

BANKRUPTCY AND FAMILY LAW

**The Bankruptcy Bar Association
of the Southern District of Florida
Brown Bag Series**

July 29, 2016



Panelists

Judge Laurel M. Isicoff

USBC, Southern District of Florida

Judge Robert A. Mark

USBC, Southern District of Florida

Sandy Karlan, Former Family Court Judge

11th Judicial Circuit, Certified Fam. Ct. Mediator

Moderators—Brown Bag Committee

Michael Lessne, GrayRobinson, PA

Annette Tucker, Tripp Scott, PA

Thomas Zeichman, Messana, PA

P E A C E

P arental Responsibility/Time Sharing

E quitable Distribution

A limony

C hild Support

E verything Else: i.e. Attorney's fees, suit money

Florida Statute 61.08 Alimony

1. There are several types of alimony:
 - a. Bridge the Gap – to allow a party to make a transition from married to single.
 - b. Rehabilitative – to allow a party to re-establish or establish employable skills after a marriage
 - c. Durational – when permanent alimony is inappropriate, this form of alimony is to provide assistance in a relatively short term marriage or moderate term marriage.
 - d. Permanent – to provide for needs and necessities of life as they were established during the marriage, based upon need and ability to pay.
2. There are several factors that the Court must consider to award alimony:
 - a. Standard of living during marriage
 - b. Duration of the marriage
 - c. Age and physical/emotional condition of parties
 - d. Financial resources of each party
 - e. Earning capacities and educational levels, etc
 - f. Contribution of each spouse...
 - g. Responsibilities of each spouse during marriage
 - h. Tax treatment and consequences to both parties of an alimony award
 - i. All sources of income to either party
 - j. Any other factor to do equity and justice
3. Court can award security for alimony, i.e. life insurance, bond or property

Florida Statute 61.075 Equitable Distribution

The Court has an obligation to identify the marital and non marital assets and liabilities of the parties. As to the marital assets and liabilities, it has a further obligation to distribute the properties, assets and liabilities, equitably between the parties. It is obligated to begin with an equal distribution.

In order to make an unequal distribution, the Court must consider the factors in the statute as follows:

1. The contribution of each spouse to acquisition of asset or debt
2. Economic circumstances of each party
3. Duration of the marriage
4. Interruption in either parties' careers
5. Contribution of one spouse to the other's career
6. Desirability of retaining one asset without interference by the other
7. Contribution of the spouse to the acquisition of the asset or liability
8. Marital home
9. Intentional dissipation, depletion or destruction of a marital asset
10. Any other factor to do equity and justice

Award vests upon judgment if it is a cash payment and does not terminate upon remarriage or death of either party

Practice Tips from Judge Karlan

- A. Compare bankruptcy schedules (which includes a list of debts, assets, and schedules of income and expenses) with the family law financial affidavit—especially in connection with contempt proceedings. (Remember to advise your client that these documents, whether in bankruptcy or family law, are to be filed under oath).
- B. If it isn't a DSO and it isn't secured by a lien, any award can be avoided or limited as a general unsecured claim. So, for example, if you monetize an interest in the marital home, make sure the obligation is secured either by an equitable lien or an actual recorded mortgage.
- C. If one spouse files for bankruptcy during the pendency of the Dissolution of Marriage, file a Motion for Stay Relief and ask the Bankruptcy Court to allow the State Court to determine equitable distribution.
- D. Collection efforts, such as contempt, may not proceed against property of the estate.
WHEN IN DOUBT, FILE A MOTION FOR STAY RELIEF.
- E. Collection efforts for DSOs can proceed against exempt assets. Make sure that the property is truly exempt under Florida Statutes or that the time for an objection to a debtor's claimed exemption has passed.
- F. Have a bench/bar seminar with the bankruptcy/family judges in your circuit.
- G. Make friends with a colleague who practices bankruptcy/family law and if you are in doubt, consult with bankruptcy/family counsel.

BANKRUPTCY AND FAMILY LAW

By: Sandy Karlan, Former Family Court Judge, 11th Judicial Circuit

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Bankruptcy and Family Law

I. Introduction

A. Bankruptcy Abuse Prevention and Consumer Protection Act

- On April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was signed into law and became effective on October 20, 2005. BAPCPA made substantial changes to the existing bankruptcy code, and particularly to those code sections that affect family law. The intention of those changes was to protect recipients of child support, alimony and maintenance. The most significant change was the creation of the Domestic Support Obligation (DSO).

B. Basic Principles Influencing Drafters of BAPCPA as Related to Family Law

- Bankruptcy should interfere as little as possible with the establishment and collection of ongoing obligations for spousal and child support.
- The Bankruptcy Code should provide a broad and comprehensive definition of a Domestic Support Obligation and all claims for Domestic Support Obligations should receive equal and favored treatment in the bankruptcy process.
- The bankruptcy process should ensure the continued payment of ongoing spousal and child support and family support arrearages with minimal need for participation by support creditors in bankruptcy proceedings.
- The bankruptcy process should allow a debtor to liquidate nondischargeable debt to the greatest extent possible within the bankruptcy case, and emerge from bankruptcy with the freshest start feasible.

C. What is a Domestic Support Obligation (DSO)?

- 11 U.S.C. § 101 (14A) states as follows:
 - 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) 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.

D. Priority of a Domestic Support Obligation - 11 U.S.C. § 507(a)(1)

- The DSO has an enhanced priority among creditors. A DSO must be paid before all other creditors (including the IRS) except for the Trustee's administrative expenses and secured claimants.

E. If you think you have a DSO there are FOUR critical things to know:

- What type of bankruptcy has been filed?
- Does the automatic stay apply?
- What is property of the estate?
- Is it dischargeable?

