

**Dischargeability of Divorce Debts in Bankruptcy:
How to Determine Whether a Particular Debt Will Be
Dischargeable if the Obligor Files Bankruptcy**

Diane Brazen Gordon, Esq.

Bankruptcy, which was once considered by many as a last resort, has become a viable option to save a home or to conserve available income to pay for basic living expenses and for the care of children. The goal of most individuals filing bankruptcy is to obtain a discharge of personal liability for his or her unsecured debts. Section 523 of the Bankruptcy Code may operate to hamper a debtor's goal of a fresh start because that section creates exceptions for certain debts that are nondischargeable by the debtor.¹

The word "bankruptcy" instills panic in a person who is owed money. Understandably, a person who is owed a divorce-related debt wants to know if he or she can collect that debt if the former spouse files bankruptcy. If you practice family law, you should know about bankruptcy law's treatment of divorce debts so that you can better protect your clients and be able to respond to their questions. Your divorce client may need the assistance of bankruptcy counsel to protect his or her rights in the bankruptcy case filed by the former spouse.

Bankruptcy courts must struggle with the competing concerns of giving bankruptcy debtors a fresh start and the payment of marital obligations and support. The recent amendments to the Bankruptcy Code have made it much more difficult to discharge divorce-related debts in bankruptcy. Creditors owed alimony and support now have much greater ability to collect those debts. In order to understand the bankruptcy law in this area, it is helpful to know some basic information about the different bankruptcy chapters.

Basic Information about Chapter 7 and Chapter 13

Bankruptcy cases can be filed under chapters 7, 11, 12, and 13 of the Bankruptcy Code. Most individuals file cases under chapters 7 or 13, and those chapters will be our focus. In a Chapter 7 case an individual discharges, or eliminates, personal liability for most unsecured debts such as credit card debt and medical bills, and keeps property that is within the amounts of the applicable exemptions. A Chapter 7 trustee liquidates a debtor's nonexempt assets and makes payments to the creditors according to certain statutory rules of priority.

In a Chapter 13 case a debtor proposes a repayment plan for all or of a percentage of the unsecured debts. At the end of a Chapter 13 plan, as in a Chapter 7, the debtor receives a discharge of personal liability for most unsecured debts. If the debtor's gross income is too high, he or she may not qualify for a Chapter 7.² A Chapter 13 case may allow the debtor to keep nonexempt property that would be at risk of being sold by a Chapter 7 trustee. Also, in a Chapter 13 a debtor may be able to cure an arrearage on a mortgage or a car loan by paying the arrearage through the Chapter 13 plan. Chapter 13 also provides substantial opportunities to reduce car loan balances on loans for older vehicles and to eliminate second or third mortgages when the property's value is less than the balance owed on the first mortgage.

The Bankruptcy Code contains exceptions to a debtor's discharge of personal liability. Section 523 of the Bankruptcy Code lists these exceptions. Two of these exceptions are the typical ones at issue if you are considering a divorce- related debt.³ I will refer to these exceptions as (i) the Domestic Support Obligation (DSO) exception contained in Bankruptcy Code Section 523(a)(5); and (ii) the Property Settlement Debt exception, found in Bankruptcy Code Section 523(a)(15).

Domestic Support Obligation Exception: 11 U.S.C. § 523(a)(5)

Section 523(a)(5) provides that “[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual from any debt – (5) for a domestic support obligation.”⁴ A bankruptcy discharge does not discharge an individual debtor from a debt for a domestic support obligation under any chapter of the Bankruptcy Code.⁵ In a Chapter 13 case, a debtor is required to propose a plan that pays a DSO in full.⁶

The starting point in determining any issue of dischargeability of a divorce debt is to answer the question: is the debt a Domestic Support Obligation? If the answer is “yes,” the debt will not be discharged if the debtor files a bankruptcy case under any chapter.

BAPCPA added the term “domestic support obligation” (referred to as a “DSO”) to the Bankruptcy Code. Domestic Support Obligation is defined in Section 101(14A) of the Bankruptcy Code. Section 101(14A) provides that a DSO is:

[A] debt that accrues before, on, or after the date of the order of 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).

