FAMILY LAW ISSUES UNDER THE BANKRUPTCY REFORM ACT

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General Background

Raised in Texas and Oklahoma, Michael J. McNally was graduated from the University of Kansas School of Law in 1970 after receiving his Bachelor's degree in Business Administration from the University of Kansas School of Business in 1967. His legal experience over the past twenty-five years includes general civil litigation, business, bankruptcy, banking, personal injury and employment law.

A past president of the Smith County Bar Association, Mr. McNally is a founder and past chairman of the board of directors of the Smith County Pro Bono Project and a former member of the Liaison with the Federal Judiciary Committee of the State Bar of Texas.

Bankruptcy and Reorganization

Mr. McNally is certified in both business bankruptcy law and consumer bankruptcy law by the Texas Board of Legal Specialization. He is a member of the Bankruptcy Committee of the Business Law Section of the State Bar of Texas, a founding director of the East Texas Bankruptcy Bar Association, a member of the American Bankruptcy Institute and has served as a member of the Bankruptcy Law Advisory Commission of the State Board of Legal Specialization. A former panel Trustee, he has also served as chairman of the Local Rules Committee of the United States Bankruptcy Court for the Eastern District of Texas.

Over the last few years, Mr. McNally has authored or co-authored a dozen articles for the State Bar of Texas Professional Development Program on bankruptcy and reorganization subjects and has served as a speaker or moderator in connection with over twenty different continuing legal education programs on the topics of litigation, bankruptcy and mediation. He was Course Director of the 1990 State Bar of Texas Advanced Business Bankruptcy Course.

Mediation

Mr. McNally trained as an attorney-mediator with the American Academy of Attorney-Mediators, Inc. of Dallas, Texas. He is a member of the Alternative Dispute Resolution Section of the State Bar of Texas, the Dispute Resolution Section of the American Bar Association, the Society of Professionals in Dispute Resolution, the Association of Attorney-Mediators, and is a founder and vice-president of the East Texas Chapter of the Association of Attorney-Mediators.

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Following graduation from the University of Texas, Mr. Lippman worked for American General Investment Corporation in Houston, Texas, as an account representative. While in law school, Mr. Lippman was an intern for the Honorable Leif M. Clark, Bankruptcy Judge, Western District of Texas. Since graduating from law school, Mr. Lippman has been the law clerk for the Honorable Houston Abel, Chief Bankruptcy Judge, Eastern District of Texas.

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The views expressed herein are those of the authors' and do not necessarily reflect those of the Honorable Houston Abel.

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Family Law Issues Under the Bankruptcy Reform Act

Michael J. McNally and Kevin M. Lippman

I. Introduction

The Bankruptcy Reform Act of 1994 ("Reform Act") is the broadest modification to the Bankruptcy Code since its enactment in 1978. Section 304 of the Reform Act, titled "Protection of Child Support and Alimony", provides significant changes for debtors with obligations arising out of failed marriages. Effective as to bankruptcy cases filed on or after October 22, 1994, the Reform Act elevates the interests of non-filing former spouses and children of the debtor relative to other classes of creditors. The Reform Act also expands the types of domestic obligations which may not be discharged, affords additional protection to divorce related liens and transfers in favor of former spouses, and provides easier access to bankruptcy proceedings for nondebtor family law claimants.

The Reform Act creates opportunities and pitfalls for both divorce and bankruptcy litigants. There are new possibilities for additional rounds of litigation-- this time in the bankruptcy court--between litigious former spouses. The obligation of the bankruptcy court to look behind divorce settlements and judgments is expanded. For couples planning a "friendly divorce", the Reform Act opens an unintended door to collusive divorce-bankruptcy planning at the expense of their creditors.

The overlap between divorce and bankruptcy has always been untidy. The Reform Act provides improvement. It also preserves many of the old problems and introduces a whole new set of issues to be argued. With that in mind, this article will note the amendments that most affect family law issues, reveal the first published cases addressing the amendments, and discuss the practical effects of the amendments.

II. Debt For Child Support – 11 U.S.C. § 101(12A)

A. Amendment

§ 101(12A) "debt for child support" means a debt of a kind specified in section 523(a)(5) of this title for maintenance or support of a child of the debtor

B. Cases Decided Under The Amendment

As of the date this article was submitted, no cases have been published addressing § 101(12A).

C. Practical Effects Of The Amendment

By defining the phrase "debt for child support", Congress attempted to provide bankruptcy courts guidance when addressing child support issues under § 523(a)(5). Section 523(a)(5) generally excepts from discharge unassigned claims for alimony, maintenance or support. This added definition seems like a fine idea by Congress except for the fact that the phrase is not used in either § 523(a)(5) or elsewhere in the Bankruptcy Code as amended by the Reform Act. Accordingly, it is difficult to determine how this amendment will add to existing bankruptcy law. It is interesting to note that Congress did not attempt to define the terms "alimony", "maintenance" or "support".

III. Relief From Automatic Stay – 11 U.S.C. § 362(b)(2)

A. Amendment

§ 362(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay-

. . . .

(2) under subsection of this section--

(A) of the commencement or continuation of an action or proceeding for--

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate

B. Cases Decided Under The Amendment

As of the date this article was submitted, no cases have been published addressing the amended § 362(b)(2).

C. Practical Effects Of The Amendment

Prior to the modification to § 362(b)(2), only collection of alimony, maintenance or support from property not included as part of the estate was excluded from the automatic stay. Accordingly, state court proceedings between spouses involving divorce, child custody, support obligations, or division of property, were usually stalled when one of the parties filed bankruptcy. In order to avoid entanglement in family law matters best left to state courts, bankruptcy courts liberally granted requests to lift the stay to permit a state court to establish alimony, maintenance or support obligations. However, bankruptcy courts usually were hesitant to lift the stay to permit a state court to have the final word on the issue of property division.

While the amended § 362(b)(2) does not change jurisdiction relative to property division, a nondebtor spouse or sexual partner of a debtor is no longer required to first obtain a lifting of the stay before the commencement or continuation of an action to establish paternity, or to establish or modify an order for alimony, maintenance or support. The amendment will reduce needless and perfunctory stay litigation and remove some of the incentive for using bankruptcy filing as a weapon in domestic relations battles.

