FAMILY LAW AND BANKRUPTCY

Hon. Margaret Dee McGarity©
Chief U.S. Bankruptcy Judge
Eastern District of Wisconsin

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

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

A. Bankruptcy Estate. The filing of a bankruptcy petition creates an estate, which includes all assets owned by the debtor, certain assets acquired by the debtor within 180 days of filing, certain assets transferred by the debtor before bankruptcy and recovered by the trustee in bankruptcy or by the debtor as debtor in possession, and income on property of the estate. 11 U.S.C. § 541. Joint filing creates two estates, which are usually administered together. 11 U.S.C. § 302; Fed. R. Bankr. P. 1015; *see also In re Goldstein*, 383 B.R. 496 (Bankr. C.D. Cal. 2007) (separate estates of divorcing ch. 11 debtors could hire separate divorce counsel and was in the best interest of the estates under § 327(e)); *In re Stone*, 401 B.R. 897 (Bankr. W.D. Ky. 2009) (divorce retainer was property of debtor's estate even if paid by third party and must be disclosed; fees disgorged).

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

1. Debtor's interest in property. The estate has no greater interest in an asset than the debtor had. 11 U.S.C. § 541(d). *In re McCafferty*, 96 F.3d. 192 (6th Cir. 1996) (nonfiling former spouse's interest in debtor's pension plan was held by him in constructive trust and was not property of his estate); *Chiu v. Wong*, 16 F.3d 306 (8th Cir. 1994) (partnership funds converted by debtor's husband and traceable to debtor's homestead were placed in constructive trust in favor of debtor's husband's former partner, thus excluding them from her estate); *In re Aulicino*, 400 B.R. 175 (Bankr. E.D. Pa. 2008) (debtor's former husband's sole possession of house awarded to him in divorce was notice to BFP, and likewise trustee, that deed giving him full ownership was not recorded and trustee could not use strong arm powers to bring into

estate); *In re Balzano*, 399 B.R. 428 (Bankr. D. Md. 2008) (estate had no interest in real estate titled in name of non-filing spouse); *In re Charlton*, 389 B.R. 97 (Bankr. N.D. Cal. 2008) (constructive trust of painting in debtor husband's possession did not arise until after bankruptcy and was subject to trustee's avoidance powers); *In re Flippin*, 334 B.R. 434 (Bankr. W.D. Ark. 2005) (debtor's dower interest in property owned by nonfiling spouse was property of estate but incapable of turnover); *In re Thomas*, 331 B.R. 798 (Bankr. W.D. Ark. 2005) (nonowning spouse's interest did not arise at time of filing as divorce was filed after owning spouse's bankruptcy filed); *see also In re Heck*, 355 B.R. 813 (Bankr. D. Kan. 2006) (engagement ring was conditional gift subject to return when marriage did not take place); *In re Stoltz*, 283 B.R. 842 (Bankr. D. Md. 2002) (same).

2. Dissolution action pending when bankruptcy case filed. If a divorce or legal separation is pending when a bankruptcy petition is filed by one spouse , state law must be consulted to determine if each spouse has an equitable but contingent interest in property owned by the other or if the nonowner spouse has no interest in the other's property until judgment. Unless state law provides for an inchoate or contingent interest, *see, e.g.*, *In re Skorich*, 482 F.3d 21 (1st Cir. 2007); *In re Gabel*, 353 B.R. 295 (Bankr. D. Kan. 2006), the nondebtor spouse's interest in debtor's property is cut off by filing a bankruptcy petition. *In re Charlton*, 389 B.R. 97 (Bankr. N.D. Cal. 2008) (award of painting by constructive trust entered by state court post-petition was ineffective to cut off trustee's rights); *In reDiGeronimo*, 354 B.R. 625 (Bankr. E.D. N.Y. 2006) (under N.Y. law, right to property division in divorce filed prior to bankruptcy gives rise to claim); *In re Hoyo*, 340 B.R. 100 (Bankr. M.D. Fla. 2006) (settlement agreement not approved prepetition, so debtor's property was property of estate notwithstanding award to other spouse by agreement); *In re Anjum*, 288 B.R. 72 (Bankr. S.D. N.Y. 2003) (prepetition stipulation for property division not reduced to judgment before bankruptcy resulted in claim of nonfiling spouse but did not transfer property); *In re Greer*, 242 B.R. 389 (Bankr. N.D. Ohio 1999) (no interest in nonowning spouse until decree); *see also In re Halverson*, 151 B.R. 358 (M.D. N.C. 1993) (absent levy, nonowner spouse has no interest in the other spouse's personal property before judgment); *In re Schorr*, 299 B.R. 97 (Bankr. W.D. Pa. 2003) (nonfiling spouse who filed a divorce action prepetition had unquantified property division claim that was discharged; rejecting reasoning in *In re Scholl*, 234 B.R. 636 (Bankr. E.D. Pa. 1999), which had held that pending dissolution action did not give rise to a claim that could be discharged); *Culver v. Boozer*, 285 B.R. 163 (D. Md. 2002) (under Maryland law, neither nondebtor's interest in equitable property division, nor possession of untitled asset, was sufficient for property interest to arise); *In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (debtor's former wife's claim subject to equitable subordination).

If state law provides that during the pendency of divorce, each spouse has a property interest in property of the other, state court must determine extent of interest. *See, e.g., In re Skorich*, 482 F.3d 21 (1st Cir. 2007) (under N.H. law, debtor's former wife had interest in escrow account, not a claim); *Davis v. Cox*, 356 F.3d 76 (1st Cir. 2004) (under Maine law applicable to case regarding constructive and resulting trusts, pending divorce proceeding gave nondebtor wife interest in divisible assets); *In re White*, 212 B.R. 979 (B.A.P. 10th Cir. 1997) (under Wyoming law, filing of petition for divorce vests property rights in nonowning spouse); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991) (rights of nonowning spouse in pending divorce were similar to rights of beneficiary of constructive trust and were not subordinate to trustee's rights).

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

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

C. Support due debtor from prior spouse.

1. Spousal support. The debtor's right to receive past due spousal support may be property of the estate, depending on state law. *In re Thurston*, 255 B.R. 725 (Bankr. S.D. Ohio 2000) (right to receive past due maintenance and maintenance due within 180 days of filing is property of estate; debtor failed to prove right to exemption); *In re Anders*, 151 B.R. 543 (Bankr. D. Nev. 1993) (chapter 7 debtor's right to receive prepetition spousal support arrearage and the right to receive spousal support within 180 days of filing, but not child support, was property of the estate); *contra In re Wise*, 346 F.3d 1239 (10th Cir. 2003) (right to receive spousal support is not property right

under Colorado law); *In re Jeter*, 257 B.R. 907 (B.A.P. 8th Cir. 2001) (postpetition alimony payments were not property of estate); *In re Mitchem*, 309 B.R. 574 (Bankr. W.D. Mo. 2004) (same). *See also* Christopher Celentino, *Divorce and Bankruptcy: Spousal Support as Property of the Estate*, 28, No. 4 Cal. Bankr. J. 542 (2006).

2. Child Support. Entitlement to child support is generally not property of the payee parent's bankruptcy estate, depending on state law. *In re McKain*, 325 B.R. 842 (Bankr. D. Neb. 2005) (child support is property of custodial parent under Nebraska law, and is property of the estate, but not under Wyoming law); *In re Poffenbarger*, 281 B.R. 379 (Bankr. S.D. Ala. 2002); *In re Anders*, 151 B.R. 543 (Bankr. D. Nev. 1993); *In re Prettyman*, 117 B.R. 503 (Bankr. W.D. Mo. 1990); *In re Welch*, 31 B.R. 537 (Bankr. D. Kan. 1983); *Hurlbut v. Scarbrough*, 957 P.2d 839 (Wy. 1998) (child support is children's money which parent administers in trust for child's benefit). *But see In re Harbour*, 227 B.R. 131 (Bankr. S.D. Ohio 1998) (any child support ultimately ordered paid to debtor in pending state-court paternity action, which was attributable to period after child's birth and before petition date, was estate property). In *In re Ehrhart*, 155 B.R. 458 (Bankr. E.D. Mich. 1993), the court discussed the debtor's former spouse's right to child support on behalf of the children, as opposed to a personal interest, but allowed her to recoup the property division she owed the debtor against the debtor's child support arrearage. *See also In re Edwards*, 255 B.R. 726 (Bankr. S.D. Ohio 2000) (child support arrearage was property of estate but was subject to Ohio exemption to the extent necessary for support); *In re Hopkins*, 177 B.R. 1 (Bankr. D. Me. 1995) (each child owed support was counted as a petitioning creditor for purpose of filing involuntary petition); *In re Jessell*, 359 B.R. 333 (Bankr. M.D. Fla. 2006) (debtor's right to refund of child support overpayments was property of his estate); *In re Rutter*, 204 B.R. 57 (Bankr. D. Or. 1997) (Earned Income Credit portion of federal tax refund was not child support).

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

E. Joint tax refund. Inclusion in debtor's estate depends on ownership rights under state

law. *In re Garbett*, 410 B.R. 280 (Bankr. E.D. Tenn. 2009) (50/50 ruled applied under Tennesee law); *In re Edwards*, 400 B.R. 345 (D. Conn. 2008) (under Connecticut law, interests in joint tax refund determined by respective spouse's withholding); *In re Carlson*, 394 B.R. 491 (B.A.P. 8th Cir. 2008) (under Minnesota law, non-earning spouse had no interest in joint tax return and could not claim exemption in half); *In re Kleinfeldt*, 287 B.R. 291 (B.A.P. 10th Cir. 2002) (nondebtor spouse with no earnings had no interest in joint tax refund); *In re Griffin*, 339 B.R. 900 (Bankr. E.D. Ky. 2006) (nondebtor spouse with no earnings had no interest in joint tax refund); *In re Lock*, 329 B.R. 856 (Bankr. S.D. Ill. 2005) (same); *In re Smith*, 310 B.R. 320 (Bankr. N.D. Ohio 2004) (same); *cf. In re Trickett*, 391 B.R. 657 (Bankr. D. Mass. 2008) (presumption of equal ownership under Massachusetts law); *In re Gartman*, 372 B.R. 790 (Bankr. D. S.C. 2007) (income and withholding allocated between spouses to determine respective interests); *In re Marciano*, 372 B.R. 211 (Bankr. S.D. N.Y. 2007) (presumption of equal ownership could be rebutted with evidence of spouses' conduct); *In re Innis*, 331 B.R.784 (Bankr. C.D. Ill. 2005) (presumption of equal ownership absent court order or marital agreement); *In re Barrow*, 306 B.R. 28 (Bankr. W.D. N.Y. 2004) (nondebtor spouse failed to overcome presumption of equal ownership of joint tax refund despite having no earned income). *See also In re Law*, 336 B.R. 780 (B.A.P. 8th Cir. 2006) (child tax credit was property of estate). *Compare In re Morine*, 391 B.R. 480 (Bankr. M.D. Fla. 2008) (non-debtor spouse without earnings had no interest in joint tax refund that had not been received and deposited in tenancy by the entireties account), *with In re Freeman*, 387 B.R. 871 (Bankr. M.D. Fla. 2008) (anticipated joint tax refund could be owned as tenants by the entireties), both applying Florida law.

