

Bankruptcy and Divorce: What Divorce Counsel Should Know About Bankruptcy

by David C. Hoskins and Ellen R. Welner

With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, some of the bankruptcy rules and procedures have changed. This article discusses the interplay of divorce and bankruptcy, including the importance of timing, the respective jurisdictional limits, the discharge of debt, and the application of the automatic stay.

Financial difficulties are commonplace in divorce.¹ It is not unusual for the financial stresses of divorce to lead to bankruptcy for one or both parties, or for insolvency and the need for bankruptcy relief to be the precursor to divorce. Bankruptcy attorneys must be able to identify and advise clients about issues arising out of separation and divorce that could affect a bankruptcy case. Family lawyers also should be aware of the issues common to both proceedings.

Colorado district courts have jurisdiction to enter decrees of divorce and legal separation, as well as determinations of child and spousal support, division of property and debt, and allocation of the costs of litigation between the parties.² U.S. bankruptcy courts have jurisdiction to administer bankruptcy estates, including the turnover of property to the estate, avoidance of fraudulent transactions, recovery of preferential payments, establishment and enforcement of the automatic stay, and determination of dischargeability of debts.³ In certain circumstances, the jurisdictions of the state district court and the bankruptcy court may be concurrent.⁴ In other instances, however, the bankruptcy court may have jurisdiction to supersede a decision of the state court.⁵

On April 20, 2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (2005 Act or BAPCPA).⁶ The 2005 Act made many changes to bankruptcy law, one of the most significant affecting dischargeability of debts and the way family court practitioners should approach property settlements.

This article discusses the interaction between bankruptcy⁷ and Colorado divorce law, highlighting issues pertaining to dischargeability of debts, marital assets that may be assets of the bankruptcy estate, and application of the automatic stay to family court matters. The discussion also suggests strategies for timing bankruptcy and divorce actions and drafting settlement documents.

Dischargeability

With the addition of the term “domestic support obligation” and the removal of the balancing test of 11 U.S.C. § 523(a)(15), the 2005 Act significantly changed the law relating to dischargeability of marital obligations. These changes are discussed below.

Chapter 7 and Chapter 13, Pre-BAPCPA

Discharge of debt generally is the ultimate goal of bankruptcy. Prior to the 2005 Act, all debt was discharged by a Chapter 7 bankruptcy, with notable exceptions. These exceptions included debts:

- for taxes⁸
- incurred through fraud⁹
- incurred but not listed in the schedules¹⁰
- incurred through fraud or defalcation while acting as a fiduciary¹¹
- for child or spousal support, including debt in the nature of child or spousal support¹²
- incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of court, unless the debtor did not have the ability to pay or unless discharging the debt would have resulted in a benefit to the debtor that outweighed the detrimental consequences to a spouse, former spouse, or child.¹³

Thus, under the former Bankruptcy Code, child support, spousal support, and debts “in the nature of support” were excepted from discharge.¹⁴ Some courts found debts to attorneys representing the former spouse¹⁵ and debts to guardians *ad litem* for the child¹⁶ to be debts “in the nature of support” and not dischargeable.

The “super discharge” of Chapter 13 included many debts not discharged in a Chapter 7 bankruptcy, such as debt incurred



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through fraud; debt not listed in the schedules; debt for willful and malicious injuries; and certain damages, fines, and penalties.¹⁷ A Chapter 13 discharge also relieved debt incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of court (except for child or spousal support).¹⁸

Chapter 7 and Chapter 13, Post-BAPCPA

Under the 2005 Act, debtors who file a Chapter 7 petition still receive a discharge of debts, much like a discharge under the pre-BAPCPA Bankruptcy Code.¹⁹ Significant for family law practitioners are the changes to 11 U.S.C. § 523(a)(5) and (15), which are discussed below.