Despite the attempt by Congress to minimize the involvement of bankruptcy courts in divorce related proceedings, the automatic stay is still applicable to divorce and child custody proceedings. Thus, if the stay is not lifted and a state court technically violates the stay by granting a divorce or by determining custodial rights postpetition, the decree or order is voidable because the stay was violated. *See Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) (violation of the automatic stay is voidable rather than void). It is also important to remember that the automatic stay remains applicable both to proceedings concerning the collection of alimony, maintenance or support from property that is part of the estate and to the division of property in which the debtor owns an interest. Therefore, if a marital or parental claimant desires to either divide or obtain property of the estate while the stay is still in effect,[1] the party must file a motion with the bankruptcy court requesting that the stay be lifted in order to proceed with the collection of alimony, maintenance or support.

Further, it is unlikely bankruptcy courts will be more receptive to completely lifting the stay to permit a state court to decide property division issues than the courts were prior to the amendment. Bankruptcy courts will likely want to continue their oversight on any property division to ensure there is no collusion to defraud creditors by the divorcing parties. Also, when a debtor is reorganizing under chapters 11, 12 or 13, bankruptcy courts will probably want to afford the debtor an opportunity to first confirm a plan which pays the debt according to the terms of the plan.

Because claims for alimony, maintenance or support are generally dischargeable if assigned to a third party, the "exception contained in paragraph (2) should not permit collection of the debt by the third party." 2 COLLIER ON BANKRUPTCY ¶ 362.05[2] (Lawrence P. King ed., 15th ed. 1995).[2] Therefore, a party holding an assigned claim for alimony, maintenance, or support should first request that the stay be lifted before proceeding against the debtor.

IV. Priority Of Claims – 11 U.S.C. § 507(a)(7)

A. Amendment

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

. . . .

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt--

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

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

B. Cases Decided Under The Amendment

The first published case to address the new § 507(a)(7) was *In re Grady*, 180 B.R. 461 (Bankr. E.D. Va. 1995). In *Grady*, the Circuit Court of the City of Portsmouth, Virginia, ordered the husband to pay $2,000.00 to the attorney for his former wife as attorney's fees and pay $2,770.00 to his former wife for costs associated with the proceeding. The court denied the former wife's request for spousal support but ordered the husband "to pay the outstanding balance on the joint Visa account and other specified joint debts 'in lieu of an award of spousal support'." *Id.* at 463. Following the entry of the Decree of Divorce on November 7, 1994, the husband filed chapter 13. In his schedules, the debtor listed his former wife and her attorney as unsecured nonpriority creditors and treated their claims in his chapter 13 plan as an unsecured obligation. Both the former wife and her attorney objected to confirmation of the plan asserting that their claims were entitled to be treated as priority claims and paid in full through the plan. *See* 11 U.S.C. §1322(a)(2).[3]

In addressing the issue of whether the claims were in fact in the nature of alimony, maintenance or support, the bankruptcy court noted that the language of the amended § 507(a)(7) is essentially identical to the language of § 523(a)(5). *Id.* at 464. Accordingly, the bankruptcy court reviewed and relied upon the "plethora of case law" discussing whether such debts are actually in the nature of alimony, maintenance or support under § 523(a)(5) in determining whether the debts should receive priority treatment. *Id.* (*citing Gustafson v. Alloyd Co., Inc.*, 115 S.Ct. 1061, 1067 (1995) (identical words used in different parts of the same act are intended to have the same meaning)). After analyzing the cases discussing § 523(a)(5) and the intent of the Circuit Court of the City of Portsmouth, the bankruptcy court held the debts for attorney's fees and costs were in the nature of maintenance or support under the statutory language of both § 523(a)(5) and § 507(a)(7)(B), and therefore priority claims. *Id.* at 465-66.

C. Practical Effects Of The Amendment

Section 507(a)(7) is a familiar provision in the Bankruptcy Code. However, the subject of the priority provision is no longer tax claims– it is now actual and unassigned claims for alimony, maintenance or support. A spouse, former spouse, or child of the debtor now ranks ahead of many other classes of creditors including tax debts to governmental units which now are assigned eighth priority. This is a major change.

Although the new seventh priority for alimony, maintenance or support claims could affect certain cases proceeding under chapter 7 or 11, perhaps the greatest impact will be in cases proceeding under chapter 13.[4] As noted in *Grady*, § 1322(a)(2) mandates full payment of all matured priority obligations unless otherwise agreed to by the holder of the particular claim. Thus, a chapter 13 debtor must pay claims that are in the nature of alimony, maintenance or support arrearages in full through a chapter 13 plan. A chapter 13 debtor may no longer extend the payment for marital or parental claims beyond the term of the plan as could have been done when the claims were treated as nondischargeable general unsecured claims. Regarding cases proceeding under chapter 11, § 1129(a)(9)(B) provides that unless the holder of a § 507(a)(7) matured claim otherwise agrees, the claimant must receive in cash the full amount of the claim on the effective date of the plan if the class containing the claim did not accept the plan. If the class containing the claim voted to accept the plan, the debtor may pay the claim in deferred cash payments equal to the allowed amount of the claim. Under any chapter, however, the treatment of alimony, maintenance or support as a priority claim will have an impact on the ability of a debtor to pay a dividend to unsecured creditors.

Additionally, because of the higher priority granted to claims for alimony, maintenance or support, there is a potential that a chapter 11 or 13 plan could be more onerous to the debtor than a prior state court order. Where a state court allows a debtor an extended period of time to catch-up on arrearages, the requirements under either § 1129(a)(9)(B) or § 1322(a)(2) could result in a situation whereby the debtor must pay the arrearages quicker than that ordered by a state court.

The new priority status for alimony, maintenance or support claims applies only when asserted by the direct recipient of the obligation and not by assignees of the claim. Under § 507(a)(7), no exceptions are made for marital or parental claims assigned pursuant to provisions of the Social Security Act[5] or otherwise assigned to any federal or state governmental entity as there are under § 523(a)(5). The assignment exceptions contained in § 523(a)(5)(A) were added by way of the 1981 and 1984 amendments to the 1978 Bankruptcy Code to protect governmental assignees of alimony, maintenance or support. Next time Congress amends the Bankruptcy Code, look for it to add § 523(a)(5)(A) type exceptions to protect federal and state assignees under § 507(a)(7).

