

Family Law & Bankruptcy:

A Few Collected Points

**Family Law Section
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Disclaimer: These materials contain very general information intended solely to begin a discussion on the subjects referenced. I am always happy to be later called upon to answer any questions you have on this subject or others.

BANKRUPTCY BASICS

Types

- Chapter 7 – Liquidation, LLC/ Corp termination
- Chapter 13 – Reorganization – qualifying individuals (not corp/ LLC)
- Chapter 11 – Reorganization – LLC/ Corp/ individuals with lots of debt
- Chapter 12- Reorganization – family farmer
- Chapter 9- Reorganization – municipality, e.g. Detroit (2013), Orange County (1994)

Parties

- Debtor
- Creditor
- Trustee
- United States Trustee
- Debtor-in-Possession

Terms/ Concepts

Automatic Stay (362) – Prohibits collection actions with some key family law exceptions.

Discharge Order (523 / 727 / 1328) – Releases a debtor of personal obligation for many debts with some key family law exceptions.

Petition

Statement of Financial Affairs

Means Test (B22A/ B22C)

Assets (his/ separate, hers/ separate, theirs/ community)

Exemptions (522)

Debts/ Claims including “Domestic Support Obligation” - added by BAPCPA (2005)

Property of the Estate (541 / 1306) – Post petition earnings?

Preferential Transfers (547) – DSO payment is safe/protected

Trustee can recover PT except “to the extent such transfer was a bona fide payment of a debt for a domestic support obligation” 11 USC 547(c)(7)

Fraudulent Conveyance (548) – Transfer where no debt exists

“DOMESTIC SUPPORT OBLIGATION”

Definitions: 11 USC § 101(14A) created by BAPCPA (2005)

(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.

DISCHARGE DIFFERENCES - 7 vs. 13

Chapter 7

11 USC §727 –

(b) **Except as provided in section 523** of this title, a discharge under subsection (a) of this section discharges the debtor from **all debts** that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 USC § 523 includes:

(5) for a domestic support obligation;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;
[NOTE: No longer a hardship balancing test.]

Chapter 13

11 USC § 1328 - All debts discharged except:

(b) ... paragraph (1)(B), (1)(C), (2), (3), (4), (5) [DSO], (8), or (9) of section 523(a);

NOTE: 523(a)(15) Property Settlement / Hold Harmless **not** in the nature of DSO.

RESULT: 523(a)(15) is dischargeable in Chapter 13

Specific Application – Discharge Differences

Support:	Nondischargeable in both
Maintenance:	Nondischargeable in both
Hold Harmless:	Nondischargeable in 7; Discharge in 13
Property Settlement:	Nondischargeable in 7; Discharge in 13

“In the nature of ...” possibilities (see collected cases at end of the materials)

- Attorney fees
- Education expenses
- Medical insurance
- Life insurance

[NOTE: Creditors are not parties to the divorce and, of course, are bound by the decree / restricted in who they can pursue for payment; the contact controls liability. Not all debtors understand this.]

Hold harmless obligation to ex-wife was not “domestic support obligation.” See, e.g., In re Nelson, 451 B.R. 918 (D.Or. 2011), 2011 WL 1549008

Discharge – Plan Completion Required: The debtor does not get a discharge unless the plan completes. And far less than 50% (maybe 33%, and likely, less) of Chapter 13 debtors actually complete the plan.

DEFENSE OF MARRIAGE ACT

Same sex married couples can now file joint a bankruptcy petition anywhere in the US.

Bankruptcy in the U.S. is subject to federal law – the U.S. Bankruptcy Code – and is filed in federal court. That means bankruptcy cases were subject to the 1996 federal *Defense of Marriage Act* (DOMA). That meant, according to the vast majority of courts, same sex couples could not be “married” and file a joint petition. See, e.g., In re Kandu, United States Bankruptcy Court, W.D. Washington, August 17, 2004, 315 B.R. 123. (DOMA limits “marriage” and “spouses” to opposite-sex couples for purposes of federal law).

On June 26, 2013, the U.S. Supreme Court issued a 5-4 ruling striking down portions of federal *Defense of Marriage Act*. See: U.S. v. Windsor, Supreme Court of the United States, 133 S.Ct. 2675 (2013). Now, married couples of the same sex can obtain the legal benefits of a joint bankruptcy filing in every state. The ruling removes any confusion for gay couples who may have gotten legally married in one state but filed bankruptcy in another state that did not recognize the marriage.

