WHEN YOUR CLIENT'S SPOUSE FILES BANKRUPTCY:

A Practical Guide for Nebraska Divorce Attorneys

Continuing Legal Education Seminar Materials

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DISCLAIMER

These materials are for educational purposes only and do not constitute legal advice. The law in this area is complex and fact-intensive. Attorneys should conduct independent research and consult with a bankruptcy attorney when their client is affected by a bankruptcy filing.

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I. OVERVIEW: THE INTERSECTION OF DIVORCE AND BANKRUPTCY

Divorce and bankruptcy often travel together. When a marriage ends, the financial stress that contributed to the divorce — or is created by it — frequently drives one or both spouses into bankruptcy. For the divorce attorney, a bankruptcy filing by a client or a client's spouse can feel like the ground shifting beneath a case. Rights that seemed secure under a divorce decree can suddenly be in question.

These materials are designed to give Nebraska divorce attorneys a working knowledge of the bankruptcy rules that matter most when bankruptcy intersects with a pending or completed dissolution case. The focus is practical: what do you need to do — and what mistakes must you avoid — when bankruptcy enters the picture?

The Two Key Statutes Every Divorce Attorney Must Know

11 U.S.C. § 362 — The Automatic Stay: Broadly halts most collection and enforcement actions against the bankruptcy debtor upon filing. 11 U.S.C. § 523 — Exceptions to Discharge: Defines which debts survive the bankruptcy discharge, including domestic support obligations (§ 523(a)(5)) and most other divorce-related debts (§ 523(a)(15)). Understanding the interplay between these two statutes is the foundation of everything that follows.

II. THE AUTOMATIC STAY UNDER 11 U.S.C. § 362: WHAT IT IS AND WHAT IT IS NOT

A. The Immediate Effect of Bankruptcy Filing

The moment a bankruptcy petition is filed, 11 U.S.C. § 362(a) imposes an automatic stay — one of the broadest injunctions in federal law. It halts virtually all actions against the debtor and against property of the bankruptcy estate. The stay is self-executing: it takes effect automatically, with no court order required.

For divorce attorneys, the practical effect is immediate. The filing of a bankruptcy petition by a party to a pending dissolution case — or by a former spouse after a decree has been entered — triggers an immediate question: can the divorce case continue?

B. Scope of the Stay in the Dissolution Context

The automatic stay applies to all of the following that would otherwise be available to you or your client:

- Proceeding with or commencing a divorce case to divide marital property (the property division component is stayed)
- Enforcing a money judgment from the divorce decree against the debtor's property
- Continuing a hearing or trial on property division issues in state court
- Executing on a judgment against property of the bankruptcy estate
- Filing a garnishment or attachment against the debtor's wages or bank accounts

⚠ Critical Warning — Violating the Automatic Stay

Willful violations of the automatic stay can result in sanctions against the attorney and the client, including damages, attorney fees, and even punitive damages. 11 U.S.C. § 362(k). When you learn that the other party — or your own client — has filed bankruptcy, you must immediately notify the court handling the dissolution case and halt any enforcement activities.

C. What the Stay Does NOT Stop in the Divorce Context

The Bankruptcy Code expressly carves out a number of domestic relations actions from the automatic stay. Under 11 U.S.C. § 362(b)(2), the following are NOT stayed:

- Commencement or continuation of a civil action or proceeding for the dissolution of a marriage (the divorce itself may proceed), except to the extent it concerns the division or sale of property of the bankruptcy estate
- The establishment of paternity
- The establishment or modification of an order for domestic support obligations (child support and alimony)
- The collection of a domestic support obligation from property that is not property of the bankruptcy estate

- Withholding of income that is property of the estate or the debtor for payment of a domestic support obligation under a judicial or administrative order
- Interception of a tax refund or credit to satisfy a domestic support obligation

This is a crucial distinction. The divorce proceeding can continue on issues of custody, child support, alimony, and parenting — but NOT on the division of marital property that may be part of the bankruptcy estate. The stay effectively splits the dissolution case in two.

In re Melcher | Case No. BK09-40653-TJM (Bankr. D. Neb. 2009)
The court granted relief from stay to allow the ex-wife to proceed with an appeal of the dissolution decree and to continue a contempt action for failure to pay alimony, child support, and health insurance. The court noted that 11 U.S.C. § 362(b)(2)(B) expressly exempts collection of a domestic support obligation from property that is not property of the estate.

III. EXCEPTIONS TO THE AUTOMATIC STAY FOR DOMESTIC MATTERS

A. The § 362(b)(2) Exceptions in Detail

Because domestic relations matters are handled primarily by state courts, Congress built into the Bankruptcy Code an extensive set of exceptions to the automatic stay for domestic matters. 11 U.S.C. § 362(b)(2) provides that the stay does not apply to:

1. Paternity establishment actions
2. Actions to establish or modify domestic support obligations
3. Actions to establish or modify child custody or visitation orders
4. Dissolution of marriage proceedings (but NOT the division of property of the estate)
5. Domestic violence proceedings
6. Collection of domestic support obligations from non-estate property
7. Income withholding for support
8. Tax refund intercepts for support arrears

B. What This Means Practically

Your client can still:

- Obtain a divorce — the marriage can be legally dissolved even if bankruptcy is pending
- Get a child support order established or modified
- Seek alimony or spousal support
- Pursue custody and visitation matters
- Enforce a child support order against the debtor's wages or non-estate property
- Intercept tax refunds to satisfy support arrears

Your client CANNOT, without bankruptcy court relief:

- Divide or sell property of the bankruptcy estate (house, cars, accounts)
- Enforce a money judgment from the divorce decree against estate property
- Execute on a judgment against the debtor's wages or property
- Hold the debtor in contempt for failure to pay a property-settlement-type obligation

C. Getting Relief from the Automatic Stay

When you need to proceed against estate property or enforce a property-related obligation, you must file a Motion or Stipulation for Relief from the Automatic Stay in the bankruptcy court. Under 11 U.S.C. § 362(d), the bankruptcy court may grant relief from the stay for cause or if the debtor has no equity in property and the property is not necessary for an effective reorganization.

In the domestic relations context, courts are generally willing to grant limited relief from the stay to allow the state court to proceed with property division, particularly when the case can be resolved

quickly and efficiently in state court. However, the bankruptcy court retains jurisdiction over property of the estate, and any division must respect the priority scheme of the Bankruptcy Code.

IV. THE BANKRUPTCY DISCHARGE: CHAPTER 7 vs. CHAPTER 13

A. What Is the Bankruptcy Discharge?

The bankruptcy discharge is a permanent injunction that eliminates the debtor's personal liability on dischargeable debts. 11 U.S.C. § 524. After discharge, the creditor may no longer take any action to collect the discharged debt as a personal liability of the debtor, even though the debt itself technically still exists. The creditor's only recourse may be against specific collateral that was not surrendered in the case.

B. Chapter 7 Discharge

Chapter 7 is the liquidation chapter. A trustee is appointed to liquidate non-exempt assets for the benefit of creditors. In exchange, the debtor receives a discharge of most unsecured debts, typically within 3-6 months of filing. The Chapter 7 discharge is governed by 11 U.S.C. § 727.

Under Chapter 7, the following divorce-related debts are NEVER dischargeable:

- Domestic support obligations (child support, alimony, spousal maintenance) — 11 U.S.C. § 523(a)(5)
- Debts to a spouse, former spouse, or child of the debtor arising from a divorce decree or separation agreement that are NOT domestic support obligations — 11 U.S.C. § 523(a)(15)

This means that under Chapter 7, virtually all divorce-related debts — whether support or property settlement — are non-dischargeable. The combination of §§ 523(a)(5) and (15) leaves very little room for a Chapter 7 debtor to discharge a divorce-related obligation.

In re Thimsen-Villa | Case No. A09-4066-TJM (Bankr. D. Neb. 2010)
The court held that the BAPCPA amendments made the distinction between property settlements and support obligations irrelevant for dischargeability in Chapter 7: 'Essentially, the combination of section 523(a)(5) and (15) excludes from discharge all marital and domestic relations obligations, whether support in nature, property division, or hold-harmless.' The attorney fee debt was non-dischargeable under § 523(a)(15).

C. Chapter 13 Discharge — Broader BUT More Limited on Support

Chapter 13 is the repayment chapter. The debtor proposes a 3-5 year repayment plan and, upon completion, receives a discharge. The Chapter 13 discharge under 11 U.S.C. § 1328(a) is broader than a Chapter 7 discharge in one specific respect that matters enormously to divorce attorneys:

⚠ Critical Distinction: Chapter 13 Can Discharge § 523(a)(15) Debts

Under Chapter 13, ONLY domestic support obligations (§ 523(a)(5)) are non-dischargeable. Property settlement debts and other divorce-related obligations under § 523(a)(15) ARE dischargeable in a completed Chapter 13 case. This is the critical difference between Chapter 7 and Chapter 13 as applied to divorce obligations. If your client is owed a property equalization payment or is a joint obligor on debt assigned to the ex-spouse, a completed Chapter 13 can eliminate those obligations entirely.

This is one of the most important distinctions in the bankruptcy/divorce intersection. The chart below summarizes the difference:

Debt Type	Chapter 7 Discharge	Chapter 13 Discharge (§ 1328(a))
Domestic Support Obligation (§ 523(a)(5)) — alimony, child support	**NOT dischargeable**	**NOT dischargeable**
Property Settlement / Divorce Decree Debts (§ 523(a)(15)) — hold-harmless obligations, property equalization payments, attorney fees not in nature of support	**NOT dischargeable**	**DISCHARGEABLE (key difference!)**

V. THE DOMESTIC SUPPORT OBLIGATION (DSO): THE CRITICAL CLASSIFICATION

A. Statutory Definition

The term 'domestic support obligation' is defined at 11 U.S.C. § 101(14A). This definition, enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), is the key gateway to a host of protections in the Bankruptcy Code. A DSO is a debt that:

9. Accrues before, on, or after the petition date;
10. Is owed to or recoverable by a spouse, former spouse, child of the debtor, or a governmental unit;
11. Is in the nature of alimony, maintenance, or support, without regard to whether so designated; AND
12. Is established by a separation agreement, divorce decree, property settlement agreement, court order, or governmental determination.

DSO status matters because it determines priority of payment (DSOs are first-priority claims under § 507(a)(1)(A)), non-dischargeability in ALL chapter cases, and certain automatic stay exceptions.

B. The 'In the Nature of Support' Test

The most litigated DSO issue is whether a particular obligation is 'in the nature of alimony, maintenance, or support.' The label applied by the state court is not binding on the bankruptcy court. This is a question of federal bankruptcy law. Boyle v. Donovan, 724 F.2d 681 (8th Cir. 1984); Williams v. Williams (In re Williams), 703 F.2d 1055 (8th Cir. 1983).

The Eighth Circuit's test asks: what function did the parties intend the obligation to serve at the time they entered the agreement? Courts in Nebraska and the Eighth Circuit evaluate the following factors:

- The language and substance of the agreement in context
- The relative financial conditions of the parties at the time of divorce
- The respective employment histories and prospects for financial support
- Whether one party received the marital property
- The periodic nature of the payments
- Whether it would be difficult for the former spouse and children to subsist without the payments
- Whether there is a separate alimony or child support provision (suggesting the obligation at issue is NOT support)
- Whether the debt is conditional

In re Harris | Case No. BK08-81330-TLS (Bankr. D. Neb. 2008)
The bankruptcy court distinguished between a $3,000/month alimony obligation (clearly support) and a $1,000/month property equalization payment expressly labeled 'not alimony' by the state court. The

obligation to pay the time-share debt and Discover Card debt from sale proceeds was found to be in the nature of property settlement, not support, and was therefore dischargeable in Chapter 13.

In re Maser | Case No. BK09-43079-TLS (Bankr. D. Neb. 2010)
The bankruptcy court found that a $70,580 judgment payable in installments under a property settlement agreement was NOT a DSO. The parties had expressly awarded only $1/year in alimony; the judgment was property equalization. The attorney fee award of $1,000 was also found to be property settlement, not support.

In re Braun | Case No. BK08-80400-TJM (Bankr. D. Neb. 2008)
The court found that the debtor's obligation to pay the home mortgage for his separated wife, who had possession of the home but no ability to pay the mortgage herself, WAS a domestic support obligation. The key factors were the wide income disparity — the debtor earned $78,000/year while the wife typically earned under $10,000/year — and her inability to retain the home without his payments.

In re Osborn | Case No. BK11-41944-TJM (Bankr. D. Neb. 2012)
The court held that the debtor's obligation to pay a second mortgage on the former wife's home was a DSO where the intent of the parties was to allow her and the children to remain in the home. The court also found the bankruptcy was filed in bad faith when the debtor filed the day after being found in contempt and threatened with jail, had liquidated his entire retirement account, and had falsified Schedule J.

VI. VAGUE DIVORCE DECREES: SUPPORT vs. PROPERTY SETTLEMENT — A RECURRING PROBLEM

A. Why Decree Drafting Matters Enormously

The single most common preventable problem in divorce/bankruptcy intersections is a vague or ambiguous decree. When a decree fails to clearly label an obligation as either support or property settlement — or when the parties' intent is not clearly expressed — the bankruptcy court is left to undertake an extensive factual inquiry that is expensive, uncertain, and could have been avoided.

Bankruptcy courts in Nebraska have repeatedly had to determine whether periodic payments under divorce decrees were support or property settlement — a distinction with enormous financial consequences for the creditor spouse.

B. Common Problem Patterns in Nebraska Decrees

The following fact patterns recur in bankruptcy cases and create the greatest ambiguity:

- 'Equalizing payments' that are paid periodically but labeled as property settlement — courts look past the label to function
- Obligations to pay joint marital debts directly to third-party creditors — these can be either support or property settlement depending on intent and financial disparities
- Mortgage payments on the family home awarded to the non-debtor spouse — when the receiving spouse cannot afford the home without the payments, courts often find DSO status
- Attorney fee awards in the divorce — courts distinguish between fees awarded to level the financial playing field (support) and fees awarded as sanctions for bad behavior (not support)
- Nominal alimony of $1/year with a modification clause — the modification clause may convert property settlement debt to support if the property obligation is later discharged

In re Poole | Case No. BK12-81843-TJM (Bankr. D. Neb. 2013)
The decree contained a 'Collett provision' (from Collett v. Collett, 707 N.W.2d 769 (Neb. 2005)) providing that if the debtor discharged the property equalization payment in bankruptcy, alimony would be modified to compensate the wife. The court found the $25,000 equalization payment was in the nature of support and non-dischargeable, relying on this clause and the overall intent of the settlement. This case illustrates how clever drafting can protect creditor spouses from a bankruptcy discharge.

Schriner v. Schriner | Case No. 17-4006 (Bankr. D. Neb. 2017)
The court distinguished between different attorney fee awards in the same case: (1) a $5,000 appellate court cost assessment — NOT a DSO under § 523(a)(5) because no evidence it was needed for the ex-husband's support; and (2) a $7,500 attorney fee award for bad-faith custody litigation — NOT a DSO because it was punitive. But BOTH were non-dischargeable under § 523(a)(15) as debts arising from the divorce decree. In Chapter 7, the result is the same; in Chapter 13, only the § 523(a)(5) classification would protect the debt.

C. Drafting Recommendations for Divorce Attorneys

To protect your client's interests against a future bankruptcy:

13. Expressly label every obligation. If the payment is intended as support, say so. If it is property settlement, say so. Courts give deference to the state court's characterization as a starting point.
14. Include a 'Collett provision' when property equalization payments are significant. This Nebraska Supreme Court-approved clause provides that a bankruptcy discharge of the property obligation shall constitute a material change of circumstances for purposes of alimony modification.
15. Articulate the financial circumstances supporting each obligation. Courts look to whether the receiving party needs the payments for subsistence. If she does, make that a finding in the decree.
16. Specify that property obligations are 'in the nature of support' if that is the parties' intent. While a label is not binding, it is the starting point for the bankruptcy court's analysis.
17. Require periodic payments rather than lump sums for support-type obligations. The periodic nature of payments is a factor courts use to identify DSOs.

VII. CHAPTER 13 HAS A BROADER DISCHARGE THAN CHAPTER 7 — IMPLICATIONS FOR DIVORCE ATTORNEYS

A. The Scope of the Chapter 13 Super-Discharge

As noted in Section IV, the Chapter 13 discharge under 11 U.S.C. § 1328(a) is broader than a Chapter 7 discharge. The most significant difference for divorce attorneys: property settlement obligations under § 523(a)(15) ARE dischargeable in a completed Chapter 13 case.

This means that if a debtor completes a Chapter 13 plan:

- Child support and alimony arrears classified as DSOs (§ 523(a)(5)) remain non-dischargeable and must be paid in full through the plan
- Property equalization payments, hold-harmless obligations, and other § 523(a)(15) debts can be discharged if they are treated as general unsecured claims in the plan

⚠ Practical Warning for Divorce Attorneys

If your client is owed a property equalization payment, hold-harmless reimbursement, or other § 523(a)(15)-type debt from the ex-spouse, that debt can be wiped out in the ex-spouse's completed Chapter 13. You MUST file a **Proof of Claim** to participate in the plan payments, AND you should object to confirmation if the plan fails to pay that debt appropriately. Failure to act means your client may receive nothing.

B. Strategic Implications

When the ex-spouse files Chapter 13:

- Identify every debt owed to your client by type: Is it a DSO (§ 523(a)(5)) or a property settlement debt (§ 523(a)(15))?
- DSOs must be paid in full under any confirmable Chapter 13 plan (§ 1322(a)(2))
- Property settlement debts will receive only whatever dividend is paid to general unsecured creditors — which may be zero in a 0% plan
- Consider whether your client has grounds to argue a property settlement debt is actually a DSO — the classification dispute is worth fighting

VIII. THE CHAPTER 13 HARDSHIP DISCHARGE UNDER § 1328(b): A NARROWER EXCEPTION

A. What Is a Hardship Discharge?

Sometimes a Chapter 13 debtor cannot complete the plan through no fault of their own — a job loss, serious illness, or other hardship arises. In limited circumstances, the bankruptcy court may grant a 'hardship discharge' under 11 U.S.C. § 1328(b) before plan completion.

To obtain a hardship discharge, the debtor must show: (1) failure to complete the plan is due to circumstances beyond the debtor's control; (2) unsecured creditors have received at least as much as they would have in a Chapter 7 liquidation; and (3) plan modification is not practicable.

B. The Critical Difference for Divorce Obligations

A hardship discharge under § 1328(b) is NOT as broad as the regular Chapter 13 discharge under § 1328(a). The hardship discharge does NOT discharge § 523(a)(15) property settlement debts — the same exceptions that apply in Chapter 7 also apply to the § 1328(b) hardship discharge.

Discharge Comparison: § 1328(a) vs. § 1328(b)
Regular Chapter 13 Discharge (§ 1328(a)): Discharges § 523(a)(15) property settlement debts; only DSOs under § 523(a)(5) survive. Hardship Discharge (§ 1328(b)): Does NOT discharge § 523(a)(15) debts. Both § 523(a)(5) and § 523(a)(15) divorce obligations survive the hardship discharge. This means the hardship discharge provides no greater benefit to the divorce debtor than a Chapter 7 discharge — and the divorce creditor retains the same protections.

As a divorce attorney, if you learn that the debtor ex-spouse has received a hardship discharge, your client's property settlement obligations may still be collectible. You should consult with a bankruptcy attorney to evaluate the impact.

IX. JOINT DEBTS ASSIGNED IN THE DIVORCE DECREE: WHAT HAPPENS WHEN THE ASSIGNED SPOUSE FILES BANKRUPTCY?

A. The Hold-Harmless Obligation

A common provision in property settlement agreements is the hold-harmless or indemnification clause: 'Wife shall be solely responsible for the Visa card balance and shall hold Husband harmless therefrom.' This clause creates, in effect, two obligations: (1) the duty to pay the creditor; and (2) the duty to indemnify the former spouse if the former spouse is required to pay.

When the spouse assigned the debt files bankruptcy, the debt to the creditor may be discharged — but the obligation to hold the former spouse harmless is a non-dischargeable debt under § 523(a)(15) in a Chapter 7, and is subject to discharge in Chapter 13.

In re Malcom | Case No. BK10-43769-TLS (Bankr. D. Neb. 2011)
The divorce decree assigned a pre-marital bank debt to the wife and ordered her to hold the husband harmless. The wife made no payments; the husband paid the bank $11,526.46 to protect his vehicle and credit. The court held the wife's obligation to reimburse the husband was non-dischargeable under § 523(a)(15) in Chapter 7. The pre-marital nature of the underlying debt was irrelevant — it was the indemnification obligation created by the decree that was non-dischargeable.

In re Chase (Cramer v. Chase) | Case No. A08-4073-TLS (Bankr. D. Neb. 2009)
The husband's obligation to hold wife harmless from the U.S. Bank second mortgage was non-dischargeable even though the wife's parents, not the wife herself, paid off the bank. The court held the circumstances fell squarely within § 523(a)(15) — the wife was obligated to repay her parents, and the debtor could not avoid his hold-harmless obligation on a technicality.

In re Teed (Forman v. Teed) | Case No. A10-8084-TLS (Bankr. D. Neb. 2011)
Standard hold-harmless clause for furniture store and credit card debts assigned to the wife. Court found the hold-harmless obligation non-dischargeable under § 523(a)(15) in Chapter 7. Under post-BAPCPA law, virtually all hold-harmless obligations in divorce decrees are non-dischargeable in Chapter 7.

B. The Joint-Creditor Problem in Chapter 13

When the assigned spouse files Chapter 13, the joint creditor (the bank, credit card company, etc.) is NOT bound by the divorce decree. The creditor may continue to pursue the non-filing spouse — your client — for the joint debt. The non-filing spouse cannot obtain automatic stay protection.

Your client has these options:

- File a proof of claim in the ex-spouse's bankruptcy for amounts the client has paid on the joint debt or is likely to pay (contingent, unliquidated claim)

- Monitor the bankruptcy case — if the ex-spouse completes a Chapter 13 and the §523(a)(15) debt is discharged, your client loses the indemnification right
- Object to confirmation of the Chapter 13 plan if it fails to adequately provide for payment of the joint debt or for reimbursement of the non-filing spouse
- If the ex-spouse fails to complete Chapter 13 and the case is dismissed or converted to Chapter 7, the § 523(a)(15) non-dischargeability rule revives in Chapter 7

⚠ Warning: Contingent Claim Disallowance Under § 502(e)(1)(B)

Under 11 U.S.C. § 502(e)(1)(B), a contingent claim for reimbursement by a co-debtor will be disallowed. In re Lerdahl, Case No. BK06-81003 (Bankr. D. Neb. 2007). If the assigned spouse has not yet been required to pay the joint creditor, the hold-harmless claim may be disallowed as contingent. The creditor spouse must have actually paid the debt before filing a non-contingent proof of claim. This is a critical procedural trap — the divorce attorney must monitor the joint creditor's demands.

In re Lerdahl | Case No. BK06-81003-TJM (Bankr. D. Neb. 2007)
The debtor wife was ordered to pay several joint debts and hold her former husband harmless. The husband filed a secured claim based on the divorce decree. The court held the decree was NOT a money judgment creating a lien — it created only an obligation to pay the creditors directly. The husband's claim for the balance was disallowed as contingent under § 502(e)(1)(B). Only the $250 the husband had actually paid was allowed as a general unsecured claim.

X. FILING PROOFS OF CLAIM IN BANKRUPTCY: WHAT DIVORCE ATTORNEYS MUST KNOW

A. The Proof of Claim Process

When a former spouse files bankruptcy, the creditor (your client) should file a Proof of Claim on Official Form 410. The proof of claim is the mechanism by which a creditor establishes its right to payment from the bankruptcy estate. A properly filed proof of claim constitutes prima facie evidence of the validity and amount of the claim.

The claims bar date — the deadline to file a proof of claim — is stated in the notice of the bankruptcy case sent to creditors. In Chapter 13 cases, it is typically 70 days after the order for relief. Failure to file a timely proof of claim may result in no payment from the estate.

B. Classification of the Claim: Priority vs. Secured vs. General Unsecured

The classification of your client's claim determines how much and when it will be paid. There are three possible classifications for divorce-related claims:

1. First-Priority Unsecured Claim (Domestic Support Obligation)

If the obligation is a DSO — child support, alimony, or other support-nature debt — it is entitled to first-priority status under 11 U.S.C. § 507(a)(1)(A). In Chapter 13, first-priority claims must be paid in full. On the proof of claim, check the box for 'Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).'

2. Secured Claim

If the divorce decree or applicable Nebraska law gives your client a lien on specific property of the debtor — for example, if the property equalization payment was reduced to a judgment, creating a judgment lien on real estate under Neb. Rev. Stat. § 42-371 — the claim may be filed as a secured claim. Secured claims must be paid according to the value of the collateral.

⚠ Nebraska Judgment Liens and the Divorce Decree

Under Neb. Rev. Stat. § 42-371(1), orders for payment of money in a dissolution case are liens on real property and registered personal property. A money judgment from the divorce decree — including an alimony judgment and, in some circumstances, a property equalization payment — may be a lien on the debtor's real estate. If the debtor owns real estate, the creditor spouse may have a secured claim. Filing as secured — if properly supported — ensures full payment regardless of plan distributions to unsecured creditors. BUT: An obligation to 'hold harmless' on third-party debt is NOT a money judgment until the former spouse actually makes payment. In re Lerdahl, Case No. BK06-81003 (Bankr. D. Neb. 2007).

3. General Unsecured Claim

If the debt is neither a DSO nor secured, it is a general unsecured claim. In a Chapter 13 case with a low plan payment, general unsecured creditors may receive little or nothing. In Chapter 13, §523(a)(15) property settlement debts are treated as general unsecured claims and can be discharged upon plan completion.

C. Practical Tips for Filing the Proof of Claim

18. Act quickly — check the claims bar date in the bankruptcy notice
19. Attach the complete divorce decree and any modification orders
20. Identify every separate obligation under the decree — alimony arrears, child support arrears, property equalization, hold-harmless amounts actually paid — and file a separate claim or clearly itemize each on one claim
21. Check the priority box if claiming DSO status — this triggers the § 507(a)(1)(A) first-priority status
22. If the debtor owns real estate, consider whether a judgment lien exists and file as secured
23. File a claim even for contingent amounts with a statement that the claim is contingent — this preserves the right to later amend when the amount becomes liquidated

XI. OBJECTING TO CONFIRMATION OF A CHAPTER 13 PLAN: PROTECTING YOUR CLIENT'S INTERESTS

A. Why Plans Are Often Deficient

Divorce attorneys frequently fail to object to confirmation of Chapter 13 plans that improperly treat divorce-related claims. A Chapter 13 plan that fails to pay DSO claims in full or that treats a judgment lien as unsecured cannot be confirmed — but only if someone objects. If you do not object, the plan may be confirmed over your client's interests.

B. Grounds for Objecting to Confirmation

A Chapter 13 plan is not confirmable unless it meets all requirements of 11 U.S.C. § 1325. The most relevant grounds for objection by a former spouse creditor are:

1. Failure to Pay DSOs in Full (§ 1322(a)(2))

A Chapter 13 plan must provide for full payment of all claims entitled to priority under § 507(a)(1) — which includes DSOs. If the plan does not provide for full payment of your client's alimony or child support claim, the plan cannot be confirmed. This is a per se ground for objection.

In re Parkins | Case No. BK04-83600-TJM (Bankr. D. Neb. 2005)
The court denied the debtor's objection to claim and held that daycare reimbursement obligations under the dissolution decree were in the nature of support — priority claims. The court also criticized the confirmed plan for providing payment to a secured creditor ahead of the child support claimant, noting this made no social policy sense, and directed modification.

2. Failure to Recognize a Secured Claim

If your client holds a judgment lien on the debtor's real property, the plan must provide for payment of the secured claim. Under 11 U.S.C. § 1325(a)(5), a plan must either provide for full payment of a secured claim, obtain the creditor's consent to different treatment, or surrender the collateral to the creditor. A plan that treats a secured judgment as unsecured is not confirmable.

3. Failure to Pay DSOs in Full Before Distribution to Other Unsecured Creditors (§ 1325(b))

If the plan proposes to pay any unsecured creditors, it must pay DSO creditors at least as much as other unsecured creditors — and DSO creditors have first priority.

4. Bad Faith (§ 1325(a)(3))

A plan that is filed primarily to defeat a former spouse's claim, rather than to achieve a genuine reorganization, may be denied confirmation on bad faith grounds. See Banks v. Vandiver (In re Banks), 248 B.R. 799 (B.A.P. 8th Cir. 2000).

In re Osborn (Plan Objection) | Case No. BK11-41944-TJM (Bankr. D. Neb. 2012)

The court sustained the former wife's objection to confirmation where the debtor had filed inaccurate schedules and the plan failed to properly account for the mortgage payment obligation classified as a DSO. The court ordered an amended plan or threatened dismissal for bad faith.

C. Procedure for Objecting to Confirmation

24. File a written Objection to Confirmation with the bankruptcy court before the confirmation deadline — typically before the confirmation hearing
25. Serve the objection on the debtor, debtor's attorney, the Chapter 13 trustee, and all creditors
26. Clearly identify your client's claim, its classification (DSO or secured), and how the plan fails to treat it
27. Attach the divorce decree and proof of claim as exhibits
28. If you were not served notice of the bankruptcy, argue that the plan cannot be confirmed as to your client's claim

XII. ENFORCING THE DIVORCE DECREE: CONTEMPT ACTIONS AND THE BANKRUPTCY STAY

A. The Dilemma: Contempt in Bankruptcy

One of the most frustrating aspects of the bankruptcy filing for the non-filing spouse is the immediate halt to enforcement proceedings. If you have just scheduled a contempt hearing — or the ex-spouse just filed bankruptcy the day after being held in contempt — the automatic stay appears to block further enforcement.

However, as discussed in Section III, the automatic stay does not prevent all domestic enforcement. Understanding the exceptions is critical.

B. Contempt for Failure to Pay Support — Not Stayed

Under 11 U.S.C. § 362(b)(2)(B), the stay does not apply to collection of a domestic support obligation from property that is not property of the estate. Further, under § 362(b)(2)(A), the stay does not apply to the 'establishment or modification of an order for domestic support obligations.'

More importantly, courts have consistently held that a contempt proceeding for failure to pay support (DSO-type obligations) is not automatically stayed because the automatic stay does not bar 'the exercise of a police or regulatory power' under § 362(b)(4).

In re Melcher (Contempt Issue) | Case No. BK09-40653-TJM (Bankr. D. Neb. 2009)
The court granted relief from stay to allow the former wife to proceed with a contempt action against the debtor for failure to pay alimony, child support, and health insurance. The court noted it would not allow bankruptcy to be used as a shield to protect assets from liquidation to pay domestic support obligations.

C. Contempt for Property-Settlement Obligations — Stayed

A contempt proceeding aimed at enforcing a property-settlement-type obligation — as opposed to a support obligation — is generally subject to the automatic stay. If you seek to hold the debtor in contempt for failure to convey property, pay a cash equalization amount, or pay off a joint debt, that action is stayed.

Your options in this situation:

29. File a Motion for Relief from the Automatic Stay in the bankruptcy court, asking the bankruptcy court to permit the state court contempt action to proceed
30. File a proof of claim for the amount owed and participate in the bankruptcy distribution
31. After bankruptcy is over, proceed in state court on the now-enforceable obligation if it survived the discharge

D. Post-Discharge Contempt

Once the bankruptcy is closed and the discharge is entered, the discharge injunction — 11 U.S.C. § 524 — replaces the automatic stay. The discharge injunction permanently bars any action to collect a discharged debt as a personal liability of the debtor.

For divorce attorneys, this means:

- You cannot bring a contempt action for pre-petition property settlement debts that were discharged in the bankruptcy
- You MAY bring a contempt action for post-petition divorce decree violations — the discharge only covers pre-petition debts
- You MAY bring a contempt action for DSO-type obligations at any time — DSOs are never discharged
- A post-bankruptcy modification of alimony to account for the discharged property obligation may be permissible under Collett v. Collett, 707 N.W.2d 769 (Neb. 2005)

The 'Collett Provision' — A Powerful Drafting Tool

In Collett v. Collett, 707 N.W.2d 769 (Neb. 2005), the Nebraska Supreme Court held that modification of alimony to compensate for a discharged property obligation does not violate the bankruptcy discharge injunction, as long as the modification is based on a genuine change in financial circumstances. Courts have approved decree provisions that expressly provide: 'In the event the [obligor spouse] discharges any financial obligation due [the other spouse] in bankruptcy, that event shall constitute a material change of circumstances justifying modification of alimony.' This provision was upheld in In re Poole, Case No. BK12-81843-TJM (Bankr. D. Neb. 2013).

XIII. CHILD SUPPORT ENFORCEMENT AND THE BANKRUPTCY STAY

A. Child Support Is Broadly Protected from the Stay

Child support obligations receive the broadest protection from the automatic stay of any category of debt in the Bankruptcy Code. Multiple provisions of § 362(b)(2) carve out child-support-related actions from the stay:

- Establishment or modification of a child support order is not stayed (§ 362(b)(2)(A)(ii))
- Collection of child support from non-estate property is not stayed (§ 362(b)(2)(B))
- Income withholding for child support is not stayed (§ 362(b)(2)(C))
- Interception of tax refunds to satisfy child support arrears is not stayed (§ 362(b)(2)(D))
- Reporting of child support overdue amounts to credit agencies is not stayed (§ 362(b)(2)(E))
- License revocations for non-payment of support are not stayed (§ 362(b)(2)(F))

B. Child Support in the Bankruptcy Plan

In Chapter 13, ongoing child support payments must be kept current as a condition of plan confirmation. Under 11 U.S.C. § 1325(a)(8), a Chapter 13 plan cannot be confirmed if the debtor is not current on all domestic support obligation payments due after the petition date. In addition, § 1328(a) provides that the debtor must certify that all DSOs due under the plan have been paid before receiving the discharge.

In re Parkins (Child Support Policy) | Case No. BK04-83600-TJM (Bankr. D. Neb. 2005)
The court criticized a confirmed Chapter 13 plan that provided payment to a secured creditor before child support. The court instructed that the plan should be modified to provide for pro-rata distribution to the child support claimant alongside the secured creditor, reflecting the social policy that child support should not be subordinated to commercial debt.

C. Daycare and Reimbursement Obligations

Obligations to reimburse a former spouse for shared childcare expenses are treated the same as child support for bankruptcy purposes if the obligation arises from the dissolution decree. In re Parkins, Case No. BK04-83600-TJM (Bankr. D. Neb. 2005). These are priority claims entitled to the same treatment as child support in a Chapter 13 plan.

XIV. BAD FAITH BANKRUPTCY FILINGS TO AVOID DIVORCE OBLIGATIONS

A. The Good Faith Requirement

A Chapter 13 plan must be proposed 'in good faith and not by any means forbidden by law.' 11 U.S.C. § 1325(a)(3). The Eighth Circuit applies a 'totality of the circumstances' test in evaluating good faith. The relevant inquiry is whether the debtor has stated debts and expenses accurately, made no fraudulent misrepresentations, and has not unfairly manipulated the Bankruptcy Code. Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987).

Factors particularly relevant to determining good faith in the divorce context:

32. The nature of the debt sought to be discharged — debts arising from a divorce decree that would not be dischargeable in Chapter 7 bode against good faith
33. Whether the debt would be dischargeable in Chapter 7 — if it would NOT be dischargeable in Chapter 7, a Chapter 13 filing primarily to discharge that debt is suspect
34. The debtor's motivation and sincerity in seeking relief — a filing the day after a contempt order is a red flag
35. The debtor's pre-filing conduct — hiding assets, violating court orders, spending contested funds
36. Whether the plan proposes a meager repayment — a minimal plan that pays the former spouse almost nothing is a sign of bad faith

Banks v. Vandiver (In re Banks) | 248 B.R. 799 (B.A.P. 8th Cir. 2000)
The Eighth Circuit BAP affirmed denial of confirmation and dismissal where the debtor filed Chapter 13 the day after the state court finally ordered him to pay his ex-wife $177,372.83 in military pension proceeds he had spent over eight years of litigation. The only debt in his case was to the ex-wife, and he proposed to pay her less than 15% over three years. The court found this was not a good-faith effort to reorganize but an attempt to circumvent the state court and defeat his ex-wife's claim.

In re Osborn (Bad Faith Plan) | Case No. BK11-41944-TJM (Bankr. D. Neb. 2012)
The court found the Chapter 13 plan was not filed in good faith where: the debtor filed the day after being threatened with jail for contempt; he had liquidated his entire $132,000 retirement account before filing and spent the proceeds; he made false statements on amended Schedule J regarding rent and health insurance expenses; and he made no payments on his support obligations for five months before trial.