Domestic support obligations. Under § 523(a)(5), instead of excepting from discharge child or spousal support, including debts in the nature of child or spousal support,²⁰ Congress created and precisely defined a category of debt called “domestic support obligations,” which still are excluded from discharge. The 2005 Act excepts from discharge obligations that are owed to a spouse or former spouse; child or such child’s parent, legal guardian, or responsible relative; or a governmental unit, that are in the nature of alimony, maintenance, or support of such spouse, former spouse, or child.²¹

The new law includes in the definition of “domestic support obligation” an element requiring that it be “owed and recoverable by a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian or responsible relative; or a governmental unit.”²² Also, to be excepted from discharge, the obligation must be “in the nature of alimony, maintenance or support.”²³

Cases interpreting the new definition have focused on these two elements. Concerning the issue of to whom the obligation is owed, one domestic court’s final orders of divorce required the debtor to pay the ex-spouse’s attorney fees directly to the lawyer; the order was not enforceable in the name of the ex-spouse. Because the obligation was not “owed to or recoverable by” the ex-spouse, it was not a domestic support obligation and therefore was dischargeable.²⁴

In another case, the obligation to pay the ex-spouse’s attorney fees was found to be owing to and enforceable by the debtor’s ex-spouse and in the nature of support. The court ruled the debt to be nondischargeable.²⁵

In an adversary complaint to determine dischargeability of debts allocated to the debtor, brought by the personal representatives of the estate of her ex-spouse, a bankruptcy court found the plaintiffs, who were not a spouse, former spouse, or child of the debtor, lacked standing.²⁶

Determining whether the element of the obligation is in the nature of support is a matter of federal law²⁷ and a question of fact for the bankruptcy court.²⁸ Neither state law nor the divorce court’s characterization of an award as property settlement binds the bankruptcy court.²⁹

One bankruptcy court has outlined the following factors to be assessed in determining whether an obligation is in the nature of support:

- 1) the substance and language of the document in question;
- 2) the financial condition of the parties at the time of the decree or agreement;
- 3) the function served by the obligation and intent of the parties; and

4) whether there is evidence to question the intent of a spouse or evidence of overbearing by either party.³⁰

In *Boyle v. Donovan*,³¹ although state law did not require parents to pay for a child’s college education, the agreement that debtor would provide this means of economic benefit to the child substantiated the trial court’s finding of an obligation in the nature of support. In *Williams v. Williams (In re Williams)*,³² the bankruptcy court found the debtor’s obligation to pay the ex-spouse’s attorney fees to be support, because the function of the obligation was to supplement the ex-spouse’s subsistence-level income.

It is important to note that the cases cited above regarding obligations being in the nature of support are prior to the 2005 Act. Case law established prior to the 2005 Act still is applicable for determining obligations in the nature of support under BAPCPA.³³

Property division. BAPCPA did away with the “balance of harm” analysis under the prior version of 11 U.S.C. § 523(a)(15).³⁴ Current law excepts all property division and nonsupport orders for the benefit of the spouse—such as hold harmless orders—from discharge in a Chapter 7 case.³⁵ As is the case for domestic support obligations, the 2005 Act does not require an adversary proceeding for a determination of dischargeability of property division debt.³⁶ It is worth noting, however, that property division and hold harmless orders are dischargeable in Chapter 13 proceedings.³⁷

Assets of the Bankruptcy Estate

The bankruptcy estate generally includes all legal or equitable interests of the debtor in property as of the commencement of the case.³⁸ In Colorado, prior to the filing of a divorce action, the debtor’s rights to property held in the name of the debtor’s spouse are inchoate; however, once a divorce action is filed, the debtor’s rights to property held in the name of the spouse are vested.³⁹ Thus, if the divorce case has been filed before the bankruptcy petition, the debtor’s interest in marital property, although titled only to the nonfiling spouse, will be property of the bankruptcy estate when the bankruptcy matter is commenced.⁴⁰

The Estate and the Trustee

The estate also includes property recovered by the trustee by avoidance of preference payments⁴¹ and fraudulent transfers,⁴² as well as property recovered under powers of avoidance granted to the trustee as a lien creditor and as a successor to certain creditors and purchasers.⁴³ In addition, the estate includes any interest in property to which the debtor becomes entitled, within 180 days of the filing of the petition, by inheritance, through a property settlement in a divorce or legal separation, or as a beneficiary of life insurance.⁴⁴