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

G. Tenancy by the Entireties. Whether asset owned as tenants by the entireties is

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

H. Property Acquired Within 180 Days of Filing. Estate also includes property acquired on account of the death of another person and by property settlement agreement with the debtor's spouse, or interlocutory or final divorce decree, within 180 days after filing. 11 U.S.C. § 541(a)(5)(B). *See supra* regarding past due support as property of the estate.

I. Income. Income on estate property and avoided transfers are included in the estate, but with certain exceptions, earned income of an individual debtor is not. *See* 11 U.S.C. § 541(a)(4), (6). Earned income of a chapter 12 and 13 debtor continues to be property of the estate, at least to the extent needed to fund a plan. 11 U.S.C. §§ 1207(a)(2), 1306(a)(2). *See infra* re Chapter 13 issues. Earned income of an individual chapter 11 debtor filing under BAPCPA is property of the estate. 11 U.S.C. § 1115(a)(2). A spouse in a community property state has an ownership interest in the other spouse's earned income. *In re Reiter*, 126 B.R. 961 (Bankr. W.D. Tex. 1991) (debtor acquired community property interest in spouse's income during pendency of ch. 13 plan so nondebtor spouse's income became property of the estate under § 1306(a)(1) and was under the jurisdiction of the bankruptcy court before plan was confirmed, thereby preventing levy). *But see In re Nahat*, 278 B.R. 108 (Bankr. N.D. Tex. 2002) (nondebtor spouse's earnings were "special community property" under Texas law and were not property of the estate because they were not subject to the debtor's management and control or to recovery for his debts); *In re*

Markowicz, 150 B.R. 461 (Bankr. D. Nev. 1993) (after confirmation, debtor's spouse's income was not property of the estate).

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

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

1. Sale of Entire Asset.

a. Fractional Interests. The bankruptcy trustee of a debtor owning a fractional interest in an asset can only sell entire asset under certain conditions, i.e., partition is impracticable, sale of the fractional interest alone would realize less than the estate's interest in the proceeds, the benefit to the estate outweighs the detriment to the co-owner, and the asset is not used in the production of certain types of energy. 11 U.S.C. § 363(h); *see, e.g., In re Garner*, 952 F.2d 232 (8th Cir. 1991); *In re Persky*, 893 F.2d 15 (2d Cir. 1989); *In re Grabowski*, 137 B.R. 1 (S.D. N.Y.), *aff'd*, 970 F.2d 896 (2d Cir. 1992); *In re DeRee*, 403 B.R. 514 (Bankr. S.D. Ohio 2009); *In re Gabel*, 353 B.R. 295 (Bankr. D. Kan. 2006); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007). The co-owner is entitled to his or her interest in the proceeds of sale. *In re Ball*, 362 B.R. 711 (Bankr. N.D. W. Va. 2007) (one half payable immediately; no escrow of nondebtor's share was ordered as trustee's right to recover from nondebtor not established prior to sale); *In re Shelton*, 334 B.R. 174 (Bankr. D. Md. 2005) (adjustments in distribution of proceeds for contributions by non-debtor co-owner). *See also In re Whaley*, 353 B.R. 209 (Bankr. E.D. Tenn. 2006) (possessory interest of debtor's wife could not defeat trustee's right to sell); *In re Harlin*, 325 B.R. 184 (Bankr. E.D. Mich. 2005) (sale denied because property was owned as tenants by the entireties, and there was only one minor joint creditor; non-debtor spouse's interest outweighed creditor's); *In re Johnson*, 51 B.R. 439 (Bankr. E.D. Pa. 1985) (stay was lifted to allow state court to determine relative rights of spouses in co-owned property, and the request of one debtor to sell was denied until determination was made); *In re Langlands*, 385 B.R. 32 (Bankr. N.D. N.Y. 2008) (co-

owner entitled to notice of sale); *In re Sontag*, 151 B.R. 664 (Bankr. E.D. N.Y. 1993) (non-debtor spouse occupying homestead owned with the debtor as tenant in common was liable to the trustee for failure to maintain property). Note that 11 U.S.C. § 363(h) does not allow the trustee to sell the debtor's property subject to the life estate of another. *In re Hajjar*, 385 B.R. 482 (Bankr. D. Mass. 2008).

Failure to clear title after a divorce causes particular problems as the trustee can usually exercise powers of a hypothetical BFP under 11 U.S.C. § 544 to enforce record title. *In re Claussen*, 387 B.R. 249 Bankr. D. S.D. 2007) (unrecorded divorce decree ineffective to transfer property); *In re Robinson*, 346 B.R. 172 (Bankr. E.D. Va. 2006) (trustee could sell house still titled to debtor and former spouse notwithstanding award to non-debtor in divorce decree); *In re Kelley*, 304 B.R. 331 (Bankr. E.D. Tenn. 2003) (trustee's power to sell superceded rights of debtor's former spouse, who was awarded house in unrecorded divorce judgment). *But see In re Trout*, 146 B.R. 823 (Bankr. D.N.D. 1992), *aff'd*, 2 F.3d 1154 (8th Cir. 1993) (trustee as hypothetical BFP could not sell house in which the debtor's former spouse had sole occupancy and paid all expenses for 14 years, even though record title was still in names of debtor and former spouse); *In re Weisman*, 5 F.3d 417 (9th Cir. 1993) (similar facts); *accord In re Ebel*, 144 B.R. 510 (D. Colo. 1992).

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

b. Community Property. Most community property of spouses is entirely in the bankruptcy estate of either spouse. 11 U.S.C. § 541(a)(2); *In re Martell*, 349 B.R. 233 (Bankr. D. Idaho 2005); *In re Victor*, 341 B.R. 775 (Bankr. D. N.M. 2006); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002). Accordingly, the sale of such an asset by the trustee usually does not involve a co-owner. However, common law forms of co-ownership may also occur in community property states, and a single asset may have components of value that are both separate and community property. Assets held in joint tenancy may actually be community property. *See In re Fingado*,

955 F.2d 31 (10th Cir. 1992) (certifying question to N.M. S. Ct). The New Mexico Supreme Court held that community property ownership is presumed for assets held in joint tenancy. *Swink v. Fingado*, 850 P.2d 978 (N.M. 1993). Therefore, the 10th Circuit Court of Appeals held that the bankruptcy court, at 113 B.R. 37 (Bankr. D. N.M. 1990), had properly held that the debtor's homestead, owned in joint tenancy with his nondebtor spouse, was entirely includable in his bankruptcy estate. *In re Fingado*, 995 F.2d 175 (10th Cir. 1993). The considerations of 11 U.S.C. § 363(h) did not apply, and the nondebtor spouse was not entitled to half of the proceeds. *See also* Wis. Stat. § 766.60(4) (regarding classification of Wisconsin marital property titled as joint tenants or tenants in common).

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

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

M. ERISA Benefits and Spendthrift Trust Interests. An interest that the debtor has in property that is subject to restrictions under nonbankruptcy law is not property of the debtor's estate. 11 U.S.C. § 541(c)(2); *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (ERISA qualified plan is not property of beneficiary's estate). Amendments to 11 U.S.C. § 541 by the 2005 Act provided additional protections for certain qualified plans by omitting them from property of the estate. *See* 11 U.S.C. § 541(b)(5)-(7), applicable to cases filed on or after October 17, 2005. When the non-debtor former spouse of a bankruptcy debtor has been awarded a portion of a plan for which the debtor is the nominal beneficiary, and if the plan is property of the estate, as was often the case under pre-2005 law, courts dealt with the situation in a variety of ways to protect the interests of the non-debtor. In some cases, the award of the interest, even if it had not yet been transferred at the time of filing the bankruptcy petition, excluded the plan from property of the estate. *See, e.g.*, *In re Nelson*, 274 B.R. 789 (B.A.P. 8th Cir. 2002), *aff'd*, 322 F.3d 541 (8th Cir. 2003) (debtor had interest in former spouse's ERISA qualified plan that was excluded from estate); *In re Gendreau*, 122 F.3d 815 (9th Cir. 1997) (debtor's former wife's prepetition right to obtain QDRO gave her property right that was not cut off by former husband's bankruptcy); *Holland v. Knoll*, 202 B.R. 646 (D. Mass. 1996)

(former husband of debtor had vested property interest in debtor's pension fund); *Walston v. Walston*, 190 B.R. 66 (E.D. N.C. 1995) (debtor's former wife's interest in debtor's military pension was in nature of "property right," not a claim that could be discharged); *Brown v. Pitzer*, 249 B.R. 303 (S.D. Ind. 2000) (portion of debtor's non-ERISA-qualified plan awarded to debtor's spouse prepetition, but not yet transferred, was not in debtor's estate); *In re Metz*, 225 B.R. 173 (B.A.P. 9th Cir. 1998) (debtor's interest in former husband's non-ERISA-qualified plan awarded to her in divorce was not property of her estate because of spendthrift provision); *In re Carter-Bland*, 382 B.R. 743 (Bankr. S.D. Ohio 2008) (former spouse's share of debtor's ESOP was excluded from estate); *In re Nichols*, 305 B.R. 418 (Bankr. M.D. Pa. 2004) (non-debtor former spouse's share of debtor's military pension awarded non-debtor spouse in divorce was not included in debtor's estate); *In re Seddon*, 255 B.R. 815 (Bankr. W.D. N.C. 2000) (debtor's interest in former spouse's CSRS benefits obtained prepetition through QDRO were not property of debtor's estate); *In re McQuade*, 232 B.R. 810 (Bankr. M.D. Fla. 1999) (former spouse's interest in debtor's pension plan vested at time of divorce). Other courts treated the debtor's obligation to turn over the former spouse's portion of the pension as nondischargeable support (*In re Cuseo*, 242 B.R. 114 (Bankr. D. Conn. 1999)), defalcation in a fiduciary capacity (*In re Dahlin*, 94 B.R. 79 (Bankr. E.D. Va. 1988), *aff'd*, 911 F.2d 721 (4th Cir. 1990)), conversion (*In re Wood*, 96 B.R. 993 (B.A.P. 9th Cir. 1988)), or a post-petition obligation (*Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990)). On the other hand, such obligations were sometimes discharged as a property division, although subsequent developments in the law probably supercede these cases. *See In re Teichman*, 774 F.2d 1395 (9th Cir. 1985); *see also In re Adams*, 241 B.R. 880 (Bankr. N.D. Ohio 1999) (obligation to turn over portion of 401(k) plan excepted from discharge under 11 U.S.C. § 523(a)(15)).

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

III. AUTOMATIC STAY.

A. Stay of Actions to Recover Claims or Property. The filing of a bankruptcy operates as a stay against all acts to acquire property of the debtor or to recover a claim against the debtor that arose prepetition. The 2005 Act expanded exceptions so most family law matters are excepted from the stay, except matters relating to property division. *See infra* regarding family related exceptions. Cases involving bankruptcies before the 2005 Act applied may still be relevant as to property matters. Acts to recover property of the estate for a nondischargeable debt are also stayed. *See, e.g., In re Edwards*, 214 B.R. 613 (B.A.P. 9th Cir. 1997) (ex-wife's recordation of lis pendens was part of her continuing attempts to collect on divorce-related obligation and, as such, violated automatic stay); *In re Willard*, 15 B.R. 898 (B.A.P.