B. Remedies for a Bad Faith Filing

If you believe the debtor has filed bankruptcy primarily to avoid divorce obligations, your remedies include:

- Objection to Confirmation of the Plan under § 1325(a)(3) on bad faith grounds
- Motion to Dismiss the Case under § 1307(c) for cause, including bad faith filing

- Objection to Discharge if the debtor has been dishonest in the schedules or concealed assets — § 727(a)(2), (a)(4)
- Motion for Relief from Stay to proceed with contempt action in state court
- Reporting asset concealment to the U.S. Trustee

XV. LIEN AVOIDANCE AND DIVORCE DECREE JUDGMENT LIENS: FARREY v. SANDERFOOT AND IN RE McFEE

A. Introduction: The Power to Avoid a Judicial Lien

One of the most powerful tools a debtor has in bankruptcy is the ability to avoid certain judicial liens that impair the debtor's exemptions. Under 11 U.S.C. § 522(f)(1)(A), a debtor may avoid the fixing of a judicial lien — other than one securing a domestic support obligation — on an interest of the debtor in property to the extent that lien impairs an exemption to which the debtor would otherwise be entitled.

For divorce attorneys, this creates a critical intersection: when a debtor ex-spouse owns a home and the other ex-spouse holds a judgment lien from the divorce decree against that home, can the debtor use § 522(f) to strip that lien and protect the home as exempt homestead property?

The answer depends on a threshold question established by the United States Supreme Court: did the debtor possess an interest in the property before the lien attached? Two cases — one from the U.S. Supreme Court and one from the Bankruptcy Court for the District of Nebraska — illuminate the analysis and, critically, illustrate why the answer differs depending on the sequence of events.

B. Farrey v. Sanderfoot, 500 U.S. 291 (1991): The Lien Cannot Be Avoided

Facts

Jeanne Farrey and Gerald Sanderfoot divorced in Wisconsin in 1986. The divorce decree divided the marital estate: the decree awarded Sanderfoot sole fee simple title to the family home and real estate; Farrey received other assets and a money judgment of $29,208.44 (half the difference in the value of the parties' net assets). To secure the judgment, the decree granted Farrey a lien against Sanderfoot's real property.

Sanderfoot never paid Farrey. Three months after the decree, he filed Chapter 7 bankruptcy. He claimed the home as exempt homestead property under Wisconsin law and moved to avoid Farrey's lien under § 522(f)(1), arguing that the lien was a judicial lien impaired his homestead exemption.

The Supreme Court's Holding

The United States Supreme Court reversed, holding that § 522(f)(1) requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest. Because Sanderfoot did NOT possess any interest in the property before the divorce decree simultaneously awarded him fee simple title and granted Farrey her lien, he could not avoid the lien.

The Court's reasoning rested on the plain language of the statute. The phrase 'avoid the fixing of a lien' uses the gerund 'fixing' — a temporal event, the fastening of a liability onto a pre-existing

object. The pre-existing object must be the debtor's interest in the property. If the debtor did not possess the interest before the lien fixed, there is nothing to 'avoid.'

The Court also addressed a second theory: what if the decree did not extinguish the parties' prior interests, but merely transferred Farrey's half to Sanderfoot while encumbering it with a lien? The Court held the result was the same. Even on that theory, the lien would have fastened only to what had been Farrey's interest — the half Sanderfoot received from her — and he would never have possessed that portion without the lien already having fixed. The half of the property Sanderfoot already owned before the decree was never encumbered by Farrey's lien.

The Court further noted the purpose of § 522(f)(1): Congress designed it primarily to thwart creditors who sense an impending bankruptcy and rush to court to obtain a judgment lien to defeat the debtor's exemptions. A divorce proceeding is not that. Farrey did not obtain a lien to defeat her husband's pre-existing homestead interest; she obtained a lien to protect her own pre-existing homestead interest of equal value. Permitting Sanderfoot to use the Bankruptcy Code to strip away that protection would serve neither the statute's language nor its purpose.

Farrey v. Sanderfoot | 500 U.S. 291, 111 S. Ct. 1825 (1991)
HOLDING: A debtor cannot avoid a judicial lien under § 522(f)(1) unless the debtor possessed the property interest to which the lien attached before the lien attached. Where the divorce decree simultaneously created the debtor's property interest and the ex-spouse's lien in the same transaction, the debtor never possessed the interest free of the lien and cannot use § 522(f) to avoid it. The lien survives bankruptcy.

C. In re McFee, Case No. BK08-82078-TJM (Bankr. D. Neb. 2009): The Lien CAN Be Avoided

Facts

Scott McFee and Kathy Mock divorced in Nebraska in June 2005. The divorce decree entered various money judgments in Mock's favor totaling approximately $41,000 — all in the nature of property settlement (not domestic support obligations). At that time, McFee did not own a home.

Over three years later, in July 2008, McFee and his new wife purchased a home in Omaha, Nebraska. Under Nebraska law, Mock's pre-existing judgment automatically became a lien against the newly purchased property the moment title vested in McFee, pursuant to Neb. Rev. Stat. § 25-1504 and the principle stated in Hein v. W.T. Rawleigh Co., 167 Neb. 176, 92 N.W.2d 185 (1958): real property purchased by a judgment debtor subsequent to the rendition of judgment is subject to the lien of such judgment as soon as the title vests in the debtor.

McFee filed Chapter 13 bankruptcy in August 2008 — just over a month after the home purchase. He claimed a homestead exemption in the home and moved to avoid Mock's judgment lien under § 522(f)(1)(A), arguing it impaired his homestead exemption. Mock's counsel argued that under Farrey v. Sanderfoot, the lien could not be avoided because under Nebraska law, the judgment lien attached simultaneously with the vesting of title — i.e., McFee never possessed the property interest free of the lien.

The Court's Holding and the Key Distinction from Farrey

Chief Judge Saladino rejected Mock's Farrey argument and held that the lien could be avoided. The court drew a critical distinction between the two scenarios:

In Farrey, the debtor's property interest and the ex-spouse's lien arose out of the very same transaction — the divorce decree. They were created simultaneously by the same instrument. The debtor never owned the property at all until the moment the lien came into existence; he took the property encumbered by the lien from the start.

In McFee, by contrast, the sequence was fundamentally different: (1) Mock's judgment arose in 2005 from the divorce decree; (2) McFee acquired the home in 2008 — three years later. While Nebraska law provides that a pre-existing judgment lien attaches immediately upon a debtor acquiring property, the court noted this represents two distinct analytical steps: first, the vesting of title in the debtor; and second, immediately thereafter, the fixing of the judgment lien. Those are not the same transaction.

Because McFee's title and Mock's lien did not arise from the same transaction, McFee had at least a theoretical property interest — however brief — that pre-dated the fixing of Mock's lien on that interest. Under the Farrey rule, that is sufficient: the debtor must have 'possessed' the interest to which the lien attached 'at some point before the lien attached.' The nanosecond between title vesting and the lien fixing is enough to satisfy the statute.

In re McFee | Case No. BK08-82078-TJM (Bankr. D. Neb. May 14, 2009)
HOLDING: The debtor could avoid the ex-wife's divorce decree judgment lien under § 522(f)(1)(A) because the lien arose from the divorce decree in 2005, three years before the debtor purchased the home in 2008. While Nebraska law makes a pre-existing judgment lien attach immediately upon title vesting, this involves two analytical steps (title vesting, then lien fixing) — unlike the single simultaneous transaction in Farrey. The lien would be avoided upon completion of the Chapter 13 plan. Because the claim was not a domestic support obligation, the § 522(f)(1)(A) exception for DSO liens did not apply.

D. The Critical Distinction: Simultaneous vs. Sequential

The two cases present a clear analytical framework:

Factor	Farrey v. Sanderfoot — Lien NOT Avoidable	In re McFee — Lien IS Avoidable
How interest and lien arose	Same transaction (divorce decree simultaneously created debtor's title and ex-spouse's lien)	Different transactions (divorce judgment in 2005; home purchase in 2008)
Debtor's pre-existing interest	None — debtor never owned the property before the lien fixed	Yes — debtor took title to the home, to which the pre-existing judgment then attached

Sequence	Title and lien created simultaneously	Step 1: title vests in debtor; Step 2: pre-existing lien immediately attaches
§ 522(f)(1) result	Lien CANNOT be avoided — debtor never possessed the interest before the lien fixed	Lien CAN be avoided — debtor possessed at least a brief interest before lien attached
Policy rationale	Lien protects non-debtor spouse's pre-existing equal interest in the marital estate	Lien is a general creditor judgment, not tied to any specific pre-existing property interest of the ex-spouse

E. The § 522(f)(1)(A) Exception for Domestic Support Obligation Liens

There is an important caveat in McFee that divorce attorneys must understand. Section 522(f)(1)(A) permits avoidance of judicial liens 'other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5)' — i.e., domestic support obligations.

In McFee, the court specifically noted that Mock's claim was in the nature of a property settlement — not a domestic support obligation. Therefore, the DSO lien exception did not apply and the lien was avoidable.

⚠ Critical Point for Divorce Attorneys: Label Support Obligations Correctly

If a divorce decree creates a money judgment that is in the nature of alimony or child support — a domestic support obligation — and that judgment becomes a lien on the debtor's real estate under Neb. Rev. Stat. § 42-371, that lien CANNOT be avoided under § 522(f)(1)(A) regardless of the Farrey timing rule. The DSO lien exception in § 522(f)(1)(A) protects support liens from avoidance. This is yet another reason why proper characterization of divorce decree obligations as domestic support obligations — with clear findings supporting that classification — is essential. A support lien is protected from lien avoidance; a property settlement lien is not (subject to the Farrey timing rule).

F. Practical Implications for Nebraska Divorce Attorneys

The McFee/Farrey framework has direct practical consequences:

When the debtor ex-spouse owns property at the time of the divorce decree:

If the divorce decree simultaneously awards the property to the debtor-spouse and grants the other spouse a money judgment secured by a lien on that property, Farrey applies: the lien and the interest arose in the same transaction, and the lien likely cannot be avoided. This is the most protective scenario for the creditor spouse.

When the debtor ex-spouse later acquires new property:

If the non-debtor spouse obtained a money judgment in the divorce and the debtor later acquires real estate, the McFee rule applies: the judgment lien will attach to the new property when title

vests, but because the lien and the property interest did not arise from the same transaction, the debtor may be able to avoid the lien under § 522(f)(1)(A) as impairing the homestead exemption. The creditor spouse's lien is at risk in a later bankruptcy.

Drafting strategy — convert property settlement judgments to support obligations:

Where possible, characterizing periodic payment obligations as support-type obligations (if genuinely warranted by the facts) provides the strongest protection: (1) DSO liens are exempt from § 522(f)(1)(A) avoidance; (2) DSO claims are non-dischargeable in all chapters; and (3) DSOs are first-priority claims. A well-drafted support provision can be far more durable than a property equalization judgment when bankruptcy intervenes.

Nebraska homestead exemption:

Nebraska's homestead exemption is $120,000 under Neb. Rev. Stat. § 40-101. Under § 522(f)(1)(A), a debtor can avoid a (non-DSO) judicial lien to the extent it impairs that exemption. In McFee, the debtor had $21,350 in equity — fully within his homestead exemption — and Mock's judgment lien of over $40,000 entirely impaired it. The lien was avoidable in full.

XVI. PRACTICAL CHECKLIST FOR DIVORCE ATTORNEYS WHEN BANKRUPTCY IS FILED

Upon Learning of the Bankruptcy Filing

37. STOP all enforcement activities against the debtor — the automatic stay is in effect
38. Immediately notify the state court judge or magistrate of the bankruptcy filing
39. Obtain the bankruptcy case number and check the filing on PACER (pacer.gov)
40. Determine what Chapter was filed (7, 13, 11, or 12)
41. Determine the claims bar date from the court notice
42. Consult with a bankruptcy attorney

Evaluate What Is and Is Not Stayed

43. Can the divorce proceeding continue? Yes — on support, custody, and parenting matters
44. Is property division stayed? Yes — if it involves property of the bankruptcy estate
45. Can child support be established or modified? Yes — not stayed
46. Can contempt be pursued for non-payment of support? Yes — if for DSO-type obligations
47. Do you need to file for relief from stay to continue? Determine with bankruptcy counsel

Protect Your Client's Claim

48. Identify every obligation owed to your client from the divorce decree
49. Classify each obligation: Is it a DSO (support) or property settlement?
50. File a Proof of Claim on Official Form 410 before the claims bar date
51. Check the priority box (§ 507(a)(1)(A)) for DSO claims
52. Determine if any claim has secured status due to a judgment lien
53. Attach the complete divorce decree and all supporting documentation

Monitor the Chapter 13 Plan

54. Obtain a copy of the proposed Chapter 13 plan
55. Review the plan for proper treatment of your client's claim
56. Does the plan pay all DSO arrears in full? (Required)
57. Does the plan recognize any secured claim of your client?
58. Does the plan provide for ongoing post-petition support payments?
59. If the plan is deficient, FILE AN OBJECTION TO CONFIRMATION before the deadline

After the Discharge

60. Determine what was and was not discharged
61. Confirm that all DSO obligations remain collectable

62. Evaluate whether a post-discharge alimony modification is warranted under Collett v. Collett
63. If the debtor failed to complete Chapter 13 and the case was dismissed, § 523(a)(15) debts may again be non-dischargeable
64. Consult bankruptcy counsel before resuming any collection activity

SUMMARY OF KEY NEBRASKA AND EIGHTH CIRCUIT CASES

In re Harris, BK08-81330-TLS | Bankr. D. Neb. 2008
Alimony vs. property equalization payment — importance of state court characterization. Support function governs, not label. Time-share/Discover debts were property settlement, dischargeable in Ch. 13.

In re Braun, BK08-80400-TJM | Bankr. D. Neb. 2008
Mortgage payments on separated wife's home = DSO. Income disparity ($78k vs. <$10k), inability to retain home without payments, and hold-harmless obligation all point to support.

In re Maser, BK09-43079-TLS | Bankr. D. Neb. 2010
$70,580 installment judgment in property settlement = NOT a DSO. Parties negotiated it as equalization; $1/year alimony showed support addressed separately. Attorney fee award also property settlement.

In re Malcom, BK10-43769-TLS | Bankr. D. Neb. 2011
Pre-marital debt assigned in decree — indemnification obligation is § 523(a)(15), non-dischargeable in Ch. 7. Nature of underlying debt irrelevant; it is the decree obligation that governs.

In re Thimsen-Villa, A09-4066-TJM | Bankr. D. Neb. 2010
Attorney fee debt from marriage = non-dischargeable under § 523(a)(15) in Ch. 7. Post-BAPCPA, support/property distinction irrelevant for Ch. 7 dischargeability.

In re Osborn, BK11-41944-TJM | Bankr. D. Neb. 2012
Second mortgage to keep wife/children in home = DSO. Bad faith plan: filed day after contempt order, false schedules, liquidated retirement. Plan denied; amended plan or dismissal ordered.

In re Poole, BK12-81843-TJM | Bankr. D. Neb. 2013
Collett provision effective: $25,000 equalization payment = support where decree provided alimony would modify if payment discharged in bankruptcy. Hold-harmless on joint debt = non-dischargeable.

In re Sutton, BK14-80189-TLS | Bankr. D. Neb. 2014

$87,500 cash property settlement = general unsecured (NOT a DSO). Express label as 'cash property settlement,' lump sum payable within 60 months, no indication of support need, and state court found it a property settlement.

Banks v. Vandiver (In re Banks) | 248 B.R. 799 (B.A.P. 8th Cir. 2000)
Chapter 13 filed solely to avoid paying ex-wife's share of military pension = bad faith. Debtor spent contested funds, admitted he filed only to defeat the claim. Dismissal affirmed.

In re Schriner (Schriner v. Schriner) | Case No. 17-4006-SKH (Bankr. D. Neb. 2017)
Child support = DSO. $5,000 appellate cost = NOT DSO under § 523(a)(5) but IS non-dischargeable under § 523(a)(15). $7,500 punitive attorney fees = NOT DSO but non-dischargeable under § 523(a)(15).

In re Lerdahl, BK06-81003-TJM | Bankr. D. Neb. 2007
Hold-harmless clause on third-party debt is NOT a secured claim until reduced to a money judgment. Contingent reimbursement claims disallowed under § 502(e)(1)(B). Key case on secured vs. unsecured status of indemnification obligations.

In re Miller (Darcee Miller), BK23-41052-BSK | Bankr. D. Neb. 2024
Direct alimony payments to ex-spouse credited against judgment even though not paid through court clerk per Neb. Rev. Stat. § 42-369. Nebraska Supreme Court's Cotton v. Cotton (1986) applies: statute is directory, not mandatory. Property settlement judgment = general unsecured; alimony = priority DSO.

Phegley v. Phegley (In re Phegley) | 443 B.R. 154 (B.A.P. 8th Cir. 2011)
Monthly maintenance payments = DSO where decree found they were necessary for ex-wife to complete education and she could not support herself. Attorney fees = DSO where disparities in education and earning capacity were to be leveled. Key statement of legal standards.

Farrey v. Sanderfoot | 500 U.S. 291, 111 S. Ct. 1825 (1991)
LIEN AVOIDANCE (§ 522(f)(1)): Debtor CANNOT avoid ex-spouse's divorce decree lien where the decree simultaneously created the debtor's property interest and the ex-spouse's lien in the same transaction. Debtor never possessed the interest before the lien fixed. Supreme Court rule: § 522(f)(1) requires the debtor to have possessed the interest before the lien attached. Lien survives bankruptcy.

In re McFee | Case No. BK08-82078-TJM (Bankr. D. Neb. May 14, 2009)
LIEN AVOIDANCE (§ 522(f)(1)(A)): Debtor CAN avoid ex-wife's pre-existing divorce decree judgment lien on a home purchased three years after the divorce. Nebraska's immediate attachment rule is sequential (title vests, then lien fixes), not simultaneous — distinguishing Farrey. DSO lien exception in § 522(f)(1)(A) did not apply because claim was property settlement, not support. Avoidance conditioned on Chapter 13 plan completion.

— END OF SEMINAR MATERIALS —

Sam Turco Law Offices, P.C., L.L.O.
3006 South 87th Street | Omaha, Nebraska 68124 | (402) 614-7171

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____

Case number _____

Official Form 410

Proof of Claim

04/25

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

   _____
   Name of the current creditor (the person or entity to be paid for this claim)

   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

   ❑ No
   ❑ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
_____ Name	_____ Name
_____ Number Street	_____ Number Street
_____ City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email _____	Contact email _____

   Uniform claim identifier (if you use one):

   __

4. **Does this claim amend one already filed?**

   ❑ No
   ❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

   ❑ No
   ❑ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**

❑ No
❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**

❑ No
❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

_____

9. **Is all or part of the claim secured?**

❑ No
❑ Yes. The claim is secured by a lien on property.

Nature of property:

❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
❑ Motor vehicle
❑ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%

❑ Fixed
❑ Variable

10. **Is this claim based on a lease?**

❑ No
❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**

❑ No
❑ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check one:*

	Amount entitled to priority
❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
❑ Up to $3,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
❑ Wages, salaries, or commissions (up to $17,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/28 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(3) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

❑ I am the creditor.
❑ I am the creditor's attorney or authorized agent.
❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Print | Save As... | Add Attachment | Reset

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	)	CASE NO.
	)	
(debtor) and	)	
(co-debtor),	)	
Debtors.	)	CHAPTER 13

STIPULATION FOR RELIEF FROM AUTOMATIC STAY

COME NOW (debtor) and (co-debtor), debtors herein, and hereby stipulate and agree that Relief from the Automatic Stay, if applicable, and as found in 11 U.S.C. § 362 is granted to (debtor) and (co-debtor) allowing them to bring an Action or otherwise proceed in the domestic case titled _____v._____ _____, found at case number _____ in the District Court of (county) County, Nebraska and that said Court shall be allowed to proceed with any Hearings regarding such Divorce Proceedings now and in the future, including, but not limited to, division of property and support matters between the parties.

Dated:_____

(debtor & co-debtor), Debtors

_____
(debtor's name), Debtor

_____
(co-debtor's name), Debtor

Samuel J. Turco, Jr. #19892
3006 South 87th St.
Omaha, NE 68124
Telephone: (402) 614-7171
Attorney for Debtors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	CASE NO.
DEBTOR, Debtor.	CHAPTER 13

MOTION FOR RELIEF FROM AUTOMATIC STAY
UNDER 11 U.S.C. § 362

Now comes **DEBTOR**, (hereinafter "Movant"), the debtor in the above-captioned case, and moves this Court to enter an order granting its request for relief from the automatic stay imposed by 11 U.S.C. § 362 on the following grounds:

1. This motion requests an order from the Bankruptcy Court authorizing the person filing this motion to proceed with a divorce in state court.

2. The debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code; Erin McCartney was appointed Trustee.

3. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334, 147; 11 U.S.C. § 362; and Federal Rules of Bankruptcy Procedure 4001 and 9014.

4. That the Debtor is in process of divorcing her spouse in the District Court of Sarpy County, Nebraska, case number CI _____.

5. That the bankruptcy filing has halted the divorce proceedings.

6. This motion seeks relief solely to allow the state court to issue judgments and orders concerning (i) child custody, (ii) support; and (iii) the division of exempt property.

WHEREFORE, the Movant respectfully requests that after such notice and hearing as this Court deems appropriate, the Court enter an Order pursuant to 11 U.S.C. § 362 relieving the Movant from the automatic stay so the debtor and her spouse may complete the divorce proceeding and to enter into a property settlement arrangement, and for such other relief as the court deems just.

Dated:

DEBTOR, Debtor

/s/ Samuel J. Turco, Jr. #19892
3006 South 87th St.
Omaha, NE 68124
Telephone: (402) 614-7171
Sam.Turco@SamTurcoLawOffices.com
Attorney for Debtor

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	CASE NO.
DEBTOR, Debtor.	CHAPTER 13

NOTICE

TO: All Creditors and Interested Parties

You are further notified that any resistance to the MOTION FOR RELIEF FROM AUTOMATIC STAY UNDER 11 U.S.C. § 362 must be filed no later than _____. Any resistance to the Motion must be filed with the Clerk of the Bankruptcy Court, 111 South 18th Plz, Ste 1125, Omaha Nebraska, 68102-1321, a copy of resistance must be served upon the undersigned Attorney. If no resistance is filed, the Motion shall be granted without further hearing. If a timely resistance is filed and served, the Clerk of the Bankruptcy Court will schedule a hearing upon the resistance. All hearings shall be held in the Roman Hruska Courthouse 111 South 18th Plz, Ste 1125, Omaha Nebraska, 68102-1321.

All objections/resistances shall set forth the specific factual and legal basis for the objection/resistance and conclude with the particular request for relief. If an objection/resistance is filed without the specific factual and legal basis included, the matter will be submitted to the Judge without a hearing.

DATED:

DEBTOR, Debtor.

By: /s/ Samuel J. Turco, Jr.
3006 South 87th Street
Omaha, NE 68124
Telephone: (402) 614-7171
Attorney for Debtor

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	CASE NO.
DEBTOR, Debtor.	CHAPTER 13

CERTIFICATE OF SERVICE

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Bankruptcy Court using the CM/ECF system which sent notification of such filing to the following: U.S. Trustee; Chapter13 Trustee; and all other parties receiving CM/ECF system notices.

I further certify that a true and correct copy of the above and foregoing was mailed to the parties listed below.

/s/ Samuel J. Turco, Jr. #19892

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK08-81330-TLS
	)	
ANTHONY DWAYNE HARRIS,	)	CH. 13
	)	
Debtor.	)	

ORDER

Hearing was held in Omaha, Nebraska, on August 25, 2008, on Debtor's Chapter 13 Plan (Fil. #9), and an Objection thereto filed by Felecia Renee Campbell, the ex-wife of Debtor (Fil. #21). Erin McCartney appeared for Debtor, and Thomas Blount appeared for Felecia Renee Campbell.

Background

Debtor and Ms. Campbell were married on January 14, 1978. The marriage was dissolved by a Decree of Dissolution of Marriage entered in the Sarpy County District Court on February 24, 2005. According to the divorce Decree, Debtor was ordered to pay alimony to Ms. Campbell in the amount of $3,000.00 per month commencing March 1, 2005, and continuing for a period of 16 years. The district court judge noted on the record that Ms. Campbell was undergoing cancer treatment and that her health was a material issue. The district court judge further noted that it was a long-term marriage which produced two children, and he established alimony at the rate of $3,000.00 per month for 16 years, which was intended to provide income for Ms. Campbell until she reached age 62 or was otherwise able to receive Social Security income. The district court recognized that Ms. Campbell was unable to work due to her medical situation. In addition to the alimony for 16 years, the district court also ordered an additional $1,000.00 per month to be paid as a property equalization payment (specifically not alimony) for a period of 200 months.

The divorce Decree also divided various property interests between the parties and ordered a time-share interest to be sold. Until the time-share was sold, Debtor was ordered to make the monthly payments on the time-share. Furthermore, from the sale proceeds Debtor was ordered to pay a list of marital obligations, including certain amounts due to Discover Card Services. Debtor was entitled to receive any excess proceeds from the sale of the time-share after payment of the listed debts.

For reasons that are not entirely clear, Debtor has been unable to sell the time-share interest. However, Debtor has paid many of the debts that were to have been paid from the proceeds of the time-share. There remains due and owing indebtedness secured by the time-share and indebtedness owed to Discover Card Services. The current balance due on each of those debts is not in the record.

Ms. Campbell objects to Debtor's plan because it fails to provide for the payment of the time-share indebtedness and the Discover Card debt as priority claims. In particular, Ms. Campbell asserts that Debtor's obligation to pay those debts is a domestic support obligation which is not

dischargeable. Debtor responded that the indebtedness is in the nature of a property settlement and does not constitute domestic support obligations.

Discussion

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. For purposes of the case at hand, discharge and priorities are at issue. Domestic support obligations are not discharged in Chapter 13 proceedings. *See* 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, "the crucial question is what function did the parties intend the agreement to serve when they entered into it." *Boyle v.*

Donovan, 724 F.2d 681, 683 (8th Cir. 1984) (citing *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir. 1983)). In making that factual determination, the court evaluates a number of factors, including whether the agreement contains a separate provision for alimony or child support, and whether the debt is conditional. *Ahlf v. Ahlf (In re Ahlf)*, 354 B.R. 884, 887 (Bankr. S.D. Iowa 2006) (citing *Morel v. Morel (In re Morel)*, 983 F.2d 104, 105 (8th Cir. 1992)). Other factors considered include:

> [T]he relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments.

Ahlf, 354 B.R. at 887 (quoting *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)).

It is clear that the district court judge was concerned about providing sufficient support for Ms. Campbell when he ordered Debtor to pay alimony at the rate of $3,000.00 per month for a period of 16 years. Further, to equalize the manner in which property was divided, he also ordered Debtor to pay an additional $1,000.00 per month for 200 months, which he expressly characterized as being a property settlement and not for alimony.

As far as the time-share is concerned, the district court judge simply ordered that it be sold, the balance owed on it to be paid from the proceeds, and various other debts to be paid from the time-share proceeds. The balance of the proceeds from the time-share sale were awarded to Debtor. Accordingly, it appears to this Court that the provisions regarding the sale of the time-share and the payment of the time-share indebtedness and the Discover Card indebtedness are simply for purposes of allocating the marital debt and assets; that is, property settlement and not support. The district court judge clearly considered Ms. Campbell's support needs when granting alimony for a period of 16 years. Ordering a property to be sold and payment of certain debts from the proceeds does not appear to be in the nature of support under the circumstances of this case.

IT IS, THEREFORE, ORDERED that the Objection to Confirmation of Felecia Renee Campbell (Fil. #21) is overruled, and the plan may be confirmed by separate order.

DATED: August 26, 2008.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:

*Erin McCartney
*Thomas Blount
Kathleen Laughlin
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

Positive
As of: May 22, 2026 2:42 AM Z

Banks v. Vandiver (In re Banks)

United States Bankruptcy Appellate Panel for the Eighth Circuit

May 4, 1999, Submitted ; May 31, 2000, Filed

No. 99-6079EA No. 00-6001EA

Reporter
248 B.R. 799 *; 2000 Bankr. LEXIS 567 **; Bankr. L. Rep. (CCH) P78,189; 36 Bankr. Ct. Dec. 49; 25 Employee Benefits Cas. (BNA) 1092

In re: Ronald W. Banks, Debtor. Ronald W. Banks, Debtor-appellant. v. Sandra Vandiver, Creditor-appellee.

Prior History: [1]** Appeals from the United States Bankruptcy Court for the Eastern District of Arkansas. 98-41795 S. Honorable Mary D. Scott.

Disposition: Affirmed bankruptcy court in all respects.

Core Terms

good faith, bankruptcy court, bad faith, confirm, clearly erroneous, sincerity, military pension, fact finding, pension, former spouse, state court, repayment, bankruptcy case, modified plan, pre-filing

Case Summary

Procedural Posture

Debtor appealed from the United States Bankruptcy Court for the Eastern District of Arkansas' order denying confirmation under *11 U.S.C.S. § 1325(a)(3)*, determining Chapter 13 plan was proposed in bad faith in order to avoid payment of ex-wife's share of his pension, and from the bankruptcy court's subsequent order of dismissal.

Overview

After denial of confirmation of his Chapter 13 plan based on a finding that the plan was not proposed in good faith under *11 U.S.C.S. § 1325(a)(3)*, and dismissal of his case, debtor appealed. The panel found the nature of the debt was closely tied to debtor's pre-filing conduct, leaning against a finding of good faith. The debt in controversy arose out of eight years of bitter litigation with debtor's ex-wife in state courts. Although ownership of a portion of his military pension was in dispute, the debtor spent the entire pension monies in complete disregard of the potential consequences. The inference was that debtor never intended to pay the ex-wife's share of the pension, even if she prevailed in the state court litigation. If the case had been a Chapter 7, it was likely the ex-wife's claim would not have been discharged under *11 U.S.C.S. § 523(a)(5)*, *(15)*. Debtor's sole motivation for filing bankruptcy was to avoid paying the ex-wife. The finding of bad faith and the dismissal were affirmed.

Outcome

The finding of bad faith and the dismissal were affirmed. The inference was that debtor never intended to pay the ex-wife's share of the pension, even if she prevailed in the state court litigation. Debtor's sole motivation for filing bankruptcy was to avoid paying the ex-wife.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 On appeal, a bankruptcy appellate panel reviews the bankruptcy court's findings of fact for clear error and its conclusions of law de novo.

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN2 A fact finding is clearly erroneous when the reviewing court, based on the entire evidence, is left with a definite and firm conviction that a mistake has been committed.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Consensual Confirmations

HN3 In order to be confirmed, a Chapter 13 plan must be proposed in good faith and not by any means forbidden by law. *11 U.S.C.S. § 1325(a)(3)*.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN4 A determination as to whether a Chapter 13 plan was proposed in good faith is a finding of fact reviewable under the clearly erroneous standard.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN5 The relevant inquiry regarding good faith for confirmation of a Chapter 13 is whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code. However, the foregoing inquiry is governed by a "totality of the circumstances" test.

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Business & Corporate Compliance > Bankruptcy > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN6 Factors which are particularly relevant to

determining good faith for confirmation of a Chapter 13 under the totality of the circumstances include: (1) the nature of the debt sought to be discharged; (2) whether the debt would be dischargeable in a Chapter 7 bankruptcy case; and (3) the debtor's motivation and sincerity in seeking Chapter 13 relief. Further consideration must be given to the sincerity of the debtor in putting forth his Chapter 13 plan of repayment and whether that plan demonstrates real sincerity on the part of the debtor to repay his creditors as best he can in exchange for the liberal Chapter 13 discharge. Another relevant factor in determining good faith is the debtor's pre-filing conduct. However, even in light of egregious pre-filing conduct by the debtor, a Chapter 13 plan may be confirmed if other factors suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN7 The bankruptcy court's finding of bad faith in connection with a denial of confirmation of a Chapter 13 plan is subject to review under the clearly erroneous standard.

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Evidence > ... > Testimony > Examination > General Overview

HN8 Determinations as to the credibility of witnesses are uniquely within the province of the trier of fact. Moreover, a court's choice between two permissible views of the evidence cannot be clearly erroneous.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Estate, Gift & Trust Law > Estate Planning > Community Property > General Overview

Family Law > ... > Property Rights > Characterization > Community Property

Family Law > ... > Classification > Retirement Benefits > Pensions

HN9 Although the duration of a Chapter 13 plan is not by itself indicative of bad faith, it is a factor in gauging the debtor's sincerity where a three-year plan operates to reduce the return to pre-petition creditors.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN10 Seeking Chapter 13 relief to avoid or lessen the effects of state court litigation is not bad faith constituting unfair manipulation of the Bankruptcy Code per se. Nevertheless, a debtor's motivation in seeking Chapter 13 relief is a factor that must be considered when determining good faith, and where a debtor's behavior exhibits a pattern of manipulation, such conduct should not be rewarded in bankruptcy.

Bankruptcy Law > Individuals With Regular

Income > Plans > General Overview

HN11 The good faith requirement for confirmation of a Chapter 13 plan has at its heart the fundamental notion that bankruptcy is intended to afford the honest but unfortunate debtor the opportunity to gain for himself a fresh start; bankruptcy is not meant to reward the dishonest debtor.

Counsel: Counsel who presented argument on behalf of the appellant was Mr. Basil V. Hicks, Jr. of North Little Rock, Arkansas.

Counsel who presented argument on behalf of the appellee was Mr. David A. Grace of Little Rock, Arkansas. In addition, Mr. Robert M. Cearley, Jr., also of Little Rock, appeared on the brief.

Judges: Before KOGER, Chief Judge, KRESSEL, and WILLIAM A. HILL, Bankruptcy Judges.

Opinion by: WILLIAM A. HILL

Opinion

[*801] WILLIAM A. HILL, Bankruptcy Judge.

Debtor Ronald W. Banks appeals from the bankruptcy court's [1] order determining that he filed his chapter 13 plan in bad faith and from the bankruptcy court's subsequent order of dismissal. We have jurisdiction over these appeals from the final orders of the bankruptcy court. See *28 U.S.C. § 158(b)*. For the reasons set forth below, we affirm.

BACKGROUND

The Debtor, Ronald Banks, was an Air Force pilot and officer for many years. During 20 of those years, he was married to Sandra Vandiver. On May 27, 1982, they dissolved their marriage in the state of California. However, their divorce decree left **[**2]** open the issue of whether Vandiver would later be entitled to a portion of the Debtor's military pension. The Debtor began drawing his military pension in November 1988.

In 1990, Vandiver filed a state court action in Arkansas to determine her entitlement to a portion of the Debtor's military pension. Rather than setting aside the contested portion of the pension money he received, the Debtor spent all the funds "as he saw fit," including paying attorney fees incurred contesting Vandiver's claim. Applying Arkansas law, the state court dismissed Vandiver's suit. However, the Arkansas Court of Appeals reversed the trial court, holding that the law of California -- not Arkansas -- governed the case. On remand, the state court dismissed the case again, finding that the original California divorce court had made a final adjudication with respect to Vandiver's claim and that Vandiver's suit was barred by res judicata, collateral estoppel, and an applicable California statute of limitations. On appeal a second time, the appellate court again reversed the trial court, holding that no adjudication of Vandiver's claim had occurred in the California divorce proceeding and that Vandiver's lawsuit **[**3]** was not barred by res judicata, collateral estoppel, or the California limitations statute cited by the trial court. After the second appellate ruling in her favor, Vandiver voluntarily nonsuited her case and timely refiled it, claiming her community property interest in the Debtor's military pension benefits as a tenant in common and bringing an action for partition. The case then went to trial. Afterward, the trial court dismissed Vandiver's lawsuit a third time, and Vandiver appealed yet again. On appeal, the Arkansas Supreme Court held that the prior rulings by the Arkansas Court of Appeals were the law of the case and that the trial court erred in dismissing Vandiver's lawsuit and in

[1] The Honorable Mary D. Scott, United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas.

failing to award Vandiver 37.28 percent of the Debtor's military pension benefits.

Shortly after the Arkansas Supreme Court's decision, the Debtor filed a chapter 13 petition in bankruptcy. At the time of filing, the Debtor was in good financial shape, earning an annual income of approximately $ 62,000. He had no unsecured debt other than the judgment owed to Vandiver. Indeed, the Debtor had paid off approximately $ 10,000 in unsecured debt within a few months prior to filing bankruptcy. The only **[**4]** other significant debt the Debtor had was a home mortgage loan guaranteed by the Veteran's Administration. Shortly after the petition was filed, the automatic stay was lifted so that any remaining issues regarding the liquidation of Vandiver's claim could be resolved **[*802]** in state court. The state court then determined that Vandiver's share of the military pension benefits that had been received by the Debtor was $ 177,372.83. Vandiver filed a proof of claim that included an unsecured claim for $ 24,996.85 in attorney fees and costs in addition to a secured claim for $ 177,372.83 -- her liquidated portion of the Debtor's military pension- based on an equitable lien or constructive trust.

The Debtor responded by filing an objection to Vandiver's proof of claim, contending that her entire claim was unsecured. In addition, the Debtor proposed an initial chapter 13 plan, and later, a modified plan which treated Vandiver as an unsecured creditor and purported to pay her less than 15 percent of the total amount asserted in Vandiver's proof of claim. The judgment debt owed to Vandiver was the only significant debt to be dealt with under the Debtor's modified three-year plan. Vandiver objected **[**5]** to confirmation of the Debtor's plan, contending, inter alia, that it was not filed in good faith.