Section 507(a)(7)(B) invites litigation as to whether a liability that is designated as a property settlement is actually in the nature of alimony, maintenance or support. The issue of whether a debt sought to be excepted from discharge is in the nature of alimony, maintenance or support has long been a fruitful source of litigation under § 523(a)(5). There are dozens of published opinions on a multitude of different factual situations dealing with this same basic issue. The volume of cases on this topic is partially attributable to frequent ambiguity in divorce settlement agreements and decrees and partially due to the obligation of the bankruptcy courts to look beyond labels which state courts, and even parties themselves, have given to obligations. Fortunately, the Fifth Circuit has provided guidance regarding the issue of whether a claim is alimony, maintenance or support under § 523(a)(5), and a review of and citation to those cases will be helpful in formulating an argument to a bankruptcy court on whether such a claim should be treated as a priority claim pursuant to § 507(a)(7). *See generally In re Dennis*, 25 F.3d 274 (5th Cir. 1994); *In re Joseph*, 16 F.3d 86 (5th Cir. 1994); *In re Davidson*, 947 F.2d 1294 (5th Cir. 1991); *In re Biggs*, 907 F.2d 503 (5th Cir. 1990); *In re Benich*, 811 F.2d 943 (5th Cir. 1987); *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975). The characterization of a debt and whether such debt is nondischargeable is a matter of federal bankruptcy law and not state law. *Dennis*, 25 F.3d at 277. Therefore, the doctrine of collateral estoppel is practically eliminated in such cases because divorce decrees and property settlements are based on state law and not federal bankruptcy law and the issues typically raised at the state level are not identical to the issues raised in a dischargeability proceeding. *Id.* at 279; ***but see In re Read***, 183 B.R. 107, 112-13 (Bankr. E.D. La. 1995) (held res judicata barred debtor from litigating whether debt was alimony because the debtor failed to raise the issue of dischargeability of the debt in a postpetition state court proceeding).

V. Protection Of Liens – 11 U.S.C. § 522(f)(1)(A)

A. Amendment

§ 522(f)(1) [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is–

(A) a judicial lien, other than a judicial lien that secures a debt–

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt–

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

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

B. Cases Decided Under The Amendment

As of the date this article was submitted, no cases have been published addressing the amended § 522(f)(1)(A).

C. Practical Effects Of The Amendment

Prior to the amendment to § 522(f)(1)(A), judicial liens securing a debt to a nondebtor spouse

or former spouse were generally avoidable by a debtor. For a nondebtor spouse or former spouse to prevent the avoidance of a judicial lien, the bankruptcy court was required to find that the debtor did not possess an interest in the property prior to the fixing of the lien. *See Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

In *Farrey*, the former wife of the debtor was granted a judicial lien against real property awarded to the debtor pursuant to a divorce decree. The lien secured the debtor's obligation to his former wife. The Supreme Court held the judicial lien could not be avoided because the debtor's interest in the property was acquired simultaneously with the granting of the judicial lien against the property. *Farrey*, 500 U.S. at 299-300. Thus, there was no "fixing" of a lien on an interest of the debtor since the debtor had no preexisting interest in the property at the time the lien attached.

The legislative history to this amendment states the change was designed to "supplement the reach" of *Farrey*. H.R. REP. NO. 835, 103rd Cong., 2nd Sess. (1994), 140 CONG. REC. H10,770 (daily ed. Oct. 4, 1994). However, because the change only addresses judicial liens granted to secure obligations which are in the nature of alimony, maintenance or support, judicial liens granted to secure a property settlement are still avoidable if the debtor possessed an interest in the property prior to the granting of the lien. Accordingly, like the new § 507(a)(7), reference to the cases discussing § 523(a)(5), wherein courts have interpreted whether an obligation is actually in the nature of alimony, maintenance or support, will be useful when making arguments regarding whether a judicial lien should be avoided. *See supra* part IV.C (for citation of cases analyzing § 523(a)(5)).

Further, the language of § 522(f)(1)(A) limits the protected liens to judicial liens which have not been assigned to third parties. No exceptions are made for debts assigned pursuant to provisions of the Social Security Act or otherwise assigned to any federal or state governmental entity. *See supra* part IV.C (discussion of identical limitation under § 507(a)(7)).

VI. Exception To Discharge – 11 U.S.C. § 523(a)(15)

A. Amendment

§ 523(a) A discharge . . . does not discharge an individual debtor from any debt--

. . . .

(15) 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, determination made in accordance with State or territorial law by a governmental unit unless--

(A) the debtor does not have the ability to pay such debts from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor

B. Cases Decided Under The Amendment

The first published case addressing the new exception to discharge under § 523(a)(15) is *In re Comisky*, 183 B.R. 883 (Bankr. N.D. Cal. 1995). In *Comisky*, the debtor husband was awarded the family home pursuant to a 1991 marital settlement agreement. In exchange for the former wife's community share of the residence ($38,619.00), the debtor paid $20,000.00 in cash after refinancing the note on the house and agreed to pay her the remaining $18,619.00 through a note secured by the residence. Subsequently, the home was lost to foreclosure and the debtor filed for relief under chapter 7 without paying the $18,619.00 debt to his former wife.

The bankruptcy court noted at the beginning of its analysis that neither party is "legally or equitably at fault." *Id.* at 883. Although the former wife only received little more than half of her entitlement under the marital settlement

agreement, the debtor was continuing to pay his monthly support obligation. Also, because the home was lost to foreclosure, the court noted that "if the debt is not discharged[,] James [debtor] will pay considerably more than the actual value of Susan's community interest". *Id.* Because the evidence established that the detrimental consequences to the former wife if she is not paid "are equal to" the benefit to the debtor if he does not have to pay, the court held that the debtor failed to prove a case under § 523(a)(15)(B). *Id.*

In addressing whether the debt should be discharged under § 523(a)(15)(A), the court determined that although the debtor may not be able to pay all the debt to his former wife, he could afford to pay part of the debt over a reasonable period of time.[6] *Id.* at 884. Using cases under § 523(a)(8) as an analogy, wherein courts have used their equitable powers to declare dischargeable only that amount of a student loan that would cause undue hardship if forced to pay, the court determined that the debtor could pay over a reasonable time the sum of $10,000.00 to his former wife. *Id.* The court expressly rejected the notion that § 523(a)(15) mandated an "all or nothing" determination and held that $10,000.00 of the debt is nondischargeable. *Id.*

C. Practical Effects Of The Amendment

The most significant of all the amendments regarding family law issues is § 523(a)(15). This amendment adds a new wild card exception to discharge for certain debts arising out of a divorce decree or separation agreement. Section 523(a)(15) is in addition to the existing § 523(a)(5) which has served to preserve debts "in the nature of alimony, maintenance, or support". Section 523(a)(15) specifically targets property settlements and divorce decrees that contain financial obligations other than for alimony, maintenance or support. Many times, such obligations arise out of "hold harmless" agreements whereby one spouse agrees to pay certain marital debts and to hold the other spouse harmless from such debts. The intent and scope of this new exception to discharge is best summarized by the legislative history of the amendment:

> In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts. In other words, the debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents. The Committee believes that payment of support needs must take precedence over property settlement debts. The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start.