The trustee in a bankruptcy case is the representative of the estate.⁴⁵ In Chapter 7 cases, the U.S. Trustee appoints the interim trustee,⁴⁶ whose duties include collection of the property of the estate, liquidation, investigation of the financial affairs of the debtor, and disbursement to creditors.⁴⁷ In Chapter 13 cases in the District of Colorado, the U.S. Trustee has appointed a standing Chapter 13 Trustee, whose duties are the same as those of the Chapter 7 case trustee, but who also must appear on any issue concerning the value of property subject to a lien and confirmation or modification of a plan.⁴⁸

In Chapters 7 and 13, the debtor is required to file schedules of creditors, assets, current income, and expenditures, as well as a

statement of financial affairs.⁴⁹ Also, debtors under both chapters are required to appear and submit to examination by the trustee and any creditor, and to cooperate with the trustee as necessary to enable the trustee to perform his or her duties, including the surrender of property of the estate.⁵⁰

Preferences and Fraudulent Transfers

In Chapter 7, as well as Chapter 13, the trustee may seek avoidance of preference payments to creditors.⁵¹ A preference payment is generally one that was made: (1) to or for the benefit of a creditor; (2) for an antecedent debt; (3) within ninety days before the petition was filed (or within one year if the creditor was an insider); and (4) that enabled the creditor to receive more than it would have received if the transfer had not been made.⁵²

For example, if a debtor paid an attorney \$600 or more on an outstanding account within ninety days of the bankruptcy filing, such transfer would be avoidable.⁵³ Certain preference payments are not avoidable, including *bona fide* payments of a debtor for a domestic support obligation and payments made for a contemporaneous exchange of value.⁵⁴

The trustee in bankruptcy may seek avoidance of transfers:

- 1) made within two years prior to the filing of the petition, if made with actual intent to hinder, delay, or defraud creditors;⁵⁵
- 2) made within two years prior to the filing of the petition for less than reasonably equivalent value, when the debtor was insolvent or the transaction rendered the debtor insolvent;⁵⁶ or
- 3) made within four years prior to filing, under circumstances that Colorado law defines as fraudulent.⁵⁷

The bankruptcy court may avoid a property settlement ordered by a state court in a divorce proceeding, if it is found to be a transfer for less than equivalent value.⁵⁸

The Automatic Stay

The filing of a bankruptcy petition operates as an automatic stay, applicable to all entities, of certain enumerated acts against the debtor, property of the estate, and property of the debtor.⁵⁹ Before proceeding in any action subject to the automatic stay, the party first would have to seek an order for relief from the automatic stay.⁶⁰

Pre-BAPCPA, certain actions were excepted from the automatic stay, including the commencement or continuation of actions for: establishment of paternity; establishment or modification of orders for alimony, maintenance, or child support; and collection of alimony, maintenance, or support from property other than property of the estate.⁶¹ Under the 2005 Act, division of property that is property of the bankruptcy estate is stayed.⁶² The following are not stayed: actions for establishment and modification of domestic support obligations;⁶³ actions concerning child custody or visitation; actions for divorce; actions regarding domestic violence; actions for collection of domestic support obligations from property that is not property of the estate; and withholding of income that is property of the estate for the payment of domestic support obligations pursuant to a court or administrative order or statute.⁶⁴

Timing of Bankruptcy and Divorce

Because the necessity of bankruptcy and divorce frequently converge, it is imperative that both divorce and bankruptcy counsel be

aware of each process and be prepared to guide their clients. The following discussion focuses on issues concerning the timing of divorce and bankruptcy by use of example scenarios.

In the first scenario, Mr. Jones engages the services of a bankruptcy attorney. He expects his separation from his wife to proceed to divorce in the foreseeable future. He is being plagued by creditor calls and a looming foreclosure and wants prompt relief from a bankruptcy. A Chapter 7 petition is filed, discharge is granted within the next four months, no assets are collected, and the case is closed.

After the bankruptcy is filed, his wife files for divorce and the divorce case proceeds on a contested basis. Mr. Jones's personal liability for debt both in his name and jointly in his and his wife's name is discharged in his bankruptcy while the divorce is pending.⁶⁵

Ms. Jones's personal liability for debt in her name and jointly with Mr. Jones is not addressed in his bankruptcy. This debt is allocated at permanent orders, with the court ordering Mr. Jones to pay and hold Ms. Jones harmless from one-half of the marital debt and one-half of their joint mortgage debt.

