were excepted from discharge as support for child); *In re Wilson*, 380 B.R. 49 (Bankr. M.D. Fla. 2006) (same). *But see In re Orzel*, 386 B.R. 210 (Bankr. N.D. Ind. 2008) (fees ordered to be paid directly to attorney for debtor's former spouse were not a priority claim as DSO; disagreeing with *Kline* rationale).

b. Standing. Early cases did not allow a direct claim by an attorney for the former spouse. *In re Dollaga*, 260 B.R. 493 (B.A.P. 9th Cir. 2001) (debtor's law firm lacked standing); *In re Sanders*, 236 B.R. 107 (Bankr. S.D. Ga. 1999) (debtor's law firm lacked standing); *In re Beach*, 203 B.R. 676 (Bankr. N.D. Ill 1997) (attorney lacked standing); *In re Harris*, 203 B.R. 558 (Bankr. D. Del. 1996) (law firm lacked standing). *But see In re Soderlund*, 197 B.R. 742 (Bankr. D. Mass. 1996) (law firm allowed to bring adversary proceeding). More recent cases have emphasized the nature of the obligation and allowed such actions. *See, e.g., In re Blackwell*, 432 B.R. 856 (Bankr. M.D. Fla. 2010) (fee owed former spouse's attorney was DSO); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010) (former spouse of debtor was still liable to attorney); *In re Prensky*, 416 B.R. 406 (Bankr. D. N.J. 2009) (BAPCPA was intended to enhance protection of dependents, not limit it; fees owed directly to former wife's divorce attorneys was excepted from discharge as a non-DSO debt because she could have enforced payment in state court).

c. Cases Not Allowing a Discharge of Attorney's Fees. If a spouse is

required to pay the other spouse's attorney's fees incident to divorce, and the requirement is based on need, it is usually considered support and is nondischargeable. *See, e.g., In re Strickland*, 90 F.3d 444 (11th Cir. 1996); *In re Kline*, 65 F.3d 749 (8th Cir. 1995); *In re Akamine*, 217 B.R. 104 (S.D.N.Y. 1998); *In re Kennedy*, 442 B.R. 399 (Bankr. W.D. Pa. 2010); *In re Thomas*, 222 B.R. 174 (Bankr. E.D. Mo. 1998); *In re Shea*, 221 B.R. 491 (Bankr. D. Minn. 1998); *In re Finlayson*, 217 B.R. 666 (Bankr. S.D. Fla. 1998). In *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002), the court held fees payable to attorneys who represented the mother of debtor's child in custody proceedings were excepted from discharge as support for the child, even though no attorney was appointed for the child. *See also In re Wilson*, 380 B.R. 49 (Bankr. M.D. Fla. 2006). If state law requires a showing of need for attorney's fees to be ordered, then without further evidence in the bankruptcy court, fees will be nondischargeable support. For cases filed after BAPCPA applies, the obligation would be a DSO

Attorney's fees may be nondischargeable as support even though both property division and support are at issue. *See, e.g., Matter of Joseph*, 16 F.3d 86 (5th Cir. 1994). Fees associated with custody or visitation matters are usually considered support, *e.g., In re Strickland*, 90 F.3d 444 (11th Cir. 1996); *In re Jones*, 9 F.3d 878 (10th Cir. 1993); *Macy v. Macy*, 200 B.R. 467 (D. Mass. 1996), *aff'd*, 114 F.3d 1 (1st Cir. 1997), although some courts interpret "support" in the more narrow economic sense. *See also In re Hendricks,* 248 B.R. 652 (Bankr. M.D. Fla. 2000) (debtor could not discharge ex-wife's attorney's fees in postdivorce custody dispute even though he paid no alimony); *In re Mobley*, 238 B.R. 486 (Bankr. M.D. Fla. 1998) (attorney's fees awarded debtor's former wife in custody dispute even though debtor was custodial parent); *In re Farrell*, 133 B.R. 145 (Bankr. S.D. Ind. 1991) (attorney's fees awarded in custody dispute were nondischargeable even though they were in part awarded to punish the debtor for misconduct).

d. Cases Allowing Discharge of Attorney's Fees. Cases filed before the BAPCPA amendment to 11 U.S.C. § 523(a)(15) made a non-support award of attorney's fees dischargeable. *See Estate of Mayer v. Hawe*, 303 B.R. 375 (E.D. Wis. 2003) (attorney's fees incurred in custody dispute involving adult disabled child were not for support); *Carlin-Blume v. Carlin*, 314 B.R. 286 (S.D. N.Y. 2004); *In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009) (attorney's fees awarded ch. 13 debtor's former spouse were not DSO as they were based on "bad faith litigation misconduct" and were not entitled to priority status);

In re Woods, 309 B.R. 22 (Bankr. W.D. Mo. 2004); *In re Smolenski*, 210 B.R. 780 (Bankr. N.D. Ill. 1997) (order for payment of former spouse's attorney's fees not entered before bankruptcy); *In re Schroeder*, 25 B.R. 190 (Bankr. N.D. Ill. 1982) (attorney's fees ordered on wife's behalf were considered dischargeable property division because at the time of the divorce, the wife was employed and the debtor was not, she had waived maintenance and was receiving only nominal child support); *In re Dunscombe*, 137 B.R. 768 (Bankr. E.D. Mo. 1992) (attorney's fees discharged based on lack of need). Section 523(a)(15) obligation would be subject to discharge upon completion of a chapter 13 case. *See infra* regarding chapter 13 issues.

Some early cases focus on whether the order is to pay the attorney or the former spouse, as the former is not "to a spouse, former spouse, or child of the debtor" and deny the exception to discharge. *E.g., In re Simmons*, 179 B.R. 645 (Bankr. E.D. Mo. 1995); *In re Garcia*, 174 B.R. 529 (Bankr. W.D. Mo. 1994). These are probably no longer valid in light of *In re Kline*, 65 F.3d 749 (8th Cir. 1995) (attorney could enforce award directly). *See also In re Adams*, 254 B.R. 857 (D. Md. 2000) (assignment to attorney of right to collect support from debtor in payment of nondebtor spouse's attorney fees was excepted from discharge).

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

The court in *In re Lowther*, 321 F.3d 946 (10th Cir. 2002), held attorney's fees awarded the debtor's former husband in custody dispute were discharged because of "unusual circumstance" that debtor was primary custodial parent and a finding of exception to

discharge would have adversely affected her ability to support children. *See also In re Jones*, 9 F.3d 878, 881 (10th Cir. 1993) ("'support' encompasses the issue of custody absent unusual circumstances").

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

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

g. Debtor's Attorney's Fees. The debtor's own attorney's fees in a paternity action are dischargeable. *Matter of Rios*, 901 F.2d 71 (7th Cir. 1990). The debtor's attorney's fees in custody and child support dispute were dischargeable. *In re Young*, 425 B.R. 811 (Bankr. E.D. Tex. 2010); *In re Klein*, 197 B.R. 760 (Bankr. E.D. N.Y. 1996). *See also In re Pass*, 258 B.R. 170 (Bankr. E.D. Tenn. 2001) (debtor's divorce attorney's fees were not secured by lien on property division received by debtor).

But see In re Bucciarelli, 429 B.R. 372 (Bankr. N.D. Ga. 2010) (debtor's divorce attorney's fees excepted from discharge for fraudulently inducing the attorney to continue working on divorce case while intending to discharge them in bankruptcy after divorce);

In re Hill, 425 B.R. 766 (Bankr. W.D. N.C. 2010) (fraudulent representation to attorneys representing debtors prepetition in breach of contract action by debtor husband not found); *In re Chase*, 372 B.R. 133 (Bankr. S.D. N.Y. 2007) (attorney did not prove debtor made false representation of intent to pay for divorce services). *See also In re Young*, 425 B.R. 811 (Bankr. E.D. Tex. 2010) (debtor's divorce attorney's claim was time barred and was not DSO).

h. Attorney's Charging Lien. Public policy generally precludes the enforcement of charging liens against child support. *Marriage of Etcheverry*, 921 P.2d 82 (Colo. App. 1996); *Hoover-Reynolds v. Superior Court*, 58 Cal. Rptr.2d 173 (Ct. App. 1996). Enforceability is mixed with respect to other spousal obligations. *See In re Rodvik,* 367 B.R. 148 (Bankr. D. Alaska 2007) (lien was against divorce judgment, not debtor's asset); *In re Daley*, 222 B.R. 44 (Bankr. S.D.N.Y. 1998) (firm with charging lien is not subrogated to former spouse's claim against debtor where her claim was satisfied from proceeds of action which attorney commenced for debtor); *In re Coleman*, 192 B.R. 268 (Bankr. M.D. Fla. 1995) (attorney fee award in a prepetition dissolution order was not a final judgment that could create a lien against a chapter 7 debtor's property); *In re Pass*, 258 B.R. 170 (Bankr. E.D. Tenn. 2001) (debtor's divorce attorney's fees were not secured by lien on property division received by debtor). *But cf. In re Edl*, 207 B.R. 611 (Bankr. W.D. Wis. 1997) (equitable attorney's lien in divorce proceeds was not avoidable); *In re Murray*, 442 B.R. 831 (Bankr. M.D. Fla. 2010) (same).

IX. MISCELLANEOUS SUPPORT OBLIGATIONS

A. Mother's Expenses. Costs incurred by woman giving birth to the debtor's child are usually nondischargeable. *In re Kemp,* 232 F.3d 652 (8th Cir. 2000); *Matter of Seibert*, 914 F.2d 102 (7th Cir. 1990); *In re Sullivan*, 423 B.R. 881 (Bankr. E.D. Mo. 2010) (award of attorney's fees in custody dispute to mother of debtor's children was DSO); *In re Kimbrell*, 201 B.R. 521 (Bankr. E.D. Ark. 1996); *In re Livengood*, 157 B.R. 678 (Bankr. D. Idaho 1993) (expenses were nondischargeable even though claim is by a third party); *In re McCord*, 151 B.R. 915 (Bankr. E.D. Mo. 1993) (birthing expenses and expenses incurred in establishing paternity were nondischargeable); *In re Valls*, 79 B.R. 270 (Bankr. W.D. La. 1987); *In re Balthazor*, 36 B.R. 656 (Bankr. E.D. Wis. 1984) (debtor father's obligation for hospital expenses for birth of his child nondischargeable).

B. Palimony. "Palimony" obligation is dischargeable. *In re Doyle*, 70 B.R. 106 (B.A.P. 9th Cir. 1986). A similar agreement was found nondischargeable in another case

because the debtor made a fraudulent conveyance with actual intent to hinder, defraud or delay the creditor. *In re Marcus*, 45 B.R. 338 (Bankr. S.D. N.Y. 1984).

