

Intersection of Divorce and Bankruptcy

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When Worlds Collide

Bankruptcy and Its Impact on Domestic Relations and Family Law, Fourth Edition

Divorce and bankruptcy are similar in that each attempts to provide a “fresh start.” However, the objectives of divorce are not necessarily consistent with the goals of bankruptcy. The Bankruptcy Code makes it harder to discharge certain obligations that arise in divorce. This desk book provides a brief, readable primer on the bankruptcy law that impacts their subject-matter jurisdictions. These materials provide a satisfactory starting point for any domestic-relations lawyer who needs a basic understanding of how bankruptcy intersects with family law. Appendices feature relevant sections of the Code, as well as a list of cases and articles on the issues discussed within the text.



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**WHEN BANKRUPTCY AND DIVORCE COLLIDE:
BREAKING UP IS HARD TO DO**

*American Bankruptcy Institute
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Milwaukee, Wisconsin**

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- I. APPLICABLE LAW. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made substantial substantive changes in bankruptcy law, some of which relate specifically to family obligations. The provisions having nothing to do with family law may still have an affect on cases that also have family law implications. This outline addresses only family law issues, and many of those issues apply both before and after the 2005 amendments. Most provisions of the 2005 Act apply to cases filed on or after October 17, 2005, although a few provisions applied upon enactment, April 20, 2005.
- 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*, 449 B.R. 567, (Bankr. C.D. Cal. 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). *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 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).

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 (2^d Cir. 2006) (failure to docket divorce decree before debtor filed bankruptcy resulted in property awarded to nonfiling spouse being included in debtor's 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 Newcomb* 483 B.R. 554 (Bankr. M.D. Fla. 2012 (tax refund could be owned as tenants by the entirety under Florida law); *In re Hraga*, 467 B.R. 527 (Bankr. N.D. Ga. 2011) (Under Georgia law, income tax refund was in the estate of only the husband as he was the only earner); *In re McKain*, 455 B.R. 674 (Bankr. E.D. Tenn. 2011) (tax refund was owned equally, under Tennessee law, absent evidence of separate ownership); *In re Palmer*, 449 B.R. 621 (Bankr. D. Mont. 2011) (formula for calculating spouses' respective shares under Montana law); *In re Rice*, 442 B.R. 140 (Bankr. M.D. Fla. 2010) (spouses' interests determined by contribution under Florida law); *In re Glenn*, 430 B.R. 56 (Bankr. N.D. N.Y. 2010) (50/50 rule applied, using New York law); *In re Garbett*, 410 B.R. 280 (Bankr. E.D. Tenn. 2009) (50/50 ruled applied under Tennessee 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 Herter*, 456 B.R. 455 (Bankr. D. Id. 2011); *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, and whether a joint case was filed. State law generally provides such property can be recovered only by 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)(3)(B) and *infra* regarding exemption of property owned by tenants by the entireties. Such property may be administered by the trustee as long as there are joint creditors at filing. See, e.g., *In re Ballard*, 65 F.3d 367 (4th Cir. 1995); *Matter of Paeplow*, 972 F.2d 730 (7th Cir. 1992); *Matter of Hunter*, 970 F.2d 299 (7th Cir. 1992); *In re Persky*, 893 F.2d 15 (2^d Cir. 1989).
- 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 than 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. *See also In re Herter*, 456 B.R. 455 (Bankr. D. Id. 2011) (decree awarding ex-wife an interest in former community property assets, which became final only after closing of ex-husband's case, occurred within 180 days of her filing and property that passed through his estate became part of her estate).

- 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.

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

- b. Community Property. Most community property of spouses is entirely in the bankruptcy estate of either spouse. 11 U.S.C. § 541(a)(2); *In re Martell*, 349 B.R. 233 (Bankr. D. Idaho 2005); *In re Victor*, 341 B.R. 775 (Bankr. D. N.M. 2006); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002). Accordingly, the sale of such an asset by the trustee usually does not involve a co-owner.
- 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.
- N. Other. Supplemental Security Income payments made to debtor in her capacity as representative payee of disabled minor child were not property of the estate, and therefore, SSA's withholding to compensate for prior overpayment did not violate the automatic stay. *In re Baker*, 214 B.R. 489 (Bankr. S.D. Ohio 1997).