H.R. REP. NO. 835, 103rd Cong., 2nd Sess. (1994), 140 CONG. REC. H10,770 (daily ed. Oct. 4, 1994).

The new exception to discharge is subject to two important alternative tests. Such property settlement obligations are dischargeable when (1) the debtor does not have the ability to pay the debt from income not reasonably necessary for the support of the debtor and the debtor's dependents and, if the debtor is engaged in a business, the expenditures necessary for the continuation, preservation and operation of such business; or (2) where the benefit to the debtor of discharging the

debt outweighs the harm to the nondebtor spouse or child. The later is a balancing test of the benefit of affording a debtor a fresh start versus the harm the fresh start would impose on the nondebtor spouse or child.

Both tests provide abundant opportunity for factual controversy and creative argument. Some of the new questions for the courts to ponder are: How much income or property must be set aside as "reasonably necessary"? How much working capital and reserves are necessary "for the continuation, preservation, and operation of" a particular business? How should the debtor's recent track record and financial projections be considered in determining the debtor's "ability to pay"? Is there a significant detriment to the nondebtor spouse in allowing a debtor to discharge "hold harmless" debts when the nondebtor spouse is judgment proof? How much weight should be placed on the fact that the nondebtor spouse is either independently wealthy or has since remarried a person who is wealthy? Is the debt really in the nature of alimony, maintenance or support rather than a property settlement and thus nondischargeable under § 523(a)(5)?

Section 523(a)(15) will also raise some interesting legal issues. For example, what if a property settlement agreement provides for a $500 per month payment to the nondebtor spouse and the bankruptcy court finds that the debtor has the ability to pay only $250 per month under § 523(a)(15)(A). Can the court require payment of the $250 per month or is it an all-or-nothing matter where the court must choose between either $0 or the full $500? To address this issue, courts will probably draw an analogy to the student loan discharge cases under § 523(a)(8) as was done in *Comisky*. A majority of cases under § 523(a)(8) hold that a bankruptcy court may use its equitable powers to modify or reform the repayment terms of a student loan. *See, e.g., In re Raimondo*, 183 B.R. 677, 681-82 (Bankr. W.D.N.Y. 1995) (ordered partial repayment of a student loan with balance to be discharged); *In re Raisor*, 180 B.R. 163, 167 (Bankr. E.D. Tex. 1995) (court noted its practice of ordering "imaginative repayment terms to ensure that congressional intent is not frustrated"); *In re Gammoh*, 174 B.R. 707, 711 (Bankr. N.D. Ohio 1994) (discharged a portion of the total student loan indebtedness); *In re Sands*, 166 B.R. 299, 313 (Bankr. W.D. Mich. 1994) (although did not discharge the student loan, court ordered deferment of repayment for one year). However, a minority of courts hold that it is an all-or-nothing proposition and that a bankruptcy court may not use its equitable powers to modify the repayment terms of a student loan. *See, e.g., In re Goranson*, 183 B.R. 52, 53 n.1 (Bankr. W.D.N.Y. 1995) (court in dictum stated that it "has thusfar [sic] not agreed" that student loans may be discharged "to the extent" they impose an undue hardship); *In re Courtney*, 79 B.R. 1004, 1013 (Bankr. N.D. Ind. 1987) (court had no power to modify or reform terms of a student loan).

Another legal issue to consider regards standing to bring a proceeding under § 523(a)(15). Unlike § 523(a)(5), which allows certain assignees to bring an action under that subsection,[7] § 523(a)(15) has no expressed protection for any third parties. Although § 523(a)(15) is silent on this issue, the legislative history is not!

> The exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation. If the debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligation to them were incurred prior to the divorce or separation agreement. It is only the obligation owed to the spouse or former spouse-- an obligation to hold the spouse or former spouse harmless-- which is within the scope of this section. *See In re MacDonald*, 69 B.R. 259, 278 (Bankr. D.N.J. 1986).

H.R. REP. NO. 835, 103rd Cong., 2nd Sess. (1994), 140 CONG. REC. H10,770 (daily ed. Oct. 4, 1994). However, the Supreme Court has mandated that pursuant to the rules of statutory construction, a court must begin and end its inquiry with the language of the statute itself when the language is unambiguous. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). A recognized exception to being restricted to the language of the statute is in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *Ron Pair*, 489 U.S. at 242 (*quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Accordingly, if a third party files a § 523(a)(15) action, this could

be one of the "rare cases" in which the court should look to the legislative history to discern the intent of the drafters and dismiss the proceeding. Proceedings filed by third parties protected under § 523(a)(5)(A) should also be dismissed because the legislative history states that the exception to discharge under § 523(a)(15) "can be asserted only by the other party to the divorce or separation." H.R. REP. NO. 835, 103rd Cong., 2nd Sess. (1994), 140 CONG. REC. H10,770 (daily ed. Oct. 4, 1994).

Other legal and factual issues will arise under the clause in §523(a)(15) regarding debts incurred by the debtor "in the course of a divorce or separation". Under the plain language of the statute, this clause must relate to debts beyond those incurred by the debtor "in connection with a separation agreement, divorce decree...." Perhaps the clause is intended to cover debts not addressed in an agreement or decree, in situations where a divorce or separation agreement is pending or where a marital split may never be formalized through a divorce or separation agreement. The time frame under this clause could be lengthy and difficult to define where an informal separation rather than a conventional separation and divorce is involved. All sorts of possibilities such as a separation followed by a reconciliation are not addressed. Also, the nature of debts included under the "in the course of a divorce or separation" language is not specified. Since this provision is apparently not intended to protect third parties,[8] it might be operable only as to debts directly owed to the nondebtor spouse or former spouse. However, under the clear "hold harmless" intent of Congress,[9] perhaps any debt to a third party upon which the nondebtor spouse or former spouse is also personally liable could be included. Under Texas law, for example, it could apply to debts for necessities such as food, shelter, clothing and transportation. The courts must decide whether this means a nondebtor spouse, whether divorced from the debtor or not, can object to the dischargeability of such third party debts under § 523(a)(15).