The amendments instituted by BAPCPA relative to the definition of a DSO have increased the ability of creditors owed a DSO to collect that debt.⁷ In order for a particular debt to be considered a DSO, the debt must meet the four elements contained in the statutory definition.⁸ If the debt is not a DSO, but is a property settlement debt, a different dischargeability provision applies in Chapter 7 cases.⁹ The term DSO created by BAPCPA appears in several provisions of the Bankruptcy Code.¹⁰

A state court's designation or language in an agreement stating that a debt is support or property settlement is not binding on the bankruptcy court in determining dischargeability, and a court can look behind such language to determine the real nature of the debt.¹¹ Even if a decree or marital settlement agreement contains language stating that there is no alimony or that a debt cannot be discharged in bankruptcy, a bankruptcy court can hold that the obligation is not a DSO and is not excepted from discharge under 523(a)(5).¹² The majority of courts find that payment of support, maintenance, or alimony need not be payable directly to the spouse or one of the payees listed in the first element of the definition in order to be nondischargeable.¹³

Factors Courts Look At In Determining Whether A Debt Is In the Nature Of a Support

Bankruptcy courts look to federal law to determine if a particular claim is in the nature of support.¹⁴ A debt may be in the "nature of support" within the meaning of section 523(a)(5) even though it would not legally qualify as support under state law.¹⁵ This is a case-specific, factual determination, with emphasis on whether the obligation was intended to be one for support.¹⁶

There are many cases, most of which are pre-BAPCPA but are still relevant, which address the criteria courts use to determine if a debt is in the nature of support.¹⁷ The cases set forth the various factors courts use in determining whether an obligation is in the nature of support and, therefore, dischargeable.¹⁸

The focus of this inquiry is the intent of the parties or the family law court at the time that the obligations were created.¹⁹ In deciding the dischargeability of marital obligations, courts analyze the respective financial situation of the parties at the time of the obligation.²⁰

The Sixth Circuit opinion in *Long v. Calhoun* is widely cited for the factors the courts use to determine whether the obligation was intended to create a support obligation.²¹ These factors include the actual substance and language of the agreement, the financial situation of the parties at the time of the agreement, the function served by the obligation at the time of the agreement, and whether there is any evidence of overbearing at the time of the agreement that should cause the court to question the intent of a spouse.²² Courts consider all relevant evidence including (i) the parties' employment histories and prospects for financial support; (ii) whether one party received marital property; (iii) the number and frequency of payments; (iv) whether it would be difficult for the former spouse and children to subsist without the payments; (v) the length of the marriage; (vi) the economic disparity of the parties; (vii) whether the spouse who brings the complaint is caring for minor children; (viii) age, employability, and education levels of the parties; (ix) the label in the decree or agreement; and (x) whether the obligation terminates upon the obligee's death, remarriage, or the emancipation of the children.²³ Additional factors include

(i) whether there is a waiver of alimony or support in the marital settlement agreement; (ii) the availability of state court remedies to modify or enforce the obligation; and (iii) the tax treatment of the obligation.²⁴

Usually the factors do not all line up on one side.²⁵ The bankruptcy court may look to the structure and language of the divorce decree, as well as state law, in making this decision, but those sources are not controlling.²⁶ Federal courts may look to the state law for the purpose of deciding whether an obligation is actually in the nature of support.²⁷ However, the bankruptcy court is not bound by the label given to the obligation in the decree or marital settlement agreement.²⁸ The bankruptcy court will look behind the label to ascertain the intent of the parties.²⁹

The more of these factors that apply to the particular obligation, the more likely it is that a bankruptcy court will consider the obligation to be nondischargeable support.³⁰

Property Settlement Debt Exception: 11 U.S.C. § 523(a)(15)

If a divorce-related debt is not a DSO, the debt will frequently still be excepted from discharge under Bankruptcy Code section 523(a)(15). However, it is important to always remember that this exception does not apply in Chapter 13 cases.³¹

Section 523(a)(15) provides that a debt is excepted from discharge if it meets these three statutory elements:

1. the debt must be to a spouse, former spouse, or child of the debtor;
2. the debt must not be a DSO; and
3. the debt must have been incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court.³²

Although the distinction between support debts and property settlement debts is not as important as it was prior to BAPCPA, the distinction is still important because property settlement debts may be discharged and are not priority claims in Chapter 13 cases.³³ In Chapter 7 cases, the distinction between DSO and property settlement debts is usually not important because the debt is nondischargeable as DSO under § 523(a)(5) or as a property settlement debt under §523(a)(15).³⁴

Dischargeability Of Specific Types Of Obligations

1. Hold Harmless Obligations/Indemnities

A hold harmless provision in a decree is a separate obligation between the spouses, separate from the obligation to the original creditor, and may create a nondischargeable debt to the former spouse.³⁵ A hold harmless obligation creates a new liability, independent of the preexisting liability to the third party creditor, to indemnify and hold the other spouse harmless for the debt to the third party.³⁶ An example of a hold harmless clause states is the following:

“the party responsible for the debt will indemnify the other party and hold him or her harmless for the debt.”

In determining whether a hold harmless obligation is dischargeable, you should first determine whether the obligation is a DSO, which would be nondischargeable under Section 523(a)(5).³⁷ If the hold harmless obligation is for a debt that is in the nature of support, such as medical expenses or health insurance, then that obligation will be excepted from discharge as a DSO pursuant to section 523(a)(5).