Mr. Jones's bankruptcy did not and cannot discharge his liability to his ex-wife. The obligations to hold his wife harmless (indemnify) did not exist at the time his bankruptcy was filed; bankruptcy discharges debt that exists at the time of filing of the petition.⁶⁶

Only obligations that exist as of the date of filing bankruptcy are dischargeable. Had Mr. Jones waited to file his bankruptcy until after the decree of divorce and permanent orders, he could have chosen to file either a Chapter 7 bankruptcy or a Chapter 13 bankruptcy. In a Chapter 7 case, filed after permanent orders, obligations to hold his wife harmless could not have been discharged.⁶⁷ In a Chapter 13 case, the obligations to hold her harmless from those credit card and mortgage accounts, ordered in the divorce, would have been discharged.⁶⁸

In scenario two, Ms. Jones consults with divorce counsel and immediately files a divorce petition to obtain the statutory temporary injunctions.⁶⁹ She then engages bankruptcy counsel for an immediate filing of Chapter 7 bankruptcy petition to halt a garnishment of her wages.⁷⁰ In the course of investigation, both bankruptcy and divorce counsel discover that Mr. Jones, during the marriage, surreptitiously had saved in excess of \$25,000, held in stocks and bonds. Ms. Jones's interest in this asset is listed in the schedule of assets. The Chapter 7 trustee will demand turnover of one-half of the fund⁷¹ and also enters an appearance as an interested party in the divorce case.⁷² Had Ms. Jones waited to file her bankruptcy case until after resolution of the divorce, she may have had the opportunity to use the nonexempt funds⁷³ for her immediate needs, including paying attorney fees for the divorce and bankruptcy.⁷⁴

In scenario three, Mr. and Ms. Jones consult with their respective attorneys about divorce. They have marital credit card and mortgage debt, as well as money in savings. They have suffered recent decreases in income, which likely will result in loss of the marital home. On advice of divorce counsel, together they consult with and engage bankruptcy counsel.⁷⁵ They exhaust their joint resources to pay for the bankruptcy filing and for moving expenses. After reviewing their circumstances, a joint Chapter 7 bankruptcy petition is filed, the trustee collects no assets, a discharge of all their debts is ordered, and the case closes. The divorce is not filed until after the bankruptcy case and noncontested permanent orders are entered, dividing their remaining assets between them.

In the fourth scenario, Mr. and Ms. Jones, after consulting with their separate divorce attorneys, together consult with bankruptcy counsel. Mr. Jones earns \$10,000 per month. Ms. Jones historically has been a stay-at-home mother of their two children, ages 10 and 12. Under the “means test,”⁷⁶ if they file together, they would be forced into a Chapter 13.⁷⁷ If they file separately, prior to divorce, Mr. Jones would be forced into a Chapter 13. However, if they both wait until after final orders in the divorce and negotiate child support and maintenance of \$3,500 per month for the next seven years, both may file separate Chapter 7 petitions.⁷⁸ The message of scenario four is that clients are well-served by considering the potential ramifications of bankruptcy and divorce before filing either, and preferably in cooperation with each other.

Practice Strategies

When drafting separation agreements and arguing for permanent orders, it is important to be aware of the effect of the divorce court’s orders in a subsequent bankruptcy. The following points of law should be taken into account in the divorce court orders.

➤ Maintenance and child support payments and arrears are exempt from property of the estate, if court-ordered.⁷⁹ Similarly, payments of maintenance and child support and payments on arrears are deductible in the determination of disposable income, if court-ordered.⁸⁰ Clear distinctions need to be made between maintenance and support obligations, on one hand, and payments on debt and for division of property, on the other, although the bankruptcy court may not honor such determinations made by the state court.⁸¹

➤ Domestic support obligations, owed to or recoverable by a spouse, former spouse, child or such child’s parent, legal guardian, or responsible adult, in the nature of alimony, maintenance, or support, are nondischargeable in bankruptcy.⁸² It therefore is important when drafting separation agreements to identify clearly the nature of the debt, describe its purpose, and provide for enforcement by the spouse.