9th Cir. 1981) (state court dissolution judgment made final in violation of the stay was void to the extent it transferred property of the estate, but nondebtor wife could enforce it as to property that was no longer property of the estate); *In re Aulicino*, 400 B.R. 175 (Bankr. E.D. Pa. 2008) (stay lifted for debtor's former husband to enforce property division because trustee could not avoid transfer as hypothetical BFP); *In re Balzano*, 399 B.R. 428 (Bankr. D. Md. 2008) (stay did not apply to real estate titled only in name of debtor's non-filing spouse).

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

C. Contempt Action in State Court. If incarceration is used to compel debtor to pay support from property of the estate, action violates stay. *In re Johnston*, 321 B.R. 262 (D. Ariz. 2005); *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008); *In re Farmer*, 150 B.R. 68 (Bankr. N.D. Ala. 1991); *In re Suarez*, 149 B.R. 193 (Bankr. D. N.M. 1993). The Ninth Circuit has determined that the stay does not enjoin state criminal prosecutions, even if the underlying purpose of the criminal proceedings is debt collection. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (criminal prosecution for non-payment of child support). *See also In re Siskin*, 231 B.R. 514 (Bankr. E.D. N.Y. 1999) (nondebtor spouse had no standing to recover for stay violation against debtor husband).

In *In re Kearns*, 161 B.R. 701 (D. Kan. 1993), *modified*, 168 B.R. 423 (D. Kan. 1994), the record was unclear as to whether the stay was violated by a contempt order in state court against the debtor, but the state court judge was entitled to judicial immunity from sanctions. *See also Matter of Rogers*, 164 B.R. 382 (Bankr. N.D. Ga. 1994). The opposing party in *Rogers* did not violate the stay for failing to take affirmative action to have the debtor released. *Id*. However, both the support creditor and her attorneys were sanctioned for failing to take corrective action after a stay violation in *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008). The court in *In re O'Brien*, 153 B.R. 305 (D. Or. 1993), held that a contempt action was not stayed for violation of an order to sign mortgages entered before the bankruptcy. This is probably distinguishable from an order for payment.

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

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

E. Relief from Stay. Stay regarding property may be lifted for cause, including allowing state court to adjudicate rights of the spouses in property, even though distribution of property of the estate is under the jurisdiction of the bankruptcy court. 11 U.S.C. § 362(d); *In re Claughton*, 140 B.R. 861 (Bankr. W.D. N.C. 1992), *aff'd*, 33 F.3d 4 (4th Cir. 1994); *In re Roberge*, 188 B.R. 366 (E.D. Va. 1995), *aff'd*, 95 F.3d 42 (4th Cir. 1996); *In re Robbins*, 964 F.2d 342 (4th Cir. 1992). *See In re Peterson*, 410 B.R. 133 (Bankr. D. Conn 2009) (stay lifted to continue pending proceedings); *In re Jacobson*, 231 B.R. 763 (Bankr. D. Ariz. 1999) (stay lifted so nondebtor spouse of chapter 13 debtor could continue action to enforce support

obligation and preserve right to collect interest, but not to collect arrearage, which was to be paid through plan; plan to be modified because earnings were still property of estate); *In re Sokoloff*, 200 B.R. 300 (Bankr. E.D. Pa. 1996) (stay lifted so wife could enforce her right to support and to litigate issues of the parties' marital relationship or custody of their children; but stay not lifted with regard to issues of wife's attorney's fees, equitable distribution, or other aspects of the state court action); *In re Davis*, 133 B.R. 593 (Bankr. E.D. Va. 1991) (stay was lifted so state court could adjudicate rights of parties in property; the trustee could intervene in state court action to protect the estate's interests). The nondebtor spouse cannot invoke the stay to avoid effects of state court property division. *Lopez v. Lopez*, 478 N.W.2d 706 (Mich. App. 1991).

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

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

IV. PROPERTY DIVISION vs. SUPPORT

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

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> * * *
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that —
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

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

11 U.S.C. § 523(a)(5) (2004).

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

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

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

11 U.S.C. § 101(14A) (2005).

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

claims arising before, on, and after filing and to all government support claims.

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

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

For cases to which the BAPCPA amendments apply, 11 U.S.C. § 523(a)(15) excepts debts from discharge that are not DSOs but that arise in connection with a divorce decree, separation agreement, or similar court order. Thus, except in a chapter 13 case, all debts that arise in the domestic relations context are not discharged. *See, e.g., In re Blackburn*, 412 B.R. 710 (Bankr. W.D. Pa. 2009); *In re Golio*, 393 B.R. 56 (Bankr. E.D. N.Y. 2008); *In re Schweitzer*, 370 B.R. 145 (Bankr. S.D. Ohio 2007).

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

E. Concurrent Jurisdiction to Determine Dischargeability. State and federal courts have concurrent jurisdiction to determine whether particular debts, other than those under 11 U.S.C. § 523(a)(2), (4), and (6), are subject to or excepted from the debtor's discharge. 11 U.S.C. § 523(c). *See, e.g., Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005); *In re Monsour*, 372 B.R. 272 (Bankr. W.D. Va. 2007); *see also In re McGregor*, 233 B.R. 406 (Bankr. S.D. Ohio 1999) (state court had concurrent jurisdiction to decide exception to discharge under 11 U.S.C. § 523(a)(3)

when debtor former wife omitted former husband from schedules); *In re Swartling*, 337 B.R. 569 (Bankr. E.D. Va. 2005) (bankruptcy court bound by state court's determination of nondischargeability; state court immune from liability for finding). A state court deciding a bankruptcy issue must apply bankruptcy law. *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984).

F. Burden of Proof. Burden of proof is on the party objecting to the dischargeability of the debt under 11 U.S.C. § 523(a)(5). *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990); *In re Horner*, 222 B.R. 918 (S.D. Ga. 1998); *Fraser v. Fraser*, 196 B.R. 371 (E.D. Tex. 1996); *In re Kerzner*, 250 B.R. 487 (Bankr. S.D.N.Y. 2000). Burden of proof is by a preponderance of the evidence. *In re Merrill*, 246 B.R. 906 (Bankr. N.D. Okla. 2000), *aff'd*, 252 B.R. 497 (B.A.P. 10th Cir. 2000); *In re Ferebee*, 129 B.R. 71 (Bankr. E.D. Va. 1991) (citing *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654 (1991)). Exceptions to discharge are liberally construed in favor of the debtor, but exceptions are less favored in the domestic relations context. *Matter of Crosswhite*, 148 F.3d 879, 881-82 (7th Cir. 1998); *In re Joffrion*, 240 B.R. 630 (M.D. Ala. 1999).

G. Evidence. A court may look beyond the language of the decree to determine the nature of the obligation. *See In re Brody*, 3 F.3d 35 (2d Cir. 1993); *In re Goin*, 808 F.2d 1391 (10th Cir. 1987); *In re Seixas*, 239 B.R. 398 (B.A.P. 9th Cir. 1999); *In re Adams*, 200 B.R. 630 (N.D. Ill. 1996); *see also In re Krein*, 230 B.R. 379 (Bankr. N.D. Iowa 1999) (court considered post-divorce "side agreements" as having been made in connection with divorce decree); *Matter of Jacobsen*, 161 B.R. 239 (Bankr. D. Neb. 1993). Most courts require that once the plaintiff has presented evidence that the obligation is actually in the nature of support, the burden of going forward shifts to the debtor to provide evidence that the obligation is not support, but the ultimate burden of proof is on the creditor. *See, e.g., In re Fussell*, 303 B.R. 539 (Bankr. S.D. Ga. 2003). Other jurisdictions prohibit the admission of extrinsic evidence once the plaintiff has proved the obligation qualifies as support. *See In re Van Aken*, 308 B.R. 836 (Bankr. N.D. Ohio 2004) (citing *In re Sorah*, 163 F.3d 397 (6th Cir. 1998)), *aff'd*, 320 B.R. 620 (B.A.P. 6th Cir. 2005).

H. Third Party Obligee. Some courts have held that the obligation may be to a third party for the benefit of the spouse or child entitled to support, rather than directly to the spouse, former spouse or child. *In re Leibowitz*, 217 F.3d 799 (9th Cir. 2000) (AFDC reimbursement); *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983) (obligation to pay debts to third parties constituted support of joint obligor); *In re Hamblen*, 233 B.R. 430 (Bankr. W.D. Mo. 1999) (marital debts payable to third party were support); *In re Frye*, 231 B.R. 71 (Bankr. E.D. Mo. 1999) (obligation to attorney who represented wife); *In re Harr*, 224 B.R. 718 (Bankr. E.D. Mo. 1998) (grandmother's legal fees); *In re Schwartz*, 217 B.R. 533 (Bankr. E.D. Tex. 1998) (aunt's expenses for necessaries provided to debtor's child); *In re Staggs*, 203 B.R. 712 (Bankr. W.D. Mo. 1996) (guardian ad litem). *But see In re McIntyre*, 328 B.R. 356 (Bankr. D. Mass. 2005) (death of spouse did not constitute assignment for

nondischargeability purposes, disagreeing with cases to the contrary); *In re Prettyman*, 117 B.R. 503 (Bankr. W.D. Mo. 1990) (substitution of personal representative of deceased former spouse of debtor did not constitute an assignment of nondischargeable child support, but children were proper parties to enforce, not former spouse's estate).

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

I. Factors to Consider. Various factors are considered by courts to determine whether an obligation is actually in the nature of support. *See generally* Sommer & McGarity, *Collier Family Law and the Bankruptcy Code*, ch. 6 (Matthew Bender 1991, supp. ann.). Factors include:

1. Whether there was an alimony award entered by the state court. *See In re Coleman*, 152 B.R. 779 (Bankr. M.D. Fla. 1993).

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

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

   Intent is a question of fact. *In re Morel*, 983 F.2d 104 (8th Cir. 1992). Most courts hold that the bankruptcy court is not bound by labels the parties place on a provision, but what the parties label an obligation may be evidence of intent. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001) (case remanded to determine state court's intent); *In re Mannix*, 303 B.R. 587

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

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

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

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

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

8. Whether the payment was fashioned in order to balance disparate incomes of the parties. *See In re MacGibbon*, 383 B.R. 749 (Bankr. W.D. Wash. 2008) (additional support that balanced incomes found nondischargeable); *In re Brown*, 288 B.R. 707 (Bankr. W.D. Pa. 2003) (obligation needed to balance incomes of parties); *In re Rosenblatt*, 176 B.R. 76 (Bankr. S.D. Fla.

1994) (substantial difference in income); *In re Fagan*, 144 B.R. 204 (Bankr. D. Mass. 1992) (parties' incomes were approximately equal).

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

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

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

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

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

14. Tax treatment of the payment by the debtor/payor spouse. *See, e.g., In re Robb*, 23 F.3d 895 (4th Cir. 1994)*; In re Sampson*, 997 F.2d 717 (10th Cir. 1993); *Matter of Davidson*, 947 F.2d 1294 (5th Cir. 1991); *In re Sillins*, 264 B.R. 894 (Bankr. N.D. Ill. 2001) (tax treatment was evidence but was not conclusive as to classification as support). *But see Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986) (support not intended because agreement did not allow payments to be deducted); *In re Cox*, 292 B.R. 141 (Bankr. E.D. Tex. 2003) (quasi-estoppel applied to prevent husband from asserting obligation was not support when he had deducted payments as alimony). *See also In re Bailey*, 285 B.R. 15 (Bankr. N.D. Okla. 2002) (neither party considered tax

consequences so no estoppel); *In re Kelley*, 216 B.R. 806 (Bankr. E.D. Tenn. 1998) (debtor not barred by doctrine of quasi-estoppel from arguing that debt was not in nature of support, even though he had repeatedly claimed "alimony" deduction for prior payments of same obligation on tax returns).

