FAMILY LAW AND BANKRUPTCY: A FEW SELECTED ISSUES

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I. PROPERTY OF THE ESTATE

A. Debtor's interest in property subject to 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 non-owner spouse has no interest in the other's property until judgment. Unless state law provides for an inchoate or contingent interest, the filing of a bankruptcy by an owning spouse cuts off the ownership rights of the non-owning spouse. See, e.g., *In re Skorich*, 482 F.3d 21 (1st Cir. 2007) (debtor's spouse's interest in funds held in escrow arose upon prepetition filing of divorce and was not a claim); *Culver v. Boozer*, 285 B.R. 163 (D. Md. 2002) (under Maryland law, neither non-debtor's interest in equitable property division, nor possession of untitled asset, was sufficient for property interest to arise); *In re DiGeronimo*, 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, not property interest); *In re Halverson*, 151 B.R. 358 (M.D. N.C. 1993) (absent levy, non-owner spouse has no interest in the other spouse's personal property before judgment); compare *In re Dzielak,* 435 B.R. 538 (Bankr. N.D. Ill. 2010) (under Illinois law, filing divorce action creates right in other spouse's property); *In re Goss*, 413 B.R. 843 (Bankr. D. Or. 2009) (filing of dissolution action creates vested, inchoate claim in property of other spouse under Oregon law); see also *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 non-filing spouse but did not transfer property); see also *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, ordinarily the state court must determine extent of interest, which requires relief from the stay in a pending bankruptcy proceeding.

B. 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 property awarded to the debtor's former spouse pursuant to a prepetition decree is not. *In re Gallo*, 573 F.3d 433 (7th Cir. 2009) (equalizing obligation due debtor was property of estate); *Musso v. Ostashko*, 468 F.3d 99 (2d Cir. 2006) (failure to docket divorce decree before debtor filed bankruptcy resulted in property awarded to non-filing spouse being included in debtor's estate); *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); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991) (rights of non-owning spouse in pending divorce are similar to rights of beneficiary of constructive trust and were not subordinate to trustee's rights).

II. SUPPORT DUE DEBTOR FROM PRIOR SPOUSE.

A. 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 Cal. Bankr. J. 542 (2006).

B. 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); *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).

III. 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). 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). See infra regarding rights of co-owners upon sale by trustee.

IV. JOINT TAX REFUND.

Inclusion in debtor's estate depends on ownership rights under state law. See, e.g., *In re Crowson*, 431 B.R. 484 (B.A.P. 10th Cir. 2010) (interpreting Wyoming law, estate's and non-filing spouse's portions calculated based on spouses' withholding, eligibility for certain components, and percentage of total income); *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) (non-debtor spouse with no earnings had no interest in joint tax refund); *In re Hraga* 2011 WL 2652266 (Bankr. N.D. Ga.) (Under Georgia law, income tax refund was in the estate of only the husband as he was the only earner); *In re McKain*, 455 B.R. 674 (Bankr. E.D. Tenn. 2011) (tax refund was owned equally, under Tennessee law, absent evidence of separate ownership); *In re Rice,* 442 B.R. 140 (Bankr. M.D. Fla. 2010) (spouses' interests determined by contribution under Florida law); *In re Garbett*, 410 B.R. 280 (Bankr. E.D. Tenn. 2009) (50/50 ruled applied under Tennessee law); *In re Gartman*, 372 B.R. 790 (Bankr. D. S.C. 2007) (income and withholding allocated between spouses to determine respective interests). 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.

V. 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 Herter*, 456 B.R. 455 (Bankr. D. Id. 2011); *In re Victor*, 341 B.R. 775 (Bankr.D. N.M. 2006); *In re Brassett*, 332 B.R. 748 (Bankr.M.D. La.

2005); *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). 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 non-debtor 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); *In re Petersen,* 437 B.R. 858 (D. Ariz. 2010) (non-filing spouse holding community property was subject to turnover action by trustee, but he was allowed equitable recoupment for property ordered by state court to be paid to him by debtor prepetition). 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). See also *In re Trammell*, 399 B.R. 177 (Bankr. N.D. Tex. 2007) (car titled in non-filing spouse's name was sole management community property and was not in debtor spouse's estate).