C. Attorney's Fees Incurred in Enforcing Custody and Visitation. Attorney's fees incurred by the nondebtor spouse in collecting child support arrearages are clearly related to support and are nondischargeable. *See, e.g., In re Brazier*, 85 B.R. 601 (Bankr. N.D. Ala. 1987). Some courts have held that attorney's fees imposed in litigating custody or denial of visitation are also nondischargeable. *Matter of Vazquez*, 92 B.R. 533 (S.D. Fla. 1988); *In re Lever*, 137 B.R. 243 (Bankr. N.D. Ohio 1992). Other courts have held that fees owed the debtor's spouse or former spouse are dischargeable when only noneconomic matters such as custody and visitation are at issue. *See In re Zentz*, 157 B.R. 145 (Bankr. W.D. Mo. 1993), *aff'd*, 81 F.3d 166 (8th Cir. 1996) (former wife's conduct in concealing child, for which attorney's fees were awarded, were not excepted as willful and malicious injury because of inadequate record of basis for award). Attorney's fees assessed against the debtor for nondebtor unmarried mother of debtor's child in paternity and custody matters have been held nondischargeable. *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002)*; In re Wilson,* 380 B.R. 49 (Bankr. M.D. Fla. 2006). *Cf. In re Sullivan*, 423 B.R. 881 (Bankr. E.D. Mo. 2010) (award of attorney's fees in custody dispute to mother of debtor's children was DSO). The debtor's own attorney fees in an action to establish paternity of her child are dischargeable. *Matter of Rios*, 901 F.2d 71 (7th Cir.1990). Likewise, the debtor's own attorney's fees in custody and child support action are dischargeable. *In re Lindberg*, 92 B.R. 481 (Bankr. D. Colo. 1988). *See supra* regarding the dischargeability of attorney's fees.

D. Guardian ad Litem. Most courts find guardian ad litem fees nondischargeable. *In re Chang*, 163 F.3d 1138 (9th Cir. 1998) (debts for professional fees and expenses arising from child custody proceeding were in nature of child support); *Matter of Dvorak*, 986 F.2d 940 (5th Cir. 1993) (debtor's obligation to pay attorney fees incurred by her daughter's guardian ad litem in state court custody litigation was nondischargeable); *In re Peters*, 964 F.2d 166 (2d Cir. 1992) (fees owed to attorney for his representation of debtor's son were in nature of support and were nondischargeable); *In re Miller*, 169 B.R. 715 (D. Kan. 1994), *aff'd*, 55 F.3d 1487 (10th Cir. 1995) (fees incurred during divorce proceeding for guardian ad litem to represent children's interests and for mental health professional to evaluate children and family were nondischargeable); *Levin v. Greco*, 415 B.R. 663 (N.D. Ill. 2009) ("child representative" fees were DSO; nature of the obligation rather than payee was determinative); *In re Stevens*, 436 B.R. 107 (Bankr. W.D. Wis. 2010) (reimbursement to county for GAL fees was DSO); *In re Levin*, 306 B.R. 158 (Bankr. D. Md. 2004) (state statutory scheme for child support that excludes GAL fees was not binding for dischargeability purposes); *In re Manzi*, 283 B.R. 103 (Bankr. D. Conn. 2002) (GAL fees not dischargeable except if debtor proves unusual circumstances); *In re Ross*, 247 B.R. 333 (Bankr. M.D. Fla. 2000) (obligation to pay fees of guardian ad litem

appointed to represent interests of minor children during divorce case nondischargeable); *In re Lockwood*, 148 B.R. 45 (Bankr. E.D. Wis. 1992) (children are entitled to more than economic support, including having representation in the divorce action); *In re Glynn*, 138 B.R. 360 (Bankr. D. Conn. 1992) (criticizes *Linn, infra*). *Cf. In re Sullivan*, 234 B.R. 244 (Bankr. D. Conn 1999) (GAL fees involving custody dispute over debtor's grandchildren discharged because they did not involve "child of the debtor"); *contra In re Defilippi*, 430 B.R. 1 (Bankr. D. Me. 2010) (debt to guardian ad litem was DSO because child that grandparents/debtors obtained custody of was considered a "child of the debtor"). *See also In re Cordova*, 439 B.R. 756 (Bankr. D. Colo. 2010) (child and family investigator appointed in a custody dispute, who had assigned the debt for collection only, was not a party that could do so without losing DSO status under § 101(a)(14A)(D)).

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

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

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

G. Obligations to Third Parties. The definition of a DSO expands the parties eligible to enforce a support obligation. For a property division, section 523(a)(15) applies only to obligations between spouses, former spouses, and children of the debtor. For examples under the prior statute, see *In re Bartholomew*, 226 B.R. 849 (Bankr. S.D. Ohio 1998) (debtor's obligation to former mother-in-law dischargeable), *In re Hutchins*, 193 B.R. 51 (Bankr. N. D. Ala. 1995) (parties were never married), and *In re Finaly*, 190 B.R. 312 (Bankr. S.D. Ohio 1995) (former spouse could not bring action on behalf of her parents). *See also In re Forgette*, 379 B.R. 621 (Bankr. W.D. Va. 2007) (no hold harmless provision in decree); *In re Stegall*, 188 B.R. 597 (Bankr. W.D. Mo. 1995) (no new obligation arose when debtor was assigned debts

because settlement agreement did not include hold harmless or indemnification for debts assigned to either party). *But see In re Gibson*, 219 B.R. 195 (B.A.P. 6th Cir. 1998) (debtor's obligation to pay joint marital debt to third party, which he assumed prepetition pursuant to separation agreement, excepted from discharge even though agreement lacked hold harmless language); *In re Schmitt*, 197 B.R. 312 (Bankr. W.D. Ark. 1996) (court order to pay was equivalent to hold harmless); *In re Speaks*, 193 B.R. 436 (Bankr. E.D. Va. 1995) (hold harmless inferred).

X. MODIFICATION OF DECREE OR SUPPORT

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

B. Change of Circumstances. Bankruptcy of the payor spouse leaving the payee spouse solely liable for joint debts may constitute a change in circumstances warranting modification of maintenance provisions, and most courts will allow modification. *In re Henderson*, 324 B.R. 302 (Bankr. W.D. Ky. 2005) (discharge of credit card debt resulting in state court's award of maintenance did not violate *Rooker-Feldman* doctrine or constitute circumvention of discharge); *Siragusa v. Siragusa*, 843 P.2d 807 (Nev. 1992) (husband's property settlement obligation that had been discharged in bankruptcy could be considered as "changed circumstance" in ruling on motion for modification of alimony); *In re Siragusa*, 27 F.3d 406 (9th Cir. 1994) (alimony modification did not violate discharge injunction); *Marriage of Trickey*, 589 N.W.2d 753 (Iowa App. 1998) (under Iowa law, change of circumstances must be outside the reasonable contemplation of parties at time of divorce to support modification of alimony, and bankruptcy did not meet test); *Wood v. Wood*, 438 S.E.2d 788 (W.Va. 1993) (wife was entitled to have her request for attorney fees and expenses considered once automatic stay was lifted in husband's bankruptcy proceeding); *Ward v. Ward*, 409 S.E.2d 518 (Ga. 1991) (decrease in former husband's child support obligation was supported by his need to assume entire bank obligation as a result of former wife's bankruptcy and by doubling of her income); *Marriage of Jones*, 788 P.2d 1351 (Mont. 1990) (modification was allowed, but other changes besides the payor's bankruptcy were present); *Marriage of Myers*, 773 P.2d 118 (Wash. App.1989) (court could consider creditor collection efforts against ex-wife for debts ex-husband was obligated by dissolution decree to pay but which he discharged in bankruptcy; facts supported upward modification of maintenance); *Ganyo v. Engen*, 446 N.W.2d 683 (Minn. App. 1989) (dissolution decree provided for reevaluation of maintenance if debtor spouse filed for bankruptcy; evidence

supported finding cause to modify award as to amount and duration); *Eckert v. Eckert*, 424 N.W.2d 759 (Wis. App. 1988) (changed circumstances existed by evidence that former husband obtained discharge in bankruptcy which prevented former wife from receiving her share of marital estate as contemplated in divorce judgment); *Hopkins v. Hopkins*, 487 A.2d 500 (R.I. 1985) (waiver of alimony conditioned on payment of debts; support increase allowed); *Marriage of Clements*, 184 Cal. Rptr. 756 (App.1982) (alimony reduced on account of payee's bankruptcy). It appears that the state court can modify support after payor's bankruptcy if the court looks at the totality of the circumstances and is not attempting to order payment of a discharged debt. *See also* Laura W. Morgan, *Bankruptcy and Divorce: Part II Modification of Spousal Support After Discharge in Bankruptcy of Property Settlement Obligations*, 5 Divorce Litigation 32 (1993).

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

D. Property Division. Modification of property division is not allowed. *In re Zick*, 123 B.R. 825 (Bankr. E.D. Wis. 1990); *Grassmueck v. Food Indus. Credit Union*, 127 B.R. 869 (Bankr. D. Or. 1991); *Strohmier v. Strohmier*, 839 N.E.2d 234 (Ind. App. 2005); *Spankowski v. Spankowski*, 493 N.W.2d 737 (Wis. App. 1992); *Coakley v. Coakley*, 400 N.W.2d 436 (Minn. App. 1987); *Fitzgerald v. Fitzgerald*, 481 A.2d 1044 (Vt. 1984). *See also In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (debtor's husband's attempt to reduce maintenance to setoff debtor's discharged property division obligation was violation of stay); *In re Fluke*, 305 B.R. 635 (Bankr. D. Del. 2004) (attempt to modify property division violated discharge injunction); *In re Tostige*, 283 B.R. 462 (Bankr. E.D. Mich. 2002) (attempt to modify property division violated discharge injunction). *See also* Brett R. Turner, *The Limits of Finality: Reopening Property Division Orders in Post-Judgment Proceedings*, Vol. 9, No. 8 Divorce Litigation 145 (August 1997).

E. Level of Support- Jurisdiction . The bankruptcy court has no jurisdiction to set or modify the amount of spousal or child support. *In re Brennick*, 208 B.R. 613 (Bankr.

D.N.H. 1997); *Matter of Rogers*, 164 B.R. 382 (Bankr. N.D. Ga. 1994). *Cf. In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (bankruptcy court did not violate *Rooker-Feldman* or *Younger* doctrines by allowing only part of state DSO claim with apparent clerical error, but this did not constitute an adjudication of the correct amount, which should be decided by state court).