J. Examples:

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

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

3. Credit Cards. *In re McLain*, 241 B.R. 415 (B.A.P. 8th Cir. 1999) (joint credit card debt nondischargeable); *In re Polishuk*, 243 B.R. 408 (Bankr. N.D. Okla. 1999) (hold harmless on credit card debt excepted from discharge); *In re Luman*, 238 B.R. 697 (Bankr. N.D. Ohio 1999) (same); *In re Williams*, 189 B.R. 678 (Bankr. N.D. Ohio 1995) (credit card obligation nondischargeable because parties intended to create support obligation). *But see In re Waltner* 271 B.R. 170 (Bankr. W.D. Mo. 2001) (credit card debt discharged); *In re Stone*, 199 B.R. 753 (Bankr. N.D. Ala. 1996) (credit card debts do not fall within § 523(a)(5) exception, but they are nondischargeable under § 523(a)(15)).

4. Other Marital Debts. *Matter of Coil*, 680 F.2d 1170 (7th Cir. 1982) (hold

harmless agreement for marital debts was nondischargeable); *In re McKinnis*, 287 B.R. 245 (Bankr. E.D. Mo. 2002) (various marital debts held to be for support); *In re Dean*, 277 B.R. 381 (Bankr. C.D. Ill. 2002) (payment of tax due on joint return was support); *In re Slygh*, 244 B.R. 410 (Bankr. N.D. Ohio 2000) (hold harmless was nondischargeable support because of debtor's income potential); *In re Hamblen*, 233 B.R. 430 (Bankr. W.D. Mo. 1999) (obligation to pay marital debts was awarded in lieu of maintenance); *In re Rooker*, 116 B.R. 415 (Bankr. M.D. Pa. 1990) (obligation to pay one half of marital debts was property division); *In re Zuccarell*, 181 B.R. 42 (Bankr. N. D. Ohio 1995) (debtor's obligation to pay marital debts was not support for nondebtor former spouse when nondebtor was ordered to pay debtor support).

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

6. Medical Expenses. *Matter of Seibert*, 914 F.2d 102 (7th Cir. 1990); *In re Moeder*, 220 B.R. 52 (B.A.P. 8th Cir. 1998) (child's medical and psychologist expenses nondischargeable); *In re McLain*, 241 B.R. 415 (B.A.P. 8th Cir. 1999) (health insurance premiums and medical expenses of children nondischargeable); *In re Marquis*, 203 B.R. 844 (Bankr. D. Me. 1997) (medical and counseling expenses of former spouse nondischargeable); *Matter of Olson*, 200 B.R. 40 (Bankr. D. Neb. 1996) (past and future medical expenses, which stemmed from debtor's alleged physical abuse of ex-wife, nondischargeable); *In re Azia*, 159 B.R. 71 (Bankr. D. Mass. 1993) (obligation to pay medical and dental expenses was nondischargeable even though payment was made to third party; dependents received benefit so there was no assignment); *In re Northcutt*, 158 B.R. 658 (Bankr. N.D. Ohio 1993) (health insurance premiums). *But see In re Beach*, 220 B.R. 651 (Bankr. D. N.D. 1998) (hospital obligation of former wife discharged, which enabled debtor to pay other support obligations).

7. Contributions to Spouse's Education. *Sylvester v. Sylvester*, 865 F.2d 1164 (10th Cir. 1989) (payments to compensate for assisting debtor in obtaining medical degree nondischargeable); *In re Friedrich*, 158 B.R. 675 (Bankr. N.D. Ohio 1993) (obligation to pay education expenses for former wife nondischargeable support); *In re Grasmann*, 156 B.R. 903 (Bankr. E.D. N.Y. 1992) (enhancement of husband's earning ability nondischargeable); *Stranathan v. Stowell*, 15 B.R. 223 (Bankr. D. Neb. 1981) (lump sum payment to wife for her time and financial contribution to husband's professional education was nondischargeable). *But see In re Neal*, 179 B.R. 234 (Bankr. D. Idaho 1995) (award based on former spouse's contribution to

debtor's attending medical school was discharged because it related to past obligations, not future support).

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

9. Child Support. *In re Seixas*, 239 B.R. 398 (B.A.P. 9th Cir. 1999) (provision in settlement agreement to pay private school tuition or to pay college expenses of a child over the age of majority was nondischargeable even though under state law the support obligation ceased when child turned eighteen); *In re Shaw*, 299 B.R.107 (Bankr. W.D. Pa. 2003) (college expenses were support); *In re Cunningham*, 294 B.R. 724 (Bankr. C.D. Ill. 2003) (arrearage obligation continued to be nondischargeable child support even though children had reached age of majority); *In re Kriss*, 217 B.R. 147 (Bankr. S.D.N.Y. 1998) (child care and medical obligations constituted nondischargeable child support); *In re Fritz*, 227 B.R. 700 (Bankr. S.D. Ind. 1997) (obligation to pay for costs of children's private school were in nature of nondischargeable support); *In re Bullock*, 199 B.R. 54 (Bankr. W.D. Mo. 1996) (child support obligation assigned to state agency nondischargeable); *In re Prager*, 181 B.R. 917 (Bankr. W.D. Tenn. 1995) (continuing child support as long as children were full time students and under age of 22 was nondischargeable); *In re Smith*, 180 B.R. 648 (D. Utah 1995) (claim of private child support collection service was nondischargeable because arrangement was a contingent fee, not assignment); *Matter of Bush*, 154 B.R. 69 (Bankr. S.D. Ohio 1993) (college expenses for children of chapter 13 debtor were nondischargeable); *In re Smith*, 139 B.R. 864 (Bankr. N.D. Ohio 1992) (retroactive child support is nondischargeable).

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

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

11. Miscellaneous. An agreement by the debtor to reimburse former spouse for

debtor's share of income tax debt was excepted from discharge under 11 U.S.C. § 523(a)(14) in *In re Barton*, 321 B.R. 877 (Bankr. N.D. Ohio 2005). Payments of a portion of the former spouse's income tax refund and one half of the cash value of the debtor's life insurance policy was nondischargeable support in *In re Drennan*, 161 B.R. 661 (Bankr. E.D. Ark. 1993). *See also In re Martinez*, 230 B.R 314 (Bankr. W.D. Tex. 1999) (life insurance premiums on debtor's life nondischargeable); *Fraser v. Fraser*, 196 B.R. 371 (E.D. Tex. 1996) (indemnity obligation); *In re Custer*, 208 B.R. 675 (Bankr. N.D. Ohio 1997) (stock buyout); *In re Sweck*, 174 B.R. 532 (Bankr. D. R.I. 1994) (yacht mortgage, life insurance); *In re Hughes*, 164 B.R. 923 (E.D. Va. 1994) (life insurance); *In re Pinkstaff*, 163 B.R. 504 (Bankr. N.D. Ohio 1994) (water bill). *But see In re Wehr*, 292 B.R. 390 (Bankr. D. N.D. 2003) (life insurance was to secure note, not support).

12. Attorney's Fees.

a. For Debtor's Spouse in Dissolution Action. The same factors used in weighing property division versus support apply in determining whether an award of attorney's fees is nondischargeable. The debt may be nondischargeable even if paid to someone other than the former spouse, including the former spouse's attorney, even if the third party has released the former spouse from liability. *Matter of Hudson*, 107 F.3d 355 (5th Cir. 1997); *In re Kline*, 65 F.3d 749 (8th Cir. 1995); *In re Hendricks*, 248 B.R. 652 (Bankr. M.D. Fla. 2000); *In re Ackerman*, 247 B.R. 336 (Bankr. M.D. Fla. 2000); *In re Wisniewski*, 109 B.R. 926 (Bankr. E.D. Wis. 1990). *See also In re Maddigan*, 312 F.3d 589 (2d Cir. 2002) (attorney's fees for unmarried mother of debtor's child in custody dispute were excepted from discharge as support for child); *In re Wilson*, 380 B.R. 49 (Bankr. M.D. Fla. 2006) (same). *But see In re Orzel*, 386 B.R. 210 (Bankr. N.D. Ind. 2008) (fees ordered to be paid directly to attorney for debtor's former spouse were not a priority claim as DSO; disagreeing with *Kline* rationale).

b. Standing. *In re Dollaga*, 260 B.R. 493 (B.A.P. 9th Cir. 2001) (debtor husband's law firm lacked standing as it was not a spouse, former spouse or child of the debtor). *But see In re Prensky*, 416 B.R. 406 (Bankr. D. N.J. 2009) (law firm that represented debtor's ex-wife could bring action under 11 U.S.C. § 523(a)(15)); *In re Soderlund*, 197 B.R. 742 (Bankr. D. Mass. 1996) (law firm allowed to bring adversary proceeding).

c. Cases Not Allowing a Discharge of Attorney's Fees. If a spouse is required to pay the other spouse's attorney's fees incident to divorce, and the requirement is based on need, it is usually

considered support and is nondischargeable. *See, e.g., Matter of Hudson*, 107 F.3d 355 (5th Cir. 1997); *In re Strickland*, 90 F.3d 444 (11th Cir. 1996); *In re Kline*, 65 F.3d 749 (8th Cir. 1995); *In re Akamine*, 217 B.R. 104 (S.D.N.Y. 1998); *In re Thomas*, 222 B.R. 174 (Bankr. E.D. Mo. 1998); *In re Shea*, 221 B.R. 491 (Bankr. D. Minn. 1998); *In re Finlayson*, 217 B.R. 666 (Bankr. S.D. Fla. 1998). In *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002), the court held fees payable to attorneys who represented the mother of debtor's child in custody proceedings were excepted from discharge as support for the child, even though no attorney was appointed for the child. *See also In re Wilson*, 380 B.R. 49 (Bankr. M.D. Fla. 2006); *In re Mellor*, 340 B.R. 419 (Bankr. M.D. Fla. 2006) (same). If state law requires a showing of need for attorney's fees to be ordered, then without further evidence in the bankruptcy court, fees will be nondischargeable support. For cases filed after BAPCPA applies, the obligation would be a DSO

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

d. Cases Allowing Discharge of Attorney's Fees. Cases filed before the BAPCPA amendment to 11 U.S.C. § 523(a)(15) made a non-support award of attorney's fees dischargeable. *See Estate of Mayer v. Hawe*, 303 B.R. 375 (E.D. Wis. 2003) (attorney's fees incurred in custody dispute involving adult disabled child were not for support); *Carlin-Blume v. Carlin*, 314 B.R. 286 (S.D. N.Y. 2004); *In re Woods*, 309 B.R. 22 (Bankr. W.D. Mo. 2004); *In re Smolenski*, 210 B.R. 780 (Bankr. N.D. Ill. 1997) (order for payment of former spouse's attorney's fees not entered before bankruptcy); *In re Schroeder*, 25 B.R. 190 (Bankr. N.D. Ill. 1982) (attorney's fees ordered on wife's behalf were considered dischargeable property

division because at the time of the divorce, the wife was employed and the debtor was not, she had waived maintenance and was receiving only nominal child support); *In re Dunscombe*, 137 B.R. 768 (Bankr. E.D. Mo. 1992) (attorney's fees discharged based on lack of need). Section 523(a)(15) obligation would be subject to discharge upon completion of a chapter 13 case. *See infra* regarding chapter 13 issues. *See In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009) (attorney's fees awarded ch. 13 debtor's former spouse were not DSO as they were based on "bad faith litigation misconduct" and were not entitled to priority status).