VI. 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, and whether a joint case was filed. State law generally provides such property can be recovered only by 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)(3)(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 Etoll*, 425 B.R. 743 (filing by one spouse converted tenancy by the entireties property to tenancy in common property with right of survivorship, which only existed until debtor died; interpreting New Jersey law); *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; bankruptcy law pre-empted state creditor recovery rules); *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 Swiontek* 376 B.R. 851 (Bankr. N.D. Ill. 2007 (transfer of entireties property to debtor's spouse avoided by trustee did not revert to tenancy by the entireties); *In re Stacy*, 223 B.R. 132 (N.D. Ill. 1998) (fraudulent transfer avoided when solely owned property was changed 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]. See also *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).

VII. 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. In *In re Radinick,* 419 B.R. 291 (Bankr. W.D. Pa. 2009), the debtor became entitled to a portion of her former spouse's retirement plan, which was a type that was not excluded as property of the estate, more that 180 days after filing. However, under Pennsylvania law, because the dissolution action was filed within the 180 days after filing, she had an unliquidated interest in that asset when the action was commenced, and her share became property of her estate. The court distinguished other cases where state law provided that a spouse received a property interest in the other spouse's assets only at the time of final judgment. See also *In re Herter*, 456 B.R. 455 (Bankr. D. Id. 2011) (decree awarding ex-wife an interest in former community property assets, which became final only after closing of ex-husband's case, occurred within 180 days of her filing and property that passed through his estate became part of her estate).

VIII. 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).

IX. 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 non-owner 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 Webb*, 474 B.R. 891 (Bankr. E.D. Ark. 2012) (joint venture agreement signed to ensure wife's interest in farming operation did not create partnership entity); *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). This may also have implications for the means test.

X. CO-OWNER'S RIGHTS VIS A VIS TRUSTEE OR DEBTOR IN POSSESSION.

A. Sale of Entire Asset.

1. **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). See also *In re Wolk*, 451 B.R. 468 (B.A.P. 8th Cir. 2011 (interest of co-owner outweighed interest of estate). 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 non-debtor's share was ordered as trustee's right to recover from non-debtor 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).Cf. *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). See also *In re Carmichael*, 439 B.R. 884 (Bankr. D. Kan. 2010) (trustee not allowed to sell debtor's co-owned exempt property to realize estate's interest in avoided lien; *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 spouse's son); *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 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 superseded 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).

2. **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 non-debtor 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 non-debtor spouse was not entitled to half of the proceeds.

B. 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 is 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).

C. ERISA Benefits and Spendthrift Trust Interests.

An interest that the debtor has in property that is subject to restrictions under non-bankruptcy 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.

D. 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).

XI. 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 division matters. Acts to recover property of the estate for a non-dischargeable debt are also stayed.

Acts taken in family court that violate the stay are void. See *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 non-debtor wife could enforce it as to property that was no longer property of the estate); *In re Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010) (post-nuptial agreement entered into after ch. 13 confirmation, which required transfer of property of the estate, violated stay); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002) (state court property division awarding property of the estate to non-filing spouse was void); see also *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); see also *In re Hall-Walker,* 445 B.R. 873 (Bankr. N.D. Ill. 2011) (attorney for debtor's former husband sanctioned for bringing contempt action in state court to remove former husband's name from mortgage); *In re Kallabat*, (Bankr. E.D. Mich. 2012) (attorney who knew about filing violated stay by asking state court to impose liability on debtor).

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). See also *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). 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.

An act excepted from the stay may still violate other court orders. *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).