On June 29, 1999, the bankruptcy court conducted a hearing on Vandiver's objection to confirmation as well as the Debtor's objection to Vandiver's proof of claim. On September 17, 1999, the bankruptcy court issued an order that sustained the Debtor's objection to Vandiver's proof of claim without prejudice to her filing an adversary proceeding and motion for reconsideration, reasoning that the procedural safeguards attendant a full adversary proceeding would be necessary for the bankruptcy court to impose an equitable lien or constructive trust on the Debtor's property. However, the bankruptcy court also sustained Vandiver's objection to confirmation on the grounds that the plan was proposed in bad faith. The bankruptcy court specifically stated:

> The chapter 13 plan proposes to pay [the Debtor's] unsecured creditors approximately fifteen percent of the debt owed, over a three year period. However, the only unsecured creditor the debtor has is his former spouse. The only debt to be paid pursuant to this plan is a portion of a pension he is required to pay to his former spouse. **[**6]**
>
> The debtor admits that he filed this chapter 13 case because he was about to be compelled to pay the long-unpaid benefits. Having been finally ordered by the state Chancery Court to pay the past due amounts to his former spouse, he sought to circumvent the state court's authority and to thwart his former spouse by filing a bankruptcy case and substantially devaluing her claim.
>
> * * * * *
>
> This debtor is not in need of bankruptcy relief and filed his chapter 13 plan solely to ensure that his former spouse does not obtain most of the pension money to which she is entitled, but which he chose to spend. The plan proposes to pay his

former spouse a meager portion of the amount to which she is not only entitled, but needs. The plan, as such, is not filed in good faith and cannot be confirmed. At minimum, since this debtor filed a case without either the need for relief from debt or the desire for reorganization, but merely sought to avoid payment of a single debt, any modification which would meet the good faith standard must provide for payment for the entire debt, either in full within the time limits of chapter 13, or provide that repayment of the debt will be a continuing one.

[7]** The bankruptcy court's order also provided for automatic dismissal of the bankruptcy case in the event that the Debtor failed to file a plan conforming to the bankruptcy court's decision.

The Debtor filed a motion to amend the bankruptcy court's order of September 17, 1999. By the order dated October 20, 1999, the bankruptcy court granted the Debtor's motion only insofar as removing certain footnotes which were not essential to the court's decision. On December 13, **[*803]** 1999, the Debtor's bankruptcy case was dismissed for failure to file a modified plan conforming to the bankruptcy court's previous decision.

The Debtor appeals from the bankruptcy court's orders of September 17, 1999, October 20, 1999, and December 13, 1999. The Debtor argues that the bankruptcy court clearly erred in making certain findings of fact, including the finding that he proposed his chapter 13 plan in bad faith.

STANDARD OF REVIEW

HN1 On appeal, we review the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. Fed. R. Bankr. P. 8013; *Hatcher v. U.S. Trustee (In re Hatcher), 218 B.R. 441, 445 (B. A.P. 8th Cir. 1998)* (citations omitted); *Gourley v. Usery (In re Usery), 123 F.3d 1089, 1093 (8th Cir. 1997)*; **[**8]** *O'Neal v. Southwest Mo. Bank (In re Broadview Lumber Co.), 118 F.3d 1246, 1250 (8th Cir. 1997)*. ***HN2*** A fact finding is clearly erroneous when the reviewing court, based on the entire evidence, is left with a definite and firm conviction that a mistake has been committed. *Hatcher, 218 B.R. at 445-46* (citations omitted).

DISCUSSION

HN3 In order to be confirmed, a chapter 13 plan must be proposed "in good faith and not by any means forbidden by law." *11 U.S.C. § 1325(a)(3)*. ***HN4*** A determination as to whether a chapter 13 plan was proposed in good faith is a finding of fact reviewable under the clearly erroneous standard. *Nielsen v. DLC Investment, Inc. (In re Nielsen), 211 B.R. 19, 21 (B. A.P. 8th Cir. 1997)*; *Noreen v. Slattengren, 974 F.2d 75, 77 (8th Cir. 1992)*; *Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1349-52 (8th Cir. 1990)*.

HN5 The relevant inquiry regarding good faith is "whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy **[**9]** Code." *Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987)*. However, the foregoing inquiry is governed by a "totality of the circumstances" test. *Noreen, 974 F.2d at 76*; *LeMaire, 898 F.2d at 1349*; *In re Estus, 695 F.2d 311, 316 (8th Cir. 1982)*. ***HN6*** Factors which are particularly relevant to determining good faith under the totality of the circumstances include: (1) the nature of the debt sought to be discharged; (2) whether the debt would be dischargeable in a chapter 7 bankruptcy case; and (3) the debtor's motivation and sincerity in seeking chapter 13

relief. *LeMaire, 898 F.2d at 1349* (citing *Estus, 695 F.2d at 317*). See also *In re Kurtz, 238 B.R. 826, 830 (Bankr. D.N.D. 1999)* ("Further consideration must be given to the sincerity of the Debtor in putting forth his Chapter 13 plan of repayment and whether that plan demonstrates real sincerity on the part of [the Debtor] to repay his creditors as best he can in exchange for the liberal Chapter 13 discharge."). Another relevant factor in determining good faith is the Debtor's pre-filing conduct. **[**10]** *LeMaire, 898 F.2d at 1352* (citations omitted). However, even in light of egregious pre-filing conduct by the Debtor, a chapter 13 plan may be confirmed if other factors "suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims." Id. (citation omitted).

HN7 The bankruptcy court's finding of bad faith is subject to review under the clearly erroneous standard. Although the Debtor contests various subsidiary fact findings, he ultimately fails to show that the bankruptcy court's finding of bad faith was clearly erroneous. For example, the Debtor argues that the bankruptcy court should not have found that he accumulated $ 107,000 in a savings account, that his demeanor revealed rancor, or that he failed to assist his children in pursuing a college education. Indeed, some of the factual issues raised in the Debtor's argument appear to have only scant relevance to the ultimate finding of bad faith. Nevertheless, **[*804]** the bankruptcy court heard testimony from both sides regarding these factual issues, made its credibility determinations, and based its findings thereon. ***HN8*** Determinations as to the credibility of witnesses are **[**11]** uniquely within the province of the trier of fact. *Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388, 1394 (8th Cir. 1997)* (citing *Anderson v. City of Bessemer, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)*). Moreover, a court's choice between two permissible views of the evidence cannot be clearly erroneous. *Delo, 115 F.3d at 1393-94* (citing *Moody v. Proctor, 986 F.2d 239, 241 (8th Cir. 1993)*). Accordingly, the Debtor's argument must fail.

Furthermore, there is ample evidence in the record to support the bankruptcy court's finding that the Debtor proposed his chapter 13 plan in bad faith. First, the nature of the debt at issue is closely tied to the Debtor's pre-filing conduct, and these factors bode against a finding of good faith. The debt in controversy arose out of eight years of bitter litigation in the state courts. Although ownership of a portion of his military pension was in dispute, the Debtor nevertheless spent the entire pension monies he received in complete disregard of the potential consequences for doing so. A possible inference to be drawn from such conduct is that the Debtor *never* **[**12]** intended to pay Vandiver her share of the pension, even if she prevailed in the state court litigation. Indeed, it seems apparent from the record that the Debtor funded his legal battle against Vandiver, at least in part, with pension monies that were ultimately adjudicated to be Vandiver's marital community property. Second, the potential dischargeability of the debt under chapter 7 bodes against a finding of good faith. If the Debtor had filed for protection under chapter 7 of the Bankruptcy Code, it is likely that Vandiver would have had at least a colorable claim for nondischargeability of the debt at issue. See *11 U.S.C. § 523(a)(5), (15)*. Third, the Debtor's motivation and sincerity in seeking chapter 13 relief bode against a finding of good faith. In this case, the Debtor admitted that his sole motivation for filing bankruptcy was to avoid paying Vandiver on the debt at issue. [2] This admission, combined

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[2] ***HN10*** Seeking chapter 13 relief to avoid or lessen the effects of state court litigation is not "bad faith constituting unfair manipulation of the Bankruptcy Code" *per se*. *Bayer v. Hill (In*

with the fact that the Debtor proposed only a three-year plan that paid less than 15 percent of Vandiver's claim, supports the bankruptcy court's finding that the Debtor's modified plan was proposed in bad faith as yet one more attempt to deny Vandiver **[**13]** her marital community property interest in the Debtor's pension. See *In re Zaleski, 216 B.R. 425, 431 (Bankr. D.N.D. 1997)* ("***HN9*** Although …the duration of a plan is not by itself indicative of bad faith, it is a factor in gauging the debtor's sincerity where, as here, a three-year plan operates to reduce the return to pre-petition creditors."). Indeed, the Debtor's admitted motivation for seeking chapter 13 relief suggests that his **[*805]** modified plan was proposed not with the intention of satisfying Vandiver's claim to the greatest extent possible, but with the intention of *avoiding* payment of that claim to the greatest extent possible, and the meager repayment percentage proposed by the Debtor's plan supports this conclusion. Such a purpose is the antithesis of good faith in the context of chapter 13. Since there is no strong evidence of good faith on the part of the Debtor, we are not left with a definite and firm conviction that a mistake has been committed. Therefore, the bankruptcy court's finding that the Debtor proposed his modified chapter 13 plan in bad faith is affirmed.

[14]** Finally, the bankruptcy court dismissed the case based on the Debtor's failure to file a new modified plan satisfying the good faith requirement of *11 U.S.C. § 1325(a)(3)*. The bankruptcy court's dismissal of the case was correct and is hereby affirmed as well.

CONCLUSION

For the foregoing reasons, we affirm the bankruptcy court in all respects.

End of Document

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re Bayer), 210 B.R. 794, 796 (B. A.P. 8th Cir. 1997). Nevertheless, the Debtor's motivation in seeking chapter 13 relief is a factor that must be considered when determining good faith, and where a debtor's behavior exhibits a pattern of manipulation, such conduct should not be rewarded in bankruptcy. See *Zaleski, 216 B.R. at 429* ***HN11*** ("The [good faith] requirement has at its heart the fundamental notion that bankruptcy is intended to afford the honest but unfortunate debtor the opportunity to gain for himself a fresh start; bankruptcy is not meant to reward the dishonest debtor."). During eight years of state court litigation, the Debtor consciously chose to spend the contested portion of the pension monies he received, thereby manufacturing the debt to Vandiver he now seeks to discharge in bankruptcy. The record indicates that the Debtor was gainfully employed at all times during that period and that it was not necessary for the Debtor to invade the contested portion of his military pension to provide for himself and his two dependents. Thus, the Debtor is not of the "honest but unfortunate" variety that the Bankruptcy Code was intended to protect, and his conduct in this case allows an inference of dishonest manipulation to be drawn.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
LORI S. MALCOM,	)	
	)	CASE NO. BK10-43769-TLS
Debtor(s).	)	A11-4020-TLS
BENJAMIN ALAN NICHELSON,	)	
	)	
Plaintiff,	)	CH. 7
	)	
vs.	)	
	)	
LORI SUE MALCOM,	)	
	)	
Defendant.	)	

ORDER

This matter is before the court on the cross-motions for summary judgment by the plaintiff (Fil. No. 10) and the debtor-defendant (Fil. No. 11). Claude E. Berreckman, Jr., represents the debtor, and Amber L. Ackerson represents the plaintiff. Evidence and briefs were filed, and the motions were taken under advisement as submitted without oral arguments.

The motion is granted.

The parties were formerly married to each other. A decree of dissolution of their marriage was entered on October 27, 2009, by the District Court of Dawson County, Nebraska, in which the court found certain debt, namely loans owed to Cozad State Bank and American National Bank and debt owed to Bank of America VISA, to be the separate obligation of Ms. Malcom and ordered her to hold Mr. Nichelson harmless thereon. Mr. Nichelson subsequently paid $11,526.46 to Cozad State Bank and seeks the debt from discharge under 11 U.S.C. § 523(a)(15).[1] Each party has now moved for summary judgment.

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[1]Section § 523(a)(15) provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor 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[.]

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The court must examine the record to ascertain whether the movant, through depositions, answers to interrogatories, admissions, affidavits, and other evidence, has demonstrated the absence of a genuine issue of material fact. *Beard v. Banks*, 548 U.S. 521, 529 (2006). If the movant has done so, then the non-moving party, bearing the burden of persuasion, must by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial. *Id.* The court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue. *Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939, 943-44 (8th Cir. 2008).

The following facts are undisputed:

1. Cozad State Bank is now known as Homestead Bank.

2. Mr. Nichelson and Ms. Malcom entered into the promissory note at issue on October 25, 2007.

3. The note was for the principal amount of $16,052.00. Its stated purpose was "to pay off debt at First Bank & Trust and student loans." The collateral for the note was a 2000 Ford pickup truck that apparently was owned by Mr. Nichelson.

4. Mr. Nichelson and Ms. Malcom were married on June 28, 2008.

5. The marriage was dissolved on October 27, 2009.

6. No appeal was taken from the decree of dissolution.

7. Ms. Malcom made no payments on the promissory note.

8. Mr. Nichelson voluntarily paid the promissory note in full on or about September 30, 2010.

9. No debt was owed to Homestead Bank at the time of Ms. Malcom's Chapter 7 bankruptcy filing on December 20, 2010.

Ms. Malcom argues that the Dawson County District Court's finding that the debt was a non-marital debt owed by Ms. Malcom should be given no legal effect in the bankruptcy case because each party voluntarily obligated themselves to the bank prior to the marriage and did not incur any debt to the bank during the marriage. In other words, according to Ms. Malcom, the parties' respective obligations to the bank were determined prior to their marriage and cannot be altered by the dissolution decree, particularly when the state court expressly found the debt to be non-marital.

Ms. Malcom also attempts to distinguish this case from other § 523(a)(15) decisions because this involves a pre-marital debt.

The dissolution decree states:

> (3) The following debts are non-marital debts:
>
> (A) Item 11 is the debt owed to the Cozad State Bank. The parties incurred this debt while cohabiting and as part of a larger plan to consolidate and pay pre-cohabitation debts, which includes Lori's student loan and debt she owed First Bank & Trust. The evidence establishes the debts consolidated into the first Cozad State Bank loan were debts Lori incurred prior to the cohabitation. After consideration of the evidence on this matter, the court finds that the debt owed to the Cozad State Bank is a non-marital pre-cohabitation debt of Lori and is her separate obligation.

Decree of Dissolution of Marriage, at 6 (Fil. No. 5).

The terms of the dissolution decree did not alter the parties' obligations on the promissory note. Rather, the decree created a new obligation on the part of Ms. Malcom to hold Mr. Nichelson harmless on the Cozad State Bank debt. That obligation is what is non-dischargeable under § 523(a)(15), so the fact the underlying note was a pre-marital debt is irrelevant.

> [I]n the case of an obligation to pay a debt owed to a third party, it is the obligation to hold the spouse or former spouse harmless that is presumptively nondischargeable under this section. *See* 140 Cong. Rec. H10752, H10770. "A property settlement incorporated by a divorce decree that apportions third party debt to one spouse means that the obligor-spouse indemnifies the obligee-spouse in the event that the obligee is required to pay." *In re Sturdivant*, 289 B.R. 392, 399 (citing *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 303 (Bankr. E.D. Ark. 1996)). This is true even if there is no "hold harmless" language in the decree or complaint. *Johnston* at 303 (interpreting Arkansas law) (citing *Thomas v. Thomas*, 246 Ark. 1126, 443 S.W.2d 534 (Ark. 1969); *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (Ark. 1991); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank*, 774 F.2d 909 (8th Cir. 1985)).

Douglas v. Douglas (In re Douglas), 369 B.R. 462, 463-64 n.2 (Bankr. E.D. Ark. 2007); *see also Bryan Mem'l Hosp. v. Allied Prop. & Cas. Sur. Co.*, 163 F. Supp. 2d 1059, 1069 (D. Neb. 2001) ("[W]here benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value.").

Here, Ms. Malcom failed to uphold her indemnification obligation to Mr. Nichelson. He had to pay off the bank's debt himself to protect his vehicle and his credit rating. Accordingly, the amount paid by Mr. Nichelson is a non-dischargeable debt. Mr. Nichelson also asks for interest, costs, and attorney's fees. Federal Rule of Bankruptcy Procedure 7054(b) permits the court to allow

costs to the prevailing party except when a federal statute or the federal rules of procedure otherwise provide. The court's discretion in this regard is limited by 28 U.S.C. § 1920, which contains a list of taxable costs. *Williams v. Pillar Capital Holdings, LLC (In re Living Hope Sw. Med. Servs., LLC)*, ___ B.R. ___, 2011 WL 887968, at *17 (Bankr. W.D. Ark. Mar. 14, 2011). To the extent the plaintiff seeks to recover fees listed in § 1920, he may file a bill of costs. Attorney's fees incurred in litigating dischargeability issues are generally not recoverable in the absence of a contractual or statutory provision. *Siemer v. Nangle (In re Nangle)*, 281 B.R. 654, 657 (B.A.P. 8th Cir. 2002).

IT IS ORDERED: The plaintiff's motion for summary judgment (Fil. No. 10) is granted. The debtor-defendant's motion for summary judgment (Fil. No. 11) is denied. Separate judgment will be entered.

DATED: August 3, 2011.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*Claude E. Berreckman, Jr.
*Amber L. Ackerson
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
LORI S. MALCOM,	)	
	)	CASE NO. BK10-43769-TLS
Debtor(s).	)	A11-4020-TLS
BENJAMIN ALAN NICHELSON,	)	
	)	
Plaintiff,	)	CH. 7
	)	
vs.	)	
	)	
LORI SUE MALCOM,	)	
	)	
Defendant.	)	

JUDGMENT

This matter is before the court on the cross-motions for summary judgment by the plaintiff (Fil. No. 10) and the debtor-defendant (Fil. No. 11). Claude E. Berreckman, Jr., represents the debtor, and Amber L. Ackerson represents the plaintiff.

IT IS ORDERED: For the reasons stated in the Order of today's date, judgment is hereby entered in favor of the plaintiff and against the debtor-defendant. The debt in the amount of $11,526.46 is excepted from discharge under 11 U.S.C. § 523(a)(15).

DATED: August 3, 2011.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*Claude E. Berreckman, Jr.
*Amber L. Ackerson
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

In Re:	CASE NO. BK 16-41602-SKH
SARA J SCHRINER,	Chapter 7
Debtor. _____/	
CECIL SCHRINER,	
Cecil Schriner,	
v.	Adversary No. 17-4006
SARA J SCHRINER,	
Sara Schriner. _____/	

ORDER GRANTING JUDGMENT
ON COUNTS IV AND V OF THE COMPLAINT

Creditor/Plaintiff Cecil Schriner (Schriner) initiated this adversary proceeding by Complaint filed on February 23, 2017. In his Complaint, Schriner seeks a determination denying Debtor/Defendant Sara Schriner (Debtor) a discharge under 11 U.S.C. §§ 727(a)(2), (a)(4), and/or (a)(5). He also seeks a finding that Debtor's debts to Schriner are excepted from discharge pursuant to 11 U.S.C. § 523(a)(5) and (a)(15). Debtor filed an Answer on April 4, 2017.

On May 24, 2017, Schriner filed a Motion for Partial Summary Judgment, arguing that the child support and attorney fees outlined in Counts IV and V of his Complaint should be excepted from discharge under 11 U.S.C. § 523(a)(5) or § 523(a)(15) as a matter of law because there is no genuine issue as to any material fact germane to these counts. Debtor filed a Brief in Opposition to Motion for Summary Judgment and

an Affidavit on June 22, 2017. In her Brief, Debtor does not dispute that child support is excepted from discharge under section 523(a)(5) and (a)(15). She asserts that the sole issue in this proceeding is whether the two awards of attorney fees are excepted from discharge under section 523(a)(5). Debtor argues that a district court order dated August 25, 2016, awarding $7,500 in attorney fees to Schriner was punitive and not in the nature of support. She maintains this award may not be excepted from discharge under section 523(a)(5). She notes that the appellate order assessing $5,000 in costs arising from attorney fees speaks for itself and makes no argument related to this order. In her affidavit, she asserts that this cost assessment is not in the nature of support. Doc. 22.

On July 26, 2017, the Court held oral argument on Schriner's Motion for Partial Summary Judgment. During the hearing, the Court advised the parties that a question of fact would prevent judgment on Counts IV and V. The parties agreed to submit the matter to the Court for a determination on the merits of the claims Schriner alleged in Counts IV and V. They offered the same exhibits on the merits of their claims and defenses as they submitted on motion for partial summary judgment. At the hearing, the Court received the following evidence which comprises the record for trial of the claims alleged in Counts IV and V of the Complaint: Claim 3-1 in Bankruptcy Case 16-41602, Documents 16, 12, 13, 14, 21 and 22 in Adversary Proceeding 17-4006. The parties stipulated that Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 24, 2016.

I. BACKGROUND

Schriner and Debtor are former spouses. They divorced in February 2014. The Decree of Dissolution entered on February 3, 2014, in the District Court, Franklin County, Nebraska, granted legal and physical custody of their minor children to Schriner and visitation rights to Debtor. Doc. 13 at 1. In the decree, the court ordered Debtor to pay child support in the amount of $617 per month. Id. Debtor filed an appeal of this Decree with the Nebraska Court of Appeals (Appeal No. A-14-371). Id.

A. Support Issues

On June 16, 2014, while the appeal of the divorce decree was pending, Debtor filed a Complaint to Modify the Decree. The court held a hearing on her request to modify the divorce decree on August 12, 2014. On November 18, 2014, the district court entered a Journal Entry and Order modifying the child support amount to $335 per month from February 1, 2014, to June 1, 2014. In the Order, the district court also increased the child support to $406 per month effective July 1, 2014, based on Debtor's increased earnings. Debtor appealed (Appeal No. A-15-055). The Nebraska Court of Appeals discovered that Appeal No. A-14-371 was still pending and found that the district court lacked jurisdiction to enter the Journal Entry and Order dated November 18, 2014. The Nebraska Court of Appeals dismissed Appeal No. A-15-055 on October 5, 2015, and the district court treated the Journal Entry and Order of November 18, 2014 as a nullity.

The Nebraska Court of Appeals ruled on the support issues in Appeal No. A-14-371 and issued a mandate dated October 29, 2015, affirming the portion of the divorce decree that awarded custody to Schriner and reversing the part of the Decree that set

the child support in the sum of $617 per month. Id. It also ordered Debtor to pay $5,125 in costs, $5,000 of which were due to Schriner for attorney fees. Doc. 12.

On November 23, 2015, the district court entered an Order on Mandate, reducing Debtor's child support payments to $321 per month for two children and $239 per month for the support of one child, commencing February 1, 2014. In this Order on Mandate, the district court also ordered that judgment be entered in favor of Schriner and against Debtor in the sum of $5,000 with interest at 2.107% per annum "on account of the Attorney Fees awarded as costs to the Appellee/Plaintiff by the Court of Appeals." Doc. 13 at 3.

B. Custody and Parenting Time Issues

On December 3, 2014, before the divorce decree was affirmed on custody issues, Debtor filed for modification of custody time in the divorce decree. Doc. 14 at 2. In her request for modification, Debtor sought more parenting time, demanded the right to be present at all medical/dental appointments and requested that Schriner notify her of all such medical/dental and dermatology appointments and any school/church extracurricular activities. She also requested notification of all day care providers. Schriner filed an Answer and Cross-Complaint on January 26, 2015.

The Nebraska Court of Appeals affirmed the district court's divorce decree on custody and parenting time issues and entered a Mandate on May 23, 2015.

Schriner filed an Amended-Cross Complaint on June 22, 2015, requesting a modification to standard visitation, a reduction of parenting exchanges and a reduction in Debtor's participation in the children's medical care and extracurricular activities. Schriner also requested attorney fees and parameters on co-parenting.

In an August 23, 2016, Journal Entry and Order, the district court denied most of Debtor's requests for modification and granted most of Schriner's requests in his cross-complaint. Doc. 14 at 5. In reaching this conclusion, it found that Debtor "has been disruptive, controlling and rude," and "she is not acting in the best interests of the children in promoting their emotional growth." Doc. 14 at 6.

Both parties requested attorney fees. The district court denied Debtor's request and granted Schriner's request for attorney fees. It explained:

> The Court in this case is awarding attorney fees to Plaintiff's counsel because Defendant prevailed on one issue, i.e., day care notification, which the Plaintiff agreed to. In addition, her modification was frivolous and she acted in bad faith by attempting to alienate the children and then asking for more parenting time. The Court does not reward bad behavior.

Doc. 14 at 8.

The district court ordered Debtor to pay $7,500.00 of Schriner's attorney fees at the rate of $125.00 per month, effective October 1, 2016. Doc. 14 at 8.

On October 24, 2016, Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code.

II. ANALYSIS

In general, the statutory exceptions to discharge in bankruptcy are narrowly construed to effectuate the fresh start policy of the Bankruptcy Code. Owens v. Miller (In re Miller), 276 F.3d 424, 429 (8th Cir. 2002). Exceptions from discharge for spousal and child support deserve a more liberal construction, however, because "the policy underlying § 523 favors enforcement of familial support obligations over a fresh start for the debtor." Phegley v. Phegley (In re Phegley), 443 B.R. 154, 157 (B.A.P. 8th Cir. 2011) (citing Holliday v. Kline (In re Kline), 65 F.3d 749 (8th Cir. 1995); Williams v. Kemp (In re Kemp), 242 B.R. 178, 181 (B.A.P. 8th Cir. 1999), aff'd 232 F.3d 652 (8th

Cir.2000)); Nab v. Manard-Hester (In re Manard-Hester), 2009 WL 2501142, at *3 (Bankr. D. Neb. Aug. 12, 2009). This principle remains true even if the support obligation is owed directly to a third party, such as fees owed to attorneys which are in the nature of maintenance or support of the former spouse or of the child of the debtor. In re Manard-Hester, 2009 WL 2501142, at *3.

A creditor opposing discharge of a debt carries the burden of proving that the debt falls within an exception to discharge. Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir. 1993) (per curiam). Preponderance of the evidence is the standard of proof that applies to discharge exceptions under section 523(a). Grogan v. Garner, 498 U.S. 279, 286–87 (1991); Simek v. Erdman (In re Erdman), 236 B.R. 904, 911 (Bankr. D.N.D. 1999). If the objecting creditor fails to establish every element under section 523(a), the indebtedness at issue is dischargeable. In re Erdman, 236 B.R. at 911.

A. Count IV – Debts Excepted from Discharge under 11 U.S.C. § 523(a)(5).

In Count IV, Schriner alleges that child support accruing at the rate of $321.00 per month, attorney fees in the sum of $4,669.68 plus interest assessed in connection with an appeal of the divorce decree, and $7,500 plus interest awarded by the district court on August 25, 2016 are excepted from discharge under section 523(a)(5).

Section 523(a)(5) provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (5) for a domestic support obligation.

11 U.S.C. § 523(a)(5).

In determining whether a debt falls under section 523(a)(5), courts look to the definition of "domestic support obligation" found in section 101(14A) of the Bankruptcy Code.[1] See, e.g., In re Phegley, 443 B.R. at 157; In re Harris, 2008 WL 4020608 at * 2 (Bankr. D. Neb. Aug. 26, 2008); Schultz v. Schultz (In re Schultz), 2012 WL 5879129 at * 1 (Bankr. D. Neb. Nov. 21, 2012). In this case, the debts for child support and attorney fees accrued before and after the date of petition, they are owed to a former spouse and they were established before the petition date by reason of the divorce decree. The only issue raised regarding the definition of "domestic support obligation"

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[1] Under section 101,

> (14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
>
> (A) owed to or recoverable by—
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

under section 101(14A) is whether the debts are "in the nature of alimony, maintenance, or support." See 11 U.S.C. § 101(14A)(B).

Whether a particular debt is in the nature of support is a question of federal bankruptcy law, not state law. In re Phegley, 443 B.R. at 158. While a state court's characterization of an award as maintenance or alimony in a divorce decree should be given deference, it does not bind a bankruptcy court. Id. (citing In re Hamblen, 233 B.R. 430, 435 (Bankr. W.D. Mo. 1999). This characterization is a starting point when determining the intended function of the awards. Id.

When deciding whether a debt should be characterized as one for support, the crucial question is the function the award was intended to serve. Id. at 157. "Factors considered by the courts in making this determination include: the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments." Id. at 158.

1. Child Support

The definition of domestic support obligation includes debts that accrue before, on or after the petition date for the support of children. 11 U.S.C. § 101(14A). Debtor does not dispute that child support is a domestic support obligation. This debt is excepted from discharge under section 523(a)(5).

2. $5,000 Appellate Court Cost Assessment

In her affidavit, Debtor claims that the $5,000 attorney fee award arising from her appeal of the divorce decree was not in the nature of support. Doc. 22. She offers no details in support of this testimony.

In support of his claim that this debt is excepted from discharge, Schriner offered a district court order referring to the appellate court cost assessment (Doc. 13) and the Nebraska Court of Appeals Mandate that assessed attorney fees as a cost (Doc. 12). Schriner did not offer the Nebraska Court of Appeals opinion.

In its opinion, the district court reviewed and implemented the appellate decision. Doc. 13. In doing so, it discussed the income and household debt obligation disparity between the parties: Debtor earns substantially less than Schriner and the district court found she was responsible for paying only 10.74% of the household obligations. Nothing in the opinion suggests that it would be difficult for Schriner to subsist without reimbursement for his attorney fees; there is no discussion about his needs or actual expenses. The opinion contains no information suggesting the attorney fee cost assessment was in the nature of support for Schriner. The district court simply recalculated the support amounts based on the Child Support Guidelines. Conversely, Debtor offered evidence suggesting that the $5,000 attorney fee award was not in the nature of support. The burden of proving an exception to discharge is on Schriner. He failed to meet the burden of proving the $5,000 attorney fee cost assessment is in the nature of support and thus excepted from discharge under section 523(a)(5).

3. $7,500 District Court Attorney Fee Award

Schriner also seeks a determination excepting the district court's August 25, 2017 award of $7,500 in attorney fees from discharge under section 523(a)(15). In its order, the district court did not discuss the financial condition of the parties, their employment histories, marital property or Schriner's reliance on the attorney fee award to subsist. The district court only discussed issues related to custody and visitation. Again, Schriner offered no evidence suggesting that it would be difficult for Schriner to subsist without reimbursement for his attorney fees; there is no discussion about his needs or actual expenses. There is no evidence from which this Court may conclude that the attorney fee award was in the nature of support.

Further, the reasons the district court awarded attorney fees to Schriner are clear. It ordered Debtor to pay Schriner's attorney's fees because Debtor prevailed on only one issue in their custody and visitation dispute, Debtor's case was frivolous and she acted in bad faith. Doc. 14 at 8. Since the $7,500 attorney fee cost assessment is not "in the nature of support" but rather a punitive measure, it is not a debt excepted from discharge under section 523(a)(5).

1. Count V – Debts Excepted from Discharge Under 11 U.S.C. § 523(a)(15).

In Count V, Schriner requests that the Court determine Debtor's debts arising from attorney fee awards are excepted from discharge under section 523(a)(15).

Section 523(a)(15) provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor 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).

To be excepted from discharge under section 523(a)(15), the debt must (1) be owed to the debtor's spouse, former spouse, or child; (2) not be of the type described in section 523(a)(5) referring to domestic support obligations; and (3) have been incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other court order In re Finkey, 2008 WL 2165979 at *1 (Bankr. D. Neb. May 21, 2008).

The debts at issue arise from attorney fee awards to Schriner. Thus, the debts are owed to debtor's former spouse, establishing the first element of this claim.[2] As discussed above, Schriner did not meet his burden of showing that the attorney fee award and cost assessment were in the nature of domestic support. Consequently, they are not of the type described under section 523(a)(5), establishing the second element. Finally, Schriner offered evidence showing that the attorney fee awards were incurred "in connection with" a divorce. The Nebraska Court of Appeals assessed Debtor $5,000 when she lost her appeal of the divorce decree and the district court

[2] While the language of section 523(a)(15) refers only to debts to a spouse or former spouse, it has been interpreted to extend to debts owed to third parties, including attorneys. See, e.g., In re Thimsen-Villa, 2010 WL 1609685 at *2 (Bankr. D. Neb. Apr. 20, 2010) (granting an exception from discharge under section 523(a)(15) for a debt of attorney fees incurred during a marriage); In re Finkey, 2008 WL 2165979 at *1 (Bankr. D. Neb. May 21, 2008) (finding that a debt owed to a bank was excepted from discharge under section 523(a)(15)).

awarded Cecil Schriner attorney fees because Debtor filed frivolous divorce decree modification requests and she acted in bad faith by attempting to alienate the children and then asking for more parenting time. Accordingly, the attorney fee award and cost assessment are excepted from discharge under section 523(a)(15).

III. Conclusion

For the reasons stated above, **IT IS ORDERED** that judgment shall be entered as follows:

Count IV: Schriner's prayer for relief is granted in part and denied in part. Schriner's request for a determination that child support is excepted from discharge under 11 U.S.C. § 523(a)(5) is granted. Schriner's request for a determination that the attorney fees referenced in Count IV are excepted from discharge under 11 U.S.C. § 523(a)(5) is denied.

Count V: Schriner's pray for relief is granted.

Debts arising from the attorney fee award and cost assessment owed by Debtor to Schriner are excepted from discharge under 11 U.S.C. § 523(a)(15). Any debt owed by Debtor to Schriner for child support is excepted from discharge under 11 U.S.C. § 523(a)(5).

Schriner's motion for partial summary judgment is moot.

Dated July 26, 2017.

/s/ Shon Hastings
SHON HASTINGS, JUDGE
UNITED STATES BANKRUPTCY COURT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
DEBORAH GRACE THIMSEN-VILLA,	)	
	)	CASE NO. BK09-41923-TJM
Debtor(s).	)	A09-4066-TJM
CORY OVERTURF, individually, and	)	
CORY DEVELOPMENT, INC.,	)	
a Nebraska corporation,	)	
	)	
Plaintiffs,	)	CH. 7
	)	
vs.	)	
	)	
DEBORAH GRACE THIMSEN-VILLA,	)	
	)	
Defendant.	)	

ORDER

This matter is before the court on the plaintiffs' motion for summary judgment (Fil. #14). No resistance was filed. Gregory M. Neuhaus represents the debtor, and Stacie A. Goding represents the plaintiff. Evidence and a brief were filed and, pursuant to the court's authority under Nebraska Rule of Bankruptcy Procedure 7056-1, the motion was taken under advisement without oral arguments.

The motion is granted.

The plaintiff Mr. Overturf was formerly married to the debtor. One of the debts incurred during their marriage was $66,408.00 in attorneys' fees for assistance with proceedings to move Ms. Thimsen-Villa's child from California to Nebraska. When the parties divorced in October 2008, the court divided that debt evenly between them and entered a judgment for Mr. Overturf against Ms. Thimsen-Villa in the amount of $33,204.00. The parties borrowed approximately $40,000.00 from a bank to pay the attorneys' fees. Mr. Overturf has made all of the payments to date on the bank loan, leaving a balance of $25,245.81 at the time Ms. Thimsen-Villa filed her bankruptcy petition in July 2009. He filed this adversary proceeding to except the debt from discharge under 11 U.S.C. § 523(a)(15), and now moves for summary judgment on the issue. Ms. Thimsen-Villa has not objected to the motion.

The following facts are not in dispute:

1. Mr. Overturf and Ms. Thimsen-Villa were married on July 21, 2007.

2. They divorced on October 8, 2008, in Clay County, Nebraska.

3. Contained in the amended decree of dissolution of the parties' marriage was the following finding:

> That during the course of the marriage [Mr. Overturf] and [Ms. Thimsen-Villa] became liable to an attorney in the amount of $66,408. That the amount owed the attorney was for services rendered in a legal proceeding to allow [Ms. Thimsen-Villa] to move her child to the State of Nebraska. That [Mr. Overturf] is personally liable for such $66,408 debt. That the Court deems it appropriate that [Ms. Thimsen-Villa] should be held liable for one-half (½) of such debt, to-wit: $33,204. That [Mr. Overturf] should be given a judgment against [Ms. Thimsen-Villa] in the amount of $33,204.

Amended Decree, ¶ 8 (Fil. #18).

4. Neither party was awarded alimony or spousal support.

5. The District Court of Clay County, Nebraska, entered a judgment of $33,204 in favor of Mr. Overturf and against Ms. Thimsen-Villa on October 8, 2008.

6. Ms. Thimsen-Villa filed her Chapter 7 bankruptcy petition on July 6, 2009.

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). The court must examine the record to ascertain whether the movant, through depositions, answers to interrogatories, admissions, affidavits, and other evidence, has demonstrated the absence of a genuine issue of material fact. Beard v. Banks, 548 U.S. 521, 529 (2006). If the movant has done so, then the non-moving party, bearing the burden of persuasion, must by affidavit or otherwise set forth specific facts showing that there is a genuine issue for trial. Id. To withstand a motion for summary judgment, the non-moving party "has an affirmative burden to designate specific facts creating a triable controversy." Crossley v. Georgia-Pac. Corp., 355 F.3d 1112, 1113 (8th Cir. 2004) (internal citations omitted). Failure to oppose a basis for summary judgment constitutes a waiver of that argument. Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trs., 558 F.3d 731, 734-35 (8th Cir. 2009). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

Section 523(a)(15) provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor 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[.]