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

On the other hand, the court in *In re Brooks*, 371 B.R. 761 (Bankr. N.D. Tex. 2007), interpreted the definition of DSO in post-BAPCPA case and held that law firm that was awarded fees on behalf of debtor's former spouse in divorce action could not enforce provision because it was not a party by whom debts were "recoverable."

The court in *In re Lowther*, 321 F.3d 946 (10th Cir. 2002), held attorney's fees awarded the debtor's former husband in custody dispute were discharged because of "unusual circumstance" that debtor was primary custodial parent and a finding of exception to discharge would have adversely affected her ability to support children. *See also In re Jones*, 9 F.3d 878, 881 (10th Cir. 1993) ("'support' encompasses the issue of custody absent unusual circumstances").

e. For Debtor's Spouse in Bankruptcy Court Action. Attorney's fees are usually not allowed the prevailing party in bankruptcy court proceedings, even if the creditor is the debtor's former spouse. *In re Anderson*, 300 B.R. 831 (Bankr. W.D. N.Y. 2003); *In re Nichols*, 221 B.R. 275 (Bankr. N.D. Okla. 1998). However, in *Matter of Scannell*, 60 B.R. 562 (Bankr. W.D. Wis. 1986), and *In re Teter*, 14 B.R. 434 (Bankr. N.D. Tex. 1981), the bankruptcy courts awarded

attorney's fees in the § 523(a)(5) actions based on state statutes authorizing award of attorney's fees in family law or contract matters. *See also In re Busch,* 369 B.R. 614 (B.A.P. 10th Cir. 2007); *In re Golio*, 393 B.R. 56 (Bankr. E.D. N.Y. 2008). The reasoning of these earlier cases was criticized in *In re Colbert*, 185 B.R. 247 (Bankr. M.D. Tenn. 1995), and *In re Barbre*, 91 B.R. 846 (Bankr. S.D. Ill. 1988).

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

g. Debtor's Attorney's Fees. The debtor's own attorney's fees in a paternity action are dischargeable. *Matter of Rios*, 901 F.2d 71 (7th Cir. 1990). The debtor's attorney's fees in custody and child support dispute were dischargeable. *In re Klein*, 197 B.R. 760 (Bankr. E.D. N.Y. 1996). *See also In re Chase*, 372 B.R. 133 (Bankr. S.D. N.Y. 2007) (attorney did not prove debtor made false representation of intent to pay for divorce services); *In re Pass*, 258 B.R. 170 (Bankr. E.D. Tenn. 2001) (debtor's divorce attorney's fees were not secured by lien on property division received by debtor).

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

Wis. 1997) (equitable attorney's lien in divorce proceeds was not avoidable).

i. Guardian ad Litem. Most courts find guardian ad litem fees a nondischargeable support obligation, even though they are usually not an obligation of the child or payable to the child. *In re Chang*, 163 F.3d 1138 (9th Cir. 1998); *Matter of Dvorak*, 986 F.2d 940 (5th Cir. 1993); *In re Miller*, 169 B.R. 715 (D. Kan. 1994), *aff'd*, 55 F.3d 1487 (10th Cir. 1995); *Levin v. Greco*, 415 B.R. 663 (N.D. Ill. 2009) (fees of debtor's children's representative in state court action was DSO); *In re Levin*, 306 B.R. 158 (Bankr. D. Md. 2004) (state statutory scheme for child support that excludes GAL fees not binding for dischargeability purposes); *In re Manzi*, 283 B.R. 103 (Bankr. D. Conn. 2002) (GAL fees not dischargeable except if debtor proves unusual circumstances); *In re Ross*, 247 B.R. 333 (Bankr. M.D. Fla. 2000); *In re Lockwood*, 148 B.R. 45 (Bankr. E.D. Wis. 1992); *In re Glynn*, 138 B.R. 360 (Bankr. D. Conn. 1992) (criticizes *Linn*). Award of fees for guardian ad litem in *In re Peters*, 124 B.R. 433 (Bankr. S.D.N.Y. 1991), *aff'd*, 964 F.2d 166 (2d Cir. 1992), was ordered "as additional support" and was nondischargeable. *See also In re Sullivan*, 234 B.R. 244 (Bankr. D. Conn 1999) (GAL fees involving custody dispute over debtor's grandchildren discharged because they did not involve "child of the debtor").

K. Objections Under 11 U.S.C. § 523(a)(2), (4) & (6). A debt arising in a marital settlement agreement may be nondischargeable if incurred by fraud. 11 U.S.C. § 523(a)(2). Procedural rules and time limits for such objections must be followed. Bankruptcy Rules 4004, 4007. *See Sanford Inst. for Sav. v. Gallo*, 156 F.3d 71 (1st Cir. 1998) (justifiable reliance standard); *In re Lang*, 293 B.R. 501 (B.A.P. 10th Cir. 2003) (fraud related to paternity);*In re Travis*, 364 B.R. 285 (Bankr. N.D. Ohio 2006) (fraud in obtaining credit cards in former husband's name); *In re Cooke*, 335 B.R. 269 (Bankr. D. Conn. 2005) (debtor must have known there was insufficient equity in property to pay former wife from proceeds of sale as promised); *In re Zaino*, 316 B.R. 1 (Bankr. D. R.I. 2004) (concealed assets related to support); *In re Ingalls*, 297 B.R. 543 (Bankr. C.D. Ill. 2003) (obligations assumed without intent to pay were nondischargeable); *In re Dixon*, 280 B.R. 755 (Bankr. M.D. Ga. 2002) (time-barred fraud complaint allowed under 11 U.S.C. § 523(a)(3)); *In re Hallagan*, 241 B.R. 544 (Bankr. N.D. Ohio 1999) (failure to comply with state court orders was evidence of debtor's fraud); *In re Paneras*, 195 B.R. 395 (Bankr. N.D. Ill. 1996) (fraud in incurring joint debt). *But see In re Stanifer*, 236 B.R. 709 (B.A.P. 9th Cir. 1999) (forensic psychologist failed to prove fraud in inducement to provide services in custody case); *In re Graham*, 194 B.R. 369 (Bankr. E.D. Pa. 1996) (debtor did not materially misrepresent stability of marriage when he obtained loans from former in-laws); *In re Kruszynski*, 150 B.R. 209 (Bankr. N.D. Ill. 1993)

(former wife was allowed after bar date to amend pleadings alleging nondischargeability under § 523(a)(5) to add a second count of fraud under § 523(a)(2)(A); relation back applied because both counts arose in the divorce action); *In re Ellerman*, 135 B.R. 308 (Bankr. N.D. Ill. 1992) (former wife could not show that husband's deceit resulted in financial loss, only that she would have requested more had she known); *In re Shreffler*, 319 B.R. 113 (Bankr. W.D. Pa. 2004) (timing of bankruptcy close to marital agreement is not per se fraud); *In re Butler*, 277 B.R. 843 (Bankr. M.D. Ga. 2002) (fraud in entering marital settlement agreement not proven); *In re D'Atria*, 128 B.R. 71 (Bankr. S.D. N.Y. 1991)(failure to fulfill requirements of property settlement did not, without more, prove fraud in entering the agreement). Fraud must be plead with particularity. *In re Demas*, 150 B.R. 323 (Bankr. S.D. N.Y. 1993); *see also* Laura W. Morgan, "Civil Conspiracy and Civil RICO in Divorce Actions," Divorce Lit., Vol. 12/No. 11 (Nov. 2000).

A debt may also be excepted from discharge for willful and malicious injury to property of another, such as conversion. 11 U.S.C. § 523(a)(6). *See Matter of Rose*, 934 F.2d 901 (7th Cir. 1991) (debtor's unauthorized taking of cash from joint safe deposit box and resulting obligation in divorce were nondischargeable); *In re Hamilton*, 390 B.R. 618 (Bankr. E.D. Ark. 2008), *aff'd*, 400 B.R. 696 (E.D. Ark. 2009) (failing to care for horses in debtor's possession which were awarded to former spouse was willful and malicious; discharge also denied); *In re Petty*, 333 B.R. 472 (Bankr. M.D. Fla. 2005) (treble damages awarded against debtor in state court civil judgment for conversion of former wife's share of military pension excepted from discharge); *In re Gray*, 322 B.R. 682 (Bankr. N.D. Ala. 2005) (damages awarded for sexual abuse of debtor's daughter excepted from discharge as to both wife and daughter); *In re Hixson*, 252 B.R. 195 (Bankr. E.D. Okla. 2000) (adversary proceeding unrelated to divorce could be brought by debtor's former wife for assault by debtor/former husband); *In re Shteysel*, 221 B.R. 486 (Bankr. E.D. Wis. 1998) (debtor-husband's transfer of marital property to son shortly after served with divorce papers was willful and malicious); *In re Garza*, 217 B.R. 197 (Bankr. N.D. Tex. 1998) (debtor willfully and fraudulently refused to deliver property awarded to former spouse); *In re Arlington*, 192 B.R. 494 (Bankr. N.D. Ill. 1996) (attorney fee award within exception for willful and malicious injury); *In re Sateren*, 183 B.R. 576 (Bankr. D. N.D. 1995) (debtor's sale and conversion of proceeds of cattle and grain awarded former spouse was willful and malicious); *In re Wells*, 160 B.R. 726 (Bankr. N.D.N.Y. 1993) (former wife's embezzlement or conversion of the proceeds of the sale of the marital residence made obligation nondischargeable). *But see In re Patch*, 526 F.3d 1176 (8th Cir. 2008) (debtor's leaving three year old son with boyfriend who had previously abused and eventually murdered him did not rise to level of willful and malicious); *In re Reichardt*, 380 B.R. 596 (Bankr. M.D. Fla. 2006) (debtor's former wife failed to prove obligation was for wilful and malicious injury when judgment was for division of marital estate); *In re White*, 363 B.R. 157 (Bankr. D. Idaho 2007) (gelding of horse eventually awarded to debtor's former husband was not willful and malicious injury as she had equal right to manage and control community property in her

possession); *In re Wright*, 184 B.R. 318 (Bankr. N.D. Ill. 1995) (award to former spouse for debtor's dissipation of assets was not a legal wrong equivalent to willful and malicious standard); *In re Zentz*, 157 B.R. 145 (Bankr. W.D. Mo. 1993), *aff'd*, 81 F.3d 166 (8th Cir. 1996) (attorney's fees awarded to former husband on account of former wife's concealment of child were not excepted from discharge as a willful and malicious injury). *See also In re Moffitt*, 252 B.R. 916 (B.A.P. 6th Cir. 2000) (prior action for damages to debtor's former spouse unrelated to divorce entitled to issue preclusion and found excepted from discharge for willful and malicious injury).