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

A. Fraud. A debt arising in a marital settlement agreement may be nondischargeable if incurred by fraud. 11 U.S.C. § 523(a)(2). Procedural rules and time limits for such objections must be followed. Bankruptcy Rules 4004, 4007. *See Sanford Inst. for Sav. v. Gallo*, 156 F.3d 71 (1st Cir. 1998) (justifiable reliance standard); *In re Lang*, 293 B.R. 501 (B.A.P. 10th Cir. 2003) (fraud related to paternity);*In re Travis*, 364 B.R. 285 (Bankr. N.D. Ohio 2006) (fraud in obtaining credit cards in former husband's name); *In re Cooke*, 335 B.R. 269 (Bankr. D. Conn. 2005) (debtor must have known there was insufficient equity in property to pay former wife from proceeds of sale as promised); *In re Zaino*, 316 B.R. 1 (Bankr. D. R.I. 2004) (concealed assets related to support); *In re Ingalls*, 297 B.R. 543 (Bankr. C.D. Ill. 2003) (obligations assumed without intent to pay were nondischargeable); *In re Dixon*, 280 B.R. 755 (Bankr. M.D. Ga. 2002) (time-barred fraud complaint allowed under 11 U.S.C. § 523(a)(3)); *In re Hallagan*, 241 B.R. 544 (Bankr. N.D. Ohio 1999) (failure to comply with state court orders was evidence of debtor's fraud); *In re Paneras*, 195 B.R. 395 (Bankr. N.D. Ill. 1996) (fraud in incurring joint debt). *But see In re Stanifer*, 236 B.R. 709 (B.A.P. 9th Cir. 1999) (forensic psychologist failed to prove fraud in inducement to provide services in custody case); *In re Graham*, 194 B.R. 369 (Bankr. E.D. Pa. 1996) (debtor did not materially misrepresent stability of marriage when he obtained loans from former in-laws); *In re Kruszynski*, 150 B.R. 209 (Bankr. N.D. Ill. 1993) (former wife was allowed after bar date to amend pleadings alleging nondischargeability under § 523(a)(5) to add a second count of fraud under § 523(a)(2)(A); relation back applied because both counts arose in the divorce action); *In re Ellerman*, 135 B.R. 308 (Bankr. N.D. Ill. 1992) (former wife could not show that husband's deceit resulted in financial loss, only that she would have requested more had she known); *In re Shreffler*, 319 B.R. 113 (Bankr. W.D. Pa. 2004) (timing of bankruptcy close to marital agreement is not per se fraud); *In re Butler*, 277 B.R. 843 (Bankr. M.D. Ga. 2002) (fraud in entering marital settlement agreement not proven); *In re D'Atria*, 128 B.R. 71 (Bankr. S.D. N.Y. 1991)(failure to fulfill requirements of property settlement did not, without more, prove fraud in entering the agreement). Fraud must be plead with particularity. *In re Demas*, 150 B.R. 323 (Bankr. S.D. N.Y. 1993); *see also In re Bucciarelli*, 429 B.R. 372 (Bankr. N.D. Ga. 2010) (debtor's divorce attorney's fees excepted from discharge for fraudulently inducing the attorney to continue working on divorce case while intending to discharge them in bankruptcy after divorce)*; see also* Laura W. Morgan, *Civil Conspiracy and Civil RICO in Divorce Actions*, Divorce Lit., Vol. 12/No. 11

(Nov. 2000).

B. Willful and Malicious Injury. A debt may also be excepted from discharge for willful and malicious injury to property of another, such as conversion. 11 U.S.C. § 523(a)(6). *See Matter of Rose*, 934 F.2d 901 (7th Cir. 1991) (debtor's unauthorized taking of cash from joint safe deposit box and resulting obligation in divorce were nondischargeable); *In re Hamilton*, 390 B.R. 618 (Bankr. E.D. Ark. 2008), *aff'd*, 400 B.R. 696 (E.D. Ark. 2009) (failing to care for horses in debtor's possession which were awarded to former spouse was willful and malicious; discharge also denied); *In re Suarez*, 400 B.R. 732 (B.A.P. 9th Cir. 2009) (judgment for harassment of new wife of debtor's former husband was nondischargeable even without compensatory damage award); *In re Alessi*, 405 B.R. 65 (Bankr. W.D. N.Y. 2009) (dissipation of funds earmarked for former spouse in divorce judgment excepted from discharge under § 523(a)(6); *In re Petty*, 333 B.R. 472 (Bankr. M.D. Fla. 2005) (treble damages awarded against debtor in state court civil judgment for conversion of former wife's share of military pension excepted from discharge); *In re Gray*, 322 B.R. 682 (Bankr. N.D. Ala. 2005) (damages awarded for sexual abuse of debtor's daughter excepted from discharge as to both wife and daughter); *In re Hixson*, 252 B.R. 195 (Bankr. E.D. Okla. 2000) (adversary proceeding unrelated to divorce could be brought by debtor's former wife for assault by debtor/former husband); *In re Shteysel*, 221 B.R. 486 (Bankr. E.D. Wis. 1998) (debtor-husband's transfer of marital property to son shortly after served with divorce papers was willful and malicious); *In re Garza*, 217 B.R. 197 (Bankr. N.D. Tex. 1998) (debtor willfully and fraudulently refused to deliver property awarded to former spouse); *In re Arlington*, 192 B.R. 494 (Bankr. N.D. Ill. 1996) (attorney fee award within exception for willful and malicious injury); *In re Sateren*, 183 B.R. 576 (Bankr. D. N.D. 1995) (debtor's sale and conversion of proceeds of cattle and grain awarded former spouse was willful and malicious); *In re Wells*, 160 B.R. 726 (Bankr. N.D.N.Y. 1993) (former wife's embezzlement or conversion of the proceeds of the sale of the marital residence made obligation nondischargeable). *But see In re Patch*, 526 F.3d 1176 (8th Cir. 2008) (debtor's leaving three year old son with boyfriend who had previously abused and eventually murdered him did not rise to level of willful and malicious); *In re Reichardt*, 380 B.R. 596 (Bankr. M.D. Fla. 2006) (debtor's former wife failed to prove obligation was for wilful and malicious injury when judgment was for division of marital estate); *In re White*, 363 B.R. 157 (Bankr. D. Idaho 2007) (gelding of horse eventually awarded to debtor's former husband was not willful and malicious injury as she had equal right to manage and control community property in her possession); *In re Wright*, 184 B.R. 318 (Bankr. N.D. Ill. 1995) (award to former spouse for debtor's dissipation of assets was not a legal wrong equivalent to willful and malicious standard); *In re Zentz*, 157 B.R. 145 (Bankr. W.D. Mo. 1993), *aff'd*, 81 F.3d 166 (8th Cir. 1996) (attorney's fees awarded to former husband on account of former wife's concealment of child were not excepted from discharge as a willful and malicious injury). *See also In re Moffitt*, 252 B.R. 916 (B.A.P. 6th Cir. 2000) (prior

action for damages to debtor's former spouse unrelated to divorce entitled to issue preclusion and found excepted from discharge for willful and malicious injury).

C. Defalcation. A divorce related debt may also be excepted from discharge for defalcation in a fiduciary capacity. For example, in *In re Lam*, 364 B.R. 379 (Bankr. N.D. Cal. 2007), the debtor had used community property to pay child support when he had separate property available for that purpose, and California law provided a remedy for reimbursement of community property. The state court had granted judgment to the debtor's former wife under the California statute, and the bankruptcy court held the debt excepted under 11 U.S.C. § 523(a)(4). *See also In re Jacobson,* 433 B.R. 183 (Bankr. S.D. Tex. 2010) (Texas statutory trust in favor of spouse later awarded property that had been in possession of other spouse did not give rise to defalcation); *In re Lewis*, 359 B.R. 732 (Bankr. E.D. Mo. 2007) (trust relationship not proved); *In re Hughes*, 354 B.R. 820 (Bankr. S.D. Tex. 2006) (trust must be express or imposed by statute or common law, not by wrongdoing; not proved); *In re Green*, 352 B.R. 771 (Bankr. W.D. La. 2005) (defalcation of former wife's community share of retirement pay proved); *cf.* pension cases, *supra*.

XII. PREVIOUSLY LITIGATED ISSUES - ISSUE AND CLAIM PRECLUSION

A. Claim Preclusion. If divorce has been completed, the bankruptcy court cannot change the adjudicated rights of the parties. *In re Comer*, 723 F.2d 737 (9th Cir. 1984) (amount of support arrearage set by family court could not be attacked in bankruptcy court); *In re Tarone*, 434 B.R. 41 (Bankr. E.D. N.Y. 2010) (attorney's fees awarded to debtor's former spouse pursuant to divorce was *res judicata* in bankruptcy case); *In re Kearney*, 433 B.R. 640 (Bankr. S.D. Tex. 2010) (state court's determination that sanctions arose as continuation of divorce entitled to claim preclusion in bankruptcy court); *In re Vigil*, 250 B.R. 394 (Bankr. D. N.M. 2000) (court's determination in motion for relief from stay did not have claim preclusive effect in nondischargeability proceedings as stay determination was summary and not fully litigated); *In re Perry*, 254 B.R. 675 (Bankr. E.D. Va. 2000) (administrative support order precluded bankruptcy court from determining amount of AFDC reimbursement owed); *In re Ennis*, 178 B.R. 177 (Bankr. W. D. Mo. 1995) (validity of prior divorce could not be relitigated because issue of wife's mental capacity could have been raised in state court but was not); *In re Zrubek*, 149 B.R. 631 (Bankr. D. Mont. 1993) (award of portion of debtor's military retirement pay to debtor's former spouse was res judicata even if the divorce court had no statutory authority at that time to do so).

In *In re Rosenbaum*, 150 B.R. 990 (Bankr. E.D. Tenn. 1992), *aff'd,* 150 B.R. 994 (E.D. Tenn. 1993), the court held that the debtor could have raised the bankruptcy as a defense in an action to enforce a divorce obligation in state court and did not do so and was bound by res judicata as to its enforceability. In *In re Phillips*, 175 B.R. 901

(Bankr. E. D. Tex. 1994), the debtor's former spouse was bound by confirmed plan even though the divorce was filed postpetition because some of her claims were based on prepetition conduct. *See also Matter of Swate*, 99 F.3d 1282 (5th Cir. 1996)(bankruptcy court's determination thatdebt was nondischargeable alimony was res judicata as to later state court proceeding, which reduced alimony obligation to a lump-sum payment).

B. Issue Preclusion. Facts or issues determined in another court may be binding on the bankruptcy court if the elements of collateral estoppel, or issue preclusion, are present, provided the prior court had jurisdiction to decide the matter. The prior determination may also have been made in the same court. In *In re Chase*, 392 B.R. 72 (Bankr. S.D. N.Y. 2008), the court held in an adversary proceeding it was bound to its earlier determination in an automatic stay proceeding that an obligation was in the nature of support. On the other hand, in *In re Nelson*, 255 B.R. 398 (Bankr. E.D. Va. 2000), the bankruptcy court was not bound by the state court's holding that a property division was excepted from discharge because the law at that time required an adversary proceeding in bankruptcy court, and the state court had no jurisdiction to decide the issue. Similarly, in *In re Tatge*, 212 B.R. 604 (B.A.P. 8th Cir. 1997), the pre-bankruptcy settlement agreement stated the debtor's obligation to make mortgage payments for his former wife could be discharged, but neither she nor the bankruptcy court was bound by that determination as the matter was not properly before the state court at the time. In *In re Freeman*, 165 B.R. 307 (Bankr. S.D. Fla. 1994), the court held that the provision in the settlement agreement that the debtor's obligation was nondischargeable was unenforceable because it did not constitute a valid waiver of discharge under 11 U.S.C. § 727(a)(10), and no court has jurisdiction to make such a finding before a bankruptcy is filed. On the other hand, the court in *In re Monsour*, 372 B.R. 272 (Bankr. W.D. Va. 2007), held that the state court had jurisdiction to overrule the debtor's argument that an obligation to his former spouse was discharged when it approved a lump sum award, thereby binding the bankruptcy court to the classification as support.