JOINT 13 WITH SEPARATION AND/ OR DIVORCE - OPTIONS

Scenario: Divorce in the middle of a Chapter 13 case. Options?

Modify plan to reflect changed financial circumstances, if any

Joint Conversion to 7

Bifurcate and convert one spouse to 7, other continues in 13

Relief from stay is likely needed to divide assets and liabilities in the divorce action:

- Confirmation can reconstitute property in the debtors
- Confirmation order language – can't dispose of assets w/o approval
- Post-petition wages as “property of the estate?” Complicated

FILE JOINT/ SOLO CASE BEFORE/ AFTER DISSOLUTION/ SEPARATION ?

ANSWER: There is no set answer. The chosen approach depends on various factors including, but not limited to:

- Cooperation
- Conflicts
- Costs
- Debts
- Assets
- Timing Considerations
- Disso goals
- Etc etc

Joint Case Possible: As long as you are still married, you can file a joint case.

Solo Case Possible: If you are married, you can still file a solo case.

Cost: Joint case – one filing fee and attorney fee; Solo cases – two filing and attorney fees

Conflict

One bk attorney can represent both parties as long as there are no conflicts (e.g., there is agreement on exemptions and issues to survive the bk to be dealt with in the divorce).

An agreed statement/stipulation signed by both prior to bk filing might be useful to make sure both parties are on the same page re: exemptions and discharged debts.

If conflict arises, withdraw and/or each need own attorney (normally).

Example: After beginning conflict free representation, one spouse inherits potentially nonexempt property. Clients now disagree on exemptions given new assets. Conflict.

Cooperation

Chapter 7: They can **normally** get along well enough to get through a 7.

Chapter 13: Personally, I do not like filing joint case for separated couple. Cooperation is required for three to five years.

Discharge Considerations

Chapter 7: Exceptions to discharge for DSO, property settlement, hold harmless

Chapter 13: Includes property settlement and hold harmless debts (not in the nature of DSO)

Labels do not control. Court – independent review of DSO qualifications

NOTE: Filing an amicable joint Chapter 7 removes the possibility of a Chapter 13 with a discharge of a property settlement / hold harmless obligations for at least four years.

Sneaky/ Tricky?

- “I’ll (later) pay this debt to pay and, to make it fair, will take this offsetting asset...” then a 13 is filed discharging the property settlement
- Maintenance/support described as property settlement: What should a divorce decree say about property in lieu of domestic support to ensure that it is considered pursuant to a domestic support order?

Married – First to File Control Exemptions

Scenario: Only one spouse files. It does not have to create problems, but it potentially can.

All community property is “property of the estate”. 11 USC 541(a)(2)

Debtor (not nondebtor spouse) gets to claim the exemptions in debtor’s case unless the debtor does not claim *any* exemptions. (No idea why this would ever happen with the exception of an involuntary case.)

11 USC 522(f): The **debtor shall file** a list of property that the debtor claims as exempt under subsection (b) of this section. **If the debtor does not file such a list**, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

CASE EXAMPLE: In re Pixler, 2002 WL 33939734 (Bankr.Idaho 2002) – **attached**.
GREAT explanation of some bankruptcy/family law timing issues.

Excerpt 1:

The Bankruptcy Code, as interpreted in Ninth Circuit decisional law, does not allow a non-filing spouse to claim exemptions *on her own behalf* in her spouse’s bankruptcy case.

Excerpt 2:

It is easy to imagine that during separation, one spouse may need bankruptcy relief, and as a result of strain of the marital relationship, be motivated to protect his or her assets through exemption, but may also lack the desire to protect the property of the soon-to-be former spouse. What then?

The issue is further complicated by the interplay of the bankruptcy statutes law and the law of community property in Idaho (and elsewhere). State community property law grants an equal right to manage community property to both spouses. **The Bankruptcy Code vests all of that community property in the bankruptcy estate of either spouse who files a petition.** Consequently, as the Ninth Circuit has acknowledged, “[f]or purposes of § 541(a)(2), all community property not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate.”

