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Strange Bedfellows: The Uneasy Alliance between Bankruptcy and Family Law

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I. INTRODUCTION**

A basic understanding of bankruptcy law has become increasingly important to those who specialize in family law if only because of the increasing number of bankruptcy cases filed annually by individuals. Many of these cases are filed by persons who are in the process of obtaining a dissolution of the marriage bond, a division of marital or community property, or custody of children. Others are filed by individuals, who, having already obtained an order of dissolution, are obliged to provide support for a former spouse or child or to comply with the terms of a property settlement order. In each case, important questions of bankruptcy and family law can, and frequently do, arise.

Where the party filing bankruptcy is either in the process of obtaining a dissolution decree or is already required to make support or property settlement payments, the ex-spouse entitled to receive these payments, once aware of the bankruptcy, will often first contact the attorney who represented the ex-spouse in the dissolution proceeding. The attorney is likely to be asked a number of questions which he or she will be unable to answer without an understanding of the relevant principles of bankruptcy law. A list of possible questions which might be posed under these circumstances includes:

1. May the pending dissolution action continue during the bankruptcy case?
2. May an action be commenced or continue against an ex-spouse for the past due support or sums due under a property settlement order?
3. Can an ex-spouse discharge the support or property settlement obligations which are past due, now due, or due in the future?
4. Will a mortgage or a security interest given to secure payment of...
a support or property settlement obligation survive and be enforceable after bankruptcy?

This Article explores the confluence of bankruptcy and family law. It attempts to set forth and resolve the important issues which arise when the two bodies of law intersect in a bankruptcy proceeding. In so doing, it examines the fundamental policies underlying the principles of both bankruptcy and family law which conflict, perhaps inevitably, in the context of a bankruptcy case. A general overview of three types of bankruptcy proceedings and the major events which occur in these proceedings is first provided in an effort to set the stage for the subsequent discussion of the automatic stay, the dischargeability of family obligations under the Bankruptcy Code, the liability of the debtor and the debtor’s property after bankruptcy, and the debtor’s ability to avoid liens granted in a dissolution action in order to secure performance of support and property settlement obligations. Finally, pre-bankruptcy planning suggestions are offered in an effort to assist the attorney drafting support or property settlement agreements.

II. AN OVERVIEW OF A BANKRUPTCY CASE

A voluntary bankruptcy case begins or is “commenced” when the petitioner, the debtor, files a petition with the clerk of the bankruptcy court. The petition requests relief under one of the chapters of the Bankruptcy Code. Requesting relief simply means that the petitioner wishes to take advantage of the protections of the Bankruptcy Code. The debtor’s filing of the petition constitutes an order for relief. The order for relief will always be entered in the type of bankruptcy case that the debtor initiated, for example, it will be identified as a Chapter 7, 13, or 11 order for relief.

The debtor’s act of filing a bankruptcy petition triggers the creation of a new legal entity called the bankruptcy estate. The estate is comprised of certain items of the debtor’s property. The major portion of the property of the estate consists of the petitioner’s legal and equitable interests in property as of the date the bankruptcy petition is filed.

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3. Id.

4. Id. § 541.

5. Id. § 541(a)(1).
property jurisdictions, the estate also includes all community property in which the debtor has sole, equal, or joint management and control.\textsuperscript{6} Whether wages earned by the debtor after the bankruptcy case is commenced, and other property acquired after the bankruptcy petition has been filed, are treated as property of the estate depends, in part, on under which chapter the debtor has sought relief. For example, in a Chapter 7 liquidation case, as well as in a Chapter 11 business reorganization proceeding, post-petition wages are not considered to be property of the estate.\textsuperscript{7} The same is true of nearly all other property acquired by the debtor after the petition has been filed.\textsuperscript{8} In contrast, however, wages earned and property acquired after the case is commenced are deemed to be property of the estate in a Chapter 13 proceeding.\textsuperscript{9}

One of the most important immediate effects of filing a bankruptcy case is the imposition of an automatic stay against all of the petitioner’s creditors.\textsuperscript{10} This means that creditors are automatically restrained from any act or proceeding to collect a pre-petition claim against the debtor, the debtor’s property, or property of the estate.\textsuperscript{11}

The debtor’s filing of a Chapter 7 bankruptcy petition is also the triggering event which directs the bankruptcy court to appoint a trustee.\textsuperscript{12} The trustee’s main obligation is to take possession of the property of the estate, sell it, and then to distribute the proceeds to the debtor’s general unsecured creditors.\textsuperscript{13} If a creditor has a property interest, a lien, in an item that the trustee wishes to sell, the trustee generally must pay the lien holder in full before any amounts will be paid to unsecured creditors.\textsuperscript{14} Typically, the value of an asset does not exceed or will only slightly exceed the value of the liens against it. As a result, the trustee will often decide to relinquish any claim to the asset. This is known as abandoning the asset.\textsuperscript{15}

Along with the bankruptcy petition, the debtor files schedules which list all of the debtor’s assets and liabilities,\textsuperscript{16} as well as property exempt from the claims of creditors.\textsuperscript{17} The right to claim property as exempt is

\textsuperscript{6} Id. § 541(a)(2)(A).
\textsuperscript{7} Id. §§ 541(a)(1), 541(a)(6).
\textsuperscript{8} For exceptions to this general rule, see 11 U.S.C. § 541(a)(5), which governs the circumstances under which certain post-petition assets become part of the estate. See also 11 U.S.C. § 541(a)(6), which generally states that post-petition rents or profits from property of the estate will also be considered part of the bankruptcy estate.
\textsuperscript{9} Id. § 1306(a)(2).
\textsuperscript{10} Id. § 362(a).
\textsuperscript{11} Id. § 362(a)(1)-(a)(3).
\textsuperscript{12} Id. §§ 701, 702.
\textsuperscript{13} Id. § 704.
\textsuperscript{14} Id. §§ 506, 554, 726.
\textsuperscript{15} Id. § 554.
\textsuperscript{16} Id. § 521; Bankruptcy Rule 1007 (Supp. 1983).
\textsuperscript{17} Id. § 521; Bankruptcy Rules 1007, 4003 (Supp. 1983).
governed by the Code, and if the debtor is successful in utilizing an exemption, this will have the effect of immunizing particular items of property from the claims of most creditors during pendency of the bankruptcy proceeding as well as after the case is closed.

In a Chapter 13 case, the debtor also files a repayment plan in addition to schedules itemizing assets, liabilities, and exempt property. The Chapter 13 plan is a statement proposing how full or partial payment of the debtor's pre-petition debts will be achieved. Typically, the debtor proposes that the source of plan payments will be from the debtor's post-petition earnings, which are property of the estate. After a hearing in which creditors are given an opportunity to raise objections, the court decides whether to approve or confirm the plan. If a plan is confirmed, it is binding on all the debtor's creditors whether or not they consented to the plan.

Although generally more complicated than a Chapter 13 case, a Chapter 11 proceeding shares many similar characteristics. For example, as in a Chapter 13 case, the Chapter 11 debtor also files a plan proposing full or partial repayment of pre-petition debts. However, unlike a Chapter 13 case, an election is held in which creditors are given the opportunity to vote for or against the plan. If the requisite number of votes are obtained in favor of the plan, and other statutory criteria are met, the court will approve or confirm the plan following a hearing in which creditors may object to the plan's provisions. After the plan's confirmation, all creditors holding claims which are provided for by the plan are bound by it even though they did not vote in favor of the plan.

The requirement that a plan be filed in a Chapter 13 or 11 case is closely related to the underlying purpose of Chapter 13 or 11 bankruptcy cases. Typically, a debtor utilizing these chapter proceedings, rather than a Chapter 7 (straight bankruptcy) proceeding, intends to repay creditors over a period of time. In contrast, the primary objective of the debtor in a Chapter 7 proceeding is to forever enjoin creditors from taking any steps to collect the debt as a personal liability of the debtor. The peti-
tioner’s discharge of a debt within a Chapter 7 bankruptcy therefore prevents the creditor from collecting any pre-petition debt as a personal liability of the debtor.  

Thus, two of three fundamental purposes of American bankruptcy law are served in a Chapter 7 case. The first, that of providing the honest and financially embarrassed debtor with a fresh start, is accomplished principally through the grant of a discharge. The second, that of providing an equitable basis for the division of the debtor’s assets to creditors, is realized through the mechanisms of the automatic stay, the trustee’s avoiding powers, and the Bankruptcy Code’s priority and distribution schemes.

Some Chapter 7 debtors are disappointed to learn that not all of their debts are subject to discharge in bankruptcy. Many debts are not dischargeable simply because of the wrongful manner in which the obligation was incurred. The classic example of this type of nondischargeable debt would be one which arose as a result of fraud. Others, such as obligations for alimony, maintenance, or spousal, or child support will not be discharged for reasons of public policy. The practical effect of a nondischargeable debt is that the debtor’s personal liability survives bankruptcy. A creditor to whom a nondischargeable debt is owed will eventually be allowed to pursue a personal claim against the debtor in an effort to collect the debt.

Even if all of the debtor’s obligations are dischargeable, in certain instances, the debtor nonetheless may not receive the benefits of a general discharge of debts. For example, a general discharge can be denied due to serious misconduct by the debtor either before or during the Chapter 7 proceeding. If this occurs, then even those debts that would normally be considered dischargeable will survive bankruptcy, and the claimants will eventually be allowed to pursue the debtor and the debtor’s property for payment of the obligations.

Unlike the case of a debtor who files a Chapter 7 bankruptcy case, the debtor’s principal motivation in filing a Chapter 13 or 11 case is not necessarily to obtain a discharge. If the debtor intends to repay creditors

31. Id. § 524(a). However, it is important to note that the discharge of an obligation does not prevent a creditor with a valid lien in the debtor’s property from proceeding against the property subject to the lien. Before the creditor can initiate an in rem procedure, however, steps to have the automatic stay lifted must be taken unless it has already expired. Id. §§ 362, 506.
33. Id. at 30.
35. Id. § 523(a)(5).
36. Id. §§ 523, 524, 727(b).
37. Id. § 727.
38. Id. § 727(a).
39. Id. §§ 524, 727.
in full over a period of time, there will be no need to seek a discharge of these debts. In this instance, the debtor seeks the protection of the provisions of Chapter 13 or 11 in order to bind even nonconsenting creditors to the plan, and to prevent them from utilizing any state-based collection remedies while the debtor makes the payments called for by the plan. If, however, the debtor proposes less than full payment to creditors, the debtor’s motivation in filing a Chapter 13 or 11 petition is, at least in part, to obtain a discharge. Thus, the third principal purpose of American bankruptcy law, that of rehabilitating a financially troubled debtor, is served through the device of Chapter 13 or 11 repayment plans.

After the debtor obtains or is denied a discharge, or the case is closed or dismissed, whichever occurs first, the automatic stay expires. A Chapter 7 case will be closed only after the trustee has distributed the proceeds of the debtor’s nonexempt assets, if any, and made a full report to the bankruptcy court. This usually occurs after the debtor has been either granted or denied a discharge. Once the stay has expired or has been terminated, unsecured creditors whose debts have not been discharged may now pursue a personal claim against the debtor, but are not allowed to proceed against property that has been exempted in the bankruptcy proceeding. There is an important exception to this rule, however. Creditors holding unsecured claims for alimony, maintenance, spousal or child support may utilize state collection remedies to reach property exempted in the bankruptcy case for payment of their claims.

III. PROPERTY OF THE ESTATE

A new entity called the estate is created when a bankruptcy case is filed. The bankruptcy estate consists of certain assets of the debtor which are called collectively property of the estate.

40. Id. §§ 362, 1327.
41. There are two types of Chapter 13 discharges: a “general” and a “hardship” discharge. Id. § 1328(a)-(b). The only requirement for a general discharge is that the debtor successfully complete the plan payments. A Chapter 13 general discharge is broader than a Chapter 7 discharge, because with respect to the former, only debts for alimony, maintenance, spousal, and child support are considered nondischargeable. Id. § 1328(a). Under certain circumstances, a Chapter 13 “hardship” discharge is available even though the debtor was not able to complete the payments proposed by the plan. Id. § 1328(b). However, unlike a Chapter 13 general discharge, a hardship discharge will not extinguish any obligations which are not subject to discharge in a Chapter 7 proceeding. Id. § 1328(c). Likewise, a Chapter 11 discharge does not extend to any debts that an individual could not discharge in a Chapter 7 liquidation. Id. § 1141(d).
42. WHITE, supra note 32, at 30.
43. 11 U.S.C. § 362(c).
44. Id. § 704; Bankruptcy Rule 3009 (Supp. 1983).
45. Id. § 362(c)-(d).
46. Id. §§ 523, 524.
47. Id. § 522(c).
48. Id. § 522(c)(1).
An understanding of the bankruptcy concept of property of the estate is important because it defines, in part, the scope of the automatic stay and a particularly important exception to the stay for family law lawyers. Furthermore, it is the assets which are property of the estate that the debtor attempts to immunize from the obligations owed creditors by claiming the assets as exempt. The Chapter 7 trustee then sells the remaining assets in the estate, if any, and distributes the proceeds to creditors.

Section 541 of the Bankruptcy Code provides that the commencement of a bankruptcy case creates an estate. The bulk of this estate is comprised of all legal and equitable interests of the debtor in property as of the commencement of the bankruptcy proceeding. All property of the debtor as of the commencement of the case, wherever located, whether tangible or intangible, is property of the estate. Thus, if the debtor’s interest in such assets as real estate, personal property, causes of action, contract rights, tax refunds, or trusts exists, on the date the case is commenced, it is property of the estate.

Section 541 is broader than its predecessor under the Bankruptcy Act. It is no longer necessary that nonbankruptcy law permit the debtor’s creditors to reach the property or that the debtor be able to transfer the
property for it to be considered property of the estate. However, the estate acquires only the legal or equitable interest held by the debtor. Thus, if the debtor’s interest in property is limited, so also is the interest of the estate.

In Chapter 7 and Chapter 11 cases, the debtor’s wages and earnings from services performed after the case is filed are not property of the estate. However, the debtor’s post-petition wages and earnings are property of the estate in a Chapter 13 case at least until confirmation of a repayment plan. Unless the plan or order of confirmation provides otherwise, “the confirmation of a plan vests all of the property of the estate in the debtor.” As a result, post-petition property and wages which are not devoted to the plan or submitted to the control and supervision of the trustee as necessary for the execution of the plan do not constitute property of the estate.

In community property jurisdictions, the estate includes not only the debtor’s interest in community property but also the non-filing spouse’s

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61. 11 U.S.C. § 541(c)(1)(A); In re Goff, 706 F.2d 574, 578 n. 9 (5th Cir. 1983) (Keogh retirement funds held to be property of estate despite restrictions on transfer); Regan v. Ross, 691 F.2d 81 (2nd Cir. 1982) (retirement funds held to be property of estate despite limits on assignment and attachment of proceeds under New York law). But see Warren v. G.M. Scott & Sons, 34 Bankr. 543 (Bankr. S.D. Ohio 1983) (Keogh plans held not to be property of estate).

Under section 70a(5) of the Bankruptcy Act, the trustee was vested with the debtor’s title, as of the filing of the petition, to “property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered. . . .” Section 70a(5), 30 Stat. 565, 565-6 (repealed 1979).

62. 11 U.S.C. § 541(d); Matter of Depoy, 29 Bankr. 466 (Bankr. N.D. Ind. 1983) (termination of lease prior to bankruptcy left debtor with no interest in the lease for his estate to assume at the time bankruptcy was filed). See also Warren, 34 Bankr. 543 (debtor’s interest in profit-sharing pension plan not part of bankruptcy estate because it was subject to alienation restrictions enforceable against general creditors and, therefore, also enforceable against bankruptcy trustee).

63. 11 U.S.C. § 541(a)(6); In re Fitzsimmons, 725 F.2d 1208 (9th Cir. 1984) (earnings generated by services performed personally by Chapter 11 debtor were exempted from property of the estate, but all other earnings from debtor’s law practice attributable to invested capital and good will were included); In re Summerlin, 26 Bankr. 875, 877-78 (Bankr. E.D.N.C. 1983) (Chapter 11 debtor’s postpetition wages were not property of the estate and thus were subject to ex-spouse’s alimony collection efforts).

64. 11 U.S.C. § 1306(a)(2); In re Denn, 37 Bankr. 33 (Bankr. D. Minn. 1983) (garnishment of debtor’s postpetition wages violated stay because Chapter 13 plan vested postpetition wages in the estate).

65. 11 U.S.C. § 1327(b).

66. Denn, 37 Bankr. 33 (Chapter 13 plan vested debtor’s post-petition wages in the bankruptcy estate; these wages were protected by the automatic stay from past due child support collection efforts); In re Sak, 21 Bankr. 305 (Bankr. E.D. N.Y. 1982) (confirmation of Chapter 13 plan vested all property not provided for in the plan in the debtor); In re Adams, 12 Bankr. 540 (Bankr. D. Utah 1981) (upon confirmation of Chapter 13 plan former spouse permitted to proceed against debtor’s wages for alimony in the amount the wages exceeded payments required under the plan and against any property not being used to fund the plan or which was not necessary to the execution of the plan).
interest in that community property. The estate is also comprised of property recovered by the trustee under certain circumstances, any interest in property that the estate acquires after the case is filed, and proceeds, product, offspring, rents, or profits of or from property of the estate. Finally, the estate includes property interests acquired by the debtor within 180 days after the commencement of the case by bequest, devise or inheritance, as a beneficiary of a life insurance policy or death benefit plan, and as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree.