Generally, issue preclusion rules of the first jurisdiction must be applied. *See In re Stage*, 321 B.R. 486 (B.A.P. 8th Cir. 2005). With some minor differences, most courts apply the doctrine so a finding in one court is binding on a subsequent court if the parties are the same, the issues are the same, the issue was actually litigated, and the finding was necessary to the result. *In re Hartnett*, 330 B.R. 823 (Bankr. S.D. Fla. 2005) (no collateral estoppel where paternity was established by default and not actually litigated; DNA showed debt was for support of child who was not the debtor's); *In re Battaglia*, 321 B.R. 67 (Bankr. M.D. Fla. 2005) (family court record insufficient to apply collateral estoppel); *In re Zambre*, 306 B.R. 428 (Bankr. D. Mass. 2004) (state court's previous determination that debtor had no interest in homestead precluded determination of lien avoidance motion); *In re Lepar*, 272 B.R. 758 (Bankr. M.D. Fla. 2001) (state court determination that debtor could not claim

homestead exemption with respect to former husband's judgment lien could not be challenged in bankruptcy court); *In re Adkins*, 191 B.R. 941 (Bankr. M.D. Fla. 1996) (bankruptcy court collaterally estopped from determining the dischargeability of a dissolution award to a chapter 7 debtor's ex-husband because same issue had been ruled on by state court that ordered a Qualified Domestic Relations Order to enforce the award); *In re Clegg*, 189 B.R. 818 (Bankr. N.D. Okla. 1995) (issue preclusion applied to state court determination that attorney fees were in nature of support); *In re Rabeiro*, 151 B.R. 965 (Bankr. M.D. Fla. 1993) (nondebtor former spouse was bound by state court determination that obligation was property division); *In re Reid*, 149 B.R. 669 (Bankr. D. Kan. 1992) (finding in divorce judgment that debtor had disposed of marital assets by traveling and gambling was entitled to collateral estoppel effect in § 523(a)(6) action).

The parties can stipulate to facts that are binding on subsequent court. *See, e.g., Klingman v. Levinson,* 114 F.3d 620 (7th Cir. 1997)*; In re Berlingeri*, 246 B.R. 196 (Bankr. D. N.J. 2000) (debtor was collaterally estopped from contesting dischargeability of consent judgment for marital tort grounded in assault, battery, and intentional infliction of emotional distress); *In re Dunkley*, 221 B.R. 207 (Bankr. N.D. Ill. 1998) (chapter 13 debtor estopped from contending that unpaid debt to former spouse was dischargeable where, in adversary proceeding in prior chapter 7 case, debtor stipulated to entry of nondischargeable judgment); *In re Carter*, 138 B.R. 356 (Bankr. D. Conn. 1992) (marital settlement agreement approved by court satisfied "actually litigated" requirement). *But see In re Hopson*, 216 B.R. 297 (Bankr. N.D. Ga. 1997) (agreement to settle contempt issue did not prevent later nondischargeability proceeding).

The same standards must be used in state and bankruptcy courts if issue preclusion applies. *In re Edwards*, 162 B.R. 83 (D. Conn. 1993) (family court considered fault in determination of obligations in the decree, which precluded use of collateral estoppel); *In re Vigil*, 250 B.R. 394 (Bankr. D. N.M. 2000) (determination that obligation was support in stay proceeding not binding in adversary proceeding on same issue because motion for relief from stay was summary proceeding without full adjudication); *In re D, S & S Enters., Inc.*, 155 B.R. 691 (Bankr. W.D. Pa. 1993) (characterization in divorce of transfers from debtor corporation to husband as loans or compensation was not binding on bankruptcy court). Likewise, in *Matter of Dennis*, 25 F.3d 274 (5th Cir. 1994), collateral estoppel did not apply to an obligation characterized as property division under Texas law (which did not at the time provide for alimony) and found to be support under bankruptcy law. *See also In re Kritt*, 190 B.R. 382, 387 (B.A.P. 9th Cir. 1995) (holding that court must look beyond language of the decree to the intent of the parties and the substance of the obligation).

C. Judicial Estoppel. Under certain circumstances, parties will be precluded from taking inconsistent positions on the same issue in separate but related actions. *See In re*

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

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

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

XIII. CHAPTER 12 AND 13 CONSIDERATIONS

A. General Provisions.

1. Estate Property. Estate includes 11 U.S.C. § 541 property owned by the debtor on the date of filing, including certain property held by a nondebtor spouse in a community property state, plus any such property acquired while the plan is in effect, plus earnings for services performed by the debtor before the case is closed, dismissed or converted. 11 U.S.C. §§ 1207(a)(2), 1306(a)(2). *See also In re Brinkley*, 323 B.R. 685 (Bankr. W.D. Ark. 2005) (interpreting 11 U.S.C. §§ 541, 1306, and 348, life insurance proceeds acquired by one joint debtor upon death of the other during ch. 13 was not property of estate upon conversion to ch. 7). Property vests at confirmation unless otherwise ordered. 11 U.S.C. § 1327(b). Order of confirmation can provide that all earnings of the debtor and/or other property continue to be property of the estate even after confirmation, bringing any dispute concerning such income into the bankruptcy court. *See In re Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010) (post-nuptial agreement that required transfer of property of estate, including debtor's earnings for to be paid for support, violated stay); *In re Dahlgren,* 418 B.R. 852 (Bankr. D. N.J. 2009) (debtor's plan, in case filed on eve of partition of tenants in common property owned with debtor's former domestic partner, could not treat co-owner's interest as a claim); *In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (wages vested upon confirmation and were not protected by automatic stay as to postpetition support due).

2. Eligibility. A chapter 13 debtor must be an individual, or an individual and his or her spouse, with regular income having not more than $360,475 in non-contingent, liquidated, unsecured debts and not more than $1,081,400 in non-contingent, liquidated, secured debts. 11 U.S.C. § 109(e). A chapter 12 debtor must be a "family farmer," also with regular income. 11 U.S.C. §§ 101(18),(19), 109(f). For a chapter 12 case filed on or after October 17, 2005, a "family fisherman" may also qualify as a chapter 12 debtor. 11 U.S.C. § 101(19A), (19B). If both spouses would individually qualify, they may file a joint case even if their aggregate debts exceed debt limits. *In re Werts*, 410 B.R. 677 (Bankr. D. Kan. 2009). *See also In re Lovell*, 444 B.R. 367 (Bankr. E.D. Mich. 2011) (chapter 13 debtor who depended on husband's income, when he had also filed a chapter 13 case, did not qualify as having regular income).

3. Community claims. A community claim, defined in 11 U.S.C. § 101(7), incurred by the debtor's nonfiling spouse must be included in the determination of eligibility. *In re Monroe*, 282 B.R. 219 (Bankr. D. Ariz.

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

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

4. Good Faith. If a case is not filed in good faith, or if conversion to another chapter is not in good faith, the case may be dismissed or conversion not allowed as confirmation would be impossible. *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). *See also In re Grafton*, 421 B.R. 765 (Bankr. N.D. Miss. 2009) (treatment of property division claim of former spouse in plan was not in good faith); *In re Hofer*, 437 B.R. 680 (Bankr. D. Minn. 2010) (chapter 13 case filed in impermissible attempt to modify dissolution decree; confirmation denied, case dismissed); *In re Melcher*, 416 B.R. 666 (Bankr. D. Neb. 2009) (treatment of former wife's claim was not in good faith); *In re Selinsky*, 365 B.R. 260 (Bankr. S.D. Fla. 2007) ("tag team" filing by husband and wife was bad faith); *In re Pakuris*, 262 B.R. 330 (Bankr. E.D. Pa. 2001) (conversion from ch. 7 to ch. 13 not allowed because debtor's only purpose was to regain control over property division litigation that had been settled by ch. 7 trustee); *In re Nahat*, 315 B.R. 368 (Bankr. N.D. Tex. 2004) (separate cases filed by spouses with respect to the same property not in bad faith); *In re Feldman*, 309 B.R. 422 (Bankr. E.D. N.Y. 2004) (court had no in rem jurisdiction over nonfiling spouse's interest in property to grant prospective relief).

5. Automatic Stay. Stay remains in effect until discharge is granted. 11 U.S.C. § 362(c)(2)(C). *But see* 11 U.S.C. § 362(c)(3) and (4), applicable to cases filed on or after October 17, 2005, regarding the automatic stay for debtors filing serial cases. Discharge is issued after ch. 13 plan payments are completed or the debtor receives a "hardship" discharge. 11 U.S.C. §§ 1228(a), (b), 1328(a), (b). Upon confirmation, most courts have held that property of the estate vests in the debtor, 11 U.S.C. §§ 1227(b), 1327(b),

unless the order of confirmation provides otherwise, and the spouse can then proceed against the debtor's nonestate property. *See* 11 U.S.C. § 362(b)(2)(B). For this reason, many debtors owing support prefer to provide in the plan that property does not vest until completion of the plan and discharge. This protects postpetition income and property acquired by the debtor. *See, e.g., In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (wages vested upon confirmation and were not protected by automatic stay as to postpetition support due). In *Matter of James*, 150 B.R. 479 (Bankr. M.D. Ga. 1993), the court refused to lift the stay to allow the nondebtor spouse to enforce collection of support arrearage, pending amendment of debtor's plan to provide for such arrearage. *Accord In re Fullwood*, 171 B.R. 424 (Bankr. S.D. Ga. 1994) (similar facts); *In re Price*, 179 B.R. 209 (Bankr. E.D. Cal. 1995). *See also In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (both held income withholding by state for child support did not violate stay but was improper as violation of order confirming plan that provided for support arrearage).

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

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

6. Income of Non-Debtor Spouse. Income of the nondebtor spouse must be disclosed, even if the debtor has no interest in the income, to allow the court to determine if the plan meets disposable income and good faith tests. Combined income also determines the length of the plan. *See* 11 U.S.C. § 1322(d); Official Form 6, Schedule I. *In re Harman*, 435 B.R. 596 (B.A.P. 8th Cir. 2010) (joint debtors' income combined even though they lived separately); *In re Vollen*, 426 B.R. 359 (Bankr. D. Kan. 2010) (if non-filing spouse's income not regularly contributed to household expenses, it should

not be included in calculating debtor's disposable income); *In re Stansell*, 395 B.R. 457 (Bankr. D. Idaho 2008) (deceased wife's income received in six months before filing included to determine commitment period); *In re Mullins*, 360 B.R. 493 (Bankr. W.D. Va. 2007) (sufficient income of debtor's spouse, who committed to making payments, was regular income to unemployed debtor); *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006) (income of non-filing spouse must be included to extent contributed to household expenses).