A court will look behind the labels in order to determine the intent of the family law court and the parties in ordering the payment. A hold harmless obligation to pay a mortgage may or may not be considered in the nature of support, depending on the language of the decree and the circumstances of the parties at the time of the obligation.³⁸

If the underlying obligation is for a nonsupport debt, such as a credit card, the presence of the hold harmless obligation creates a new debt between the parties and will be nondischargeable in Chapter 7 cases under section 523(a)(15), but still dischargeable in Chapter 13 cases.

Courts are divided on the issue of whether a hold harmless obligation is necessary in order to meet the statutory elements of section 523(a)(15). Some courts find that a hold harmless obligation is necessary in order for there to be a debt owed to a former spouse incurred in connection with the divorce.³⁹

Other courts conclude that if the property settlement agreement or divorce decree requires a spouse to pay a third party debt, the obligation to pay the third party debt is a new debt owed to the former spouse, regardless of the presence of hold harmless language.⁴⁰

What is clear is that the presence of hold harmless language in the marital settlement agreement or divorce decree will meet the elements of the exception to discharge in section 523(a)(15). This means that if there is hold harmless language in the property settlement agreement or decree, the debtor cannot discharge that debt in a bankruptcy unless the case is a Chapter 13 (in which Section 523(a)(15) does not apply).

Case example

Let's look at the bankruptcy case of *Shepard v. Shepard* as an example of how all of this works.⁴¹ In *Shepard*, the debtor and her former spouse executed a marital settlement agreement which listed four debts for which each party agreed to pay for half: a credit card debt, a loan for a motor home, and a first and second mortgage. Post decree, Mrs. Shepard filed a Chapter 7 bankruptcy.

Mr. Shepard filed a complaint in Mrs. Shepard's bankruptcy case. Mr. Shepard argued that the four debts addressed in the Marital Settlement Agreement are not dischargeable under section 523(a)(15). Mrs. Shepard argued that she should be able to discharge those debts. Her reason was that the debts to those third parties were not “incurred in the course of the divorce or

separation,” as required for the exception to apply. The parties agreed that the debts were not DSO’s.

The bankruptcy court noted that normally exceptions to discharge are to be narrowly construed in favor of the debtor so as to promote the policy of a “fresh start” after bankruptcy but that the underlying policy of section 523(a) favors the enforcement of familial obligations over the debtor’s fresh start.

The bankruptcy court explained that courts are divided on the issue of whether debts owed to third parties that are related to a divorce agreement require an indemnity clause to be within the 523(a)(15) exception to discharge. In the *Shepard* case there was no need to resolve the issue because of the presence of a hold harmless clause in the marital settlement agreement.

The Bankruptcy Court held that the marital settlement agreement created new obligations of the debtor to Mr. Shepard, including an obligation to hold harmless, and therefore falls within the exception to discharge in section 523(a)(15). The court noted that its conclusion was not dependent on the presence of the hold harmless clause, but is bolstered by the presence of the hold harmless language. The result of the case was that debts owed by Mrs. Shepard to Mr. Shepard to indemnify him for half of the amounts owed to the third party creditors were non-dischargeable.

2. Attorneys Fees

In determining whether attorneys fees will be discharged, it is important to distinguish between (i) an obligation imposed by a state court against one spouse to pay the other spouse’s attorneys fees and (ii) a debtor’s obligation to pay the attorneys’ fees he or she owes to his or her own attorney.

a. Attorneys Fees Ordered to be Paid For Spouse’s Attorney

An obligation of one spouse to pay the other spouse’s attorneys fees generally will be in the nature of support and nondischargeable.⁴² In *Nelson, Keys & Keys v. Hudson*, a law firm that represented the child support recipient in a paternity and support proceeding filed an adversary complaint seeking a determination that the fees owed to it by the child support obligor were nondischargeable under 11 U.S.C. § 523(a)(5). The state court had ordered the Debtor to pay child support and also ordered him to pay the mother’s attorneys fees directly to the law firm that represented her. The Bankruptcy Court held found that the fees were nondischargeable support.⁴³

However, a recent Bankruptcy Court in Florida found that attorneys fees ordered to be paid by the debtor for the other spouse’s attorney were not a DSO because the fees were ordered to be paid due to the Debtor’s bad faith in the litigation.⁴⁴ Because the Court found that the attorneys fees were not in the nature of support, they were dischargeable. Likewise, in *In re Spence*, the Bankruptcy Court found that attorneys fees ordered to be paid due to bad faith litigation misconduct in a divorce proceeding are punishment for the wrongful conduct, not a domestic obligation meant to support the other party.⁴⁵

b. Attorneys Fees Owed To Debtor's Attorney

In contrast, when the fees at issue are owed by the debtor to any attorney who represented the debtor, the debt is not in the nature of support and is dischargeable.⁴⁶