The bankruptcy estate includes all property of the debtor, including those assets the debtor wishes to exempt. The debtor thus exempts property from the property of the estate. If the debtor fails to claim these exemptions in a Chapter 7 case, all property of the estate will be available for distribution by the trustee to the debtor's creditors.

In the determination of what is property of the estate, the state law

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67. 11 U.S.C. § 541(a)(2); In re Teel, 34 Bankr. 762 (Bankr. 9th Cir. 1983) (community property of both debtor and his spouse was property of the estate and, therefore, within exclusive jurisdiction of bankruptcy court thereby precluding state court division of marital property pursuant to dissolution proceedings until the close of the bankruptcy case); In re Jeffery, 2 Bankr. 197 (Bankr. S.D. Tex. 1980) (where joint obligations of debtor and his wife were sought to be discharged, all community property was subject to liability for debts to be discharged).


69. Id. § 541(a)(6), (7).

70. Id. § 541(a)(5)(A); In re Means, 16 Bankr. 775 (Bankr. W.D. Mo. 1982) (real estate of debtor's father became part of bankruptcy estate where father died intestate within 180 days after petition for bankruptcy filed).

71. 11 U.S.C. § 541(a)(5)(C); In re Howland, 27 Bankr. 896 (Bankr. D. Md. 1983) (life insurance proceeds received by the debtor as a result of her husband's death were included in property of the estate because they were acquired within 180 days after bankruptcy filed).


73. H.R. REP. No. 595, 95th Cong., 1st Sess. 367-68, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6322; S. REP. No. 989, 95th Cong., 2d Sess. 82-83, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5868; Tignor v. Parkinson, 729 F.2d 977 (4th Cir. 1984) (debtor's personal injury claims, whether unliquidated when the petition was filed or settled during bankruptcy, were property of the estate as of the commencement of the case). Under the Bankruptcy Act property of the estate did not include exempt property. Lockwood v. Exchange Bank, 190 U.S. 294 (1903).

74. Warren, 34 Bankr. 543 (debtor's interest in profit-sharing pension plan was eligible for exemption from the estate); In re Lowe, 25 Bankr. 86 (Bankr. D. S.C. 1982) (debtor could not exempt I.R.A.s because at the time bankruptcy filed he did not request an exemption and at that time he was not entitled to payments from the funds in the account); In re Gagnard, 17 Bankr. 811 (Bankr. W.D. La. 1982) (washer, dryer, and air conditioner were initially property of the estate but once exemption upheld they became property of the debtor); In re Walters, 14 Bankr. 92 (Bankr. S.D. W. Va. 1981) (unmatured life insurance policy on life of debtor's son claimed as exempt).

75. 11 U.S.C. §§ 704(1), 726; Matter of Cipa, 11 Bankr. 968 (Bankr. W.D. Pa. 1981) (debtor's property remains property of the bankruptcy estate unless claimed as exempt). In a Chapter 11 or Chapter 13 case, unlike a case under Chapter 7, an individual debtor usually remains in possession of all property of the estate, including exempt property, and attempts to formulate a plan in which the creditors are paid in full or in part from future income. Property of the estate generally is not liquidated to satisfy the creditors' claims. 11 U.S.C. §§ 1107, 1108, 1121-1129, 1141, 1303, 1304, 1321-1325; In re Estus, 695 F.2d 311 (8th Cir. 1982).
label of an item as property is not controlling. However, the Bankruptcy Code does give weight to the state law determination of the nature, extent and other relevant attributes of an asset.

IV. THE AUTOMATIC STAY

One of the most important effects of the filing of a bankruptcy petition is the automatic imposition of a stay against virtually all creditor activity directed at the debtor. The purposes of the automatic stay are to provide a breathing space in which the financially troubled debtor may attempt to formulate a repayment or reorganization plan and to relieve him of the pressures which drove the debtor into bankruptcy. It also protects creditors from piecemeal dismemberment of the assets available to satisfy their claims.

Thus, the commencement or continuation of all actions and proceedings which were pending against the debtor at the time of filing, those which could have been commenced against the debtor before filing, or those to enforce, collect, or recover a pre-petition claim or judgment against the debtor are automatically stayed upon the filing of the petition. The automatic stay prohibits any act to create, perfect, or enforce liens based on pre-petition claims against the debtor’s property. Property of the debtor’s estate is similarly shielded from the enforcement of pre-petition judgments and any acts to obtain possession or exercise control over it. Furthermore, the stay prevents certain acts to create, perfect, or enforce

76. In re Matto’s, Inc., 9 Bankr. 89 (Bankr. E.D. Mich. 1981) (state court’s determination as to whether liquor license was “property” was not controlling in bankruptcy court because the Code makes it clear that licenses become property of the estate).

77. Butner v. United States, 440 U.S. 48, 55 (1979) (mortgagee’s interest in rents and profits earned by property in bankruptcy estate defined by state law); Golden Plan, 37 Bankr. 167 (corporate name was an interest to be defined by state law); In re Langley, 30 Bankr. 595 (Bankr. N.D. Ind. 1983) (debtor’s interest in land trust was to be determined at the time of filing for bankruptcy by looking to state law); In re Graham, 24 Bankr. 305 (Bankr. N.D. Iowa 1982) (non-bankruptcy law defines debtor’s interest in proceeds of pension and profit-sharing fund and bankruptcy law determines whether that interest passed to the trustee as property of the bankruptcy estate), aff’d, 726 F.2d 1268 (8th Cir. 1984); Gander, 8 Bankr. 390 (state statute on presumption of ownership not applied by bankruptcy court).

78. One authority has summarized the effects of the automatic stay as follows: “In short, upon the filing of the petition the creditor may continue to eat, sleep and breath; perhaps he can smile at the debtor, but he may do little else.” WHITE, supra note 32, at 97.


81. Id. § 362(a)(5), (7).

82. See supra notes 49-77 and accompanying text for a discussion of property of the estate.

liens based on either pre-petition or post-petition claims against property of the estate.  

The automatic stay imposed on the above actions, proceedings, and acts is effective immediately upon the filing of the bankruptcy petition and before informal or formal notice is received by any entity affected by the stay. Orders, judgments, or acts in violation of the stay are generally held to be void.  

There are eleven important statutory limitations on the scope of the automatic stay. Only the two exceptions relevant to the purposes of this Article are discussed.

A. Criminal Actions and Proceedings

The automatic stay is the most immediate and one of the most important protections provided to the debtor when the bankruptcy petition is filed. However, the protective shield of the automatic stay does not extend to the commencement or continuation of criminal proceedings against the debtor. "The bankruptcy laws are not a haven for criminal offenders but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of the bankruptcy." However, when a criminal action involves the collection of an obligation of the debtor, such as in a criminal nonsupport action, the fresh start policy of bankruptcy and the public's interest in enforcing these criminal laws can conflict.

Many bankruptcy courts have held and continue to hold that the court has the equitable power to enjoin the parties to a criminal action relating

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84. Id. § 362(a)(4). Section 362(b)(3) narrows the scope of the stay against postpetition lien perfection and allows such perfection when it would be effective against the trustee under section 546(b) through timely notice or within the ten day period provided for in section 547(e)(2)(A). See also Kennedy, Automatic Stays Under the New Bankruptcy Law, 12 U. Mich. J.L. Ref. 1, 17-21 (1978).

85. In re Elder, 12 Bankr. 491, 495 (Bankr. M.D. Ga. 1981) (garnishment of debtor's wages after bankruptcy violated automatic stay and was void even though done without actual knowledge of the stay).

86. For a discussion of the consequences of violating the automatic stay see infra notes 141-55 and accompanying text.


88. Id. § 362(a).

89. Id. § 362(b)(1).


91. 11 U.S.C. § 105(a) provides in part that "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title [11]."
to the writing of bad checks from proceeding if the principal motive in prosecuting the debtor is to collect the debt. These courts broadly interpret the situations in which a court’s injunctive power may be exercised in order to protect the debtor’s interest in a fresh start.

In contrast, the Third\textsuperscript{94} and Eleventh\textsuperscript{95} Circuits apply a more stringent standard to determine when a court’s injunctive power may be exercised to enjoin such criminal actions. Because there is a fundamental policy against federal interference with state criminal prosecutions, these courts will not enjoin parties to a state court criminal action, unless there is a great and immediate danger of irreparable harm which constitutes a threat to a federally protected right.\textsuperscript{96}

\textsuperscript{92} In re Whitaker, 16 Bankr. 917 (Bankr. W.D. Tenn. 1982) (criminal prosecution for violation of bad check law enjoined because the District Attorney’s motive was to recover a discharged debt); In re Kaping, 13 Bankr. 621 (Bankr. D. Or. 1981) (the court permanently enjoined the State of Oregon from prosecuting a debtor in a criminal nonsupport action because it was instituted primarily to collect a dischargeable debt rather than to “vindicate the rights of the public” or to “discourage such criminal conduct by others”); In re Lake, 11 Bankr. 202 (Bankr. S.D. Ohio 1981) (state permanently enjoined from continuing criminal prosecution for violation of bad check law because the action was instituted solely to collect a debt); In re Caldwell, 5 Bankr. 740 (Bankr. W.D. Va. 1980) (where creditor instituted criminal action as a means of extracting a preference not accorded other creditors similarly situated rather than merely to aid the prosecutor in punishing violations of the criminal law, creditor’s participation in prosecution was enjoined); In re Trail West, Inc., 17 Bankr 330 (Bankr. D.S.D. 1982) (criminal prosecution not enjoined because the state was not using the criminal complaint to collect a debt by coercion or duress). See also In re Wagner, 18 Bankr. 339 (Bankr. W.D. Mo. 1982) (debtor not entitled to an injunction curtailing criminal prosecution because he failed to prove the prosecution’s motive was to collect a debt); In re Brown, 39 Bankr. 820 (Bankr. M.D. Tenn. 1984) (district attorney may be enjoined from seeking to revoke debtor’s probation for debtor’s failure to pay restitution stemming from criminal offense). Contra In re Taylor, 44 Bankr. 548 (Bankr. D. Md. 1984) (bankruptcy court could not permanently enjoin state prosecution of a debtor for allegedly passing bad checks even though the principal motivation behind such prosecution was the collection of a civil debt). Many of the decisions in which a criminal action or parties to the action have been enjoined emphasize the dischargeable nature of a prepetition debt as partial justification for the issuance of an injunction against the parties to the criminal action. Such motives undoubtedly thwart the “fresh start” policy of the Code. This rationale implies that if the principal motive in the prosecution of a criminal action is to collect a nondischargeable debt, the debtor’s case for the issuance of the injunction is considerably weakened. Since, with only one exception, Section 362(a) stays any action on and any efforts to collect dischargeable as well as nondischargeable debts, and because, with only two exceptions, nondischargeable debts may not be enforced against exempt property, the dischargeability status of the debt should not be controlling in determining whether an injunction should issue. 11 U.S.C. §§ 362(a)(1),(2),(6), 522(c) (1982). Kennedy, \textit{supra} note 84, at 25 (1978).

\textsuperscript{93} See \textit{supra} note 92.

\textsuperscript{94} In re Davis, 691 F.2d 176, 179 (3d Cir. 1982) (the court rejected the principal motive test, applying the Younger standard instead, and found that the debtor would not suffer irreparable injury if an injunction was denied).

\textsuperscript{95} Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982) (the court applied the Younger standard and found that there was no great and immediate danger of injury nor was the injunction necessary to preserve a federally protected right).

\textsuperscript{96} This standard was articulated by the Supreme Court in a nonbankruptcy case captioned Younger v. Harris, 401 U.S. 37.
Under either approach, the automatic stay does not prevent the prosecution of a criminal action,\textsuperscript{97} the imposition of a sentence,\textsuperscript{98} the collection of the debt\textsuperscript{99} nor the collection of a fine\textsuperscript{100} where the criminal action only collaterally involves the collection of an obligation of the debtor. Only in relatively rare cases, then, will the lawyer prosecuting a criminal nonsupport action be prevented from commencing or continuing the action due to the filing of a bankruptcy petition by the defendant.

\textbf{B. The Collection of Alimony, Maintenance, and Support}

The purpose of this section is to explore the effect of the filing of a bankruptcy petition on collection activity designed to satisfy the debtor’s outstanding obligations for alimony, maintenance, and support. The filing of a bankruptcy petition does not automatically stay the “collection of alimony, maintenance, or support from property that is not property of the estate.”\textsuperscript{101} In order to delineate precisely the boundaries of this exception to the automatic stay, familiarity with judicial interpretations of the word “collection” as well as the concept of property of the estate is necessary.

Congress’s choice of the word “collection” in section 362(b)(2) should be compared to its choice of words in other subsections setting forth other exceptions to the automatic stay.\textsuperscript{102} Section 362(b)(2) has been interpreted to except only actions and proceedings to enforce monetary obligations for support, alimony, and maintenance evidenced by an order or judgment for child support or spousal support entered before the bankruptcy case.
is filed.\textsuperscript{103} Under this view, all other family law actions such as dissolution proceedings,\textsuperscript{104} actions in which an award of support, alimony, or maintenance is sought,\textsuperscript{105} or actions in which the parties seek a division of marital property\textsuperscript{106} are stayed.

The property from which support, alimony, and maintenance may be collected without interference from the automatic stay is limited to property “that is not property of the estate.”\textsuperscript{107} Recall that when a bankruptcy case is filed, an estate is created\textsuperscript{108} consisting of all property in which the debtor has a legal or equitable interest as of the commencement of the case.\textsuperscript{109} Recall further that in Chapter 7 and Chapter 11 bankruptcy proceedings, wages earned by an individual debtor for services performed after the commencement of the case are not property of the estate.\textsuperscript{110} However, in a Chapter 13 wage-earner proceeding, post-petition wages are property of the estate at least until the plan is confirmed.\textsuperscript{111} In addition,

\begin{itemize}
  \item \textsuperscript{103} In re Murray, 31 Bankr. 499, 501 (Bankr. E.D. Pa. 1983) (stay must be modified in order to permit debtor’s wife to obtain an adjudication of the right to alimony and child support before section 362(b)(2) exception applies); In re Garrison, 5 Bankr. 256, 260-61 (Bankr. E.D. Mich. 1980) (state court decree fixing alimony and child support must precede bankruptcy court confirmation of a plan); Amonte v. Amonte, 17 Mass. App. 621, 461 N.E.2d 826, 830 (1984) (“collection” applies to proceedings and actions to collect domestic obligations where a final judgment adjudicating the obligation was entered prior to the filing of bankruptcy). Contra In re Lovett, 6 Bankr. 270, 272 (Bankr. D. Utah 1980) (entry of a state court judgment for delinquent child support after bankruptcy filing was not stayed). See Kennedy supra note 92, at 25-26, in which the author notes that the automatic stay rules applicable to “straight” bankruptcies under the Bankruptcy Act of 1898 did not stay the “commencement or continuation of any action, or the enforcement of any judgment” for alimony, maintenance, and support of wife and child.
  \item \textsuperscript{104} See infra notes 125-26 and accompanying text.
  \item \textsuperscript{105} See infra notes 127-28 and accompanying text.
  \item \textsuperscript{106} See infra note 129 and accompanying text.
  \item \textsuperscript{107} 11 U.S.C. § 362(b)(2).
  \item \textsuperscript{108} Id. § 541(a).
  \item \textsuperscript{109} Id. § 541. Property of the estate also includes the debtor’s interest and, under certain circumstances, the interest of the debtor’s spouse in community property; property recovered by the trustee; interests in property recovered by the trustee or preserved for the benefit of the estate; certain property acquired within 180 days after the filing of the petition; proceeds, rents, and profit from property of the estate; and any interest in property that the estate acquires after the commencement of the case. Id. § 541(a)(2)-(7). For a detailed discussion of property of the estate see supra notes 49-77 and accompanying text.
  \item \textsuperscript{110} 11 U.S.C. § 541(a)(6); Summerlin, 26 Bankr. at 877-78 (Chapter 11 debtor’s earnings from services after commencement of the bankruptcy case were not property of the estate and thus were subject to alimony claims). But see In re Sundale Associates, Ltd., 23 Bankr. 230, 232 (S.D. Fla. 1982) (real estate acquired by Chapter 11 debtor after bankruptcy case commenced is property of the estate upon his acquisition and is protected by the automatic stay).
  \item \textsuperscript{111} 11 U.S.C. § 1306(a)(2); Denn, 37 Bankr. at 35 (Chapter 13 debtor’s post-petition wages were protected by automatic stay from court order for mandatory income withholding to collect delinquent child support payments); In re Moore, 22 Bankr. 200, 201-02 (Bankr. M.D. Fla. 1982) (debtor’s wife could not force liquidation of debtor’s assets or seizure of his property, including his
all other property specified in section 541(a) acquired by a Chapter 13 debtor after the case is commenced is property of the estate at least until the plan is confirmed.112

Thus, a Chapter 7 and Chapter 11 debtor's post-petition wages and property acquired therefrom may be garnished or attached to satisfy alimony, support, or maintenance obligations without violating the automatic stay. But, at least until confirmation of a plan, a Chapter 13 debtor’s post-petition wages and property may not be used to satisfy such claims without permission of the bankruptcy court and an order lifting the automatic stay.113

Property exempted in a bankruptcy proceeding is property of the debtor and is not property of the estate; it may thus be reached by an alimony, support, or maintenance claimant without violating the stay.114 However,
the Code is not explicit in stating how or when property of the estate leaves the estate once it has been exempted. 115

This issue is not the equivalent of the medieval theological debate regarding the quantity of celestial beings able to dance on the head of a pin. It is important since, if property claimed as exempt ceases to be property of the estate as soon as the list of exempt property is filed by the debtor, the alimony, support, or maintenance claimant may immediately proceed against such property without violating the automatic stay. If, however, property claimed as exempt remains property of the estate until the thirty-day period in which to file an objection to the debtor’s claim of exemptions passes uneventfully, or even later regarding property to which an objection is timely filed, the claimant’s attorney proceeding against such property will violate the automatic stay. As a result, either the claimant, the claimant’s attorney, or both could be found in contempt of the bankruptcy court and ordered to pay to the debtor all damages caused by the violation of the stay. 116

One court has stated that as soon as property is claimed as exempt it ceases to be property of the estate. 117 Other courts have held that property claimed as exempt ceases to be property of the estate and revests as property of the debtor only after the thirty-day period for objection to exemptions expires. 118 A Minnesota bankruptcy court has held that where

115. Kennedy, supra note 114, at 38 n. 158 (1978). Professor Kennedy goes on to state:
Section 541(a) declares that the property of the estate comprises all legal or equitable interests of the debtor in property as of the commencement of the case. Section 522(l), however, says that property claimed as exempt in a list filed by the debtor is exempt unless a party in interest objects. Presumably, such a list will ordinarily be filed with the debtor’s petition in a voluntary case. . . . Arguably, exempt property never enters and therefore never leaves the estate when the debtor claims his exemptions concurrently with the filing of the petition, if no objection is raised to the claim. If objection is made, it is not clear whether the property claimed comes into the estate pending the resolution of the issue raised or only after there has been a determination adverse to the claim of exemption.