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

Under BAPCPA amendments, the income of the debtor and debtor's spouse are combined to determine the commitment period under the means test. 11 U.S.C. § 1322(d). *See also* 11 U.S.C. §§ 707(b)(2)(A) and 1325(b) regarding payment requirements under BAPCPA means test, allowable expenses, and exclusion of DSO payments. The contribution to household expenses by a nondebtor spouse may affect the means test and required contributions to a plan. *See In re Boatright*, 414 B.R. 526 (Bankr. W.D. Mo. 2009); *In re Barnes,* 378 B.R. 774 (Bankr. D. S.C. 2007); *In re Shahan*, 367 B.R. 732 (Bankr. D. Kan. 2007); *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006); *In re Beasley*, 342 B.R. 280 (Bankr. C.D. Ill. 2006). *See also In re Harman*, 435 B.R. 596 (B.A.P. 8th Cir. 2010) (spouses' income had to be combined even though they had separate residences); *In re Waechter*, 439 B.R. 253 (Bankr. D. Mass. 2010) (pre-marital agreement that gave non-filing spouse a "free ride" on household expenses resulted in plan being rejected for bad faith); *In re Stocker*, 399 B.R. 522 (Bankr. M.D. Fla. 2008) (antenuptial agreement that restricted nondebtor spouse's responsibility for household expenses was not a "special circumstance" that could be considered as part of the means test). Contribution to household expenses by a non-spouse are also counted, but not that person's entire income. *In re Roll*, 400 B.R. 674 (Bankr. W.D. Wis. 2008); *In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007).

Household size is a factor in determining whether debtors are below or above

median income. *In re Epperson,* 409 B.R. 503 (Bankr. D. Ariz. 2009) ("heads on beds" determines household size; criticizing cases focusing on support provided); *In re Herbert*, 405 B.R. 165 (Bankr. W.D. N.C. 2008) (all members of household, including ones debtor is not obligated to support, are included in calculating means test); *In re Fleishman*, 372 B.R. 64 (Bankr. D. Or. 2007) (unborn child cannot be counted in household size); *In re Pampas*, 369 B.R. 290 (Bankr. M.D. La. 2007) (same).

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

7. Plan Confirmation, Modification. To be confirmed, a plan, among other things, must be feasible, must be proposed in good faith, and if objected to, must commit all of the debtor's disposable income (remaining after basic expenses) to the plan over its term. It must pay creditors at least as much as they would receive in a Chapter 7, including 100% payment on priority claims. 11 U.S.C. § 1325; *see In re Deberry*, 429 B.R. 532 (Bankr. M.D. N.C. 2010) (proceeds from sale of marital residence were DSO priority claim in chapter 13 case as they were in lieu of support; balance of obligations were not); *In re Westerfield*, 403 B.R. 545 (Bankr. E.D. Tenn. 2009) (obligation to pay mortgage on former marital home was DSO; confirmation of plan identifying debt as § 523(a)(15) not binding); *In re Johnson,* 397 B.R. 289 (Bankr. M.D. N.C. 2008) (obligation to pay second mortgage on house awarded debtor's former wife was DSO); *In re Williams*, 387 B.R. 211 (Bankr. N.D. Ill. 2008) (DSO claim must be paid 100%); *In re Dorf*, 219 B.R. 498 (Bankr. N.D. Ill. 1998) (debtor, who could not maintain proposed plan payments to former spouse for maintenance arrears as well as postpetition payments as they came due, was financially unable to produce confirmable plan); *In re Davis*, 172 B.R. 696 (Bankr. S.D. Ga. 1993) (plan filed in good faith even though it affected obligations under divorce decree); *In re Kelly*, 378 B.R. 769 (Bankr. M.D. Pa. 2007) (prepetition transfer of assets into joint tenancy with spouse, which was probably avoidable, would increase hypothetical chapter 7 distribution, so plan did not meet best interests test). Standards for modification of a plan are the same as for confirmation, with certain exceptions. 11 U.S.C. §§ 1323, 1329.

If BAPCPA applies, the debtor must be current in postpetition DSO

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

A chapter 13 case filed solely to circumvent the requirements of a dissolution decree may be subject to dismissal for bad faith. *In re Fleury*, 294 B.R. 1 (Bankr. D. Mass 2003) (case dismissed when debtor dissipated over $350,000, and only significant debt was to former husband); *In re Lewis*, 227 B.R. 886 (Bankr. W.D. Ark. 1998) (plan filed solely to attempt to circumvent divorce court orders was filed in bad faith); *In re Maras*, 226 B.R. 696 (Bankr. N.D. Okla. 1998) (plan not proposed in good faith where debtor's sole motivation was to avoid paying former wife); *In re Green*, 214 B.R. 503 (Bankr. N.D. Ala. 1997) (dismissal warranted where debtor filed successive chapter 13 petitions with child support obligation constituting vast majority of claims). *But see In re Brugger*, 254 B.R. 321 (Bankr. M.D. Pa. 2000) (case not filed in bad faith when plan did not provide for payment of property division debt, but debtor did not meet test of paying creditors more than they would receive in chapter 7); *In re Lindquist*, 349 B.R. 246 (Bankr. D. Or. 2006) (bad faith allegations by former wife of debtor not proven); *In re Nelson*, 189 B.R. 748 (Bankr. D. Minn. 1995) (debtor's voluntary conduct in marrying a disabled person and purchasing an expensive vehicle did not constitute cause for plan modification). *See also In re Dean*, 317 B.R. 482 (Bankr. W.D. Pa. 2004) (debtor could not reject prepetition contract assigning right to receive alimony in exchange for lump sum payment).

8. Objections to Confirmation. Since a property division may be discharged upon completion of a chapter 13 plan, and the claim may be paid less that the full amount as a nonpriority claim if the plan so provides, a creditor who believes an obligation is for support and not property division may wish to object to confirmation before such a plan is confirmed. *See, e.g., In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010) (attorney for debtor's former spouse awarded fees pursuant to divorce had standing to object to confirmation of plan that proposed payment as non-DSO); *In re Johnson,* 397 B.R. 289 (Bankr. M.D. N.C. 2008) (obligation to pay second mortgage on house awarded debtor's former wife was DSO)*; In re Boller*, 393 B.R. 569 (Bankr. E.D. Tenn. 2008) (obligation was for property division, not support, and was not entitled to priority status). Otherwise, the order of confirmation is res judicata as to matters set forth in the plan. 11 U.S.C. § 1327. Other causes to object to confirmation may also apply, such as lack of good faith, failure to commit all disposable income to the plan, or fealiure to provide as much to the plan as would be available under chapter 7. *See* 11 U.S.C. §§

1322, 1325; *In re Poole*, 383 B.R. 308 (Bankr. D. S.C. 2007).

9. Claims - Support Priority. To receive distributions from a plan trustee, the creditor must timely file a proof of claim. Fed. R. Bankr. P. 3002. If the creditor fails to do so, the debtor (or trustee) may file a claim on the creditor's behalf. Fed. R. Bankr. P. 3004. The debtor may wish to do so to allow plan payments to reduce nondischargeable support debts, rather than have those debts remain at completion of the plan. For cases filed before October 17, 2005, support debts had seventh priority for payment under prior 11 U.S.C. § 507(a)(7), unless assigned. For cases filed on or after October 17, 2005, a DSO is entitled to first priority, subject to trustee's fees and expenses incurred in connection with paying the DSO. 11 U.S.C. § 507(a)(1). DSO claimants who are not governmental entities, i.e. custodial parents, have priority over governmental DSO claimants. *Id.* Priority claims must be paid in full, unless creditor otherwise consents, 11 U.S.C. §§ 1222(a)(2), 1322(a)(2), except for governmental support claims. If the plan provides that the governmental DSO claim is not paid in full, and the BAPCPA amendments apply, the debtor must commit to a five year plan. 11 U.S.C. § 1322(a)(4). *See also In re Beverly*, 196 B.R. 128 (Bankr. W.D. Mo. 1996) (support enforced by state child support enforcement division was entitled to priority because agency collected support for payee, and rights had not been assigned); *In re Pfalzgraf*, 236 B.R. 390 (Bankr. E. D. Wis. 1999) (child support payable by nondebtor spouse was a community claim in debtor's chapter 13 case, but obligation was not entitled to priority because obligation was not for children of debtor). If a support is debt not paid by completion of the plan, either by agreement of the priority creditor, because in a pre-BAPCPA case the support is not a priority debt, or because the debt is payable to a governmental entity, the debt is not subject to a Chapter 12 or 13 discharge. 11 U.S.C. §§ 1228(a)(2), 1328(a)(2). Likewise, interest accrued during the chapter 13 is not discharged, even if the claim is paid in full. *See In re Foross*, 242 B.R. 692 (B.A.P. 9th Cir. 1999). Current support is part of the debtor's expenses and is not to be paid through the plan.

A claim categorized as property division is not entitled to priority status. *In re White*, 408 B.R. 677 (Bankr. S.D. Tex. 2009); *In re Jennings*, 306 B.R. 672 (Bankr. D. Or. 2004). *See also In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009) (attorney's fees awarded ch. 13 debtor's former spouse were not DSO as they were based on "bad faith litigation misconduct" and were not entitled to priority status). If the plan is silent with respect to classifying a former spouse's claim, the former spouse/creditor may wish to file a claim designating the obligation as support priority. *See* Official Bankruptcy Form 10 Proof of Claim. If not objected to, the claim would be paid in full. If the plan and proof of claim are in conflict as to priority of the claim, it is

necessary to know whether the plan or claim controls in the applicable jurisdiction and to bring the matter before the court, either as an objection to the claim by the debtor or as an objection to confirmation by the creditor. Other creditors may also object to the priority of a debt, since payment of 100% to a family creditor may reduce amounts payable to general unsecured debts.

Debtor's divorce attorney's fees, as opposed to the bankruptcy attorney's fees, may be an administrative expense payable through plan, but only if incurred postpetition and only to extent there is a benefit to the case. *See In re Powell*, 314 B.R. 567 (Bankr. N.D. Tex. 2004).

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

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

D. Procedure. Since a DSO is excepted from discharge under all chapters, and only chapter 13 allows for discharge of a property division under BAPCPA, the matter is most likely to arise in the context of plan confirmation or treatment of a claim. Failure of a potential DSO creditor to object to confirmation of a plan that treats the debt as property division may face the claim preclusion effect of the order confirming the plan. Similarly, if a proof of claim controls the classification of a debt, failure of the debtor to object to the claim may be precluded from challenging that classification after the plan is confirmed.