II. The Bankruptcy Chapters (Individual)

A. Chapters

- Chapter 7- Liquidation
 - o Corporate or Individual
 - o Trustee automatically appointed
- Chapter 11- Reorganization

- o Corporate or (formerly rich) individual
- Chapter 12- Family Farmers or Family Fishermen
 - o Corporate or Individual
 - o Trustee automatically appointed
- Chapter 13- Reorganization
 - o Individual only with regular income
 - o Trustee Automatically appointed

III. The Automatic Stay

A. Automatic Injunction triggered by the filing of a bankruptcy petition
 (debtors should file a suggestion of Bankruptcy in State Court proceedings to alert creditors to stop all collection efforts). The Stay is in effect even if the Debtor does not file a Suggestion of Bankruptcy.

B. Application of Automatic Stay – 11 U.S.C. § 362

- (a) Bankruptcy operates as a stay, applicable to all entities, of—
- o The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action of proceeding against the debtor;
 - o The enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
 - o Any act to obtain possession of property in the estate or of property from the estate or to exercise control over property of the estate;
 - o Any act to create, perfect, or enforce any lien against property of the estate;
 - o Any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
 - o Any act to collect, assess, or recover a claim that arose before the commencement of the case under this title;
 - o The setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor.

C. Exceptions to the Automatic Stay -11 U.S.C. § 362(b)(2)

- Bankruptcy does not operate as a stay-
 - o Of the commencement or continuation of a criminal action or proceeding against the debtor; under subsection (a)
 - For the establishment of paternity;
 - For the establishment or modification of an order for domestic support obligation;
 - Concerning child custody or visitation;
 - For the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is of the estate; or
 - Regarding domestic violence;
 - o Of the collection of a domestic support obligation from property that is not property of the estate;
 - o With respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute (e.g. Income Withholding Order).
- Practice Tip**
 - o Collection efforts, such as contempt proceedings, may not proceed against property of the estate.
 - o Could proceed against exempt property like IRA, pension, and homestead.

D. Violations of automatic stay actions are either void or voidable on any action taken while a stay is in place can be set aside.

- The bankruptcy court and the state court have concurrent jurisdiction to determine the applicability of the automatic stay to a given action or proceeding.
- A creditor who violated the automatic stay may be subject to contempt proceedings in bankruptcy court and the imposition of a fine or attorney's fees.
- Only the bankruptcy court can provide relief from the stay.
- Practice Tip**
 - o If in doubt, file a Motion for Relief from Stay in the bankruptcy court.

- o If proceeding in a dissolution of marriage case, ask for stay relief to allow the state court to determine equitable distribution.

E. Automatic stay terminates when:

- Property of the estate is abandoned by trustee because, for example, the trustee determines the property has no liquidation value.
- Property is determined exempt.
- Bankruptcy case is terminated or dismissed.

IV. Property of the Estate – 11 U.S.C. § 541

A. All legal and equitable interests of the debtor in property as of the commencement of the case, including:

- Property recoverable by the Trustee (like preferential or fraudulent transfers);
- Property that would have been property of the estate if it had been an interest of the debtor in property as of the petition date that was acquired within 180 days after filing bankruptcy by bequest, devise, or inheritance, or as a result of a property settlement agreement with the debtor's spouse or a divorce decree, or as a beneficiary of a life insurance policy or of a death benefit plan;
- Postpetition income from property of the estate earned prior to but received after filing;
- In Chapters 11, 12, and 13, earnings and property acquired after the filing of the petition ARE included in property of the estate.

B. Not included in property of the estate:

- If debtor holds only legal title but no equitable interest;
- Funds held in certain retirement and education savings account;
- Funds withheld by employer or contributed by employee to an employee benefit plan;
- Lessee interest in a lease that has terminated or will terminate during the pendency of the case;
- Tenants by the entirety.

C. Property of the Debtor

- All property NOT property of the estate, including:
 - o Property owned by the debtor prior to bankruptcy case;
 - o Property acquired by the debtor after bankruptcy;
 - o Property that the debtor claims as exempt;
 - o Property that has been abandoned by the trustee (i.e., the trustee has decided that the value of the property is not worth administrating in bankruptcy).

D. Exempt properties are those under Florida Law – 11 U.S.C. § 522

- If no timely objection is filed, claimed exemptions are deemed allowed.
- Creditor can proceed against exempt property even if the property is exempt from such claims under state law.
- Fla. Const. Art. X, §4 – Homestead Exemption
- Chapter 222, Florida Statutes – Personal property exemptions
- If Debtor does not claim exempt property, a dependent of the debtor may do so.

V. Bankruptcy Discharge and Dischargeability under 11 U.S.C. § 523(a)(5)

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

- For a domestic support obligation (11 U.S.C. § 523(a)(5));
- To a spouse, former spouse, or child of the debtor and not of the kind described or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit (11 U.S.C. § 523(a)(15)).

B. Dischargeability of Property Settlement- 11 U.S.C. § 523(a)(15)

- The section provides for the nondischargeability of property divisions/equitable distribution under all chapters except Chapter 13.
- DSO or Property Settlement?

- o In Chapter 13 cases, property settlement debts will be discharged only if debtor makes all payments required under a Chapter 13 plan. The property division is treated as an ordinary unsecured debt and does not have the priority that a DSO does. Consequently the debtor might owe a lump sum equalizing payment of \$25,000 and the debtor places this debt in a plan payable over five (5) years paying all unsecured creditors 20 cents on the dollar. If the plan is approved by the Chapter 13 trustee and the Court, and the debtor completes the plan, the debt will be discharged. The question in Chapter 13 cases will be whether the debtor's obligation is a DSO (which is not dischargeable) or property settlement (which is dischargeable in the plan).