Bankruptcy Rule 4003(b) provides that the trustee or any creditor may file objections to a claim of exemptions within 30 days after the conclusion of the meeting of creditors or the filing of any amendment to the list of claimed exemptions unless further time to object is granted by the court. Rule 4003(b).

116. Penalties for violations of the automatic stay are discussed infra at notes 141-55 and accompanying text.

117. Summerlin, 26 Bankr. at 878 (once property is claimed as exempt it is no longer property of the estate and is subject to alimony claims).

118. In re Kretzer, 48 Bankr. 585, 588 (Bankr. D. Nev. 1985) (debtor claimed pickup truck as exempt without objection by any party in interest and, therefore, repossession by credit union did not violate stay because the truck was no longer property of the estate); In re Wiesner, 39 Bankr. 963, 965 (Bankr. W.D. Wis. 1984) (railroad cars became property of debtor after the then-applicable fifteen-day period for objections to exemptions expired without objection); In re Cassell, 41 Bankr. 737, 740 (Bankr. E.D. Va. 1984) (debtor claimed automobile as exempt without objection by a
an objection was filed regarding property claimed as exempt, the property did not leave the estate until the bankruptcy court’s order determining the matter became final.\textsuperscript{119}

The cautious practitioner seeking to collect alimony, maintenance, or support obligations from exempt property will either allow the thirty-day objection period to pass or seek a ruling from the court that the property in question is exempt before proceeding against such property in order to avoid violating the automatic stay.\textsuperscript{120} In one noted commentator’s view, the exclusion of collection activity by alimony, maintenance, or support creditors by section 362(b)(2) from the automatic stay is not limited by its terms to the collection of nondischargeable support obligations.\textsuperscript{121} He notes that the debtor or the trustee may seek an injunction against an effort to collect dischargeable alimony, maintenance, or support obligations from the debtor pursuant to section 105.\textsuperscript{122}

However, this issue does not appear to have been so resolved by the courts. Several decisions hold that the section 362(b)(2) exemption to the stay applies only to nondischargeable debts for alimony, maintenance, or support, and that if there is uncertainty about the dischargeability of the obligation and the resulting applicability of section 362(b), the claimant should petition the bankruptcy court for clarification.\textsuperscript{123} The claimant and

\textsuperscript{119} In re Oliver, 38 Bankr. 245, 247 (Bankr. D. Minn. 1984) (foreclosure proceedings brought against real property before the court’s final determination of creditor’s objection to exemption violated the stay).

\textsuperscript{120} Such a ruling is obtained by a motion seeking relief from the automatic stay. Bankruptcy Rules 4001 and 9014 govern requests for relief from the automatic stay.

\textsuperscript{121} Kennedy, supra note 92, at 26.

\textsuperscript{122} Id. Alimony, support, or maintenance may be determined to be a dischargeable property settlement obligation under § 523(a)(5)(B). See infra notes 167-288 and accompanying text.

\textsuperscript{123} In re Pody, 42 Bankr. 570, 573-74 (Bankr. N.D. Ala. 1984) (ex-spouse violated the automatic stay by not releasing garnishment on debtor’s wages in an effort to collect a debt determined to be a nondischargeable property settlement obligation); Van Hoose v. Van Hoose, 31 Bankr. 332, 336-37 (Bankr. S.D. Ohio 1983) (automatic stay prevents commencement or continuation of collection actions until dischargeability of family obligation is determined); Stamper v. Stamper, 17 Bankr. 216, 221 (Bankr. S.D. Ohio 1982) (ex-spouse found in contempt of bankruptcy court for violating the automatic stay by initiating state court contempt action against debtor before obtaining a determination of the dischargeability of family obligation); In re Bailey, 20 Bankr. 906, 913 (W.D. Wis. 1982) (section 362(b)(2) exception to the automatic stay does not apply to efforts to collect dischargeable property settlement obligations). See also Summerlin, 26 Bankr. at 877-78 (where ex-spouse sought relief from the automatic stay in order to collect family obligation, bankruptcy court first determined that the debt was a nondischargeable support obligation and then held that the automatic stay did not prevent efforts to collect alimony from property which is not property of the estate). A similar approach was taken by the court in In re Renzulli, 28 Bankr. 41, 43-46 (Bankr. N.D. Ill. 1982).
the claimant’s attorney who do not do so proceed at their peril and take the calculated risk of being held in contempt of the bankruptcy court for violating the automatic stay.\textsuperscript{124}

**C. Dissolution Actions, Child Custody Actions, and Contempt Proceedings**

Although there is authority to the contrary,\textsuperscript{125} most courts which have addressed the issue have held that an action to dissolve the marriage bond is automatically stayed.\textsuperscript{126} Similarly, the majority of courts hold that actions in which adjudications of rights to spousal and child support are sought\textsuperscript{127} and to determine rights to the custody of children\textsuperscript{128} are stayed. Finally, actions in which the non-debtor seeks a state court order dividing marital property are routinely held to be automatically stayed.\textsuperscript{129}

If the automatic stay applies to a state court proceeding, the bankruptcy court may terminate or modify the stay on request of a party in interest if grounds for so doing can be shown.\textsuperscript{130} Requests to lift the automatic stay in order to allow the dissolution action to proceed are routinely granted for cause.\textsuperscript{131} Cause for lifting or modifying the automatic stay

\textsuperscript{124} See, e.g., Pody, 42 Bankr. at 573-74 (ex-spouse held in contempt of bankruptcy court for violation of automatic stay and ordered to pay debtor’s attorneys’ fees and damages caused by the violation of the stay). But see In re Charter First Mortgage, 42 Bankr. 380, 385 (Bankr. D. Or. 1984) (parties proceeding under one of the exemptions to the stay in § 362(b) may proceed as though no bankruptcy had been filed). See also H.R. REP. NO. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6298; S. REP. NO. 989, 95th Cong., 2d Sess. 51, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5837 which state in part, "[b]y excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay."

\textsuperscript{125} In re Schock, 37 Bankr. 399 (Bankr. D. N.D. 1984) (the automatic stay does not apply to actions in which the dissolution of the marriage bond is sought).

\textsuperscript{126} In re Flagg, 17 Bankr. 677, 679 (Bankr. E.D. Pa. 1982) (divorce action was stayed); Schulze v. Schulze, 15 Bankr. 106 (Bankr. S.D. Ohio 1981) (divorce action was stayed).

\textsuperscript{127} Murray, 31 Bankr. 499 (stay applied to action in which ex-spouse sought an adjudication of her rights to alimony and child support); In re Howard, 27 Bankr. 894 (Bankr. W.D. Ky. 1983) (state court proceeding against debtor seeking an award of separate maintenance was automatically stayed); In re Kaylor, 25 Bankr. 394 (Bankr. M.D. Fla. 1982) (stay applied to an application seeking spousal and child support); Schulze, 15 Bankr. 106 (automatic stay applied to action seeking order for child support); Amonte, 17 Mass.App. 621, 461 N.E. 2d 826 (stay applied to proceedings to award alimony and support); Rogers v. Rogers, 671 P.2d 160, 165 (Utah 1983) (automatic stay applied to state court action seeking an adjudication of alimony and child support).

\textsuperscript{128} Schulze, 15 Bankr. 106 (action seeking an order regarding custody of children was stayed).

\textsuperscript{129} Schock 37 Bankr. 399 (stay prevented continuation of action to divide marital property); Murray, 31 Bankr. 499 (stay applied to prevent partition of marital realty); Kaylor, 25 Bankr. 394 (stay applies to action to divide marital property).

\textsuperscript{130} 11 U.S.C. § 362(d).

\textsuperscript{131} On request of a party in interest and after notice and a hearing, the bankruptcy court is required to grant relief from the stay for "cause." Id. § 362(d)(1). Flagg, 17 Bankr. 677 (court lifted automatic stay to allow divorce action to proceed on the ground the debtor failed to establish that its continuation would interfere with bankruptcy case); Schulze, 15 Bankr. 106 (court lifted stay to allow continuation of divorce action).
exists, in the language of the legislative history of the Code, where there is a "desire to permit an action to proceed to completion in another tribunal" and a "lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case." In light of this statement of congressional intent, it is not difficult to discern why orders lifting the stay to allow the state court to determine rights to the custody of children and rights to alimony and spousal and child support are routinely granted.

In contrast, bankruptcy courts are generally unwilling to lift or modify the stay to allow a state court to enter orders dividing marital property if that property is property of the estate. These decisions are understandable perhaps less because of the fact that federal courts have exclusive jurisdiction of the debtor's and the estate's property as of the commencement of a bankruptcy case than because of the tension between the fundamental purposes of bankruptcy and a state court action dividing marital property. In liquidation cases, the debtor's assets are temporarily protected from the claims of individual creditors to allow an orderly and, in the case of unsecured creditors, collective distribution of nonexempt assets to be made to creditors. The value of an individual creditor's right to receive a share of nonexempt assets depends on the aggregate value of the nonexempt assets of the bankruptcy estate and the

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134. Schulze, 15 Bankr. 106 (court lifted the automatic stay in order to allow determination of matter relating to custody of children).
135. Murray, 31 Bankr. 499 (automatic stay modified to permit debtor's spouse obtain an adjudication of the awards of alimony and child support); Howard, 27 Bankr. 894 (court lifted automatic stay to permit state court proceedings against debtor for an award of maintenance); Kaylor, 25 Bankr. 394 (stay modified in order to allow debtor's wife to obtain an award of alimony and child support against debtor).
136. Schock, 37 Bankr. at 400 (refusing to lift stay to allow state court to enter any order affecting property of the estate); Murray, 31 Bankr. at 502 (refusing to modify or lift stay to allow partition of marital realty); Kaylor, 25 Bankr. 394 (refusing to lift stay either to allow division of property or to allow enforcement of any state court order affecting property of the estate). But see Schulze, 15 Bankr. 106 (modifying stay to allow division of marital property by state court). See also In re Willard, 15 Bankr. 898 (Bankr. 9th Cir. 1981) (state court order entered awarding marital homestead to wife after husband filed a Chapter 7 case did not bind the bankruptcy estate or affect title or character of property of the estate).
137. 28 U.S.C. § 1334(d) (1982); See, e.g., Teel, 34 Bankr. 762 (community property of both debtor and his spouse was property of the estate and, therefore, within the exclusive jurisdiction of bankruptcy court, thereby precluding state court division of marital property until close of bankruptcy case).
aggregate value of the claims against those assets. To the extent that assets are removed from the bankruptcy estate (as would occur in a state court action to divide marital property) after the commencement of the case, the value of an unsecured creditor’s right to a distributive share in the assets of the estate will be impaired. Thus, the purpose of an action to divide marital property—to split the value of assets between a non-debtor and debtor spouse—necessarily conflicts with the purpose of a liquidation case.

The decisions are split on the question of whether state court contempt proceedings arising out of the debtor’s disobedience of a state court order regarding alimony, maintenance, support, or a property settlement agreement are stayed. Bankruptcy courts have taken two approaches to this issue. Some courts approach the issue using a “purpose” analysis. If the purpose of the contempt proceeding is to punish the debtor for insubordinate conduct and to uphold the dignity of the state court, the contempt proceeding is not stayed. On the other hand, if the purpose of the contempt action is in fact to collect a debt, the action is stayed.

The second approach taken by the courts with respect to the question of whether contempt proceedings are stayed is to base the decision on whether the contempt proceedings arose out of disobedience to a state court order which was entered before or after the automatic stay was in place. If the contempt action concerns a state court order entered prior to the stay, the contempt action is not stayed, regardless of whether the sentence or fine for the contempt is made after the stay became effective. Presumably, the contempt action is stayed if the state court order which

138. In re Spagat, 4 F.Supp. 926, 927 (S.D.N.Y. 1933) (contempt proceedings were not stayed because through such proceedings court’s dignity was vindicated).

139. Guariglia v. Community Nat’l Bank and Trust Co., 382 F.Supp. 758, 761 (E.D.N.Y. 1974) (state court contempt order to collect debt through fine payable to creditor stayed) aff’d, 516 F.2d 896 (2d Cir. 1975); In re Thayer 24 Bankr. 491, 491-93 (Bankr. W.D. Wis. 1982) (contempt proceedings against debtor’s wife and her attorney for violating automatic stay by moving state court to enforce contempt order against the debtor as method to collect debt); In re Marriage of Lytle, 105 Ill. App. 3d 1095, 435 N.E.2d 522, 525 (1982) (state court contempt proceedings stayed because invoked as a sanction for failure to pay a property settlement obligation rather than to uphold “the dignity of the court”).

140. In re Hall, 170 F. 721 (S.D.N.Y. 1909) (debtor disobeyed state court order entered prior to the stay, and as a result, state court contempt proceedings for criminal contempt were not stayed by the bankruptcy court even though the fine was not awarded before the stay); In re Dumas, 19 Bankr. 676, 678 (Bankr. 9th Cir. 1982) (state court’s sentence for contempt entered after bankruptcy for disobedience of court order entered before bankruptcy not stayed); In re Ackerman, 28 Bankr. 509, 511 (Bankr. S.D.N.Y. 1983) (state court contempt action initiated before bankruptcy for failure to abide by the state court’s support order was stayed); Moore, 22 Bankr. at 202 (even though property of the bankruptcy estate is protected by the automatic stay debtor may proceed against debtor in state court by way of a contempt proceeding to enforce state court alimony award entered prior to stay).

Although the court in Dumas, 19 Bankr. at 677 cited David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977) for the proposition that contempt actions arising out of disobedience to state court orders
is the subject of the contempt action was entered after the stay was in place.

D. Consequences of a Violation

Serious consequences attend the decision to proceed against the debtor with any activity, such as a state court dissolution action or a contempt action for delinquent support, that may violate the automatic stay. Orders or judgments obtained in violation of the stay are frequently held to be nullities and attorneys as well as clients are regularly found in contempt of the bankruptcy court, fined, and ordered to pay damages for willful violations of the stay. An application of the rule that orders entered in violation of the stay are void could result in the invalidity of a dissolution order or decree and in other obvious and embarrassing consequences for attorney and client alike.

Many courts hold that judgments or orders obtained in violation of the automatic stay are void. The ancestor of this proposition is the Supreme Court’s decision, *Kalb v. Feuerstein,*141 in which the Court held that a foreclosure sale in violation of the stay was a nullity.

This rule has been applied frequently to a variety of actions, judgments, and orders entered in violation of the automatic stay imposed by section 362 of the Code.142 However, it has also been held that “the characterization of every violation of section 362 as being absolutely void [is] inaccurate and overly broad”143 due to the power of the court to annul entered prior to bankruptcy are not stayed, the court’s ruling in *Hooker* is ambiguous. The *Hooker* court cited both Spagat, 4 F. Supp. at 927 (any contempt order entered by state court for the purpose of upholding the dignity of the court is not stayed) and Hall, 170 F. 721 (state court order setting fine after bankruptcy filed not stayed because the disobedience to the state court order occurred prior to bankruptcy), and then simply decided that the contempt action was not stayed without explicitly adopting either approach.

141. 308 U.S. 433 (1940).