XIV. AVOIDABLE TRANSFERS

A. Preferences. 11 U.S.C. § 547. A preference is a pre-bankruptcy transfer of a debtor's interest in property made to or for the benefit of a creditor of an antecedent debt, made while the debtor is insolvent, that allows a creditor to receive more than he/she would have received in a Chapter 7. This could be payment, perfection of a security interest, obtaining a judgment lien or any other kind of transfer. If the debtor makes a transfer to his or her spouse or former spouse that would otherwise constitute a preference, the transfer cannot be recovered if the debt was for alimony, maintenance or support debt that arose in connection with a divorce decree, separation agreement or court order. It does not shield other types of debt that arise in that context, usually property division. *In re Paschall*, 408 B.R. 79 (E.D. Va. 2009) (buyout of prior marital agreement with transfer of real estate was a preference, and former spouse was insider because estranged parties were still married when transfer occurred); *In re Mantelli*, 149 B.R. 154 (B.A.P. 9th Cir. 1993) (payment to former wife in lieu of jail for civil contempt for destruction of her personal property was preference); *Grassmueck v. Food Indus. Credit Union*, 127 B.R. 869 (Bankr. D. Or. 1991) (payments for car awarded debtor's spouse in the divorce within 90 days of filing were preferences). Depending on state law, the right to receive a property division may not be a claim or antecedent debt; it is an equitable interest. Therefore, the nondebtor's interest in escrowed funds from sale of property prepetition awarded in postpetition property division could not be avoided by trustee. *In re Skorich*, 482 F.3d 21 (1st Cir. 2007). *Accord In re Smith*, 321 B.R. 385 (Bankr. W.D. N.Y. 2005) (award of attorney's fees for one spouse out of property as part of property division was not for antecedent debt and was not a preference).

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

Query: Is the former spouse an insider, making preference period one year? *See Matter of Holloway*, 955 F.2d 1008 (5th Cir. 1992) (yes, under the facts of that case); *In re Paschall*, 408 B.R. 79 (E.D. Va. 2009) (yes, because parties were still married when transfer occurred); *In re Busconi*, 177 B.R. 153 (Bankr. D. Mass. 1995) (no, under the facts of that case); *In re Schuman*, 81 B.R. 583 (B.A.P. 9th Cir. 1987) (no, under the facts of that case). *See also In re Grove-Merrit*, 406 B.R. 778 (Bankr. S.D. Ohio 2009) ("paramour" was insider for fraudulent transfer purposes); *In re Farson*,

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

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

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

1. Between Spouses in Fraud of Creditors' Rights. Transfers between spouses during an ongoing marriage will always be subject to scrutiny, especially as to the adequacy of consideration, concealment, retention of beneficial interest, impending recovery by a spouse's creditors, and other badges of fraud. *See, e.g., In re Jacobs*, 490 F.3d 913 (11th Cir. 2007); *Rosen v. Bezner*, 996 F.2d 1527 (3rd Cir. 1993); *Coleman v. Simpson,* 327 B.R. 753 (D. Md. 2005); *In re Phillips*, 379 B.R. 765 (Bankr. N.D. Ill. 2007); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007); *In re Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005); *In re Nam*, 257 B.R. 749 (Bankr. E.D. Pa. 2000); *In re Hicks*, 176 B.R. 466 (Bankr. W.D. Tenn. 1995). If a transfer of the debtor's property within one year of filing is found to be with the intent to hinder, delay or defraud creditors, not only may the transfer be avoided, the debtor/transferor may be denied a discharge. 11 U.S.C. § 727(a)(2)(A). Any form of transfer, such as a change in how the property is held, or the recording of a mortgage (as occurred in *Unglaub*), may be avoided by the trustee. Under 11 U.S.C. § 544(a) a trustee has avoiding powers of a hypothetical lien creditor, execution creditor, or BFP. *See In re Aulicino*, 400 B.R. 175 (Bankr. E.D. Pa. 2008) (trustee could not qualify as BFP under Pennsylvania law because debtor's spouse lived in house transferred by unrecorded judgment); *In re Claussen*, 387 B.R. 249 (Bankr. D. S.D. 2007) (unrecorded divorce judgment that transferred property was ineffective as to trustee). A fraudulent transfer can be avoided under bankruptcy law, or under state law if there is an unsecured creditor who could avoid the transfer. *See* 11 U.S.C. §§ 548(a)(1), 544(b)(1). Other consequences might include loss of the exemption and denial of the debtor's discharge under 11 U.S.C. §

727(a)(2). *See, e.g., In re Coady,* 588 F.3d 1312 (11th Cir. 2009) (debtor denied discharge for concealing equitable interest in spouse's business); *In re Matus*, 303 B.R. 660 (Bankr. N.D. Ga. 2004) (transfer of property to debtor's spouse concealed until discovered by trustee, and discharge was denied despite return of property); *In re Boba*, 280 B.R. 430 (Bankr. N.D. Ill. 2002) (transfer at divorce while retaining beneficial interest was fraudulent; discharge denied)*; see also In re Young*, 238 B.R. 112 (B.A.P. 6th Cir. 1999) (dower rights and right to exemption were not revived when transfer to debtor's spouse avoided); *In re Leonard* 418 B.R. 477 (Bankr. S.D. Fla. 2009) (after avoiding transfer to debtor's wife, trustee could sell interests of both debtor and wife); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007) (avoided transfer did not revert to tenancy by the entireties property). The trustee has the burden of proof, which may be by a preponderance of the evidence or by clear and convincing evidence, depending on whether the state or federal statutes are used, although the burden of producing evidence may shift once a prima facie case for fraudulent transfer is established. *See, e.g., In re Duncan*, 562 F.3d 688 (5th Cir. 2009); *In re Prichard*, 361 B.R. 11 (Bankr. D. Mass. 2007).

Transfers between spouses may arise in many contexts. *See, e.g., United States v. Loftis*, 607 F.3d 173 (5th Cir. 2010) (partition of community property with wife waiving future interest in husband's future earned income in exchange for real estate lacked consideration, especially in light of husband's imminent incarceration); *Frierdich v. Mottaz*, 294 F.3d 864 (7th Cir. 2002) (transfer pursuant to prenuptial agreement was ineffective as stock was not delivered and debtor maintained control); *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000) (partition of community property allegedly pursuant to divorce that did not occur was fraudulent; value of property assigned to each spouse not supported, fraudulent intent found, and turnover to trustee ordered); *In re Craig*, 144 F.3d 587 (8th Cir. 1998) (debtor made indirect fraudulent transfer to wife when he directed that his loan proceeds be used to pay for residence titled in wife's name); *Howison v. Hanley*, 141 F.3d 384 (1st Cir. 1998) (debtor's transfer of joint tenancy interest to wife for no consideration resulted in loss of exemption); *In re Gutpelet*, 137 F.3d 748 (3d Cir. 1998) (avoidable transfer found and exemption lost where husband transferred legal title in solely owned property to debtor without consideration; debtor mortgaged property and transferred title to herself and husband as tenants in the entirety and subsequently sold property to third party); *In re Rauh*, 119 F.3d 46 (1st Cir. 1997) (assignment of debtor's partner's note and debtor's interest in tenancy by the entirety home to debtor's wife was fraudulent); *Klingman v. Levinson*, 114 F.3d 620 (7th Cir. 1997) (assignment of beneficial interest in land trust to wife was a fraudulent conveyance; both spouses intended to protect their family home from the husband's creditors when they

executed the assignment); *In re Futoran*, 76 F.3d 265 (9th Cir. 1996) (debtor's scheme to buy out his monthly obligation to former wife was to detriment of creditors); *Abramowitz v. Palmer*, 999 F.2d 1274 (8th Cir. 1993) (constructive trust also placed on nondebtor spouse's interest in fraudulently acquired home); *Matter of Halloway*, 955 F.2d 1008 (5th Cir. 1992) (transfer of security interest to former wife was fraudulent even though debtor's wife had previously made unsecured loans); *Matter of Perez*, 954 F.2d 1026 (5th Cir. 1992) (debtor's transfer of one half of tax refund to wife was fraudulent, given premarital agreement to keep property separate; discharge denied); *In re Davis,* 911 F.2d 560 (11th Cir. 1990) (transfer of assets to debtor's wife was fraudulent even though re-transferred to debtor prepetition); *In re McGavin*, 220 B.R. 125 (D. Utah 1998), *aff'd*, 189 F.3d 1215 (10th Cir. 1999) (court imposed constructive and resulting trusts on assets transferred to spouse and family trust); *In re Greenfield*, 273 B.R. 128 (E.D. Mich. 2002) (release of dower for interest in property as tenant by the entireties did not constitute consideration); *In re Pappas*, 239 B.R. 448 (E.D. N.Y. 1999) (remedy for transfer of debtor's interest in tenancy by the entireties property to wife was one half of proceeds when sold by wife); *In re Paul*, 217 B.R. 336 (S.D. Fla. 1997) (debtor used her own money to pay debt owed by husband alone, which was fraudulent as to debtor); *In re Griffin*, 319 B.R. 609 (B.A.P. 8th Cir. 2005) (unrecorded transfer by prenuptial agreement not valid, interpreting Arkansas law); *In re Kelsey*, 270 B.R. 776 (B.A.P. 10th Cir. 2001) (value of consideration measured from creditor's standpoint, not debtor's, so love and support were not consideration); *In re Tomlinson*, 347 B.R. 639 (Bankr. E.D. Tenn. 2006) (nondebtor wife's unrecorded lien on debtor's aircraft ineffective as to trustee; alleged ownership required fact determination); *In re Gonzalez*, 342 B.R. 165 (Bankr. S.D. N.Y. 2006) (payment of mortgage as support for child of which he was not adjudicated father was for fair consideration); *In re Richardson*, 268 B.R. 331 (Bankr. D. Conn. 2001) (alleged desire for fairness or for estate planning was not consideration for transfer); *In re Glazer*, 239 B.R. 352 (Bankr. N.D. Ohio 1999) (transfer of real estate to debtor's wife was avoided when she failed to establish her release of claim for domestic abuse had value); *In re Leucht*, 221 B.R. 1003 (Bankr. M.D. Fla. 1998) (transfer of possession of assets to former spouse was fraudulent regardless of whether debtor intended to transfer ownership interest); *In re Bryant*, 221 B.R. 262 (Bankr. D. Colo. 1998) (as result of debtor's fraudulent transfer of one half interest in homestead to husband, she lost right to claim an exemption); *In re Bouldin*, 196 B.R. 202 (Bankr. N.D. Ga. 1996) (transfer for "love and affection" presumed fraudulent); *In re Matus*, 303 B.R. 660 (Bankr. N.D. Ga. 2004) (transfer of property to debtor's spouse concealed until discovered by trustee; discharge denied despite return of property); *In re Gipe*, 157 B.R. 171 (Bankr. M.D. Fla. 1993) (also warranting denial of discharge); *In re Briglevich*, 147

B.R. 1015 (Bankr. N.D. Ga. 1992) (spouse's previous contributions to improvement of debtor's solely owned asset was not present consideration); *Matter of Kaczorowski*, 87 B.R. 1 (Bankr. D. Conn. 1988) (transfers to spouse as "lump-sum alimony" without consideration when the parties did not actually separate or divorce was a fraudulent conveyance).