Given the legal landscape, and the facts of this case, Lopez (married – filed first) may have **left Pixler in a jam** (filed second after divorce was final). The parties were separated, but not divorced, when Lopez filed for bankruptcy. The Subaru, Pixler’s sole means of transportation, became property of the Lopez bankruptcy estate because it was, and remains, the parties’ community property, when Lopez commenced his bankruptcy case. **Pixler, as a nondebtor, cannot claim an exemption in Lopez’s case.** More importantly, **she also can not claim the Subaru exempt in her bankruptcy case because all of her interest in the vehicle passed to the Lopez bankruptcy estate prior to the date she filed her petition.** In other words, Pixler had no remaining interest in the Subaru to exempt when she filed.

QUESTION: What can the State disso court do to remedy a first filer’s failure to exempt the nonfiling spouse’s share of community property (and any other bk resulting issues)?

RCW 26.09.080 Disposition of property and liabilities — Factors

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, **without regard to misconduct**, make such disposition of the property and the liabilities of the parties, either community or separate, **as shall appear just and equitable after considering all relevant factors including, but not limited to:**

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner **at the time the division of property is to become effective**, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time

Generally, for purposes of distributing property during a dissolution proceeding, a court can exercise its equitable powers and evaluate whether a party wasted or concealed community assets. In re Marriage of Kaseburg (2005) 126 Wash.App. 546, 108 P.3d 1278.

A just and equitable division of property in a marriage dissolution action does not require mathematical precision, but, rather, fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties. In re Marriage of Larson and Calhoun (2013) 2013 WL 6169338.Divorce

In dividing property in a marriage dissolution action, the statutory requirement of a just and equitable distribution does not mean that the court must make an equal distribution. In re Marriage of Larson and Calhoun (2013) 2013 WL 6169338.

Exemption By Filing Spouse for NonFiling Spouse?

Question: Can Filing Spouse Claim exemptions for NonFiling Spouse if they want to? Do they have to?

Start with In re Homan, 112 BR 356 (9th Cir.BAP, 1998) and go from there on who can claim what exemption in what property when only one spouse file bk.

Arizona: Filing spouse can claim her and nonfiling spouses exemptions in community property using federal exemptions. In re Perez, 302 BR 661 (Bankr.D.Ariz. 2003)

Arizona: Second filing spouse's case can be administratively joined to first filing spouses case and allows joined spouse to claim an exemption in the first spouse's case. In re Morris, 2013 WL 1187817 (Bankr.D.Ariz. 2013), citing with approval In re Homan, 112 B.R. 356 (9th Cir.BAP 1989).

Nevada: As a matter of first impression, the Nevada Supreme Court held that Nevada state statute governing exemptions of property from execution did not permit Chapter 7 debtor to claim additional exemptions on behalf of non-filing spouse. In re Fox 302 P.3d 1137129 Nev. Adv. Op. 39 (Supreme Court of Nevada, 2013)

ANSWER: The trustees here normally either just recognize that the nonfiling spouse has exemptions (through the filing spouse, if chosen) or they don't object if the debtor just lists a ½ interest in community property and exempts that ½ interest. Long story short, in practice, we don't have any issues here along those lines (yet, if ever).

AUTOMATIC STAY (11 USC § 362)

Generally, the debtor and all “property of the estate” are protected from **all** collection action on a “claim” with exceptions including some particular to family law.

Property of the Estate / Assets - Protected
Claims/Debts – Can’t collect
Establish/Modify Support / Maintenance – Exceptions
Domestic Support Obligation - Exceptions

11 U.S. Code § 362 - Automatic stay

...

(b) The filing of a (bankruptcy) petition ... does **not** operate as a stay—

(2) under subsection (a)—

(A) of the **commencement or continuation** of a civil action or proceeding—

(i) for the establishment of **paternity**;

(ii) for the **establishment or modification** of an order for **domestic support obligations**;

(iii) **concerning child custody or visitation**;

(iv) for the **dissolution of a marriage**, **except** to the extent that such proceeding seeks to determine the division of property that is **property of the estate**; or

(v) regarding **domestic violence**;

(B) of the collection of a **domestic support obligation** from property that is **not property of the estate**;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a **domestic support obligation** *under a judicial or administrative order or a statute*;

DSO – Entitled to payment “priority” in 7 and 13

11 U.S. Code § 507 – Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for **domestic support obligations** that, as of the date of the filing of the petition in a case under this title, are **owed to** or recoverable **by a spouse, former spouse, or child of the debtor**, or such child’s parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for **domestic support obligations** that, as of the date of the filing of the petition, are **assigned** by a spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative **to a governmental unit (unless** such obligation is assigned **voluntarily** by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

Chapter 7

11 U.S. Code § 726 - Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) **first**, in payment of claims of the kind specified in, and in the order specified in, **section 507** of this title, ...