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

L. Standing. The definition of a DSO expands the parties eligible to enforce a support obligation. For a property division, section 523(a)(15) applies only to obligations between spouses, former spouses, and children of the debtor. For examples under the prior statute, see *In re Bartholomew*, 226 B.R. 849 (Bankr. S.D. Ohio 1998) (debtor's obligation to former mother-in-law dischargeable), *In re Hutchins*, 193 B.R. 51 (Bankr. N. D. Ala. 1995) (parties were never married), and *In re Finaly*, 190 B.R. 312 (Bankr. S.D. Ohio 1995) (former spouse could not bring action on behalf of her parents). *See also In re Forgette*, 379 B.R. 621 (Bankr. W.D. Va. 2007) (no hold harmless provision in decree); *In re Stegall*, 188 B.R. 597 (Bankr. W.D. Mo. 1995) (no new obligation arose when debtor was assigned debts because settlement agreement did not include hold harmless or indemnification for debts assigned to either party). *But see In re Gibson*, 219 B.R. 195 (B.A.P. 6th Cir. 1998) (debtor's obligation to pay joint marital debt to third party, which he assumed prepetition pursuant to separation agreement, excepted from discharge even though agreement lacked hold harmless language); *In re Schmitt*, 197 B.R. 312 (Bankr. W.D. Ark. 1996) (court order to pay was equivalent to hold harmless); *In re Speaks*, 193 B.R. 436 (Bankr. E.D. Va. 1995) (hold harmless inferred).

M. Since a DSO is excepted from discharge under all chapters, and only chapter 13 allows for discharge of a property division under BAPCPA, the matter is most likely to arise in the context of plan confirmation or treatment of a claim. *See infra* regarding chapter 13 issues.

V. CHAPTER 12 AND 13 CONSIDERATIONS

A. General Provisions.

1. Estate Property. Estate includes 11 U.S.C. § 541 property owned by the debtor on date of filing, including certain property held by a non-debtor spouse in a community property state, plus any such property acquired while plan is in effect, plus earnings for services performed by the debtor before case is closed, dismissed or converted. 11 U.S.C. §§ 1207(a)(2), 1306(a)(2). *See also In re Brinkley*, 323 B.R. 685 (Bankr. W.D. Ark. 2005) (interpreting 11 U.S.C. §§ 541, 1306, and 348, life insurance proceeds acquired by one joint debtor upon death of the other during ch. 13 was not property of estate upon conversion to ch. 7). Order of confirmation can provide that all earnings of the debtor and/or other property continue to be property of the estate even after confirmation. *See also In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (wages vested upon confirmation and were not protected by automatic stay as to post-petition support due).

2. Eligibility. A chapter 13 debtor must be an individual, or an individual and his or her spouse, with regular income having not more than $336,900 in non-contingent, liquidated, unsecured debts and not more than $1,010,650 in non-contingent, liquidated, secured debts. 11 U.S.C. § 109(e). A chapter 12 debtor must be a "family farmer," also with regular income. 11 U.S.C. §§ 101(18),(19), 109(f). For a chapter 12 case filed on or after October 17, 2005, a "family fisherman" may also qualify as a chapter 12 debtor. 11 U.S.C. § 101(19A), (19B).

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

   If a case is not filed in good faith, or if conversion to another chapter is not in good faith, the case may be dismissed or conversion not allowed as confirmation would be impossible. *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007); *In re Melcher*, 416 B.R. 666 (Bankr. D. Neb. 2009) (provisions for former wife

were not in good faith). *See also In re Seligman*, 417 B.R. 171 (Bankr. E.D. N.Y. 2009) (joint chapter 13 case could be severed so one spouse could convert to chapter 7); *In re Selinsky*, 365 B.R. 260 (Bankr. S.D. Fla. 2007) ("tag team" filing by husband and wife was bad faith); *In re Pakuris*, 262 B.R. 330 (Bankr. E.D. Pa. 2001) (conversion from ch. 7 to ch. 13 not allowed because debtor's only purpose was to regain control over property division litigation that had been settled by ch. 7 trustee); *In re Nahat*, 315 B.R. 368 (Bankr. N.D. Tex. 2004) (separate cases filed by spouses with respect to the same property not in bad faith); *In re Feldman*, 309 B.R. 422 (Bankr. E.D. N.Y. 2004) (court had no in rem jurisdiction over nonfiling spouse's interest in property to grant prospective relief).

3. Automatic Stay. Stay remains in effect until discharge is granted. 11 U.S.C. § 362(c)(2)(C). *But see* 11 U.S.C. § 362(c)(3) and (4), applicable to cases filed on or after October 17, 2005, regarding the automatic stay for debtors filing serial cases. Discharge is issued after ch. 13 plan payments are completed or the debtor receives a "hardship" discharge. 11 U.S.C. §§ 1228(a), (b), 1328(a), (b). Upon confirmation, most courts have held that property of the estate vests in the debtor, 11 U.S.C. §§ 1227(b), 1327(b), unless the order of confirmation provides otherwise, and the spouse can then proceed against the debtor's nonestate property. *See* 11 U.S.C. § 362(b)(2)(B). For this reason, many debtors owing support prefer to provide in the plan that property does not vest until completion. In *Matter of James*, 150 B.R. 479 (Bankr. M.D. Ga. 1993), the court refused to lift the stay to allow the nondebtor spouse to enforce collection of support arrearage, pending amendment of debtor's plan to provide for such arrearage. *Accord In re Fullwood*, 171 B.R. 424 (Bankr. S.D. Ga. 1994) (similar facts); *In re Price*, 179 B.R. 209 (Bankr. E.D. Cal. 1995). *See also In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (income withholding by state for child support did not violate stay but was improper as violation of order confirming plan that provided for support arrearage); *In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (same).

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

A claim against the debtor includes a claim against debtor's property, 11

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

4. Income of Non-debtor Spouse. Income of the non-debtor spouse must be disclosed, even if the debtor has no interest in the income, to allow the court to determine if the plan meets disposable income and good faith tests. Combined income also determines the length of the plan. *See* 11 U.S.C. § 1322(d); Official Form 6, Schedule I. *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006); *In re McNichols*, 254 B.R. 422 (Bankr. N.D. Ill. 2000); *In re Bottelberghe*, 253 B.R. 256 (Bankr. D. Minn. 2000); *In re Ehret*, 238 B.R. 85 (Bankr. D. N.J. 1999). *See also In re Stansell*, 395 B.R. 457 (Bankr. D. Idaho 2008) (deceased wife's income received in six months before filing included to determine commitment period); *In re Mullins*, 360 B.R. 493 (Bankr. W.D. Va. 2007) (sufficient income of debtor's spouse, who committed to making payments, was regular income to unemployed debtor). Similarly, in *In re Antoine*, 208 B.R. 17 (Bankr. E.D.N.Y. 1997), the court determined that an unemployed debtor with no sources of income was nevertheless an "individual with regular income," because wife made a commitment to devote her entire salary in support of the debtor's plan. *See also In re Murphy*, 226 B.R. 601 (Bankr. M.D. Tenn. 1998) (unconditional written commitment to make plan payments by debtor's "significant other" constituted "regular income"). *But see In re Jordan*, 226 B.R. 117 (Bankr. D. Mont. 1998) (debtor who was completely dependent on gratuitous support payments provided by live-in boyfriend was not "individual with regular income" eligible to file for chapter 13 relief).

Under BAPCPA amendments, the income of the debtor and debtor's spouse are combined to determine the commitment period under the means test. 11 U.S.C. § 1322(d). *See also* 11 U.S.C. §§ 707(b)(2)(A) and 1325(b) regarding payment requirements under BAPCPA means test, allowable expenses, and exclusion of DSO payments. The contribution to household expenses by a non-debtor spouse may affect the means test and required contributions to a plan. *See In re Barnes*, 378 B.R. 774 (Bankr. D. S.C. 2007); *In re Shahan*, 367 B.R. 732 (Bankr. D. Kan. 2007); *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006); *In re Beasley*, 342 B.R. 280 (Bankr. C.D. Ill. 2006). *See also In re Stocker*, 399 B.R. 522 (Bankr. M.D. Fla. 2008) (antenuptial agreement that restricted non-debtor spouse's responsibility for household expenses was not a "special circumstance" that could be considered as part of the means test). Contribution to expenses to a household by a non-spouse are also counted, but not that person's entire income. *In re Roll*, 400 B.R. 674 (Bankr. W.D. Wis. 2008); *In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007).

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

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

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

If BAPCPA applies, the debtor must be current in post-petition DSO payments for a plan to be confirmed. 11 U.S.C. §§ 1225(a)(7), 1325(a)(8). Other BAPCPA amendments may affect plan provisions. *See, e.g., In re Vagi*, 351 B.R. 881 (Bankr. N.D. Ohio 2006) (car purchased for use of

debtor's spouse qualified for protection of "hanging paragraph" of 11 U.S.C. § 1325(a), acknowledging contrary authority).

A chapter 13 case filed solely to circumvent the requirements of a dissolution decree may be subject to dismissal for bad faith. *In re Fleury*, 294 B.R. 1 (Bankr. D. Mass 2003) (case dismissed when debtor dissipated over $350,000, and only significant debt was to former husband); *In re Lewis*, 227 B.R. 886 (Bankr. W.D. Ark. 1998) (plan filed solely to attempt to circumvent divorce court orders was filed in bad faith); *In re Maras*, 226 B.R. 696 (Bankr. N.D. Okla. 1998) (plan not proposed in good faith where debtor's sole motivation was to avoid paying former wife); *In re Green*, 214 B.R. 503 (Bankr. N.D. Ala. 1997) (dismissal warranted where debtor filed successive chapter 13 petitions with child support obligation constituting vast majority of claims); *In re Wilson*, 168 B.R. 260 (Bankr. N.D. Fla. 1994). *But see In re Brugger*, 254 B.R. 321 (Bankr. M.D. Pa. 2000) (case not filed in bad faith when plan did not provide for payment of property division debt, but debtor did not meet test of paying creditors more than they would receive in chapter 7); *In re Lindquist*, 349 B.R. 246 (Bankr. D. Or. 2006) (bad faith allegations by former wife of debtor not proven); *In re Nelson*, 189 B.R. 748 (Bankr. D. Minn. 1995) (debtor's voluntary conduct in marrying a disabled person and purchasing an expensive vehicle did not constitute cause for plan modification). *See also In re Dean*, 317 B.R. 482 (Bankr. W.D. Pa. 2004) (debtor could not reject prepetition contract assigning right to receive alimony in exchange for lump sum payment).

6. Objections to confirmation. Since a property division may be discharged upon completion of a chapter 13 plan, and the claim may be paid less that the full amount as a nonpriority claim if the plan so provides, a creditor who believes an obligation is for support and not property division may wish to object to confirmation before such a plan is confirmed. *See, e.g., In re Johnson*, 397 B.R. 289 (Bankr. M.D. N.C. 2008) (obligation to pay second mortgage on house awarded debtor's former wife was DSO)*; In re Boller*, 393 B.R. 569 (Bankr. E.D. Tenn. 2008) (obligation was for property division, not support, and was not entitled to priority status). Otherwise, the order of confirmation is res judicata as to matters set forth in the plan. 11 U.S.C. § 1327. Other causes to object to confirmation may also apply, such as lack of good faith, failure to commit all disposable income to the plan, or failure to provide as much to the plan as would be available under chapter 7. *See* 11 U.S.C. §§ 1322, 1325; *In re Poole*, 383 B.R. 308 (Bankr. D. S.C. 2007).