The ability to now have a property claim declared nondischargeable under § 523(a)(15) will increase litigation in bankruptcy courts. The nondischargeability of a marital or parental obligation is very likely to be alleged alternatively under §§ 523(a)(5) and (15). Accordingly, a bankruptcy court will be required to first determine if the debt is actually in the nature of alimony, maintenance or support and thus nondischargeable under § 523(a)(5). If it is not such a debt, then the court will be required (1) to determine if the debtor has the ability to pay the debt; and (2) to balance the debtor's need to a fresh start with the harm it can cause the nondebtor spouse or child of the debtor.

Additionally, parties litigating a proceeding under § 523(a)(15) will need to be mindful regarding who has the burden of proof. The burden is generally on the party "who asserts nondischargeability of a debt to prove its exemption from discharge." *See Benich*, 811 F.2d at 945; *In re Cohn*, 54 F.3d 1108, 1114 (3rd Cir. 1995). Accordingly, the nondebtor spouse or child of the debtor bears the burden of demonstrating to the bankruptcy court that the debt is in the nature of alimony, maintenance or support under § 523(a)(5). *E.g., In re Gianakas*, 917 F.2d 759, 761 (3rd Cir. 1990); *Benich*, 811 F.2d at 945; *In re Calhoun*, 715 F.2d 1103, 1111 (6th Cir. 1983). However, many courts under § 523(a)(8) essentially shift the ultimate burden of proof to the debtor if the debtor is requesting that a student loan be discharged because of "undue hardship". *See, e.g., In re Woodcock*, 45 F.3d 363, 367 (10th Cir. 1995), *petition for cert. filed* (U.S. May 12, 1995) (No. 94-9242); *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993); *In re Stebbins-Hopf*, 176 B.R. 784, 787 (Bankr. W.D. Tex. 1994). Because § 523(a)(15) is conceptually related to § 523(a)(5) but partially written in a manner similar to § 523(a)(8), it is likely courts will require a shifting of the burden of proof under § 523(a)(15). The burden clearly will be on the nondebtor party to initially establish that the debt was incurred during the course of a divorce or separation. The more difficult issue is which party should bear the burden of proof on the two alternative tests.

The factual issue of whether or not the debtor has the ability to pay the debt is analogous to the "undue hardship" issue under § 523(a)(8)(B). Therefore, the burden should shift to the debtor to prove that the debtor does not have the ability to pay the debt under § 523(a)(15)(A). The debtor is in a much better position to address this issue. However, regarding the factual issue of whether discharging the debt outweighs the detrimental consequences to the nondebtor party under § 523(a)(15)(B), the burden should stay with the objecting party. *But see Comisky*, 183 B.R. at 883, (held debtor did not prove a case under §

523(a)(15)(B)). It is the objecting party who will be in a better position to establish the detrimental consequences that will occur if the debt is discharged. Also, because § 523(a)(15)(B) requires a balancing of a debtor's fresh start versus the harm it could impose on the nondebtor spouse or child, requiring the nondebtor party to bear the burden of proof will be consistent with bankruptcy policy of strictly construing § 523(a) exceptions against the creditor. *See, e.g., Cohn*, 54 F.3d at 1113; *In re Menna*, 16 F.3d 7, 9 (1st Cir. 1994); *In re Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992); *In re Bennett*, 970 F.2d 138, 148 (5th Cir. 1992).

Very importantly, § 523(a)(15) is added to § 523(c)(1) which means that dischargeability under this subsection must be raised in an adversary proceeding within the time period permitted by Federal Rule of Bankruptcy Procedure 4007 or the debt will be discharged. Under Rule 4007, the complaint must be "filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a)." This is very tricky and confusing because § 523(a)(5) obligations for alimony, maintenance or support are reserved automatically without the necessity of an adversary proceeding.

Since Congress elected to not include § 523(a)(15) in § 1328(a)(2), which provides a laundry list of debts that are nondischargeable under chapter 13, there is yet another incentive for debtors to select chapter 13. Thus, all property settlement obligations are subject to the "super discharge" in chapter 13. Accordingly, there may be situations where, rather than answer an adversary complaint filed pursuant to § 523(a)(15), the chapter 7 debtor elects to convert to chapter 13.

VII. Protection Against Trustee Avoidance -- 11 U.S.C. § 547(c)(7)

A. Amendment

§ 547(c) The trustee may not avoid under this section a transfer--

. . . .

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt--

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

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

B. Cases Decided Under The Amendment

As of the date this article was submitted, no cases have been published addressing the new § 547(c)(7).

C. Practical Effects Of The Amendment

Section 547(c)(7) prevents a trustee from recovering payments made to a spouse, former spouse, or child of the debtor for alimony, maintenance or support as preferences if "such transfer was a bona fide payment of a debt". Although the legislative history is silent as to what is a "bona fide payment", presumably Congress was not removing from the protection afforded under § 547(c)(7) payments made with the sole intent to place assets of the debtor beyond the reach of creditors. Accordingly, there is the potential of litigation concerning the debtor's intent of the transfer under this subsection. This subsection provides a potential for a collusive divorce-bankruptcy planning. *See* APPENDIX A (two scenarios illustrative of this possibility). In its zeal to protect marital creditors, Congress may well have opened the door to all sorts of unintended benefits for creative, forward thinking debtors and their spouses.

Also, this subsection only protects payments which are in the nature of alimony, maintenance or support. Transfers which are in the nature of a property settlement may still be set aside as a preference. Therefore, like the prior amendments discussed herein, reference to the cases analyzing § 523(a)(5), wherein courts have interpreted whether a payment is in the nature of alimony, maintenance or support, will be useful when

making arguments regarding whether the transfer may be a preference. *See supra* part III.C (for citation of cases).

Further, the language of § 547(c)(7) limits its protection to debts which have not been assigned to third parties. Once again, no exceptions are made for debts assigned pursuant to provisions of the Social Security Act or otherwise assigned to any federal or state governmental entities. *See supra* part IV.C (discussion of identical limitation under § 507(a)(7)).

VIII. Special Appearance And Cost Waivers

A. Amendment

> Child support creditors or their representatives shall be permitted to appear and intervene without charge, and without meeting any special local court rule requirement for attorney appearances, in any bankruptcy case or proceeding in any bankruptcy court or district court of the United States if such creditors or representatives file a form in such court that contains information detailing the child support debt, its status, and other characteristics.
>
> Note: This amendment was contained in § 304(g) of the Act and is not codified as part of the Bankruptcy Code.

B. Official Appearance Form

Pursuant to § 304(g) of the Reform Act, the Director of the Administrative Office of the United States Courts promulgated a new procedural form which became effective upon the issuance on January 31, 1995. The new procedural form entitled *Appearance of Child Support Creditor or Representative* is attached to this article as APPENDIX B.