Chapter 13 – pay it unless agreed or 5 years to governmental unit

11 U.S. Code § 1322 - Contents of plan

(a) The plan—

(2) shall provide for the **full payment**, in deferred cash payments, of all claims entitled to priority under section 507 of this title, **unless** the holder of a particular claim **agrees** to a different treatment of such claim;

...

(4) notwithstanding any other provision of this section, may provide for **less than full payment** of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a **5-year period** beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

Chapter 13 - Plan Approval/ Confirmation

11 U.S. Code § 1325 - Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(8) the debtor has paid all amounts that are required to be **paid** under a **domestic support obligation** and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation;

Chapter 13 - Discharge

11 U.S. Code § 1328 - Discharge

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a **domestic support obligation**, after such **debtor certifies** that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) **have been paid**, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except ...

[NOTE: A DSO debt not paid in full in a 13 is not discharged.]

Chapter 13 - Involuntarily assigned DSO – Discussion in *In re Penaran*, 424 BR 868 (D.KS 2010)

EXCERPT:

Section 507(a)(1) gives unsecured DSOs a first priority. This first priority for DSOs is further differentiated in subparts (A) and (B). If the DSO falls within § 507(a)(1)(A), it must be paid in full during the plan pursuant to § 1322(a)(2). If the DSO falls within § 507(a)(1)(B), it may be paid less than in full during the plan under § 1322(a)(4). A debt that is a DSO must then be identified as either one that is payable to or recoverable by the custodial parent, whether or not the claim is filed for her by a governmental unit, falling under § 507(a)(1)(A), or one that has been assigned to, or owed directly to or recoverable by, the governmental unit coming under § 507(a)(1)(B).³¹ The key, according to Collier, “is the party to whom the claim is owed,” the individual or the governmental unit. If it is the latter, the claim is subordinated in priority to the former by virtue of § 507(a)(1)(B) which assigns a lesser priority within § 507(a)(1) to such claims. And, if the claim is subject only to second support priority, it may be paid less than in full under the plan pursuant to § 1322(a)(4). DSO claims bearing a first support priority (payable to the custodial parent) must be paid in full during the plan term under § 1322(a)(2). DSO debts having either § 507(a)(1) priority are non-dischargeable under § 523(a)(5), as debtor concedes.

FN31: The language of § 507(a)(1)(B) which excludes DSOs *voluntarily* assigned by the spouse or parent for the purpose of collecting the debt suggests that a DSO voluntarily assigned to a governmental unit for the purpose of collecting child support is a § 507(a)(1)(A) priority DSO claim. See Collier, ¶ 507.02A[1], p. 507–27. DSOs involuntarily assigned to a governmental unit would be a § 507(a)(1)(B) priority DSO claim.

“CODEBTOR” PROTECTION OF THE CURRENT/ FORMER SPOUSE

Chapter 7 – no; no protection for codebtor (*in personam*)

Chapter 13 – yes, but ...

11 U.S. Code § 1301 - Stay of action against codebtor

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is **liable on such debt with the debtor**, or that secured such debt, **unless**—

- (1) such individual became **liable on** or secured such debt in the ordinary course of such individual’s **business**; or
- (2) the case is **closed, dismissed, or converted** to a case under chapter 7 or 11 of this title.

(c) – (d) Relief from codebtor stay if plan does not pay in full, etc

COMMUNITY / SEPARATE LIABILITY

Some protection outside bk – RCW 26.16.200

Less/no protection inside bk – 11 USC § 541

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541 (a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541 (a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, **community** claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541 (a)(2) of this title, except to the extent that such property is **solely liable** for debts of the debtor.

(B) Second, to the extent that **community** claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541 (a)(2) of this title that is **solely liable** for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including **community** claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541 (a)(2) of this title.