C. Which court decides the dischargeability of a debt?

- State courts have concurrent jurisdiction with bankruptcy courts to determine that a particular debt is a DSO excepted for discharge.
 - o Debtor or creditor can file an adversary complaint to determine discharge in bankruptcy court.
 - o If debtor lists a DSO but never files a dischargeability action in bankruptcy court, and the creditor spouse files to collect or for contempt in state court, the issue of dischargeability is before the state court to decide.

VI. How does the bankruptcy court determine whether a debt is a DSO?

- Whether or not a particular obligation is a domestic support obligation (and thus entitled to priority of distribution and excepted from discharge) is a question of federal bankruptcy law.
- It is critical that state court judges and parties to marital dissolution agreements spell out their intentions with respect to marital debts. This is particularly true with respect to indemnification agreements and any other third party obligation such as attorney fees.
- Factors to be considered by a bankruptcy court:
 - o Whether payments terminate upon death or remarriage of the spouse receiving them;
 - o Whether payments terminate when minor reaches a certain age;
 - o Whether payments are contingent on future earning abilities ;
 - o Whether payments are to be periodic over a long period of time rather than in a lump sum;

- o Whether the payments are designated as being for purposes such as medical care, housing or other needs of the spouse or children.

VII. Sample language to protect judgments

A. Nondischargeable attorney's fees:

- "Because of the disparity in the parties' respective incomes, earning capacity and financial positions, the husband shall pay the sum of \$_____ as and for the wife's attorney fees and costs."

B. Obligation to pay a joint debt:

- "Relieving the wife of her obligation to pay the joint debts is necessary to enable the wife to maintain the family home and provide her share of support for the minor children."

C. Monetary award as a DSO:

- "The payment of \$_____ is to provide for the support and living expenses of the spouse or minor child; or [the payment of \$ is intended to pay for the mortgage on a home]; or [other necessities for the child or the spouse.]"
- "The Wife needs the Husband to pay the second mortgage and line of credit secured by the marital residence. The Husband has the ability to pay these amounts until the home is sold. The payments by the Husband are for support for the wife and the minor children. He shall make the payment of \$_____ directly to the Wife, who shall then be responsible to pay the mortgage and the line of credit."

D. Make sure that when you draft agreements you make it very clear that any transfer of money to the non-filing spouse is in the nature of alimony, maintenance or support, or similar language. The mere label will not be binding on a bankruptcy judge.

VIII. Practice Tips

- A. Compare bankruptcy schedules (which includes a list of debts, assets, and schedules of income and expenses) with the family law financial affidavit—especially in connection with contempt proceedings.
- B. If it isn't a DSO and it isn't secured by a lien, any award can be avoided or limited as a general unsecured claim. So, for example, if you monetize an interest in the marital home, make sure the obligation is secured either by an equitable lien or an actual recorded mortgage.
- C. If one spouse files for bankruptcy during the pendency of the dissolution of marriage, file a Motion for Stay Relief and ask the bankruptcy court to allow the state court to determine equitable distribution.
- D. Collection efforts, such as contempt, may not proceed against property of the estate. **IF IN DOUBT FILE A MOTION FOR STAY RELIEF.**
- E. Collection efforts for DSOs can proceed against exempt assets. Make sure that the property is truly exempt under Florida Statutes or that the time for an objection to a debtor's claimed exemption has passed.
- F. Have a bench/bar seminar with the bankruptcy judges in your circuit.

IX. Questions you should be asking

- A. Is the bankruptcy a Chapter 7, 11, 12, or 13?
- B. Who is the actual debtor in the bankruptcy?
- C. Is the debt a Domestic Support Obligation (DSO)?
- D. Does the automatic stay apply?
- E. If so, has a motion for stay relief been filed?
- F. Has the exempt property been determined?
- G. Is the debt dischargeable or has the debt been discharged?
- H. Have any payments been made to the Chapter 13 trustee on account of past due support obligations?

X. Case Law

A. Criteria to be applied to determine a DSO

In re Harrell, 754 F.2d 902 (11th Cir. 1985).

Bankruptcy Courts should only inquire as to whether or not an obligation is in the nature of support, and not whether or not a spouse is in need of support.

B. Bankruptcy Court must determine the intent of parties

***Grogan v. Garner*, 111 S.Ct. 654 (1991).**

The standard of proof required in adversary proceedings brought pursuant to 11 U.S.C. 523(a)5 is a preponderance of the evidence.

***Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001).**

The bankruptcy courts are directed in the first instance to determine the intention of the state court and/or the parties in creating the obligation.

***In re Caputo*, 2013 WL 2701976 (Bankr. S.D. Fla. June 13, 2013)**

In a Chapter 13 case, a Bankruptcy Court determined that a \$200,000 debt to the Former Wife was non dischargeable as being in the nature of support. The court reached this conclusion by reviewing the Marital Settlement Agreement, taking testimony of the parties and concluding that it was the intention of the parties to have this money act as support.

C. Exempt Properties

***In re Castillo*, 2014 WL 843606 (Bankr. S.D. Fla. Mar. 3, 2014).**

When an individual does not own his/her homestead, the benefits of the homestead that they enjoy are not benefits that deprive them of their wildcard exemption under Fla .Stat. § 222.25(4). In this case, Debtor's home was solely in his Wife's name; thus, he did not claim the home as exempt and was, therefore, entitled to claim the \$4000 personal property exemption.

***In re Cason*, 211 B.R. 72 (Bankr. N.D. Fla. 1997).**

Claimed exemption to an ex-spouses state retirement fund is valid regardless of whether there is a QDRO.

***Brose v. Brose*, 750 So.2d 717 (Fla. 2d DCA 2000).**

Homestead exemptions are not to be used to defraud individuals or to defeat family support obligations.