3. Fees of Guardian Ad Litem or Child Representative

Courts have addressed whether fees owed to guardian ad litem or child representative are domestic support obligations. Debtors have argued that the fees owed to guardian ad litem or child representative are not DSO's because they do not meet the first element of the DSO definition, as a debt "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." Generally, courts find that fees owed to a guardian ad litem are DSO's and nondischargeable.⁴⁷

For example, in *Kelly v. Burnes*, the Bankruptcy Court in Missouri found that a debt owed to a guardian ad litem was a DSO and nondischargeable.⁴⁸ In *Stella*, a Bankruptcy Court in Indiana likewise found that debts in the nature of support need not be payable directly to one of the parties listed in the definition of a DSO in order to be nondischargeable.⁴⁹ In *Levin v. Greco*, a United States District Court in Illinois reversed a Bankruptcy Court, and found that the attorneys fees owed to child representative were domestic support obligations, even though the fees were not owed to one of the payees specifically listed in the statute.⁵⁰

However, in *In re Densmore* a Bankruptcy Court in Texas held that the Chapter 13 claim of a state court appointed attorney ad litem was not a DSO, and thus not entitled to priority status in the Debtor's Chapter 13 plan.⁵¹ The Court in *Densmore* found that the claim filed by the attorney ad litem was not one for a debt owed to or recoverable by a legal guardian or other listed category of persons and so does not meet the requirements of a DSO.⁵²

4. Other Types of Expenses

Many other types of obligations have been found to be in the nature of support and nondischargeable DSO's under § 523(a)(5).⁵³ Other types of obligations which have been found to be nondischargeable DSO's are medical expenses and health insurance, payment for a spouse's interest in a business, obligations to pay life insurance or disability insurance, obligations to divide retirement benefits, obligations to pay tax liabilities and obligations to pay the value of professional licenses or degrees.⁵⁴

Numerous bankruptcy courts have found that obligations that are essential to enable a party to maintain basic necessities or to protect a residence are support obligation excepted from discharge.⁵⁵

Importance of Characterization of a Debt as a DSO in a Chapter 13

The issue of whether a particular debt meets the definition of a DSO is also important for reasons beyond dischargeability. A bankruptcy court cannot confirm a debtor's Chapter 13 plan if the debtor has failed to make all payments due post-petition on a domestic support

obligation.⁵⁶ If a Chapter 13 debtor is required to pay a domestic support obligation, the debtor cannot obtain a discharge unless the debtor certifies that all amounts due on the obligation, including prepetition arrears as provided for by the Chapter 13 plan, have been paid.⁵⁷

Unsecured claims for DSO obligations in existence as of the date of filing have first priority status over all other claims and expenses.⁵⁸ The professional fees and expenses incurred by a bankruptcy trustee in collecting and recovering such DSO obligations are administrative expenses that are paid before the DSO.

BAPCPA expanded the exceptions to the automatic stay as it relates to family law matters and allows many family law matters to proceed without seeking relief from the automatic stay from the bankruptcy court.⁵⁹ However, it is still necessary to obtain relief from the automatic stay to collect a DSO from property of the bankruptcy estate.

Considerations If Nondebtor Spouse Files Chapter 13

If a debtor files a Chapter 13 and the ex-spouse's interests or claims are affected, the ex-spouse should carefully review the bankruptcy schedules and the Chapter 13 plan to determine whether all assets were disclosed with the appropriate value and to determine how the debt of the ex-spouse is treated under the proposed Chapter 13 plan. The ex-spouse should file a proof of claim and object to confirmation of the Chapter 13 plan, if there are appropriate grounds. In *Johnson v. Johnson*, the debtor's ex-wife filed an objection to confirmation of the debtor's plan on the grounds that the plan proposed to make no payments on a secured debt he was obligated to pay in the divorce decree. The Court found that the obligation was a DSO that must be paid in full under the Plan and denied confirmation, giving the debtor the opportunity to file a new plan providing for payment of the debt.⁶⁰

The ex-spouse may have an objection based on the characterization of the debt as a property settlement debt rather than as a first priority domestic support obligation. Strategy decisions need to be made to determine if it is in the ex-spouse's best interest to agree to a debtor's bankruptcy plan if such result will make funds available to pay current support debts.⁶¹

If the debtor is not current in postpetition domestic support, the ex-spouse may consider filing a motion to dismiss if such action would be in his or her best interest. There may be grounds for dismissal of a bankruptcy case based on bad faith if the sole reason for the filing is to discharge a marital debt.⁶²

Create Unavoidable Liens To Secure Payment of Support or Property Settlement Debts: Lien Should Be On Property Held Jointly And Not On Property That Was Only In The Name Of The Debtor Spouse

A potential creditor spouse may obtain some protection by obtaining a lien to secure the repayment of a debt and the lien should be on property held jointly. Bankruptcy Code section 522(f)(1)(A) gives a debtor a right to avoid any judicial lien that impairs an exemption, subject only to the exception for domestic support obligation debt, which may not be avoided. 11 U.S.C. § 522(f)(1)(A).