III. EXEMPTIONS.

- A. Removal from Estate. The debtor may remove from the estate property claimed as exempt under state law or, unless the state has opted out of the federal exemptions, under federal law. 11 U.S.C. § 522(b)(1); Rule 4003. The 730 day domicile rule established by BAPCPA, 11 U.S.C. § 522(b)(3), may result in conflicting exemption laws applicable to mobile debtors. See, e.g., *In re Connor*, 419 B.R. 304 (Bankr. E.D. N.C. 2009) (resident spouse was required to claim North Carolina exemptions, but the spouse that had not lived in North Carolina for 730 days and did not qualify

for Florida exemptions, where she previously lived, was allowed to claim federal exemptions); *In re Zolnierowicz*, 380 B.R. 84 (Bankr. M.D. Fla. 2007) (730 day rule inapplicable to entireties exemption); *see also pre-BAPCPA cases Seung v. Silverman*, 288 B.R. 174 (E.D. N.Y. 2003) (applying N.Y. law, joint debtors, one of whom lived in New Jersey, were limited to N.Y. exemptions); *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).

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).

- B. Homestead Exemption. A debtor's right to claim a homestead exemption, or what constitutes an exempt homestead, is generally determined by state law. *See In re Belcher*, 551 F.3d 688 (7th Cir. 2008) (applying Illinois property law, not divorce or probate rights, husband whose name was not on title could not claim homestead exemption in proceeds); *In re Scotti* 456 B.R. 760 (Bankr. D. S.C. 2011) (debtor must have ownership to claim exemption under S.C. law). 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 Goularos*, 456 B.R. 729 (Bankr. D. Mass. 2011) (debtor could claim homestead exemption in house occupied by estranged husband); *In re Minton*, 402 B.R. 380 (Bankr. M.D. Fla. 2008) (debtor did not abandon homestead when she left to avoid domestic violence); *In re Moulterie*, 398 B.R. 501 (Bankr. E.D. N.Y. 2008) (presence of debtor's estranged wife, and his continued interest as title holder, was sufficient to claim homestead exemption under New York law); *In re Lindquist*, 395 B.R. 707 (Bankr. D. Or. 2008) (Oregon homestead law protects interests of both the owner spouse and the occupant spouse); *In re Gunnison*, 397 B.R. 186 (Bankr. D. Mass. 2008) (interpreting Massachusetts law, debtor husband's later claim of homestead

exemption extinguished debtor wife's earlier claim; married parties could not claim separate properties); *In re Taylor*, 280 B.R. 294 (Bankr. D. Mass. 2002) (leaving marital home marital discord to live with father did not constitute abandonment of homestead); *In re Webber*, 278 B.R. 294 (Bankr. D. Mass. 2002) (homestead exemption not lost because debtor ordered by court to leave family home). *But see In re Fink*, 417 B.R. 786 (Bankr. E.D. Wis. 2009) (security interest in former homestead awarded debtor's former wife eight years earlier did not qualify for Wisconsin homestead exemption); *In re Holman*, 286 B.R. 882 (Bankr. D. Minn. 2002) (debtor had no present intent to return to home); *In re Roberts*, 280 B.R. 540 (Bankr. D. Mass. 2001) (debtor failed to establish requisite "intent to occupy" marital residence); *In re Weza*, 248 B.R. 470 (Bankr. D. N.H. 2000) (debtor could not claim Massachusetts homestead exemption, where estranged wife resided, when he resided in New Hampshire); *In re Moneer*, 188 B.R. 25 (Bankr. N.D. Ill. 1995) (debtor abandoned homestead shortly before divorce); *In re Nerios*, 171 B.R. 224 (Bankr. N.D. Tex. 1994) (spouses could not claim two homes on adjoining lots where they resided separately because of marital discord).