(D) Fourth, to the extent that **community** claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, **such claims shall be paid from all remaining property of the estate.**

“FIDUCIARIES” IN BANKRUPTCY? - NOPE

Spouses are not “fiduciaries” as that term is used is the exception to discharge found in 11 USC § 523(a)(4)

In re Mele, 501 B.R. 357 (9th BAP, 2013)

We conclude that Washington common law does not make marriage an “express” or “technical” trust relationship that necessarily makes married spouses fiduciaries of the marital community for purposes of the exception to discharge provisions of § 523(a)(4). ... Accordingly, we conclude as a matter of law that the marital community of the parties, when they were married spouses, did not constitute an express trust relationship for purposes of § 523(a)(4). ... We recognize the intuitive appeal of the bankruptcy court's conclusion that marriage establishes a trust relationship between spouses that entails the imposition of fiduciary duties. However, in the absence * 368 of a Washington statute that characterizes marriage as a trust relationship or that describes the obligations of spouses in managing and disposing of community property as fiduciary in nature, we do not see how the incidental characterizations of the marital relationship and its obligations in Washington common law decisions, upon which the bankruptcy court relied for its conclusion, constitute more than generalized descriptions of fiduciary duty that do not meet the “express” or “technical” trust standard required as an element of a § 523(a)(4) claim.

PROPERTY OF THE ESTATE – CHAPTER 13 GARNISHMENT - DSO

Chapter 7: 11 U.S. Code § 541 - Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

- (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
- (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
 - (A) under the sole, equal, or joint management and control of the debtor; or
 - (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

Chapter 13: 11 U.S. Code § 1306 - Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

- (1) **all property** of the kind specified in such section that the debtor acquires **after** the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; **and**

(2) **earnings** from services performed by the debtor **after the commencement** of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

M EANS TEST ISSUES

Purpose

Chapter 7: Rebuttable Presumption re: qualification for 7 Discharge

Chapter 13: (1) Duration – 36/60 mo, (2) Rebuttable presumption re: gen uns distribution

Does Not Apply – primarily business debts

Household Size

Heads on Beds: The first approach adopted by some bankruptcy courts, the so-called “heads on beds” approach, includes anyone living in a debtor’s home at the time he or she files for bankruptcy as part of a household for means test calculations purposes.

IRS “Dependent” Test: A debtor can claim anyone that is a “dependent” under IRS rule.

Economic Unit: Some courts have fashioned a test that deems a person a member of a debtor’s household if that person operates as a “single economic unit with the debtor”.

WHICH ONE? BK Code not clear. We use “economic unit” and have not had any issues.

Case Example: *In re Kops*, 2012 WL 438623 (D.Idaho) also likes that approach.

“Inasmuch as the **economic unit approach** is limited to a unit consisting of a debtor and his dependents, such an approach is appropriate for use throughout the means test. In other words, the correct approach is one that determines household members based on a person’s financial dependence upon, and residence with, a debtor.¹⁴ “ (FN 14: Given the facts of this case, the Court need not determine whether household members must also be related to a debtor.)

“Because **Debtor’s two children** may reside with him for a portion of each month, and because those children are his financial dependents, the Court concludes they should be counted as part of Debtor’s household for means test purposes.”

Case Example: *In re Crow*, 2012 WL 8255519 (E.D.CA 2012) appears to approve of “economic unit” as well.

“Debtor’s **boyfriend** qualifies as a dependent for the purposes of the Means Test under both the “economic unit” approach used by *In re Kops* as well as the more restrictive “IRS dependency approach.”

Income - What Income Is Counted?

Chapter 7

Joint filing: All income, potential extra expenses

One filer - Separated but living in same home – line __ deduct funds not contributed to household by nonfiler - SPOUSES INCOME INCLUDED BUT DEDUCTIONS AVAILABLE

One filer – Separated but not living in same home – SPOUSES INCOME NOT INCLUDED

Form 22A Current Monthly Income and Means Test for Chapter 7

Information to determine which median income and IRS allowances apply to this debtor

General | Income | Median

Debtor Location: Clark, WA Change Location

Location is used to lookup State Median Income, County Housing Allowance and Regional Transportation Allowance.