142. See, e.g., *In re Advent Corp.*, 24 Bankr. 612, 614 (Bankr. 1st Cir. 1982) (action to cancel bond void regardless of lack of knowledge of filing of bankruptcy case); *Willard,* 15 Bankr. at 900-901 (state court order dividing marital property after bankruptcy case was filed was effective between the parties but ineffective against the estate); *In re Scott,* 24 Bankr. 738 (Bankr. M.D. Ala. 1982) (foreclosure sale in violation of stay void regardless of creditor’s lack of knowledge of filing of bankruptcy case); *In re Miller,* 10 Bankr. 778, 780 (Bankr. D. Md. 1981) (repossession of debtor’s car violated stay and was void and without effect), aff’d, 22 Bankr. 479 (D.C. Md. 1982); *Young,* 14 Bankr. 809 (Bankr. N.D. Ill. 1981) (tax sale to satisfy prepetition debt was in violation of the stay and was null and void); *Johnson,* 16 Bankr. 193 (replevin judgment obtained in violation of the stay was void); United Northwest Fed. Credit Union Arena, 233 Kan. 514, 516, 664 P.2d 811, 813 (1983) (filing of foreclosure action was void and without effect); *Amonte,* 17 Mass. App. 621, 461 N.E.2d 826 (order for separate support entered in violation of stay was void); *Rogers,* 671 P.2d at 165 (state court order dividing marital property in violation of the automatic stay was “ineffective”). *Contra Willard,* 15 Bankr. at 900 (judgment of dissolution entered after filing of bankruptcy petition was not void by reason of automatic stay but judgment had no effect on property of the estate).

143. *In re Fuel Oil Supply and Terminaling, Inc.*, 30 Bankr. 360, 362 (Bankr. N.D. Tex. 1983) (good faith actions under sections 542(c), 546, and 549(c) not absolutely void).
the automatic stay.\textsuperscript{144} The use of the word "annul" in section 362(d) has been interpreted to authorize the bankruptcy court to exercise its discretion and ratify a state court judgment obtained in violation of the stay.\textsuperscript{145}

Whether actions, judgments, or orders in violation of the stay are void or voidable, it is clear that their validity is, at best, subject to the discretion of the bankruptcy court. Caution being the better part of valor, the wise family law lawyer will seek leave of the bankruptcy court before proceeding with any action that arguably violates the automatic stay.\textsuperscript{146}

The Code also provides pecuniary disincentives for continuing any action or activity in violation of the stay without an order lifting, terminating, or modifying the automatic stay. Actual damages, including costs and attorneys' fees, and, in appropriate circumstances, punitive damages may be recovered by any individual injured by a willful violation of the automatic stay.\textsuperscript{147} Willful violation of the stay means intentional or deliberate action to violate the stay.\textsuperscript{148} An award of punitive damages is based on the gravity of the offense and should be set at a sufficient amount to ensure that the offending party is punished and deterred from such conduct.\textsuperscript{149} Action taken in ignorance of the stay or the filing of the bankruptcy case generally is not considered a willful violation.\textsuperscript{150}

\textsuperscript{144} 11 U.S.C. § 362(d).

\textsuperscript{145} Oliver, 38 Bankr. at 248 (foreclosure proceedings in violation of automatic stay were not void because the debtor did nothing to attempt to enforce the stay for a period of seven months); \textit{In re Mellor}, 31 Bankr. 151, 154 (Bankr. 9th Cir. 1983) (bankruptcy court could ratify state court judgment obtained in violation of the automatic stay), \textit{rev'd on other grounds}, 734 F.2d 1396 (9th Cir. 1984). On appeal, the Ninth Circuit Court of Appeals refused to reach "the serious question which is presented where a bankruptcy court purports to annul an automatic stay in order to attempt retroactively to validate avoid state court judgment. . . . Since, in the instant matter, the Appellate Panel's decision construing the validity of an attempt to annul retroactively an automatic stay in order to avoid the rule of Kalb v. Feuerstein was based on a faulty factual and legal premise, the decision appealed from should not be given any precedential effect." \textit{Id.} at 1402.

\textsuperscript{146} A request for relief from the automatic stay must be made by motion in the bankruptcy court. Bankruptcy Rules 4001(a); 9014. The automatic stay may be lifted "for cause, including the lack of adequate protection of an interest in property" of the moving party and with respect to a stay of an act against property, where the debtor has no equity in the property and it is not necessary to an effective reorganization. 11 U.S.C. § 362(d).

\textsuperscript{147} 11 U.S.C. § 362(h).

\textsuperscript{148} \textit{In re Tel-a-Communications Consultants, Inc.}, 50 Bankr. 250, 254 (Bankr. D. Conn. 1985) (willful, in the context of § 523(a)(6), which relates to the nondischargeability of debts caused by willful and malicious injury to the person or property of another entity, has been construed to mean intentional or deliberate); \textit{In re Mercer}, 48 Bankr. 562, 565 (Bankr. D. Minn. 1985) (punitive damages may be awarded if the offending party has committed an intentional wrong without any legal justification).

\textsuperscript{149} Mercer, 48 Bankr. at 564 (stereo rental company required to pay $5,000 in punitive damages for egregious conduct while repossessing stereo equipment in violation of the stay); \textit{In re Shriver}, 46 Bankr. 626, 627 (Bankr. N.D. Ohio 1985) (debtor's own bad faith conduct precluded an award of damages).

\textsuperscript{150} Van Hoose, 31 Bankr. 332 (ex-wife's letter to judge technically violated stay but court held a finding of contempt was not warranted because she was merely expressing concern about paying marital debts due to ex-husband's bankruptcy); \textit{In re Ramage}, 39 Bankr. 37 (Bankr. E.D. Pa. 1984) (former spouse not held in contempt for continuing litigation against debtor after bankruptcy because
Violators of the stay can also be held in contempt of court.\textsuperscript{151} Some courts require evidence that the violators had actual knowledge of the stay before imposing a contempt sanction.\textsuperscript{152} Others require only evidence that the violator had notice or actual knowledge of the filing of the bankruptcy petition and infer knowledge of the existence of the automatic stay.\textsuperscript{153} Attorneys\textsuperscript{154} as well as clients\textsuperscript{155} have been held in contempt of court and are frequently ordered to pay the debtor's attorney's fees and costs incurred by reason of the violation of the stay.

\textbf{E. Duration}

The automatic stay does not remain in effect forever. It may be terminated or modified by the bankruptcy court on motion of a party in interest if sufficient grounds for doing so exist.\textsuperscript{156} However, even if relief she mistakenly believed the debt was nondischargeable); \textit{In re Gray}, 41 Bankr. 759 (Bankr. S.D. Ohio 1984) (recipient who commenced contempt action for nonpayment of child support in violation of stay not subject to sanction because she acted as an innocent and uninformed instrument of the county); \textit{Johnson}, 16 Bankr. 193 (individual who proceeded in nonbankruptcy forum in violation of stay not held in contempt because element of intentional willfulness was lacking).

151. \textit{Bailey}, 20 Bankr. 906 (attorney held in contempt for violating the stay by securing a lien on the debtor's homestead even though he thought the stay did not apply); \textit{Thayer}, 24 Bankr. 491 (ex-spouse and her attorney found in contempt for bankruptcy court for proceeding with state contempt action for delinquent support and property settlement obligations).


153. \textit{In re} Zartun, 30 Bankr. 544, 546 (Bankr. 9th Cir. 1983) (knowledge of bankruptcy "... is the legal equivalent of knowledge of the stay"); \textit{Bailey}, 20 Bankr. at 913 (debtors' attorney's erroneous belief that stay did not apply was insufficient to show excuse for violation); \textit{Thayer}, 24 Bankr. at 493 (ex-spouse and her attorney found in contempt of bankruptcy court for proceeding with state contempt action for delinquent support and property settlement obligations).

154. \textit{Bailey}, 20 Bankr. 906 (ex-spouse's attorney found in contempt for fixing lien on debtor's exempt property to satisfy divorce judgment in violation of stay and ordered to pay debtor's attorney's and witness' fees incurred as a result of the violation).

155. \textit{Pody}, 42 Bankr. 570 (ex-spouse found in contempt of bankruptcy court for refusing to release garnishment on debtor's wages in violation of the stay and liable for debtor's attorney's fees and damages for loss of use of wages, embarrassment, and anguish); \textit{Stamper}, 17 Bankr. 216 (ex-spouse found in contempt of the bankruptcy court and held liable for debtor's attorney's fees for proceeding with state court contempt action before requesting a determination from bankruptcy court that obligations pursuant to divorce decree were excepted from discharge and the automatic stay).

156. Section 362(d) provides:

\begin{itemize}
  \item On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
  \item (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
  \item (2) with respect to a stay of an act against property under subsection (a) of this section, if—
    \begin{itemize}
      \item (A) the debtor does not have an equity in such property; and
      \item (B) such property is not necessary to an effective reorganization.
    \end{itemize}
\end{itemize}

from the automatic stay is not obtained, eventually the stay terminates just as it arose—automatically and without the necessity of a court order.

The automatic stay of any act against property of the estate continues until the property is no longer property of the estate. Thus, alimony, maintenance, and support claimants who wish to proceed against property of the estate must determine when it ceases to exist as such.

As has already been discussed, property claimed as exempt by the debtor eventually leaves the bankruptcy estate and ceases to exist as property of the estate. Such property is then referred to as the property of the debtor or as exempt property. It will also be recalled that wages earned after the bankruptcy case are not property of the estate in Chapter 7 or 11 cases but, in general, are property of the estate in Chapter 13 cases.

In addition, property of the estate ceases to exist as such upon its sale or abandonment. As is the case with exempt property, the Code is silent as to when sale or abandonment of property of the estate has the effect of transforming its status to non-estate property, but it is likely that this transformation is effective in uncontested situations when the property is actually sold or abandoned. Usually the trustee abandons property to the person with a possessory interest in the property. This person typically will be the debtor. Thus, abandoned property frequently becomes property of the debtor.

To the extent that an act against the debtor or an act against property of the debtor is stayed by the provisions of section 362, the stay is not terminated "if the property leaves the estate and goes to the debtor" as frequently occurs when the trustee abandons property. In such cases, the stay continues until the earliest of three events: the time the case is closed or dismissed or the time the debtor is granted a discharge.

Thus, a property settlement claimant whose claim is secured by an en-

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158. See, e.g., Id. §§ 362(a)(5), 522(c). See supra notes 118-20 and infra 178-84 and accompanying text.
159. See supra notes 49-77 and 108-20 and accompanying text.
161. Kennedy, supra note 92, at 38.
162. See Bankruptcy Rules 6004 and 6007 for the procedural rules associated with sales and abandonments.
164. 11 U.S.C. § 350(a) and Bankruptcy Rule 5009 provide that when an estate has been fully administered and the court has discharged the trustee, the case shall be closed by the bankruptcy court.
165. 11 U.S.C. §§ 305, 349, 1112, and 1307 govern the dismissal of bankruptcy proceedings.
166. Id. § 362(c)(2). Id. §§ 524, 727, 1141, and 1328 govern discharge. See infra notes 189-226 and accompanying text.
forceable lien on property abandoned by the trustee to the debtor may
not proceed against the property, absent an order lifting the stay, until
one of the three events listed above occurs.

V. THE DISCHARGE AND DISCHARGEABILITY
OF FAMILY OBLIGATIONS

The bankruptcy discharge is the principal mechanism through which
"the honest debtor [is relieved] from the weight of indebtedness which
has become oppressive and [is permitted] to have a fresh start. . . ." 167
In general, all debtors receive the benefit of a discharge and all debts are
dischargeable in bankruptcy. 168 However, under certain circumstances, a
debtor can be denied a discharge of his debts. 169 In the event the debtor
is denied a discharge, the debtor remains personally liable for all debts. 170
A debtor may be denied a Chapter 7 or Chapter 11 discharge as a result
of the debtor's status, 171 pre-petition conduct which is in some sense
unethical or fraudulent, 172 or as a result of a previous discharge in bank-
ruptcy. 173 A Chapter 13 discharge is more readily available and can be
obtained if the debtor completes all or a specified percentage of the
payments called for in the Chapter 13 plan. 174

Even where the debtor receives a discharge, he remains liable for debts
which are not dischargeable in bankruptcy. 175 Some debts are not dis-

169. Id. §§ 727(a), 1141(d)(3), 1328(a)-(b).
170. Id. § 524. Where the debtor is denied a discharge, the creditors may recommence collection
efforts against the debtor when the bankruptcy case is closed or dismissed, whichever occurs earlier.
Id. § 362(c).
171. Only individuals receive a Chapter 7 discharge. Id. § 727(a)(1).
172. A debtor may be denied a discharge for engaging in a fraudulent conveyance [Id. § 727(a)(2)],
for concealing, destroying, or falsifying financial books or records [Id. § 727(a)(3)], or engaging in
specified fraudulent or otherwise objectionable conduct in connection with the bankruptcy case [Id.
§ 727(a)(4)-(7)]. See also Id. § 1141(d)(3)(C) which deprives an individual Chapter 11 debtor of a
discharge if the debtor would have been denied a discharge under Chapter 7. In addition, a Chapter
11 debtor's eligibility for a discharge depends on the nature of the Chapter 11 plan and whether the
debtor engages in business after consummation of the plan. Id. § 1141(d)(3)(A)-(B).
173. An individual seeking a Chapter 7 or 11 discharge will not receive one if the debtor received
a previous discharge under Chapter 7 or Chapter 11 within the six years prior to the filing of the
bankruptcy petition. Id. §§ 727(a)(8), 1141(d)(3)(C). An individual who received a Chapter 13
discharge within the six years immediately preceding Chapter 7 petition is nevertheless eligible for
a Chapter 7 discharge under certain circumstances. Id. § 727(a)(9).
174. Id. § 1328(a)-(c). There are two types of Chapter 13 discharges. More debts are dischargeable
under an 11 U.S.C. § 1328(a) discharge than under a "hardship" discharge under 11 U.S.C. § 1328(b)
(1982). Compare id. § 1328(a)(2) with § 1328(c)(2).
175. Id. §§ 523(a), 1141(d), 1328(a)-(c). Individuals receiving a Chapter 11 discharge or a Chapter
13 hardship discharge may discharge only those debts dischargeable in a Chapter 7 case. Id. §§ 1141(d)(2),
1328(c)(2). However, a "regular" Chapter 13 discharge will discharge many debts which are other-
chargeable because they were incurred fraudulently or as a result of other socially undesirable conduct. Others are not dischargeable because of the nature of the debt itself. Part V of this Article considers an exception to debt dischargeability which falls into the latter category: the exception to discharge for debts in the nature of alimony, maintenance, and support.

A. Historical Background

Even before Congress codified an exception to discharge for family support obligations, debtors were unable to discharge family support obligations in bankruptcy. In *Audubon v. Shufeldt*, the United States Supreme Court held that alimony could not be characterized as a provable debt because it "did not arise from any business transaction, but from the relation of marriage" and was "not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife." Since only provable debts could be discharged in bankruptcy, post-marital family obligations could not be discharged.

Shortly thereafter, the Court held that a child support obligation could not be discharged in bankruptcy even though the obligation was evidenced by a contract and had not been incorporated into the divorce decree. Congress and the Supreme Court quickly laid to rest any remaining doubts concerning the nondischargeability of family support obligations. In 1903, Congress codified an exception to discharge for family obligations and, in 1904, the Supreme Court held that this statute was merely declaratory of existing law. The language of the statutory exception to discharge

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176. For example, debts incurred through the use of false pretenses, false representations, or false financial statements are nondischargeable (*Id.* § 523(a)(2)), as are those incurred as a result of embezzlement, larceny, or defalcation while acting in a fiduciary capacity (*Id.* § 523(a)(4)). Debts arising from the debtor's willful and malicious injury to persons or property and from the debtor's operation of a motor vehicle while intoxicated are also nondischargeable under § 523(a)(6) and (9).

177. Debts for taxes and student loans of specified vintages as well as fines and penalties owed to governmental units are nondischargeable. *Id.* §§ 523(a)(1), 523(a)(7), 523(a)(8). In addition, debts for alimony, maintenance, and support are nondischargeable. *Id.* § 523(a)(5). Section 523(a)(2)(c) declares consumer debts for "luxury goods or services" incurred within a specified time frame to be nondischargeable. Creditors whose debts are not discharged in bankruptcy may recommence collection efforts against the debtor as soon as the bankruptcy case is closed or dismissed or the debtor receives a discharge, whichever occurs earlier. However, the property to which they may look in satisfaction of their nondischargeable debts is usually restricted to nonexempt property. *Id.* §§ 362(c), 522(c)(1). See infra notes 289-98 and accompanying text.

178. 181 U.S. 575 (1901).

179. *Id.* at 577.

180. Under the Bankruptcy Act, a debt included "any debt, demand, or claim provable in bankruptcy. . . ." Bankruptcy Act of 1898, ch. 541, § 1, 30 Stat. 544 (repealed 1979).