In some states, proceeds of the sale of a homestead remain exempt, usually for a period of time before reinvestment. *In re Graziadei*, 32 F.3d 1408 (9th Cir. 1994) (proceeds from an exempt homestead remained exempt under Nevada law); *In re 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). When only one spouse files and community property is in the estate, an exemption may be allowed in the entire asset because of the debtor's interest is an undivided in the entire asset. See *In re Griffith*, 449 B.R. 909 (Bankr. W.D. Wis. 2011) (exemption in entire assets allowed when debtor used federal exemptions); *In re Vanderhei*, 449 B.R. 359 (Bankr. W.D. Wis. 2011) (exemption in entire assets allowed when debtor used Wisconsin exemptions); *In re Xiong*, No. 05-43121, 2006 WL 1277129 (Bankr. E.D. Wis. May 3, 2006) (exemption of nondivisible asset allowed). But see *In re Wald*, 2012 Bankr. LEXIS 2552 (Bankr. W.D. Tex.) (Only debtor's one half interest allowed exempt).

- C. Objections to Exemptions. Objections to a debtor's claimed exemptions must be filed within 30 days after the conclusion of the meeting of creditors or within 30 days after the filing of an amendment to the claimed exemptions. Rule 4003(b). Failure to object within the time limit results in allowance of the exemption. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992). This allowance applies even if property claimed is not property of the estate. *In re Zimmer*, 154 B.R. 705 (Bankr. S.D. Ohio 1993) (late objection resulted in wife's claim of exemption to husband's tax refund being allowed even though she had no interest in it). Objecting party bears the burden of proving grounds for the objection, such as the debtor's intent to abandon the homestead. *In re Jones*, 193 B.R. 503 (Bankr. E.D. Ark. 1995). Generally, debtors can convert non-exempt property into exempt property before filing. However, indicia of fraudulent use of an exemption may include conduct intentionally designed to materially mislead or deceive creditors about debtor's position, use of credit to buy exempt property, conversion of very great amount of property, and conveyance for less than adequate consideration. *In re Cataldo*, 224 B.R. 426 (B.A.P. 9th Cir. 1998).
- D. Exempt Assets Recoverable for Support Claims. Exempt property is subject to recovery for tax and spousal support claims. 11 U.S.C. § 522(c); *In re O'Brien*, 367 B.R. 240 (Bankr. D. Mass. 2007); *In re Slater*, 188 B.R. 852 (Bankr. E.D. Wash. 1995). Under pre-BAPCPA law, this exception to a claim of exemption did not create a recovery right that did not otherwise exist under state law. *In re Davis*, 170 F.3d 475 (5th Cir. 1999). However, *Davis* was overruled by the 2005 Act, which provides that the support (DSO) creditor may recover from exempt assets, even if

such a right does not exist under state law. It is not yet clear how this provision might affect recovery from tenancy by the entireties property held by a liable debtor and nonliable spouse.

IV. 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.

Acts taken in family court that violate the stay are void, or in some jurisdictions, voidable. See *In re Edwards*, 214 B.R. 613 (B.A.P. 9th Cir. 1997) (ex-wife's recordation of lis pendens was part of her continuing attempts to collect on divorce-related obligation and, as such, violated automatic stay); *In re Willard*, 15 B.R. 898 (B.A.P. 9th Cir. 1981) (state court dissolution judgment made final in violation of 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 Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010) (post-nuptial agreement entered into after ch. 13 confirmation, which required transfer of property of the estate, violated stay); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002) (state court property division awarding property of the estate to nonfiling spouse was void).

- 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 Kallabat*, 482 B.R. 563 (Bankr. E.D. Mich. 2012) (continuing to go forward with divorce trial one day after debtor filed bankruptcy was excepted from stay, except for property division, resulting in sanctions for attorney); *In re 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 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). While withholding of income for payment of a domestic support obligation is an exception to the stay, an order compelling payment of a support obligation from assets other than income may be a stay violation.