Part I. Exclusion for Military and Non-Consumer Debts

1A. Disabled Veteran
 1B. Non-consumer debts
 1C. Reservists & National Guard

Part II. Calculation of Monthly Income for § 707(B)(7) Exclusion

Marital / Filing Status

a. Unmarried.

b. Married, not filing jointly, with declaration of separate households. Spouse income is not included.

c. Married, not filing jointly, without decl. of separate households. Spouse income in CMI & DMI, edit Marital Adj to reduce DMI.

d. Married, filing jointly. (Enter income for debtor and spouse)

Household Size (HS) and Family Size (FS)

Dependents: 2

Number of Persons for Census & IRS tables

Median Income HS: 3 Override

IRS Living FS: 3 Override

IRS Housing FS: 3 Override

Expected Filing Date: 2/12/2014

CMI Current Monthly Income 5,000.00 Income Under Median, Chapter 7 Ok

OK Cancel Help

Presumption of Abuse: No

Chapter 13

One filer - Separated but living in same home – line ___ deduct funds not contributed to household by nonfiler

- SPOUSES INCOME INCLUDED BUT DEDUCTIONS AVAILABLE
- Can't just exclude consideration of the income

The screenshot shows the 'Form 22C Current Monthly Income, Commitment Period and Disposable Income for Chapter 13' window. The 'Income' tab is selected. The debtor location is 'Clark, WA'. Under 'Part I. Report of Income', the 'Marital / Filing Status' section has three options: 'a. Unmarried', 'b. Married, not filing jointly, separate households. (Chapter 7 Only)', and 'c. Married, not filing jointly. (Spouse income in CMI & DMI, edit Marital Adjustment to reduce DMI)'. Option 'c' is selected. The 'Household Size (HS) and Family Size (FS)' section shows 'Dependents: 0', 'Number of Persons for Census & IRS tables: 2', and 'Median Income HS: 2', 'IRS Living FS: 2', 'IRS Housing FS: 2'. The 'Expected Filing Date' is '1/28/2014'. At the bottom, it shows 'CMI Current Monthly Income: 0.00 No Income Has Been Entered' and navigation buttons for 'Prev', 'Next', 'OK', 'Cancel', and 'Help'.

ATTORNEY FEES

In re Hamilton

United States Bankruptcy Appellate Panel, of the Ninth Circuit. February 21, 2013 2013 WL 646387

Decisions in the Ninth Circuit, as well as in other circuits, support the section 523(a)(5) nondischargeability of attorney's fees awarded either in connection with a dissolution proceeding as alimony, maintenance, or support or in child custody proceedings. *See Rehkow v. Lewis (In re Rehkow)*, 2006 Bankr.LEXIS4870 *9 (9th Cir. BAP Aug. 17, 2006) (compiling cases).

In re Rehkow

United States Bankruptcy Appellate Panel, of the Ninth Circuit. August 17, 2006 2006 WL 6811011

Cases in the Ninth Circuit and in other circuits customarily have held that attorneys' fees awarded in connection with a dissolution proceeding are non-dischargeable in bankruptcy under § 523(a)(5) as alimony, maintenance, or support. *See, e.g., In re Spong*, 661 F.2d 6, 11 (2nd Cir.1981); *In re Gwinn*, 20 B.R. 233, 235 (9th Cir.B.A.P.1982). More importantly, the vast majority of reported decisions dealing with an award of attorneys' fees in a child custody proceeding have concluded that the fees were in the nature of the child's support within the meaning of § 523(a)(5).⁹ *See, e.g., Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1490 (10th Cir.1995); *Jones v. Jones (In re Jones)*, 9 F.3d 878, 882 (10th Cir.1993); *Dvorak v. Carlson (In re Dvorak)*, 986 F.2d 940, 941 (5th Cir.1993); *Peters v. Hennenhoefter (In re Peters)*, 964 F.2d 166, 167 (2nd Cir.1992); *Marks v. Catlow (In re Catlow)*, 663 F.2d 960, 963 (9th Cir.1981) (construing former law); *James C. Booth, Inc. v. Ratcliff (In re Ratcliff)*, 195 B.R. 466, 468 (Bankr .C.D.Cal.1996). *See also Gionis v. Wayne (In re Gionis)*, 170 B.R. 675, 683 n. 11 (9th Cir.B.A.P.1994), *aff'd* 92 F.3d 1192 (9th Cir.1996) (noting that an attorney's fees award in a marital dissolution proceeding "based upon custody battles in which an important issue is ordinarily the welfare of the child ... would not be difficult to characterize ... as child support.").