In *Farrey v. Sanderfoot*, the United States Supreme Court held that a judicial lien cannot be avoided under 522(f)(1) unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest.⁶³ In *Farrey*, the divorce decree awarded each party one-half interest in their marital home and granted the husband (Sanderfoot) sole title to the home. The state court ordered the husband to pay the wife (Farrey) a sum of money and provided the wife a lien against the home for the total amount due to her in the order.⁶⁴ The husband never made any of the payments, filed a Chapter 7 bankruptcy petition, and filed a motion to avoid the ex-wife's lien pursuant to 11 U.S.C. § 522(f)(1), claiming that the ex-wife possessed a judicial lien that impaired his homestead exemption.⁶⁵ The issue before the Court was whether § 522(f)(1) permits the husband/debtor to avoid the fixing of the ex-wife's lien on the property interest that he obtained in the divorce decree.⁶⁶ In *Farrey*, the divorce decree extinguished the parties' joint tenancy in the marital home and created new interests. The Court found that the ex-wife's lien fixed not on the debtor's preexisting interest, but rather on the fee simple interest that he was awarded in the decree that simultaneously granted the ex-wife her lien.⁶⁷ The Court held that the debtor could not use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached.⁶⁸ The Court stated that "unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1)."⁶⁹

The *Farrey* decision was followed in *In re White*, in which the Bankruptcy Court found that because the debtor did not have an existing interest in the home before the lien attached, the ex-wife's secured claim was proper and the lien could not be avoided.⁷⁰

Conclusion

If a former spouse files a bankruptcy case and that debtor owes a divorce related debt to his or her ex-spouse, the first question to ask is whether the debt is a domestic support obligation within the Bankruptcy Code definition set forth in 11 U.S.C. § 101(14A). If the answer is yes, then the debt will be nondischargeable in any chapter of the Bankruptcy Code. If the answer is no, and the debt is a property settlement debt, the next question to ask is whether the debtor filed a Chapter 7 or a Chapter 13 bankruptcy. If the debtor filed a Chapter 7 bankruptcy, the debt will usually be nondischargeable under 11 U.S.C. § 523(a)(15) if the debt falls within the statutory language. A hold harmless obligation in the property settlement or decree creates a new debt between the parties, which will be nondischargeable in a Chapter 7.

If the debt is not a DSO and the debtor filed a Chapter 13, the debt may be dischargeable. In such a situation, the ex-spouse/creditor should carefully review the debtor's bankruptcy schedules and Chapter 13 plan and file a proof of claim in the Chapter 13 case. The ex-spouse should consider retaining a bankruptcy attorney to determine if he or she has grounds to object to confirmation of the Chapter 13 plan, but should keep in mind strategy considerations as to whether or not such action is in his or her best interests.

Proactive steps can be taken to protect clients in a divorce from the potential impact of the other spouse's bankruptcy filing, such as documenting the intent to create a support obligation and including as many of the factors as possible that the bankruptcy courts look at in finding that the obligation is in the nature of support. If possible, create a lien to ensure payment

of any support or property debt, but make sure that the lien is placed on jointly owned property and not on property titled only in the name of the obligor/spouse.