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

- C. Contempt Action in State Court. If incarceration is used to compel debtor to pay support from property of the estate, especially if support arrearage will be paid through a plan, the action violates stay. *In re Johnston*, 308 B.R. 469 (Bankr. D. Ariz. 2005), *aff'd in part, rev'd in part*, 321 B.R. 262 (D. Ariz. 2005) *aff'd in part, rev'd in part*, 595 F.3d 937 (9th Cir. 2010); *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), *aff'd*, 384 Fed. Appx. 882 (11th Cir. 2010); *In re 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., Young v. Repine (In re Repine)*, 536 F.3d 512 (5th Cir. 2008); *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), *aff'd*, 384 Fed. Appx. 882 (11th Cir. 2010); *In re Bailey* 428 B.R. 694 (Bankr. N.D. W. Va. 2010). *But see 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). *But see In re Rucker*, 2011 WL 4494345 (Bankr. D. S.C.) (debtor incarcerated prepetition; chapter 13 eligibility unlikely).

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); *In re Storozhenko*, 459 B.R. 697 (Bankr. E.D. Mich. 2011) (criminal and civil contempt distinguished); *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). The *Storozhenko* court held the complainant's motivation in seeking criminal contempt was irrelevant.

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

- D. Duration. Stay continues until property is no longer property of the estate, until case is closed or dismissed, or debtor is discharged. 11 U.S.C. § 362(c). In a Chapter 7, stay is in effect about three months. In Chapters 12 and 13, it is in effect until the plan is completed, 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 deciding whether to modify the stay to allow the property division to go forward, the court will consider the effect on the estate. See *In re Anderson*, 463 B.R. 981 (Bankr. N.D. Ill. 2011) (GAL granted relief from stay to collect DSO fees from

property that was not property of the estate); *In re Secret*, 453 B.R. 623 (Bankr. E.D. Va. 2011) (no cause to lift stay when property could be more efficiently administered through sale by trustee rather than by property division in state court); *In re Taub* 413 B.R. 55 (Bankr. E.D. N.Y. 2009) (stay lifted to allow state court to determine spouses' rights in property, which would resolve certain issues relevant to ch. 11 plan confirmation); *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); *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 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); *see also In re Dzielak*, 435 B.R. 538 (Bankr. N.D. Ill. 2010) (trustee could represent estate's interest in divorce action).

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

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

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

V. PROPERTY DIVISION vs. SUPPORT

- A. Cases interpreting § 523 (a)(5), applicable to cases filed *before* October 17, 2005, may resolve issues arising in chapter 13 cases. *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. *See In re Cooke*, 455 B.R. 503 (Bankr. W.D. Va. 2011) (property division obligation dischargeable even though found nondischargeable under previous version of sec. 523(a)(15) in prior chapter 7 case). Therefore, the same standards used before the 2005 amendments in determining the nature of an obligation apply in the chapter 13 context. *See also infra* regarding chapter 13 issues. Thus, principles applied to whether an obligation would be support or property division in cases to which the BAPCPA amendments do not apply may still be useful in determining whether debts can be discharged in a chapter 13 case or whether claims are entitled to priority

- D. Federal Question. Determination of whether a provision in decree or agreement is property division or for support is a federal, rather than a state, question. *Matter of Swate*, 99 F.3d 1282 (5th Cir. 1996); *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008); *In re Brown*, 288 B.R. 707 (Bankr. W.D. Pa. 2003). The court may nevertheless be guided and informed by state law. *In re Catron*, 164 B.R. 912 (E.D. Va. 1994), *aff'd*, 43 F.3d 1465 (4th Cir. 1994); *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 (3^d 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)); *In re Hayden*, 456 B.R. 378 (Bankr. S.D. Ind. 2011). 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 (2^d 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 Oblige. 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 necessities 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). However, 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. The distinction may be whether the obligation is to a governmental entity that had provided support, which is within the definition of DSO, or to an individual, who was not actually awarded support. Compare *Wisconsin Dept. of Workforce Dev. v. Ratliff*, 390 B.R. 607 (E.D. Wis. 2008) (refund of overpaid food stamp benefits was DSO), with *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010) (refund of overpaid child support was not DSO). See also *In re Kloepfner*, 460 B.R. 759 (D. Minn. 2011) (reimbursement to person found not to be father of debtor's child was dischargeable non-DSO); *In re Taylor*, 455 B.R. 799 (Bankr. D. N.M. 2011) (refund of spousal support was not DSO); *In re Anderson*, 439 B.R. 206 (Bankr. M.D. Ala. 2010) (food stamp overpayment was DSO); see also *In re Kloepfner*, 460 B.R. 759 (Bankr. D. Minn. 2011) (obligation to return child support received before child was determined not to be a child of the payor was not DSO).