➤ Obligations owed to a spouse, former spouse, or child, other than domestic support obligations, are nondischargeable in Chapter 7 but are dischargeable in Chapter 13.⁸³ Thus, provisions for one spouse to pay the other spouse’s attorney fees or the other spouse’s share of fees for other professionals should make the obligation in favor of and enforceable by the other spouse and describe the purpose of the obligation—that is, why it should be considered to be in the nature of support.

➤ “Hold harmless” obligations with collateral in the hands of the obligor also should be considered.⁸⁴ For example, a party could require execution of a deed of trust on real property, the release of which is preconditioned on payoff of hold harmless obligations. Moreover, if the client anticipates filing bankruptcy, that client’s at-

torney should avoid agreements that include hold harmless (indemnification) provisions regarding marital debt.

➤ The state court may determine dischargeability.⁸⁵ The practitioner should consider negotiating for dischargeability or nondischargeability, or asking the domestic court to rule on dischargeability, using federal law. For example, the separation agreement could specify that in light of wife’s and son’s economic circumstances, by undertaking to pay son’s education loan (cosigned by both parents), husband’s promise is a child support obligation and, as such, is intended by the parties to be nondischargeable in bankruptcy.⁸⁶ The crucial issue in determining whether an obligation is a support obligation is the function intended to be served,⁸⁷ and that should be the focus of drafting language that would survive a challenge in bankruptcy court.

➤ The bankruptcy court can avoid preferential transfers made within ninety days of the bankruptcy filing (or within one year, if to an insider), and fraudulent transfers made within four years.⁸⁸ Therefore, the practitioner should avoid requirements for payments to unsecured creditors (including attorneys) prior to bankruptcy filing (ninety days for most; one year for insiders). Also, the trustee will scrutinize settlement terms to determine whether the debtor receives appropriate values for what was given to the debtor’s ex-spouse.

➤ The bankruptcy estate includes any interest in property to which the debtor becomes entitled within 180 days after the filing of the petition, including through a property settlement in a divorce or legal separation.⁸⁹ Thus, it is important to consider the timing of filing the divorce *vis-à-vis* a potential bankruptcy.

➤ The trustee in bankruptcy, at the commencement of the case, has the rights and powers of the holder of a judicial lien against property of the estate.⁹⁰ Thus, it is important to file a notice of *lis pendens* on marital property that is not titled to the client. After final orders, immediately perfect transfers of marital property to avoid the ex-spouse/debtor having legal title to property that was supposed to have been transferred to the client.

➤ Creditors, whose personal property collateral is security for a loan, may pursue their rights to collateral under nonbankruptcy law, unless the debtor either reaffirms the debt or redeems the collateral.⁹¹ After final orders, the spouse to whom the property is awarded should immediately seek refinancing of autos and other personal property collateral for cosigned loans.

➤ Bankruptcy processes are time-sensitive, often with short deadlines.⁹² The attorney must react promptly to notices and file proofs of claim, objections to confirmation, or adversary proceedings, as appropriate.

Conclusion

Because of economic circumstances, a client's need for divorce also may call for consideration of a bankruptcy filing. An awareness of certain bankruptcy concepts is important to the domestic practitioner. The automatic stay of bankruptcy, dischargeability of debt, determination of property of the estate, and availability of a bankruptcy discharge may affect the goals to be achieved for the client in divorce. It also is important to consider the timing of divorce and bankruptcy filings.

1. The term "divorce" is used throughout this article to refer to "dissolution of marriage."

2. CRS § 14-10-106(1)(b).

3. 28 U.S.C. § 157(b)(2).

4. For instance, either court may determine dischargeability of debt. *Eden v. Robert A. Chapski Ltd.*, 405 F.3d 582 (7th Cir. 2005). The state court had concurrent jurisdiction to determine dischargeability of attorney fees in divorce case.

5. For instance, the bankruptcy court may avoid as fraudulent a transfer of property ordered by the divorce court in its determination of a fair and equitable division of property. *In re Kelsey*, 270 B.R. 776 (10th Cir. BAP 2001).

6. Pub. L. 109-8 (2005 Act or BAPCPA). Most provisions of the 2005 Act went into effect on October 17, 2005. Pub. L. 109-8 § 1501. See Hoskins, "The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," 35 *The Colorado Lawyer* 15 (Feb. 2006).