C. Contempt Action in State Court.

If incarceration is used to compel debtor to pay support from property of the estate, especially if support arrearage will be paid through a plan, the action violates stay. *In re Johnston*, 308 B.R. 469 (Bankr. D. Ariz. 2005), aff'd in part, rev'd in part, 321 B.R. 262 (D. Ariz. 2005) aff'd in part, rev'd in part, 595 F.3d 937 (9th Cir. 2010); *In re Caffey,* 384 B.R. 297 (Bankr. S.D. Ala. 2008), aff'd, 384 Fed. Appx.882 (11th Cir. 2010); *In re Farmer*, 150 B.R. 68 (Bankr.N.D. Ala. 1991); *In re Suarez,* 149 B.R. 193 (Bankr. D. N.M. 1993). Both the DSO creditor and his or her attorney may be subject to sanctions for violating the stay in bringing the action in state court, or for failing to take corrective action once the party or attorney is aware of the violation. See, e.g., *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), aff'd,384 Fed. Appx.882 (11th Cir. 2010); *In re Bailey* 428 B.R. 694 (Bankr. N.D. W. Va. 2010). But see Matter of Rogers, 164 B.R. 382 (Bankr. N.D. Ga. 1994)(no violation for failure of creditor to act affirmatively as debtor's incarceration was the act of state court, not the creditor).But see *In re Rucker,* 2011 WL 4494345 (Bankr. D. S.C.) (debtor incarcerated prepetition; chapter 13 eligibility unlikely).

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 into before the bankruptcy. This is probably distinguishable from an order for payment.

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). 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); *In re Storozhenko*, 459 B.R. 697 (Bankr. E.D. Mich. 2011) (criminal and civil contempt distinguished).

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, or up to five years for cause with court order. In a Chapter 11, stay is in effect until the plan is confirmed. After the stay expires or is terminated, the 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); *In re Dryja,* 425 B.R. 608 (Bankr. D. Colo. 2010) (stay lifted to allow state court to proceed with property division).

In deciding whether to modify the stay to allow the property division to go forward, the court will consider the effect on the estate. See *In re Anderson*, 463 B.R. 981 (Bankr. N.D. Ill. 2011) (GAL granted relief from stay to collect DSO fees from property that was not property of the estate); *In re Secrest*, 453 B.R. 623 (Bankr. E.D. Va. 2011) (no cause to lift stay when property could be more efficiently administered through sale by trustee rather than by property division in state court; *In re Taub* 413 B.R. 55 (Bankr. E.D. N.Y. 2009) (stay lifted to allow state court to determine spouses' rights in property, which would resolve certain issues relevant to ch. 11 plan confirmation); *In re Goss*, 413 B.R. 843 (Bankr. D. Ore. 2009) (stay not lifted for debtor's former wife to enforce property division when it would defeat debtor's means to effectuate chapter 13 plan and there was equity in property on which she held lien); *In re Jacobson*, 231 B.R. 763 (Bankr. D. Ariz. 1999) (stay lifted so non-debtor 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); see also *In re Dzielak,* 435 B.R. 538 (Bankr. N.D. Ill. 2010) (trustee could represent estate's interest in divorce action).

1. Co-debtor Stay. The chapter 13 co-debtor stay, which protects non-filing co-debtors, was not changed by the 2005 Act. 11 U.S.C. 1301. A creditor is stayed from commencing or continuing a civil action to collect a consumer debt from a co-debtor who is liable on a debt or who has secured a debt of the debtor.

2. The co-debtor stay 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).

3. Filing fee. A motion for relief from stay requires a $176 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.

XII. PROPERTY DIVISION VS. SUPPORT

A. 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.

B. Property Division:11 U.S.C. 523(a)(15).

Property division debts continue to be dischargeable upon completion of a chapter 13 plan. See *In re Cooke*, 455 B.R. 503 (Bankr. W.D. Va. 2011) (property division obligation dischargeable even though found non-dischargeable under previous version of sec. 523(a)(15) in prior chapter 7 case). Therefore, the same standards used before the 2005 amendments in determining the nature of an obligation apply in the chapter 13 context. 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 or subject to discharge.

XIII. MODIFICATION OF DECREE OR SUPPORT

A. Automatic Stay.

Under BAPCPA, actions to establish support or modify support are excepted from the automatic stay. Amendments in the 2005 Act are more expansive in exceptions in that collection may continue from income withholding, even if the debtor's income is property of the estate.