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

Property deemed to be exempt in a bankruptcy case will remain liable for DSO debts even if the exempt property would not be reachable to satisfy those claims under applicable state law.

***In re Harrison*, 236 B.R. 788 (Bankr. M.D. Fla. 1999).**

In a Chapter 7 case, the factors leading to a case of abandonment include: (1) moving out of the home; (2) not re-establishing residence; and, (3) not residing at a marital home at the time of filing the petition. Since the debtor remained a co-owner of the property and her former spouse and child lived there, she was entitled to claim an interest as a homestead. Debtor remaining co-owner of the home whose ex-spouse and child still live in the house are factors relevant to reverse a finding of abandonment and allow a homestead interest.

***In re Kalynych*, 284 B.R. 149 (Bankr. M.D. Fla. 2002).**

The proceeds from the voluntary sale of a homestead are exempt from the claims of creditors if the debtor has a good faith intention to reinvest the proceeds in another homestead within a reasonable time.

***In re Kauffman*, 299 B.R. 641 (Bankr. M.D. Fla. 2003).**

Absent a showing of bad faith on the part of the debtor or prejudice to creditors, a court does not have discretion to deny any debtor's amendment to exemptions.

D. Tenants by the Entireties

***In re Sinnreich*, 391 F.3d 1295 (11th Cir. 2004).**

Property owned by a Chapter 13 debtor as a tenancy by the entireties with a non-debtor (under Florida law) was not part of the bankruptcy estate and therefore could not be reached by creditors. When ownership of property is defined as a tenancy by the entireties and one party is a non-debtor, that property is exempt from bankruptcy administration under §522(b)(2)(B).

***In re Pierre*, 468 B.R. 419 (Bankr. M.D. Fla. 2012).**

Debtor in a Chapter 13 case who is a tenant by the entirety (with non-debtor spouse) cannot reduce or eliminate a mortgage encumbering real property, unless the non-debtor spouse was a debtor in the Chapter 13 case and was also entitled to a Chapter 13 discharge.

E. Attorney's Fees

***In re Strickland*, 90 F.3d 444 (11th Cir. 1996).**

Award of attorney's fees to an ex-spouse constitute support and are not dischargeable.

***In re Gentilini*, 365 B.R. 251 (Bankr. S.D. Fla 2007).**

For attorney's fees to be nondischargeable, the obligation must remain enforceable against the nondebtor former spouse.

***In re Peterson*, 2005 Bankr. LEXIS 920 (Bankr. S.D. Fla. Mar. 21, 2005).**

Attorney's fees related to paternity actions are not dischargeable under § 523(a)(5) regardless of whether the child was born out of wedlock and whether there was an action for visitation or support.

***Satterfield-Price v. Parrish*, 2014 U.S. Dist. LEXIS 36707 (M.D. Fla. Mar. 20, 2014).**

Attorney's fees are non-dischargeable as a DSO. Guardian ad Litem fees and the fees of the attorney for GAL are nondischargeable. The costs of the custody evaluator are also not dischargeable.

***In re Finlayson*, 217 B.R. 666 (Bankr. S.D. Fla. 1998).**

Awards of attorney's fees by state courts based on findings of need and ability to pay are properly characterized as support even if legal services were not directly related to maintenance, alimony, or support issues. Therefore, they are not dischargeable.

***In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009).**

Attorney fees awarded based upon bad faith litigation that are not awarded based on need and ability to pay but rather are awarded as sanctions are dischargeable.

***In re Spence*, 2009 Bankr. LEXIS 3497 (Bankr. S.D. Fla. Oct. 26, 2009).**

A judicial lien based upon attorney's fees awarded in a Final Judgment can be avoided if the fees were awarded as a sanction and not based upon need and ability to pay.

F. Miscellaneous DSO

***In re Harnage*, 2013 Bankr. LEXIS 4625 (Bankr. M.D. Fla. Nov. 1, 2013).**

Spouse's promise in an MSA to contribute funds to the Wife to help pay for a marital debt owed to a third party is not dischargeable in bankruptcy. Language in an MSA permitting a spouse to seek bankruptcy relief as to their obligations does not render the obligations dischargeable.

***In re Miller*, 55 F.3d 1487 (10th Cir. 1995).**

Fees owed to guardian ad litem and psychologists as a result of divorce proceedings are not dischargeable under 11 U.S.C. 523(a)(5).

***In re Ginzl*, 430 B.R. 702 (Bankr. M.D. Fla. 2010).**

In a Chapter 7 proceeding, the Bankruptcy Court determined that the debtor/former husband was responsible for permanent periodic alimony, lump sum distribution, assumption of and payment of mortgages, homeowner's association dues and a tax deficiency. These were all DSOs whether under Section 523(a)(5) or 523(a)(15).

***Satterfield-Price v. Parrish*, 2014 U.S. Dist. LEXIS 36707 (M.D. Fla. Mar. 20, 2014).**

Attorney's fees are non-dischargeable as a DSO. Guardian ad Litem fees and the fees of the attorney for GAL are nondischargeable. The costs of the custody evaluator are not dischargeable, nor are the costs for the educational evaluator.

***In re Arnott*, 210 B.R. 651 (Bankr. S.D. Fla. 1997).**

In a Chapter 7 proceeding, an obligation to provide a former spouse with health insurance is non dischargeable.

***In re Berman*, 26 B.R. 301 (Bankr. S.D. Fla. 1982).**

An obligation to pay a mortgage on a home that a child will be living in is support of the child and is not dischargeable.

***In re Foster*, 292 B.R. 221 (Bankr. M.D. Fla. 2003).**

Support obligations are both non-dischargeable obligations and are also priority claims. If the support obligation has been assigned to a third party, the claim is no longer a priority claim.