7. Although a debtor may choose from Chapters 7, 11, 12, and 13 for bankruptcy relief, this article examines the interaction between bankruptcy and divorce only in the context of Chapters 7 and 13. Chapter 12 is available for family farmers or fishers. 11 U.S.C. § 109(f). An individual with primarily consumer debt may not be a debtor under Chapter 7 if relief would be an abuse, e.g., if he or she has sufficient income to make some payment on unsecured debt (11 U.S.C. § 707(b)) and may not be a debtor under Chapter 13 if unsecured debt exceeds \$336,900 or secured debt exceeds \$1,010,650 (11 U.S.C. § 109(e)). A debtor who is ineligible for relief under Chapters 7 and 13, with primarily consumer debt, may have to file Chapter 11 bankruptcy to gain relief; Chapter 11 is a reorganization bankruptcy.

8. 11 U.S.C. § 523(a)(1) (pre-BAPCPA).

9. 11 U.S.C. § 523(a)(2) (pre-BAPCPA).

10. 11 U.S.C. § 523(a)(3) (pre-BAPCPA).

11. 11 U.S.C. § 523(a)(4) (pre-BAPCPA).

12. 11 U.S.C. § 523(a)(5) (pre-BAPCPA).

13. 11 U.S.C. § 523(a)(15) (pre-BAPCPA); *Matter of Crosswhite*, 148 F.3d 879 (7th Cir. 1998).

14. 11 U.S.C. §§ 1328(a)(2) and 523(a)(5), (8), and (9) (pre-BAPCPA).

15. *In re Jones*, 9 F.3d 878 (10th Cir. 1993); *In re Turner*, 266 B.R. 491 (10th Cir. BAP 2001).

16. *Miller v. Gentry*, 55 F.3d 1487 (10th Cir. 1995).

17. 11 U.S.C. § 1328(a)(2) (pre-BAPCPA).

18. 11 U.S.C. §§ 1328(a)(2) and 523(a)(15) (pre-BAPCPA).

19. 11 U.S.C. § 727(a).

20. 11 U.S.C. § 523(a)(5) (pre-BAPCPA).

21. 11 U.S.C. § 523(a)(5). 11 U.S.C. § 101(14A) provides:

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.

22. 11 U.S.C. § 101(14A).

23. *Id.*

24. *Leo, Warren, P.C. v. Brooks (In re Brooks)*, 371 B.R. 761 (Bankr. N.D.Tex. 2007).

25. *In re O'Brien*, 367 B.R. 240 (Bankr.D.Mass. 2007).

26. *In re Poppleton*, 382 B.R. 455 (Bankr.D.Id. 2008).

27. *In re Harrell*, 754 F.2d 902 (11th Cir. 1985); *In re Poole*, 383 B.R. 308 (D.S.C. 2007).

28. *Boyle v. Donovan*, 724 F.2d 681 (8th Cir. 1984).

29. *Williams v. Williams (In re Williams)*, 703 F.2d 1055 (8th Cir. 1983).

30. *Poole, supra* note 27 at 314, citing *In re Fitzgerald*, No. 02-15275-W, slip op. at 5 (Bankr.D.S.C., March 12, 2003), with reference to *Boyle, supra* note 28 and *Williams, supra* note 29. The *Poole* court found the debtor's obligation to hold the ex-spouse harmless from payment of credit card debt, to pay one-half of her attorney fees, and to make a \$70,000 payment over time not to meet the statutory definition of "domestic support obligations"; rather, the court found those obligations to be in the nature of a property settlement. The court cited factors that may be considered when determining whether an obligation is intended as support or property settlement—*i.e.*, the substance and language of document creating the obligation, the financial condition of the parties at the time of decree or agreement, the function served by the obligation and intent of the parties, and whether there is evidence of undue influence. *Poole, supra* note 27 at 314. A contrary result was reached in *Williams, supra*, note 29, where the evidence supported the court's finding that the obligee was in poor health, had not worked for many years, and that her income was insufficient to meet reasonable living expenses. *Id.* at 1057.