Awarding property of one spouse to the other in connection with a divorce decree, either by agreement or contested, is a transfer which may in some cases be fraudulent as to creditors. *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000) (intangible benefits do not constitute reasonably equivalent value; prepetition partition of community property avoided even though divorce contemplated at time of agreement); *Matter of Erlewine*, 349 F.3d 205 (5th Cir. 2003) (contested divorce resulting in unequal division of community property was valid as a matter of law; however, *Rooker-Feldman* doctrine, issue and claim preclusion did not apply to trustee); *In re Beverly*, 374 B.R. 221 (B.A.P. 9th Cir. 2007), *aff'd*, 551 F.3d 1092 (9th Cir. 2008) (settlement that awarded exempt assets to debtor and nonexempt asset to nondebtor found fraudulent); *In re Hill*, 342 B.R. 183 (Bankr. D. N.J. 2006) (debtor's marital settlement agreement transferred property to spouse with actual intent to defraud creditors); *In re Boba*, 280 B.R. 430 (Bankr. N.D. Ill. 2002) (transfer at divorce while retaining beneficial interest was fraudulent; discharge denied); *In re Lankry*, 263 B.R. 638 (Bankr. M.D. Fla. 2001) (unjustified, unequal division of marital assets or liabilities at dissolution might be avoidable; summary judgment denied); *In re Pilavis*, 233 B.R. 1 (Bankr. D. Mass. 1999) (marital settlement agreement lacked indicia of arms length transaction); *In re Clausen*, 44 B.R. 41 (Bankr. D. Minn. 1984) (allowing the debtor's spouse to receive all property of the parties by default constituted a fraudulent conveyance). *But see In re Bledsoe*, 350 B.R. 513 (Bankr. D. Or. 2006), *aff'd*, 569 F.3d 1106 (9th Cir. 2009) (state court property division without evidence of fraud or collusion established reasonably equivalent value).

Subsequent transferees of fraudulently transferred assets may also be liable. *In re Knippen*, 355 B.R. 710 (Bankr. N.D. Ill. 2006). *But see In re Meredith*, 527 F.3d 372 (4th Cir. 2008) (nominal transferee was not liable as no beneficial interest transferred).

The court in *In re Roosevelt*, 176 B.R. 534 (B.A.P. 9th Cir. 1995), *aff'd*, 87 F.3d 311 (9th Cir.), *amended by* 98 F.3d 1169 (9th Cir. 1996), distinguished between the transfer to the debtor's spouse, which took place by agreement more than one year before filing with actual intent to hinder, delay or defraud creditors, and the recorded deed perfecting the transfer, which occurred within a year of filing. There was no finding of continuing concealment. Even though the transfer might have been avoidable before recording, this

factor is independent of the requirements for denial of discharge under 11 U.S.C. § 727(a)(2)(A). *See also In re Roosevelt*, 220 F.3d 1032 (9th Cir. 2000); *Frierdich v. Mottaz*, 294 F.3d 864 (7th Cir. 2002) (transfer occurred when proceeds of stock sale transmitted to debtor's wife, not when prenuptial agreement signed requiring transfer).

In *In re Carmean*, 153 B.R. 985 (Bankr. S.D. Ohio 1993), a former spouse of the debtor was prohibited by spousal privilege from testifying concerning communications between the spouses relating to an alleged fraudulent conveyance to the debtor's parents.

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

spouse's funds was traceable to debtor); *In re Boyd*, 264 B.R. 62 (Bankr. D. Conn. 2001) (reconciliation attempt was consideration for transfer); *In re Hope*, 231 B.R. 403 (Bankr. D. D.C. 1999) (noncollusive agreement to divide property was within range of what would have been equitable under state law and was not avoidable); *In re Falk*, 88 B.R. 957 (Bankr. D. Minn. 1988), *aff'd*, 98 B.R. 472 (D. Minn. 1989) (chapter 11 debtor attempted to set aside transfer of property to ex-wife in divorce; he was estopped from asserting that his voluntary marital settlement agreement was a fraudulent conveyance; debtor was also denied discharge).

Certain acts that appear to be transfers may not be. *Bressner v. Ambroziak,* 379 F.3d 478 (7th Cir. 2004) (one spouse working in the other spouse's business for minimal compensation is not making a fraudulent transfer); *In re Costas*, 346 B.R. 198 (B.A.P. 9th Cir. 2006), *aff'd*, 555 F.3d 790 (9th Cir. 2009) (prepetition disclaimer of inheritance is not a transfer); *but see In re Schmidt*, 362 B.R. 318 (Bankr. W.D. Tex. 2007) (postpetition disclaimer of prepetition inheritance avoided); *In re Kellman*, 248 B.R. 430 (Bankr. M.D. Fla. 1999) (removing debtor's wife's name from joint account was not a transfer as she was never intended to have an interest); *Matter of Grady*, 128 B.R. 462 (Bankr. E.D. Wis. 1991) (wife received her own individual property in the divorce, and since the debtor husband had no interest, there was no transfer to be fraudulent); *In re Pietri*, 59 B.R. 68 (Bankr. M.D. La. 1986) (spouse has no property interest in future accumulations of community property, and marital agreement giving up those rights was not a conveyance).

For a marital settlement agreement to be valid, of course, it cannot be a sham or collusive. *In re Stinson*, 364 B.R. 278 (Bankr. W.D. Ky. 2007) (one-sided marital settlement agreement, without more, failed to show intent to hinder, delay or defraud creditors); *In re Hope*, 231 B.R. 403 (Bankr. D. D.C. 1999) (trustee's power to avoid a fraudulent transfer could not reach any transfer under parties' initial agreement, but could reach any fraudulent transfer under their separation agreement, assuming that transfer of equity then occurred); *In re Fair*, 142 B.R. 628 (Bankr. E.D. N.Y. 1992) (transfer in exchange for wife's waiver of maintenance was fair consideration); *Matter of Weis*, 92 B.R. 816 (Bankr. W.D. Wis. 1988) (property transferred would have been exempt so it could not have been transferred with intent to hinder, delay and defraud creditors); *In re Sorlucco*, 68 B.R. 748 (Bankr. D. N.H. 1986) (agreement fell within "reasonable range" of what the court would have ordered if property division was litigated and would not be set aside); *Johnson v. Dowell*, 592 So.2d 1194 (Fla. App. 1992) (transfer of interest in property to secure maintenance obligation was not a fraudulent conveyance).

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

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

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

A. In General. A debtor may avoid (remove) a judicial lien that impairs an exemption, other than a lien that secures an obligation of support described below, and may avoid a nonpossessory, nonpurchase money security interest in certain items of exempt property, i.e., household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments or jewelry held primarily for personal use, tools of the trade and health aids. 11 U.S.C. § 522(f). Lien avoidance is requested by motion. Bankr. Rule 4003(d); *In re Citrone*, 159 B.R. 144 (Bankr. S.D. N.Y. 1993). Judicial liens cannot be avoided if they secure a debt for alimony, maintenance or support, or a debt that is actually in the nature of alimony, maintenance or support, unless the debt is assigned to another entity. *See In re Johnson,* 445 B.R. 50 (Bankr. D. Mass. 2011); *In re Allen*, 217 B.R. 247 (Bankr. S.D. Ill. 1998); *In re Nevettie*, 227 B.R. 724 (Bankr. E.D. Mo. 1998); *see also In re Smith*, 586 F.3d 69 (1st Cir. 2009) (penalty imposed by state court for failure to pay maintenance was punitive and not DSO; lien avoidable). The lien of a third party creditor can only be avoided on the debtor's interest in property. *See In re Denillo*, 309 B.R. 866 (Bankr. W.D. Pa. 2004) (only portion of judicial lien which impaired debtor's exemption could be avoided); *In re Cronkhite*, 290 B.R. 181 (Bankr. D. Mass. 2003) (debtor could not avoid lien on former husband's share of property she received in divorce). Statutory liens, such as tax liens, are not avoidable under this section. *E.g.,* Wis. Stat. § 49.854 (liens for public support payments).

B. Security Interest vs. Judicial Lien. Cases decided before *Farrey v. Sanderfoot*, 500

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

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

D. Pre-Existing Interest. If the nondebtor, lienholder spouse had an interest in the property awarded to the debtor in the dissolution decree subject to the lien, the debtor would not have owned the property free of the lien, and the lien will be unavoidable. *Farrey v. Sanderfoot, supra*. One court found that under Indiana law, the fact that premarriage property is still subject to division was sufficient to find that the debtor's former spouse had a pre-existing interest before the lien attached, making the lien unavoidable. *In re Haynes*, 157 B.R. 646 (Bankr. S.D. Ind. 1992). *See also In re Brasslett*, 233 B.R. 177 (Bankr. D. Me. 1999); *In re Byler*, 160 B.R. 178 (Bankr. N.D. Okla. 1993); *In re Yerrington*, 144 B.R. 96 (B.A.P. 9th Cir. 1992), *aff'd*, 19 F.3d 32 (9th Cir. 1994); *In re Simons*, 193 B.R. 48 (Bankr. W.D. Okla. 1996) (for lien to

be avoidable, debtor must hold interest in newly created estate prior to the fixing of the lien); *In re Warfield*, 157 B.R. 651 (Bankr. S.D. Ind. 1993) (*Sanderfoot* rationale also applied to pension plans); *In re Fischer*, 129 B.R. 285 (Bankr. M.D. Fla. 1991) (under facts of that case, court was not imposing a judicial lien at divorce but was recognizing pre-existing equitable lien). A lien on former community property is similarly unavoidable. *In re Catli*, 999 F.2d 1405 (9th Cir. 1993); *In re Finch*, 130 B.R. 753 (S.D. Tex. 1991); *In re Norton*, 180 B.R. 168 (Bankr. E.D. Tex. 1995); *cf. In re Donovan*, 137 B.R. 547 (Bankr. S.D. Fla. 1992) (debtor could not avoid lien on interest in property she received from former husband subject to lien of former husband's attorney).

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

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

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

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

impaired. 11 U.S.C. § 522(f)(2).

XVI. CLAIMS

A. Property Division Claim of Spouse or Former Spouse. The nondebtor former spouse of the debtor who is subject to an economic obligation in a decree of dissolution has a claim in the debtor's bankruptcy estate, and the debtor's spouse may have a claim for property division if division has not taken place. *See* Bankruptcy Rule 3001, *et seq*.; *Perlow v. Perlow*, 128 B.R. 412 (E.D. N.C. 1991) (nondebtor spouse had a general unsecured claim for property division; right to specific property was cut off even though the property was exempt and revested in the debtor); *In re Rul-Lan*, 186 B.R. 938 (Bankr. W.D. Mo. 1995) (monetary award to debtor's spouse arose prepetition, even though divorce judgment was entered postpetition, because it was to compensate the spouse for share of assets squandered by debtor prepetition); *In re Briglevich*, 147 B.R. 1015 (Bankr. N.D. Ga. 1992) (creditors interests in the debtor's bankruptcy estate superceded nondebtor spouse's interest in property division; the stay lifted to allow debtor's spouse to return to state court to have amount of her claim determined). *But see In re Compagnone*, 239 B.R. 841 (Bankr. D. Mass. 1999) (no claim until final judgment); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991) (nondebtor's equitable interest in assets on account of pending divorce not property of estate and she had no "claim," therefore, her interest was nondischargeable); *In re Peterson*, 133 B.R. 508 (Bankr. W.D. Mo. 1991) (proceeds from the sale of a marital asset were in constructive trust and not part of the debtor's estate, so the nondebtor spouse's interest was not a dischargeable "claim"). *Cf. In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (all of former wife's claims subordinated because of her conduct).