B. Bankruptcy as Change of Circumstances.

Bankruptcy of the payor spouse leaving the payee spouse solely liable for joint debts may constitute a change in circumstances warranting modification of maintenance provisions, and most courts will allow modification. *In re Henderson*, 324 B.R. 302 (Bankr. W.D. Ky. 2005) (discharge of credit card debt resulting in state court's award of maintenance did not violate Rooker-Feldman doctrine or constitute circumvention of discharge); *Siragusav. Siragusa*, 843 P.2d 807 (Nev. 1992) (husband's property settlement obligation that had been discharged in bankruptcy could be considered as changed circumstance in ruling on motion for modification of alimony); *In re Siragusa*, 27 F.3d 406 (9th Cir. 1994) (alimony modification did not violate discharge injunction); Marriage of Trickey,

589 N.W.2d 753 (Iowa App. 1998) (under Iowa law, change of circumstances must be outside the reasonable contemplation of parties at time of divorce to support modification of alimony, and bankruptcy did not meet test); *Wood v. Wood*, 438 S.E.2d 788 (W.Va. 1993) (wife was entitled to have her request for attorney fees and expenses considered once automatic stay was lifted in husband's bankruptcy proceeding); *Ward v. Ward*, 409 S.E.2d 518 (Ga. 1991) (decrease in former husband's child support obligation was supported by his need to assume entire bank obligation as a result of former wife's bankruptcy and by doubling of her income); Marriage of Jones, 788 P.2d 1351 (Mont. 1990) (modification was allowed, but other changes besides the payor's bankruptcy were present); Marriage of Myers, 773 P.2d 118 (Wash. App.1989) (court could consider creditor collection efforts against ex wife for debts ex husband was obligated by dissolution decree to pay but which he discharged in bankruptcy; facts supported upward modification of maintenance); *Ganyo v. Engen*, 446 N.W.2d 683 (Minn. App. 1989) (dissolution decree provided for reevaluation of maintenance if debtor spouse filed for bankruptcy; evidence supported finding cause to modify award as to amount and duration); *Eckert v. Eckert*, 424 N.W.2d 759 (Wis. App. 1988) (changed circumstances existed by evidence that former husband obtained discharge in bankruptcy which prevented former wife from receiving her share of marital estate as contemplated in divorce judgment); *Hopkins v. Hopkins*, 487 A.2d 500 (R.I. 1985) (waiver of alimony conditioned on payment of debts; support increase allowed); Marriage of Clements, 184 Cal. Rptr. 756 (App.1982) (alimony reduced on account of payee's bankruptcy). It appears that the state court can modify support after payor's bankruptcy if the court looks at the totality of the circumstances and is not attempting to order payment of a discharged debt.

C. Circumventing Discharge.

State court proceedings cannot be used for the sole purpose of forcing the debtor to pay otherwise dischargeable debts. *In re Heilman*, 430 B.R. 213 (B.A.P. 9th Cir. 2010); *In re Tostige*, 283 B.R. 462 (Bankr. E.D. Mich. 2002); *In re Beardslee,* 209 B.R. 1004 (Bankr. D. Kan. 1997); *In re Freels,* 79 B.R. 358 (Bankr. E.D. Tenn. 1987); Matter of Thayer, 24 B.R. 491 (Bankr. W.D. Wis. 1982); *Benavidez v. Benavidez*, 660 P.2d 1017 (N.M. 1983). See also *In re Hamilton*, 540 F.3d 367 (6th Cir. 2008) (state court order to indemnify former spouse on joint debt that had been determined discharged in bankruptcy court was void); *In re Harris*, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (debtor's husband's attempt to reduce maintenance to setoff debtor's discharged property division obligation was violation of stay). But see *Ward v. Ward*, 409 S.E.2d 518 (Ga. 1991) (spouse who willfully refused to pay a debt that was later discharged in bankruptcy could be found in criminal, not civil, contempt).