G. State Courts have concurrent jurisdiction to determine dischargeability

***Huey v. Huey*, 643 So.2d 1141 (Fla. 4th DCA 1994).**

The former wife filed a petition in state court to determine dischargeability of certain debts after Former Husband was discharged in bankruptcy. The District court affirmed the trial court's finding that the obligations were in the nature of support and not dischargeable.

***Scharmen v. Scharmen*, 613 So.2d 121 (Fla. 1st DCA 1993).**

Attorney's fees awarded in post dissolution proceedings are nondischargeable if they are in the nature of alimony, maintenance, or support. Former Wife filed to

enforce post judgment attorney's fee awarded and the state trial judge found fees has been discharged in former husband's bankruptcy. The district court reversed the trial court.

H. Contempt Proceedings

***In re Campbell*, 185 B.R. 628 (Bankr. S.D. Fla. 1995).**

State contempt orders are not subject to the automatic stay and are permitted to go forward provided that (1) the Debtor cannot be required to use property of the estate to make a payment of the pre-petition debts for support or maintenance, and (2) the purging of any contempt order cannot be made conditional upon payment of money from the property of the estate.

***In re Montana*, 185 B.R. 650 (Bankr. S.D. Fla. 1995).**

Automatic stays do not prevent state divorce courts from compelling compliance with its pre-petition orders that the debtor has violated. A spouse's action to collect pre-petition support arrearage is not subject to the automatic stay so long as the property of the estate is not used to satisfy the claim. A bankruptcy filing does not stay the State Court's right to carry out its orders of incarceration of the debtor for their failure to pay court ordered support and alimony obligations. (Consider indirect criminal contempt if the facts warrant such an action)

I. Chapter 13

***Carver v. Carver*, 954 F.2d 1573 (11th Cir.1992).**

Bankruptcy Courts do not have the power to modify child support.

***In re Hutchens*, 480 B.R. 374 (Bankr. M.D. Fla. 2012).**

A spouse is bound to a debtor's confirmed plan. A spouse cannot attempt to collect arrears until a bankruptcy case is closed. Portions of payment obligations that are unaccounted for are not dischargeable.

***In re Diaz*, 647 F.3d 1073 (11th Cir. 2011).**

Bankruptcy court's discharge order does not discharge a debtor's child support obligation. Therefore, a state child support agency cannot be enjoined from attempting to collect child support from the debtor after discharge (in a Chapter 13 case). Further, where the state did not include the correct amount owed in its proof of claim, a child support obligation cannot be limited to that mistaken amount by the Bankruptcy Court ruling on a proof of claim.

***In re Gonzalez*, 2012 Bankr. LEXIS 3347 (Bankr. S.D. Fla. Jul. 19, 2012).**

Department of Revenue (D.O.R.) child support creditor may not pursue collection of child support outside the provisions of a Chapter 13 confirmed plan if the child support debt is included in the plan and methods for its payment are set forth in the plan. So, even though the creditor, DOR, is not stayed by the automatic stay from collection of the child support/DSO, the creditor is stayed by the confirmation of the plan.

J. Chapter 11

***In re Davis*, 465 B.R. 309 (Bankr. M.D. Fla. 2011).**

Bankruptcy court's discharge order does not discharge a debtor's child support obligation. Therefore, a state child support agency (DOR) cannot be enjoined from attempting to collect child support from the debtor after discharge (in a Chapter 11 case).

K. Property Settlement

***In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009).**

Awards resulting from bad faith litigation that are not awarded based on need and ability to pay but rather as sanctions are dischargeable.

***In re Hutchens*, 480 B.R. 374 (Bankr. M.D. Fla. 2012).**

The former wife/creditor filed a proof of claim for \$78,000 when the debt was actually \$139,999. She didn't correct this mistake when she requested that this debt be treated as a priority obligation. Therefore, under the confirmed Chapter 13 plan, she was only entitled to payments toward the \$78,000 over 60 months. The balance of the debt, plus interest, was still nondischargeable as a DSO; however, she may not proceed to collect it until after the completion of the Chapter 13 plan. Although she was not prohibited from collection by the automatic stay, she was prohibited by confirmation of the Chapter 13 plan.

She also filed a claim for a property settlement debt to her of \$337,055; however, it was found to be dischargeable since it was not a DSO. Unfortunately, this obligation, which was a division of property, was not secured by any property. *See also In re Nachon-Torres*, 2013 WL 793246 (Bankr. S.D. Fla. Mar. 1, 2013). The Court also found that reimbursement for the minor child's surgery, for college, for unpaid medical bills and for a \$25,000 interest sanction for not paying alimony and child support were all non-dischargeable DSOs.

L. Bad Faith

***In re Moog*, 159 B.R. 357 (Bankr. S.D. Fla. 1993).**

Chapter 11 Bankruptcy petitions filed in bad faith in an effort to avoid execution of a divorce judgment and as a means to use bankruptcy court to renegotiate a divorce will be dismissed. Not all chapter 11 petitions filed primarily to resolve the claim of a single creditor are subject to dismissal as bad faith filings.

***In re Bandini*, 165 B.R. 317 (Bankr. S.D. Fla. 1994).**

A Chapter 13 petition filed in bad faith to avoid paying alimony arrearages will be dismissed.

M. Payments to third parties are generally dischargeable

***In re Reinhardt*, 478 B.R. 455 (Bankr. M.D. Fla. 2012).**

Mortgage payments owed to a third party creditor can be discharged. Due to indemnification provisions favoring the wife in the MSA, obligations were not dischargeable as to the ex-wife or children of the marriage.

XI. Article

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and its Impact on the Practice of Family Law¹

INTRODUCTION

On April 20, 2005 the President signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA"). The majority of the changes became effective on October 20, 2005. BAPCPA has made substantial changes to the existing Bankruptcy Code ("the prior Code"). This article will highlight only those that affect family law.