Under the Bankruptcy Code as it existed prior to October 2005, bankruptcy courts used to have to distinguish between support obligations and property settlements, because the dischargeability of such debts was treated differently. See the prior versions of 11 U.S.C. § 523(a)(5) and (15); Williams v. Williams (In re Williams), 703 F.2d 1055, 1056 (8th Cir. 1983) (whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law). Courts were to look at the parties' intent and the function the award was intended to serve at the time of the divorce. Moeder v. Moeder (In re Moeder), 220 B.R. 52, 55 (B.A.P. 8th Cir. 1998) (citing Holliday v. Kline (In re Kline), 65 F.3d 749, 751 (8th Cir. 1995); Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992); Williams, 703 F.2d at 1056; Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984)).

Now, however, the distinction between property settlements and support obligations is irrelevant for purposes of dischargeability.[1] The changes wrought by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") render all debts owed to a former spouse pursuant to a divorce decree non-dischargeable. Hon. William Houston Brown, Bankruptcy and Domestic Relations Manual § 1:3(b) (2006) ("Essentially, the combination of section 523(a)(5) and (15) excludes from discharge all marital and domestic relations obligations, whether support in nature, property division, or hold-harmless[.]").

While the language of § 523(a)(15) refers to debts to a spouse or former spouse, it generally is interpreted to extend to marital debts such as the attorneys' fees at issue here.

> [I]n the case of an obligation to pay a debt owed to a third party, it is the obligation to hold the spouse or former spouse harmless that is presumptively nondischargeable under this section. *See* 140 Cong. Rec. H10752, H10770. "A property settlement incorporated by a divorce decree that apportions third party debt to one spouse means that the obligor-spouse indemnifies the obligee-spouse in the event that the obligee is required to pay." *In re Sturdivant*, 289 B.R. 392, 399 (citing *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 303 (Bankr. E.D. Ark. 1996)). This is true even if there is no "hold harmless" language in the decree or complaint. *Johnston* at 303 (interpreting Arkansas law) (citing *Thomas v. Thomas*, 246 Ark. 1126, 443 S.W.2d 534 (Ark. 1969); *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (Ark.

[1]The distinction remains important for establishing the priority of a debt, as domestic support obligations have first priority. § 507(a)(1).

1991); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank,* 774 F.2d 909 (8th Cir. 1985)).

Douglas v. Douglas (In re Douglas), 369 B.R. 462, 463-64 n.2 (Bankr. E.D. Ark. 2007); see also Bryan Mem'l Hosp. v. Allied Prop. & Cas. Sur. Co., 163 F. Supp. 2d 1059, 1069 (D. Neb. 2001) ("[W]here benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value.")

Mr. Overturf has established that the debt at issue falls within the exception to discharge at § 523(a)(15). Ms. Thimsen-Villa has not demonstrated the existence of any material factual issue, so Mr. Overturf is entitled to summary judgment.

IT IS ORDERED: The plaintiffs' motion for summary judgment (Fil. #14) is granted. Separate judgment will be entered.

DATED: April 20, 2010

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
Gregory M. Neuhaus
*Stacie A. Goding
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK09-43079-TLS
	)	
DANIEL L. MASER,	)	CH. 13
	)	
Debtor.	)	

ORDER

Hearing was held in Lincoln, Nebraska, on August 18, 2010, on Debtor's objection to claim of Susan L. Maser (Fil. #61), and a resistance thereto (Fil. #63). Ms. Maser also objected to Debtor's Chapter 13 plan, but such objection was deferred pending resolution of the objection to claim. David P. Kyker appeared for Debtor, and Joel Lonowski appeared for the claimant, Susan Maser.

Background

Susan Maser is the former spouse of Debtor, Daniel L. Maser. Ms. Maser filed a proof of claim in this Chapter 13 proceeding asserting a domestic support obligation claim in the amount of $77,743.41. Debtor objected asserting that the claim was not entitled to priority status as a domestic support obligation.

The parties have settled some of their differences and a stipulation has been filed with this Court with respect to the settled issues (Fil. #85). The remaining questions before this Court are whether the monetary judgment (identified in the stipulation as the "property judgment") and the attorney fee award entered in favor of Ms. Maser pursuant to the property settlement agreement and divorce decree constitute domestic support obligations entitled to priority status.

Discussion

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. For purposes of the case at hand, discharge and priorities are at issue. Domestic support obligations are not discharged in Chapter 13 proceedings. *See* 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, "the crucial question is what function did the parties intend the agreement to serve when they entered into it." *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir. 1984) (citing *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir. 1983)). In making that factual determination, the court evaluates a number of factors, including whether the agreement contains a separate provision for alimony or child support, and whether the debt is conditional. *Ahlf v. Ahlf (In re Ahlf)*, 354 B.R. 884, 887 (Bankr. S.D. Iowa 2006) (citing *Morel v. Morel (In re Morel)*, 983 F.2d 104, 105 (8th Cir. 1992)). Other factors considered include:

> [T]he relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments.

Ahlf, 354 B.R. at 887 (quoting *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)).

The divorce decree and property settlement agreement were admitted into evidence as part of the affidavit of Ms. Maser (Fil. #71). The decree incorporates the settlement agreement and specifically provides:

> That a judgment shall be entered against the Respondent and in favor of the Petitioner in the sum of $70,580.00, which judgment shall draw interest at the rate of 6% per annum from and after the date of the Decree. The judgment shall be paid as follows:
>
> (a) $5,000.00 on August 1, 2004;
>
> (b) $550.00 on September 1, 2004 and on the first of each month thereafter until all sums due herein shall be paid in full. In the event the Respondent shall fail to pay any installment when due then and in that event all remaining sums shall be immediately due and payable.
>
> . . .
>
> That the Respondent shall pay alimony to the Petitioner in the sum of $1.00 per year for a period of fifteen years. The obligation to pay alimony shall not terminate upon the death or remarriage of either party. In the event the Respondent shall discharge all or any portion of any sums due the Petitioner in this Settlement Agreement the same shall be considered a substantial and material change of circumstances and the Respondent's obligation to pay alimony shall be modified to provide that the Petitioner shall not receive less than the amounts due her pursuant to this Settlement Agreement.
>
> That the Respondent shall pay the sum of $1,000.00 toward Petitioner's attorney fees.

Under the terms of the settlement agreement, Debtor was awarded all of Ms. Maser's right, title, interest, and equity in eight parcels of residential property plus a cabin located in Dodge County, Nebraska. The money judgment set forth in the property settlement agreement mirrors the judgment set forth in the divorce decree itself, with the additional language:

> In the event the Respondent shall file a bankruptcy and discharge any financial obligation due the Petitioner pursuant to this Settlement Agreement the parties agree that alimony shall be modified to provide that the Petitioner shall not receive less than she is entitled to receive pursuant to this Settlement Agreement.

Also, as part of her affidavit (Fil. #71), Ms. Maser included copies of the pretrial memoranda that were submitted on her behalf and on Debtor's behalf during their divorce proceedings and prior to the time the property settlement agreement was entered into. At paragraph 14 of Ms. Maser's filing, the following question and answer are provided:

> 14. If support is an issue, list living expenses for you and any minor children living with you.
>
> **ANSWER**: Not applicable.

Ms. Maser did, however, list "division of assets," "division of debts," and "alimony" as issues to be tried. Debtor's pretrial memorandum listed only division of assets and division of debts as issues.

The question in this proceeding is whether the remaining debt from the judgment granted to Ms. Maser in the settlement agreement, and the award of $1,000.00 in attorney fees, should be characterized as one for support or property settlement. The inescapable conclusion to be reached from the property settlement agreement and divorce decree is that the judgment was for property settlement, not support. The decree awards virtually all of the real estate and related assets to Debtor. Prior to the execution of the settlement agreement and divorce decree, the parties submitted pretrial memoranda indicating that the division of assets and divisions of debts was going to be an issue in the proceeding. Ultimately, in the settlement, Debtor received the assets (and the equity in the assets), while Ms. Maser received the judgment. Further, I cannot ignore the fact that the settlement agreement and divorce decree awarded only $1.00 per year in alimony. If the parties had intended an additional sum in the nature of support to be paid to Ms. Maser over and above the amount she was already entitled to receive upon division of the marital assets, they would have said so. In other words, regardless of the alimony/support situation, Ms. Maser was entitled to her share of the property equalization settlement. Instead of awarding her an additional amount, they agreed that she was only entitled to alimony of $1.00 per year (apparently in an effort to preserve the alimony issue in the event Debtor discharged his property settlement obligations).

While it is true that the judgment was set up on a periodic payment basis over a number of years, thereby establishing an income stream for Ms. Maser, it was clearly for the convenience of the parties and to avoid liquidating the assets awarded to Debtor. The provision the parties inserted into the property settlement agreement and divorce decree, allowing Ms. Maser to seek a modification of the alimony award if Debtor discharged any obligations in bankruptcy, seems to support this position. First, it implies that the judgment award is subject to being discharged as a property settlement obligation. Further, it indicates that the parties determined that due to the amounts Ms. Maser would receive as a property settlement, she apparently did not need further support from Debtor. However, to the extent Debtor did not pay the property settlement, then Ms. Maser may need additional support and she expressly reserved the right to seek it. Accordingly, I find that the judgment set forth in the property settlement agreement and divorce decree is in the nature of a property settlement, and is not a domestic support obligation.

For the same reasons discussed above, I also find that the $1,000.00 attorney fee award was in the nature of a property settlement and not support. There is no evidence or other indication as to any significant disparity of income among the parties. In fact, the only evidence in that regard is Debtor's affidavit indicating that Ms. Maser's income was higher than his. There is simply no indication as to how the $1,000.00 amount was calculated. Accordingly, I will consider it to be another avenue by which the parties allocated their assets.

IT IS, THEREFORE, ORDERED that:

1. The stipulation (Fil. #85) is approved and the specified portions of Ms. Maser's proof of claim shall be treated as set forth in the stipulation; and

2. The monetary judgment portion of Susan Maser's proof of claim is in the nature of a property settlement and is not entitled to priority status.

DATED: August 26, 2010.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*David P. Kyker
*Joel Lonowski
Kathleen Laughlin
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

In the Matter of:	)	Case No. BK23-41052
	)	
DARCEE D. MILLER,	)	Chapter 13
	)	
Debtor.	)	**Opinion**
	)	

This matter came before the court for trial on July 9, 2024, on the debtor's objection to proof of claim #4, which claim was filed by her ex-husband Jeff Miller (Doc. #31). James C. Bocott appeared for the debtor Darcee Miller. Claude E. Berreckman, Jr., appeared for the claimant Jeff Miller. The objection to claim is granted in part. The debtor established she directly paid the claimant alimony and property settlement payments which are not reflected in the judgment records of the state court. Under Nebraska law it is appropriate the debtor receive a credit.

Findings of Fact

The debtor and Mr. Miller married on September 13, 2000. The marriage lasted approximately 13 years, during which the parties accumulated significant marital debt. Their divorce was finalized on June 10, 2014. During the marriage two sons were born, the first in 2004, the second in 2008. Mr. Miller was granted physical custody of the boys.

The divorce decree does not award child support, but requires the parties equally pay the children's daycare and unreimbursed medical expenses. Child support was not awarded because the Millers wanted to attack their debt and wanted to make the debt payments affordable for the debtor. This arrangement was memorialized in the decree. It states no support was ordered because the parties had "significant debt", and they "have an agreed upon arrangement for the minor children". No evidence was offered as to any "agreed upon arrangement" outside the divorce decree and the settlement agreement upon which the decree was based. When asked whether the parties had discussions "regarding how to go forward with supporting your boys in the absence of a court ordered child support", Mr. Miller responded, "Not really".

Although child support was not awarded, alimony was. Under the decree, "[t]he [debtor] agrees to pay $600.00 per month alimony to [Mr. Miller] … for a total of 48 months. These funds will be used by [Mr. Miller] to pay on joint debt." After 48

months, the debtor was ordered to pay a property settlement judgment of $400 per month for 144 months, which payments the decree states are "considered payment on debt and not alimony".[1] Mr. Miller, whose background is in accounting, was ordered to provide an accounting of the parties' marital debt every three months. He only provided two accountings. But he refinanced the debt shortly after the divorce was final, releasing the debtor from liability for the marital debt.

Mr. Miller contends the debtor never paid any part of the alimony judgment or the property settlement judgment. The debtor contends she paid alimony and property settlement payments totaling $34,310 immediately before the entry of the divorce decree and the filing of her bankruptcy case.[2]

The debtor could not always afford to pay $600 in alimony every month. She testified the parties communicated about her inability to pay. Neither party provided details of the dates, times, places, or substance of any communications or side agreements regarding payments. The debtor testified she paid the claimant whatever she could afford. From the entry of the decree through March 2016, the debtor paid varying amounts approximately every two weeks, typically $300. In March 2016 she temporarily stopped making payments. She resumed payments in November 2016. But the payments were smaller. From November 2016 through August 3, 2023, the debtor typically paid $150 approximately every two weeks.

The debtor offered into evidence typed and handwritten ledgers of payments and copies of some, but not all the checks she paid Mr. Miller.[3] She did not explain why all the checks were not available. Mr. Miller does not dispute he received the checks offered into evidence. He disputes their purpose. He believed the payments were to support the boys. After the divorce, the boys primarily lived with Mr. Miller. The debtor had visitation every other weekend and six weeks in the summer. When

---

[1] The debtor testified the alimony payments were not to support Mr. Miller. They were to pay down marital debt. Neither party offered evidence as to why they agreed to characterize the first 48 payments as alimony. In her objection, the debtor did not request the payments be recharacterized as property settlement payments.

[2] The debtor seeks a credit for payments she made before the divorce decree. The parties agreed to the amount of the debt and the debt payments as part of their divorce decree. Presumably, the pre-judgment payments paid down the marital debt, thereby reducing what would have otherwise been a higher property settlement judgment. The debtor did not establish the contrary.

[3] The debtor lists the following checks (Check No., Date, and Amount) as paid to Mr. Miller but did not offer them into evidence: #1032, 7/16/2014, $300.00; #1059, 10/9/2014, $400, #1076, 1/2/2015, $870; #1078, 1/16/2015, $400; #1086, 3/3/2015, $400; #1087, 3/16/2015, $375; #1088, 4/1/2015, $400; #1089, 4/12/2015, $475; #1090, 4/12/2015, $475; #1093, 6/5/2015, $675; #1095, 6/19/2015, $475; and #1743, 8/26/2018, $225.

asked, "As you began to receive the payments, what did you understand those payments to be for?", Mr. Miller responded, "Bills, daycare, because I had primary custody." He believed a "significant portion" of the payments was for day care. He also testified:

> Q. Do you believe Mr. Miller that the payments that Ms. Miller made to you throughout the years that are summarized under Doc. 63 - did those come close to paying anywhere near what you believe to be her share of the cost of supporting your boys?
>
> A. No.

The parties spent considerable time disputing support of the boys.[4] Except for orthodontic bills paid by the debtor's parents, neither party quantified daycare expenses or unreimbursed medical expenses either paid. As to daycare, Mr. Miller testified generically - the expenses were "significant". But the boys were in school when the divorce was finalized. They only required after school daycare. No evidence was adduced as to who the day care provider was, how often the provider was used, the amount the provider charged, any amounts Mr. Miller paid, if and when the provider's services terminated, or whether at some point the older child watched the younger.

Mr. Miller offers several other reasons the payments should not be deemed alimony. The debtor did not pay the district court clerk. She paid Mr. Miller directly. The checks do not state "alimony" in the memo line. The debtor does not have a receipt stating alimony was paid. For her part, the debtor testified she reads the decree to mean she was required to pay Mr. Miller directly. It does not expressly require payments be made to the court clerk. The debtor was never told to pay the district court. She was never counseled not to pay Mr. Miller directly. She assumed she would get credit for payments, and Mr. Miller would handle the crediting.

As further support for his position, Mr. Miller testified he texted the debtor demanding payment. He did not have copies of the texts.[5] He also attempted to

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[4] The parties disputed who paid medical bills. They disputed who paid health insurance. They disputed who paid for the boy's cars, camps, sports, electronics, and entertainment. But these disputes are not part of the claimant's claim. And they were never raised before the Nebraska state court. Other than the orthodontic bills, neither party produced a shred of probative evidence regarding amounts demanded, paid, or due for any expenses to be shared under the divorce decree.

[5] It is not clear whether the texts simply requested payment or whether they stated Mr. Miller's position he was never paid alimony.

collect the unpaid alimony judgment. In June 2018, after the final alimony payment came due, Mr. Miller hired a lawyer who demanded in writing the debtor begin making alimony payments. The debtor testified she did not receive the demands. Mr. Miller did not pursue collection efforts or a contempt action because he knew the debtor could not afford to pay.

In 2023, the debtor stopped paying Mr. Miller. Her last payment was on August 3, 2023. Mr. Miller retained new counsel who demanded payment of $59,632.13 in past due alimony and property settlement payments. Counsel offered a payment plan. The debtor did not agree. In late 2023 Mr. Miller garnished the debtor's wages and obtained just over $1,404.50. Shortly thereafter, on November 7, 2023, the debtor filed her bankruptcy petition. The garnishment was returned as preferential.

In the bankruptcy case Mr. Miller filed a proof of claim seeking a $60,209.04 claim with domestic support priority under 11 U.S.C. § 507(a)(1)(A). The claim included the alimony judgment in the amount of $31,862.05, including interest and the property settlement judgment of $28,346.99 including interest. Both were calculated as of January 16, 2024.[6] The judgment record for the property settlement states a balance due of $27,433.77, including principal of $26,000 and interest of $1,477.92. Interest on the property settlement judgment is 2.066% per year, or $1.47167 per day.

The debtor objected to the claim. In her objection the debtor seeks credit for the $34,310 she asserts she paid Mr. Miller. She seeks a credit for half of the over $20,000 in orthodontic expenses her parents paid. She also asserts the claim should be disallowed because Mr. Miller did not provide the required accountings and did not act "equitably".[7]

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[6] Mr. Miller calculated his claim as of January 16, 2024, instead of the bankruptcy petition date. His filed claim also does not include future property settlement payments.

[7] The accounting allowed the debtor to monitor her indebtedness to joint creditors and ensure her obligations were decreasing. Mr. Miller asserts he did not provide accountings because they became unnecessary. Mr. Miller refinanced the marital debt shortly after the divorce decree was entered, relieving the debtor from any further obligation.

Conclusions of Law

A proof of claim filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes "prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). "The filing of an objection does not deprive the proof of claim of a presumptive validity unless the objection is supported by substantial evidence." *United States v. Austin (In re Austin)*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). "If, however, evidence rebutting the claim is brought forth, then the claimant must produce additional evidence to 'prove the validity of the claim by a preponderance of the evidence.'" *Gran v. IRS (In re Gran)*, 964 F.2d 822, 827 (8th Cir. 1992); *see also FDIC v. Union Entities (In re Be-Mac Transp. Co.)*, 83 F.3d 1020, 1025 n.3 (8th Cir. 1996) ("Once an objection is made and the burden of overcoming the claim is met, the ultimate burden of persuasion always rests on the claimant."). Mr. Miller's claim is entitled to prima facie validity. It was timely and properly filed and included supporting documentation. But the debtor supported her objection with substantial evidence including copies of checks Mr. Miller does not dispute receiving.

Mr. Miller argues the payments cannot be alimony because they were not paid through the district court as required by Neb. Rev. Stat. § 42-369(1) (requiring payments for alimony "shall be made to the clerk of the district court (a) when the order, decree, or judgment is for spousal support, alimony, or maintenance support and the order, decree, or judgment does not also provide for child support."). The Nebraska Supreme Court rejected this argument on similar facts thirty-eight years ago.

> Petitioner has appealed, contending that because the decree of dissolution directed payments to be made through the clerk of the court, as provided for in Neb. Rev. Stat. § 42–369 (Reissue 1984), respondent should get no credit for payments made directly to the petitioner, as evidenced by respondent's canceled checks admittedly endorsed by the petitioner.
>
> ….
>
> The statute in question was designed to avoid this type of litigation. Had respondent followed its dictates, he would have avoided a great deal of time, trouble, and expense. However, the language of the statute, we believe, is only directory, not mandatory. The Legislature could not have intended that a plaintiff receive double recovery.

Cotton v. Cotton, 383 N.W.2d 739, 739–40 (Neb. 1986).[8] The debtor's direct payments to Mr. Miller do not disqualify their application to either the alimony judgment or the property settlement.

The debtor established the payments were for alimony. It was the legal obligation she owed Mr. Miller. Mr. Miller claims the payments were for support of the children and daycare expenses. His claim fails. Mr. Miller likely spent "significant" amounts supporting his children. His support does not convert the debtor's payments into support, which the debtor did not owe. The state court ordered, and Mr. Miller agreed, the debtor would not pay child support. Although the decree states the parties "have an agreed upon arrangement for the minor children," Mr. Miller denied any separate arrangement. This leaves us with only the parties' settlement agreement and divorce decree to define the debtor's obligations.

Mr. Miller characterized a portion of the payments as daycare expenses, which unlike child support was another legal obligation of the debtor. But Mr. Miller did not offer evidence of the amount he paid or the amount he asked the debtor to pay. He did not offer invoices from the daycare provider. He did not offer checks or bank statements evidencing his payments.

Mr. Miller's collection efforts in 2018 do not change the analysis. His efforts lend some support to his personal belief the debtor was not paying alimony. But a demand for payment does not change the debtor's legal obligations or the terms and effect of the divorce decree. Mr. Miller also did not explain why he accepted payments for four years without comment. Mr. Miller's position in 2018, after the final alimony payment came due, is inconsistent with his testimony the parties desired to attack their debt in an affordable way for the debtor. Construing the payments, which were often less than the required $600 per month, as support or daycare expenses, leaving a large alimony obligation, only drives the debtor deeper into debt.

The debtor's request to offset Mr. Miller's claim with orthodontic expenses paid by her parents is denied. Certain offsets are allowed under state law in domestic cases. *See, e.g., Davis v. Davis*, 660 N.W.2d 162, 167 (Neb. 2003) ("We determine that Gregory may offset the $11,773.94 owed to Juanita against the amount owed to him

[8] The Nebraska Supreme Court did not indicate which party had the burden of proof to credit direct payments. Presumably the burden is on the party seeking the credit, in this case the debtor. For an objection to claim in bankruptcy the ultimate burden of persuasion when the debtor produces significant evidence lies with the claimant, in this case Mr. Miller. To avoid any doubt, the court assumes the debtor has the burden of proof to establish the credit. She met her burden.

for Juanita's share of the marital debt and personal property."). The bankruptcy code also allows an offset of a mutual debt. *See* 11 U.S.C. § 553(a). But one of the required elements is the debt and claim are "mutual obligations". *Matter of Nickerson & Nickerson, Inc.*, 62 B.R. 83, 85 (Bankr. D. Neb. 1986). "[D]ebts are considered "mutual" only when "they are due to and from the same persons in the same capacity." *In re SemCrude, L.P.*, 399 B.R. 388, 393 (Bankr. D. Del. 2009). The debtor did not establish mutuality regarding the orthodontic payments. The debtor's parents paid these expenses. The terms of the payment are not in evidence, leaving unanswered questions. Did the debtor's parents loan the debtor money expecting she would recover half from Mr. Miller? Did they pay the costs gratuitously? Mr. Miller alluded to a separate agreement with the debtor's parents. What were the terms?

Mr. Miller also contends it is "too late" to credit the payments. Assuming this to be a statute of limitations defense, it fails because the debtor's claim is defensive. *See* 54 C.J.S. Limitations of Actions § 80; *see also Ed Miller & Sons, Inc. v. Earl*, 502 N.W.2d 444, 452 (Neb. 1993) ("Unlike a counterclaim that seeks an affirmative judgment, the defense of recoupment is not barred by a statute of limitations."). The debtor asserts she paid the amounts due. She does not assert an independent cause of action. She seeks credit for payments she made. Her request to apply the payments is not barred by any statute of limitation.

The debtor's request Mr. Miller's claims be disallowed for equitable reasons is denied. Allowance of claims is governed by 11 U.S.C. § 502. A claim is allowed except for the specific reasons enumerated. *See* 11 U.S.C. § 502(b); *Reichel v. Jensen-Carter (In re Reichel)*, 645 B.R. 620, 625 (B.A.P. 8th Cir. 2022). The debtor did not establish any of the enumerated grounds. Disallowance is not appropriate.[9]

Conclusion

The debtor's objection to claim is sustained in part. Mr. Miller has a general, unsecured claim for the unpaid amount of the property settlement judgment.[10] The debtor is entitled to credit to the alimony judgment for the payments she made to

[9] The court has the power to subordinate claims "under principles of equitable subordination." 11 U.S.C. § 510(c). The debtor did not request subordination. Even if she had, it is not appropriate in this case. "[E]quitable subordination is an unusual remedy which should be applied only in limited circumstances." *Fabricators, Inc. v. Technical Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1464 (5th Cir. 1991).

[10] During trial, the parties agreed the property settlement judgment is a general unsecured claim and is not entitled to priority under 11 U.S.C. § 507.

Mr. Miller, as evidenced by cancelled checks.[11] The total amount of post-judgment cancelled checks in evidence does not exceed the alimony judgment.

The debtor did not provide a calculation for crediting payments. Simply subtracting the payments from the judgment as of the date of the petition ignores the effect of judgment interest and would improperly inflate Mr. Miller's claim. Judgment interest in Nebraska is governed by Neb. Rev. Stat. § 45-103. Under Nebraska law a prevailing party is typically entitled to simple interest on a judgment. See *Meiergerd v. Qatalyst Corp.*, 7 N.W.3d 636, 642 (Neb. 2024) ("[I]n the absence of a contract or statute, compensation in the form of compound interest is generally not allowed to be computed upon a debt.").

A separate order will be entered detailing Mr. Miller's claim, including calculations.

Dated: July 22, 2024

BY THE COURT

/s/ Brian S. Kruse
Brian S. Kruse
Bankruptcy Judge

[11] The debtor's itemized recordkeeping of the payments was not sufficiently established to credit payments for which checks do not exist. The records raised some questions. The debtor conceded two checks (#1775 dated 11/30/2018, and #1624 dated 8/1/2022) were not paid to the claimant. Check #1775 was not on the debtor's itemized summary for 2018. But check #1624 was included in the debtor's total for 2022. Check #1052 referenced it was, in part, for daycare. Checks #1052, #1624, and #1775 are not credited to the judgment. The checks in footnotes 2 and 3 are also not credited to the judgment.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
GENE PARKINS,	)	CASE NO. BK04-83600
	)	
Debtor(s).	)	CH. 13

ORDER

Hearing was held in Omaha, Nebraska, on May 5, 2005, on the debtor's objection to claim of Michelle Perez (Fil. #33) and resistances thereto (Fils. #38 and 39). Richard Register appeared for the debtor, and Michelle Perez appeared on her own behalf.

The debtor has objected to a claim filed by his former spouse concerning his obligation to reimburse her for daycare expenses. The dissolution of marriage decree requires the debtor to reimburse his former spouse for a portion of her daycare expenses. Such reimbursement is in the nature of child support. The objection is denied and the claim is allowed at the same priority level as her other child support claim.

A. The Claim

Ms. Perez filed a priority claim in this case for $959 of day care expenses owed by the debtor pursuant to the decree dissolving the parties' marriage. The debtor objected to the characterization of the claim as a priority claim, asserting that the debt is a general unsecured debt.

A properly filed proof of claim is prima facie evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f). The debtor then bears the burden of demonstrating to the contrary. McDaniel v. Riverside County Dept. of Child Support Servs. (In re McDaniel), 264 B.R. 531, 533 (B.A.P. 8th Cir. 2001).

In this case, Ms. Perez filed with the court relevant portions of the decree of dissolution and the property settlement and custody agreement. Section 6 of the property settlement and custody agreement – which was incorporated in its entirety in the dissolution decree – sets forth the parties' agreement that each would pay half of the child-care expenses incurred in connection with Ms. Perez's employment. Pursuant to that agreement, Ms. Perez was to send Mr. Parkins a copy of the monthly statements or receipts for child care, and Mr. Parkins was to pay his half directly to Ms. Perez within 14 days thereafter. The bankruptcy claim arose because Mr. Parkins did not reimburse Ms. Perez for

those expenditures.

It seems reasonable to conclude from the language of the property settlement and custody agreement that the division of the child care expenses was intended to be in the nature of family support. The debtor has offered no evidence to the contrary.

B. Other Matters

At the hearing, Ms. Perez informed the court that she had not been receiving child support, either prior to the bankruptcy case or since the petition has been filed. The debtor's plan provides for eventual payment of child support through the plan. However, it provides for a secured claim to be paid prior to the time any payment will be made on child support. As a social policy matter, that practice makes no sense. I am aware that there is a confirmed plan. However, it is my belief that either the trustee or the child support claimant should move for an order amending the plan to provide for a pro rata distribution to the child support claimant along with the secured claim.

With regard to delinquent post-petition child support, the child support collection agency is not prohibited by the automatic stay from proceeding against the debtor for post-petition delinquent child support.

It was brought to the attention of the court that the debtor has changed jobs and has different income than he had at the time the petition was filed or the plan was confirmed. The debtor is ordered to amend Schedules I and J to accurately reflect his current financial circumstances. He is also directed to make certain that the Chapter 13 trustee has the name and address of his current employer. The amendment and the information required to be delivered to the trustee shall occur no later than June 15, 2005.

C. Conclusion

IT IS ORDERED the debtor's objection to claim of Michelle Perez (Fil. #33) is overruled.

DATED: May 9, 2005

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Richard Register
Michelle Perez
Kathleen Laughlin
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK11-41944-TJM
	)	
GEORGE R. OSBORN, JR.	)	CH. 13
	)	
Debtor(s).	)	

ORDER

This matter was submitted to the Court at a live evidentiary hearing held in Lincoln, Nebraska, on December 14, 2011. The issues involved Fil. #20, an Objection to Claim of Heather Eads, filed by the debtor; Fil. #26, Resistance, filed by Heather Eads; Fil. #35, Objection to Confirmation of Plan, filed by Heather Eads; and Fil. #41, Response to Objections to Plan, filed by the debtor. Trev Peterson appeared for the debtor and Heather Eads, a creditor, appeared pro se.

The creditor, Ms. Eads, is a former spouse of the debtor and is a holder of a claim arising out of the parties' dissolution of marriage decree. She asserts that her claim is a priority unsecured claim constituting a domestic support obligation. Debtor has objected to the classification of the claim as a domestic support obligation. Ms. Eads has also objected to the plan filed by the debtor asserting that the bankruptcy and the plan were not filed in good faith. The objection to claim is denied and the objection to the plan is granted. An amended plan and schedules are due February 27, 2012.

Background

The parties were married in April of 1995 and the decree of dissolution of marriage was entered on March 2, 2009. Three children were born of the marriage and the decree provided for joint custody, with the children residing on a permanent basis with Ms. Eads.

During the marriage, the parties purchased a home in Lincoln, Nebraska, and granted a deed of trust to Wells Fargo Home Mortgage. They also obtained a line of credit from Wells Fargo which was also secured by a deed of trust as a second lien.

In September of 2008, in contemplation of the forthcoming dissolution of marriage, the parties refinanced the home. They had incurred significant debt on the line of credit, resulting from, among other things, the expenses related to the premature birth of twins, and medical expenses and other expenses to meet the dietary needs of the children. They agreed as part of the refinancing that the note secured by the first deed of trust and the line of credit would be paid off and a new note secured by a new first deed of trust would be taken out with Wells Fargo, adding approximately $20,000.00 to the new note secured by the first deed of trust. A second note secured by a second deed of trust would be taken out for approximately $20,000.00. Anticipating the dissolution of marriage, Ms. Eads, formerly Ms. Osborn, and Mr. Osborn, agreed that she would keep the home, subject to her obligation to pay the first mortgage. He would agree to pay the second mortgage in the approximate amount of $20,000.00. Those terms were incorporated into the decree and property settlement agreement.

At the time of the decree, Ms. Eads' gross income was, according to the child support calculator attached to the property settlement agreement and included in this court file at Fil. #31-1,

$2,556.00 per month and the gross income of Mr. Osborn was $2,643.00 per month. Her net income was $2,212.41 and his net income was $2,053.96.

Pursuant to the decree, he was directed to pay child support in the amount of $741.00 per month, medical expenses not covered by health insurance, a portion of child care expenses, and the approximately $271.00 per month required to pay off the second mortgage.

She kept her vehicle, subject to its debt, the home, including any remaining equity, and he kept his vehicle and his retirement account which contained approximately $132,000.00.

The decree provided that, "Neither party shall be required to pay alimony to the other."

Law and Discussion

The current statutory language and case law concerning the term "domestic support obligation" and the good faith requirement for confirmation of a Chapter 13 plan were discussed in detail by Chief Bankruptcy Judge Thomas Saladino in the Chapter 13 case of Timothy J. McPheron, 2010 WL 5173719, Case No. BK10-40861-TLS (Dec. 15, 2010). His explanation follows:

> Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:
>
> > [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
> >
> > (A) owed to or recoverable by –
> >
> > (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> >
> > (ii) a governmental unit;
> >
> > (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
> >
> > (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
> >
> > (i) a separation agreement, divorce decree, or property settlement agreement;
> >
> > (ii) an order of a court of record; or
> >
> > (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
> >
> > (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the

Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. For purposes of the case at hand, discharge and priorities are at issue. Domestic support obligations are not discharged in Chapter 13 proceedings. See 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, "the crucial question is what function did the parties intend the agreement to serve when they entered into it." Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984) (citing Williams v. Williams (In re Williams), 703 F.2d 1055, 1057 (8th Cir. 1983)). In making that factual determination, the court evaluates a number of factors, including whether the agreement contains a separate provision for alimony or child support, and whether the debt is conditional. Ahlf v. Ahlf (In re Ahlf), 354 B.R. 884, 887 (Bankr. S.D. Iowa 2006) (citing Morel v. Morel (In re Morel), 983 F.2d 104, 105 (8th Cir. 1992)). Other factors considered include:

> [T]he relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments.

Ahlf, 354 B.R. at 887 (quoting Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)).

. . .

11 U.S.C. § 1325(a)(3) provides that a Chapter 13 plan must be proposed in good faith and not by any means forbidden by law. In discussing the good faith obligation, the Eighth Circuit Bankruptcy Appellate Panel stated:

> The relevant inquiry regarding good faith is "whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code." Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). However, the foregoing inquiry is governed by a "totality of the circumstances" test. Noreen, 974 F.2d at 76; LeMaire, 898 F.2d at 1349; In re Estus, 695 F.2d 311, 316 (8th Cir. 1982). Factors which are particularly relevant to determining good faith under the totality of the circumstances include: (1) the nature of the debt sought to be discharged; (2) whether the debt would be dischargeable in a

> chapter 7 bankruptcy case; and (3) the debtor's motivation and sincerity in seeking chapter 13 relief. LeMaire, 898 F.2d at 1349 (citing Estus, 695 F.2d at 317). See also In re Kurtz, 238 B.R. 826, 830 (Bankr. D.N.D. 1999) ("Further consideration must be given to the sincerity of the Debtor in putting forth his Chapter 13 plan of repayment and whether that plan demonstrates real sincerity on the part of [the Debtor] to repay his creditors as best he can in exchange for the liberal Chapter 13 discharge.") Another relevant factor in determining good faith is the Debtor's pre-filing conduct. LeMaire, 898 F.2d at 1352 (citations omitted). However, even in light of egregious pre-filing conduct by the Debtor, a chapter 13 plan may be confirmed if other factors "suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims." Id. (citation omitted).

Banks v. Vandiver (In re Banks), 248 B.R. 799, 803 (B.A.P. 8th Cir. 2000).

McPheron, at 2-5.

The first issue to be addressed here is the debtor's objection to the claim of Ms. Eads. He asserts that the claim, which is based on the portion of the decree assigning to the debtor responsibility for payment of the note secured by the second deed of trust on Ms. Eads' home, is not a domestic support obligation. Although the decree contained an express provision for child support, as well as an express alimony provision providing that neither party shall pay alimony to the other, the evidence is that the parties planned to equalize their assets and their debt obligations to enable Ms. Eads to keep the home for herself and her children. Based upon her net monthly income at the time of the decree, it is clear that she would have been unable to retain the home with any reasonable degree of financial security if she was required to make the monthly payments on the second deed of trust. On the other hand, he left the marriage with a child support obligation of $741.00 a month plus the second mortgage obligation of approximately $271.00 a month to be paid, along with other living expenses, from a net income of more than $2,000.00 per month. He was apparently willing and able to make the payments for at least a year after the decree was entered. Then, perhaps because of the purchase of a new car, or his remarriage, his monthly income was not sufficient to pay his monthly living expenses and his obligations from the first marriage. To access his retirement funds, he quit his employment of 37 years, paid taxes on approximately $65,000.00 from the retirement account, and then proceeded to go through the balance of the cash received from liquidating the retirement account between March of 2010 and May of 2011.