D. Property Division.

Modification of property division is not allowed. *In re Zick*, 123 B.R. 825 (Bankr.E.D. Wis. 1990); *Grassmueck v. Food Indus. Credit Union*, 127 B.R. 869 (Bankr. D. Or. 1991); *Strohmier v. Strohmier*, 839 N.E.2d 234 (Ind. App. 2005); *Spankowski v. Spankowski*, 493 N.W.2d 737 (Wis. App. 1992); *Coakley v. Coakley*, 400 N.W.2d 436 (Minn. App. 1987); *Fitzgerald v. Fitzgerald*, 481 A.2d 1044 (Vt. 1984). See also *In re*

Harris, 310 B.R. 395 (Bankr. E.D. Wis. 2004) (debtor's husband's attempt to reduce maintenance to setoff debtor's discharged property division obligation was violation of stay); *In re Fluke*, 305 B.R. 635 (Bankr. D. Del. 2004) (attempt to modify property division violated discharge injunction); *In re Tostige*, 283 B.R. 462 (Bankr. E.D. Mich. 2002) (attempt to modify property division violated discharge injunction).

E. Level of Support- Jurisdiction.

The bankruptcy court has no jurisdiction to set or modify the amount of spousal or child support. *In re Brennick*, 208 B.R. 613 (Bankr.D.N.H. 1997); Matter of Rogers, 164 B.R. 382 (Bankr. N.D. Ga. 1994). Cf. *In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (bankruptcy court did not violate Rooker-Feldman or Younger doctrines by allowing only part of state DSO claim with apparent clerical error, but this did not constitute an adjudication of the correct amount, which should be decided by state court).

XIV. OBJECTIONS TO DISCHARGE UNDER 11 U.S.C. 523(a)(2), (4) & (6).

A. Fraud.

A debt arising in a marital settlement agreement may be non-dischargeable 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 Lyons,* 454 B.R. 174 (Bankr. D. Kan. 2011) (fraud found in debtor's failing to inform former husband that she no longer qualified for maintenance); *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 non-dischargeable); *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 *Corso v. Walker*, 449 B.R. 838 (W.D. Pa. 2011) (fraud not proved because as manager of family finances, debtor was authorized to sign husband's name to obligations); *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 Taylor,* 455 B.R. 799 (Bankr. D. N.M. 2011) (fraud not found in debtor's cohabiting, resulting in cessation of right to support; former husband stated claim as nonsupport divorce related debt for overpayment); *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 non-dischargeability 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 *In re Bucciarelli,* 429 B.R. 372 (Bankr. N.D. Ga. 2010) (debtor's divorce attorney's fees excepted from discharge for fraudulently inducing the attorney to continue working on divorce case while intending to discharge them in bankruptcy after divorce).

B. Willful and Malicious Injury.

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 non-dischargeable); *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 Suarez,* 400 B.R. 732 (B.A.P. 9th Cir. 2009) (judgment for harassment of new wife of debtor's former husband was non-dischargeable even without compensatory damage award); *In re Alessi*, 405 B.R. 65 (Bankr. W.D. N.Y. 2009) (dissipation of funds earmarked for former spouse in divorce judgment excepted from discharge under 523(a)(6); *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 non-dischargeable). 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 willful 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).

C. Defalcation.

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 Jacobson,* 433 B.R. 183 (Bankr. S.D. Tex. 2010) (Texas statutory trust in favor of spouse later awarded property that had been in possession of other spouse did not give rise to defalcation); *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); cf. pension cases, supra.

XV. CHAPTER 12 AND 13 CONSIDERATIONS

A. General Provisions.

1. **Estate Property**. Estate includes 11 U.S.C. 541 property owned by the debtor on the date of filing, including certain property held by a non-debtor spouse in a community property state, plus any such property acquired while the plan is in effect, plus earnings for services performed by the debtor before the case is closed, dismissed or converted. 11 U.S.C. 1207(a)(2), 1306(a)(2). Property vests in the debtor at confirmation unless otherwise ordered. 11 U.S.C. 1327(b). The 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, bringing any dispute concerning such income into the bankruptcy court. See *In re Clouse,* 446 B.R. 690 (Bankr. E.D. Pa. 2010) (post-nuptial agreement that required transfer of property of estate, including debtor's earnings for to be paid for support, violated stay); *In re Dahlgren*, 418 B.R. 852 (Bankr. D. N.J. 2009) (debtor's plan, in case filed on eve of partition of tenants in common property owned with debtor's former domestic partner, could not treat co-owner's interest as a claim); *In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (wages vested upon confirmation and were not protected by automatic stay as to postpetition 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 $360,475 in non-contingent, liquidated, unsecured debts and not more than $1,081,400 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). If both spouses would individually qualify, they may file a joint case even if their aggregate debts exceed debt limits. *In re Hannon*, 455 B.R. 814 (Bankr. S.D. Fla. 2011); *In re Werts,* 410 B.R. 677 (Bankr. D. Kan. 2009). See also *In re Lovell*, 444 B.R. 367 (Bankr. E.D. Mich. 2011) (chapter 13 debtor who depended on husband's income, when he had also filed a chapter 13 case, did not qualify as having regular income).