Depending on your perspective as counsel for either a debtor or a creditor who holds a claim against the debtor, you may or may not welcome the changes. Regardless, the revisions contained in BAPCPA are clearly intended to protect recipients of support and alimony.

One of the most significant changes is a newly created Bankruptcy Code term called "Domestic Support Obligation", which is defined to encompass all debts for alimony, maintenance or support which accrue before, during or after the time the bankruptcy case is filed.

I invite you to judge for yourself whether you're a fan of BAPCPA after reviewing the most significant changes as outlined in this article. Regardless of your perspective, the bankruptcy court is now a less friendly place for debtors with support obligations. As you will see, in enacting BAPCPA, Congress has given the bankruptcy court an expanded role in the enforcement and collection of support obligations.

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DOMESTIC SUPPORT POLICIES IN BAPCPA

Four basic principles guided the authors of BAPCPA in drafting the alimony/child support sections:²

1. Bankruptcy should interfere as little as possible with the establishment and collection of ongoing obligations for spousal and child support.

2. The Bankruptcy Code should provide a broad and comprehensive definition of a Domestic Support Obligation and all claims for Domestic Support Obligations should receive equal and favored treatment in the bankruptcy process.

3. The bankruptcy process should ensure the continued payment of ongoing spousal and child support and family support arrearages with minimal need for participation by support creditors in bankruptcy proceedings.

4. The bankruptcy process should allow a debtor to liquidate nondischargeable debt to the greatest extent possible within the bankruptcy case, and emerge from bankruptcy with the freshest start feasible.

In applying these principles, one author opined that BAPCPA would result in:³

1. A reduction in the need for family support creditors to appear in bankruptcy court and a related reduction in the cost and uncertainty inherent in litigating family support issues in bankruptcy court;

2. Greater consistency in law and policy between the Bankruptcy Code and the federal and child support enforcement program established by Title IV-D of the Social Security Act;

² Philip L. Strauss, Legislative Analysis of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005; Subtitle (II-)B, Priority Child Support, February 10, 2005.

³ Philip L. Strauss, Testimony before the U.S. Senate Committee on the Judiciary, February 10, 2005 [http://iudiciarv.senate.gov/Drint testimonyv.cfm?id=1381 &wit id+3993](http://iudiciarv.senate.gov/Drint%20testimonyv.cfm?id=1381%20&wit%20id+3993)

3. Greater assurance that legitimate family support enforcement mechanisms will not be frustrated by the bankruptcy process; and

4. A clear recognition that all family support debts are entitled to preferential treatment in bankruptcy.

NEW DEFINITIONS

A major change under BAPCPA is the new language regarding family law obligations. It differs significantly from the limited definition under the prior Code under the exception to discharge provision for alimony and support in 11 USC §523(a)(5). A new term has been coined, "Domestic Support Obligation" or DSO, which is defined in §101(14A) of the Bankruptcy Code as follows:

(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.

This newly defined term provides a single comprehensive definition used throughout the Bankruptcy Code in sections governing priority, discharge, exemptions and lien avoidance. Following are some additional highlights arising from this new Domestic Support Obligation term of art:

1. The expansive definition of who is now considered to be the recipient of a Domestic Support Obligation is more practical and has a more realistic application. For example the newly defined term will now include an obligation owed to a responsible relative or legal guardian. It remains to be seen how future cases will interpret who is considered to be a "responsible relative".
2. The obligation of support now includes one that accrued "before, on or after" the date of the order for relief, and will include interest that accrues on the debt under state law. Interest was not specifically included as part of a support obligation under the prior Code.
3. The obligation of support may now appear in a property settlement agreement as well as in an order of the domestic relations court, whereas in the prior Code property settlement agreements were not included at all.
4. The Domestic Support Obligation can be established pursuant to a determination by a governmental unit in accordance with applicable nonbankruptcy law such as a child support order from a department of revenue.

5. Previously the obligation could not have been assigned to third parties except under limited circumstances. Now there are specific assignees that are protected under BAPCPA.

6. Under the prior Code, the support award had to have accrued prior to the order for relief. Consequently, if a support order was signed after the filing of the bankruptcy, the debtor's obligation would not have been affected by the bankruptcy. Under BAPCPA, the debtor may not receive a discharge if a postpetition support obligation is not paid in full.

BAPCPA does incorporate language from the prior Code in defining a Domestic Support Obligation. Specifically the Domestic Support Obligation Obligations must be "in the nature of alimony, maintenance or support..." This language suggests that in the event that there is any question as to whether a debtor's obligation to pay is a Domestic Support Obligation, the courts will still look to established law such as In Re Harrell 754 F.2d 902 (11th Cir. 1985), for the criteria to be applied in determining the exact nature of the obligation.

In re Cummings, 244 F.3d 1263 (11th Cir. 2001) would also continue to be good law for its discussion of the need for the bankruptcy court to consider the intent of the state court in determining the nature of a support award. Cases such as In re Strickland, 90 F.3d 444 (11th Cir. 1996) which define attorneys fees awarded in a domestic relations proceeding as support would continue to be applicable in applying the definition of Domestic Support Obligation.

NEW PRIORITIES

In addition to expanding the definition of a traditional support obligation, BAPCPA has also enhanced the priority of Domestic Support Obligations as compared to other general unsecured debts of the debtor. The DSO is now the first priority claim to be paid subject only to the trustee's administrative expenses. 11 U.S.C §§ 507 (a) (1) (A), (B) and (C).