7. Claims - Support Priority. To receive distributions from a plan trustee, the creditor must timely file a proof of claim. Fed. R. Bankr. P. 3002. If the creditor fails to do so, the debtor (or trustee) may file. Fed. R. Bankr. P. 3004. The debtor may wish to do so to allow plan payments to reduce

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

A claim categorized as property division is not entitled to priority status. *In re White*, 408 B.R. 677 (Bankr. S.D. Tex. 2009); *In re Jennings*, 306 B.R. 672 (Bankr. D. Or. 2004). *See also In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009) (attorney's fees awarded ch. 13 debtor's former spouse were not DSO as they were based on "bad faith litigation misconduct" and were not entitled to priority status). If the plan is silent with respect to classifying a former spouse's claim, the former spouse/creditor may wish to file a claim designating the obligation as support priority. *See* Official Bankruptcy Form 10 Proof of Claim. If not objected to, the claim would be paid in full. If the plan and proof of claim are in conflict as to priority of the claim, it is necessary to know whether the plan or claim controls in the applicable jurisdiction and to bring the matter before the court, either as an objection to the claim by the debtor or as an objection to confirmation by the creditor. Other creditors may also object to the priority of a debt, since payment of 100% to a family creditor may reduce amounts payable to general unsecured debts.

Debtor's divorce attorney's fees, as opposed to the bankruptcy attorney's

fees, may be an administrative expense payable through plan, but only if incurred post-petition and only to extent there is a benefit to the case. *See In re Powell*, 314 B.R. 567 (Bankr. N.D. Tex. 2004).

B. Contents of Plan - Support Arrearage. Early cases often would not allow payment of support arrearage in a plan. This has changed, particularly since the Bankruptcy Reform Act of 1994. *See* 11 U.S.C. §§ 503(b)(7), 1322(a)(2). Accordingly, making support recipient a separate class of creditor does not discriminate unfairly against other unsecured claimants, provided separate classification is necessary to effectuate the plan. *In re Crawford*, 324 F.3d 539 (7th Cir. 2003); *In re Leser*, 939 F.2d 669 (8th Cir. 1991). *But cf. In re Burns*, 216 B.R. 945 (Bankr. S.D. Cal. 1998) (debtors' obligation to county on an assigned child support claim, a nonpriority but nondischargeable debt, could not be placed in a separate class from debtors' other general unsecured debt). Since the BAPCPA amendments, the priority status of DSO (custodial parent) and government DSO creditors removes this problem. *See also In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (income withholding by state for child support did not violate stay but was improper as violation of order confirming plan that provided for support arrearage); *In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (same).

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

VI. AVOIDABLE TRANSFERS

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

right to receive a property division may not be a claim or antecedent debt; it is an equitable interest. Therefore, the nondebtor's interest in escrowed funds from sale of property prepetition awarded in postpetition property division could not be avoided by trustee. *In re Skorich*, 482 F.3d 21 (1st Cir. 2007). *Accord In re Smith*, 321 B.R. 385 (Bankr. W.D. N.Y. 2005) (citing *In re Hope*, 231 B.R. 403 (Bankr. D. D.C. 1999)) (award of attorney's fees for one spouse out of property as part of property division was not for antecedent debt and was not a preference).

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

Query: Is the former spouse an insider, making preference period one year? *See Matter of Holloway*, 955 F.2d 1008 (5th Cir. 1992) (yes, under the facts of that case); *In re Paschall*, 408 B.R. 79 (E.D. Va. 2009) (yes, because parties were still married when transfer occurred); *In re Busconi*, 177 B.R. 153 (Bankr. D. Mass. 1995) (no, under the facts of that case); *In re Schuman*, 81 B.R. 583 (B.A.P. 9th Cir. 1987) (no, under the facts of that case). *See also In re Grove-Merrit*, 406 B.R. 778 (Bankr. S.D. Ohio 2009) ("paramour" was insider for fraudulent transfer purposes); *In re Farson*, 387 B.R. 784 (Bankr. D. Idaho 2008) (trustee presented no proof that debtor's boyfriend was insider before marriage); *In re Dupuis*, 265 B.R. 878 (Bankr. N.D. Ohio 2001) (hearing necessary to determine insider status of debtor's former husband who received transfer pursuant to divorce decree); *In re Demko*, 264 B.R. 404 (Bankr. W.D. Pa. 2001) (debtor's cohabitant was insider); *In re McIver*, 177 B.R. 366 (Bankr. N.D. Fla. 1995) (live-in girlfriend was an insider); *In re Levy*, 185 B.R. 378 (Bankr. S.D. Fla. 1995) (same); *In re Tanner*, 145 B.R. 672 (Bankr. W.D. Wash. 1992) (debtor's former lesbian companion was an insider).

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

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

1. Between Spouses in Fraud of Creditors' Rights. Transfers between spouses during an ongoing marriage will always be subject to scrutiny, especially as

to the adequacy of consideration, concealment, impending recovery by a spouse's creditors, and other badges of fraud. *See, e.g., In re Jacobs*, 490 F.3d 913 (11th Cir. 2007); *Coleman v. Simpson*, 327 B.R. 753 (D. Md. 2005); *In re Phillips*, 379 B.R. 765 (Bankr. N.D. Ill. 2007); *In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007); *In re Unglaub*, 332 B.R. 303 (Bankr. N.D. Ill. 2005); *In re Hicks*, 176 B.R. 466, 470 (Bankr. W.D. Tenn. 1995). Any form of transfer, such as a change in how the property is held, or the recording of a mortgage as occurred in *Unglaub*, may be avoided by the trustee. Under 11 U.S.C. § 544(a) a trustee has avoiding powers of a hypothetical lien creditor, execution creditor, or BFP. *See In re Aulicino*, 400 B.R. 175 (Bankr. E.D. Pa. 2008) (trustee could not qualify as BFP under Pennsylvania law because debtor's spouse lived in house transferred by unrecorded judgment). A fraudulent transfer can be avoided under bankruptcy law, or under state law if there is an unsecured creditor who could avoid the transfer. *See* 11 U.S.C. §§ 548(a)(1), 544(b)(1). Other consequences might include loss of the exemption and denial of the debtor's discharge under 11 U.S.C. § 727(a)(2). *See, e.g., In re Young*, 238 B.R. 112 (B.A.P. 6th Cir. 1999) (dower rights and right to exemption were not revived when transfer to debtor's spouse avoided); *see also In re Swiontek*, 376 B.R. 851 (Bankr. N.D. Ill. 2007) (avoided transfer did not revert to tenancy by the entireties property). The trustee has the burden of proof, which may be by a preponderance of the evidence or by clear and convincing evidence, depending on whether the state or federal statutes are used, although the burden of producing evidence may shift once a prima facie case for fraudulent transfer is established. *See, e.g., In re Duncan*, 562 F.3d 688 (5th Cir. 2009); *In re Prichard*, 361 B.R. 11 (Bankr. D. Mass. 2007).

Transfers between spouses may arise in many contexts. *See, e.g., In re Duncan*, 562 F.3d 688 (5th Cir. 2009) (transfer not fraudulent as it cleared outstanding loans from wife's separate property); *Frierdich v. Mottaz*, 294 F.3d 864 (7th Cir. 2002) (transfer pursuant to prenuptial agreement was ineffective as stock was not delivered and debtor maintained control); *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000) (partition of community property allegedly pursuant to divorce that did not occur was fraudulent; value of property assigned to each spouse not supported, fraudulent intent found, and turnover to trustee ordered); *In re Craig*, 144 F.3d 587 (8th Cir. 1998) (debtor made indirect fraudulent transfer to wife when he directed that his loan proceeds be used to pay for residence titled in wife's name); *Howison v. Hanley*, 141 F.3d 384 (1st Cir. 1998) (debtor's transfer of joint tenancy interest to wife for no consideration resulted in loss of exemption); *In re Gutpelet*, 137 F.3d 748 (3d Cir. 1998) (avoidable transfer found and exemption lost where husband transferred legal title in solely owned property to debtor without consideration; debtor mortgaged property and transferred title to herself and husband as tenants in the entirety and subsequently sold property to third party); *In re Pappas*, 239 B.R. 448 (E.D.

N.Y. 1999) (remedy for transfer of debtor's interest in tenancy by the entireties property to wife was one half of proceeds when sold by wife); *In re Rauh*, 164 B.R. 419 (Bankr. D. Mass. 1994), *aff'd*, 119 F.3d 46 (1st Cir. 1997) (assignment of debtor's partner's note and debtor's interest in tenancy by the entirety home to debtor's wife was fraudulent); *Klingman v. Levinson*, 114 F.3d 620 (7th Cir. 1997) (assignment of beneficial interest in land trust to wife was a fraudulent conveyance; both spouses intended to protect their family home from the husband's creditors when they executed the assignment); *In re Futoran*, 76 F.3d 265 (9th Cir. 1996) (debtor's scheme to buyout his monthly obligation to former wife was to detriment of creditors); *Abramowitz v. Palmer*, 999 F.2d 1274 (8th Cir. 1993) (constructive trust also placed on nondebtor spouse's interest in fraudulently acquired home); *Matter of Halloway*, 955 F.2d 1008 (5th Cir. 1992) (transfer of security interest to former wife was fraudulent even though debtor's wife had previously made unsecured loans); *Matter of Perez*, 954 F.2d 1026 (5th Cir. 1992) (debtor's transfer of one half of tax refund to wife was fraudulent; discharge denied); *In re Davis*, 911 F.2d 560 (11th Cir. 1990) (transfer of assets to debtor's wife was fraudulent even though re-transferred to debtor prepetition); *In re McGavin*, 220 B.R. 125 (D. Utah 1998), *aff'd*, 189 F.3d 1215 (10th Cir. 1999) (court imposed constructive and resulting trusts on assets transferred to spouse and family trust); *In re Greenfield*, 273 B.R. 128 (E.D. Mich. 2002) (release of dower for interest in property as tenant by the entireties did not constitute consideration);*In re Paul*, 217 B.R. 336 (S.D. Fla. 1997) (debtor used her own money to pay debt owed by husband alone, which was fraudulent as to debtor); *In re Griffin*, 319 B.R. 609 (B.A.P. 8th Cir. 2005) (unrecorded transfer by prenuptial agreement not valid, interpreting Arkansas law); *In re Kelsey*, 270 B.R. 776 (B.A.P. 10th Cir. 2001) (value of consideration measured from creditor's standpoint, not debtor's); *In re Cohen*, 236 B.R. 1 (B.A.P. 9th Cir. 1999) (debtor's husband, not his creditor, was initial transferee of payment for his debt); *In re Tomlinson*, 347 B.R. 639 (Bankr. E.D. Tenn. 2006) (nondebtor wife's unrecorded lien on debtor's aircraft ineffective as to trustee; alleged ownership required fact determination); *In re Richardson*, 268 B.R. 331 (Bankr. D. Conn. 2001) (alleged desire for fairness or for estate planning was not consideration for transfer); *In re Glazer*, 239 B.R. 352 (Bankr. N.D. Ohio 1999) (transfer of real estate to debtor's wife was avoided when she failed to establish her release of claim for domestic abuse had value); *In re Leucht*, 221 B.R. 1003 (Bankr. M.D. Fla. 1998) (transfer of possession of assets to former spouse was fraudulent regardless of whether debtor intended to transfer ownership interest); *In re Bryant*, 221 B.R. 262 (Bankr. D. Colo. 1998) (as result of debtor's fraudulent transfer of one half interest in homestead to husband, she lost right to claim an exemption); *In re Bouldin*, 196 B.R. 202 (Bankr. N.D. Ga. 1996) (transfer for "love and affection" presumed fraudulent); *In re Matus*, 303 B.R. 660 (Bankr. N.D. Ga. 2004) (transfer of property to debtor's spouse concealed until

discovered by trustee, and discharge was denied despite return of property); *In re Gipe*, 157 B.R. 171 (Bankr. M.D. Fla. 1993) (also warranting denial of discharge); *In re Briglevich*, 147 B.R. 1015 (Bankr. N.D. Ga. 1992) (spouse's previous contributions to improvement of debtor's solely owned asset was not present consideration); *Matter of Kaczorowski*, 87 B.R. 1 (Bankr. D. Conn. 1988) (transfers to spouse as "lump-sum alimony" without consideration when the parties did not actually separate or divorce was a fraudulent conveyance).