183. Wetmore, 196 U.S. 68.
for family support obligations did not change until the enactment of the Bankruptcy Code in 1979. 184

Under the present Bankruptcy Code, debts for alimony, maintenance, and support are nondischargeable obligations under section 523(a)(5). 185 To be nondischargeable, a familial obligation must be a debt to a spouse, former spouse, or child of the debtor for alimony, maintenance, or support which arose in connection with a separation agreement, divorce decree, or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or in connection with a property settlement agreement. 186 It is not enough that the debt be designated as alimony, maintenance, or support. The obligation will be discharged unless it is actually in the nature of alimony, maintenance, or support. 187 An otherwise nondischargeable familial obligation can be discharged if it has been assigned, unless the assignment was made to a governmental entity or pursuant to section 402(a)(26) of the Social Security Act. 188

B. Distinguishing Support Obligations from Property Settlement Obligations

In all types of chapter proceedings under the Bankruptcy Code, an individual’s family support obligations are nondischargeable. Obligations arising from efforts to divide marital property, however, are dischargeable

184. The statute stated in part that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities . . . for alimony due or to become due, or maintenance or support of wife or child. . . ." Act of Feb. 5, 1903, Pub. L. No. 57-62, ch. 487, §5, 32 Stat 797, 798 (amending Bankruptcy Act of 1898, ch. 541, §17, 30 Stat. 544, 550) (repealed 1979).
185. Section 523(a)(5) of the Bankruptcy Code provides in part:
   (a) A discharge . . . does not discharge an individual debtor from any debt—
   (5) to a spouse, former spouse, or child of the debtor, for alimony to, main-
   tenance for, or support of such spouse or child, in connection with a
   separation agreement, divorce decree, or other order of a court of record,
   determination made in accordance with State or territorial law by a gov-
   ernmental unit, or property settlement agreement, but not to the extent
   that—
   (A) such debt is assigned to another entity, voluntarily, by operation of
   law, or otherwise (other than debts assigned pursuant to section 402(a)(26)
   of the Social Security Act, or any such debt which has been assigned
   to the Federal Government or to a State or any political subdivision
   of such State); or
   (B) such debt includes a liability designated as alimony, maintenance, or
   support, unless such liability is actually in the nature of alimony, main-
   tenance, or support . . .
187. Id. § 523(a)(5)(B).
188. Id. § 523(a)(5)(A).
It is usually relatively simple to determine if a debt represents an obligation for child support. However, the critical task of distinguishing between a spousal support obligation and a property settlement obligation is far more difficult since the court, and the parties themselves, frequently take into account either the amount of marital property to be transferred to a recipient spouse when making an award of spousal support or the award of spousal support to the recipient spouse when dividing marital property. As a result, the characterization of the obligation as spousal support or as a property settlement in a court order or an agreement between the parties does not always reflect the true nature of the obligation.

Despite the difficulty of distinguishing between the two types of obligations, section 523(a)(5)(B) of the Code requires that such a distinction be made. This section defines the scope of the marital discharge exception by providing that a family support debt is nondischargeable only if "such liability is actually in the nature of alimony, maintenance, or support." As a result, labels placed on an obligation by the parties or the state court in the divorce decree or marital property settlement agreement do not control the determination of whether the debt is dischargeable in bankruptcy.

The legislative history of the family support exception to discharge indicates that Congress intended the determination of the status of the obligation to include more than an inquiry into the state law classification of the obligation: "What constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not state law." State law has not become entirely irrelevant, however, because there is

189. Id. §§ 523(a)(5), 1141(d)(2), 1228(a), (c), 1328(a), (c); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984); In re Matten, 658 F.2d 466 (7th Cir. 1981). Obligations for alimony, maintenance, and spousal and child support are referred to as "family support" obligations or debts throughout this and the following six sections.


192. In re Bedingfield, 42 Bankr. 641, 645-46 (Bankr. S.D. Ga. 1983) (applying principle that dischargeability is determined by substance of liability rather than form, court held agreement to pay additional monthly payments, second mortgage on house, bank note, and law school expenses was intended as property settlement and dischargeable); In re Anderson, 21 Bankr. 335, 338 (Bankr. S.D. Cal. 1982) (dissolution agreement expressly stating that wife was to receive a percentage of debtor's military pension as her share of community property held to be actually in the nature of support and nondischargeable); In re Hughes, 16 Bankr. 90, 92 (Bankr. N.D. Ala. 1981) (agreement to pay second mortgage and bill owed to hospital was actually promise to provide support to former wife and nondischargeable); Bailey, 20 Bankr. at 909 (labels and recitations in divorce decree not determinative of nature of award, but rather court must look to the form of the award, and the circumstances of the parties to determine whether a need for support exists).

"no federal law of domestic relations." Indeed, these matters which traditionally have been viewed as falling within the exclusive domain of the state courts. Consequently, the courts are not uniform in the degree of reliance they place on state law in distinguishing between support and property settlement obligations nor in the general approach used to make this distinction. The alternative approaches to this question are examined in detail in this section but may also be briefly summarized.

In some jurisdictions, the state's law which otherwise governs the obligation plays a primary role in determining whether the debt is a dischargeable property settlement obligation or a nondischargeable support obligation. In others, general principles of the law of domestic relations, rather than specific state law, are considered in this determination. Many courts emphasize the parties' or the family court's intention in creating the obligation in characterizing it for the purpose of discharge. There is a split of authority regarding the propriety of examining the parties' present or past financial circumstances in determining whether a debt represents a nondischargeable support obligation.

1. The Role of State Law

Whatever the approach taken, state law cannot be ignored when determining whether a debt represents a support obligation. However, the manner and degree to which state law plays a role in this determination varies widely. It is frequently held that state law can provide useful guidance, but that its characterization of the obligation is not binding. Therefore, in determining whether an obligation is a nondischargeable support debt, some courts consider the same factors generally used by state courts in the decision whether to impose a support obligation. While some courts focus exclusively on the factors relevant under the particular

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196. See, e.g., In re Calhoun, 715 F.2d 1103, 1107-08 (6th Cir. 1983) (Congress did not intend bankruptcy courts to ignore well-developed state law principles in determining whether assumption of loan was in the nature of alimony or support); In re Spong, 661 F.2d 6, 9 (2d Cir. 1981) (Congress did not intend for federal courts to formulate the bankruptcy law of alimony and support in a vacuum without any reference to well-established state law).
197. See, e.g., Matilen, 658 F.2d at 467 (court looked to Indiana case law for principles to guide interpretation of the nature of agreement to pay debts); In re King, 15 Bankr. 127, 129 (Bankr. D. Kan. 1981) (although bankruptcy courts are not bound by state law characterization of debts, most courts look to state law, as well as the dissolution decree, for guidance); In re Dirks, 15 Bankr. 775, 779 (Bankr. D.N.M. 1981) (bankruptcy court has power to look at the language and intent of a state court order regarding family support obligations or property settlements to insure their power is not abused by a mischaracterization of the nature of such obligation).
state's family law, others concentrate on general principles of the law of domestic relations.

The factors most frequently considered by courts concentrating on general principles of domestic relations law include: the presence or absence of provisions for alimony, maintenance, or support in the divorce or separation decree or marital property agreement; the absolute or contingent nature of the award (i.e., whether it terminates or survives upon the former spouse's death or remarriage or upon the children reaching majority); the method by which the debt may be enforced (i.e., by execution and levy or by contempt proceedings); whether the award is final or is subject to modification due to changed circumstances; whether the obligation is payable in a lump sum or periodically; the length of the marriage; the existence of children from the marriage; the relative earning power of the parties; the age, health, and work skills of the parties; and the label given the award by the state court.

Several courts have focused on whether or not there is an underlying state law obligation to pay alimony, maintenance, or child support in determining the nature of the obligation. Under this approach, any obligation arising out of a dissolution decree or marital property agreement would presumably be dischargeable if there is no obligation to provide such support under state law, even if the parties intended the obligation to function as support. However, the judicial trend and the better view

198. *Maiden*, 658 F.2d at 468-69 (court looked to Indiana case law for factors to consider in distinguishing property division from support obligations such as the location of the provision in the separation agreement which created obligation, whether children were involved, indications that obligation was intended to balance the relative income of the parties, whether the obligation terminated upon death or remarriage); *Rule v. Rule*, 612 F.2d 1098 (8th Cir. 1980) (court looked to Arkansas law and concluded that husband's obligation to pay alimony did not terminate automatically upon wife's remarriage and that remarriage was only one factor to be considered); *Dirks*, 15 Bankr. 775 (factors used under New Mexico's law to determine nature of an obligation include value and income of property awarded; wife's need after division of community property; wife's age, health, and means of support; wife's work experience; husband's earning capacity and future earnings; length of marriage; amount of property owned by each; whether obligation was modifiable; and whether obligation terminated on remarriage or death).


201. See, e.g., *Calhoun*, 715 F.2d at 1107 (state law can not be ignored in determination of nature of obligation and bankruptcy court erred in holding that language of separation agreement controlled dischargeability issue); *In re Knight*, 29 Bankr. 748, 751-52 (W.D.N.C. 1983) (North Carolina legislation and case law supported finding that counsel fees were in the nature of alimony); *Miller*, 8 Bankr. 174 (hold harmless agreement representing debts for travel trailer, general merchandise, and gasoline purchases which were not property or services necessary for support of ex-wife and child was dischargeable); *In re Pelikant*, 5 Bankr. 404, 407 (Bankr. N.D. Ill. 1980) (award of attorney's fees under Illinois statute is based on husband's duty to support wife, and therefore, falls within definition of alimony for purposes of dischargeability).
runs counter to this criterion for dischargeability. Several circuits have characterized debts which could not have been imposed under the applicable state law legal duty of support as nondischargeable support obligations. These decisions and those in which general principles of family law are applied rather than a specific jurisdiction's family law appear to federalize family law for purposes of the dischargeability determination.

2. The Intention of the Parties

The parties' intentions are also relevant in deciding whether the family obligation is in the nature of support, particularly where a more federal approach to the dischargeability of family obligations determination is taken. Whether the parties intended a particular obligation to serve as support may be discerned directly from an examination of contracts and agreements between them or indirectly from an examination of the factors frequently considered by state courts in making an award of support.

3. The Form of the Obligation

The form of payment of the obligation does not determine whether or not it is dischargeable. Periodic payment obligations have been held to represent nondischargeable support obligations as well as dischargeable

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202. In re Harrell, 754 F.2d 902, 904-05 (11th Cir. 1985) (obligation to pay postmajority child support and educational expense was nondischargeable support obligation even though state law did not require parent to support child after age eighteen); Shaver, 736 F.2d at 1316 (obligation owed former spouse would not be considered alimony under state law but was nevertheless nondischargeable as support obligation); Boyle, 724 F.2d at 683 (debtor's obligation to pay educational expenses was nondischargeable child support obligation even though there was no state law duty to provide such support). See also In re Williams, 703 F.2d at 1055, 1057 (8th Cir. 1983) (obligation for attorneys' fees was nondischargeable support obligation despite fact it was not considered support for some purposes under state law).

203. Boyle, 724 F.2d at 683 (critical question in dischargeability determination is the function parties intended agreement to serve at the time they entered into it); Calhoun, 715 F.2d at 1109 (initial inquiry must be whether parties intended to provide support by assumption of joint debts and, if so, the next inquiry is whether such assumption has the effect of providing the support necessary to ensure former spouse's daily needs).

204. In re Altavilla, 40 Bankr. 938, 941 (Bankr. D. Mass. 1984) ($10,000 note payable to ex-wife was dischargeable where settlement agreement unambiguously characterized obligation as a property settlement, obligation did not terminate upon death or remarriage of the wife, and financial circumstances of the parties did not warrant inference that the obligation was intended as support). See also W. NORTON, NORTON BANKRUPTCY LAW AND PRACTICE § 27.61 (1981).

205. Shaver, 736 F.2d at 1316-17 ($150,000 debt payable over seventy-five month period was in the nature of support of minor children involved, former spouse was unemployed and possessed no job skills, and debtor had substantial income at time of divorce); Williams, 703 F.2d at 1057-58 (whether periodic payments labeled "property settlement" are in fact in the nature of a property settlement rather than support, is a question of fact to be determined in light of all the facts and circumstances relevant to the intention of the parties); Bedingfield, 42 Bankr. at 647 ($1,500 monthly payments payable to former wife until her death or remarriage, and $350-per-child monthly payments payable until each finish a four-year college program, were found to be alimony and child support); In re Bradley, 17 Bankr. 107, 110-11 (Bankr. M.D. Tenn. 1981) (periodic payments were nondischargeable support obligations where payable over a potentially long period of time, not for a total sum, terminated upon debtor's death, paid directly to ex-spouse, and a child was involved).
property division obligations. Lump sum obligations have been characterized as debts for family support as well as property settlement debts. Nondischargeable support obligations have also been found to exist where the debtor was obliged to pay a portion of his retirement benefits to the former spouse, to pay for the family’s medical treatment, and to pay the former spouse one-half the sale proceeds of the marital home. Obligations as varied as a promise to transfer a farm, to pay one-half of certain retirement benefits, and to pay the former spouse one-half the proceeds of a bank account have been held to represent property settlement obligations. Obligations payable to third parties can be in the nature of support and therefore nondischargeable, or they can be in the nature of a property settlement obligation and thus dischargeable in bankruptcy.

4. The Present Financial Circumstances of the Parties

All jurisdictions in the United States allow alimony and support obligations due after the date of a petition or a motion for modification to be modified upon a showing of changed financial circumstances. In

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206. Altavilla, 40 Bankr. at 941 ($10,000 note payable to ex-wife in monthly installments was dischargeable because was in the nature of a property settlement); Bedingfield, 42 Bankr. at 648-49 (obligation to pay additional alimony of $423.69 per month for twelve years, regardless of remarriage or death, was not actually in the nature of support); In re Presler, 34 Bankr. 895, 898-99 (Bankr. M.D. Tenn. 1983) (agreement to pay “alimony in solido” in monthly installments until total sum paid was dischargeable because not in the nature of support where ex-spouse had substantial independent income of her own).

207. In re Froman, 43 Bankr. 609, 612-13 (Bankr. S.D. Fla. 1984) (promissory notes payable to ex-spouse were in the nature of “lump sum” alimony where without alimony, the award would have been seventy-five dollars per month, which was inconsistent with the intentions of the parties for the wife to remain at home and raise the child); In re Kline, 42 Bankr. 141, 143 (Bankr. N.D. Ohio 1984) (lump sum payment was intended as support because the facts show ex-wife was on welfare, wanted to conclude all affairs with her ex-husband, believed the only way she would actually receive the money was to receive it in one payment rather than to rely on periodic payments, and there was very little property involved in the settlement).


212. Hansen, 44 Bankr. at 655-56.


215. See infra notes 230-46 for a discussion of hold harmless agreements and notes 247-61 and accompanying text for a discussion of the dischargeability of the debtor’s obligation, as a result of a dissolution order or marital property agreement, to pay the former spouse’s attorney’s fees and other third party obligations.

216. The state statutes and case law providing for modification of alimony and support payments are: Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725 (1961) (court has continuing jurisdiction to modify periodic payments in divorce decree upon proof of substantial change in circumstances);
most jurisdictions, however, modification is limited to future installments of alimony. In these states, any amounts which have accrued before the motion and which are unpaid will be neither modified nor revoked.217 A few jurisdictions, such as New York, allow modification of both accrued and future support payments.218

Debtors have argued that an examination of the present financial circumstances of both the debtor and the ex-spouse is relevant in the determination of the dischargeability of a family obligation. For example, in In re Harrell,219 the debtor argued that unpaid arrearages were dischargeable because the accrued payments were not necessary for the ex-spouse’s support due to her present financial circumstances. Therefore, the debtor argued, the accrued payments could not be characterized as in the nature of support.220 A similar argument was advanced by the debtor in Boyle v. Donovan221 with respect to accrued child support obligations.

The courts in both cases rejected the debtors’ arguments and held that


218. Id.

219. 754 F.2d 902, 906 (11th Cir. 1985).

220. Id. at 906.

221. 724 F.2d 681, 682-83 (8th Cir. 1984).
consideration of the parties' present financial circumstances was irrelevant in the dischargeability determination.\(^{222}\) The *Harrell* court reasoned that Congress intended the federal courts to limit their inquiry to "whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support."\(^{223}\)

Limited to their facts, these decisions are sound in light of the fact that accrued spousal and child support obligations are generally not modified by state courts.\(^ {224}\) However, a strong argument can be made that, with respect to future spousal and child support obligations, an examination of the parties' present financial circumstances is appropriate.

Bankruptcy courts and state courts have concurrent jurisdiction to determine the dischargeability of a family support obligation under section 523(a)(5).\(^ {225}\) Therefore, it is not outside the realm of possibility or propriety that the parties' present financial circumstances will be examined by a state court where the state court has been requested to determine the dischargeability of a future obligation. The present financial situation of the parties might be considered by the state court in the determination of whether the obligation continues to function as support and is thus in the nature of support or, more directly perhaps, if the debtor, opposing a determination of nondischargeability, also requests a modification of the state court decree.

If, instead, the matter comes to a head in the bankruptcy court and the court refuses to consider the parties' present pecuniary circumstances in the dischargeability determination, the debtor will be forced to litigate a second time in state court. When one considers the "fresh start" policy of the Bankruptcy Code, the expenses likely to be incurred by litigating for a second time in state court, and the certainty that Congress intended to prevent the discharge of obligations truly necessary for the support of the ex-spouse and children of the debtor, it is appropriate for the bankruptcy court to consider the present financial circumstances of the parties in the context of the discharge of future obligations. Doing so will not necessarily favor the debtor over the recipient spouse since a discharge of the debtor's other obligations may result in an improvement of the debtor's financial circumstances and, thus, the debtor's ability to pay future support.\(^ {226}\)

This position finds support in a Sixth Circuit case in which the court has held that an inquiry into the parties' present financial circumstances

\(^{222}\) Id. at 683; *Harrell*, 754 F.2d at 906.

\(^{223}\) *Harrell*, 754 F.2d at 906.

\(^{224}\) See supra note 216.