How does this work as a practical matter? Provided a Chapter 7 trustee recovers unencumbered assets, the recipient of the DSO

now will receive a distribution before all other priority and nonpriority general unsecured creditors. This includes even the IRS! Unfortunately this change may be largely symbolic since the overwhelming majority of Chapter 7 debtors have no assets to distribute to unsecured creditors, even those holding priority claims.

However, BAPCPA has made it more difficult for debtors to file for relief under Chapter 7. Legislative history suggests that in enacting BAPCPA, it was the intent of Congress to require debtors to take more responsibility for their financial affairs, as well as to curb the misuse of bankruptcy laws by individuals with sufficient income to repay a portion of their debts.

The end result of this change in policy is that under BAPCPA there is a presumption of abuse for debtors with a certain level of disposable income which may preclude them from filing a Chapter 7 case. These debtors may now be filing under Chapter 13 or even Chapter 11. In both of these chapters, DSOs are well protected.

Chapter 11 and Chapter 13 will not provide an escape for the debtor. Under BAPCPA the Chapter 13 debtor's proposed plan must provide for *full* payment of *all* prebankruptcy DSOs with only two exceptions:

1. If the recipient/spouse agrees to a lower amount
2. If the recipient has assigned the benefits to a governmental entity and the debtor has committed all disposable income to the 5- year plan. Moreover, in Chapter 11 cases, an individual debtor can confirm a plan over a support creditor's objection only if the plan pays DSOs in full on the effective date of the plan.

Typically after the debtor submits his or her Chapter 13 plan, there is a period of time, sometimes weeks or even months, between the time a plan is proposed and the time the plan is actually confirmed by court order. During that window of time, debtors often fail to remain current in their postpetition support obligations. If this occurs, BAPCPA prohibits the confirmation of a debtor's proposed Chapter 13 plan if the debtor has failed to pay in full all DSO that have accrued after the debtor filed for bankruptcy. 11 USC §1325(a) (8). In addition to the confirmation requirement, the debtor's failure to pay any Domestic Support Obligations that first become payable after the date of the filing of the petition is

grounds for conversion or dismissal in both Chapter 11 and Chapter 13. 11 U.S.C. §§ 1112(b)(4)(P); 1307(c)(11). Finally, a Chapter 13 debtor cannot obtain a discharge unless the debtor has fully paid his or her prepetition and postpetition Domestic Support Obligations.

Under the prior Code, a Chapter 13 debtor had to include his or her current support obligations in the plan but the arrearages payment as ordered by the state court could be modified in the plan. This is no longer true.

Practically speaking, family lawyers should think very carefully before advising their client, the obligor/payor, to file bankruptcy to avoid a judicial support obligation or one made by agreement. These changes should also be a caution to any obligor who thinks that the agreement they make can later be discharged if their lifestyle or finances change or believes that the bankruptcy court will be a safe haven.

THE AUTOMATIC STAY AND PROCEEDINGS FOR INITIAL ACTIONS, MODIFICATION OR ENFORCEMENT

BAPCPA has expanded the scope of domestic relation matters which are not subject to the automatic stay in 11 USC § 362. Under §362(b)(2), the following actions are not stayed:

1. establishment or modification of a domestic support obligation.
2. establishment of paternity
3. an action concerning child custody or visitation
4. an action for the dissolution of marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate
5. an action regarding domestic violence.

BAPCPA continues to exclude from the automatic stay the collection of DSOs from property that is not property of the estate. This provision was in the prior code. However, BAPCPA also specifically excludes, for the first time, the enforcement of or continuation of an Income Deduction Order pursuant to a judicial order, administrative order or statute. In other words the deductions from salaries through an income deduction order continue even after the filing of a bankruptcy in any

chapter.

Also unaffected by the automatic stay is the collection/enforcement procedures used by the child support enforcement division under Florida law and the Social Security Act including the withholding or suspension of driver's licenses or professional licenses, the reporting of overdue support obligations to credit agencies as well as the interception of tax refunds. 11 USC 362(b) (2) (D-G)

These changes are significant in enforcing support awards. Under the prior law the recipient or the state had to apply to the bankruptcy court for stay relief which was time consuming and expensive.

One enforcement limitation in the prior Code remains unchanged. DSO creditors still cannot attempt to collect against "property of the estate" which is still exclusively determined by the bankruptcy court. For example, attempting to seize a prepetition non-exempt bank account of a debtor in chapter 7 would require stay relief. By contrast, the continued collection of child support through an Income Deduction Order is specifically excepted from the automatic stay and, as discussed earlier, under Chapters 11 and 13, the debtor cannot have a plan confirmed unless all DSOs are paid in full.

As under the prior law, the DSO creditor can still proceed to enforce DSOs against exempt property of the debtor. 11 USC§ 522 (c). Such exempt property might include an IRA or 401 (K). This right has been expanded by BAPCPA with the addition of language in §522(c) allowing DSO creditors to proceed against exempt property even if that property would be exempt from support claims under state law.

In the case of a pending dissolution of marriage action in which the parties have substantial marital or non marital property to divide, the family court cannot proceed to divide such property without stay relief from the bankruptcy court. As a practical matter, the bankruptcy court may grant such relief and allow the state court to determine then equitable distribution but may limit the court from actually allowing or authorizing a distribution of that property.

DISCHARGEABILITY OF DOMESTIC SUPPORT OBLIGATIONS AND JURISDICTION

Some of the most significant family law changes in BAPCPA, changes that should eliminate substantial post judgment litigation consistent with the intention of the drafters, are the changes to the exception from discharge provisions in sections 523(a)(5) and 523(a)(15).

Section 523 (a)

Prior to BAPCPA, §523(a)(5) excepted from discharge debts to a spouse, former spouse, or child of the debtor for alimony, maintenance or support provided that the debt was "actually in the nature of alimony, maintenance or support." Bankruptcy courts and state courts had concurrent jurisdiction to determine dischargeability under this section.