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

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

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

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

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

2. Between Spouses not in Fraud of Creditors' Rights. Most marital settlement agreements in connection with the dissolution of the debtor's marriage are negotiated in good faith from adversary positions, and these are not subject to avoidance. *In re Duncan*, 562 F.3d 688 (5th Cir. 2009) (transfer satisfied legitimate debts from wife's separate property); *In re Erlewine*, 349 F.3d 205 (5th Cir. 2003) (unequal division without evidence of property that was "fully litigated, without any suggestion of collusion, sandbagging, or indeed any irregularity" would not be set aside); *In re Lodi*, 375 B.R. 33 (Bankr. D. Mass. 2007) (uneven allocation of loan proceeds justified); *In re Boyer*, 367 B.R. 34 (Bankr. D. Conn. 2007), *aff'd*, 384 B.R. 44 (D. Conn. 2008) (intent to defraud not proved); *In re Carbaat*, 357 B.R. 553 (Bankr. N.D. Cal. 2006) (trustee failed to meet burden of proof under either bankruptcy or California statute); *In re Bledsoe*, 350 B.R. 513 (Bankr. D. Or. 2006), *aff'd*, 569 F.3d 1106 (9th Cir. 2009) (state court property division without evidence of fraud or collusion established reasonably equivalent value); *In re Rodgers*, 315 B.R. 522 (Bankr. D. N.D. 2004) (transfers at divorce found not to be in fraud of creditors); *In re Gathman*, 312 B.R. 893 (Bankr. C.D. Ill. 2004) (no misrepresentation in convincing former wife to enter into second mortgage on her homestead to pay debts former husband was solely responsible for); *In re Hope*, 231 B.R. 403 (Bankr. D. D.C. 1999) (noncollusive agreement to divide property was within range of what would have been equitable under state law and was not avoidable). *See also In re Falk*, 88 B.R. 957 (Bankr. D. Minn. 1988), *aff'd*, 98 B.R. 472 (D. Minn. 1989) (chapter 11 debtor attempted to set aside transfer of property to ex-wife in divorce; he was estopped from asserting that his voluntary marital settlement agreement was a fraudulent conveyance; debtor was also denied discharge); *In re Rauh*, 164 B.R. 419 (Bankr. D. Mass. 1994), *aff'd*, 119 F.3d 46 (1st Cir. 1997) (debtor's wife's withdrawals from a joint bank account did not result in fraudulent conveyance); *In re Taylor*, 133 F.3d 1336 (10th Cir. 1998) (transfer for estate planning purposes was not fraudulent); *In re Bergman*, 293 B.R. 580 (Bankr. W.D. N.Y. 2003) (transfer of debtor's interest in homestead in exchange for investing in debtor's business was not fraudulent); *In re Oscarson*, 363 B.R. 542 (Bankr. N.D. Ill. 2007) (setting up separate accounts and transferring funds to wife who

habitually wrote checks for household expenses not fraudulent); *In re Montalvo*, 333 B.R. 145 (Bankr. W.D. Ky. 2005) (debtor's transfer of funds to wife, by writing checks on his bank account and giving her cash for payment of household expenses, was not fraudulent); *In re True*, 285 B.R. 405 (Bankr. W.D. Mo. 2002) (debtor not insolvent when gift was made); *In re Stewart*, 280 B.R. 268 (Bankr. M.D. Fla. 2001) (trustee failed to meet burden of proof that increase in debtor's spouse's funds was traceable to debtor). *See also In re Wingate*, 377 B.R. 687 (Bankr. M.D. Fla. 2006) (under Florida law, transfer of exempt entireties property to one spouse cannot be fraudulent).

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

For a marital settlement agreement to be valid, of course, it cannot be a sham or collusive. *In re Stinson*, 364 B.R. 278 (Bankr. W.D. Ky. 2007) (one-sided marital settlement agreement found fraudulent); *In re Fair*, 142 B.R. 628 (Bankr. E.D. N.Y. 1992) (transfer in exchange for wife's waiver of maintenance was fair consideration); *Matter of Weis*, 92 B.R. 816 (Bankr. W.D. Wis. 1988) (property transferred would have been exempt so it could not have been transferred with intent to hinder, delay and defraud creditors); *In re Hope*, 231 B.R. 403 (Bankr. D. D.C. 1999) (trustee's power to avoid a fraudulent transfer could not reach any transfer under parties' initial agreement, but could reach any fraudulent transfer under their separation agreement, assuming that transfer of equity then occurred); *In re Sorlucco*, 68 B.R. 748 (Bankr. D. N.H. 1986) (agreement fell within "reasonable range" of what the court would have ordered if property division was litigated and would not be set aside); *Johnson v. Dowell*, 592 So.2d 1194 (Fla. App. 1992) (transfer of interest in property to secure maintenance obligation was not a fraudulent conveyance).

3. <u>To Third Parties in Fraud of Spouse's Rights</u>. Transfer may be fraudulent if

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

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

VII. CLAIMS

A. Property Division Claim of Spouse or Former Spouse. The nondebtor former spouse of the debtor who is subject to an economic obligation in a decree of dissolution has a claim in the debtor's bankruptcy estate, and the debtor's spouse may have a claim for property division if division has not taken place. *See* Bankruptcy Rule 3001, *et seq.*; *Perlow v. Perlow*, 128 B.R. 412 (E.D. N.C. 1991) (nondebtor spouse had a general unsecured claim for property division; right to specific property was cut off even though the property was exempt and revested in the debtor); *In re Rul-Lan*, 186 B.R. 938 (Bankr. W.D. Mo. 1995) (monetary award to debtor's spouse arose prepetition, even though divorce judgment was entered postpetition, because it was to compensate the spouse for share of assets squandered by debtor prepetition); *accord In re Townsend*, 155 B.R. 235 (Bankr. S.D. Ala. 1992); *In re Hilsen*, 119 B.R. 435 (S.D.N.Y. 1990); *In re McCulley*, 150 B.R. 358 (Bankr. M.D. Pa. 1993); *In re Briglevich*, 147 B.R. 1015 (Bankr. N.D. Ga. 1992) (creditors interests in the debtor's bankruptcy estate superceded nondebtor spouse's interest in property division). Also, in *Briglevich, supra*, the stay was lifted to allow the debtor's spouse to return to state court to have the amount of her claim determined. *But see In re Compagnone*, 239 B.R. 841 (Bankr. D. Mass. 1999) (no claim until final judgment); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991) (nondebtor's equitable interest in assets on account of pending divorce were not property of estate and she had no "claim," therefore, her interest was nondischargeable); *In re Peterson*, 133 B.R. 508 (Bankr. W.D. Mo. 1991) (proceeds from the sale of a marital asset were in constructive trust and not part of the debtor's estate, so the nondebtor spouse's interest was not a dischargeable "claim"). *See also In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Sir. 2009) (all of former wife's claims subordinated because of her conduct).

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

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

If the debtor is obligated to pay a joint debt, but the divorce decree does not contain an obligation to pay the spouse, the claim may not be enforceable. *See In re Forgette*, 379 B.R. 621 (Bankr. W.D. Va. 2007); *see also In re Bayhi*, 528 F.3d 393 (5th Cir. 2008) (co-obligor on non-dischargeable community debt could enforce debtor's share of obligation in state court without action in bankruptcy court).

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

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

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

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

G. Child support creditors. Child support creditors or their representatives can appear "without charge" and without meeting local rules for attorney appearances as long as a form is filed showing information about the debt. AO Form B281. Adversary proceedings and motions for relief from the stay can be filed without fee by child support creditors. Appendix to 28 U.S.C. § 1930(6), (20). It appears that other proceedings may be filed without fee by child support creditors, even if unrelated to child support. *See* Official Form 17 Notice of Appeal.

H. Priority claims. Pre-BAPCPA sec. 507(a)(7) granted priority status to claims for debts to a spouse, former spouse, or child of the debtor for support debts, unless the debt is assigned to another entity. BAPCPA made DSO claims first priority, subject to the trustee's expenses in recovering funds to pay these claims. Individual DSO claimants' claims supercede government DSO claims, and government DSO claims are not necessarily paid in full in a chapter 13 plan under certain circumstances. *See* 11 U.S.C. §§ 507(a)(1), 1322(a)(4). Cases preceding the enactment of BAPCPA may be instructive in determining the types of obligations that constitute support. *In re Chang*, 163 F.3d 1138 (9th Cir. 1998) (priority status for debtor's share of GAL fees and other professional expenses incurred in connection with custody dispute were priority); *In re Foster*, 292 B.R 221 (Bankr. M.D. Fla. 2003) (former spouse's attorney's fees owed by debtor were priority); *In re Pearce*, 245 B.R. 578 (Bankr. S.D. Ill. 2000) (plumbing and tax bills were nonpriority property division; back support payments were priority support); *In re Polishuk*, 243 B.R. 408 (Bankr. N.D. Okla. 1999) (hold harmless on credit card debt was priority claim); *In re Crosby*, 229 B.R. 679 (Bankr. E.D. Va. 1998) (post-secondary educational expenses were priority child support). *But see In re Lutzke*, 223 B.R. 552 (Bankr. D. Or. 1998) (debtor's former husband's claim for overpayment of child support not entitled to seventh-level priority because amount not necessary for children's support). *See also In re Chira*, 378 B.R. 698 (S.D. Fla. 2007), *aff'd*, 567 F.3d 1307 (11th Cir. 2009) (all former wife's claims, including priority child support claims, equitably subordinated to other creditors because of her wrongful conduct). *See also In re Smith*, 398 B.R. 715 (B.A.P. 1st Cir. 2008), *aff'd*, 586 F.3d 69 (1st Cir. 2009) (sanction for failure to make support payments was not DSO and was not entitled to

priority status).

VIII. ETHICS

Ethical pitfalls in representing both spouses when one may have a claim in bankruptcy against the other is demonstrated in *In re Vann*, 136 B.R. 863 (D. Colo. 1992), *aff'd*, 986 F.2d 1431 (10th Cir. 1993). *See also In re Morey*, 416 B.R. 364 (Bankr. D. Mass. 2009) (same attorney could not represent debtor and debtor's former husband in adversary proceeding brought by debtor's trustee alleging avoidable transfers by debtor to former husband); *In re EWC, Inc.*, 138 B.R. 276 (Bankr. W.D. Okla. 1992) (concurrent representation of debtor in bankruptcy and debtor's sole shareholder in divorce is not per se a conflict, but in this case it warranted setting aside appointment and denial of all fees).