\(^{225}\) See 11 U.S.C. § 523(c); *In re Aldrich*, 34 Bankr. 776, 780 (Bankr. 9th Cir. 1983); *In re Mattern*, 33 Bankr. 566, 568 (Bankr. S.D. Ala. 1983).

was required in the determination of whether a current and continuing obligation is a nondischargeable support obligation.\textsuperscript{227} The court expressly confined its holding to future obligations. The court noted: "There has been no claim that [the debtor was] in arrears on past payments due under this obligation. The dischargeability of such unpaid past liabilities requires an analysis distinct from consideration of whether the continuing obligation to hold harmless may be discharged.\textsuperscript{228} Subsequent cases adopting this approach have so limited their consideration to the parties’ present financial circumstances.\textsuperscript{229}

C. Hold Harmless Agreements

Not all support obligations require the periodic payment of money directly to the former spouse or child. However, the statutory language of the family support exception to discharge appears to require that a debt must be owed to the spouse, former spouse, or child of the debtor, rather than to a third party, to be nondischargeable as a support obligation.\textsuperscript{230} As a result, the courts have struggled with the issue of whether the debtor’s obligation to pay a debt jointly incurred during marriage for which the debtor has agreed to hold the former spouse harmless is dischargeable despite the fact that it is in the nature of support.\textsuperscript{231}

The legislative history regarding this question is conflicting. At one point it indicates that to be nondischargeable, a support obligation must be payable directly to the former spouse.\textsuperscript{232} At another point, it indicates that no such requirement exists in the case of hold harmless agreements.\textsuperscript{233}

The majority of courts which have considered the question have adopted

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\item \textsuperscript{227} In re Calhoun, 715 F.2d 1103 (6th Cir. 1983).
\item \textsuperscript{228} Id. at 1109 n.9.
\item \textsuperscript{229} See, e.g., Bedingfield, 42 Bankr. at 646; Ploski, 44 Bankr. at 913; Elder, 48 Bankr. 414; In re Wright, 51 Bankr. 630 (Bankr. S.D. Ohio 1985).
\item \textsuperscript{230} 11 U.S.C. § 523(a)(5)(B) provides in part: "A discharge . . . does not discharge an individual debtor from any debt—to a spouse, former spouse, or child of the debtor. . . ."
\item \textsuperscript{231} See, e.g., Dirks, 15 Bankr. at 780-81 (hold harmless obligation dischargeable in bankruptcy because such an agreement amounts to an assignment of support under section 523(a)(5)(A)).
\item \textsuperscript{232} The legislative history provides:
Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (43 U.S.C. § 656(b)) by section 327 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent (emphasis supplied).
\item \textsuperscript{233} This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that
the better view that if the obligation is in the nature of support, it need not be payable directly to the spouse, former spouse, or child of the debtor to constitute a nondischargeable debt.\textsuperscript{234} Naturally, the obligation is dischargeable if it is in the nature of a property settlement.\textsuperscript{235} Under one of the approaches used in determining whether the hold harmless obligation is in the nature of support, the courts analyze the obligation as they do any other obligation owed directly to the spouse or child under the family support exception, such as by examining the intentions of the parties and the family court in creating the obligation,\textsuperscript{236} the debtor’s ability to pay,\textsuperscript{237} or factors such as whether the obligation terminates on the death or remarriage of the former spouse.\textsuperscript{238} In contrast, the Sixth Circuit articulated an elaborate federal standard against which to evaluate hold harmless agreements for purposes of the family support exception to discharge in \textit{In re Calhoun}.\textsuperscript{239} The Sixth Circuit’s standard requires an

\begin{itemize}
\item are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.
\item \textit{Calhoun}, 715 F.2d at 1106-07 (payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable); \textit{Williams}, 703 F.2d at 1057 (debts payable to third parties can be nondischargeable depending on whether the particular debt is determined to be a support obligation or part of a property settlement); \textit{Maitlen}, 658 F.2d at 468-69 (obligation to make mortgage payments was a nondischargeable debt because termination of the obligation upon death or remarriage of the spouse was an indication that the obligation was support rather than a division of property); \textit{In re Coil}, 680 F.2d 1170 (7th Cir. 1982) (promise to hold spouse harmless for debts incurred during marriage was not dischargeable because the facts indicated the promise was intended to be support); \textit{In re Holt}, 40 Bankr. 1009, 1013-14 (S.D. Ga. 1984) (husband’s agreement to pay his wife’s attorney’s fees arising under a separation agreement is not dischargeable even though payable to a third party); \textit{Ploski}, 44 Bankr. at 914 (obligation to pay mortgage on the family home under a divorce decree was not dischargeable where the family home was given to the ex-wife for the necessary shelter of herself and her child); \textit{Bedingfield}, 42 Bankr. at 648-49 (a mortgage payment obligation was not dischargeable merely because the payments were not made directly to the spouse, but where such obligation is to continue even after the need for support terminates it is an indication that the obligation is a division of property rather than support, and therefore, dischargeable).
\item \textit{Coil}, 680 F.2d 1170 (hold harmless obligation was nondischargeable because it was intended to serve as support).
\item \textit{Bedingfield}, 42 Bankr. 641 (if an obligation substantially exceeds the debtor’s ability to pay, the amount of the obligation which exceeds that ability should not be characterized as support).
\item \textit{Ploski}, 44 Bankr. 911 (most pertinent question as to the nature of the obligation was whether it terminated upon the death or remarriage of the benefited spouse).
\item 715 F.2d 1103 (6th Cir. 1983).
\end{itemize}
analysis of 1) the parties' intention to create a support obligation, 2) the effectiveness of the obligation in providing support, and 3) the financial circumstances of the parties.

The initial inquiry is devoted to ascertaining whether either the state court or the parties intended to provide support through the hold harmless agreement. If not, the obligation is dischargeable and the inquiry at an end.240 Proof of intent to provide support may be found in any relevant evidence, including that evidence generally considered by state courts in determining whether to award support.241

The next issue to be addressed is whether the hold harmless agreement has the effect of providing support. If discharging the obligation would not negatively affect the former spouse's ability to sustain daily needs, it should be discharged.242 If its discharge would negatively affect the dependent spouse's ability to sustain daily needs, the obligation is in the nature of support.243

Finally, to hold that the obligation is fully nondischargeable, the court must determine that the amount of support represented by the agreement to pay the joint debt is "not so excessive that it is manifestly unreasonable under traditional concepts of support."244 In this regard, the debtor's past and present ability to pay the obligation is considered as well as the relative earning powers of the parties, their financial status, prior work experiences or abilities, and other traditional state law factors relevant to a decision to place a reasonable limit on support.245 The amount by which the obligation exceeds the reasonable limit of support should be discharged. To the extent that the obligation is within the reasonable limit of support, it should be deemed to be in the nature of support and held to be nondischargeable in bankruptcy.246

D. Obligations Owed to Attorneys and Other Third Parties

State court orders for spousal and child support take many forms. The debtor is frequently ordered to pay the ex-spouse's attorney's fees incurred in obtaining the divorce or custody decree.247 The state court often orders the debtor to pay family obligations, such as the ex-spouse's or children's

240. Id. at 1109. It also appears that there must be a recognized state law duty of support which may be expressed or satisfied in whole or in part through a hold harmless agreement. Id. at 1107.
241. Id.
242. Id.
243. Id.
244. Id. at 1110.
245. Id.
246. Id.
247. See, e.g., Spong, 661 F.2d at 9 (debtor's obligation to pay wife's attorney's fees in connection with dissolution proceeding was a debt for alimony and nondischargeable).
medical and educational expenses, which will arise in the future.\textsuperscript{248} Finally, the family court regularly orders the debtor to pay debts incurred jointly by the parties during the marriage, or by the ex-spouse alone. However, the court does not always include a hold harmless or indemnity provision in its order.\textsuperscript{249} As has already been observed, the legislative history of the family support exception regarding the dischargeability of support debts payable to third parties is conflicting.\textsuperscript{250} Under a strict statutory interpretation,\textsuperscript{251} adopted only by a small minority of courts, such obligations are arguably dischargeable even if they are in the nature of spousal or child support since they are not owed to or payable directly to the former spouse or child.\textsuperscript{252} In addition, the support obligation can be viewed as having been assigned to a third party (the creditor) and, as a result, is transformed into a dischargeable obligation.\textsuperscript{253} However, neither approach to the family support exception has been embraced by the overwhelming majority of courts facing the issue.\textsuperscript{254}

If a literal interpretation of the Code’s requirement that the debt must be owed to a spouse, former spouse, or child of a debtor to be nondis-

\textsuperscript{248} See, e.g., Bedingfield, 42 Bankr. at 643 (state court dissolution decree required husband to pay wife’s law school expenses, children’s educational expenses through college and a graduate degree, and medical and dental expenses of the children).

\textsuperscript{249} See, e.g., Maitlen, 658 F.2d at 467 (debtor ordered to pay mortgage on home but not to hold ex-spouse harmless for its payment); Knight, 29 Bankr. at 750 (debtor ordered to pay joint credit card obligations but not to hold ex-spouse harmless for their payment).

\textsuperscript{250} A joint statement issued by the Senate and House of Representatives shortly before Congress passed the 1978 Bankruptcy Code states in part:

If the debtor has assumed an obligation of the debtor’s spouse to a third party in connection with a separation agreement, property settlement agreement, or divorce proceeding, such debt is dischargeable to the extent that payment of the debt by the debtor is not actually in the nature of alimony, maintenance, or support of debtor’s spouse, former spouse, or child.


\textsuperscript{251} The author is mindful of the words of Judge Learned Hand: “There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route.” Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J. concurring), aff’d, 324 U.S. 193 (1945).

\textsuperscript{252} See, e.g., Dirks, 15 Bankr. 775 (debts to third parties which were intended for support were discharged because exceptions to discharge must be narrowly interpreted so as not to undercut the “fresh start” policy); In re Daiker, 5 Bankr. 348 (Bankr. D. Minn. 1980) (debts owed to Employees Credit Union, Master Charge, and the medical center were dischargeable because the payments were not made directly to former spouse).

\textsuperscript{253} 11 U.S.C. § 523(a)(5)(A) (1982); See, e.g., Dirks, 15 Bankr. at 779 (payment of debt to third party was intended as support, but under § 523(a)(5)(A), the debt was assigned and payable to another entity and thus dischargeable).

\textsuperscript{254} Thus, critics of the bankruptcy laws have less reason to embrace the belief of Mr. Bumble that “the law is a ass, a idiot.” \textsc{Charles Dickens, Oliver Twist}. 
chargeable is adopted, a ritualistic arrangement whereby the debtor funnels the payments through the spouse who in turn pays the creditor would be necessary to avoid discharge of the obligation.\footnote{255} As a result, the majority of courts faced with the question have adopted the better view that Congress did not intend support obligations to be discharged even though payable to the ex-spouse’s attorney\footnote{256} or to a third party as a result of a debt incurred either during the marriage\footnote{257} or after the marriage was dissolved.\footnote{258} The obligation need not be payable to the debtor’s former spouse or child, but its payment must be for their benefit in order for it to be a nondischargeable debt.\footnote{259} Attorneys to whom such obligations are owed have sufficient standing to object to the debtor’s discharge of the obligation.\footnote{260} Arguments that a support obligation payable to a third person transformed a nondischargeable obligation into a dischargeable debt be-

\footnote{255. Cf. In re Linn, 38 Bankr. 762, 763 (Bankr. 9th Cir. 1984) (debtor’s spouse not liable on obligation and, therefore, debt discharged even though in the nature of support).}

\footnote{256. Williams, 703 F.2d at 1057 (husband’s obligation to pay wife’s attorney’s fees arising out of divorce proceeding was support and, therefore, nondischargeable); Spong, 661 F.2d at 9-10 (obligation to pay wife’s legal bills in connection with divorce was in the nature of alimony and support); In re Gwinn, 20 Bankr. 233, 234 (Bankr. 9th Cir. 1982) (attorney fees awarded in post-divorce proceeding involving child support and custody and spousal support were not dischargeable); Holt, 40 Bankr. at 1013 (award of attorney’s fees may be essential to spouse’s ability to sue or defend a matrimonial action and, therefore, are in the nature of support and nondischargeable); In re Tessler, 44 Bankr. 786, 787-88 (Bankr. S.D. Cal. 1984) (debtor’s obligation to pay ex-wife’s attorney’s fees as part of his responsibility to provide child support was not dischargeable); In re Romeo, 16 Bankr. 531, 536 (Bankr. D.N.J. 1981) (counsel fees equated with alimony because they cut expenses in litigating a matrimonial issue and put the spouses on equal footing to litigate).}

\footnote{257. Holt, 40 Bankr. 1009 (mortgage payments payable directly to mortgagee and intended as child support were not dischargeable); In re Rich, 40 Bankr. 92, 94 (Bankr. D. Mass. 1984) (obligation to pay unsecured home improvement loan obtained during marriage was not dischargeable); Altavilla, 40 Bankr. at 942 (obligation to pay real estate taxes was intended to provide support for wife until the real estate could be sold and was not dischargeable).}

\footnote{258. Boyle, 724 F.2d at 683 (8th Cir. 1984) (debtor’s agreement to pay sons’ college expenses as they came due was in the nature of support and not dischargeable); Holt, 40 Bankr. 1009 (a nondischargeable “debt” created by a separation agreement is an undertaking of a former spouse to pay past or future obligations of the other spouse); In re Breaux, 8 Bankr. 218, 220 (Bankr. W.D. La. 1981) (obligation, created by divorce decree a month and a half before the debtor’s child’s birth, to pay debts incurred in the birth of debtor’s child was not dischargeable).}

\footnote{259. Stranathan v. Stowell, 15 Bankr. 223, 226 (Bankr. D. Neb. 1981) (payments to third parties which are determined to be in the nature of support will not be dischargeable if the nonpaying spouse will receive any benefit from the payment of the debt); Holt, 40 Bankr. at 1012 (in determining the nature of a debt the court is to consider whether the debt was: (1) in connection with dissolution proceedings, (2) actually in the nature of support, and (3) benefits the debtor’s spouse or child); Tessler, 44 Bankr. at 788 (debt owed to ex-wife’s attorney not dischargeable where intended as alimony or support and the ex-wife received a present benefit from the payment of the debt).}

\footnote{260. Gwinn, 20 Bankr. at 234-35 (attorney successfully brought action to determine dischargeability of attorney’s fees awarded to debtor’s ex-wife); In re Whitman, 29 Bankr. 362, 363 (Bankr. D.R.I. 1983) (debtor’s wife’s attorney had standing to object to the dischargeability of the debt for attorney’s fees).}
cause it was assigned to a third party in contravention of section 523(a)(5)(A) have also been unsuccessful.261

E. Debtor's Spouse, Former Spouse, or Child

Apart from the questions raised in the event that support obligations are payable to third parties, the statutory language of the support exception which states that "a discharge . . . does not discharge"262 any support debt "to a spouse, former spouse, or child of the debtor"263 raises the question of which persons qualify as a child or spouse of the debtor. Support obligations owed to both legitimate264 and illegitimate265 children are nondischargeable in bankruptcy if the obligations arose in connection with a separation or property settlement agreement, a divorce decree, an order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.266

Congress' choice of the word "spouse"267 is significant since, under the former Bankruptcy Act, the family support exception excepted from discharge debts for alimony, maintenance, and support "of wife or child."268 Certainly, a former husband or husband of the debtor to whom a support obligation is owed is now protected by the exception. The extent to which Congress intended to extend the protections of the family support exception to putative spouses and unmarried cohabitants is unclear. Under the Bankruptcy Act, support obligations owed putative spouses269 and unmarried cohabitants270 were held to be dischargeable. These decisions stand for the proposition that under the Bankruptcy Act, support agreements or orders arising in connection with judgments of

261. Spong, 661 F.2d at 10 (obligation to pay wife's attorney's fees was not dischargeable because it was a third party beneficiary contract and not an assignment); Whitman, 29 Bankr. at 364 (fact that attorney's fees were awarded directly to the attorney did not render the debt dischargeable as being "assigned to another entity"); In re Kloss, 29 Bankr. 720, 721-22 (Bankr. M.D. Pa. 1983) (obligation to pay attorney's fees was a third party beneficiary contract executed in favor of the attorney and not an assignment). See infra notes 281-88 and accompanying text for a discussion of §523(a)(5)(A) which, with several important exceptions, provides that support obligations which have been assigned voluntarily, by operation of law, or otherwise, are dischargeable in bankruptcy.


263. Id. § 523(a)(5).

264. Id. See, e.g., Boyle, 724 F.2d 681 (father's promise to pay college expenses for his sons incorporated into the divorce decree was in the nature of support and nondischargeable).

265. 11 U.S.C. § 523(a)(5); See, e.g., In re Balthazor, 36 Bankr. 656 (Bankr. E.D. Wis. 1984) (obligation to pay expenses arising out of the birth of debtor's illegitimate child was not dischargeable).

266. 11 U.S.C. § 523(a)(5). See infra notes 273-80 and accompanying text for a discussion of the "in connection with" requirement of the family support exception to discharge.

267. "Spouse" is defined as a "wife or husband." BLACK'S LAW DICTIONARY 1258 (5th ed. 1979).