BAPCPA amended §523(a)(5) which now simply states that "domestic support obligations" are excepted from discharge. As discussed earlier, the definition of DSOs is broader than "alimony, maintenance or support" used in old §523(a)(5). For example, debts voluntarily assigned to a nongovernmental entity for purposes of collection are now included in DSOs and are therefore excepted from discharge under §523(a)(5).

Under both the old and new §523(a)(5), the obligation must be in the "nature" of support, an issue that was frequently litigated and an issue which has been the subject of several commentaries by the author of this article. Future litigation over this issue should be significantly reduced because of the significant changes in §523(a)(15) discussed below.

Section 523 (a)(15)

The pre-BAPCPA exception from discharge provision in §523(a)(15) was a terrifying provision of the prior Code for family

litigators and for recipients of a support obligation as well as a potential malpractice trap for practitioners. This provision was intended to provide for the nondischargeability of property divisions/equitable distributions under limited circumstances. However this section had numerous problems from the viewpoint of the recipient spouse and attorney.

Dischargeability actions under §523(a)(5) could be brought before either the state court or the bankruptcy court because they had concurrent jurisdiction and there was no statutory time limit to seek relief. However, proceedings under §523(a)(15) to avoid the discharge of a property settlement had to be brought by adversary proceeding in bankruptcy court and if not filed within 60 days of the meeting of creditors the complaint would be time barred. This resulted in the practitioner having to file two actions, one in both state and bankruptcy court, or having to file an action in bankruptcy court just to preserve a possible dischargeability claim.

BAPCPA greatly simplifies §523(a)(15). As amended, this section excepts property settlement debts from discharge without the need to apply the cumbersome standards in former §523(a)(15), namely (1) ability to pay; and (2) whether discharge would benefit the debtor more than excepting the debt from discharge would benefit the non-debtor spouse. Moreover, under amended §523(a)(15), as in §523(a)(5), the state courts now have concurrent jurisdiction and (a)(15) actions no longer need to be filed within 60 days after the first meeting of creditors.

The only remaining complication is that §523(a)(15) does not apply in Chapter 13. In Chapter 13 cases, property settlement debts, like other unsecured debts, will be discharged although only if the debtor makes all payments required under a Chapter 13 plan.

The net result of these changes is that in Chapter 7, 11 or 12 cases, all obligations arising out of divorce or separation agreements will be excepted from discharge. DSOs, essentially debts in the nature of alimony, maintenance or support, are excepted under 523(a)(5) and property settlement obligations are excepted under 523(a)(15). Thus, in these chapters, there should no longer be a need to litigate the "nature" of the support issue.

By contrast, in Chapter 13 cases, this issue will remain alive because only 523(a)(5) applies. Thus, dischargeability of a domestic relations debt in Chapter 13 will still depend on whether the debt is in the nature of support under federal law.

TRUSTEE'S EXPANDED ROLE

The Trustee has a new role under Chapter 7 (11 USC 704) and Chapter 13 (11 USC 1302) to assist Domestic Support Obligation recipients. BAPCPA requires that the trustee provide in substantial detail the following information to such creditor

1. written notice of the claim and that the creditor/spouse/parent/guardian has the right, in the case of a child support obligation, to use the services of the state child support enforcement agency to collect the debt,
2. written notice to the state child support enforcement agency of such claim,
3. written notice that the debtor has been granted a discharge, the debtor's last known address and employer, and the existence of other nondischargeable debts and reaffirmed debts.

This is a tremendously helpful change for the recipient of the Domestic Support Obligation. So many pro se litigants have a difficult time navigating in state courts and the bankruptcy court is even more difficult for them. Often, the bankruptcy trustee will be the person with the most knowledge about the debtor and the debtor's ability to pay and this provision will provide a great service to parties who are not receiving child support as ordered.

Some have raised the question of how aggressive a Chapter 7 trustee will be in attempting to locate assets in a liquidation proceeding if there will be no recovery for other creditors because of the priority of the domestic support obligation. This remains to be seen.

CONCLUSION

In general, the changes in BAPCPA are very favorable to recipients of Domestic Support Obligations. It is important for every practitioner to become familiar with the definition of DSO as this provides the basis for all actions related to alimony, maintenance and child support. The new provisions faithfully attempt to apply the four basic principles above and make it more difficult, if not impossible, for a debtor to discharge a debt established in a child support proceeding, paternity action, divorce or modification proceeding whether incurred through judicial order, administrative order or marital or property settlement agreement.

I believe that these changes will result in substantially less litigation on family related matters for the bankruptcy courts. Of course there will always be those who argue that the division of debts, an indemnification provision, or payments on marital obligations to a third person are not really Domestic Support Obligations. In those instances the existing case law defining what is support and what is in the nature of alimony, maintenance and support should still be informative and applicable.

All in all, it appears that the days when a debtor could try to use the Bankruptcy Court to obtain a "second bite of the apple" are over and that should be good news for families.

BIOGRAPHY

The Honorable Sandy Karlan is currently the Associate Administrative Judge in the Family Division in the 11 Judicial Circuit. She is also specially assigned to the Complex Litigation Division of the Unified Family Court in addition to her regular division. Judge Karlan has been a circuit court judge since 1995. Prior to that, she was an attorney in private practice specializing in Family Law and Bankruptcy. She is certified by The Florida Bar in Marital and Family Law. She regularly lectures on family law and bankruptcy to lawyers and judges and has taught related courses at the Advanced Judicial Studies College and the Circuit Court Conference Educational Program.

The author wishes to specially thank Barbara Phillips, Esq. for her substantial contribution to this article. Additional materials were contributed by Paul L. Orshan, Esq., and Patricia Redmond, Esq.

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