C. Practical Effects Of The Amendment

Congress made a special effort to welcome "child support creditors or their representatives" without regard to local bankruptcy or district court rules. It is unclear whether this amendment permits appearances by non-attorney representatives other than the creditors themselves. It does allow certain parties to appear without obtaining formal admission to the United States courts or filing a *pro hac vice* motion. In a typical situation, either a parent of the child or a retained attorney will appear on the child's behalf. However, an unanswered question is whether a friend, relative, teacher, hairdresser, etc., who is not a licensed attorney may appear and represent the child. Also, does this provision extend to state laws which prohibit a individual who is not a licensed attorney from representing an individual in a legal dispute? Further, the provision is unclear as to whether the waiver of charges extends to filing fees ordinarily required to commence adversary proceedings. Interestingly, the special welcome does not apply to adult support creditors.

IX. Conclusion

Section 304 of the Bankruptcy Reform Act of 1994 is an attempt by Congress to lessen the impact a bankruptcy case could have on marital and parental obligations. Congress stated the intent of these amendments is "to provide greater protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of a debtor in bankruptcy." H.R. REP. NO. 835, 103rd Cong., 2nd Sess. (1994), 140 CONG. REC. H10,770 (daily ed. Oct. 4, 1994).[10] At the same time, the legislation represents a further erosion of both "fresh start" for debtors and "equal treatment" for unsecured creditors.

The full impact of the Reform Act in family law matters will not be known for many years. What is known at this time is that the Reform Act is not fully understood. *See* APPENDIX D (Senator Domenici's comment in support of the Reform Act). The Ninth Circuit recently provided an excellent example of judicial misunderstanding of the effects of the Reform Act in a recent unpublished opinion concerning § 523(a)(5). Although the case arose prior to the enactment of the Reform Act, the Ninth Circuit stated that the characterization of debts relating to dissolution of a marriage will "generally no longer arise in bankruptcies filed on or after October 22, 1994." *In re Chalkley*, 53 F.3d 337 (9th Cir. 1995) (TABLE, TEXT IN WESTLAW, NO. 93-17198). With due respect to the Ninth Circuit, the Reform Act will require the bankruptcy courts to become even more deeply involved in examining the factual nature of marital obligations to determine whether they are or should be construed to be actually in the nature of alimony, maintenance or support. Such optimism by the Ninth Circuit is

comparable to the faith the treasurer of Orange County placed in the success of derivatives as an investment. New Bankruptcy Code §§ 507(a)(7), 522(f)(1)(A) and 547(c)(7) will extend the "actually in the nature of" arguments previously raised only under § 523(a)(5).

Additional litigation will also arise out of the new exception to discharge provision in § 523(a)(15) and under various transfer and lien issues raised in § 547(c)(7) and § 522(f)(1)(A). Finally, Congress set a new malpractice trap for unwary divorce and bankruptcy practitioners alike under the new dischargeability provision in § 523(a)(15).

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1. The automatic stay terminates at the earliest of--
   1) the time the case is closed;
   2) the time the case is dismissed; or
   3) the time a discharge is granted or denied if the case concerns an individual under chapter 7 or is a case under chapter 9, 11, 12, or 13.

11 U.S.C. § 362(c)(2).

2. However, such debts that are assigned pursuant to provisions of the Social Security Act (42 U.S.C. § 602(a)(26)) or otherwise assigned to any federal or state governmental entity are nondischargeable. *See* 11 U.S.C. § 523(a)(5)(A).

3. Section 1322(a)(2) provides that a plan shall "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim".

4. Under chapters 12 and 13, priority claims are treated identically. *See* 11 U.S.C. §§ 1222(a)(2) & 1322(a)(2). However, because of the relatively small number of chapter 12 cases, reference is only made to chapter 13.

5. Section 402(a)(26) of the Social Security Act requires that a child support obligation be assigned to a state as a condition to obtain Aid to Families with Dependent Children. *See* 42 U.S.C. § 602(a)(26).

6. The court did not state what constitutes a "reasonable period of time".

7. Assignees who received the claim pursuant to 42 U.S.C. § 602(a)(26) or are otherwise a federal or state governmental entity have standing.

8. *See supra* part VI.C (discussion of standing of third parties to bring an action).

9. *See supra* part VI.C (discussion of "hold harmless" intent of Congress).

10. *See also* APPENDIX C (Representative Slaughter's comments in support of the Reform Act).

Appendix A

Scenario #1

Dr. Quack is a forty-year old neuro surgeon who has been married for 18 years to Daisy. The marriage has produced three bright college bound teen-age girls and years of marital agony. The parties own no property of any consequence except for a note receivable obtained by Dr. Quack when his partnership interest was bought out by his former medical associates. The note pays $5,000 a month for a period of ten years. Dr. Quack faces three medical malpractice claims, each large, valid and grossly underinsured. Further, Dr. Quack faces a revocation of his medical license due to multiple instances of patient sexual abuse and long standing drug dependency. Having dropped out of college to marry Dr. Quack and work at a fast food restaurant to pay for his medical education, Daisy has no significant employment prospects. During divorce negotiations with Daisy, Dr. Quack transfers the note receivable to Daisy and the girls for the stated purpose of alimony and child support. He then surrenders his medical license and then makes one last stop to file a Chapter 7 bankruptcy before heading to British Columbia to seek employment as a fishing guide. Where does Daisy stand relative to Dr. Quack's tort claimants?

Scenario #2

Dr. Quick is a forty year old neuro surgeon who has been married for 18 years to Clarence Quick, a bankruptcy lawyer board certified by the Texas Board of Legal Specialization. Dr. Quick maintains a steady take home of $20,000 per month while Clarence's income has been downsized by his firm to $5,000 per month. The marriage has produced perfect marital bliss, perhaps because the couple have no children. The parties own considerable exempt property including well-funded retirement accounts and an unencumbered $600,000 home in Highland Park. The couple own little non-exempt property except for a note receivable obtained by Dr. Quick when her partnership interest was bought out by her former medical associates. The note pays $5,000 a month for a period of ten years. Dr. Quick faces three medical malpractice claims, each large, valid and grossly underinsured. During a pillow talk discussion of Dr.Quick's tort tribulations Clarence reminds Dr. Quick of how much fun it was to get married the first time and suggests they do it again in two or three years. The couple stage a public altercation and obtain an agreed divorce judgment transferring the note receivable to Clarence for the stated purpose of his maintenance and support and awarding the house to Dr. Quick. She then files her Chapter 7. Where does Clarence stand relative to Dr. Quick's tort claimants?