During that time period, from the date he quit his job in March of 2010 until he obtained employment in August of 2011, he spent very little time attempting to obtain employment which would enable him to pay his obligations. He even told Ms. Eads on at least one occasion that he would arrange his financial situation so that he would have no money available to pay his obligations if she took him to court.

She did take him to court for failure to pay child support, failure to pay child care expenses and failure to pay medical expenses, plus failure to pay his obligation on the second lien. As a result, on July 18, 2011, he was found in civil contempt and sentenced to 30 days in jail. He was allowed to purge himself of contempt by making monthly payments of $50.00 per month on the

arrearage of the child care and child support, by making an immediate payment on the overdue medical expense, and by curing the delinquency on the second lien obligation. He was ordered by the state court judge in that contempt order, Fil. #100, to remain current on the payments of the second lien.

I find, based upon the intent of the parties when they refinanced the home and when they agreed on the property settlement agreement, that Mr. Osborn was taking responsibility for the second lien so that Ms. Eads and the children could stay in the home. That is the essence of a domestic support obligation and I so find that the requirement for him to pay it is a domestic support obligation which is non-dischargeable in a Chapter 13 case.

Turning now to the plan objection, Ms. Eads argues that the bankruptcy case was not filed in good faith and the plan was not proposed in good faith. Specifically, she asserts that the debtor did not list all of his assets when he filed the initial petition and schedules. She provided information, apparently to the trustee and to counsel for Mr. Osborn, concerning property that he had in his possession on the petition date that was not listed on the schedules.

In addition, on cross-examination by Ms. Eads at trial, Mr. Osborn admitted that although his amended schedules showed he paid rent in the amount of $300.00 per month, health insurance in the amount of $450.00 a month, and child care expenses in the amount of $182.00 a month, none of that was true. He has not paid rent to anyone for many months. He has lived temporarily with his sister and with his brother and, although he testified that he will pay them rent when he is able to, he has not yet done so. He had no explanation for the $450.00 per month health care expense that he put on his amended schedules.

Of the $182.00 a month that he listed as child care, he eventually suggested that perhaps $100.00 of it related to the $50.00 per month that he was paying to purge himself of contempt. He testified that he had recently paid an $82.00 medical bill, but was unable to explain what a one-time payment of an $82.00 medical bill had to do with his assertion that he paid at least that much on a monthly basis.

Finally, although he was ordered on July 18, 2011, to maintain payments on the second lien or be subject to a jailhouse opportunity, he filed this Chapter 13 bankruptcy case on the very next day. He has made no payments on the second lien for at least five months prior to the trial date in this case.

Although I could easily conclude that he provided erroneous rental and health insurance and medical care information to his attorney so that his amended schedules would show reduced net disposable income making him unable to pay the second lien monthly payments, I will reserve making such a finding. Ms. Eads is not interested in having Mr. Osborn's case dismissed so that he can be sent to jail for failing to obey the state court order. She is interested in receiving payments that he is obligated to pay. The best way to assure him that he is not going to jail and to assure her that she will receive the payments is to let him remain in Chapter 13 and file an amended plan that reflects the truth on the amended schedules and provides for payment of his divorce decree obligations.

If amended schedules continue to reflect inaccuracies with regard to his financial condition, or if an amended plan does not properly provide for his dissolution of marriage decree obligations, the case will be dismissed as one filed in bad faith and Mr. Osborn can take his chances outside the bankruptcy system.

IT IS ORDERED: The debtor's objection to claim of Heather Eads (Fil. #20) is denied. The objection to confirmation of plan, filed by Heather Eads (Fil. #35), is granted. An amended plan with amended schedules shall be filed no later than February 27, 2012.

DATED: January 26, 2012

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
*Trev Peterson
*Heather Eads
Kathleen Laughlin
U.S. Trustee

* Movant is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	BK 23-80638
	)	
HEATHER ANN WRIGHT,	)	Chapter 13
	)	
Debtor.	)	

Order on Objection to Claim

Attorney Justin Quinn filed a secured claim in the amount of $39,666.13 for services he performed for the debtor in her divorce proceeding. Quinn asserts his claim is secured by an attorney's lien against one-half of the debtor's home obtained from the debtor's former spouse and against child support and attorney's fees awards entered in favor of the debtor. The debtor objects, asserting an attorney's lien, as a general matter, cannot attach to real estate under Nebraska law. This basis of the debtor's objection is denied. Although an attorney does not have a general or possessory attorney's lien against a client's real estate, an attorney's charging lien can attach to real estate that is the subject of and recovered in an action.

Under Nebraska law an attorney does not have a lien for services, "except as provided by statute". *Card v. George*, 299 N.W. 487, 488 (Neb. 1941). Nebraska has an attorney's lien statute. It provides:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

Neb. Rev. Stat. § 7-108. The statute codifies "two types of attorney's liens: a retaining or general lien, and a charging or special lien." *Anderson v. Farmers Co-op. Elevator Ass'n, Inc.*, 874 F. Supp. 989, 991 (D. Neb. 1995). The retaining lien allows an attorney to retain the client's papers and money in the attorney's hands. The retaining lien is a "bargaining chip with which to force a settlement of outstanding fees." *Id.* The retaining lien is not at issue in this case.

The charging lien secures "payment of just charges out of the fruits of [the attorney's] own labor." *Neighbors & Danielson v. W. Nebraska Methodist Hosp.*, 77 N.W.2d 667, 669 (Neb. 1956). The charging lien protects the attorney's claim through "equitable interference of the court". *Id.* The charging lien requires a fund or "some subject matter to which such lien may attach." 23 Williston on Contracts

§ 62:11 *Attorney's liens* (4th ed.). The fund or subject matter is the judgment the attorney obtains for the client.

> The special or charging lien is based on natural equity—the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it. Thus, the charging lien gives the attorney an equitable ownership interest in the client's cause of action, and the client's property right in the client's own cause of action is only that which remains after the attorney is paid.

Id. (citations omitted).

An attorney's charging lien can attach to real estate under Nebraska law. Real estate owned by the client may be subject to a charging lien if it was the subject of and "in the hands of the adverse party in an action or proceeding in which the attorney was employed."

> Ordinarily, in the absence of an agreement therefor, a lawyer has no lien as such upon the lands of his clients. However, if properly perfected, he does have a lien upon the judgment or any process of the court, which lien is enforceable by intervention in the original action upon any money *or property* recovered thereby for the satisfaction of his client's claim.
>
> As early as *Griggs and Ashby v. White*, 5 Neb. 467, this court held that: 'An attorney has a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit in which it was obtained. And this right is paramount to the rights of the parties in the suit.' That opinion affirmed a judgment enforcing an attorney's lien *against the lands recovered by the judgment*.

Tuttle v. Wyman, 32 N.W.2d 742, 749 (Neb. 1948) (emphasis added).

The court in *Tuttle* definitively held "money" under Nebraska's attorney's lien statute means "wealth" and can include real estate:

> [T]he statute giving an attorney a lien on money in the hands of the adverse party must be liberally construed. The word 'money' is used not only in a specific but also in a comprehensive and general sense, and when so used, as we do here, and in similar cases where money or property or both are recovered by a judgment or its equivalent process of the court, then the word 'means wealth,—the representative of commodities of all kinds, *of lands*, and of everything that can be transferred in commerce' for the satisfaction of a claim so established in litigation.

Id. (emphasis added) (citations omitted).

To support her contention an attorney's lien cannot attach to real estate, the debtor cites two Nebraska cases preceding *Tuttle*. In the first case, the Nebraska Supreme Court affirmed a trial court, which trial court found "the statutes do not provide for an attorney's lien against real estate." *Marshall v. Casteel*, 8 N.W.2d 690, 691 (Neb. 1943). The court in *Marshall* noted the statute refers to "money", and when the attorney filed his lien, "the land here involved was real estate (not money)". *Id.*

Marshall involved an action to quiet title to real estate on which attorney Lee Card claimed an attorney's lien. The facts span twenty years and two reported Nebraska cases, *Marshall v. Casteel*, 8 N.W.2d 690 (Neb. 1943) and *Reed v. Good*, 209 N.W. 619 (Neb. 1926). The real estate upon which attorney Card came to claim a lien was owned by James Good. Mr. Good borrowed $3,000 from C. Harris Reed in March 1920, and gave Mr. Reed a mortgage to the land. In September 1920, Mr. Reed assigned the loan and mortgage to Chadron State Bank. The loan went into default. Despite the assignment, attorney Card filed a foreclosure action for Mr. Reed in June 1923. A foreclosure decree was entered but appealed. The appellate court reversed and remanded for a new trial. In October 1927, after remand, attorney Card filed an attorney's lien. A second foreclosure decree was entered in November 1927. The second foreclosure decree was vacated in January 1928 after the bank intervened and asserted it owned the debt and mortgage. The bank then obtained its own decree and sold the real estate. A sale was confirmed in 1933 to G. Kennedy. Mr. Kennedy conveyed the real estate to Mr. Marshall in February 1941. Marshall filed suit to quiet title against a number of folks, including attorney Card who asserted his attorney's lien. In October 1941, the court quieted title in Mr. Marshall. In denying attorney Card his lien, the Nebraska Supreme Court held, in a somewhat poorly written paragraph:

> The inception of defendant's [Card's] lien rights, if any, must be determined as of the date he filed his claim of lien. At that time the land here involved was real estate (not money), the title to which was in the "adverse party," [the mortgagor] Good, subject to the foreclosure decree. This the defendant recognized when he filed his claim of lien against the decree and the "title affected by the proceedings." *That land never became money in the hands of the adverse party. The legislature, clearly, did not intend that an attorney should have an attorney's lien under such circumstances*. Had they so intended it would have been a simple matter to have so stated the law. The court does not have the power to extend the act by construction beyond its plain terms, so as to give a right to a lien where under the statute no lien right is granted. The plaintiff was entitled to a decree removing the cloud of the claimed lien.

Id. at 691–92 (emphasis added).

The "circumstances" upon which the court denied the lien are ambiguous. The debtor asserts the circumstances were that the land was not "money". The circumstances could also be Mr. Good was not adverse to attorney Card's client, Mr.

Reed. Mr. Reed did not own the mortgage and was not a proper plaintiff. The circumstances could be attorney Card did not obtain a recovery for Mr. Reed. The recovery was in favor of the bank, which obtained the foreclosure decree. Attorney Card did not represent the bank.

The circumstances could also be Mr. Marshall was a bona fide purchaser and transfers destroyed any attorney lien. *See* Williston on Contracts § 62:11 *Attorney's liens* (4th ed.) (stating an attorney lien is waived when an "innocent third-party purchaser for value has obtained the fruits of the judgment"). This is ultimately the construction the Nebraska Supreme Court later adopted in the case of *Young v. Card*, 18 N.W.2d 302 (Neb. 1945). Therein the court walked back the debtor's reading of *Marshall* when the court described its own holding as "an attorney's lien would not *follow land* after it was sold under a decree". *Id*. at 304 (emphasis added). Notably the court did not find the lien did not "attach" to real estate. The court did not need to reach the issue of whether a lien followed real estate if an attorney's lien never could attach in the first place.

Young v. Card also happens to be the second case the debtor cites to support her claim an attorney's lien will not attach to real estate. In *Young* attorney Lee Card was again front and center. The plaintiff, Charles Young, hired attorney Card to foreclose a mortgage. The mortgagor filed for protection under the then existing Frazier–Lemke Farm Bankruptcy Act. During the bankruptcy, the mortgagor offered to deed the real estate to Mr. Young with a one-year lease back provision. Instead of taking the deed in Mr. Young's name, attorney Card took the deed in his own name. Attorney Card then claimed a *possessory*, not a charging, attorney's lien. In denying the possessory lien, the court held:

> The defendants contend that an attorney has a possessory lien upon property of any sort belonging to a client. This court has held in the case brought by Lee Card against Anna Rose George and others, found in 140 Neb. 426, 299 N.W. 487, that an attorney has no lien for services performed by him except such as provided by statute, and that section 7–108, R.S.1943, does not provide for an attorney's lien on real estate owned by his client. *See, also, Marshall v. Casteel*, 143 Neb. 68, 71, 8 N.W.2d 690, 11 N.W.2d 818, in both of which cases the defendant in the instant case appeared.
>
> In the last case cited, we held that an attorney's lien would not follow land after it was sold under a decree. It appears to us that if section 7–108, R.S.1943, does not give an attorney a lien upon any real estate belonging to his client, it certainly would give him no right to take title to land belonging to his client in his own name because his client owed him a fee for foreclosing a mortgage.

Young v. Card, 18 N.W.2d at 304.

Young v. Card followed and built on a third attorney's lien case involving attorney Lee Card. *See Card v. George*, 299 N.W. 487 (1941). In *Card v. George*, attorney Card performed services for Margaret E. Kurt between 1936 to 1938. In May 1938, attorney Card filed an attorney's lien with the county clerk. One month later, Ms. Kurt died. After her death, attorney Card filed an action to foreclose the lien, claiming he had a lien against any real estate Ms. Kurt owned when the lien was filed. The Nebraska Supreme Court held, "The statute does not give an attorney a lien upon any real estate belonging to his client and the claimed lien in this case was a nullity." *Card v. George*, 299 N.W. at 488.

The cases of *Young v. Card* and *Card v. George* do not support the debtor's position an attorney's charging lien cannot attach to real estate. Both cases involved possessory liens. In *Card v. George*, the court construed the lien statute to find the attorney has no general lien against real estate owned by the client. This is the plain reading of the statute. As to possessory liens, the statute gives a charging lien against "papers" and "money" in the attorney's hands. Real estate the client owns is not on the hands of the attorney. Attorney Card sought to get around this rule by improperly taking possession of his client's real estate in *Young v. Card*. Ultimately, the court rejected attorney Card's creative, if not unethical, method of establishing a possessory lien.

Conclusion

As a general matter, an attorney's charging lien can, under the correct circumstances, attach to real estate under Nebraska law. The holding is limited to this narrow issue. As issues remain, this order is not final for purposes of appeal.

Dated: November 2, 2023

BY THE COURT

/s/ Brian S. Kruse
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK06-81003
	)	
HEIDI LERDAHL,	)	CH. 13
	)	
Debtor(s).	)	

ORDER

Hearing was held in Omaha, Nebraska, on February 5, 2007, regarding Filing No. 42, Objection to Claim of T. Lerdahl, filed by the debtor, and Filing No. 44, Resistance, filed by Timothy J. Lerdahl. Richard Johnson appeared for the debtor and Michael Matukewicz and Jason Fendrick appeared for Timothy Lerdahl.

In May of 2006, the debtor's marriage to Timothy Lerdahl was dissolved by a Decree of Dissolution of Marriage entered by the District Court of Douglas County, Nebraska. The decree referred to and incorporated in it the parties' Property Settlement and Child Custody Agreement ("Agreement"). In the Agreement, the debtor agreed to pay and hold Mr. Lerdahl harmless for the following debts:

Creditor	Amount
Premier Line Overdraft (U.S. Bank)	$ 9,415.56
Reserve Line (U.S. Bank)	9,754.83
401K Loan	8,700.00
401K Loan	17,700.00
Sam's Club	2,000.00
Total	$47,570.39

Following the entry of the decree, on July 12, 2006, Ms. Lerdahl filed this Chapter 13 case. In her initial schedules and matrix, she did not list Mr. Lerdahl as a creditor. Presumably, therefore, he did not receive notice of the case.

Upon the filing of an amended plan on August 31, 2006, the debtor did amend the matrix and listed Mr. Lerdahl, U.S. Bank, and Sam's Club. Since that date, the debtor has filed an amended plan on October 15, 2006, and an amended plan on December 18, 2006. The schedules have not been amended to show the manner in which the debtor proposes to treat the debt, if any, to Mr. Lerdahl.

Mr. Lerdahl filed a secured claim for the full amount of the obligations listed in the decree. The debtor has objected to the secured status of the claim and asserts that the claim is totally unsecured.

The debtor has made no payments on any of the obligations she agreed to pay in the above-referenced portion of the decree. She indicated, through counsel, at the hearing on the objection to the claim that she will treat the 401(k) loans as distributions and will pay the tax and penalty incurred as a result. That being the case, Mr. Lerdahl has no reason to believe that he will be called upon to make any payments on the 401(k) loans.

The issue, then, is whether the obligation to pay and hold Mr. Lerdahl harmless for the two U.S. Bank debts and the Sam's Club debt constitutes a secured claim for bankruptcy purposes. Referring to Nebraska statutory authority, Mr. Lerdahl takes the position that the payment obligation agreed to by Ms. Lerdahl in the decree creates the equivalent of a judgment which is a lien against any real or personal property that she owns and that is registered with a Douglas County office. Since she received the residence in the dissolution action, with equity of approximately $30,000, Mr. Lerdahl claims a lien to the extent of the equity in the property.

As support for his position, he cites Neb. Rev. Stat. § 42-366(5), Neb. Rev. Stat. § 42-371(1), and Neb. Rev. Stat. § 25-1504. Section 42-366 entitled "Property settlements; effect; enforcement; modification" provides, at paragraph (5): "Terms of the agreement set forth in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt."

Section 42-371(1) provides, in relevant part:

> All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments.

Section 25-1504 provides:

> The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof only from the day on which such judgments are rendered. . . . *Provided*, that a judgment shall be considered as rendered when such judgment has been entered on the judgment record.

The portion of the Agreement dealing with the obligation to pay the specified debts and hold Mr. Lerdahl harmless, although incorporated into the Decree of Dissolution of Marriage, is not a judgment or order for payment of money to Mr. Lerdahl. In the Agreement, the debtor did not agree to pay to her former spouse any of the amounts listed. Instead, she agreed to pay those amounts directly to the creditors. Had she not filed bankruptcy, he could enforce her promise to pay the debt only by paying it himself and then returning either to the court that entered the dissolution of marriage decree or to another court of competent jurisdiction to enforce the agreement and obtain a judgment against her. At this point, when he has paid no more than $250 upon the request of one of the creditors, his only monetary claim against her is for that amount. Since that amount has not been reduced to judgment, it is not a lien against the real estate owned by her. In addition, the balance of the claim is contingent and must be disallowed under § 502(e)(1)(B). To paraphrase that section, the court shall disallow any claim for reimbursement to a co-debtor if such claim is contingent.

The objection to claim is granted. The claim of Mr. Lerdahl for the $250 that he has paid

is a general unsecured claim. The claim of Mr. Lerdahl for the balance of the amount he may be required to pay in the future is an unsecured contingent claim. It is possible, though not probable, that none of the creditors will pursue him. If no creditors pursue him, he will not have been harmed, and the hold-harmless clause and the promise by her to pay will not need to be forced by any court. See Anderson v. Anderson (In re Anderson), 62 B.R. 448, 458 (Bankr. D. Minn. 1986) (indemnification obligation in divorce decree's hold-harmless clause would arise only if debtor failed to timely pay those creditors; until then, debtor's liability to former spouse is unmatured and contingent).

Mr. Lerdahl has not objected to the plan currently before the court or to any other plan that has been filed. That failure to object may be as a result of his belief that he had a secured claim that had not been dealt with in the plan. Arguably, secured claims that are not dealt with in a plan pass through bankruptcy unaffected and are enforceable when the bankruptcy is complete. However, by this order, he has been denied a secured claim. Therefore, he should be granted an opportunity to file an objection to a plan that does not propose to pay the obligations the debtor agreed to pay and does not propose to protect his interest if he is required to pay those obligations, or any part thereof. Mr. Lerdahl is granted until March 1, 2007, to object to the current plan on whatever basis he believes is appropriate. The matter will then be set for hearing and discussed in the context of an objection to plan, rather than in the context of an objection to claim.

IT IS ORDERED that:

1. The Objection to Claim, Filing No. 42, is granted;

2. Timothy Lerdahl is granted until March 1, 2007, to object to the current Chapter 13 plan.

DATED this 13th day of February ,2007.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Richard Johnson
Michael Matukewicz
Jason Fendrick
Kathleen Laughlin
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK12-81843-TJM
	)	
CHADWICK ALLEN POOLE,	)	CH. 13
	)	
	)	
Debtor(s).	)	

ORDER

Trial was held in Lincoln, Nebraska, on March 5, 2013, regarding Fil. #9, Chapter 13 Plan, filed by the debtor, Fil. #23, Objection to Confirmation of the Plan, filed by Cheryl J. Poole, and Fil. #29, Response, filed by the debtor. Dan Peters appeared for the debtor and C.J. Poole appeared on her own behalf.

The debtor has filed a Chapter 13 plan. His former spouse has objected. Contrary to the terms of the dissolution decree and settlement documents, Mr. Poole has failed to pay $3,000.00 in attorney fees owed to Mrs. Poole's attorney; failed to pay a $4,2960.00 debt to First National Bank of Omaha; and failed to pay a lump sum of $25,000.00 or monthly installment payments of $350.00 on the $25,000.00 judgment. She believes each of those are in the nature of support and should not be dischargeable. The plan treats those three obligations as general unsecured debts.

It is clear from the documentary evidence at Fil. #58, including a deposition of Mr. Poole and a transcript of the dissolution proceeding, that the $25,000.00 obligation running from the debtor to his former spouse was negotiated in an attempt to even up the financial circumstances of the parties. During the pendency of the dissolution action, and after the entry of a temporary order directing Mr. Poole not to liquidate any assets, he liquidated more than $80,000.00 from various accounts, without informing his spouse. The agreement between the parties approved by the Douglas County district court judge included a transfer of approximately $12,000.00 in a checking account directly to Mrs. Poole. It also required Mr. Poole to surrender the funds in a 401(a) account. It then required the payment of the $25,000.00, which was anticipated would come from the equity in the sale of their home, but in case there was no such equity, he was obligated to pay the amount off in installments of $350.00 per month.

Mrs. Poole did get the funds from the checking account and the 401(a) account and did receive $350 a month for two months. The house has not been sold and, from the testimony at trial, it appears there is no equity.

FINDINGS OF FACT

I find as a fact that the obligation to pay the First National Bank debt and the attorney fees are in the nature of support. I also find that the obligation to pay $25,000.00 is in the nature of support. That finding is based upon the language of the settlement documents. The decree provides:

> Alimony. Commencing January 1, 2012, Husband shall pay to Wife, through automatic income withholding through the Nebraska Child Support Payment Center the sum of $850.00 due and payable on the 1st day of each month for sixty-five (65) months for alimony or spousal support terminable upon death of either party or

remarriage of Plaintiff.

> Commencing January 1, 2012, Husband shall pay to Wife, through automatic income withholding through the Nebraska Child Support Payment Center, the sum of $1.00 on the 1st day of each month for sixty-five (65) months for alimony or spousal support and said sum shall be an alimony award in addition to the aforementioned award and modifiable only in the event that Husband fails to pay the property installment payments or any increment thereof as defined in paragraph 20 of the Property Settlement Agreement and/or in the event Husband fails to pay any marital debt assigned to him or any increment thereof as indicated in paragraph 16 of the Property Settlement Agreement, including failure to pay by virtue of discharging any debts or increments thereof in a bankruptcy proceeding and including, but not limited to, paying less than is owed through a negotiation process and/or fails to pay any expenses and debt obligations associated with the real estate as defined in the second subparagraph of paragraph 9 of the Property Settlement Agreement.

¶ 5 at 4-5 (Fil. #58-1, Ex. A).

The Property Settlement Agreement attached to the decree restates the language of those two paragraphs at pages 3 and 4. Paragraph 16 of the Property Settlement Agreement is labeled Marital Debts of the Parties and provides that the husband shall be responsible for the First National Bank line of credit #2964 in the approximate amount of $4,296.00 as of December 7, 2011. It further provides that the husband shall indemnify and hold the wife harmless from such liability.

Paragraph 17 of the Property Settlement Agreement provides for the attorney fees which were to be paid on or before June 1, 2012, and which have not been paid.

Paragraph 20 of the Property Settlement Agreement is entitled Property Settlement Equalization Payment. It provides:

> Husband shall pay to Wife the sum of $25,000.00 as a property settlement equalization payment as necessary for the benefit of Wife and the parties' children. This amount shall be repaid at the rate of $350.00 per month due and owing on the 1st day of each month commencing June 1, 2012. This amount shall accrue interest at the rate of 4% per annum and shall be paid through the Clerk of the District Court of Douglas County. At the time of closing on the sale of the marital residence, Husband shall pay to Wife from his segregated share the remaining amount of the $25,000.00 still due and owing.

I interpret the meaning of the decree language and the property settlement language that even though it is clear that the $25,000.00 should come from marital property, if it is available, to support the needs of the wife and children, such amount is nonetheless due and payable on a monthly basis in the form of alimony if it is unpaid or discharged in a bankruptcy case. I find as a fact that the $25,000.00 award is in the nature of support.

CONCLUSIONS OF LAW

Judge Saladino, in his appellate capacity, wrote extensively about support obligations and non-dischargeable attorney fees in Phegley v. Phegley (In re Phegley), 443 B.R. 154 (B.A.P. 8th Cir. 2011):

> The determination of whether an award arising out of marital dissolution proceedings was intended to serve as an award for alimony, maintenance, or support, or whether it was intended to serve as a property settlement is a question of fact to be decided by the bankruptcy court. Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608 (8th Cir. BAP 1997) (citing Holliday v. Kline (In re Kline), 65 F.3d 749, 750 (8th Cir. 1995)); Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992); Williams v. Williams (In re Williams), 703 F.2d 1055, 1056 (8th Cir. 1983).
>
> . . .
>
> The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. Id. When deciding whether a debt should be characterized as one for support or property settlement, the crucial question is the function the award was intended to serve. Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984) (citing Williams v. Williams (In re Williams), 703 F.2d 1055, 1057 (8th Cir. 1983)); see Kruger v. Ellis (In re Ellis), 149 B.R. 925, 927 (Bankr. E.D. Mo. 1993) (finding that in order to determine whether an award represents a property settlement or a maintenance obligation, a court must look to the function an award was intended to serve).
>
> Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law. See Williams, 703 F.2d at 1056. A divorce decree's characterization of an award as maintenance or alimony does not bind a bankruptcy court but is however a starting point for the determination of the award's intended function. Id.; In re Hamblen, 233 B.R. 430, 435 (Bankr. W.D. Mo. 1999) (due deference should be given to the state court's characterization of the award). The burden of proof under § 523(a)(5) is on the party asserting that the debt is nondischargeable. Lineberry v. Lineberry (In re Lineberry), 9 B.R. 700, 706 (Bankr. W.D. Mo. 1981).
>
> Factors considered by the courts in making this determination include: the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments. Morgan v. Woods (In re Woods), 309 B.R. 22 (Bankr. W.D. Mo. 2004); In re Tatge, 212 B.R. 604, 608 (8th Cir. BAP 1997); Schurman v. Schurman (In re Schurman), 130 B.R. 538, 539 (Bankr. W.D. Mo. 1991) (citing In re Gianakas, 917 F.2d 759 (3d Cir. 1990)).
>
> Exceptions from discharge for spousal and child support deserve a liberal construction, and the policy underlying § 523 favors the enforcement of familial obligations over a fresh start for the debtor, even if the support obligation is owed directly to a third party. See Holliday v. Kline (In re Kline), 65 F.3d 749 (8th Cir. 1995); Williams v. Kemp (In re Kemp), 242 B.R. 178, 181 (8th Cir. BAP 1999), aff'd 232 F.3d 652 (8th Cir. 2000).

443 B.R. at 156-58.

The parties' property settlement agreement directed the debtor to pay $3,000 of his wife's attorney's fees, to be paid to the attorney. Fil. No. 58, Ex. A, at 9, ¶ 17. The Eighth Circuit Court of Appeals has long held that an award of attorney's fees, if intended to serve as maintenance or support, are non-dischargeable even if payable to someone other than the spouse. Williams v. Williams (In re Williams), 703 F.2d 1055, 1057 (8th Cir. 1983); Holliday v. Kline (In re Kline), 65 F.3d 749, 751 (8th Cir. 1995). Bankruptcy courts have ruled that the BAPCPA amendments in 2005 did not substantively change § 523(a)(5), so Kline and other Eighth Circuit precedent remains applicable. In re Andrews, 434 B.R. 541, 546 (Bankr. W.D. Ark. 2010); Kelly v. Burnes (In re Burnes), 405 B.R. 654, 658-59 (Bankr. W.D. Mo. 2009). Therefore, the attorney's fees are not dischargeable and must be accounted for in the plan.

The provision of the decree ordering the debtor to pay the First Nebraska Bank line of credit, and the "indemnify and hold harmless" clause included therein, render that debt non-dischargeable.

> [I]n the case of an obligation to pay a debt owed to a third party, it is the obligation to hold the spouse or former spouse harmless that is presumptively nondischargeable under this section. *See* 140 Cong. Rec. H10752, H10770. "A property settlement incorporated by a divorce decree that apportions third party debt to one spouse means that the obligor-spouse indemnifies the obligee-spouse in the event that the obligee is required to pay." In re Sturdivant, 289 B.R. 392, 399 (citing Johnston v. Henson (In re Henson), 197 B.R. 299, 303 (Bankr. E.D. Ark. 1996)).

Douglas v. Douglas (In re Douglas), 369 B.R. 462, 463-64 n.2 (Bankr. E.D. Ark. 2007); see also Gibson v. Gibson (In re Gibson), 219 B.R. 195, 202-03 (B.A.P. 6th Cir. 1998) ("A debtor's obligation as part of a decree or separation agreement . . . to hold a spouse 'harmless' on a third-party obligation [is an example] of incurring a debt which satisfies the qualifying language of § 523(a)(15)[.]")

As to the alimony modification provision, it is commonly known as a Collett provision because it was described and upheld in the case of Collett v. Collett, 707 N.W.2d 769 (Neb. 2005). The decision and its effect were summarized by the Nebraska Court of Appeals in Murphy v. Murphy, 759 N.W.2d 710 (Neb. Ct. App. 2008):

> Shan Collett and Kimberly Collett were both veterinarians, and the husband, Shan, borrowed money from a bank to establish a veterinary clinic. The clinic was rather quickly unsuccessful. The wife, Kimberly, had guaranteed the loan. Shan filed a chapter 7 bankruptcy a month before their pending divorce went to trial. The evidence was that both parties expected that the collateral would cover the bank debt – which expectation turned out to be incorrect. The trial court awarded Kimberly $1 a year in alimony in March 2002, but in November 2003, the bank obtained a deficiency judgment against Kimberly for nearly $69,000. That judgment caused Kimberly to seek a modification of her alimony award, alleging a change in circumstances. Kimberly introduced evidence showing that to pay the judgment, she would be required to pay $800 a month for 122 months, that an increase in alimony would increase her tax liability by $161.41 per month, and that her yearly income had decreased from $52,000 to $38,000 since the divorce, whereas Shan's monthly income had increased from $1,400 to $4,000 plus benefits. The district court modified the alimony award from $1 a year to $950 per month for 123 months, and Shan appealed. Shan's main attack on this decision was that it violated the U.S.

Bankruptcy Code as well as the Supremacy Clause of the U.S. Constitution. The Nebraska Supreme Court affirmed the trial court's modification of the alimony award.

In Collett, as well as in the case before us, the factual pattern is a modification of an alimony obligation to account for a debt, which an obligated party was able to discharge in bankruptcy, with the other party being left with responsibility of the discharged debt. [The appellant's argument in this case], similar to the husband's argument in Collett, is that her discharge prevents the reimposition of this debt on her, in effect, via a reduction in her monthly alimony payment.

. . .

The court in Collett noted the facts that the decree originally included an award of alimony and that the modification was sought on the basis of a change in circumstances, and then said:

> Other courts addressing this scenario have rejected arguments that modification of alimony is merely a "repackaging" of debts discharged in bankruptcy and thus prohibited by federal law, if the party seeking modification is able to demonstrate an actual change in financial circumstances subsequent to the dissolution and bankruptcy of the former spouse. See, In re Siragusa, 27 F.3d 406, 407 (9th Cir. 1994); Smith v. Smith, 741 So. 2d 420 (Ala. Civ. App. 1999); In re Marriage of Trickey, 589 N.W.2d 753 (Iowa App. 1998). The court in In re Marriage of Trickey articulated what we believe to be the correct analytical approach: "If the modification is essentially a reinstatement of the property settlement under the guise of alimony, the modification violates section 524 and is not permitted. . . . Mere attempts to 'end run' around a bankruptcy discharge are not allowed. . . . However, if the alimony modification merely takes into account the fact that one spouse would no longer receive the property settlement payments upon which the original support award was premised and the discharge results in changed financial circumstances, then modification will not violate federal bankruptcy law." . . . 589 N.W.2d at 757.
>
> Collett, 270 Neb. at 730-31, 707 N.W.2d at 775-76.

Murphy, 759 N.W.2d at 717-18.

The Collett court explained the distinction between dischargeable and non-dischargeable modifications:

> In In re Siragusa, supra, the court determined that a post-bankruptcy alimony modification did not violate the discharge injunction where there was no showing that the former wife was attempting to reinstate a discharged property settlement obligation. Instead, the modification was based on the changed circumstance that the former wife would not receive the future property settlement payments upon which the original alimony award was premised. The court noted that the former husband's bankruptcy constituted a changed circumstance in that it "altered both [the former wife's] need and [the former husband's] ability to pay." In re Siragusa, 27 F.3d at 408. The court therefore concluded that the resulting modification was

> justified in that it "merely takes into account the fact that [the former wife] would no longer receive the property settlement payments upon which the original alimony was premised." Id.

Collett, 707 N.W.2d at 776.

In applying the Collett legal analysis to the facts of this case, the Pooles clearly intended that if the property equalization debt was discharged, it would create a change in the wife's financial circumstances that would support a modification to her alimony award. The obligation is in the nature of support and is non-dischargeable, and therefore must be accounted for in the debtor's plan. The current plan is denied confirmation.

IT IS ORDERED: Cheryl J. Poole's objection to confirmation of the plan (Fil. #23) is sustained. The debtor is granted thirty days to file an amended plan.

DATED: April 3, 2013

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
*Dan Peters
C.J. Poole
Kathleen Laughlin

*Movant is responsible for giving notice of this order to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	)	CASE NO. BK14-80189
	)	
WILLIAM H. SUTTON, JR.,	)	CH. 13
	)	
Debtor.	)	

ORDER

Hearing was held in Omaha, Nebraska, on July 1, 2014, on an objection to claim filed by Debtor (Fil. #24) with a resistance by creditor Mary E. Sutton (Fil. #s 32 - 35). Erin M. McCartney represents Debtor, and Kevin J. O'Connell represents Mary Sutton. Evidence was admitted, and the matter was taken under advisement.

For the reasons stated below, the objection to claim is sustained and the claim (proof of claim #4-1) shall be allowed as a general unsecured claim.

Background

Debtor's ex-wife, Mary Sutton, filed a proof of claim in the amount of $98,205.29, asserting that the claim is a priority claim for a "domestic support obligation." Debtor objected to the classification of the claim and argues that it should be classified as a general unsecured claim.

The parties were divorced in 1999, and the decree of dissolution of their marriage incorporated a property settlement agreement. Under the terms of that agreement, Debtor agreed to pay child support in specified amounts and alimony in the amount of $1.00 per month for 72 months, subject to change in the event Ms. Sutton sought a modification. She did not do so. The agreement also awarded to Ms. Sutton the family home, free and clear of any claim by Debtor and required Debtor to obtain a release of the home from a lien held by First National Bank, the lender for Debtor's business. Further, the agreement required Debtor to use the assets allocated to him as payments to or as additional collateral to First National Bank in order to obtain the release of the home from the lien for his business debts. Debtor complied with his obligations and obtained a release of the home from First National Bank's liens.

The property settlement agreement also required Debtor to pay to Ms. Sutton a "Cash Property Settlement" as follows:

> In consideration for the distribution of assets to the Husband, the Husband shall pay to the Wife a cash property settlement in the amount of Eighty-Seven Thousand Five Hundred and No/100 Dollars ($87,500.00) which shall be paid within sixty (60) months of the entry of the Decree of Dissolution. . . . The cash property settlement payment shall be deemed to be a judgment against the Husband; and, in the event that the Husband elects not to pay the amount due, the Wife shall be afforded

all legal remedies as would otherwise be available to her in the collection of a judgment.

Ms. Sutton argues that the cash property settlement qualifies as a domestic support obligation based upon the overall structure of the property settlement agreement. Debtor argues that the cash property settlement is just that – a property settlement – and is not a domestic support obligation.

Discussion

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> . . .
>
> (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;
>
> . . .
>
> (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.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. *See In re Braun*, 2008 WL 2130313, 2 (Bankr. D. Neb. 2008). For purposes of the case at hand, claim priority and discharge are at issue. Domestic support obligations are not discharged in Chapter 13 cases. *See* 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they

entitled to priority status. In this case, the requirements of § 101(14A)(A) and (C) are satisfied and not at issue. The only issue is whether the debt is in the nature of alimony, maintenance, or support as required under § 101(14A)(B).

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. *Id.* When deciding whether a debt should be characterized as one for support or property settlement, the crucial question is the function the award was intended to serve. *Adams v. Zentz*, 963 F.2d 197, 200 (8th Cir. 1992); *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir.1984) (citing *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir.1983)); *see Kruger v. Ellis (In re Ellis)*, 149 B.R. 925, 927 (Bankr. E.D. Mo. 1993) (finding that in order to determine whether an award represents a property settlement or a maintenance obligation, a court must look to the function an award was intended to serve).

Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law. *See Williams*, 703 F.2d at 1056. A divorce decree's characterization of an award as maintenance or alimony does not bind a bankruptcy court but is however a starting point for the determination of the award's intended function. *Id.*; *In re Hamblen*, 233 B.R. 430, 435 (Bankr. W.D. Mo. 1999) (due deference should be given to the state court's characterization of the award). The burden of proof under § 523(a)(5) is on the party asserting that the debt is nondischargeable. *Lineberry v. Lineberry (In re Lineberry)*, 9 B.R. 700, 706 (Bankr. W.D. Mo. 1981).

Factors considered by the courts in making this determination include: the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments. *Morgan v. Woods (In re Woods)*, 309 B.R. 22 (Bankr. W.D. Mo. 2004); *In re Tatge*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997); *Schurman v. Schurman (In re Schurman)*, 130 B.R. 538, 539 (Bankr. W.D. Mo. 1991) (citing *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990)).

Although it is not binding, the agreement's characterization of the payment is the starting point in the court's analysis. *Williams, supra*. Here, the payment was clearly characterized as a "cash property settlement" and not as a support obligation. The property settlement nature of the obligation is also indicated by the manner of payment. It is simply a lump sum obligation that was due within 60 months of the divorce decree. It was not required to be paid in monthly installments, which also indicates it was not intended as a support obligation. There is no indication that at the time of the decree, it would have been difficult for the former spouse and children to subsist without the payment, particularly since no payment was even due for up to five years after the decree. Finally, in a related proceeding to determine the priority of liens, including the judgment lien for the cash property settlement, the Douglas County District Court held: "With respect to the Motion to Determine Judgment Lien Liability, the Court finds that the judgment the Plaintiff acquired against

the Defendant via the Decree entered in 1999 was a property settlement rather than a judgment for either child support or alimony."

Ms. Sutton argues that in the divorce she gave up present claims to much of the marital property in an attempt to help Debtor become successful in his business so that he would be able to pay his support obligations. While that appears to be true, it does not turn the cash property settlement into a domestic support obligation. Instead, by giving up present rights to certain funds and assets, Ms. Sutton was able to retain the family home free of claims by her husband and her husband's lender. The cash property settlement appears to simply be a property equalization obligation and not a support obligation, for all the reasons stated in the preceding paragraph.

IT IS, THEREFORE, ORDERED that Debtor's objection (Fil. #24) to the claim of Mary Sutton is sustained and the claim (proof of claim #4-1) shall be allowed as a general unsecured claim.

DATE: July 11, 2014.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*Erin M. McCartney
Kevin J. O'Connell
Kathleen Laughlin
United States Trustee

Movant(*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK07-82609
	)	
JODIE KENNEDY,	)	
	)	CH. 7
Debtor(s).	)	

ORDER

Hearing was held in Omaha, Nebraska, on March 31, 2008, regarding Filing No. 21, Motion to Disqualify William Bianco, filed by Jodie Kennedy. James Crampton appeared for the debtor and William Bianco and Ryan Caldwell appeared for Michael Kennedy.

The debtor and her former spouse, Michael Kennedy, were involved in a dissolution of marriage action which was contested concerning child custody, child support and child care expenses. During some of the litigation with regard to the dissolution action, attorney Stephen Stroh was an associate in the office of Pamela Govier, who was then the attorney for Jodie Kennedy, and he participated in certain matters related to the litigation. He and Jodie Kennedy corresponded several times concerning the litigation.

Mr. Stroh is now affiliated with William Bianco, counsel for Michael Kennedy. Jodie Kennedy has filed this Chapter 7 bankruptcy case and Mr. Bianco, on behalf of Michael Kennedy, has filed an adversary proceeding concerning the dischargeability of Jodie Kennedy's obligations arising from the dissolution of marriage decree. Mr. Bianco has also filed a motion for relief from the automatic stay on behalf of Michael Kennedy so that Michael Kennedy can proceed in the court that granted the dissolution of marriage to find Jodie Kennedy in contempt for failing to comply with terms of the dissolution of marriage decree. Finally, Mr. Bianco has filed a motion to dismiss the Chapter 7 case for abuse, alleging that Jodie Kennedy has listed child support and child care on her schedules, but that she either does not pay any amount for those items or she pays significantly less than what she has listed.

Mr. Crampton, Jodie Kennedy's bankruptcy attorney, has filed a motion to disqualify Mr. Bianco and his firm from representing Michael Kennedy in the bankruptcy case because of Mr. Stroh's involvement in the dissolution of marriage case.

Mr. Bianco vigorously denies that he has a conflict of interest. It is his position that the motion to dismiss presently pending has nothing to do with the dissolution of marriage case, so he has no conflict.

Motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law. In re Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992). The Eighth Circuit Court of Appeals has not articulated a clear standard for ruling on such motions. The best guidance has come from the Federal Circuit in EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459 (Fed. Cir. 1984) (applying Eighth Circuit law), where the court stated:

> The precise rule on disqualification applied in the Eighth Circuit . . . is not clear but we are satisfied that that Circuit would not be less solicitous of client confidentiality than the general weight of authority which is that – where a

> substantial relationship is found to exist between two adverse matters (and sides) in which the challenged attorney or his firm has participated and will participate – there is a presumption (in the situation of a private lawyer's "changing sides") that confidential disclosures passed to the challenged lawyer, but that presumption is rebuttable.

746 F.2d at 1461 (footnote omitted).

The leading case in the Eighth Circuit in this regard is Arkansas v. Dean Foods Products Co,, 605 F.2d 380 (8th Cir. 1979), *overruled on other grounds by* In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (8th Cir. 1980). In Dean Foods, the court rejected any "bright line" rules, such as the one existing in Nebraska[1], stating:

> Disqualification of counsel, like other reaches for perfection, is tempered by a need to balance a variety of competing considerations and complex concepts. Disqualification in spasm reaction to every situation capable of appearing improper to the jaundiced cynic is as goal-defeating as failure to disqualify in blind disregard of flagrant conflicts of interest. Between those ethical extremes lie less obvious influences on the interest of society in the orderly administration of justice, on the interest of clients in candid consultation and choice of counsel, and on the interest of the legal profession in its reputational soul.
>
> So too, the judicial effort to light a disqualification path is unlikely to result in an early formulation of rules universally applicable to the Canons of the Code of Professional Responsibility. Rigid rules can be sterile and lacking in universal application. At the same time, an "every case on its own facts" approach can be facile and unhelpful. Ethical experience is the key. Until more is gained, rigidity may be feasible at the far ends of the ethics spectrum, while flexibility governed by facts must reign in a gradually diminishing area between those extremes.

605 F.2d at 383.

To that end, the Eighth Circuit Court of Appeals encourages courts "to strictly enforce the Code of Professional Responsibility." Central Milk Producers Coop. v. Sentry Food Stores, Inc., 573 F.2d 988, 993 (8th Cir. 1978). "In exercising this responsibility, the Court should also consider 'the ABA Code of Professional Responsibility, the court's duty to maintain public confidence in the legal

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[1]The Nebraska Supreme Court, in State of Nebraska ex rel. FirsTier Bank, N.A. v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993), adopted a "bright light" rule concerning attorney representation of a client in litigation against a former client. The court stated:

> We now hold that an attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.

244 Neb. at 45, 503 N.W.2d at 844.

profession and its duty to insure the integrity of the judicial proceeding.' Olson v. Snap Prod., Inc., 183 F.R.D. 539, 542 (D. Minn. 1998) (quoting United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982), cert. denied, 459 U.S. 834 (1982)).

In the District of Nebraska, however, attorneys admitted to practice before the federal court are not governed by any particular code of professional responsibility, although the court may look to the Nebraska Rules of Professional Conduct for guidance.[2] General Rule of the United States

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[2]In addition to the Nebraska Supreme Court authority cited previously, certain provisions of the Nebraska Rules of Professional Conduct are relevant to the matter before the court. Article 1 governs the client-lawyer relationship. Rules 1.10, 1.9 and 1.7 are particularly applicable. They provide as follows:

> RULE 1.10. IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE
>
> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
>
> . . .
>
> (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7
>
> RULE 1.9. DUTIES TO FORMER CLIENTS
>
> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> . . .
>
> RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

(continued...)

District Court for the District of Nebraska 1.7(b).[3] In fact, a judge in this district has specifically held that "the ethical rules adopted and interpreted by the Nebraska Supreme Court do not govern the substantive legal question of whether a lawyer should be disqualified from representing a client in a case pending in federal court." Steele v. Lacey, 1997 WL 138974, at *1 (D. Neb. Mar. 26, 1997). See also Engineered Prod. Co. v. Donaldson Co., 290 F. Supp. 2d 974, 980 (N.D. Iowa 2003) (while state standards and local rules are relevant, motions to disqualify counsel are to be decided under federal standard). Instead, a three-part test developed under federal law should be used when determining whether a law firm should be disqualified when a lawyer who had been a member of one firm, which represented an adverse party, later joins another firm representing a party on the other side. First, the court must determine whether a substantial relationship exists between the subject matter of the prior and present representation. Second, the court must determine whether the attorney whose change of employment created the issue was actually privy to any confidential information that his prior firm received from the party now seeking disqualification. Third, the court must determine whether the firm facing disqualification has taken appropriate steps to insure that its new member has not shared confidences about the member's former firm's clients. Id. at *4.

Under the relevant considerations, the issue here is whether the bankruptcy case is substantially related to the dissolution of marriage case. It is a close call. If Mr. Kennedy were seeking to modify the terms of the divorce decree, then it seems clear that the matters are substantially related and that a potential conflict exists. However, the issues in the bankruptcy court, concerning Mr. Kennedy's allegations of erroneous information in the schedules and the non-dischargeability of the debt, appear to be premised on the four corners of the decree and therefore less likely to be subject to the threat that confidential information obtained by Mr. Stroh in the course of the divorce proceedings would be used against the debtor now.

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[2](...continued)

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

[3]Nebraska General Rule 1.7 reads, in pertinent part:

Rule 1.7 Practice of Law

. . .

(b) Ethical Standards. The standards of conduct governing the members of the bar of this court are these:

(1) Rules. Counsel shall comply with the rules of this court; and
(2) Conduct. Counsel shall refrain from conduct unbecoming of a member of the bar.

(A) The court declines specifically to adopt particular codes of professional responsibility or particular codes of ethics promulgated by others.

(B) However, and in addition to any other material, the court may consult codes of professional responsibility or codes of ethics promulgated by others when determining whether a lawyer has engaged in conduct unbecoming of a member of the bar.

Nevertheless, the decision of whether to disqualify rests in the sound discretion of the court and is subject to particularly strict judicial scrutiny. Harker v. Commissioner, 82 F.3d 806, 808 (8th Cir. 1996). Doubts should be resolved in favor of disqualification. Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978); Engineered Prod. Co. v. Donaldson Co., 290 F. Supp. 2d at 980; Olson v. Snap Prod., Inc., 183 F.R.D. at 542.

While Mr. Bianco asserts that matters arising in the bankruptcy case are not the same or substantially related to the dissolution of marriage case, I disagree. The only reason Michael Kennedy is involved in the bankruptcy case is because of the obligations placed upon Jodie Kennedy by the decree of dissolution of marriage. Part of the basis for the motion to dismiss is that Jodie Kennedy has erroneously listed the monthly amount of certain obligations arising from the dissolution of marriage decree. The only reason Michael Kennedy filed a motion for relief from the automatic stay is so that he can proceed in the dissolution of marriage court with further litigation against Jodie Kennedy. The only reason Michael Kennedy has filed an adversary proceeding in this bankruptcy case is so that he can litigate the dischargeability of certain obligations arising from the dissolution of marriage decree.

In other words, everything about Michael Kennedy's interest in this bankruptcy case concerns the dissolution of marriage case. Mr. Stroh was a member of the firm that represented Jodie Kennedy during a portion of the dissolution of marriage litigation. Mr. Stroh is now a member of the firm with Mr. Bianco. The litigation in the bankruptcy court concerns matters arising from the dissolution of marriage decree. The standards governing attorney conduct require disqualification of Mr. Bianco and his firm from representing Michael Kennedy in the bankruptcy case.

IT IS ORDERED that the motion to disqualify (Fil. # 21) is granted. The pending motion to dismiss filed by Michael Kennedy (Fil. #17) is deferred. If he obtains other counsel and desires to proceed with the motion to dismiss, counsel may request a hearing. If no hearing is requested by May 1, 2008, the motion will be denied without prejudice. The United States Trustee has been given until April 28, 2008, to file its own motion to dismiss for abuse. Mr. Bianco and his firm are disqualified from representing Michael Kennedy in the adversary proceeding, Case No. A08-8018.

DATED: April 8, 2008

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*James Crampton
William Bianco
Ryan Caldwell
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK08-41383-TLS
	)	
JEFFREY RYAN CHASE,	)	CH. 7
	)	
Debtor.	)	
MELISSA A. CRAMER,	)	ADV. NO. A08-4073-TLS
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JEFFREY RYAN CHASE,	)	
	)	
Defendant.	)	

ORDER

Trial was held in Lincoln, Nebraska, on August 25, 2009, on Plaintiff's Complaint for Determination of Nondischargeability (Fil. #1). Dana M. London appeared for Plaintiff, and Todd R. Mulliner appeared for Defendant. As more fully discussed below, I find in favor of the Plaintiff.

Background

The parties have stipulated to many of the material facts. Plaintiff and Defendant were married in 2004. During the time of their marriage, they acquired a home in Lincoln, Nebraska. The home was encumbered by a first mortgage in favor of CitiMortgage and a second mortgage in favor of U.S. Bank. During the course of the divorce proceedings, the parties entered into a property settlement agreement which was incorporated into their decree of dissolution of marriage dated June 20, 2007. Paragraph 9 of the property settlement agreement states that "the Defendant shall assume sole responsibility for an [sic] hold Plaintiff harmless from the debts to US Bank, Wells Fargo (purchase of motorcycle),[1] CCS, and all other debts he has separately and individually incurred." Further, the property settlement agreement provided for the sale of the marital residence and specifically provided in Paragraph 10 as follows:

> The parties acknowledge and agree that they jointly own a marital residence located at 6825 North 15th Street, Lincoln, Lancaster County, Nebraska, and legally described as Stone Bridge Creek Addition, Block 2, Lot 31, Lincoln, Lancaster County, Nebraska. The parties agree that said property be sold and proceeds

[1]Defendant acknowledges that his obligation to hold Plaintiff harmless on the debt to Wells Fargo is nondischargeable as is Defendant's obligation to reimburse Plaintiff for the sum of $453.25, which was set off from her bank account.

> received therefrom be applied on the mortgage indebtedness owed to Citi Mortgage and US Bank, together with any real estate taxes and other closing costs associated with said sale. In the event the parties separate prior to the sale of the home, the Plaintiff shall be responsible for the monthly mortgage payment to Citi Mortgage until the date of sale and the Defendant shall be responsible for the monthly payment to US Bank until the date of sale; otherwise, during such time as the parties remain living together, they shall share equally in the mortgage payments until the home has sold. The Defendant agrees to vacate the residence within 15 days of the entry of the Decree approving this agreement and thereafter the Plaintiff shall have the exclusive right of possession of said residence until the residence is sold. In the event there is a balance owed to US Bank after the sale of the residence, Defendant shall assume responsibility for and hold Plaintiff harmless from said indebtedness. In the event any net proceeds are realized from the sale of the marital residence, they shall be equally divided between the parties.

Pursuant to the terms of the property settlement agreement, the property was marketed for sale. At first, the parties attempted to sell it using a "for sale by owner" service and subsequently it was listed for sale through a real estate broker at $160,000.00. In September 2007, the asking price was lowered to $150,000.00 and an agreement was ultimately reached to sell the property for the sum of $145,000.00, an amount insufficient to pay the balance due on the second mortgage to U.S. Bank. Defendant consented (reluctantly) to the sale and executed the purchase agreement.

Prior to the closing, Plaintiff, Defendant, and their realtor had meetings with U.S. Bank in an attempt to obtain a release of the U.S. Bank second mortgage, which U.S. Bank refused to do. Defendant also attempted to assume sole responsibility for the U.S. Bank loan, but U.S. Bank refused to release Plaintiff. Defendant ultimately acknowledged that he would be unable to satisfy the U.S. Bank loan.

Plaintiff did not have the funds to satisfy U.S. Bank so she sought financial assistance from her parents. Plaintiff's parents obtained a loan from another bank in an amount sufficient to pay the U.S. Bank mortgage in full. Those loan proceeds were paid to U.S. Bank on October 15, 2007, in the amount of $25,206.20 and bear interest at 7.25%. U.S. Bank released its second mortgage and the sale of the home closed on November 9, 2007.

Both Plaintiff and her father testified that Plaintiff is obligated to reimburse her parents for the amount of the loan they obtained to pay the debt to U.S. Bank. However, there is no written documentation of Plaintiff's obligation to reimburse her parents.

Discussion

Plaintiff's position is that pursuant to the terms of the divorce decree and property settlement agreement, Defendant was obligated to hold Plaintiff harmless from any obligations owed to U.S. Bank. Accordingly, Plaintiff asserts that the obligation is nondischargeable pursuant to 11 U.S.C. § 523(a)(15). Defendant asserts that Plaintiff did not pay the obligation to U.S. Bank and, therefore,

there is no further obligation from which he is to hold Plaintiff harmless. Defendant's position seems to be centered around the fact that there is no documentation to evidence an obligation by Plaintiff to repay her parents for the new debt incurred to pay off the U.S. Bank debt.

Section 523(a)(15) excepts from discharge debts arising from marital dissolution or separation decrees. The parties do not dispute that the property settlement incorporated into the marital dissolution decree established a debt in the form of Defendant's obligation to hold Plaintiff harmless from the indebtedness due to U.S. Bank. In fact, the property settlement agreement expressly anticipated that the sale of the property would not produce sufficient funds to pay U.S. Bank in full and that Defendant would hold Plaintiff harmless from that indebtedness.

Clearly, the facts of this case fall squarely within § 523(a)(15). The property settlement agreement and divorce decree created an obligation of Defendant to hold Plaintiff harmless from all amounts due to U.S. Bank. Defendant agreed to sell the house for a price insufficient to satisfy U.S. Bank. Defendant acknowledged that he was unable to pay the balance due to U.S. Bank in order to facilitate the sale of the house. Plaintiff asked her parents for assistance, and they took steps to obtain a loan and pay the U.S. Bank loan in full. The uncontroverted testimony is that Plaintiff is obligated to reimburse her parents for that amount. Therefore, Defendant's obligation to Plaintiff for the amount paid to satisfy the U.S. Bank debt, plus interest at 7.25% from October 15, 2007, until paid, is nondischargeable.

Defendant's arguments with respect to whether this scenario technically falls within the terms of § 523(a)(15) are not persuasive. Plaintiff had no choice but to satisfy the U.S. Bank debt when Defendant admitted he could not do so. In order to close the sale of the home (to which Defendant agreed), Plaintiff effectively obtained a loan from her parents. The fact that the payoff funds came from Plaintiff's parents instead of from Plaintiff's own funds is irrelevant since Plaintiff is obligated to repay her parents. Therefore, this transaction does fall within the technical provisions of § 523(a)(15) and Defendant's other arguments need not be addressed.

A separate judgment will be entered in Plaintiff's favor finding the obligations owed to her to be excepted from discharge.

DATED: September 11, 2009.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:

*Dana M. London
Todd R. Mulliner
Rick D. Lange
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK08-41383-TLS
	)	
JEFFREY RYAN CHASE,	)	CH. 7
	)	
Debtor.	)	
MELISSA A. CRAMER,	)	ADV. NO. A08-4073-TLS
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JEFFREY RYAN CHASE,	)	
	)	
Defendant.	)	

ORDER

Trial was held in Lincoln, Nebraska, on August 25, 2009, on Plaintiff's Complaint for Determination of Nondischargeability (Fil. #1). Dana M. London appeared for Plaintiff, and Todd R. Mulliner appeared for Defendant. As more fully discussed below, I find in favor of the Plaintiff.

Background

The parties have stipulated to many of the material facts. Plaintiff and Defendant were married in 2004. During the time of their marriage, they acquired a home in Lincoln, Nebraska. The home was encumbered by a first mortgage in favor of CitiMortgage and a second mortgage in favor of U.S. Bank. During the course of the divorce proceedings, the parties entered into a property settlement agreement which was incorporated into their decree of dissolution of marriage dated June 20, 2007. Paragraph 9 of the property settlement agreement states that "the Defendant shall assume sole responsibility for an [sic] hold Plaintiff harmless from the debts to US Bank, Wells Fargo (purchase of motorcycle),[1] CCS, and all other debts he has separately and individually incurred." Further, the property settlement agreement provided for the sale of the marital residence and specifically provided in Paragraph 10 as follows:

> The parties acknowledge and agree that they jointly own a marital residence located at 6825 North 15th Street, Lincoln, Lancaster County, Nebraska, and legally described as Stone Bridge Creek Addition, Block 2, Lot 31, Lincoln, Lancaster County, Nebraska. The parties agree that said property be sold and proceeds

[1]Defendant acknowledges that his obligation to hold Plaintiff harmless on the debt to Wells Fargo is nondischargeable as is Defendant's obligation to reimburse Plaintiff for the sum of $453.25, which was set off from her bank account.

> received therefrom be applied on the mortgage indebtedness owed to Citi Mortgage and US Bank, together with any real estate taxes and other closing costs associated with said sale. In the event the parties separate prior to the sale of the home, the Plaintiff shall be responsible for the monthly mortgage payment to Citi Mortgage until the date of sale and the Defendant shall be responsible for the monthly payment to US Bank until the date of sale; otherwise, during such time as the parties remain living together, they shall share equally in the mortgage payments until the home has sold. The Defendant agrees to vacate the residence within 15 days of the entry of the Decree approving this agreement and thereafter the Plaintiff shall have the exclusive right of possession of said residence until the residence is sold. In the event there is a balance owed to US Bank after the sale of the residence, Defendant shall assume responsibility for and hold Plaintiff harmless from said indebtedness. In the event any net proceeds are realized from the sale of the marital residence, they shall be equally divided between the parties.

Pursuant to the terms of the property settlement agreement, the property was marketed for sale. At first, the parties attempted to sell it using a "for sale by owner" service and subsequently it was listed for sale through a real estate broker at $160,000.00. In September 2007, the asking price was lowered to $150,000.00 and an agreement was ultimately reached to sell the property for the sum of $145,000.00, an amount insufficient to pay the balance due on the second mortgage to U.S. Bank. Defendant consented (reluctantly) to the sale and executed the purchase agreement.

Prior to the closing, Plaintiff, Defendant, and their realtor had meetings with U.S. Bank in an attempt to obtain a release of the U.S. Bank second mortgage, which U.S. Bank refused to do. Defendant also attempted to assume sole responsibility for the U.S. Bank loan, but U.S. Bank refused to release Plaintiff. Defendant ultimately acknowledged that he would be unable to satisfy the U.S. Bank loan.

Plaintiff did not have the funds to satisfy U.S. Bank so she sought financial assistance from her parents. Plaintiff's parents obtained a loan from another bank in an amount sufficient to pay the U.S. Bank mortgage in full. Those loan proceeds were paid to U.S. Bank on October 15, 2007, in the amount of $25,206.20 and bear interest at 7.25%. U.S. Bank released its second mortgage and the sale of the home closed on November 9, 2007.

Both Plaintiff and her father testified that Plaintiff is obligated to reimburse her parents for the amount of the loan they obtained to pay the debt to U.S. Bank. However, there is no written documentation of Plaintiff's obligation to reimburse her parents.

Discussion

Plaintiff's position is that pursuant to the terms of the divorce decree and property settlement agreement, Defendant was obligated to hold Plaintiff harmless from any obligations owed to U.S. Bank. Accordingly, Plaintiff asserts that the obligation is nondischargeable pursuant to 11 U.S.C. § 523(a)(15). Defendant asserts that Plaintiff did not pay the obligation to U.S. Bank and, therefore,

there is no further obligation from which he is to hold Plaintiff harmless. Defendant's position seems to be centered around the fact that there is no documentation to evidence an obligation by Plaintiff to repay her parents for the new debt incurred to pay off the U.S. Bank debt.

Section 523(a)(15) excepts from discharge debts arising from marital dissolution or separation decrees. The parties do not dispute that the property settlement incorporated into the marital dissolution decree established a debt in the form of Defendant's obligation to hold Plaintiff harmless from the indebtedness due to U.S. Bank. In fact, the property settlement agreement expressly anticipated that the sale of the property would not produce sufficient funds to pay U.S. Bank in full and that Defendant would hold Plaintiff harmless from that indebtedness.

Clearly, the facts of this case fall squarely within § 523(a)(15). The property settlement agreement and divorce decree created an obligation of Defendant to hold Plaintiff harmless from all amounts due to U.S. Bank. Defendant agreed to sell the house for a price insufficient to satisfy U.S. Bank. Defendant acknowledged that he was unable to pay the balance due to U.S. Bank in order to facilitate the sale of the house. Plaintiff asked her parents for assistance, and they took steps to obtain a loan and pay the U.S. Bank loan in full. The uncontroverted testimony is that Plaintiff is obligated to reimburse her parents for that amount. Therefore, Defendant's obligation to Plaintiff for the amount paid to satisfy the U.S. Bank debt, plus interest at 7.25% from October 15, 2007, until paid, is nondischargeable.

Defendant's arguments with respect to whether this scenario technically falls within the terms of § 523(a)(15) are not persuasive. Plaintiff had no choice but to satisfy the U.S. Bank debt when Defendant admitted he could not do so. In order to close the sale of the home (to which Defendant agreed), Plaintiff effectively obtained a loan from her parents. The fact that the payoff funds came from Plaintiff's parents instead of from Plaintiff's own funds is irrelevant since Plaintiff is obligated to repay her parents. Therefore, this transaction does fall within the technical provisions of § 523(a)(15) and Defendant's other arguments need not be addressed.

A separate judgment will be entered in Plaintiff's favor finding the obligations owed to her to be excepted from discharge.

DATED: September 11, 2009.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:

*Dana M. London
Todd R. Mulliner
Rick D. Lange
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK07-40109-TJM
	)	
MICHAEL A. DANKERT,	)	CH. 13
	)	
Debtor.	)	

ORDER

Hearing was held in Lincoln, Nebraska, on September 19, 2007, on Debtor's objections to the claim filed by Roxana Dankert (Fil. #28 and #42), and a resistance thereto filed by the creditor (Fil. #32)[1]. John C. Hahn appeared for Debtor, and Matthew S. McKeever appeared for Roxana Dankert.

The issue presented in this case is whether Debtor's obligation to pay Ms. Dankert the sum of $17,025.35 under the parties' divorce decree constitutes a "domestic support obligation" under 11 U.S.C. § 101(14)(A). As discussed below, I find that the payment is in the nature of a property settlement and is not a domestic support obligation.

Background

The parties were married on July 28, 1990, and on September 11, 2006, a decree of dissolution of marriage was filed in the District Court of Madison County, Nebraska. A copy of said divorce decree is filed herein as an attachment to the declaration of Roxana Dankert (Fil. #57). At Paragraph 3, the decree provides for the payment of child support by Debtor. The parties agree that such support is a domestic support obligation. Debtor is also obligated to continue to provide health insurance pursuant to Paragraph 6 of the decree. There does not appear to be any dispute that such obligation is also a domestic support obligation. Paragraph 11 of the decree assigns specific assets and liabilities to each of the parties, and then Paragraph 12 provides, in part: "In order to equalize the marital estate of these parties, the Court enters judgment in the favor of the Plaintiff [Ms. Dankert] and against the Defendant [Debtor] in the amount of $17,025.35." The issue is whether that monetary obligation constitutes a domestic support obligation.

[1]Chief Judge Timothy J. Mahoney presided over the hearing and took this matter under advisement. The undersigned has had the opportunity to review the record and to listen to the digital audio recording of the hearing.

Discussion

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. For purposes of the case at hand, discharge and priorities are at issue. Domestic support obligations are not discharged in Chapter 13 proceedings. *See* 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

In order to prevail on her assertion that Debtor's obligation to pay $17,025.35 is a domestic support obligation pursuant to Paragraph 12 of the divorce decree, Ms. Dankert must show that the debt is (1) owed to or recoverable by her; (2) in the nature of alimony, maintenance, or support; and (3) established or subject to establishment pre- or post-petition by reason of a separation agreement, divorce decree, property settlement agreement, or court order. *Deemer v. Deemer (In re Deemer)*, 360 B.R. 278, 281 (Bankr. N.D. Iowa 2007). Here, the obligation clearly is owed to or recoverable

by Ms. Dankert and was established pursuant to a pre-petition divorce decree. Thus, the only issue is whether the obligation is in the nature of alimony, maintenance, or support.

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, "the crucial question is what function did the parties intend the agreement to serve when they entered into it." *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir. 1984) (citing *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir. 1983)). In making that factual determination, the court evaluates a number of factors, including whether the agreement contains a separate provision for alimony or child support, and whether the debt is conditional. *Ahlf v. Ahlf (In re Ahlf)*, 354 B.R. 884, 887 (Bankr. S.D. Iowa 2006) (citing *Morel v. Morel (In re Morel)*, 983 F.2d 104, 105 (8th Cir. 1992)). Other factors considered include:

> [T]he relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments.

Ahlf, 354 B.R. at 887 (quoting *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)).

The divorce decree clearly contained a separate provision for child support. The provision at issue requiring Debtor to pay $17,025.35 is not related to the child support provision. Instead, the decree expressly provides that the payment is "in order to equalize the marital estate of the parties . . . ." It is the amount the court calculated as due to Ms. Dankert after assigning marital assets and marital liabilities between the parties. Ms. Dankert received the vast majority of the marital assets (approximately $264,000.00 in value compared to $24,000.00 in value received by Debtor), and also received the vast majority of the debts (approximately $302,000.00 compared to approximately $28,000.00 for Debtor). Many of the assets and much of the debt appeared to relate to a business operated by Ms. Dankert and known as "Roxi's Bridal Boutique." The payment obligation of Debtor to Ms. Dankert is a lump-sum obligation rather than a periodic payment obligation.

In light of the foregoing, it is clear to this Court that the obligation of Debtor to pay $17,025.35 to Ms. Dankert pursuant to Paragraph 12 of the parties' divorce decree is a property settlement payment and is not in the nature of support. Therefore, it is not a "domestic support obligation" excepted from discharge in Chapter 13, nor is it a priority claim.

THEREFORE, IT IS ORDERED: That Debtor's objections to the claim of Roxana Dankert (Fil. #28 and #42) are sustained. The claim of Roxana Dankert shall be reclassified as a general unsecured claim.

DATED: September 27, 2007.

BY THE COURT:

/s/ Thomas L. Saladino
United States Bankruptcy Judge

Notice given by the Court to:
*John C. Hahn
Matthew S. McKeever
Kathleen Laughlin
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

Caution
As of: May 22, 2026 2:41 AM Z

Phegley v. Phegley (In re Phegley)

United States Bankruptcy Appellate Panel for the Eighth Circuit

January 11, 2011, Submitted; January 25, 2011, Filed

No. 10-6063

Reporter
443 B.R. 154 *; 2011 Bankr. LEXIS 194 **; 64 Collier Bankr. Cas. 2d (MB) 1672

In re: John Joseph Phegley, Debtor.Sheri L. Phegley; David C. Stover, Plaintiffs - Appellees, v. John Joseph Phegley, Defendant - Appellant.

Prior History: [1]** Appeal from the United States Bankruptcy Court for the Western District of Missouri.

Core Terms

support obligation, domestic, bankruptcy court, decree, spouse, property settlement, marital, monthly maintenance, alimony, dissolution, divorce, renewal

Case Summary

Procedural Posture

In an adversary proceeding, appellant Chapter 13 debtor sought judicial review of the United States Bankruptcy Court for the Western District of Missouri's determination that his debts for monthly maintenance payments and attorney's fees pursuant to a state court marriage dissolution proceeding were excepted from discharge pursuant to *11 U.S.C.S. § 523(a)(5)*.

Overview

In the present case, the requirements of *11 U.S.C.S. § 101(14A)(A)* and *(C)* were satisfied and not at issue; the issue was whether the debt was in the nature of alimony, maintenance, or support as required under *§ 101(14A)(B)*. The decree of dissolution specifically held that the monthly maintenance payments were necessary so that the debtor's ex-wife could continue her education and pursue her teaching certificate and that she could not presently earn sufficient income to support herself. In addition, the decree provided that the monthly maintenance payments would terminate upon death or remarriage. Those factors were indicative of domestic support obligations. The bankruptcy court's determination that the function and purpose of the maintenance payments were to provide support to the ex-wife was amply supported by the record and was not overturned. The record also supported the bankruptcy court's finding that the attorney fee award was in the nature of support.

Outcome

The bankruptcy court's decision was affirmed.

LexisNexis® Headnotes

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Alimony, Child Support & Maintenance

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1 The determination of whether an award arising out of marital dissolution proceedings was intended to serve as an award for alimony, maintenance, or support, or whether it was intended to serve as a property settlement is a question of fact to be decided by the bankruptcy court. An appellate court reviews a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Fed. R. Bankr. P. 8013*.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Alimony, Child Support & Maintenance

HN2 See *11 U.S.C.S. § 101(14A)*.

Bankruptcy Law > ... > Types of Claims > Unsecured Priority Claims > Alimony, Maintenance & Support

Bankruptcy Law > Discharge & Dischargeability > Individuals With Regular Income

Business & Corporate Compliance > Bankruptcy > Discharge & Dischargeability > Individuals With Regular Income

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Alimony, Child Support & Maintenance

HN3 The definition of domestic support obligation in *11 U.S.C.S. § 101(14A)* was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. Domestic support obligations are not discharged in Chapter 13 cases. *11 U.S.C.S. §§ 1328(a)* and *523(a)(5)*. Further, domestic support obligations are priority claims pursuant to *11 U.S.C.S. § 507(a)(1)(A)*. If, on the other hand, the obligation is not a domestic support obligation, it would fall under *11 U.S.C.S. § 523(a)(15)*, which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Alimony, Child Support & Maintenance

HN4 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amendments that added *11 U.S.C.S. § 101(14A)* and altered *11 U.S.C.S. § 523(a)(5)* and *(15)* did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, the crucial question is the function the award was intended to serve.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Alimony, Child Support & Maintenance

Evidence > Burdens of Proof > Allocation

HN5 Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law. A divorce decree's characterization of an award as maintenance or alimony does not bind a bankruptcy court but is however a starting point for the determination of the award's intended function. Due deference

should be given to the state court's characterization of the award. The burden of proof under *11 U.S.C.S. § 523(a)(5)* is on the party asserting that the debt is nondischargeable. Factors considered by the courts in making that determination include (1) the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; (2) the relative financial conditions of the parties at the time of the divorce; (3) the respective employment histories and prospects for financial support; (4) the fact that one party or another receives the marital property; (5) the periodic nature of the payments; and (6) whether it would be difficult for the former spouse and children to subsist without the payments.

Bankruptcy Law > ... > Types of Claims > Unsecured Priority Claims > Alimony, Maintenance & Support

Governments > Legislation > Interpretation

HN6 Exceptions from discharge for spousal and child support deserve a liberal construction, and the policy underlying *11 U.S.C.S. § 523* favors the enforcement of familial obligations over a fresh start for the debtor, even if the support obligation is owed directly to a third party.

Judges: Before KRESSEL, Chief Judge, SALADINO, and NAIL, Bankruptcy Judges.

Opinion by: SALADINO

Opinion

[*155] SALADINO, Bankruptcy Judge.

John Phegley appeals the bankruptcy court's [1] memorandum and order dated August 3, 2010, and the judgment pursuant thereto dated August 9, 2010, which determined that Mr. Phegley's debts for monthly maintenance payments and attorney's fees pursuant to a state court marriage dissolution proceeding are excepted from discharge pursuant to *11 U.S.C. § 523(a)(5)*. **[*156]** For the reasons stated below, we affirm.

BACKGROUND

John J. Phegley ("John") and Sheri L. Phegley ("Sheri") were married on May 9, 1998, and lived in Missouri. On June 3, 2009, the Circuit Court of Jackson County Missouri entered a Judgment and Decree of Dissolution of Marriage ("Decree") that dissolved the marriage of John and Sheri. The Decree provided, *inter alia*, that the parties were awarded joint physical and legal custody of the two minor children of the marriage. John was ordered to pay child support to Sheri in the amount of $325.00 **[**2]** per month.

The Decree further provided that John shall pay to Sheri:

> [T]he sum of one thousand two hundred fifty and 00/100 dollars ($1,250.00) per month as and for contractual maintenance for a period of forty-eight (48) months beginning on the 1st day of July, 2009 and continuing on the 1st day of each month until the final payment is due at which time [John's] maintenance obligation shall terminate; provided, however, that such maintenance may earlier terminate upon [Sheri's] remarriage or the death of either party.

In addition, John and Sheri were each awarded certain specified items of marital property and John was ordered to pay Sheri

[1] The Honorable Dennis R. Dow, Chief Judge, United States Bankruptcy Court for the Western District of Missouri.