I. Attorney's Fees.

1. 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); see also *In re Hutton*, 463 B.R. 819, 827 (Bankr. W.D. Tex. 2011) (fees "recoverable" by spouse satisfied DSO requirement for payment to spouse); *In re Johnson*, 445 B.R. 50 (Bankr. D. Mass. 2011) (fees awarded former spouse in defending custody dispute were DSO); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010); *In re Tarone*, 434 B.R. 41 (Bankr. E.D. N.Y. 2010) (fact that fees were for debtor's former wife's benefit was sufficient to meet requirement that they be payable to her); *In re Blackwell*, 432 B.R. 856 (Bankr. M.D. Fla. 2010) (obligation to former spouse's attorney in dissolution action awarded under the same standards as support and was DSO); *In re Papi*, 427 B.R. 457 (Bankr. N.D. Ill. 2010) (attorney had standing to bring action in bankruptcy court as debtor's former spouse was

still liable); *In re Sullivan*, 423 B.R. 881 (Bankr. E.D. Mo. 2010) (award of attorney's fees in custody dispute to mother of debtor's children was DSO); *In re Wisniewski*, 109 B.R. 926 (Bankr. E.D. Wis. 1990) (attorney fees intended to be support even though attorney had forgiven remaining amount due from debtor's former spouse). See also *In re Maddigan*, 312 F.3d 589 (2^d 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).

2. 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 Rogowski*, 462 BR. 435 (Bankr. E.D. N.Y. 2011) (ch. 13 claim filed by former spouse's attorney allowed as DSO); *In re Morris*, 454 B.R. 660 (Bankr. N.D. Tex. 2011) (fees not discharged even though awarded directly to attorney for former spouse); *In re Blackwell*, 432 B.R. 856 (Bankr. M.D. Fla. 2010) (fee owed former spouse's attorney was DSO); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010) (former spouse of debtor was still liable to attorney); *In re Prenskey*, 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).

VI. 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).
- C. Circumventing Discharge. State court proceedings cannot be used for the sole purpose of forcing the debtor to pay otherwise dischargeable debts. *In re Heilman*, 430 B.R. 213 (B.A.P. 9th Cir. 2010); *In re Tostige*, 283 B.R. 462 (Bankr. E.D. Mich. 2002); *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kan. 1997); *In re Freels*, 79 B.R. 358 (Bankr. E.D. Tenn. 1987); *Matter of Thayer*, 24 B.R. 491 (Bankr. W.D. Wis. 1982); *Benavidez v. Benavidez*, 660 P.2d 1017 (N.M. 1983). *See also In re Hamilton*, 540 F.3d 367 (6th Cir. 2008) (state court order to indemnify former spouse on joint debt that had been determined discharged in bankruptcy court was void); *In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (debtor's husband's attempt to reduce maintenance to setoff debtor's discharged property division obligation was violation of stay). *But see Ward v. Ward*, 409 S.E.2d 518 (Ga. 1991) (spouse who willfully refused to pay a debt that was later discharged in bankruptcy could be found in criminal, not civil, contempt).
- D. Property Division. Modification of property division is not allowed. *In re Zick*, 123 B.R. 825 (Bankr. E.D. Wis. 1990); *Grassmueck v. Food Indus. Credit Union*, 127 B.R. 869 (Bankr. D. Or. 1991); *Strohmier v. Strohmier*, 839 N.E.2d 234 (Ind. App. 2005); *Spankowski v. Spankowski*, 493 N.W.2d 737 (Wis. App. 1992); *Coakley v. Coakley*, 400 N.W.2d 436 (Minn. App. 1987); *Fitzgerald v. Fitzgerald*, 481 A.2d 1044 (Vt. 1984). *See also In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (debtor's husband's attempt to reduce maintenance to setoff debtor's discharged property division obligation was violation of stay); *In re Fluke*, 305 B.R. 635 (Bankr. D. Del. 2004) (attempt to modify property division violated discharge injunction); *In re Tostige*, 283 B.R. 462 (Bankr. E.D. Mich. 2002) (attempt to modify property division violated discharge injunction)..
- E. Level of Support- Jurisdiction . The bankruptcy court has no jurisdiction to set or modify the amount of spousal or child support. *In re Brennick*, 208 B.R. 613 (Bankr. D.N.H. 1997); *Matter of Rogers*, 164 B.R. 382 (Bankr. N.D. Ga. 1994). *Cf. In re*