-
1. Section 101(13) of the Bankruptcy Code defines the term “debtor” to mean a person or municipality concerning which a case under Title 11 (11 U.S.C. § 101 et. seq.) has been commenced.
 2. This determination involves applying what is known as the “means test.” The starting point is the debtor’s current monthly income, determined by calculating the average monthly income during the complete six months prior to filing.
 3. For bankruptcy cases filed on or after October 17, 2005, the key dischargeability provisions relevant to divorce related debts are sections 523(a)(5) and 523(a)(15), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).
 4. See *Ker v. Ker*, 365 B.R. 807, 807, n. 1 (Bankr. S.D. Ohio 2002), citing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L.No. 109-8, § 1501(b)(1), 119 Stat. 23, 216.
 5. *Johnson v. Johnson*, 397 B.R. 289, 295 (Bankr. M.D.N.C. 2008); *In re Michael S. O’Brien*, 339 B.R. 529, 530 (Bankr. D. Ma. 2006).
 6. *In re Bolar*, No. 08-10350-WHD, 2008 Bankr. Lexis 3897, at * 5 (Nov. 5, 2008).
 7. Judith K. Fitzgerald, *We All Live in a Yellow Submarine: BAPCPA’s Impact on Family Law*, 31 S. Ill. L. J. 563, 592 (Spring 2007). See also *In re Westerfield*, 403 B.R. 545, 548 (Bankr. E.D. Ten. 2009) (“[a] 2005 law made several amendments to the Bankruptcy Code for the purpose of giving more protection to creditors owed support debts”).
 8. See *Wis. Dep’t of Workforce Dev. v. Ratcliff*, 390 B.R. 607, 613-614 (E.D. Wis. 2008), citing *In re Forgette*, 379 B.R. 623, 625 (Bankr. W.D. Va. 2007) (“[t]he definition has four separate requirements; all four must be met for an obligation to be considered a domestic support obligation”).
 9. 11 U.S.C. § 523(a)(15).
 10. See Steinfield and Steinfield, *The Family Lawyer’s Guide to Bankruptcy* (2d ed. 2008) at page 5- 6.
 11. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001); *In re Dennis* 25 F.3d 274 (5th Cir. 1994).
 12. *In re Westerfield*, *supra* at 551(citations omitted).
 13. *Johnson v. Johnson*, 397 B.R. 289, 296 (Bankr. M.D.N.C. 2008), citing *In re Calhoun*, 715 F.2d 1103, 1107 (6th Cir. 1983) and *In re Spong*, 661 F.2d 6, 10-11 (2d Cir. 1981).
 14. *In re Rhodes*, No. 08-03606-HB, 2008 Bankr. Lexis 4140, at **1-2 (Bankr. D.S.C. Oct. 31, 2008), citing *In re Davis*, No. 06-10581-DHW, 2007 WL 865683, at *2 (Bankr.M.D. Ala. March 15, 2007); *In the Matter of Sprouse*, No. BK07-81752, 2008 Bankr. Lexis 4104, at **3-4 (Bankr. D.Neb. Feb.25, 2008), citing *Williams v. Williams*, 703 F.2d 1055, 1056 (8th Cir. 1983).
 15. *Nelson, Keys & Keys v. Hudson*, No. 06-81745, 2007 Bankr. Lexis 3943, at *4 (Bankr. C.D. Ill. Nov. 27, 2007), citing *In re Strickland*, 90 B.R. F.3d 444, 446 (11th Cir. 1996); *In re Yeates*, 807 F.2d 874 (10th Cir. 1986).

16. *In re Rhodes*, supra, at *8; *Baroody v. Baroody*, No. 05-14326-JMD, 2007 Bankr. Lexis 320, at **7-8 (Bankr. N.H. January 29, 2007).

17. *Chiquito v. Livingston*, BAP No. CO-08-047, 2008 Bankr. Lexis 2617, at *11 n.24 (10th Cir. BAP Oct. 21, 2008).

18. *Werthern v. Werthern*, 329 F.3d 269, 272-273 (1st Cir. 2003); *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986); *In re Gianakas*, 917 F.2d 759, 762 & n.1 (3rd Cir. 1990); *In re Tatge*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997); *In re Calhoun*, 715 F.2d 1103, 1107 (6th Cir. 1983); *Johnson*, supra at 297-298; *In re Lepley*, No 07-20344, 2007 Bankr. Lexis 2983, at ** 10-12 (Bankr. W.D. Mo. Sept. 6, 2007).

19. Sommer and McGarity, supra at ¶ 6.04[2]; *In re White*, No. 08-37068-H4-13, 2009 Bankr. Lexis 1983, at * 7 (Bankr. S.D. Tex. July 9, 2009); *Wisc. Dept. of Workforce Dev. V. Ratliff*, 390 B.R. 607, 616 (E.D. Wisc. 2008); *Sponge*, 661 F.2d 6, 10-11 (2d Cir. 1981). See also *In the Matter of Sprouse*, No. BK07-81752, 2008 Bankr. Lexis 4104, at **3-4 (Bankr. D. Neb. Feb. 25, 2008) (“[c]ourts are to look at the parties’ intent and the function the award was intended to serve at the time of the divorce,” [citations omitted]).

20. Sommer & McGarity, supra at ¶ 6.04[4].

21. *Ker v. Ker* 365 B.R. 807, 812 (Bankr. S.D. Ohio 2007), citing *Long v. Calhoun*, 715 F.2d. 1103, 1109-10 (6th Cir. 1982).

22. *Johnson*, supra at 296-298.

23. *Id.* at 297.

24. Sommers & McGarity, supra at ¶ 6.04[5] - ¶ 6.04[10].

25. *Werthern*, supra at p. 273.

26. *Baroody*, supra, at * 8, citing *Brasslett v. Brasslet*, 233 B.R. 177, 178 (Bankr. D.Me. 1999).

27. *Westerfield*, supra at 545, 551, citing *Long v. Calhoun*, supra at 1106-1109.