31. *Boyle, supra* note 28.

32. *Williams, supra* note 29.

33. *Chiquito v. Livingston (In re Livingston)*, 07-14280 SBB (Bankr.D.Colo. May 12, 2008).

34. 11 U.S.C. § 523(a)(15) (pre-BAPCPA); *Crosswhite, supra* note 13.

35. 11 U.S.C. § 523(a)(15).

36. 11 U.S.C. § 523(c)(1).

37. 11 U.S.C. § 1328(a).

38. 11 U.S.C. § 541(a)(1).

39. *In re Questions Submitted by U.S. District Court*, 517 P.2d 1331 (Colo. 1974).

40. 11 U.S.C. § 541(a).

41. 11 U.S.C. § 547.

42. 11 U.S.C. § 548.

43. 11 U.S.C. § 544.

44. 11 U.S.C. § 541(a)(5).

45. 11 U.S.C. § 323.

46. 11 U.S.C. § 701.

47. 11 U.S.C. §§ 704 and 726.

48. 11 U.S.C. § 1302.

49. 11 U.S.C. § 521(a). The form of such schedules and statements is prescribed by the Judicial Conference of the United States, U.S. Bankruptcy Court Rule 9009.

50. 11 U.S.C. §§ 341, 343, and 521(a)(3) and (4).

51. 11 U.S.C. § 547(b).

52. *Id.*

53. *Id. But see In re Hagen*, 922 F.2d 742 (11th Cir. 1991) (a contingency fee paid to attorneys within ninety days was not avoidable, because it was secured by a charging lien).

54. 11 U.S.C. § 547(c)(1) and (7).

55. 11 U.S.C. § 548(a)(1)(A).

56. 11 U.S.C. § 548(a)(1)(B).

57. CRS §§ 38-8-103, -105, and -106 (Colorado Uniform Fraudulent Transfer Act).

58. 11 U.S.C. § 548(a)(1)(B); *In re Beverly*, 374 B.R. 221 (9th Cir. BAP 2007); *In re Fordu*, 201 F.3d 693 (6th Cir. 1999).

59. 11 U.S.C. § 362(a).

60. 11 U.S.C. § 362(a) (pre-BAPCPA).

61. 11 U.S.C. § 362(b) (pre-BAPCPA).

62. 11 U.S.C. § 362(a)(2).

63. *O'Brien*, *supra* note 25 at 242 (the bankruptcy court found the debtor's obligation to pay his ex-wife for her attorney fees in postdecree litigation concerning child support to be a domestic support obligation and granted relief from the automatic stay, relying on the domestic court's characterization of the debt as such).

64. 11 U.S.C. § 362(b)(2). Also excepted from operation of the automatic stay are actions for: the withholding, suspension, or restriction of a driver's license, professional or occupational license, or recreational license; the reporting of overdue support; interception of tax refunds; and enforcement of medical obligations, as specified in various provisions of the Social Security Act.

65. 11 U.S.C. §§ 524(a) and 727(b).

66. *Id.*

67. 11 U.S.C. § 523(a)(15).

68. 11 U.S.C. § 1328(a)(2).

69. CRS § 14-10-107(4)(b).

70. 11 U.S.C. § 362(a).

71. 11 U.S.C. § 541(a).

72. 11 U.S.C. § 323(b).

73. Exemptions from execution, such as those provided in CRS § 13-54-102, are applicable in bankruptcy to protect the debtor's assets from turnover to the trustee in bankruptcy. 11 U.S.C. § 522(b).

74. Generally, there is no statutory exemption that protects cash resources from turnover to the trustee. *See* CRS § 13-54-102. If the bankruptcy case is filed when there are savings, the trustee will demand turnover for the benefit of unsecured creditors. However, if the parties cooperate prior to filing bankruptcy, they could agree to use cash resources

to pay divorce and bankruptcy attorneys, and not leave those savings to their creditors.