* 4 In holding that attorneys' fees incurred during a child custody proceeding are in the nature of support, the courts have primarily focused on the fact that the issues involved in custody disputes are generally decided by consideration of the child's best interests. As an example, in the *Jones* case the Tenth Circuit observed that, "[g]enerally, custody actions are directed toward determining which party can provide the best home for the child's benefit and support. Therefore, in order that genuine support obligations are not improperly discharged, we hold that the term 'support' encompasses the issue of custody absent unusual circumstances..." *Jones*, 9 F.3d at 882. *See also Falk & Streiner, LLP v. Maddigan (In re Maddigan)*, 312 F.3d 589, 597 (2nd Cir.2002) (concluding that attorneys' fees imposed by a state court during a child custody proceeding are in the nature of support for the child); *Dvorak*, 986 F.3d at 941 (finding that attorney's fees arising from a custody hearing are for the child's benefit and support); *Ratcliff*, 195 B.R. at 467 (stating that "a child custody proceeding is always in the nature of child support" and that "the purpose of the custody proceeding ... was to determine who could provide the best home for [the child]"); *Holtz v. Poe (In re Poe)*, 118 B.R. 809, 812

(Bankr.N.D.Okla.1990) (“Since determination of child custody is essential to the child's proper ‘support,’ attorney fees incurred and awarded in child custody litigation should likewise be considered as obligations for ‘support,’ at least in the absence of clear indication of special circumstances to the contrary.”).

NONSUPPORT DIVORCE OBLIGATIONS - Attorney fees

Debt which debtors owed, not to spouse, former spouse or child of debtors, but to their **former daughter-in-law**, on attorney fee award entered by state court in action that debtors had brought in unsuccessful attempt to establish that they had visitation rights with their former daughter-in-law's child, i.e., the debtors' grandchild, was **not in nature** of nondischargeable “domestic support obligation.” Tucker v. Oliver, W.D.Okla.2010, 423 B.R. 378. Bankruptcy ☞ 3365(9)

Pursuant to “hold harmless” provision in parties' divorce decree, creditor, Chapter 7 debtor's former wife, **was** entitled to recover attorney fees incurred in litigating her **state law claims**, that is, the validity and amount of debtor's obligations, in her nondischargeability proceeding, but she was **not** entitled to recover fees for litigating the **bankruptcy law issues**; debtor, in his motion for summary judgment and in his response to creditor's motion, had denied the validity and amount of his debts, thus requiring creditor to demonstrate that she was entitled to payment of same. Renfrow v. Draper, C.A.9 (Wash.) 2000, 232 F.3d 688. Bankruptcy

Prospect of **immediate impact** upon dependents of debtor was an important factor to be weighed in construing scope of statutory exemption of support obligations from discharge in bankruptcy. Williams v. Department of Social and Health Services, State of Wash., C.A.9 (Wash.) 1976, 529 F.2d 1264. Bankruptcy ☞ 3366

Bankruptcy courts have discretion to order partial discharge of separate debts arising out of terms of divorce decree. In re Myrvang, C.A.9 (Wash.) 2000, 232 F.3d 1116. Bankruptcy ☞ 3363

Significant factor in determining whether debt is nondischargeable spousal support obligation or dischargeable property settlement is whether there are other **provisions in agreement** separate and distinct from provision in question which are designated as support payments and which terminate at specific date or upon specific event. In re Combs, 9th Cir.BAP (Or.) 1989, 101 B.R. 609. Bankruptcy ☞ 3365(12)

Determination of whether debtor was entitled to discharge of debt for periodic payment arrearage to former wife would be made upon **facts in existence at time debtor filed bankruptcy petition** rather than upon facts in existence on date of dischargeability hearing, so to extent that arrearage was for spousal support owed to former wife, the debt was nondischargeable, although the wife had died, so it would be her estate that would be entitled to receive money owed by debtor, through assignment by operation of law, and statute excepts from discharge support obligation assigned to another entity. In re Combs, 9th Cir.BAP (Or.) 1989, 101 B.R. 609. Bankruptcy ☞ 3365(5)

In deciding whether obligation arising out of dissolution of Chapter 7 debtor's marriage, when debtor and his former spouse agreed to share equally in costs of their children's college education, was nondischargeable in bankruptcy as being in nature of “alimony, maintenance or support,” bankruptcy court was not required to accept the “ADDITIONAL BENEFITS FOR CHILDREN” label used by parties or

state court's interpretation of this provision as "an additional benefit, apart from child support"; rather, **court could look beyond language** of agreement and state court's characterization to parties' intent and substance of this obligation. In re Seixas, 9th Cir.BAP (Nev.) 1999, 239 B.R. 398.Bankruptcy 3365(12)Bankruptcy 3366