28. Sommer and McGarity, supra at ¶ 6.04[3].

29. Sommer and McGarity, supra at ¶ 6.04[3].

30. See Steinfeld and Steinfeld, supra at pp. 14-15 for a list of the many cases discussing these factors; see also Sommer and McGarity, supra at ¶ 6.04 for a thorough analysis of the vast case law discussing the factors considered by the courts in distinguishing alimony, maintenance, and support claims from property settlement debts.

31. The reason this exception in 523(a)(15) does not apply in Chapter 13 cases is that the Chapter 13 discharge provision in 11 U.S.C. § 1328(a)(2) does not include § 523(a)(15) in the exceptions to the Chapter 13 discharge. See *Sprouse*, supra at **2-3 (“[i]n contrast to the non-dischargeability of a domestic support obligation, a debt to a former spouse that is not in the nature of support, described in 11 U.S.C. § 523(a)(15), which would be non-dischargeable in a Chapter 7 case, is dischargeable in a Chapter 13 case.”)

32. 11 U.S.C. § 523(a)(15) states as follows:

[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual from any debt—

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or

other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit. 11 U.S.C. § 523(a)(15).

Prior to the bankruptcy amendments in 2005, section 523(a)(15) permitted a court to discharge property settlement debts if the defendant established affirmative defenses known as the undue burden defense and the balancing test. With the 2005 amendments, these affirmative defenses were eliminated. *Gilman v. Golio*, 393 B.R. 56, 61 (E.D.N.Y. 2008).

33. Sommer & McGarity, *Collier Family Law and the Bankruptcy Code* at ¶ 8.05.

34. *Gilman v. Golio*, *supra*, at p. 61.

35. *Calhoun*, *supra* at 1106; *In re Burckhalter*, 389 B.R. 185 (Bankr. D. Colo. 2008); *In re Forgette*, 379 B.R. 623 (Bankr. W.D. Va. 2007).

36. *Higgins v. Harn*, No. 07-81072, 2008 Bankr. Lexis 100, at *9 (Bankr. C.D. Ill. Jan. 10, 2008).

37. See *In re Coil*, 680 F.2d 1170, 1171-1172 (7th Cir. 1982) (Court first looked to parties' intent and additional factors).

38. See *In re Blad*, No. 07-12436, 2008 Lexis 2442 (Bankr. D.Kan. Aug. 22, 2008) (Bankruptcy Court in Chapter 13 case found that a hold harmless obligation to pay a mortgage in a divorce decree was not in the nature of maintenance or support but was in the nature of property division and, therefore, was not entitled to priority and may be discharged at the completion of payments under the plan); See also *In re Johnson*, 397 B.R. 289, 298 (Bankr. M.D.N.C. 2008) (Bankruptcy Court held that hold harmless obligation in a divorce decree that required debtor to pay mortgage on residence was in the nature of alimony, maintenance or support and was nondischargeable under Section 523(a)(5)).

39. See *In re Burckhalter*, 389 B.R. 185, 189 (Bankr. D.Colo. 2008) (“[a] number of bankruptcy courts have found marital debts ... to be dischargeable because of a lack of a hold harmless or indemnification language in the parties’ divorce decree or property settlement”).

40. *Finkey v. Schuett*, No. BK07-81797-TLS, 2008 Bankr. Lexis 1555, at *6 (Bankr. D. Neb. May 21, 2008) (section 523(a)(15) covers debts owed to third parties because the obligation to hold the former spouse is what is presumed nondischargeable); *Burckhalter*, *supra* at 191 (debtor’s obligation to pay credit card debt was a nondischargeable debt to a former spouse under 11 U.S.C. §523(a)(15), regardless of whether the agreement contained a hold harmless provision); *Johnson*, *supra* at 298.

41. *In re Shepard*, Adv. No. 07-1177 S, 2008 Lexis 3349 (Bankr. S.D. N.Mex. June 30, 2008).

42. *Macy v. Macy*, 114 F.3d 1 (1st Cir. 1997); *In re Catlow*, 663 F.2d 960 (9th Cir. 1981). *Mellor v. Mellor*, 340 B.R. 419, 421 (Bankr. M.D. Fla. 2006). See also *Nelson, Keys & Keys v. Hudson*, *supra* at *3 (“[a]wards of attorneys fees for services in obtaining support orders are held nondischargeable notwithstanding a provision for direct payment to the attorney so long as the payment is for the benefit of the obligor’s spouse, former spouse, child or parent of such child.... This principle reflects the reality that if the attorney’s client paid the fees, the client would be permitted to obtain reimbursement from the obligor,” citing *In re Beardon*, 330 B.R. 214, 222-23 (Bankr. N.D. Ill. 2005)).