   If one spouse in a joint case wishes to convert to chapter 7, the case can be severed. *In re Seligman*, 417 B.R. 171 (Bankr. E.D. N.Y. 2009).

3. **Community claims**. A community claim, defined in 11 U.S.C. 101(7), incurred by the debtor's non-filing spouse must be included in the determination of eligibility. *In re Monroe*, 282 B.R. 219 (Bankr. D. Ariz. 2002) (tort committed by non-debtor 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, hypothetically, some kind of community property would be available under state law to satisfy a creditor's claim, then it meets the definition of a community claim. See, e.g., *In re Field*, 440 B.R. 191 (Bankr. D. Nev. 2009; *In re Pfalzgraf,* 236 B.R. 390 (Bankr. E. D. Wis. 1999) (child support payable by non-debtor 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). The term creditor also includes an entity that has a community claim. 11 U.S.C. 101(10).See also *In re Whitus*, 240 B.R. 705 (Bankr. W.D. Tex. 1999) (IRS claim for which only non-filing spouse was personally liable, is entitled to community property available under state law rules, plus one half of all community property, even if not available under state law rules).

4. **Good Faith**. 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). See also *In re Grafton*, 421 B.R. 765 (Bankr. N.D. Miss. 2009)

(treatment of property division claim of former spouse in plan was not in good faith); *In re Hofer,* 437 B.R. 680 (Bankr. D. Minn. 2010) (chapter 13 case filed in impermissible attempt to modify dissolution decree; confirmation denied, case dismissed); *In re Melcher,* 416 B.R. 666 (Bankr. D. Neb. 2009) (treatment of former wife's claim was not in good faith); *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 non-filing spouse's interest in property to grant prospective relief).

5. **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 non-estate 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 of the plan and discharge. This protects postpetition income and property acquired by the debtor. See, e.g., *In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008) (wages vested upon confirmation and were not protected by automatic stay as to postpetition support due). In Matter of James, 150 B.R. 479 (Bankr. M.D. Ga. 1993), the court refused to lift the stay to allow the non-debtor 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 Fort,* 412 B.R. 840 (Bankr. W.D. Va. 2009); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (both held 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).

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 *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 non-debtor spouse's income).

6. **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, Form B22C. *In re Harman,* 435 B.R. 596 (B.A.P. 8th Cir. 2010) (joint debtors' income combined even though they lived separately); *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); *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006) (income of non-filing spouse must be included to extent contributed to household expenses); *In re Baldino*, 369 B.R. 858 (Bankr. M.D.Pa. 2007).

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 debtor's CMI, or the CMI of the debtor and debtor's spouse in a joint case, plus regular contributions by a non-filing spouse determine the applicable commitment period under the means test. 11 U.S.C. 101(10A), 1322(d), 1325(b)(4). 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. Pursuant to the marital adjustment, funds not contributed by the non-filing spouse are deducted from the debtor's CMI. See, e.g., *In re Rable*, 445

B.R. 826 (Bankr. N.D. Ohio 2011) (mortgage payments made by debtor's spouse for joint residence were not subject to marital adjustment); *In re Vollen*, 426 B.R. 359 (Bankr. D. Kan. 2010) (if non-filing spouse's income not regularly contributed to household expenses, it should not be included in calculating debtor's disposable income); *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) (same).See also *In re Harman,* 435 B.R. 596 (B.A.P. 8th Cir. 2010) (spouses' income had to be disclosed even though they had separate residences); *In re Waechter,* 439 B.R. 253 (Bankr. D. Mass. 2010) (pre-marital agreement that gave non-filing spouse a free ride on household expenses resulted in plan being rejected for bad faith); *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 household expenses 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 members 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).