Fort, 412 B.R. 840 (Bankr. W.D. Va. 2009) (bankruptcy court did not violate *Rooker-Feldman* or *Younger* doctrines by allowing only part of state DSO claim with apparent clerical error, but this did not constitute an adjudication of the correct amount, which should be decided by state court).

VII. 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 Hannon*, 455 B.R. 814 (Bankr. S.D. Fla. 2011); *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).

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

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

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

4. Good Faith. If a case is not filed in good faith, or if conversion to another chapter is not in good faith, the case may be dismissed or conversion not allowed as confirmation would be impossible. *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 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 nonstate 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, Form B22C. *In re Harman*, 435 B.R. 596 (B.A.P. 8th Cir. 2010) (joint debtors' income combined even though they lived separately); *In re 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); *In re Baldino*, 369 B.R. 858 (Bankr. M.D. Pa. 2007).

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

Under BAPCPA amendments, the debtor's CMI, or the CMI of the debtor and debtor's spouse in a joint case, plus regular contributions by a non-filing spouse determine the "applicable commitment period" under the means test. 11 U.S.C. §§ 101(10A), 1322(d), 1325(b)(4). See also 11 U.S.C. §§ 707(b)(2)(A) and 1325(b) regarding payment requirements under BAPCPA means test, allowable expenses, and exclusion of DSO payments. The contribution to household expenses by a nondebtor spouse may affect the means test and required contributions to a plan. Pursuant to the "marital adjustment," funds not contributed by the nonfiling spouse are deducted from the debtor's CMI. See, e.g., *In re Rable*, 445 B.R. 826 (Bankr. N.D. Ohio 2011) (mortgage payments made by debtor's spouse for joint residence were not subject to marital adjustment); *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 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) (same). See also *In re Harman*, 435 B.R. 596 (B.A.P. 8th Cir. 2010) (spouses' income had to be disclosed even though they had separate residences); *In re Waechter*, 439 B.R. 253 (Bankr. D. Mass. 2010) (pre-marital agreement that gave 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).

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

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

due maintenance); *In re McGrahan*, 448 B.R. 811 (Bankr. D. N.H. 2011) (because no objection was filed, DHSS bound by confirmed plan prohibiting setoff of tax refunds for child support arrears, even though setoff was exception to automatic stay).

- 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. See, e.g., *In re King*, 461 B.R. 789 (Bankr. D. Alaska 2010) (debtor's former wife objected to confirmation of plan); *In re Kusek*, 461 B.R. 691 (B.A.P. 1st Cir. 2011) (dispute over DSO status of obligation arose originally upon debtor's objection to POC); *In re Anthony*, 453 B.R. 782 (Bankr. D. N.J. 2011) (same); *In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (same). Failure of a potential DSO creditor to object to confirmation of a plan that treats the debt as property division may face the claim preclusion effect of the order confirming the plan. See *In re Burnett*, 646 F.3d 575 (8th Cir. 2011) (*res judicata* effect of plan confirmation on former spouse's claim); *In re Hutchens*, 480 B.R. 374 (Bankr. N.D. Fla. 2012) (same). 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.