Questions to Ponder:

Under Scenario #1: *Would it make any difference if....*

1. Dr. Quack and Daisy have no dependents?
2. Daisy has marketable employment skills?
3. Daisy is the beneficiary of a large discretionary trust fund?
4. Dr. Quack emerges from the woods a year later cleansed of his bad habits, regains his medical license and remarries Daisy?
5. Neither Dr. Quack, Daisy nor any of their attorneys ever heard of the Bankruptcy Reform Act of 1994?

Under Scenario #2: *Would it make any difference if....*

6. Clarence also pulls down $20,000.00 per month?
7. Clarence drops out of law practice during the divorce and returns to SMU to seek an Th.D.?
8. Dr. Quick and Clarence freely admit their collusion?
9. The parties deny collusion but continue to live together in Dr. Quick's exempt home?

Under Scenario #1 or #2: *Would it make any difference if....*

10. The transfer was designated in the divorce judgment as property settlement rather than spousal support and maintenance?
11. The non-debtor spouse received a lien on the note receivable securing a like amount and duration of support rather then a transfer of the note?
12. There were no tort claims but the debtor spouse owes a million dollars in a non-disputed, non-contingent and liquidated 1980's style deficiency on a real estate development note?
13. The note receivable were separate property of the debtor spouse?

Appendix B

Appearance of Child Support Creditor or Representative

(12/94)

UNITED STATES BANKRUPTCY COURT
_____ OF _____

In re

Bankruptcy Case No.

Debtor
Address:
Social Security No(s).:
Employer's Tax Identification No(s). [if any]:

Chapter _____

APPEARANCE OF CHILD SUPPORT CREDITOR*
OR REPRESENTATIVE

I certify under penalty of perjury that I am a child support creditor* of the above-named debtor, or the authorized representative of such child support creditor, with respect to the child support obligation which is set out below.

Name:
Organization:
Address:

Telephone Number:

_____ X _____
Date Child Support Creditor* or Authorized Representative

Summary of Child Support Obligation

Amount in arrears:

$ _____

Amount currently due per week or per month: on a continuing basis:

$ _____
(per week) (per month)

If Child Support has been assigned:

Amount of Support which is owed under assignments:

$ _____

Amount owed primary child support creditor (balance not assigned):

$ _____

Attach an itemized statement of account

* Child support creditor includes both creditor to whom the debtor has a primary obligation to pay child support as well as any entity to whom such support has been assigned, if pursuant to Section 402(a)(26) of the Social Security Act or if such debt has been assigned to the Federal Government or to any State or political subdivision of a State.

Appendix C

Ms. Slaughter

Mr. Speaker, I rise in strong support of H.R. 5116, the Bankruptcy Reform Act of 1994.

H.R. 5116 contains a number of improvements to the Bankruptcy Code, including expedited court procedure, increased protection against bankruptcy fraud, and the establishment of a National Bankruptcy Commission to pay close attention to key issues in bankruptcy procedure.

One section of H.R. 5116 which I feel is vitally important is similar to the text of my own bill, H.R. 4711, the Spousal Equity in Bankruptcy Amendments. Here, H.R. 5116 gives added protection to child support and alimony payments in the event of a bankruptcy filing. Under the current Bankruptcy Code, child support and alimony are given no priority when a debtor's assets are distributed. It is incomprehensible that while many creditors can collect their fees, dependent spouses and children have to wait, and may never be included. H.R. 5116 elevates child support from its current status as a general, unsecured debt to a formally prioritized debt. This import change will help ensure that a custodial parent will not have to wait years to receive payment due.

H.R. 5116 also closes a loophole which can be devastating for single-parent families. During a divorce agreement, it is not uncommon for the custodial parent to accept a lower level of child support in exchange for the other parent assuming the couple's marital debts. If the non-custodial parent declares bankruptcy, however, the marital debts than fall to the single parent. Think of what the custodial parent then faces: little or no child support payments, the heavy responsibilities of all the marital debts, and the expenses that come with rearing children alone.

The Bankruptcy Reform Act would obligate the non-custodial spouse, who agreed to pay the couple's marital debts, to continue responsibility for these debts. I think it is outrageous that wives and dependent children must answer to creditors for debts the husband first agreed to pay. This relatively small-but vital-change in the Bankruptcy Code would prevent this situation, and ensure a more equitable treatment of all parties in the event of bankruptcy.

Mr. Speaker, I have heard heartbreaking stories from single parents who want nothing but the best for their children, but find themselves forced to fight for their rightful level of child support. With no other recourse, these families often turn to welfare to provide the child support the absent parent ought to be responsible for. H.R. 5116 takes an important first step in breaking this tragic cycle by strengthening current bankruptcy law and enforcing tougher measures for child support and alimony collection.

Finally, Mr. Speaker, I would like to commend the distinguished Chairman of the Judiciary Committee, JACK BROOKS, and ranking member HAMILTON FISH, for their diligent efforts and hard work in moving omnibus bankruptcy reform before Congressional adjournment. I encourage my colleagues to join me in supporting the Bankruptcy Reform Act. Thank you, Mr. Speaker, and I yield back the balance of my time.

140 CONG. REC. H10,773 (daily ed. Oct. 4, 1994) (statement of Rep. Slaughter).

Appendix D

"I have been told that this bill increases the amount of debt which must be paid to creditors under Chapter 13 from $350,000 to $1 million."

140 CONG. REC. S14,739-01 (daily ed. Oct. 7, 1994) (statement of Sen. Domenici).

FAMILY LAW ISSUES UNDER THE BANKRUPTCY REFORM ACT

1995 Advanced Consumer Bankruptcy Course
State Bar of Texas
September 1995

(Supplemental Cases)

III. Relief From Automatic Stay-- 11 U.S.C. § 362(b)(2)

B. Cases Decided Under The Amendment

The first published case to directly address the new exceptions to the automatic stay under § 362(b)(2) is *In re Campbell*, 1995 WL 497348 (Bankr. S.D. Fla. June 28, 1995). In *Campbell*, an action for paternity and child support was initiated prepetition in state court against the debtor. After the debtor failed to comply with an order to pay child support, the state court entered an order sentencing the debtor to 60 days in jail for willful contempt of court. However, the court allowed the debtor to purge the contempt by paying within thirty days the child support owed-- $40,132.00. If the debtor failed to timely pay the amount due, the debtor was ordered to surrender himself before the court on June 28, 1995 ("Surrender Hearing"), to serve the 60 day sentence. Also set concurrently with the Surrender Hearing were other motion filed by the child's mother including a motion for contempt for alleged violation by the debtor of a restraining order, a motion for attorneys fees, a motion seeking income deduction order, and discovery matters. Prior to the scheduled Surrender Hearing, the debtor filed bankruptcy. Asserting that the Surrender Hearing is stayed pursuant to § 362, the debtor filed an emergency motion to cancel the Surrender Hearing.