43. *Nelson, Keys & Keys v. Hudson*, *supra* at *6. See also *Spong*, *supra* at 10 (debt for legal services rendered to a debtor’s former spouse in connection with divorce proceeding is nondischargeable); *Kline v. Kline*, 65 F.3d 749 (8th Cir. 1995) (attorney fee awards that are in the nature of support can be nondischargeable even if payable directly to the ex-spouse’s attorney); *Catlow v. Catlow*, 663 F.2d 960 (9th Cir. 1981) (attorneys fees awarded to a debtor’s ex-spouse in a post-divorce child custody proceeding was found nondischargeable); *Hudson v. Raggio & Raggio, Inc.*, 107 F.3d 355 (5th Cir. 1997) (attorney’s fees awarded directly to an attorney were nondischargeable).

44. *In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009).

-
45. *In re Spence*, No. 02-12093, 2009 Bankr. Lexis 3497, at *12 (Bankr. S.D. Fla. Oct. 26, 2009).
46. *In re Rios*, 901 F.2d 71 (7th Cir. 1990); *In re Lindberg*, 92 B.R. 481 (D.Colo. 1988); *Brennan, Fabriani & Novenstern v. Akamine*, 217 B.R. 104, 110 (S.D.N.Y. 1998); *Gulimetti & Gesmer, P.C. v. Klein*, 197 B.R. 760 (Bankr. E.D.N.Y. 1996); Steinfeld and Steinfeld, *supra* p. 16 and n.'s 128-29.
47. *Kelley v. Burnes*, 405 B.R. 654, 658 (Bankr. W.D. Missouri 2009); *Miroff Cross & Woolsey v. Stella*, No. 07-08434-JKC-7, 2008 Bankr. Lexis 3281, at ** 6-8 (Bankr. S.D. Ind. Dec. 1, 2008); *Brodsky v. Brodsky*, 239 B.R. 365, 375 (N.D. Ill. 1999).
48. *Kelly v. Burnes, supra*. The Court in *Kelly* recognized that the guardian ad litem is none of the persons or entities specifically listed in the definition, and that some courts have held that a guardian ad litem's fees are not a DSO if they are not payable to one of the payees listed in the definition. *Id.* at 658-659, citing *In re Greco*, 397 B.R. 102 (Bankr. N.D. Ill. 2008). *Greco* was reversed on appeal at *Levin v. Greco*, 415 B.R.663 (N.D. Ill. 2009).
49. *Stella, supra* at *5.
50. *Levin v. Greco*, 415 B.R.663 (N.D. Ill. 2009).
51. *In re Densmore*, No. 09-40011-DML-13, 2009 Bankr. Lexis 3416 (Bankr. N.D. Tex. Oct. 28, 2009).
52. *Id.* at *9.
53. *See Emmons v. Emmons*, 349 B.R. 780, 790 (Bankr. W.D. Missouri 2006) (college expenses); *Johnson, supra* at 297 (mortgage payments); *Westerfield, supra* at 549-558.
54. *Sommer & McGarity, supra* at ¶ 6.05. It is also possible for a spouse who is a creditor for a divorce-related debt to argue that under Bankruptcy Code section 523(a)(6) the debt is nondischargeable because it was for "willful and malicious injury by the debtor." In *Ker v. Ker*, 365 B.R. 807, 815-816 (Bankr. S.D. Ohio 2007), the bankruptcy court found that the debtor's actions in intentionally failing to make the mortgage payments on the marital home in violation of the decree, and causing depletion of equity in the home, was a willful and malicious injury and therefore nondischargeable under section 523(a)(6).
55. *In re Johnson*, 399 B.R. 289, 297-298 (Bankr. M.D. N.C. 2008).
56. *Westerfield, supra* at 548, citing 11 U.S.C. § 1325(a)(8).
57. 11 U.S.C. §1328(a).
58. 11 USC §507(a)(1).
59. 11 U.S.C. § 362(b)(2).
60. *Johnson, supra*, at 298.
61. *See Sommer & McGarity, supra* at ¶ 8.50[2] for a checklist of considerations for an ex-spouse obligee on marital obligations if the obligor files bankruptcy.
62. *In re Ellis*, 406 B.R. 736 (Bankr. E.D. Va. 2009).
63. *Farrey v. Sanderfoot*, 500 U.S. 291; 111 S.Ct. 1825; 114 L.Ed. 3d 337 (1991).
64. *Farrey*, 500 U.S. at 293.

65 *Id.* at 294.

66. *Id.* at 295-296.

67. *Id.* at 292.

68. *Id.* at 299.

69. *Id.* at 297.

70. *White, supra* at * 22. *See also, Parrish v. Parrish*, 7 F.3d 76, 78 (5th Cir. 1993) (lien securing ex-wife's judgment was avoidable because the debtor's interest in the property he obtained by inheritance existed before the divorce and continued unaltered afterward).