75. Colo. RPC 1.7(b) provides for representation of clients with concurrent conflict of interest.

76. The most significant provision of the 2005 Act is the so-called "means test" calculation, by which the debtor's average gross income for the six months prior to filing, less allowable expenses, is considered "disposable income." Official Form B22A, available at www.uscourts.gov/bkforms/bankruptcy_forms. If monthly disposable income, paid over sixty months, is \$6,000 or 25 percent of unsecured debt (whichever is greater), the debtor's Chapter 7 case is subject to dismissal or being converted to Chapter 13. 11 U.S.C. § 707(b). Also, disposable income is a factor in determining the amount of plan payments in a Chapter 13 case. 11 U.S.C. § 1325(b).

77. In this example, the annualized monthly income (AMI) is \$120,000 and current monthly income (CMI) is \$10,000. The median family income (MFI) in Colorado for a household of four is \$77,933 per year (as of January 2008). *See* www.usdoj.gov/ust. Allowable deductions are \$7,550.36. *See* www.usdoj.gov/ust. Thus, the family's disposable income is \$2,449.64. 11 U.S.C. § 707(b)(2); Official Form B22A.

78. His AMI is \$120,000 and CMI is \$10,000. The MFI in Colorado for a household of three is \$66,731. Allowable deductions are \$10,423. Thus, there is no disposable income. Her AMI is \$42,000. The MFI in Colorado for a household of three is \$66,731. Her AMI is less than the MFI; therefore, there is no abuse for Chapter 7 filing.

79. CRS §§ 13-54-102(1)(u) and -102.5(1); 11 U.S.C. § 522(b).

80. 11 U.S.C. §§ 101(14A) and 507(a)(1); Official Bankruptcy Form B22A, Line 28; Official Bankruptcy Form B22C, Line 33.

81. *Harrell*, *supra* note 27; *Poole*, *supra* note 27; *Boyle*, *supra* note 28; *Williams*, *supra* note 29; *Fitzgerald*, *supra* note 30.

82. 11 U.S.C. §§ 101(14A)(A) and 523(a)(5).

83. 11 U.S.C. §§ 523(a)(15) and 1328(a).

84. Lien rights pass through the bankruptcy case unaffected. 11 U.S.C. § 506(d)(1); *In re Tarnow*, 749 F.2d 464 (7th Cir. 1984).

85. *Eden*, *supra* note 4.

86. Note the apparent contradiction between the bankruptcy court's jurisdiction to make its own determination regarding obligations in the nature of support and the concurrent jurisdiction of the two courts to determine dischargeability. *Harrell*, *supra* note 27; *Poole*, *supra* note 27; *Boyle*, *supra* note 28; *Williams*, *supra* note 29; *Fitzgerald*, *supra* note 30. In those cases in which the bankruptcy court overruled the state court, there was no indication that the state court had attempted to apply federal law in its determination of the nature of the obligation.

87. *Harrell*, *supra* note 27; *Poole*, *supra* note 27; *Boyle*, *supra* note 28; *Williams*, *supra* note 29; *Fitzgerald*, *supra* note 30.

88. 11 U.S.C. §§ 547 and 548; CRS §§ 38-8-103, -105, and -106.

89. 11 U.S.C. § 541(a)(5).

90. 11 U.S.C. § 544(a)(1). *See In re Tucker*, 95 B.R. 796 (Bankr.D.Colo. 1989). If a judgment lien creditor perfects a lien on real property before debtor's spouse asserts and perfects a claim to the property, the rights of the spouse are subordinate to those of the judgment creditor. *In re Fisher*, 67 B.R. 666 (Bankr.D.Colo. 1986). When the wife had not recorded notice of *lis pendens*, a judgment lien creditor seeking to execute on debtor's property took title free and clear of her interests. *See In re Harms*, 7 B.R. 398 (Bankr.D.Colo. 1980).

91. 11 U.S.C. § 521(a)(6). Since the effective date of the 2005 Act, certain auto creditors have been actively repossessing cars under provisions of security agreements in which the filing of a bankruptcy petition is an event of default. Depending on the language of the security agreement, a co-signer who does not file a bankruptcy petition still may face repossession, despite the absence of default in payments.

92. The date for the § 341 creditors' meeting is twenty to forty days after filing the petition. Fed.R.Bankr.P. 2002(a). Creditors and the trustee have sixty days after the § 341 meeting to file objections to discharge and/or complaints to determine dischargeability of debts. Fed.R.Bankr.P. 4007(c). ■