269. Norris v. Norris, 324 F.2d 826, 828-29 (9th Cir. 1963) (balance owed to putative spouse under a support order was discharged where marriage was subsequently declared void).

annulment were not excepted from discharge. The courts reasoned that there could be no nondischargeable support obligation because support obligations could only be grounded on a valid marriage and the order of annulment established that there was never a valid marriage.271 A narrow construction of the Code's support exception can also be supported.272

However, the better approach is to extend the support exception to support obligations owed to a putative spouse where the debt arose in connection with a property settlement agreement, an order of a court of record such as an order of annulment, or a determination made in accordance with State or territorial law by a governmental unit.273 This construction of the support exception not only reinforces the policy of parity between putative spouses and validly married spouses in jurisdictions which recognize the putative spouse's right to support, but also better effectuates the policy behind the support exception itself: protecting creditor-dependents of the debtor.

With respect to unmarried cohabitants, the language of the support exception is unlikely to withstand the weight of an interpretation excepting from discharge support obligations arising out of a property settlement agreement, order of a court of record, or determination by a governmental unit.274 However, the logic of the court's decision in *Marvin v. Marvin*275 might suggest that the protections of the exception should extend to unmarried cohabitants.

**F. The "In Connection With" Requirement**

The language of the family support exception to discharge requires that the debtor's obligation for alimony, maintenance, or support arise "in connection with a separation agreement, divorce decree, or other order

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271. Norris, 324 F.2d, 828-29 (support agreement discharged where marriage subsequently declared void); Collis, 184 Misc. at 722, 53 N.Y.S. 2d at 320 (obligation to pay lump sum as support and maintenance discharged where marriage later annulled).

272. The argument would focus on the conventional definition of the word "spouse" as a validly married husband or wife, the absence of legislative history to support an extension of the support exception to a putative spouse, and the purposes of the amendments to this section which added the language "or other order of a court of record, and the language "determination made in accordance with State or territorial law by a governmental unit." For an additional discussion of these amendments see infra notes 276-80 and accompanying text. In addition, a proponent of this construction would point to other federal legislation concerning the putative spouse in order to demonstrate that when Congress determines that the interests of the putative spouse deserve protection, it does so in explicit terms. See, e.g., Social Security Act, 42 U.S.C. § 416 (h)(l)(B)(1982).


274. 11 U.S.C. § 302(a) allows the filing of a joint bankruptcy case by "an individual that may be a debtor under such chapter and such individual's spouse." In *In re Malone*, 50 Bankr. 2, 3 (Bankr. E.D. Mich. 1985), the court held that unmarried cohabitants were precluded from filing a joint petition under this section. *See also In re Stuart*, 31 Bankr. 18, 19 (Bankr. D. Conn. 1983) (when filing joint petition, each spouse must list assets, liabilities, and claimed exemptions separately, and claims made against the debtor's estate must be filed separately).

of a court of record, or determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement.\textsuperscript{276} Therefore, the family support exception permits mere contractual agreements between the debtor and the debtor’s spouse or child to pay support to be discharged if those obligations were not ordered or agreed to be paid or did not arise as a result of a separation agreement, divorce decree, property settlement agreement, order of a court of record, or determination made in accordance with State or territorial law by a governmental unit.\textsuperscript{277} Furthermore, the in connection with requirement often allows the debtor to discharge contractual liabilities owed third parties which were incurred directly or indirectly for the purpose of supporting the spouse or child.\textsuperscript{278}

The family support exception’s statutory language, “or other order of a court of record,” and “determination made in accordance with State or territorial law by a governmental unit,”\textsuperscript{279} were added by amendments in 1984 and 1986 as a result of several decisions in which the in connection with requirement was interpreted to allow the discharge of a support obligation imposed in connection with adjudications of paternity.\textsuperscript{280} Such obligations are now clearly nondischargeable. The amendments have also arguably expanded the scope of the section to prevent the discharge of support obligations imposed in connection with an order of annulment,\textsuperscript{281} and certainly prevent discharge of support orders by a welfare department making the debtor’s child a ward of the court,\textsuperscript{282} or an interim court order of support during a trial separation.\textsuperscript{283}

\textbf{G. The Assignment of Support}

Under the family support exception as originally enacted, support obligations voluntarily or involuntarily assigned by the recipient spouse to any entity, including governmental entities, for any reason, including assignments made in order to obtain welfare or other relief, were dis-

\textsuperscript{276} 11 U.S.C. § 523(a)(5).
\textsuperscript{277} 11 U.S.C. § 523(a)(5).
\textsuperscript{278} 11 U.S.C. § 523(a)(5).
\textsuperscript{279} 11 U.S.C. § 523(a)(5).
\textsuperscript{281} See supra note 273 and accompanying text.
\textsuperscript{282} See Marino, 29 Bankr. at 800 (prior to 1984, statutory language allowed discharge of support obligation which arose in connection with court order making debtor’s son a ward of the court).
\textsuperscript{283} Richards, 33 Bankr. 56 (prior to 1984, statutory language allowed discharge of child support debt which arose in connection with court order during trial separation).
A support obligation is assigned voluntarily when the obligee objectively manifests an intention to transfer all or even part of his rights to another. 285

In 1981, Congress amended the Bankruptcy Code to prevent the discharge of alimony and support payments assigned to a state or county welfare agency as required by the Social Security Act as a condition precedent to receipt of Aid to Families with Dependent Children. 286 In 1984, Congress further amended the Code to prevent the discharge of alimony and support obligations assigned to the federal government or any state or any political subdivision thereof for any reason. 287 The 1984 amendment appears to make an alimony or support obligation assigned to the clerk of court for purposes of collection nondischargeable. 288

Even after the 1984 amendment, if a debt for alimony or support is assigned voluntarily or by operation of law to a nongovernmental entity it is dischargeable. 289 A voluntary assignment of an overdue child support obligation to an agency for purpose of collection allows the debt to be discharged. 290 If a support obligation is assigned by operation of law to the deceased creditor-spouse's personal representative, the obligation is thereafter dischargeable in bankruptcy. 291

VI. THE LIABILITY OF THE DEBTOR AND THE DEBTOR'S PROPERTY AFTER DISCHARGE

This section addresses the effect of a bankruptcy discharge on the


286. Pub. L. No. 97-35, § 764 (amending 11 U.S.C. § 523(a)(5)(A)). Under § 402(a)(26) of the Social Security Act, parents receiving Aid to Families with Dependent Children must assign to the state any rights to support to which they are entitled and which have accrued at the time the assignment is executed. 42 U.S.C. § 602(a)(26) (1982). In making these assignments nondischargeable, Congress indicated "that a parent's obligation to support his child is not one that should be allowed to be discharged by filing for bankruptcy, and that a child support obligation assigned to a state as a condition of AFDC eligibility should not be subject to termination that way." S. REP. No. 139, 97th Cong., 1st Sess. 523, reprinted in 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 780; Matter of Stovall, 721 F.2d 1133, 1135 (7th Cir. 1983) (neither support arrears nor right to collect support due in the future are dischargeable as a result of this amendment).


289. Reichardt, 27 Bankr. at 753-54.

personal liability of the debtor and the liability of the debtor's property for both dischargeable and nondischargeable pre-petition family obligations. 292 This matter is of particular significance when structuring support and property settlement agreements with the spectre of bankruptcy in mind and in assessing the effects of a bankruptcy discharge on the creditor-spouse if the spectre materializes.

First, the debtor's personal liability and the liability of the debtor's property after discharge can be examined by focusing on the nature of a discharge in bankruptcy. Second, it is appropriate to ask whether the debt in question has been discharged and whether the debt is secured or unsecured. Finally, the type of property from which the family creditor seeks to satisfy the pre-petition obligation must be analyzed by asking whether the property was exempted in the bankruptcy case or acquired by the debtor after the case was filed.

It has been said that a discharge of an obligation in bankruptcy extinguishes the debtor's personal liability on the debt. 293 However, this is a somewhat misleading characterization since the Code simply does not address the viability of the debt after it has been discharged. 294 Instead, when a debt is discharged in bankruptcy, the Code imposes a barrier, in the form of an injunction, which prevents collection of the debt as a personal liability of the debtor and voids any judgment against the debtor to the extent that the judgment is a determination of the personal liability of the debtor. 295 Thus, the creditor spouse holding a dischargeable property settlement obligation is prohibited from collecting the obligation as a personal liability of the debtor. In contrast, the spousal or child support claimant is not barred from this activity because such claims cannot be discharged in bankruptcy.

What then, is the effect of a discharge on the ability of a secured creditor, one who has a charge or interest in the debtor's property to secure to payment of a debt (a lien), to reach the property securing its claim? In general, the Code preserves valid and enforceable liens against both exempt and nonexempt property and allows creditors who hold such

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292. Because it is beyond the scope of this Article, neither the nature nor the limitations on the family support creditor's state remedies against a debtor or the debtor's property where the debtor has received a discharge in bankruptcy is addressed. Instead, this Article explores the creditor's threshold ability to utilize state remedies to enforce the obligation as a result of a discharge in bankruptcy.


294. Section 524(a) states that a discharge "voids any judgment" to the extent it is a "determination of the personal liability of the debtor" and places an injunction on any act to collect the debt "as a personal liability of the debtor." 11 U.S.C. § 524(a).

295. Id. § 524(a)(1)-(2).
liens eventually to enforce their liens. Therefore, a property settlement claimant (as well as other kinds of secured creditors) with a valid prepetition lien on the debtor’s property may look to the property securing the claim in satisfaction of the debt as long as the lien survives bankruptcy. If the value of the property is not sufficient to satisfy the obligation, the discharge prevents any further effort to collect the claim as a personal liability of the debtor because the obligation is dischargeable in bankruptcy. Naturally, a claimant holding a nondischargeable support claim secured by a lien on the debtor’s property can also look to the debtor’s property in satisfaction of the claim and, in addition, may pursue the debt as a personal liability of the debtor because the support obligation is a nondischargeable obligation.

We have seen that liens on both exempt and nonexempt property generally survive bankruptcy and may be enforced by a creditor holding the lien after the underlying debt has been discharged. The situation of a spousal or child support creditor whose nondischargeable claim is unsecured is similar. Such a creditor may not only pursue the debtor personally, but may also pursue the debtor’s property acquired after bankruptcy and, unlike most holders of nondischargeable debts, the debtor’s property exempted in the bankruptcy proceeding, if such property is otherwise

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296. Id. §§ 506, 522(c); Hall, 752 F.2d 582; In re Weathers, 15 Bankr. 945 (Bankr. D. Kan. 1981). A “secured” creditor is one who has a charge or interest in property to secure payment of a debt. Such a creditor’s interest in property is called a “lien.” 11 U.S.C. § 101(31). Under the Bankruptcy Code, there are three types of liens and three corresponding types of secured creditors. Id. § 506(a). A lien which arises by agreement between the debtor and creditor is called a security interest. Id. § 101(43). A statutory lien is one which arises solely by force of a statute on specified circumstances or conditions. Id. § 101(45). A mechanics lien is one example of a statutory lien. A judicial lien is an interest in property obtained by judgment, levy, sequestration or other legal or equitable process or proceeding. Id. § 101(30). There is arguably one additional type of secured creditor under the Code. A creditor who owes a debt to the debtor is treated as a secured claimant to the extent of the amount subject to setoff. Id. § 506(a).

297. A lien may not survive bankruptcy because the trustee or the debtor has successfully set it aside under one of the avoidance sections of the Code. See infra notes 299-332 and accompanying text for a discussion of some of the debtor’s avoiding powers. In addition, under Section 506(d), a lien will not survive bankruptcy to the extent that it does not secure an “allowed secured claim.” A claim cannot be an “allowed secured claim” unless there is value in the collateral supporting the lien which secures the claim. A simple example illustrates the operation of Section 506(d). Assume that the debtor owns a nonexempt parcel of real estate worth $20,000. Assume further that there are three mortgages on the real estate each securing a debt in the amount of $10,000. The first, ($10,000) and second ($10,000) mortgage liens will survive bankruptcy because the liens are fully supported by value ($20,000) in the real estate. The third mortgage lien will not survive bankruptcy because it is not supported by any value in the real estate and is, therefore, not an allowed secured claim. It is treated as an unsecured claim. 11 U.S.C. § 506(a).

298. The support claimant’s lien will survive bankruptcy as long as it is supported by value in the property which is subject to the lien, even though part of the claim for support is disallowed under section 502(b)(5). Id. §§ 502(b)(5), 506(d)(1).
liable for these obligations. An unsecured property settlement creditor is not so fortunate. Since a property settlement obligation is dischargeable and, in this example is unsecured, the creditor may not pursue either the debtor or the debtor's property in an effort to satisfy the claim. Thus, if the unsecured property settlement creditor receives anything on a claim in a Chapter 7 case, it will result from the trustee's distribution of the net sale proceeds of the debtor's nonexempt property.

VII. THE DEBTOR'S AVOIDANCE OF LIENS ON EXEMPT PROPERTY

Section 522(f) of the Code allows the debtor to avoid certain liens on exempt property to the extent the liens impair an exemption to which the debtor would otherwise have been entitled. After the lien is avoided, it will not be valid in bankruptcy or thereafter. Judicial liens on any exempt property may be avoided. The debtor may also avoid nonpossessory, nonpurchase-money security interests in any exempt household goods, wearing apparel, and musical instruments held primarily for household, family, or personal use; tools of the debtor's trade, and professionally prescribed health aids.

Debtors frequently utilize section 522(f)(1) in attempting to avoid liens granted in dissolution or separation proceedings to secure repayment of familial obligations. Consensual, nonpossessory, nonpurchase-money security interests in household goods, wearing apparel, tools of the trade, and professionally prescribed health aids, granted to secure repayment of a familial obligation, may also be set aside through the exercise of the debtor's section 522(f)(2) avoiding power.

Neither a waiver of the right to avoid an interest in exempt property

299. Id. §§ 522(c), 524.
300. Id. § 524.
301. Id. §§ 504, 507.
302. Id. § 522(f).
303. Id. § 522(f)(1).
304. Id. § 522(f)(2)(A).
305. Id. § 522(f)(2)(B).
306. Id. § 522(f)(2)(C).
308. Under certain circumstances, the debtor is authorized to claim as exempt property the trustee has recovered through an exercise of one of his avoiding powers; under other circumstances, the debtor may exercise the trustee's avoiding powers himself in order to increase the amount of property which may be exempted. 11 U.S.C. § 522(g), (i). These sections are not as likely as § 522(f) to involve attempts to avoid liens securing familial obligations and are, therefore, not discussed. However, it is possible that the trustee (or the debtor) might attempt to avoid as preferential a payment, a security interest, a mortgage, a lien, or an outright transfer of an interest in property under a dissolution order or agreement (11 U.S.C. § 547), or as a fraudulent conveyance (11 U.S.C. § 548). See, e.g., Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983) (transfer of property from debtor...
nor a waiver of the right to claim property as exempt after an interest in it has been avoided is enforceable.\textsuperscript{309}

\textbf{A. Judicial Lien Avoidance and Family Obligations}

Section 522(f)(1) of the Bankruptcy Code has been frequently invoked by debtors seeking to set aside liens granted in dissolution or separation decrees to secure repayment of a familial obligation.\textsuperscript{310} Under this section, the debtor may avoid the fixing of a judicial lien on an interest in property to the extent the lien impairs an exemption to which the debtor would otherwise have been entitled.\textsuperscript{311}

In order to set aside a judicial lien, three prerequisites must be met. In resisting the debtor’s effort to set aside a lien under this section, the holder of a lien securing repayment of a family support obligation can frequently argue that one or more of these prerequisites have not been established.

First, the lien which the debtor seeks to avoid must be a judicial lien.\textsuperscript{312} A lien is a charge against or interest in property to secure payment of a debt or performance of an obligation.\textsuperscript{313} A judicial lien is a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.”\textsuperscript{314} The typical judgment lien is the kind of interest in property which is acquired by a judgment creditor who obtains a writ of execution or attachment, or properly docket s a judgment.\textsuperscript{315} Neither a statutory lien\textsuperscript{316} to ex-wife could be set aside as fraudulent conveyance if ex-wife’s release of support rights did not amount to reasonably equivalent value for the transfer). For a further discussion of these avoiding powers and additional avoiding powers available to the debtor, see Norton, supra note 204, at §§ 26.43-47; 30.01-06; 32.01-31; 34.01-37.03 (1984).

\textsuperscript{309} 11 U.S.C. §522(e).

\textsuperscript{310} See, e.g., Boyd, 741 F.2d 1112 (attempt to set aside a lien on marital residence as “judicial lien”); Williams, 38 Bankr. 224 (attempt to set aside divorced wife’s lien against ex-husband’s real property). Section 522(f) provides:

\begin{quote}
Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is (1) a judicial lien. . . .
\end{quote}


\textsuperscript{311} Id. § 522(f)(1); In re Brown, 734 F.2d 119, 125 (2d Cir. 1984) (even though a debtor lacks equity in property, he may avoid a judicial lien if avoidance would allow him to enjoy an exemption).

\textsuperscript{312} 11 U.S.C. §522(f)(1).

\textsuperscript{313} Id. §101(31).

\textsuperscript{314} Id. §101(30).

\textsuperscript{315} See, e.g., In re Schnabel, 39 Bankr. 853 (Bankr. N.D. Ohio 1984) (ex-spouse recorded judgment based on arrearages of alimony and support payments); In re Dionne, 40 Bankr. 137 (Bankr. D. R.I. 1984) (writ of attachment on debtor’s real property); Marino, 39 Bankr. 830 (judgment entered by state court arising from debtor’s breach of an employment contract created a judicial lien on debtor’s automobile); In re Jaxtheimer, 36 Bankr. 786 (Bankr. S.D. Fla. 1984) (recording of final judgment and awarding of equitable lien on real property).

