

## **Family Law Considerations in Bankruptcy**

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Historically, support obligations and alimony were non-dischargeable and property settlements were dischargeable in a bankruptcy case. Prior to the Bankruptcy Reform Act of 1994, the bankruptcy court would make the determination as to whether an obligation was a support obligation or a property settlement obligation. *See, Cummings v. Cummings*, 244 F.3d 1263 (11<sup>th</sup> Cir. 2001).

However, following the Bankruptcy Reform Act of 1994, 11 U.S.C. § 523(a)(15) was added to the Code. Section (a)(15) provided that debts in the nature of property settlements would be non-dischargeable, if the benefit to the debtor outweighed the detriment to the non-debtor recipient, meaning that the court would only discharge the debt if the recipient was better off financially than the debtor. This is commonly referred to as the “balancing the harms test.”

The law changed once again in 2005 with the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), and the “balancing the harms test” was eliminated. Per BAPCPA, if a bankruptcy case is filed after October 16, 2005, “all debts owed to a former spouse pursuant to a divorce decree are excepted from discharge,” meaning that they are non-dischargeable and must be paid. *In re Davis*, 2007 WL 4510367, 3 (Bankr. M.D. Ala. 2007). “Therefore, for purposes of dischargeability, it is no longer necessary to make the support versus property settlement distinction nor is it necessary to undertake the balancing the harm analysis.” *Id.* However, the support versus property settlement distinction is still relevant for the purposes of determining whether a debt is entitled to priority. Debts for alimony and support are entitled to priority payment from the bankruptcy estate. *Id.*

In order for a debt to be non-dischargeable under section 523(a)(15) of the Bankruptcy Code, three (3) elements must be satisfied: 1) the debt must be to a spouse, former spouse, or child of the debtor; 2) the debt must not be of the type described in section 523(a)(5) of the Bankruptcy Code; 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 order of court. Section 523(a)(5) of the Bankruptcy Code states “a discharge...does not discharge an individual debtor from any debt for a domestic support obligation.” 11 U.S.C. § 523(a)(5).

From a practical standpoint, the timing of a debtor’s bankruptcy filing in relation to a divorce proceeding creates some new twists and turns as to when and how the debt becomes dischargeable. For instance, in *In re Deemer*, 360 B.R. 278 (Bankr. N.D. Iowa 2007), the facts were as follows: the husband filed for bankruptcy while the parties were separated, but not yet divorced; the wife sought to except from the husband’s bankruptcy discharge the debts owed by the husband to Best Buy and Sears as non-dischargeable; the husband asserted that the debts were not owed to the wife but were debts owed to third parties, and the debts were not in the nature of support nor were they established by a separation agreement, divorce decree, or property settlement agreement. The bankruptcy court ruled in the husband’s favor, stating that the debts were dischargeable, because the debts were not owed to or recoverable by the wife nor were the debts established by an order of the state court. The bankruptcy court explained that the state court in the divorce proceeding can consider both spouses assets and liabilities, including

the fact that the husband received a bankruptcy discharge, in determining the support obligations and the distribution of assets and debts between the parties. *See, Id.* a 281-2. The bankruptcy court stated further that although the husband's discharge ends his liability to Sears and Best Buy, it does not effect the state court's determination of the equities between the parties regarding marital debts. *Id.*

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