After noting that the state court action was filed to establish paternity, the bankruptcy court held that all actions "directly connected with efforts to establish paternity and to obtain orders of support or maintenance are not stayed by the [d]ebtor's bankruptcy." *Id.* at *2. Significantly, included with the actions not stayed was any discovery related to the determination

of paternity and child support. *Id.* However, the bankruptcy court did find that the state court is stayed from requiring the debtor to use property of the estate to purge the contempt or pay child support. *Id.* Because attorneys fees were not "clearly in the nature of support or maintenance", the bankruptcy court determined that the state court is stayed from considering this request. *Id.* Finally, the bankruptcy court lifted the stay to permit the state court to "impose any appropriate sanctions other than the payment of money from the bankruptcy estate." *Id.* at *3.

VI. Exception To Discharge-- 11 U.S.C. § 523(a)(15)

B. Cases Decided Under The Amendment

Since the submission for publication of the article, four additional cases have been published addressing the new § 523(a)(15). The most informative of the cases is *In re Hill*, 184 B.R. 750 (Bankr. N.D. Ill. 1995). In *Hill*, the bankruptcy court was requested by the nondebtor former spouse to determine whether five debts assumed by the debtor during the course of a divorce are nondischargeable under §§ 523(a)(5) and (15). Initially, the court stated that the burden of proof under § 523(a)(15) shifts to the debtor. *Id.* at 752. Thus, the court concluded that the debtor's inability to pay or the fact that discharging the debt would result in a benefit to the debtor that outweighs the detriment to the former spouse are affirmative defenses that a debtor is required to plead. *Id.* at 754. Also, the court found that for both affirmative defenses the appropriate measuring point is the date the complaint was filed and not the date the divorce was granted. *Id.*

In determining whether the debtor had the ability to pay the debts (§523(a)(15)(A)), the court looked to cases analyzing the "disposable income test" under 11 U.S.C. § 1325(b)(2) although the debtor had filed for relief under chapter 7. *Id.* at 755. In so doing, the court determined that the debtor's budgeted expenses are reasonably necessary and thus the debtor did not have the ability to pay the debts. *Id.* Interestingly, the court in *dictum* questioned whether an analysis similar to the one invoked for "undue hardship" in student loan cases is appropriate. *Id.* at 754. Further, the court in *dictum* hinted that it has doubts that courts have the equitable powers to only discharge part of a debt rather than take an all-or-nothing approach. *Id.* at 755 n.15. In its determination that the benefits of the

discharge to the debtor outweighs the detrimental consequences to the former spouse under § 523(a)(15)(B), the court stated that certain factors should be considered, including: "the income and expenses of both parties; whether the nondebtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the nondebtor spouse's ability to pay." *Id.* at 756. In making this determination, the court noted that one of the detrimental consequences to the nondebtor spouse of discharging the debts is that she may have to file chapter 7. *Id.* However, the court question whether that was such a bad option because a "discharge of debts by both parties strikes the Court as the most sensible solution". *Id.*

Finally, the court included within its opinion two very good queries. First, if the debtor's obligation to indemnify his former spouse were declared nondischargeable under § 523(a)(15), and the former spouse subsequently files chapter 7 and discharges her liability for the third party debts, would the debtor still be legally obligated to pay the nondischargeable § 523(a)(15) debt to his former spouse? *Id.* at 756 n.16. Secondly, if the nondebtor former spouse now files bankruptcy after unsuccessfully requesting certain obligations be declared nondischargeable under §523(a)(15), can the former husband now file a § 523(a)(15) proceeding in her bankruptcy or is it res judicata? *Id.*

In *In re Becker*, 1995 WL 505133 (Bankr. W.D. Mo. Aug. 2, 1995), the nondebtor former husband requested that a joint obligation assigned to the debtor in the parties' divorce be held nondischargeable pursuant to §523(a)(15). By agreement, the debtor was to indemnify her former husband and hold him harmless with respect to $78,457.00 in personal debt. After initially making payments directly to her former husband on the debts she assumed, the debtor filed for relief under chapter 7.

The bankruptcy court held that § 523(a)(15) created a "rebuttable presumption that any property settlement obligation arising from a divorce is nondischargeable unless the debtor can prove one of two things." *Id.* at *3. Accordingly, the court held that once a former spouse brings a timely action under § 523(a)(15), the burden of proof shifts to the debtor to demonstrate that the debtor either is unable to pay the debt or discharging the debt would result in a benefit to the debtor which outweighs the detrimental consequences to the former spouse. *Id.* at *3-4. Based on "the

relative positions of the parties at the time of the bankruptcy, not at the time of the divorce", the court found the indemnification and hold harmless obligation to be dischargeable. *Id.* at *4.

In *In re Zeigler*, 1995 WL 512197 (Bankr. N.D. Ohio Aug. 9, 1995), the former spouse of the debtor requested that the debtor's obligation under the terms of a divorce decree to hold his former spouse harmless for a joint credit card debt should be declared nondischargeable pursuant to §523(a)(15). The debtor conceded that the obligation to hold his former spouse harmless is nondischargeable but contended that the underlying debt may still be discharged. After noting that § 523(a)(15) is only applicable to debts owed to a former spouse, the court held that the hold harmless obligation to the debtor's former spouse is nondischargeable while the underlying debt of the debtor to the credit card company is dischargeable. *Id.* at *1. Accordingly, because it was likely the debtor's former spouse may be required to pay the joint credit card debt to protect her credit rating, the former spouse may recover from the debtor any payments and costs associated therewith. *Id.* at *2.

Finally, in *In re Colbert*, 1995 WL 490470 (Bankr. M.D. Tenn. Aug. 11, 1995), the issue before the court was whether a nondebtor spouse may be awarded attorney fees that were incurred in successfully prosecuting a nondischargeability proceeding under §§ 523(a)(5) and (15). After analyzing applicable state law on the issue, the court held that § 523(a)(15) does not authorize the award of attorney fees. Id. at *3. According to the court, only the amount already awarded in state court is nondischargeable under § 523(a)(15). *Id.*