\textsuperscript{316} 11 U.S.C. §101(45) defines statutory lien as a:

\begin{quote}
lien arising solely by force of a statute on specified circumstances or conditions,
\end{quote}
nor a lien acquired by virtue of a security agreement\textsuperscript{317} are judicial liens and thus may not be avoided under section 522(f)(1). An interest in property arising out of an agreement to divide marital property which has been subsequently embodied in a dissolution decree can be viewed as a security interest rather than as a judicial lien because it was originally consensual. Viewed as such, it cannot be avoided under this section.\textsuperscript{318} Similarly, a property interest characterized as a statutory lien may not be avoided under this section.\textsuperscript{319}

Second, the lien must be against an interest of the debtor in property.\textsuperscript{320} Several courts have held that the lien did not attach to an interest of the debtor in property where the debtor’s former spouse was granted a lien to secure repayment of the former spouse’s equity in a marital asset.\textsuperscript{321} Rather, these provisions in a divorce decree were viewed as simple declarations of the former spouse’s pre-existing interest in the marital asset. The property awarded the debtor in the divorce decree was viewed as having been conveyed subject to a lien securing repayment of the non-debtor spouse’s interest in the property. Therefore, the lien was not avoided because section 522(f)(1) does not allow avoidance of a lien which has attached prior to the debtor’s acquisition of the property.\textsuperscript{322}

Third, the lien must impair an exemption to which the debtor would otherwise be entitled. This means that there must be a statutory basis for a claim of exemption of the type of property on which the debtor seeks to avoid the lien. If the property could not be claimed as exempt, the lien cannot be said to impair “an exemption to which the debtor would

\textsuperscript{317} Id. § 101(43) defines security interest as a “lien created by agreement.”

\textsuperscript{318} 11 U.S.C. § 522(f).

\textsuperscript{319} In re Lekvold, 18 Bankr. 663 (Bankr. D.N.M. 1982) (lien for back child support was a statutory lien and could not be avoided as a judicial lien under section 522(f)(1)); In re Biddle, 31 Bankr. 449 (Bankr. N.D. Iowa 1983) (lien on federal income tax return for back child support was a statutory lien).

\textsuperscript{320} See, e.g., Boyd, 741 F.2d at 1114, Williams, 38 Bankr. 224.

\textsuperscript{321} Williams, 38 Bankr. at 228; Thomas, 32 Bankr. at 12; Scott, 12 Bankr. at 615 (the intent of Congress was that § 522(f) apply only to liens that are fixed after the debtor acquires the interest in the item).
have been entitled.\footnote{323} Several courts have held that liens granted in divorce decrees could not be avoided in the debtor's homestead because the homestead could have been sold to satisfy the former spouse's lien.\footnote{324}

A few courts have taken a different approach to the issue of whether a debtor may avoid a lien granted or created by virtue of a dissolution decree. In one case, the court conditioned avoidance of a lien granted in a dissolution decree on the debtor's full payment of the former spouse's one-half interest in the equity of the homestead.\footnote{325} In another, the court allowed avoidance of a lien granted in a divorce decree to secure repayment of a property settlement agreement. However, the court correctly suggested that avoiding a similar lien to secure repayment of spousal support would be futile since exempt property remains liable for these obligations.\footnote{326} Finally, it has been held that the debtor has no interest in exempt property which can be impaired within the meaning of this section because the debtor holds the property in constructive trust for the former spouse and any dependents.\footnote{327} Under this approach, the debtor cannot claim an exemption in such property because the debtor's and the estate's sole interest in any property which is held in constructive trust is confined to bare legal title. The beneficial interest in such property belongs to the former spouse.\footnote{328}

B. The Avoidance of Nonpossessor, Nonpurchase-Money Security Interests and Family Obligations

Section 522(f)(2) provides that the debtor may avoid a nonpossessor, nonpurchase-money security interest in:

- (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
- (B) implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; or

\footnote{323. 11 U.S.C. § 522(f); In re Ranes, 31 Bankr. 70, 71 (Bankr. D. Colo. 1983) (even if attorney's lien was a judicial lien it could not be avoided under § 522(f)(1) because alimony was not exempt under Colorado law).
\footnote{324. Adams, 29 Bankr. at 454; Scott, 12 Bankr. at 616-17. See also Williamson, 11 Bankr. at 795-96 (holding that because tenancy by entirety property was immune from process where judgment creditor's lien was against only one spouse, debtor's exemption was not impaired and lien could not be avoided).
\footnote{327. Graham, 28 Bankr. at 931-32.
\footnote{328. In re Shepard, 29 Bankr. 928, 932 (Bankr. M.D. Fla. 1983) (a trustee in bankruptcy succeeds to the same title the debtor holds—bare legal title).}
professionally prescribed health aids for the debtor or a dependent of the debtor to the extent such lien impairs an exemption to which the debtor would otherwise have been entitled.\textsuperscript{329}

Under this section, the security interest in certain items of the debtor's exempt property which may be avoided is consensual.\textsuperscript{330} A lien created or granted in a property settlement agreement, even though incorporated into a dissolution decree, has been held to be a security interest because it was originally consensual.\textsuperscript{331}

The debtor's section 522(f)(2) avoiding power must necessarily concern the family law lawyer when structuring marital dissolution settlement agreements. Specifically, the cautious practitioner will secure family obligations with assets on which nonpossessory, nonpurchase-money security interests cannot be avoided if the items would otherwise be subject to a claim of exemption in bankruptcy.

The debtor's avoidance power under this section does not extend to possessory or purchase-money security interests. The former exclusion protects a pawnbroker's lien and the latter the security interest of a lender whose loan is used to acquire the item subject to the security interest.\textsuperscript{332}

Some courts have held that a state may nullify the debtor's avoidance power under this subsection by precluding the exemption of encumbered property either directly\textsuperscript{333} or indirectly.\textsuperscript{334} Others have suggested and adopted the better view that state efforts to nullify the effect of section 522(f)(2) fall victim to the Supremacy Clause and are invalid.\textsuperscript{335} In any event, it is wise, where possible, to secure the repayment of family obligations in

\textsuperscript{330} Id. § 101(43) defines security interest as a "lien created by an agreement."
\textsuperscript{331} Wicks, 26 Bankr. 769 (former husband's lien on debtor's homestead was consensual and therefore a security interest), aff'd sub nom., Boyd, 31 Bankr. 591; Scott, 12 Bankr. 613 (agreement of debtor and former husband was a negotiated agreement respecting a division of jointly acquired property); Dunn, 10 Bankr. 385 (voluntary property settlement agreement secured by a second lien on real estate was not an involuntary judicial lien).
\textsuperscript{332} Norton, supra note 204, at § 26.42 (1984). There is some dispute as to the type of loan agreement covered by the exception for purchase-money security interests. However, the classic purchase-money security interest is an interest acquired by a lender in an item upon a "single advance made and used for the acquisition of [that] item." See id. n. 4 and the cases cited therein for a discussion of this issue.
\textsuperscript{333} In re Allen, 725 F.2d 290 (5th Cir. 1984) (under § 522(b) a state may: (1) allow federal law to be the sole remedy, (2) partially or wholly preclude the remedy available under 522(d), or (3) allow an election between state and federal exemptions); In re McManus, 681 F.2d 353 (5th Cir. 1982) (Section 522(f) is tied to Section 522(b) which in turn rests on applicable state law in cases in which the state has opted out).
\textsuperscript{334} In re Pine, 717 F.2d 281 (6th Cir. 1983) (creditor in Chapter 7 cases is entitled to retain nonpossessory, nonpurchase-money security interest under Tennessee and Georgia exemption statutes), cert denied 466 U.S. 928 (1984).
\textsuperscript{335} Hall, 752 F.2d at 586-87; Maddox, 713 F.2d at 1530 (dictum); In re Dahdah, 20 Bankr. 665, 666 (Bankr. 9th Cir. 1982); In re McKelvey, 20 Bankr. 405, 408 (Bankr. D. Ariz. 1982).
items other than those in which a nonpossessory, nonpurchase-money security interest may be avoided.

VIII. PROTECTING THE CREDITOR SPOUSE THROUGH PRE-BANKRUPTCY PLANNING

The spectre of bankruptcy should haunt the prudent family law attorney when drafting, negotiating, and structuring a dissolution order or marital settlement agreement. By confronting the possibility of bankruptcy through planning, the lawyer can better protect the interests of a client seeking a divorce or a legal separation.

When representing a spouse entitled to receive spousal or child support, the attorney should make a thorough record of the facts and circumstances giving rise to this entitlement by including them in any court orders or decrees or in any stipulations or agreements between the parties. Labeling an obligation as support neither controls the characterization of the debt for discharge purposes in bankruptcy, nor precludes an inquiry into the nature of the obligation.\textsuperscript{336} However, it is one of the factors many courts consider in determining whether the debt is a nondischargeable support obligation or a dischargeable property settlement obligation.\textsuperscript{337} Thus, counsel should not lightly agree to characterize what is truly a spousal support obligation as a property settlement obligation in a court order or in a written agreement between the parties. If the debtor has expressly waived his right to a discharge of the obligation or implicitly waived it by virtue of the characterization of the debt as support in an agreement between the parties, the debt will nevertheless be discharged if it is not in the nature of support. This is because neither a pre-bankruptcy waiver of the right to discharge an otherwise nondischargeable debt, nor a waiver of the right to a discharge is enforceable.\textsuperscript{338}

With a few exceptions, the lien rights of secured creditors are preserved in bankruptcy.\textsuperscript{339} An attorney representing a spouse to whom payments will be made pursuant to a dissolution or separation order or agreement should, whenever possible, obtain a mortgage or a security interest in

\textsuperscript{336} In re George, 15 Bankr. 247, 248-49 (Bankr. N.D. Ohio 1981) (even though hold harmless clause was labeled nondischargeable alimony, the provision was not in fact in the nature of alimony, maintenance, or support and was dischargeable).

\textsuperscript{337} See supra note 200 and accompanying text.

\textsuperscript{338} 11 U.S.C. §§523(a)(1), 727(a)(10); In re Bisbach, 36 Bankr. 350, 352 (Bankr. W.D. Wis. 1984) (provision in divorce settlement to the effect that amounts which husband had agreed to pay wife should be construed in "whatever manner necessary so as to be nondischargeable in bankruptcy" was not enforceable); In re Crowder, 37 Bankr. 53, 55-56 (Bankr. S.D. Fla. 1984) (state court's reliance on pre-bankruptcy waiver of rights in property settlement agreement was erroneous); George, 15 Bankr. at 248-49 (clause in separation agreement providing that the debtor's assumption of joint debts was nondischargeable was not enforceable).

\textsuperscript{339} See supra notes 289-332 and accompanying text.
the obligor's real or personal property to secure repayment of the obligation. This is particularly important if the debt is likely to be characterized as a dischargeable property settlement obligation rather than as a nondischargeable debt for spousal or child support. Even though a secured property settlement obligation is discharged, the lien which secures it, and thus the creditor's in rem rights, will survive bankruptcy unless the lien itself is avoided or void in bankruptcy. When an unsecured property settlement obligation is discharged in bankruptcy, the creditor spouse is effectively barred from collecting the debt.

The debtor's personal liability for a nondischargeable unsecured debt for spousal or child support will survive bankruptcy and can be collected from property claimed as exempt in the bankruptcy estate as well as from nonexempt property and property acquired by the debtor after bankruptcy. During the pendency of the bankruptcy proceeding, such claims may be collected from property that is not property of the estate. The secured spousal or child support claimant has the foregoing rights as well as any in rem rights which secure the obligation as long as the lien survives bankruptcy. The advantage of securing a spousal or child support obligation is that, even if the obligation is mischaracterized as a dischargeable property settlement obligation, the creditor will usually retain lien rights against the property which secures the obligation.

If it is possible to obtain a security interest or mortgage to secure an obligation owed under a dissolution or separation order or agreement, the assets to which the mortgage or security interest will attach must be selected with an eye toward the possibility of bankruptcy. The attorney representing the creditor-spouse should, if possible, obtain liens securing the obligation in nonexempt property since the debtor's personal avoiding powers may be exercised only with respect to exempt property. If all available assets are exempt under the applicable exemption scheme, a mortgage on real estate is preferable because the debtor's ability to avoid consensual liens on exempt property extends primarily to household goods and furnishings, tools of the trade, and health aids. Care should be taken to avoid any unnecessary characterization of mortgages or security

340. See supra notes 289-98 and accompanying text.
341. See supra generally notes 289-332 and accompanying text.
342. See supra notes 289-98 and accompanying text.
343. Id.
345. See supra notes 289-98 and accompanying text.
346. For a discussion of the dischargeability of family obligations, see supra notes 167-288 and accompanying text.
347. See supra notes 299-332 and accompanying text.
interests obtained in dissolution or separation proceedings as judicial liens since the debtor may avoid judicial liens in any exempt property, including real estate. Any mortgages or security interests obtained as a result of such proceedings should be immediately recorded or perfected, because if they are not properly recorded or perfected, they may be avoided under other sections of the Bankruptcy Code.

If securing an obligation is possible, the creditor-spouse’s attorney should select assets in which the debtor-spouse has equity. If a mortgage or security interest is taken in an item in which there is no equity at the time of bankruptcy, the lien will not survive bankruptcy.

In most instances, the Bankruptcy Code preserves a creditor’s right to offset a debt owed by the creditor to the debtor by treating the creditor’s claim as a secured claim up to the value of the creditor’s obligation to the debtor. Therefore, if there are mutual debts between the former spouse and the debtor and, under applicable nonbankruptcy law, the former spouse has a right of setoff, the former spouse has at least a partially secured claim. The claim should be filed as such with the bankruptcy court. A failure to do so could result in a later state court order requiring the former spouse to pay the debtor after the discharge of the debtor’s obligation to the former spouse.

An equitable lien theory can be used to the advantage of an otherwise unsecured property settlement or support claimant. In bankruptcy, as elsewhere, equitable liens are imposed to prevent unjust enrichment and

349. *Id.* § 522(f)(1).
350. *Id.* §§ 522(g)-(j), 544, 547. For a discussion of lien avoidance under these circumstances, see NORTON, supra note 204, at §§ 26.43-26.47, 30.03-30.06, 32.01-32.31.
351. 11 U.S.C. § 506(d). *See supra* note 294 and accompanying text for a further discussion of section 506(d).
352. 11 U.S.C. §§ 506(a), 553. The creditor’s setoff rights are preserved except where:

1. the claim of such creditor against the debtor is disallowed other than under § 502(b)(3) of this title;
2. such claim was transferred, by an entity other than the debtor, to such creditor-
   (A) after the commencement of the case; or
   (B)(i) after 90 days before the date of the filing of the petition; and
3. the debt owed to the debtor by such creditor was incurred by such creditor-
   (A) after 90 days before the date of the filing of the petition;
   (B) while the debtor was insolvent; and
   (C) for the purpose of obtaining a right of setoff against the debtor.
*Id.* § 553(a).
353. *In re* Marriage of Williams, 157 Cal. App. 3d 1215, 1222, 203 Cal.Rptr. 909, 913 (1984) (where husband failed to appear in ex-wife’s bankruptcy proceeding in order to preserve right to offset, that offset could not be used to revive, in a state court proceeding, a debt already discharged in bankruptcy and, as a result, husband remained liable to wife). For a discussion of the use of setoff in the context of dischargeable property settlement obligations, see Bailey, 20 Bankr. at 911-12.
to enforce the equitable right to have a particular piece of property applied to the payment of a specific debt.\textsuperscript{354} Equitable liens have been imposed by the bankruptcy court in favor of creditor-spouses whose claims against the debtor were held to be dischargeable property settlement obligations both where the divorce decree specified certain property as the source of the payment of the obligation,\textsuperscript{355} and where it did not do so.\textsuperscript{356}

\section*{XII. CONCLUSION}

Congress attempted to forge an alliance between bankruptcy and family law to facilitate both the fresh start policy of the Bankruptcy Code and the policy of awarding spousal and child support by creating an exception to the automatic stay for the collection of support and an exception to discharge for support obligations. The extent to which Congress was successful in accommodating the important interests which both policies seek to promote is questionable in light of the narrow construction given the automatic stay exception by many courts and the inherent possibility of mischaracterization of a nondischargeable support award as a dischargeable property settlement obligation. Nevertheless, should the prospect of bankruptcy materialize, there is much that can be done to protect the interests of a support or property settlement claimant. Attention to the possibility of bankruptcy at the time support or property settlement agreements are drafted can blunt the hegemony of bankruptcy in the alliance between bankruptcy and family law.

\begin{thebibliography}{99}
\bibitem{354} Caldwell v. Armstrong, 342 F.2d 485, 490 (10th Cir. 1965) (definition of equitable lien), \textit{Restatement of the Law of Restitution} 161 (1936).
\bibitem{355} Caldwell, 342 F.2d 485 (divorce award gave ex-wife an equitable lien on endowment policy proceeds); \textit{In re} Thumm, 2 Bankr. Ct. Dec. 1347 (Bankr. E.D. Wis. 1967).
\bibitem{356} Bailey, 20 Bankr. 906 (former wife had equitable lien on debtor's property to secure dischargeable divorce award).
\end{thebibliography}