$32,371.98 as equalization of property. Finally, the Decree provided that John "shall pay a portion of [Sheri's] attorney's fees in the amount of nine thousand one hundred seventy-eight and 69/100 dollars ($9,178.69) . . . ."

On September 2, 2009, John filed a Chapter 13 bankruptcy petition. Subsequently, Sheri filed a complaint to determine dischargeability of indebtedness pursuant to *11 U.S.C. § 523*. In the complaint, Sheri contended that the attorney's fees of $9,178.69 and the monthly maintenance payments of $1,250.00 are nondischargeable as domestic **[**3]** support obligations pursuant to *U.S.C. § 523(a)(5)*. [2] John asserts that the debts are not domestic support obligations, but instead are a division of marital property and should not be excepted from discharge.

The bankruptcy court found that the maintenance payments and attorney's fees awarded in the Decree are nondischargeable as domestic support obligations pursuant to *§ 523(a)(5)*. John appeals.

STANDARD OF REVIEW

HN1 The determination of whether an award arising out of marital dissolution proceedings was intended to serve as an award for alimony, maintenance, or support, or whether it was intended to serve as a property settlement is a question of fact to be decided by the bankruptcy court. *Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)* (citing *Holliday v. Kline (In re Kline), 65 F.3d 749, 750 (8th Cir. 1995)*; *Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992)*; *Williams v. Williams (In re Williams), 703 F.2d 1055, 1056 (8th Cir. 1983)*. **[**4]** We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *First Nat'l Bank of Olathe v. Pontow (In re Pontow), 111 F.3d 604, 609 (8th Cir. 1997)*; *Sholdan v. Dietz (In re Sholdan), 108 F.3d 886, 888 (8th Cir. 1997)*; *Fed. R. Bankr. P. 8013*.

[*157] DISCUSSION

In its opinion, the bankruptcy court correctly identified the general legal principles applicable to this matter as follows: [3]

Pursuant to *11 U.S.C. § 101(14A)*, the term "domestic support obligation" means:

> ***HN2*** [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is —
>
> (A) owed to or recoverable by —
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> . . .
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former **[**5]** 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

[2] Sheri also asserted that the debts were nondischargeable pursuant to ***§ 523(a)(15)***, but the bankruptcy court previously ruled that since this was a Chapter 13 case, the ***§ 523(a)(15)*** issue was not ripe for consideration. Thus, the trial dealt only with ***§ 523(a)(5)***.

[3] With only minor contextual modifications, the following description of the applicable legal standards is taken directly from the bankruptcy court's memorandum.

> 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;
>
> . . .
>
> (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.

HN3 This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. *See* *In re Braun, 2008 Bankr. LEXIS 1666, 2008 WL 2130313, 2 (Bankr. D. Neb. 2008)*. For purposes of the case at hand, discharge is at issue. Domestic support obligations are not discharged in Chapter 13 cases. *See 11 U.S.C. § 1328(a)* and *11 U.S.C. § 523(a)(5)*. Further, domestic support obligations are priority **[**6]** claims pursuant to *11 U.S.C. § 507(a)(1)(A)*. If, on the other hand, the obligation is not a domestic support obligation, it would fall under *11 U.S.C. § 523(a)(15)*, which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status. In this case, the requirements of *§ 101(14A)(A)* and *(C)* are satisfied and not at issue; but whether the debt is in the nature of alimony, maintenance, or support as required under *§ 101(14A)(B)* is the issue of this adversary proceeding.

HN4 The BAPCPA amendments that added *§ 101(14A)* and altered *§§ 523(a)(5)*and *(15)* did not change the standard for whether an obligation is in the nature of support. *Id*. When deciding whether a debt should be characterized as one for support or property settlement, the crucial question is the function the award was intended to serve. *Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992)*; *Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir.1984)* (citing *Williams v. Williams (In re Williams), 703 F.2d 1055, 1057 (8th Cir. 1983))*; *see* *Kruger v. Ellis (In re Ellis), 149 B.R. 925, 927 (Bankr. E.D. Mo. 1993)* (finding that in order to determine whether **[*158]** an award represents a property settlement or a maintenance **[**7]** obligation, a court must look to the function an award was intended to serve).

HN5 Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law. *See* *Williams, 703 F.2d at 1056*. A divorce decree's characterization of an award as maintenance or alimony does not bind a bankruptcy court but is however a starting point for the determination of the award's intended function. *Id.;* *In re Hamblen, 233 B.R. 430, 435 (Bankr. W.D. Mo. 1999)* (due deference should be given to the state court's characterization of the award). The burden of proof under *§ 523(a)(5)* is on the party asserting that the debt is nondischargeable. *Lineberry v. Lineberry (In re Lineberry), 9 B.R. 700, 706 (Bankr. W.D. Mo. 1981)*.

Factors considered by the courts in making this determination include: the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature **[**8]** of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments. *Morgan v. Woods (In re*

Woods), 309 B.R. 22 (Bankr. W.D. Mo. 2004); *In re Tatge, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)*; *Schurman v. Schurman (In re Schurman), 130 B.R. 538, 539 (Bankr. W.D. Mo. 1991)* (citing *In re Gianakas, 917 F.2d 759 (3d Cir. 1990))*.

HN6 Exceptions from discharge for spousal and child support deserve a liberal construction, and the policy underlying *§ 523* favors the enforcement of familial obligations over a fresh start for the debtor, even if the support obligation is owed directly to a third party. *See Holliday v. Kline (In re Kline), 65 F.3d 749 (8th Cir. 1995)*; *Williams v. Kemp (InreKemp), 242 B.R. 178, 181 (B.A.P. 8th Cir. 1999)*, *aff'd 232 F.3d 652 (8th Cir. 2000)*.

After correctly describing the above legal standards, the bankruptcy court then proceeded to apply those standards to the facts of this case. First, in determining that the monthly maintenance payments awarded by the Decree did constitute domestic support obligations excepted from discharge pursuant to *§ 523(a)(5)*, the bankruptcy court noted that the Decree specifically held that the **[**9]** monthly maintenance payments were necessary so that Sheri could continue her education and pursue her teaching certificate and that she could not presently earn sufficient income to support herself. In addition, the Decree provided that the monthly maintenance payments would terminate upon death or remarriage. Those factors are indicative of domestic support obligations. As the bankruptcy court found, the state court "clearly took into account the parties' income and expenses, their employment at the time of dissolution and ability to obtain a job, [Sheri's] continuing schooling and whether [Sheri] could support herself without monthly maintenance payments during the time period that she was continuing her education." Those findings are clearly supported by the record and are not clearly erroneous.

John's primary argument on appeal is that the Decree granted the "maintenance" payments to Sheri only because John was awarded the marital asset referred to as "renewal premiums." As a former insurance agent, John was entitled to receive additional income if and when **[*159]** any insurance policies he had previously sold are renewed by the insured and the premiums are paid. Thus, the renewal premium **[**10]** income is contingent upon the policies being renewed, and John was awarded all of the rights to that potential income. His theory appears to be that the state court judge only awarded the "maintenance" payments as a way of dividing the contingent renewal premium income. However, as discussed in the preceding paragraph, that position simply is not supported by the record.

At oral argument, John's attorney took the position that the Eighth Circuit Court of Appeals was wrong in *Williams* and its progeny when it said that the court should look to the function the award was intended to serve when assessing whether an award was intended as support. Instead, he argues that the better approach is to look at the "source of the funding" for the award, rather than at the intent or function of the award. Even if we could entertain such an argument, we disagree that such an approach is the better way to proceed. In any event, this court simply cannot ignore the long-standing precedent from the Eighth Circuit Court of Appeals in *Williams*.

The bankruptcy court's determination that the function and purpose of the maintenance payments were to provide support to Sheri is amply supported by the record and **[**11]** will not be overturned.

The bankruptcy court also found that the attorney fee award was in the nature of support. The disparities in the parties' education, training, employment history, and earning capacity all led the bankruptcy court to

find that the attorney fee award was made to balance those disparities and was, therefore, intended as support. The record supports the bankruptcy court's finding.

Accordingly, we affirm the decision of the bankruptcy court.

End of Document

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____

Case number _____

Official Form 410

Proof of Claim

04/25

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

   _____
   Name of the current creditor (the person or entity to be paid for this claim)

   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

   ❑ No
   ❑ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
_____ Name	_____ Name
_____ Number Street	_____ Number Street
_____ City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email _____	Contact email _____

   Uniform claim identifier (if you use one):

   __

4. **Does this claim amend one already filed?**

   ❑ No
   ❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

   ❑ No
   ❑ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**

❑ No
❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**

❑ No
❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

_____

9. **Is all or part of the claim secured?**

❑ No
❑ Yes. The claim is secured by a lien on property.

Nature of property:

❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
❑ Motor vehicle
❑ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%

❑ Fixed
❑ Variable

10. **Is this claim based on a lease?**

❑ No
❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**

❑ No
❑ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check one:*

	Amount entitled to priority
❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
❑ Up to $3,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
❑ Wages, salaries, or commissions (up to $17,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/28 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(3) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

❑ I am the creditor.
❑ I am the creditor's attorney or authorized agent.
❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Print | Save As... | Add Attachment | Reset

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK09-40653-TJM
	)	
RANDY C. MELCHER,	)	CH. 12
	)	
Debtor(s).	)	

ORDER

Hearing was held in Omaha, Nebraska, on April 13, 2009, on Filing #19, Motion for Relief from Stay, filed by Alesa Melcher. Todd Mulliner appeared for the debtor and David Copple appeared for Alesa Melcher.

Alesa Melcher, the former spouse of the debtor, has filed a motion for relief from stay to permit the parties to complete the appeal of the decree of dissolution of marriage to the Nebraska Court of Appeals/Nebraska Supreme Court. Argument before the Nebraska Court of Appeals is tentatively scheduled for later this month.

In addition, the movant requests relief to permit her to continue with a contempt action against the debtor because he has failed to comply with the terms of the decree, including failure to pay alimony, child support and health insurance.

Finally, the movant requests relief from the stay to permit her to exercise state court remedies over property of the debtor or property of the estate to collect the amounts due her and her children from the debtor.

Counsel for the debtor did not resist that portion of the motion which requests relief from the automatic stay to complete the appeal. Therefore, relief from the automatic stay is granted and the debtor and the movant are permitted to proceed with the appeals process to its completion.

Since the debtor does not deny that he has failed to make the payments required by the decree, but asserts that he is unemployed and unable to make such payments, it is appropriate to permit the movant to proceed in state court in an attempt to obtain a determination of contempt. It is for the state court judge to weigh the debtor's evidence explaining his reasons for failing to make the payments. Therefore, relief is granted for that purpose.

With regard to the movant's request that relief be granted to permit the movant to use state court remedies to collect the amounts due from property of the debtor or property of the estate, the statute, 11 U.S.C. § 362(b)(2)(B), makes it clear that the stay of 11 U.S.C. § 362(a) does not operate as a stay "of the collection of a domestic support obligation from property that is not property of the estate." In other words, the automatic stay protects property of the bankruptcy estate, but, if the debtor has property that is not property of the bankruptcy estate, movant is free to use state court remedies to take possession of and liquidate such property without this court's permission.

I am inclined to grant the relief requested pursuant to 11 U.S.C. § 362(d)(1) for cause, because I do not believe individuals should be permitted to use a bankruptcy reorganization statute to protect assets from liquidation to pay domestic support obligations. In this case, the schedules have not yet been filed and so it cannot be determined whether the debtor claims to have any

unencumbered property which could be subject to the claims of the moving party. In addition, I hesitate to grant such relief for cause without all other parties in interest having received notice of the motion with an opportunity to object to the payment of pre-petition domestic support obligations ahead of other claims that may have priority. Therefore, I will entertain a motion requesting specific relief with regard to proceeding against estate property if all parties in interest receive notice and an opportunity to resist.

If the debtor resists such motion and the debtor fails to request permission of the court to use estate assets to pay the domestic support obligations during the pendency of the case, I will consider dismissal of the case for cause under 11 U.S.C. § 1208(c)(10). Such dismissal can only be based on a request of a party in interest, after notice and hearing.

IT IS ORDERED:

1. Relief from the automatic stay is granted for the purpose of the debtor and the movant to proceed with the appeal process of the decree of dissolution of marriage to its completion in the Nebraska Court of Appeals;

2. Relief from the stay is granted for the purpose of continuing with a contempt action against the debtor in state court for failing to comply with the terms of the decree of dissolution of marriage; and

3. A specific relief request with regard to proceeding against estate property will be entertained if all parties in interest receive notice and an opportunity to resist.

DATED: April 15, 2009

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
Todd Mulliner
*David Copple
U.S. Trustee

*Movant is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK08-80400-TJM
	)	
RONALD LEE BRAUN,	)	CH. 13
	)	
Debtor(s).	)	

ORDER

Hearing was held in Omaha, Nebraska, on May 12, 2008, on Debtor's Objection to the Claim of Evelyn Braun (Fil. #11), and the Objection to Confirmation of Plan filed by Evelyn Braun (Fil. #10). Bryan Meismer appeared for the debtor and Clark Grant appeared for Evelyn Braun. Steffi Swanson appeared for Washington Mutual Bank, which entity filed a Motion for Relief from Stay to be addressed in a separate order.

The issue presented is whether the debtor's home mortgage payment obligation under a decree of legal separation constitutes a "domestic support obligation" under 11 U.S.C. § 101(14A). As discussed below, I find that the debtor's obligations are domestic support obligations.

Background

Debtor and Evelyn Braun were married on July 17, 1970. In 1973, they purchased approximately two acres of ground in Columbus, Nebraska, and built a house thereon ("the Property"). The parties were legally separated by a decree filed in the Platte County District Court on July 27, 1998, which incorporated the terms of a property settlement agreement.

According to the terms of the decree and property settlement agreement, each party was awarded an undivided one-half interest in the Property. Evelyn Braun was awarded possession of the Property. Even though Debtor did not have possession of the Property, he was ordered to pay the house payments to the two mortgage holders, including principal, interest, insurance and taxes. The parties were ordered to each pay one-half of the maintenance and repairs. There is also a clause providing that each party is to hold the other harmless from any liability which he or she is ordered to pay through the decree.

In March of 2002, the indebtedness secured by the Property was refinanced with a loan obtained by the debtor from Community America Credit Union in the amount of $85,000.00. The new loan was in excess of the balance owed on the prior loans. No evidence was presented as to how those excess funds were used other than Ms. Braun's statement that she did not receive any benefit from that refinancing. In March of 2006, the indebtedness was again refinanced with a new loan in the amount of $108,000.00 from Nationwide Lending Corporation. The funds from that refinancing were used to pay Community America Credit Union, Debtor's credit card debt, delinquent taxes for the Property, and a loan that Debtor previously obtained from Ms. Braun's mother. The new loan was made to Mr. Braun; however, Ms. Braun did sign the new deed of trust. Washington Mutual Bank appears to be the mortgage loan servicer for Nationwide Lending

Corporation.

Debtor has failed to pay the payments due to Washington Mutual Bank on the refinanced loan secured by the Property. He has stated his intention to abandon any interest in that Property. Ms. Braun asserts that his obligation to make mortgage payments constitutes a domestic support obligation under the Bankruptcy Code and has objected to his plan for failing to provide for such payments. She has also included the delinquent payment amounts in her proof of claim.

Discussion

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. For purposes of the case at hand, discharge and priorities are at issue. Domestic support obligations are not discharged in Chapter 13 proceedings. *See* 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

In order to prevail on her assertion that Debtor's obligation to pay the Washington Mutual mortgage is a domestic support obligation, Ms. Braun must show that the debt is (1) owed to or recoverable by her; (2) in the nature of alimony, maintenance or support; and (3) established or subject to establishment pre- or post-petition by reason of a separation agreement, divorce decree, property settlement agreement, or court order. *Deemer v. Deemer (In re Deemer)*, 360 B.R. 278, 281 (Bankr. N.D. Iowa 2007).

As far as whether the obligation is owed to or recoverable by her, Debtor asserts that the obligation is owed to Washington Mutual, not Ms. Braun. He is mistaken. While the underlying debt may be owed to Washington Mutual, the obligation to pay that debt to Washington Mutual and to hold Ms. Braun harmless therefrom is an obligation owed to Ms. Braun. Further, the obligation was clearly established pursuant to a property settlement agreement and separation decree. Thus, the only issue to be resolved is whether the obligation is in the nature of alimony, maintenance or support.

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, "the crucial question is what function did the parties intend the agreement to serve when they entered into it." *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir. 1984) (citing *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir. 1983)). In making that factual determination, the court evaluates a number of factors, including whether the agreement contains a separate provision for alimony or child support, and whether the debt is conditional. *Ahlf v. Ahlf (In re Ahlf)*, 354 B.R. 884, 887 (Bankr. S.D. Iowa 2006) (citing *Morel v. Morel (In re Morel)*, 983 F.2d 104, 105 (8th Cir. 1992)). Other factors considered include:

> [T]he relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments.

Ahlf, 354 B.R. at 887 (quoting *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)).

Ms. Braun submitted an affidavit (Fil. #31) stating that, during the course of the marriage, Mr. Braun was always the primary wage earner and that Ms. Braun had only sporadic employment at wages slightly above the minimum wage. Mr. Braun, on the other hand, has been employed for the past twenty-three years as a truck driver at Yellow Transportation and currently makes in excess of $78,000.00 per year. Ms. Braun's affidavit indicates that she has never made more than $13,790.00 in a year, and typically earns less than $10,000.00 per year. At the time of the legal separation, Ms. Braun was not able to make the mortgage payments on her own.

In light of the foregoing, it is clear that the obligation of the debtor under the separation

decree to pay the home mortgage obligations is in the nature of support and is a "domestic support obligation." However, debtor further argues that those mortgages have now been satisfied as a result of refinancings in which Ms. Braun cooperated (by signing the deeds of trust) and, therefore, his decree obligations have been satisfied. I disagree. According to the affidavit of Ms. Braun, each refinancing of the original indebtedness was for the benefit of Mr. Braun. Ms. Braun did not receive any benefit from those refinancings. In fact, the last refinancing was used primarily to pay the prior loans, as well as insurance and taxes on the Property. Those are all obligations he was ordered to pay as part of the separation decree.

THEREFORE, IT IS ORDERED that Debtor's Objection to Claim of Evelyn Braun (Fil. #11) is denied and Ms. Braun's Objection to Confirmation of Plan (Fil. #10) is sustained. Debtor shall have until May 31, 2008, to file an amended plan consistent with this order.

DATED: May 15, 2008

BY THE COURT:

Thomas L. Saladino
United States Bankruptcy Judge

Notice given by the Court to:
*Bryan Meismer
*Clark Grant
Kathleen Laughlin
United States Trustee

*Movant is responsible for giving notice of this order to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
KRISTI DANIEL TEED,	)	
	)	CASE NO. BK10-82757-TLS
Debtor(s).	)	A10-8084-TLS
RYAN F. FORMAN,	)	
	)	
Plaintiff,	)	CHAPTER 7
	)	
vs.	)	
	)	
KRISTI DANIEL TEED,	)	
	)	
Defendant.	)	

ORDER

This matter is before the court on the plaintiff's motion for summary judgment (Fil. No. 19) and the debtor-defendant's objection thereto (Fil. No. 22). The debtor represents herself, and Donald A. Roberts represents the plaintiff. Briefs were filed by both parties, evidence was filed by the debtor, and pursuant to the court's authority under Nebraska Rule of Bankruptcy Procedure 7056-1 the motion was taken under advisement without oral arguments.

The motion is granted.

The parties were married to each other, but divorced in January 2010. As part of the divorce decree and property settlement, payment of certain debts for which both parties are liable was assigned to the debtor, including a debt to Nebraska Furniture Mart. That debt is delinquent, and the company has attempted to collect from the plaintiff. Ms. Teed filed a Chapter 7 bankruptcy petition on September 23, 2010. Her former husband filed this adversary proceeding on December 6, 2010, to except from discharge the marital debt she was ordered to pay. The complaint was brought under 11 U.S.C. § 523(a)(5), which holds domestic support obligations non-dischargeable, but the plaintiff later asserted § 523(a)(15) as well, which holds certain debts imposed via divorce decrees non-dischargeable.

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

The materials[1] before the court establish that the decree dissolving the parties' marriage contained the following provision:

> IT IS FURTHER ORDERED, by the Court, that [Ms. Teed] shall pay the following debts and hold [Mr. Forman] harmless therefrom: Nebraska Furniture Mart, Capital One credit card, Chase Credit Card, and Citi Card.

Complaint, ¶ 3 (Fil. No. 1).

Section 523 of the Bankruptcy Code excepts from discharge debts for domestic support obligations (§ 523(a)(5)) and any debt

> 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[.]

§ 523(a)(15).

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or

[1]The plaintiff did not submit any evidence on his motion. The debtor's evidence did not include a copy of the decree of dissolution. However, the complaint quotes the relevant portion of the decree, and the debtor specifically admitted its truth in her answer.

> (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.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to expand the protections for those whom the debtor is obligated to support.

Under the Bankruptcy Code as it existed prior to October 2005, bankruptcy courts used to have to distinguish between support obligations and property settlements, because the dischargeability of such debts was treated differently. *See* the prior versions of 11 U.S.C. § 523(a)(5) and (15); *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1056 (8th Cir. 1983) (whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law). Courts were to look at the parties' intent and the function the award was intended to serve at the time of the divorce. *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 55 (B.A.P. 8th Cir. 1998) (citing *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995); *Adams v. Zentz*, 963 F.2d 197, 200 (8th Cir. 1992); *Williams*, 703 F.2d at 1056; *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir. 1984)).

Now, however, the distinction between property settlements and support obligations is irrelevant for purposes of dischargeability.[2] The changes wrought by BAPCPA render all debts owed to a former spouse pursuant to a divorce decree non-dischargeable. Hon. William Houston Brown, *Bankruptcy and Domestic Relations Manual* § 1:3(b) (2006) ("Essentially, the combination of section 523(a)(5) and (15) excludes from discharge all marital and domestic relations obligations, whether support in nature, property division, or hold-harmless[.]"). *See also Douglas v. Douglas (In re Douglas)*, 369 B.R. 462 (Bankr. E.D. Ark. 2007):

> Section 523(a)(15) now provides, unqualifiedly, that a property settlement obligation encompassed by section 523(a)(15) is nondischargeable. Thus, in individual cases under chapters 7 and 11 and in cases under chapter 12, all of which base dischargeability on the subsections of section 523(a), the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no practical consequence in determining the dischargeability of the debt.

369 B.R. at 465 (quoting *Tracy v. Tracy (In re Tracy)*, 2007 WL 420252 at *2-3 (Bankr. D. Idaho Feb. 2, 2007)).

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[2]The distinction remains important for establishing the priority of a debt, as domestic support obligations have first priority. § 507(a)(1).

The provision of the decree ordering the debtor to pay the Nebraska Furniture Mart and credit card debt, and the "hold harmless" clause included therein, render those debts non-dischargeable.

> [I]n the case of an obligation to pay a debt owed to a third party, it is the obligation to hold the spouse or former spouse harmless that is presumptively nondischargeable under this section. *See* 140 Cong. Rec. H10752, H10770. "A property settlement incorporated by a divorce decree that apportions third party debt to one spouse means that the obligor-spouse indemnifies the obligee-spouse in the event that the obligee is required to pay." *In re Sturdivant*, 289 B.R. 392, 399 (citing *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 303 (Bankr. E.D. Ark. 1996)).

Douglas , 369 B.R. at 463-64 n.2; *see also Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 202–03 (B.A.P. 6th Cir. 1998) ("A debtor's obligation as part of a decree or separation agreement . . . to hold a spouse 'harmless' on a third-party obligation [is an example] of incurring a debt which satisfies the qualifying language of § 523(a)(15)[.]")

The debts at issue in this case fit squarely within the § 523(a)(15) exception to discharge. For that reason, Mr. Forman's motion for summary judgment should be granted.

IT IS ORDERED: The plaintiff's motion for summary judgment (Fil. No. 19) is granted. Separate judgment will be entered.

DATED: April 21, 2011.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
Kristi Daniel Teed
*Donald A. Roberts
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
KRISTI DANIEL TEED,	)	
	)	CASE NO. BK10-82757-TLS
Debtor(s).	)	A10-8084-TLS
RYAN F. FORMAN,	)	
	)	
Plaintiff,	)	CHAPTER 7
	)	
vs.	)	
	)	
KRISTI DANIEL TEED,	)	
	)	
Defendant.	)	

JUDGMENT

This matter is before the court on the plaintiff's motion for summary judgment (Fil. No. 19) and the debtor-defendant's objection thereto (Fil. No. 22). The debtor represents herself, and Donald A. Roberts represents the plaintiff.

IT IS ORDERED: For the reasons stated in the Order of today's date granting the plaintiff's motion for summary judgment, judgment is hereby entered in favor of the plaintiff and against the debtor-defendant. The debts at issue are excepted from discharge pursuant to 11 U.S.C. § 523(a)(15).

DATED: April 21, 2011.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
Kristi Daniel Teed
*Donald A. Roberts
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK08-81978-TJM
	)	
THERESA MARY LABENZ,	)	CH. 13
	)	
Debtor.	)	

ORDER

This matter was presented to the Court on a motion for order for payment of secured claim filed by creditor Joseph Labenz (Fil. #101), and a resistance filed by Debtor (Fil. #102). Ronald A. Hunter appeared for Debtor, and Marion F. Pruss appeared for Joseph Labenz. In lieu of a hearing, the parties submitted this matter on written argument.

Debtor and Joseph Labenz were formerly husband and wife. On September 17, 2007, their decree of dissolution of marriage was filed in the District Court of Douglas County, Nebraska. Pursuant to the terms of the decree, Debtor was awarded the marital home located in Omaha, Nebraska. The decree specifically provided that Debtor was awarded the marital home "to be hers absolutely, free and clear of any claim by Defendant."

In determining the value of the property allocated by the decree, including the marital home, the District Court of Douglas County provided that the home was subject to a second mortgage balance of $24,000.00. The court also specifically found that the funds borrowed against the marital home using the second mortgage were spent for marital purposes and had not been dissipated from the marital estate. Further, Debtor was ordered to pay both the first and second mortgages on the marital home, and the decree specifically found that "[e]ach party shall indemnify and hold the other harmless from all liability on the debts that they have been ordered to pay."

On August 7, 2008, Debtor filed this Chapter 13 bankruptcy proceeding. She listed the second mortgage debt of U.S. Bank on Schedule D. On July 10, 2009, Debtor filed a motion to sell the home (Fil. #83). The motion proposed to pay the indebtedness due to U.S. Bank on the second mortgage from the sale proceeds. On July 31, 2009, the motion was granted (Fil. #85).

As part of the sale process, Debtor discovered that U.S. Bank had released its second mortgage lien shortly before the filing of the bankruptcy case. Apparently, U.S. Bank discovered that its mortgage was faulty because it was signed only by Joseph Labenz and not by Debtor.[1]

On September 17, 2009, Debtor filed a motion for interim distribution of sale proceeds (Fil. #91) so that she could receive the amount of her homestead exemption, with the balance of the sale proceeds retained pending further order of this Court. Mr. Labenz resisted (Fil. #93), but the motion

[1]In order to be enforceable, a mortgage on a homestead must be executed by both husband and wife. Neb. Rev. Stat. § 40-103.

was granted (Fil. #100). In the order granting the motion, this Court provided that Mr. Labenz may commence appropriate proceedings to recover his claim, if any, from the remaining proceeds. Accordingly, the instant motion was filed.

Mr. Labenz argues that he has a judgment lien against the proceeds of the sale of the real estate by virtue of the divorce decree. He contends that the portion of the decree requiring Debtor to hold him harmless from the second mortgage obligation of U.S. Bank constitutes a judgment for payment of money and, therefore, constitutes a lien upon the judgment obligor's real property pursuant to Neb. Rev. Stat. § 42-370. However, that argument is not persuasive since the decree specifically awarded Debtor the property "free and clear of any claim by [Joseph Labenz]." There is nothing else in the decree to indicate that the district court intended to grant Mr. Labenz a judgment lien. *See also In re Lerdahl*, Case No. BK06-81003 (Bankr. D. Neb. Feb. 13, 2007) (holding that hold harmless obligation is not a secured claim until reduced to a money judgment). Accordingly, the claim of Mr. Labenz in this proceeding is not a judgment lien against the real estate.

Mr. Labenz next argues that Debtor should be estopped from claiming that the proceeds of the sale of her residence should not be used to hold him harmless from the U.S. Bank claim. In this regard, Mr. Labenz points out that the entire dissolution of marriage proceeding and most of the first two years of this Chapter 13 proceeding were conducted on the assumption that U.S. Bank had a valid, perfected second lien on the real estate securing the note signed by Mr. Labenz individually. In particular, the amount of the purported second lien against the real estate was duly factored into the calculation of asset values and distribution of liabilities among the parties. Debtor argues that equitable estoppel should not apply since Mr. Labenz has not proven that he somehow changed his position based on any reliance.

The factual scenario in this case is, to say the least, unique. The facts do not fit neatly into a "secured claim" payment scenario, and perhaps do not meet all of the necessary elements of equitable estoppel under Nebraska law.[2] In fact, the posture of this matter (motion for payment of secured claim) is not even correct. The real issue in this proceeding is the manner in which the remaining proceeds from the sale should be distributed. This Court, in its order granting the interim distribution, specifically retained authority with respect to such proceeds.

Regardless of whether the facts of this matter fit neatly into any asserted legal theory, one undisputed fact rises above all others. That is, the divorce decree required Debtor to pay the obligation to U.S. Bank on the "second mortgage." That indebtedness exists regardless of whether U.S. Bank properly obtained and perfected its second mortgage loan, and that obligation was taken into account when dividing the assets and liabilities of the marital estate almost two and one-half years ago. If the sale proceeds are not used to pay the indebtedness to U.S. Bank, Mr. Labenz will continue to be personally obligated to pay that indebtedness. Debtor had the duty to hold him

[2]Debtor argues this point in her brief, but does not recite any Nebraska or other law on the subject.

harmless from that obligation and was awarded the marital property on the premise that she would do so. In fact, the decree provided that Debtor was supposed to have refinanced the obligation to remove Mr. Labenz as an obligor within 90 days of the decree, though Debtor apparently failed to do so. It was clearly the intent of Debtor, Mr. Labenz, and the District Court of Douglas County that the U.S. Bank obligation would be paid from the proceeds of the home.

Failure to use the sale proceeds for payment of the U.S. Bank "second mortgage" debt would be inequitable, contrary to the clear intent of the divorce decree, and contrary to the terms of Debtor's own motion to sell. In addition, to the extent that Mr. Labenz has made any payments on such loan to U.S. Bank after September 17, 2007, for which Debtor has not provided reimbursement, the sale proceeds should be used to reimburse him for such amounts. Mr. Labenz also seeks payment of his attorney's fees, but the only basis recited for such fees is a contempt statute. There is no evidence that Debtor has been found to be in contempt, so that portion of the motion should be denied. Any remaining sale proceeds should be distributed in accordance with Debtor's motion to sell.

IT IS, THEREFORE, ORDERED that the motion for order for payment of secured claim filed by creditor Joseph Labenz (Fil. #101) is granted in part and denied in part as follows:

1. The remaining sale proceeds shall be used to satisfy the remaining balance due to U.S. Bank on the indebtedness described as the second mortgage loan by payment directly to U.S. Bank;

2. To the extent that Mr. Labenz has made any payments on such loan to U.S. Bank after September 17, 2007, for which Debtor has not provided reimbursement, the sale proceeds shall be used to reimburse him for such amounts;

3. The request for payment of attorney's fees and costs is denied; and

4. Any remaining sale proceeds are to be distributed in accordance with Debtor's motion to sell.

DATED: March 4, 2010.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*Ronald A. Hunter *Marion F. Pruss
Kathleen Laughlin United States Trustee
Movant(*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK10-40861-TLS
	)	
TIMOTHY J. McPHERON,	)	CH. 13
	)	
Debtor.	)	

ORDER

This matter was submitted to the Court on the joint stipulation of facts (Fil. #59) and the affidavit/declaration of the parties (Fil. #57 and #58). The issues involve an objection to confirmation of plan (Fil. #15), a resistance thereto (Fil. #18), an objection to claim (Fil. #29), and a resistance thereto (Fil. #31). David P. Lepant represents Debtor, and John C. Hahn represents the creditor, Candace McPheron.

The objection to confirmation of plan and the objection to claim are intertwined. The creditor, Ms. McPheron, is the former spouse of Debtor and is the holder of a claim arising out of the parties' divorce decree. Ms. McPheron asserts that her claim is a priority unsecured claim constituting a domestic support obligation. Debtor has objected to the classification of the claim as a domestic support obligation. Ms. McPheron has also objected to the plan filed by Debtor, asserting that the bankruptcy and the plan were not filed in good faith.[1] For the reasons stated below, the objection to claim is sustained and the plan objection is overruled.

Background

The underlying facts are largely undisputed and the parties have entered into a stipulation of facts with respect to this matter (Fil. #59). In light of the stipulation, not all of the facts will be set forth in this order. However, certain bear mentioning.

The 20-year marriage of the parties ended in divorce on October 19, 2009. During their marriage, they resided in a home that Ms. McPheron acquired by gift from her parents, free and clear of liens and encumbrances. Subsequent to acquiring the home, the parties consolidated some debt and encumbered the home with a deed of trust.

The original divorce decree was filed on October 19, 2009. An amended decree was entered on February 11, 2010. At the time of the original decree, Ms. McPheron's gross income was approximately $1,386.00 per month and Debtor's gross income was approximately $2,478.00 per month. For the last 18 years, Ms. McPheron has worked out of her home as a day care provider. Debtor has worked various jobs outside the home.

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[1]Ms. McPheron also objected to the plan for failure to commit all of Debtor's disposable income to the plan. However, Ms. McPheron appears to have abandoned that objection as it was not addressed in her brief.

Since the residence was a gift from Ms. McPheron's parents, the decree provided that she was to receive that property as a non-marital asset. The decree further provides as follows:

> iv. Debts:
>
> 1. Each party is responsible for one-half (50%) of the Citifinancial indebtedness on the Plaintiff's house as of August 20, 2009, in the amount of $76,956, subject to the following adjustments:
>
> a. The Plaintiff should receive a credit for one-half of the amounts withdrawn by the Defendant from the Defendant's 401(k) in the amount of $19,831.40.
>
> b. The Defendant should receive a credit in the amount of $15,000 for improvements made to the Plaintiff's house during the marriage.
>
> c. Alter [sic] adjustments, the Plaintiff is responsible for $33,646.60 (44%) of the indebtedness on the Plaintiff's house, and the Defendant is responsible for $43,309.40 (56%) of the indebtedness on the Plaintiff's house.
>
> . . .
>
> vi. Equalization: The Defendant is hereby ordered to pay the sum of $43,309.40 towards the indebtedness on the home and should hold the Plaintiff harmless thereon.
>
> . . .
>
> viii. Alimony: Neither party shall pay alimony to the other.

Discussion

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or

> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. For purposes of the case at hand, discharge and priorities are at issue. Domestic support obligations are not discharged in Chapter 13 proceedings. *See* 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, "the crucial question is what function did the parties intend the agreement to serve when they entered into it." *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir. 1984) (citing *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir. 1983)). In making that factual determination, the court evaluates a number of factors, including whether the agreement contains a separate provision for alimony or child support, and whether the debt is conditional. *Ahlf v. Ahlf (In re Ahlf)*, 354 B.R. 884, 887 (Bankr. S.D. Iowa 2006) (citing *Morel v. Morel (In re Morel)*, 983 F.2d 104, 105 (8th Cir. 1992)). Other factors considered include:

> [T]he relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments.

Ahlf, 354 B.R. at 887 (quoting *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)).

The first issue to be addressed is Debtor's objection to the claim of Ms. McPheron. Debtor asserts that the claim, which is based on the portion of the decree assigning to Debtor responsibility for a portion of the indebtedness secured by Ms. McPheron's home, is not a domestic support obligation. It is significant that the divorce decree contains an express provision for child support, as well as an express alimony provision as follows: "Neither party shall pay alimony to the other." Debtor's obligation to pay $43,309.40 towards the indebtedness on the home is set forth in two sections of the decree, one entitled "Debts" and one entitled "Equalization." In calculating the

amount to be paid, the court began with an equal division of the indebtedness between the parties and then made certain adjustments based upon unique facts and circumstances. Debtor was ordered to pay the resulting amount towards the indebtedness on the home and to hold Ms. McPheron harmless therefrom.

Unfortunately, the divorce decree does not describe how that indebtedness is to be paid (i.e., lump sum, monthly, directly to the bank, or to Ms. McPheron). There is no indication that the judgment was in lieu of alimony or support. In fact, quite to the contrary, the decree indicates that it was simply a calculation dividing the only marital debt the parties appeared to have.