7. **Plan Confirmation, Modification**. To be confirmed, a plan, among other things, must be feasible, must be proposed in good faith, and if objected to, must commit all of the debtor's disposable income (remaining after basic expenses) to the plan over its term. It must pay creditors at least as much as they would receive in a Chapter 7, including 100% payment on priority claims. 11 U.S.C. 1325; see *In re Deberry*, 429 B.R. 532 (Bankr. M.D. N.C. 2010) (proceeds from sale of marital residence were DSO priority claim in chapter 13 case as they were in lieu of support; balance of obligations were not); *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 postpetition 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) (prepetition 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.

Generally, confirmation is res judicata as to the classification and payment provisions in a plan. See *In re Burnett*, 646 B.R. 575 (8th Cir. 2011); *In re Hutchens*, 480 B.R. 374 (Bankr. M.D. Fla. 2012); but 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).

The debtor must be current in postpetition DSO payments for a plan to be confirmed. 11 U.S.C. 1225(a)(7), 1325(a)(8).

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). 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).

8. **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 non-priority 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 King*, 461 B.R. 789 (Bankr. D. Alaska 2010) (obligation was DSO; case dismissed because no feasible plan could be confirmed); *In re Nelson*, 451 B.R. 918 (Bankr. D. Or. 2011) (debt determined not DSO; plan confirmable); *In re Andrews*, 434 B.R. 541 (Bankr. W.D. Ark. 2010) (attorney for debtor's former spouse awarded

fees pursuant to divorce had standing to object to confirmation of plan that proposed payment as non-DSO); *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).

Failure to object to confirmation may result in res judicata as to matters set forth in the plan. 11 U.S.C. 1327.See, e.g., *Burnett v. Burnett* (*In re Burnett*), 646 F.3d 575 (8th Cir. 2011) (provision in plan allowing debtor's former spouse to return to state court to determine interest on past due child support was res judicata and prohibited her from pursuing interest on past due maintenance or to enforce recovery of prepetition support in excess of her POC); *In re McGrahan*, 448 B.R. 811 (Bankr. D. N.H. 2011) (because no objection was filed, DHSS bound by confirmed plan prohibiting setoff of tax refunds for child support arrears, even though setoff was exception to automatic stay).

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).

9. **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 a claim on the creditor's behalf. Fed. R. Bankr. P. 3004. The debtor may wish to do so to allow plan payments to reduce non-dischargeable support debts, rather than have those debts remain at completion of the plan. 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, and rights had not been assigned); *In re Pfalzgraf,* 236 B.R. 390 (Bankr. E. D. Wis. 1999) (child support payable by non-debtor 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 Cooke,* 455 B.R. 503 (Bankr.W.D. Va. 2011); *In re Uzaldin,* 418 B.R. 166 (Bankr. E.D. Va. 2009); *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 postpetition 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. Discharge.

Under BAPCPA, a debtor must certify that s/he is current in postpetition 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).

C. Procedure.

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, e.g., *In re King,* 461 B.R. 789 (Bankr. D. Alaska 2010) (debtor's former wife objected to confirmation of plan); *In re Kusek*, 461 B.R. 691 (B.A.P. 1st Cir. 2011) (dispute over DSO status of obligation arose originally upon debtor's objection to POC); *In re Anthony*, 453 B.R. 782 (Bankr. D. N.J. 2011) (same); *In re Johnson*, 397 B.R. 289 (Bankr.M.D. N.C. 2008) (same). Failure of a potential DSO creditor to object to confirmation of a plan that treats the debt as property division may face the claim preclusion effect of the order confirming the plan.

See *In re Burnett*, 646 F.3d 575 (8th Cir. 2011) (res judicata effect of plan confirmation on former spouse's claim); *In re Hutchens,* 480 B.R. 374 (Bankr. M.D. Fla. 2012). Similarly, if a proof of claim controls the classification of a debt, failure of the debtor to object to the claim may be precluded from challenging that classification after the plan is confirmed.