Bankruptcy court is obligated to make **independent determination** of what constitutes alimony, maintenance, or support for purposes of dischargeability; the court is not bound by label attached by parties or by the state court. In re Doyle, 9th Cir.BAP (Cal.) 1986, 70 B.R. 106.Bankruptcy 3366

Provision would ordinarily be held to be nondischargeable maintenance support, rather than dischargeable property settlement if provision's intended function were to **provide necessity of life**. In re Combs, 9th Cir.BAP (Or.) 1989, 101 B.R. 609.Bankruptcy 3366

To determine whether debt is nondischargeable spousal support obligation or dischargeable property settlement, court must ascertain intention of parties **at time they entered into stipulation agreement** and not current circumstances of parties. In re Combs, 9th Cir.BAP (Or.) 1989, 101 B.R. 609.Bankruptcy 3365(12)

In deciding whether Chapter 7 debtor's obligation to former spouse was nondischargeable support obligation, or rather in nature of dischargeable property settlement, bankruptcy court was **not bound by labels** used by parties in settlement agreement incorporated into divorce decree; rather, bankruptcy court had to look beyond language of decree to **intent of parties and to substance of obligation**. In re Kritt, 9th Cir.BAP (Cal.) 1995, 190 B.R. 382.Bankruptcy 3366

In interpreting decree to determine whether debt is nondischargeable spousal support obligation or dischargeable property settlement, and in deciding whether decree is ambiguous, court should consider surrounding circumstances and all other relevant incidents bearing on parties' intent when they entered into decree. In re Combs, 9th Cir.BAP (Or.) 1989, 101 B.R. 609.Bankruptcy 3366

"**Pailimony**" - Judgment entered against debtor in palimony case requiring debtor to pay creditor nonmarital support was **not exempt from discharge** under statute exempting certain alimony and support obligations payable to spouses or children from discharge; nonmarital relationship between creditor and debtor could not be considered type of family arrangement creating family duties entitled to protection under the Bankruptcy Code or the California Family Law Act. In re Doyle, 9th Cir.BAP (Cal.) 1986, 70 B.R. 106.Bankruptcy 3368

Under this section, attorney's fees awarded to bankrupt's former spouse in **postdivorce child custody proceeding** in Arizona were nondischargeable as support obligations. Matter of Catlow, C.A.9 (Ariz.) 1981, 663 F.2d 960.Bankruptcy 3365(9)

Award of attorney fees to be paid directly to attorney for services performed for former wife of Chapter 7 debtor in **postdivorce child custody** hearing were in nature of child "support" and were nondischargeable. In re Ratcliff, Bkrcty.C.D.Cal.1996, 195 B.R. 466.Bankruptcy 3365(9)

Ex-husband's \$12,482.37 debt owed to ex-wife, which included attorneys' fees incurred during divorce proceeding as a result of **custody issues** concerning the parties' child, was founded on an obligation of support and was therefore a non-dischargeable debt under statute governing exception to bankruptcy

discharges. In re Rehkow, C.A.9 2007, 239 Fed.Appx. 341, 2007 WL 1879974, Unreported.Bankruptcy 3365(3)Bankruptcy 3365(9)

Debtor's obligation under dissolution decree to pay attorney fees incurred by ex-spouse was **not** debt for alimony, maintenance or support, for dischargeability purposes; state court did not appear to consider relative need or financial circumstances of parties in making the determination, and state court's actions with regard to the fee award were more consistent with division of community property and debt, rather than support award. In re Gibson, 9th Cir.BAP (Cal.) 1989, 103 B.R. 218.Bankruptcy 3365(9)

???? Judgment against Chapter 7 debtor-husband for former wife's attorney fees in divorce action was in nature of maintenance and was nondischargeable, **even though payable directly to attorney.** In re Kline, C.A.8 (Mo.) 1995, 65 F.3d 749.Bankruptcy 3365(9)

Where state court judgment in dissolution of marriage proceeding divided the couple's community property equally, without taking attorneys' fees into account, and then ordered spousal support payments for the wife, the court obviously concluded, in addition, that the wife's earning abilities, assets and needs were such that she should be unburdened of the \$3,500 fee owed to her attorney and that the husband was in a better position to pay the debt; accordingly, the attorney's fee award to the wife was in the **nature of alimony** and was nondischargeable in husband's subsequent bankruptcy proceeding. Jones v. Tyson, C.A.9 (Cal.) 1975, 518 F.2d 678.Bankruptcy 3365(9)