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

C. Obligations to Pay Joint Debts of Former Spouses. Former spouse may have a claim for payment of joint debt that the debtor was ordered to pay. Claim may be filed on behalf of a creditor. Bankr. Rules 3003(c)(1), 3004; s*ee also In re Cooper*, 83 B.R. 544 (Bankr. C.D. Ill. 1988) (former wife of debtor was subrogated for nondischargeability but not priority status of taxing authority for payment of tax that debtor was ordered to pay). *But see Matter of Campbell*, 74 B.R. 805 (Bankr. M.D. Fla. 1987). In *In re Spirtos*, 154 B.R. 550 (B.A.P. 9th Cir. 1993), *aff'd*, 56 F.3d 1007 (9th Cir. 1995), the debtor was obligated under the marital settlement agreement to pay one half of a judgment against her former husband. The claim in her estate was enforceable even though the former husband had breached other provisions in the agreement.

If the debtor is obligated to pay a joint debt, but the divorce decree does not contain an obligation to pay the spouse, the claim may not be enforceable. *See In re Bayhi*, 528 F.3d 393 (5th Cir. 2008) (co-obligor on nondischargeable community debt could enforce debtor's share of obligation in state court without action in bankruptcy court); *In re Forgette*, 379 B.R. 621 (Bankr. W.D. Va. 2007) (former wife did not have allowable claim against debtor respecting joint debt to third party that debtor was ordered to pay under divorce decree).

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

An agreement involving a former marital asset as collateral is not necessarily a reaffirmation agreement but can be a novation. *In re Stangler*, 186 B.R. 460 (Bankr. D. Minn. 1995). Thus, some courts have held that even though the agreement did not comply with the requirements of 11 U.S.C. § 524, it may nevertheless be enforceable.

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

F. Government Claims. The Bankruptcy Reform Act of 1994, applicable to cases filed after October 22, 1994, amended § 502(b) to provide that claims of governmental units, including support claims, are timely if filed within 180 days of filing or such later time that the Rules provide. For cases filed on or after October 17, 2005, a government claim related to support may be classified as a DSO and as such is

entitled to priority and exception from discharge.

G. Child Support Creditors. Child support creditors or their representatives can appear "without charge" and without meeting local rules for attorney appearances as long as a form is filed showing information about the debt. AO Form B281. Adversary proceedings and motions for relief from the stay can be filed without fee by child support creditors. Appendix to 28 U.S.C. § 1930(6), (20). It appears that other proceedings may be filed without fee by child support creditors, even if unrelated to child support. *See* Official Form 17 Notice of Appeal. *See also In re Wright*, 438 B.R. 550 (Bankr. M.D.N.C. 2010) (interest on overdue DSO was also DSO)

H. Priority Claims. Pre-BAPCPA 11 U.S.C. § 507(a)(7) granted priority status to claims for debts to a spouse, former spouse, or child of the debtor for support debts, unless the debt was assigned to another entity. *See, e.g., In re Chang*, 163 F.3d 1138 (9th Cir. 1998) (priority status for debtor's share of GAL fees and other professional expenses incurred in connection with custody dispute were priority); *In re Clark*, 441 B.R. 752 (Bankr. M.D. N.C. 2011) (claimant has burden of proof as to priority; burden not met); *In re Foster*, 292 B.R 221 (Bankr. M.D. Fla. 2003) (former spouse's attorney's fees owed by debtor were priority); *In re Pearce*, 245 B.R. 578 (Bankr. S.D. Ill. 2000) (plumbing and tax bills were nonpriority property division; back support payments were priority support); *In re Polishuk*, 243 B.R. 408 (Bankr. N.D. Okla. 1999) (hold harmless on credit card debt was priority claim); *In re Crosby*, 229 B.R. 679 (Bankr. E.D. Va. 1998) (post-secondary educational expenses were priority child support). *But see In re Lutzke*, 223 B.R. 552 (Bankr. D. Or. 1998) (debtor's former husband's claim for overpayment of child support not entitled to seventh level priority because amount not necessary for children's support); *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010) (same). *Cf. In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (all former wife's claims, including priority child support claims, equitably subordinated to other creditors because of her wrongful conduct).

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

I. Community Claims. Any creditor entitled under state law to recover any community property that is property of the estate meets the definition of a "community claim," whether or not such property exists. 11 U.S.C. § 101(7). For example, a premarriage

creditor of a nondebtor spouse is entitled under Wisconsin law to recover marital property that would have been the property of the nondebtor but for the marriage. Wis. Stat. § 766.55(c)1; *see also In re Kimmel*, 378 B.R. 630 (B.A.P. 9th Cir. 2007) (effect of failure to file adversary proceeding objecting to hypothetical discharge of debt of debtor's spouse); *In re Monroe*, 282 B.R. 219 (Bankr. D. Ariz. 2002) (tort committed by nondebtor husband resulted in community claim in debtor wife's chapter 13 case, applying Arizona law for tort recovery). As such property, if it existed, could be property of the estate, that creditor has a community claim and is entitled to notice and to file a claim in the bankruptcy of the debtor spouse. 11 U.S.C. § 342(a); *In re Sweitzer*, 111 B.R. 792 (Bankr. W.D. Wis. 1990) (in community property states, creditors of nondebtor spouse must receive such notice as is appropriate of bankruptcy case; appropriate notice is provided when creditors of nondebtor spouse receive notice equivalent to that provided to creditors of debtor spouse); *cf. In re Pfalzgraf*, 236 B.R. 390 (Bankr. E.D. Wis. 1999) (claims for child support owed by debtor's spouse were community claims but were not entitled to priority).

J. Imputed Culpability for Nondischargeable Debt. Unless spouses are both involved in a business activity, fraud by one spouse is not imputed to the other spouse who was not active in the fraud. *See, e.g., In re Carp*, 340 F.3d 15 (1st Cir. 2003); *In re Daviscourt*, 353 B.R. 674 (B.A.P. 10th Cir. 2006); *In re Rodenbaugh*, 431 B.R. 473 (Bankr. E.D. Mo. 2010); *In re Hawkins*, 430 B.R. 225 (Bankr. N.D. Cal. 2010), *aff'd*, 447 B.R. 291 (N.D. Cal. 2011); *In re Crumley*, 428 B.R. 349 (Bankr. N.D. Tex. 2010); *In re Lewis*, 424 B.R. 455 (Bankr. E.D. Mo. 2010); *In re Cooper*, 399 B.R. 637 (Bankr. E.D. Ark. 2009); *In re Antonious*, 358 B.R. 172 (Bankr. E.D. Pa. 2006).

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

A. 11 U.S.C. § 707(b). For cases to which BAPCPA applies, a debtor's spouse's income is not included in calculating the means test, although payment of household expenses may be. 11 U.S.C. § 707(b)(2). It may, however, be a factor in determining whether the chapter 7 filing is an abuse of the bankruptcy code under the totality of the circumstances test of 11 U.S.C. § 707(b)(3). *In re Rable*, 445 B.R. 826 (Bankr. N.D. Ohio 2011); *In re Stampley*, 437 B.R. 825 (Bankr. E.D. Mich. 2010); *In re Boatright*, 414 B.R. 526 (Bankr. W.D. Mo. 2009). The spouses' combined income is considered in determining the commitment period in chapter 13. 11 U.S.C. § 1322(d). *See In re Harter*, 397 B.R. 860 (Bankr. N.D. Ohio 2008) (when debtor's spouse has substantial income, it must be considered under totality of circumstances under § 707(b)(3)); *In re Crego*, 387 B.R. 225 (Bankr. E.D. Wis. 2008) (expenses incurred by debtors maintaining separate households pending divorce constituted "special circumstances" under §707(b)(2)(B)(I)); *In re Witek*, 383 B.R. 323 (Bankr. N.D. Ohio 2007) (special circumstances relating to debtor's pregnancy not proved); *In re Lightsey*, 374 B.R. 377 (Bankr. S.D. Ga. 2007) (unfairness in considering

nondebtor spouse's income in chapter 13 involving pre-marriage debts was not a "special circumstance" in chapter 7 case); *In re Baldino*, 369 B.R. 858 (Bankr. M.D. Pa. 2007) (chapter 7 case; income of nondebtor spouse not contributed to household expenses did not have to be considered, although it would in chapter 13); *In re Castle*, 362 B.R. 846 (Bankr. N.D. Ohio 2006) (fact that debtor/wife's child support was included in income for ch. 7 means test, but was excluded under ch. 13 means test, with effect that creditors would receive nothing under ch. 13 plan, did not lead to "absurd result" or "special circumstances" that would prevent dismissal of ch. 7 case under § 707(b)); *In re Rysso*, 321 B.R. 522 (Bankr. D. Minn. 2005) (income of spouse of ch. 7 debtor could not be used to increase debtor's income, although it would be considered in whether debtor could fund hypothetical ch. 13 plan, and it could be considered in reducing joint household expenses). *See also In re Welch*, 347 B.R. 247 (Bankr. W.D. Mich. 2006) (pre-BAPCPA standard of "substantial abuse" analyzed with respect to non-filing spouse's income; collecting cases).

B. Bad Faith Dismissal. Although BAPCPA changed the standard of "substantial abuse" to "abuse" under 11 U.S.C. § 707(b)(3), cases decided under the earlier version of the statute may be instructive in determining whether abuse exists in a chapter 7 case. Cases filed under other chapters may also be subject to dismissal on the grounds of bad faith, or may result in denial of a discharge or an exception to the discharge of a debt on account of the debtor's conduct. *See In re Mickler*, 344 B.R. 817 (W.D. Ky. 2006) (chapter 11 filed in bad faith for purpose of avoiding obligations to former spouse); *In re Urban*, 432 B.R. 302 (Bankr. D. Wyo. 2010) (debtor could not deduct payments of child support for children of non-filing spouse as expense on means test because she was not legally obligated to support them); *In re Laine*, 383 B.R. 166 (Bankr. D. Kan. 2008) (chapter 7 filed solely to frustrate attempts of former spouse to enforce divorce decree); *In re Mondore*, 326 B.R. 214 (Bankr. W.D. N.Y. 2005) (debtor denied discharge for omitting assets on schedules he had litigated to maintain in matrimonial action; court cautioned debtors to be especially diligent in disclosing assets when there is an "ex" involved); *In re Chadwick*, 296 B.R. 876 (Bankr. S.D. Ga. 2003) (chapter 11 case dismissed for bad faith in that only purpose was to avoid divorce obligation). *Cf. In re Traub*, 140 B.R. 286 (Bankr. D. N.M. 1992) (obligation to former spouse was consumer debt for purpose of motion to dismiss under § 707(b)).

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

(1) In this subsection –

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

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

(2) Except as provided in paragraph (3), after notice and a hearing, the court, on a motion by the victim of a crime of violence or a drug trafficking crime, may

when it is in the best interest of the victim dismiss a voluntary case filed under this chapter by a debtor who is an individual if such individual was convicted of such crime.

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

XVIII. ETHICS

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

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

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

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