Ms. McPheron's argument relies heavily upon the current income disparity of the parties. However, their current income is not relevant to an analysis of whether the debt division in the divorce decree was intended to be a domestic support obligation. Instead, only the intent of the court at the time the decree was entered is relevant. According to the factual stipulation, there was an income disparity at the time the decree was entered – Debtor earned approximately 64% of the total family income. Despite that income disparity, and despite the 20-year marriage, the district court clearly determined that no alimony should be paid. No explanation was given, but the determination was clearly stated. One potential explanation, as Debtor points out, is that the income disparity is effectively eliminated once the child support obligation is factored into the equation. Perhaps that is why the court treated the parties as equals in dividing obligations and declining to award alimony. For the foregoing reasons, I find that the hold-harmless obligation with respect to the CitiFinancial indebtedness is not a domestic support obligation.

Turning now to the plan objection, Ms. McPheron argues that the bankruptcy case was not filed in good faith and the plan was not proposed in good faith. Specifically, she asserts that Debtor has filed the case solely to circumvent his obligation to her with respect to the indebtedness owed under the divorce decree.

11 U.S.C. § 1325(a)(3) provides that a Chapter 13 plan must be proposed in good faith and not by any means forbidden by law. In discussing the good faith obligation, the Eighth Circuit Bankruptcy Appellate Panel stated:

> The relevant inquiry regarding good faith is "whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code." *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987). However, the foregoing inquiry is governed by a "totality of the circumstances" test. *Noreen*, 974 F.2d at 76; *LeMaire*, 898 F.2d at 1349; *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1982). Factors which are particularly relevant to determining good faith under the totality of the circumstances include: (1) the nature of the debt sought to be discharged; (2) whether the debt would be dischargeable in a chapter 7 bankruptcy case; and (3) the debtor's motivation and sincerity in seeking chapter 13 relief. *LeMaire*, 898 F.2d at 1349 (citing *Estus*, 695 F.2d at 317). *See also In re*

> *Kurtz*, 238 B.R. 826, 830 (Bankr. D.N.D. 1999) ("Further consideration must be given to the sincerity of the Debtor in putting forth his Chapter 13 plan of repayment and whether that plan demonstrates real sincerity on the part of [the Debtor] to repay his creditors as best he can in exchange for the liberal Chapter 13 discharge."). Another relevant factor in determining good faith is the Debtor's pre-filing conduct. *LeMaire*, 898 F.2d at 1352 (citations omitted). However, even in light of egregious pre-filing conduct by the Debtor, a chapter 13 plan may be confirmed if other factors "suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims." *Id.* (citation omitted).

Banks v. Vandiver (In re Banks), 248 B.R. 799, 803 (B.A.P. 8th Cir. 2000).

While the mortgage indebtedness owed on Ms. McPheron's home dwarfs the other indebtedness owed by Debtor at the time of bankruptcy filing, the claims register in his bankruptcy indicates that he does owe significant additional debt. Beatrice Community Hospital filed a claim in excess of $1,200.00; the Nebraska Department of Revenue filed a claim for $633.45; a credit card company filed a claim for $350.44; the Internal Revenue Service filed a claim for $2,154.48; and CitiFinancial Auto filed a claim for $792.73. Further, CitiFinancial, Inc., the holder of the mortgage on Ms. McPheron's home, filed a claim for $79,429.58 since Debtor is a co-obligor on that entire indebtedness. Thus, Debtor's mortgage liability far exceeds the portion for which he was to hold Ms. McPheron harmless. A review of Schedule J also indicates that Debtor is not, by any means, living an extravagant lifestyle. Finally, Debtor submitted an affidavit that he ultimately determined the need to file bankruptcy after the Nebraska Department of Revenue began garnishing his wages.

Ms. McPheron does assert that Debtor's pre-petition conduct should factor into whether Debtor filed this bankruptcy and/or plan in good faith. In particular, she points out that Debtor withdrew substantial funds from his 401(k) account shortly before the divorce filing and even after the divorce filing and entry of an order of the divorce court prohibiting transfers of property. However, all of those withdrawals took place prior to entry of the divorce decree and the amended decree. The withdrawals were brought to the attention of the court handling the divorce case and were specifically addressed in the decree issued by that court in calculating the division of debts. Notably, that court did not make any findings of contempt, bad faith, or otherwise with respect to those withdrawals. Accordingly, those actions are not relevant to the issue of whether this bankruptcy case was filed in good faith.

In light of the foregoing circumstances, I find that Debtor filed his Chapter 13 case and proposed his Chapter 13 plan in good faith.

IT IS, THEREFORE, ORDERED that:

1. The objection to claim (Fil. #29) is sustained and the claim is reclassified as a general unsecured claim; and

2. The objection to confirmation of plan (Fil. #15) is overruled, and the plan (Fil. #4) may be confirmed provided all other confirmation requirements have been met.

DATED: December 15, 2010.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*David P. Lepant
*John C. Hahn
Kathleen Laughlin
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK10-40861-TLS
	)	
TIMOTHY J. McPHERON,	)	CH. 13
	)	
Debtor.	)	

ORDER

This matter was submitted to the Court on the joint stipulation of facts (Fil. #59) and the affidavit/declaration of the parties (Fil. #57 and #58). The issues involve an objection to confirmation of plan (Fil. #15), a resistance thereto (Fil. #18), an objection to claim (Fil. #29), and a resistance thereto (Fil. #31). David P. Lepant represents Debtor, and John C. Hahn represents the creditor, Candace McPheron.

The objection to confirmation of plan and the objection to claim are intertwined. The creditor, Ms. McPheron, is the former spouse of Debtor and is the holder of a claim arising out of the parties' divorce decree. Ms. McPheron asserts that her claim is a priority unsecured claim constituting a domestic support obligation. Debtor has objected to the classification of the claim as a domestic support obligation. Ms. McPheron has also objected to the plan filed by Debtor, asserting that the bankruptcy and the plan were not filed in good faith.[1] For the reasons stated below, the objection to claim is sustained and the plan objection is overruled.

Background

The underlying facts are largely undisputed and the parties have entered into a stipulation of facts with respect to this matter (Fil. #59). In light of the stipulation, not all of the facts will be set forth in this order. However, certain bear mentioning.

The 20-year marriage of the parties ended in divorce on October 19, 2009. During their marriage, they resided in a home that Ms. McPheron acquired by gift from her parents, free and clear of liens and encumbrances. Subsequent to acquiring the home, the parties consolidated some debt and encumbered the home with a deed of trust.

The original divorce decree was filed on October 19, 2009. An amended decree was entered on February 11, 2010. At the time of the original decree, Ms. McPheron's gross income was approximately $1,386.00 per month and Debtor's gross income was approximately $2,478.00 per month. For the last 18 years, Ms. McPheron has worked out of her home as a day care provider. Debtor has worked various jobs outside the home.

---

[1]Ms. McPheron also objected to the plan for failure to commit all of Debtor's disposable income to the plan. However, Ms. McPheron appears to have abandoned that objection as it was not addressed in her brief.

Since the residence was a gift from Ms. McPheron's parents, the decree provided that she was to receive that property as a non-marital asset. The decree further provides as follows:

> iv. Debts:
>
> 1. Each party is responsible for one-half (50%) of the Citifinancial indebtedness on the Plaintiff's house as of August 20, 2009, in the amount of $76,956, subject to the following adjustments:
>
> a. The Plaintiff should receive a credit for one-half of the amounts withdrawn by the Defendant from the Defendant's 401(k) in the amount of $19,831.40.
>
> b. The Defendant should receive a credit in the amount of $15,000 for improvements made to the Plaintiff's house during the marriage.
>
> c. Alter [sic] adjustments, the Plaintiff is responsible for $33,646.60 (44%) of the indebtedness on the Plaintiff's house, and the Defendant is responsible for $43,309.40 (56%) of the indebtedness on the Plaintiff's house.
>
> . . .
>
> vi. Equalization: The Defendant is hereby ordered to pay the sum of $43,309.40 towards the indebtedness on the home and should hold the Plaintiff harmless thereon.
>
> . . .
>
> viii. Alimony: Neither party shall pay alimony to the other.

Discussion

Pursuant to 11 U.S.C. § 101(14A), the term "domestic support obligation" means:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
>
> (A) owed to or recoverable by –
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or

> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

This definition was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and has an impact throughout the Bankruptcy Code on issues of discharge, the automatic stay, priorities, exemptions, the means test, and the calculation of disposable income in a Chapter 13 case. For purposes of the case at hand, discharge and priorities are at issue. Domestic support obligations are not discharged in Chapter 13 proceedings. *See* 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a)(5). Further, domestic support obligations are priority claims pursuant to 11 U.S.C. § 507(a)(1)(A). If, on the other hand, the obligation is not a domestic support obligation, it would fall under 11 U.S.C. § 523(a)(15), which obligations are not excepted from discharge in Chapter 13 cases, nor are they entitled to priority status.

The BAPCPA amendments that added § 101(14A) and altered §§ 523(a)(5) and (15) did not change the standard for whether an obligation is in the nature of support. When deciding whether a debt should be characterized as one for support or property settlement, "the crucial question is what function did the parties intend the agreement to serve when they entered into it." *Boyle v. Donovan*, 724 F.2d 681, 683 (8th Cir. 1984) (citing *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir. 1983)). In making that factual determination, the court evaluates a number of factors, including whether the agreement contains a separate provision for alimony or child support, and whether the debt is conditional. *Ahlf v. Ahlf (In re Ahlf)*, 354 B.R. 884, 887 (Bankr. S.D. Iowa 2006) (citing *Morel v. Morel (In re Morel)*, 983 F.2d 104, 105 (8th Cir. 1992)). Other factors considered include:

> [T]he relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and, whether it would be difficult for the former spouse and children to subsist without the payments.

Ahlf, 354 B.R. at 887 (quoting *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997)).

The first issue to be addressed is Debtor's objection to the claim of Ms. McPheron. Debtor asserts that the claim, which is based on the portion of the decree assigning to Debtor responsibility for a portion of the indebtedness secured by Ms. McPheron's home, is not a domestic support obligation. It is significant that the divorce decree contains an express provision for child support, as well as an express alimony provision as follows: "Neither party shall pay alimony to the other." Debtor's obligation to pay $43,309.40 towards the indebtedness on the home is set forth in two sections of the decree, one entitled "Debts" and one entitled "Equalization." In calculating the

amount to be paid, the court began with an equal division of the indebtedness between the parties and then made certain adjustments based upon unique facts and circumstances. Debtor was ordered to pay the resulting amount towards the indebtedness on the home and to hold Ms. McPheron harmless therefrom.

Unfortunately, the divorce decree does not describe how that indebtedness is to be paid (i.e., lump sum, monthly, directly to the bank, or to Ms. McPheron). There is no indication that the judgment was in lieu of alimony or support. In fact, quite to the contrary, the decree indicates that it was simply a calculation dividing the only marital debt the parties appeared to have.

Ms. McPheron's argument relies heavily upon the current income disparity of the parties. However, their current income is not relevant to an analysis of whether the debt division in the divorce decree was intended to be a domestic support obligation. Instead, only the intent of the court at the time the decree was entered is relevant. According to the factual stipulation, there was an income disparity at the time the decree was entered – Debtor earned approximately 64% of the total family income. Despite that income disparity, and despite the 20-year marriage, the district court clearly determined that no alimony should be paid. No explanation was given, but the determination was clearly stated. One potential explanation, as Debtor points out, is that the income disparity is effectively eliminated once the child support obligation is factored into the equation. Perhaps that is why the court treated the parties as equals in dividing obligations and declining to award alimony. For the foregoing reasons, I find that the hold-harmless obligation with respect to the CitiFinancial indebtedness is not a domestic support obligation.

Turning now to the plan objection, Ms. McPheron argues that the bankruptcy case was not filed in good faith and the plan was not proposed in good faith. Specifically, she asserts that Debtor has filed the case solely to circumvent his obligation to her with respect to the indebtedness owed under the divorce decree.

11 U.S.C. § 1325(a)(3) provides that a Chapter 13 plan must be proposed in good faith and not by any means forbidden by law. In discussing the good faith obligation, the Eighth Circuit Bankruptcy Appellate Panel stated:

> The relevant inquiry regarding good faith is "whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code." *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987). However, the foregoing inquiry is governed by a "totality of the circumstances" test. *Noreen*, 974 F.2d at 76; *LeMaire*, 898 F.2d at 1349; *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1982). Factors which are particularly relevant to determining good faith under the totality of the circumstances include: (1) the nature of the debt sought to be discharged; (2) whether the debt would be dischargeable in a chapter 7 bankruptcy case; and (3) the debtor's motivation and sincerity in seeking chapter 13 relief. *LeMaire*, 898 F.2d at 1349 (citing *Estus*, 695 F.2d at 317). *See also In re*

> *Kurtz*, 238 B.R. 826, 830 (Bankr. D.N.D. 1999) ("Further consideration must be given to the sincerity of the Debtor in putting forth his Chapter 13 plan of repayment and whether that plan demonstrates real sincerity on the part of [the Debtor] to repay his creditors as best he can in exchange for the liberal Chapter 13 discharge."). Another relevant factor in determining good faith is the Debtor's pre-filing conduct. *LeMaire*, 898 F.2d at 1352 (citations omitted). However, even in light of egregious pre-filing conduct by the Debtor, a chapter 13 plan may be confirmed if other factors "suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims." *Id.* (citation omitted).

Banks v. Vandiver (In re Banks), 248 B.R. 799, 803 (B.A.P. 8th Cir. 2000).

While the mortgage indebtedness owed on Ms. McPheron's home dwarfs the other indebtedness owed by Debtor at the time of bankruptcy filing, the claims register in his bankruptcy indicates that he does owe significant additional debt. Beatrice Community Hospital filed a claim in excess of $1,200.00; the Nebraska Department of Revenue filed a claim for $633.45; a credit card company filed a claim for $350.44; the Internal Revenue Service filed a claim for $2,154.48; and CitiFinancial Auto filed a claim for $792.73. Further, CitiFinancial, Inc., the holder of the mortgage on Ms. McPheron's home, filed a claim for $79,429.58 since Debtor is a co-obligor on that entire indebtedness. Thus, Debtor's mortgage liability far exceeds the portion for which he was to hold Ms. McPheron harmless. A review of Schedule J also indicates that Debtor is not, by any means, living an extravagant lifestyle. Finally, Debtor submitted an affidavit that he ultimately determined the need to file bankruptcy after the Nebraska Department of Revenue began garnishing his wages.

Ms. McPheron does assert that Debtor's pre-petition conduct should factor into whether Debtor filed this bankruptcy and/or plan in good faith. In particular, she points out that Debtor withdrew substantial funds from his 401(k) account shortly before the divorce filing and even after the divorce filing and entry of an order of the divorce court prohibiting transfers of property. However, all of those withdrawals took place prior to entry of the divorce decree and the amended decree. The withdrawals were brought to the attention of the court handling the divorce case and were specifically addressed in the decree issued by that court in calculating the division of debts. Notably, that court did not make any findings of contempt, bad faith, or otherwise with respect to those withdrawals. Accordingly, those actions are not relevant to the issue of whether this bankruptcy case was filed in good faith.

In light of the foregoing circumstances, I find that Debtor filed his Chapter 13 case and proposed his Chapter 13 plan in good faith.

IT IS, THEREFORE, ORDERED that:

1. The objection to claim (Fil. #29) is sustained and the claim is reclassified as a general unsecured claim; and

2. The objection to confirmation of plan (Fil. #15) is overruled, and the plan (Fil. #4) may be confirmed provided all other confirmation requirements have been met.

DATED: December 15, 2010.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*David P. Lepant
*John C. Hahn
Kathleen Laughlin
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

Caution
As of: January 18, 2017 4:03 PM EST

Farrey v. Sanderfoot

Supreme Court of the United States

March 25, 1991, Argued ; May 23, 1991, Decided

No. 90-350

Reporter
500 U.S. 291 *; 111 S. Ct. 1825 **; 114 L. Ed. 2d 337 ***; 1991 U.S. LEXIS 2906 ****; 59 U.S.L.W. 4483; Bankr. L. Rep. (CCH) P73,964; 24 Collier Bankr. Cas. 2d (MB) 841; 21 Bankr. Ct. Dec. 1160; 91 Cal. Daily Op. Service 3705; 91 Daily Journal DAR 6028

JEANNE FARREY, fka JEANNE SANDERFOOT, PETITIONER v. GERALD J. SANDERFOOT

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition: *899 F. 2d 598*, reversed and remanded.

Core Terms

fixing, exempt, decree, pre-existing, homestead, spouse, one-half, divorce, possessed, marital property, liens, extinguished, divorce decree, state law, undivided, marital, exempt property, real estate, provision's, parties, fasten

Case Summary

Procedural Posture
Petitioner appealed a judgment from the United States Court of Appeals for the Seventh Circuit affirming the district court's ruling that under *11 U.S.C.S. § 522(f)(1)*, respondent former spouse could use a state homestead exemption in bankruptcy to avoid a lien created by the divorce decree on the marital home.

Overview
Petitioner's former spouse could not avoid a lien created by the divorce decree on the marital home by applying a state homestead exemption in bankruptcy. When the parties were divorced, respondent received title to the marital home and was ordered to pay petitioner a sum of money secured by a lien against the home. Respondent filed bankruptcy and sought to avoid petitioner's lien under *11 U.S.C.S. § 522(f)(1)* by claiming a state homestead exemption. The appellate court affirmed the district court's ruling that the lien was avoidable. The U.S. Supreme Court reversed because a debtor who did not possess an interest in property before a lien attached could not avoid the fixing of a lien on that interest. Because the divorce decree created the parties' interests in the marital home at the same time it created the lien against the property, respondent did not possess his interest before the lien attached.

Outcome
The court reversed because respondent could not avoid the fixing of a lien on an interest that he did not possess before the lien attached, and the divorce decree created the parties' interests in the property at the same time it created the lien.

LexisNexis® Headnotes

Real Property Law > Exemptions & Immunities > Homestead Exemptions

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN1 See *Wis. Stat. § 815.20* (1989-1990).

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

HN2 *11 U.S.C.S. § 522(f)(1)* provides that notwithstanding any waiver of exemptions, the 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 *§ 522(b)*, if such lien is a judicial lien. The provision establishes several conditions for a lien to be avoided.

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

HN3 Unless a 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 *11 U.S.C.S. § 522(f)(1)*.

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

HN4 A debtor cannot use *11 U.S.C.S. § 522(f)(1)* to avoid a lien on an interest acquired after the lien attached. The critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he or she did not, *§ 522(f)(1)* does not permit the debtor to avoid the fixing of the lien on that interest.

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Family Law > Marital Duties & Rights > Property Rights > Homestead Rights

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Real Property Law > Bankruptcy > General Overview

Real Property Law > Exemptions & Immunities > Homestead Exemptions

HN5 Congress primarily intends *11 U.S.C.S. § 522(f)(1)* as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's exemptions. That is not what occurs in a divorce proceeding. One spouse obtains a lien not to defeat the other spouse's pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead that is fully equal to that of her spouse. The divorce court awards the lien to secure an obligation the court imposes on the spouse receiving the property in exchange for the court's simultaneous award of the other spouse's homestead interest to the spouse receiving the property. To permit a debtor in these circumstances to use the Bankruptcy Code to deprive a spouse of this protection would neither follow the language of the statute nor serve the main goal it was designed to address.

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

HN6 *11 U.S.C.S. § 522(f)(1)* of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest.

Lawyers' Edition Display

Decision

Lien on homestead granted to debtor's former spouse to secure value of former interest, under divorce decree extinguishing prior interests, held not avoidable in bankruptcy under *11 USCS 522(f)(1)*.

Summary

In granting a couple a judgment of divorce and property division which awarded each party one-half of the marital estate, a Wisconsin court (1) granted the husband sole title to all real estate, including the family house, but (2) ordered the husband to pay the wife half the difference in the value of their net assets, or $ 29,208.44, in two payments, and (3) secured these payments by giving the wife a lien against the real estate. The husband never made the required payments, and voluntarily filed for bankruptcy under Chapter 7 of the Bankruptcy Code (11 USCS 701-766) 3 months after the written divorce decree. Claiming the marital home and real estate as exempt homestead property to the amount of $ 40,000 under the state homestead exemption, as allowed by *11 USCS 522(b)(2)(A)*, the husband filed a motion to avoid his ex-wife's lien pursuant to *11 USCS 522(f)(1)*, which allows debtors in bankruptcy to "avoid the fixing of a lien," specifically including judicial liens, "on an interest of the debtor in property" to the extent that such liens impair an exemption granted under 522(b). The United States Bankruptcy Court for the Eastern District of Wisconsin denied the motion on the theory that the lien had not "attached" to the debtor's present interest in the home because that interest had been created by the same divorce decree which imposed the lien (*83 BR 564*). The United States District Court for the Eastern District of Wisconsin reversed, as it ruled that the lien was fixed on an interest of the debtor in the property at issue (*92 BR 802*); and the United States Court of Appeals for the Seventh Circuit, affirming the District Court's judgment, reasoned that (1) the divorce proceeding had dissolved any pre-existing interest the ex-wife had had in the homestead; and (2) her new interest created by the divorce decree had attached to the debtor's interest in the property (*899 F2d 598*).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by White, J., joined by Rehnquist, Ch. J., and Marshall, Blackmun, Stevens, O'Connor, Kennedy, and Souter, JJ., and joined in part (except as to holding 3 below) by Scalia, J., it was held that (1) 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; (2) assuming that the divorce decree in the case at hand was properly characterized by the parties under state law as extinguishing the parties' previous property interests and creating new ones, the husband may not avoid the lien on his homestead under 522(f)(1), because he never possessed his new fee simple interest before the lien fixed but took the

interest and the lien together; and (3) the same result follows even if the divorce decree did not extinguish the couple's pre-existing interests but merely reordered them, augmenting the husband's previous interest by adding to it the wife's prior interest, since, although 522(f)(1) could then be used to undo the encumbrance to the extent that the lien fastened to any portion of the husband's previous surviving interest, the divorce decree did not purport to encumber any part of that interest and the lien fastened only to what had been the wife's interest.

Kennedy, J., joined by Souter, J., concurred, expressing the view that (1) a debtor cannot use 522(f)(1) to avoid a lien on an interest which the debtor acquired after the lien attached; and (2) the husband's concession, in his brief to the Supreme Court, that the property division extinguished the pre-existing property rights was therefore fatal to his claim; but (3) absent the husband's concession, it would seem that the state court did not divest him of his pre-existing interest; (4) it is not clear that as a matter of state law the judicial lien could not attach to the husband's predecree interest in his half of the marital property; and (5) congressional action may therefore be necessary to avoid an unjust result in some future case.

Headnotes

BANKRUPTCY §17 > STATUTES §108.5 > avoidance of lien on exempt property -- purpose -- > Headnote:
LEdHN[1A] [1A]***LEdHN[1B]*** [1B]***LEdHN[1C]*** [1C]***LEdHN[1D]*** [1D]***LEdHN[1E]*** [1E]

A judicial lien cannot be avoided under *522(f)(1) of the Bankruptcy Code* (*11 USCS 522(f)(1)*)--which empowers a debtor in bankruptcy to "avoid the fixing of a lien on an interest of the debtor in property," to the extent that such lien impairs an exemption allowing the removal of such property from the bankruptcy estate--unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, because (1) the gerund "fixing" refers to a temporal event--the fastening of a liability--which assumes a pre-existing object onto which the liability can fasten; (2) other provisions of the Code, such as *11 USCS 545(1)*, likewise indicate that Congress used the term "fixing" to refer to the timing of an event; and (3) such a reading fully comports with 522(f)'s purpose and history, as Congress enacted the provision with the broad purpose of protecting the debtor's exempt property, and what specific legislative history exists suggests that a principal reason for the extension of this protection to judicial liens was because such liens are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts.

BANKRUPTCY §17 > avoidance of lien on exempt property -- purpose -- divorce decree -- > Headnote:
LEdHN[2A] [2A]***LEdHN[2B]*** [2B]

Given that a judicial lien cannot be avoided under *522(f)(1) of the Bankruptcy Code* (*11 USCS 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, 522(f)(1) does not allow a debtor to avoid the fixing of a lien on a homestead where the lien (1) is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and (2) in no event secures more than the value of the nondebtor ex-spouse's former interest; thus, assuming that the divorce decree between a former husband and wife--which decree granted the husband fee simple ownership of the marital home and real estate, which they had previously held as joint tenants each possessing an undivided half interest, while the wife received a debt equal to one-half the difference in value of the net assets received by each party in the property division, which debt was secured by a lien on the husband's fee simple interest--is properly characterized by the parties under state law as extinguishing the parties' previous property interests and creating new ones, the husband, who filed for bankruptcy 3 months after the decree, may not avoid that judicial lien under 522(f)(1), because he never possessed his new fee simple interest before the lien fixed but took the interest and the lien together; the same result follows even if the divorce decree did not extinguish the couple's pre-existing interests but merely reordered them, augmenting the husband's previous interest by adding to it the wife's prior interest, since, although 522(f)(1) could then be used to undo the encumbrance to the extent that the lien fastened to any portion of the husband's previous, surviving interest, the divorce decree did not purport to encumber any part of the husband's previous interest, but instead transferred the wife's interest to the husband and simultaneously granted a lien equal to the wife's interest minus the small amount of personal property she retained, and the lien thus fastened only to what had been the wife's interest, which the husband would never have possessed without the lien already having fixed; the result, on either theory, accords with 522(f)(1)'s main purpose of thwarting creditors who rush to court to defeat a debtor's exemptions, as the wife obtained the lien not to defeat the husband's pre-existing interest in the homestead, but to protect her own equal pre-existing interest.

BANKRUPTCY §186 > secured debts -- > Headnote:
LEdHN[3] [3]

Liens and other secured interests ordinarily survive bankruptcy.

BANKRUPTCY §264 > avoidance of lien on exempt property -- interest acquired after lien -- > Headnote:
LEdHN[4] [4]

A debtor cannot use *522(f)(1) of the Bankruptcy Code* (*11 USCS 522(f)(1)*)--which empowers a debtor in bankruptcy to "avoid the fixing of a lien on an interest of the debtor in property," to the extent that such lien impairs an exemption allowing the removal of such property from the bankruptcy estate--to avoid a judicial lien on an interest that was acquired after the lien attached, because (1) if the fixing of the lien took place before the debtor acquired the interest in question, then the "fixing" by definition was not on the debtor's interest, and (2) to permit lien avoidance in these circumstances would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor in bankruptcy.

Syllabus

When petitioner Farrey and respondent Sanderfoot divorced, a Wisconsin court awarded each one-half of their marital estate. Among other things, the decree awarded Farrey's interest in the family home and real estate to Sanderfoot and ordered him to make payments to Farrey to equalize their net marital assets. To secure the award, the court granted Farrey a lien against Sanderfoot's real property. Sanderfoot did not pay Farrey and subsequently filed for bankruptcy, listing the marital home and real estate as exempt homestead property. The Bankruptcy Court denied his motion to avoid Farrey's lien under *11 U. S. C. § 522(f)(1)* -- which provides, *inter alia*, that a debtor **[****2]** "may avoid the fixing of a [judicial] lien on an interest of the debtor in property" -- finding that the lien could not be avoided because it protected Farrey's pre-existing interest in the marital property. The District Court reversed, and the Court of Appeals affirmed.

Held:

1. *Section 522(f)(1)* requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of a lien on that interest. The statute does not permit avoidance of any lien on a property, but instead expressly permits avoidance of "the fixing of a lien on an interest of the debtor." A fixing that takes place before the debtor acquires an interest, by definition, is not on the debtor's interest. This reading fully comports with *§ 522(f)*'s purpose, which is to protect the debtor's exempt property, and its legislative history, which suggests that Congress primarily intended *§ 522(f)(1)* as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's exemptions. To permit lien avoidance where the debtor at no point possessed the interest without the judicial lien would allow judicial lienholders **[****3]** to be defrauded through the conveyance of an encumbered interest to a prospective debtor. Pp. 295-299.

2. Farrey's lien cannot be avoided under *§ 522(f)(1)*. The parties agree that, under state law, the divorce decree extinguished their joint tenancy, in which each had an undivided one-half interest, and created new interests in place of the old. Thus, her lien fixed not on Sander-foot's pre-existing interest, but rather on the fee simple interest that he was awarded in the decree that simultaneously granted Farrey her lien. The result is the same even if the decree merely reordered the couple's pre-existing interests, since the lien would have fastened only to what had been Farrey's pre-existing interest, an interest that Sanderfoot would never have possessed without the lien already having fixed. To permit Sanderfoot to use the Bankruptcy Code to deprive Farrey of protection for her own pre-existing homestead interest would neither follow the statute's language nor serve its main goal. Pp. 299-301.

Counsel: Brady C. Williamson argued the cause for petitioner. With him on the briefs was Charles J. Hertel.

Harvey G. Samson argued the cause and filed a brief for respondent. **[****4]**

Judges: WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in all but the penultimate paragraph of Part III of which SCALIA, J., joined. KENNEDY, J., filed a concurring opinion, in which SOUTER, J., joined, post, p. 301.

Opinion by: WHITE

Opinion

[*292] **[***342]** **[**1827]** JUSTICE WHITE delivered the opinion of the Court.

[1A] [1A] ***[2A]*** [2A]In this case we consider whether *§ 522(f) of the Bankruptcy Code* allows a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the nondebtor spouse's former interest. We hold that it does not.

I

Petitioner Jeanne Farrey and respondent Gerald Sanderfoot were married on August 12, 1966. The couple eventually built

a home on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. **[****5]** On September 12, 1986, the Wisconsin Circuit Court for Outagamie County entered a bench decision granting a judgment of divorce and property division that resolved all contested issues and terminated **[*293]** the marriage. See Wis. Stat. § 767.37(3) (1989-1990). A written decree followed on February 5, 1987.

The decision awarded each party one-half of their net $ 60,600.68 marital estate. This division reflected Wisconsin's statutory presumption that the marital estate "be divided equally between the parties." § 767.255. The decree granted Sanderfoot sole title to all the real estate and the family house, which was subject to a mortgage and which was valued at $ 104,000, and most of the personal property. For her share, Farrey received the remaining items of personal property and the proceeds from a court-ordered auction of the furniture from the home. The judgment also allocated the couple's liabilities. Under this preliminary calculation of assets and debts, Sanderfoot stood to receive a net award of $ 59,508.79, while Farrey's award would otherwise have been $ 1,091.90. To ensure that the division of the estate was equal, the court ordered Sanderfoot to pay Farrey $ 29,208.44, **[****6]** half the difference in the value of their net assets. Sanderfoot was to pay this amount in two installments: half by January 10, 1987, and the remaining half by April 10, 1987. To secure this award, the decree provided that Farrey "shall have a lien against the real estate property of [Sanderfoot] for the total amount of money due her pursuant to this Order of the Court, i. e. $ 29,208.44, and the lien shall **[***343]** remain attached to the real estate property . . . until the total amount of money is paid in full." App. to Pet. for Cert. 57a.

Sanderfoot never made the required payments nor complied with any other order of the state court. Instead, on May 4, 1987, he voluntarily filed for Chapter 7 bankruptcy. Sanderfoot listed the marital home and real estate on the schedule of assets with his bankruptcy petition and listed it as exempt homestead property. Exercising his option to invoke the state rather than the federal homestead exemption, *11 U. S. C. § 522(b)(2)(A)*, Sanderfoot claimed the property as exempt "to the amount of $ 40,000" under *Wis. Stat. [*294] § 815.20* (1989-1990). [1] **[****8]** He also filed a motion to avoid Farrey's lien under the provision **[****7]** in dispute, *11 U. S. C. § 522(f)(1)*, claiming that Farrey possessed a **[**1828]** judicial lien that impaired his homestead exemption. Farrey objected to the motion, claiming that *§ 522(f)(1)* could not divest her of her interest in the marital home. [2] The Bankruptcy Court denied Sanderfoot's motion, holding that the lien could not be avoided because it protected Farrey's pre-existing interest in the marital property. *In re Sanderfoot, 83 B.R. 564 (ED Wis. 1988)*. The District Court reversed, concluding that the lien was avoidable because it "is fixed on an interest of the debtor in the property." *In re Sanderfoot, 92 B.R. 802 (ED Wis. 1988)*.

A divided panel of the Court of Appeals affirmed. *In re Sanderfoot, 899 F.2d 598 (CA7 1990)*. The court reasoned that the divorce proceeding dissolved any pre-existing interest Farrey had in the homestead and that her new interest, "created in the dissolution order and evidenced by her lien, attached to Mr. Sanderfoot's interest in the property." *Id., at 602*. Noting that the issue had caused a split among the Courts of Appeals, the court expressly relied on those decisions that it termed more "faithful to the plain language of *section 522(f)*." *Ibid.* (citing *In re Pederson, 875 F.2d 781 (CA9 1989)*; *Maus v. Maus, 837 F.2d 935 (CA10 1988)*; *Boyd [*295] v. Robinson, 741 F.2d 1112, 1115 (CA8 1984)* (Ross, J., dissenting)).

Judge Posner, in dissent, argued that to avoid a lien under *§ 522(f)*, a debtor must have an interest in the property at the time the court **[****9]** places the lien on that interest. Judge Posner concluded that because the same decree that gave the entire property to Sanderfoot simultaneously created the lien in favor of Farrey, the lien did not attach to a pre-existing interest of the husband. The dissent's conclusion followed the result, though not the rationale, of *Boyd, supra*, *In re Borman, 886 F.2d 273 [***344] (CA10 1989)*, and *In re Donahue, 862 F.2d 259 (CA10 1988)*.

We granted certiorari to resolve the conflict of authority. *498 U.S. 980 (1990)*. We now reverse the Court of Appeals' judgment and remand.

II

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[1] *Section 815.20* provides in relevant part:

"Homestead exemption definition.

HN1 "(1) An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $ 40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . . The exemption extends to the interest therein of the tenants in common, having a homestead thereon with the consent of the cotenants, and to any estate less than a fee."

[2] Farrey also objected to her former husband's valuation of the home at $ 82,750 in his bankruptcy filings. Neither the Bankruptcy Court, the District Court, nor the Court of Appeals resolved this dispute on the merits.

Section 522(f)(1) provides in relevant part:

> ***HN2*** "Notwithstanding any waiver of exemptions, the 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 --
>
> "(1) a judicial lien . . . ."

The provision establishes several conditions for a lien to be avoided, only one of which is at issue. **[****10]** See *In re Hart, 50 B.R. 956, 960 (Bkrtcy. Ct. Nev. 1985)*. Farrey does not challenge the Court of Appeals' determination that her lien was a judicial lien, *899 F.2d at 603-605*, nor do we address that question here. The Court of Appeals also determined that Farrey had waived any challenge as to whether Sanderfoot was otherwise entitled to a homestead exemption under state law, *id., at 603*, and we agree. See *Owen* v. *Owen, post*, p. 305. The sole question presented in this case is whether *§ 522(f)(1)* permits Sanderfoot to avoid the fixing of **[*296]** Farrey's lien on the property interest that he obtained in the divorce decree.

The key portion of *§ 522(f)* states that "the debtor may avoid the fixing of a lien on an interest . . . in property." Sanderfoot, following several Courts of Appeals, suggests that this phrase means that a lien may be avoided so long as it is currently fixed on a debtor's interest. Farrey, following Judge Posner's lead, reads the text as permitting the avoidance of a lien only where the lien attached to the debtor's interest at **[**1829]** some point after the debtor obtained the interest.

1B [1B] **[****11]** We agree with Farrey. No one asserts that the two verbs underlying the provision possess anything other than their standard legal meaning: "avoid" meaning "annul" or "undo," see Black's Law Dictionary 136 (6th ed. 1990); H. R. Rep. No. 95-595, pp. 126-127 (1977), and "fix" meaning to "fasten a liability upon," see Black's Law Dictionary, *supra*, at 637. The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid "the fixing" of a lien on the debtor's interest in property. The gerund "fixing" refers to a temporal event. That event -- the fastening of a liability -- presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as "an interest of the debtor in property." Therefore, ***HN3*** 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)*. [3]

[3] ***1C*** [1C] **[****12]** **[*297]** ***1D*** [1D] ***3*** [3]This reading fully comports **[***345]** with the provision's purpose and history. See *United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)*. Congress enacted *§ 522(f)* with the broad purpose of protecting the debtor's exempt property. See S. Rep. No. 95-989, p. 77 (1978); H. R. Rep. No. 95-595, *supra, at 126-127*. Ordinarily, liens and other secured interests survive bankruptcy. In particular, it was well settled when *§ 522(f)* was enacted that valid liens obtained before bankruptcy could be enforced on exempt property, see *Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 582-583, 79 L. Ed. 1593, 55 S. Ct. 854 (1935)*, including otherwise exempt homestead property, *Long v. Bullard, 117 U.S. 617, 620-621, 29 L. Ed. 1004, 6 S. Ct. 917 (1886)*. Congress generally preserved this principle when it comprehensively revised bankruptcy law with the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 **[****13]** Stat. 2587, *11 U. S. C. § 522(c)(2)(A)(i)*. But Congress also revised the law to permit the debtor to avoid the fixing of some liens. See, *e. g.*, *11 U. S. C. § 545* (statutory liens).

Section 522(f)(1), by its terms, extends this protection to cases involving the fixing of judicial liens onto exempt property. What specific legislative history exists suggests that a principal reason Congress singled out judicial liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts. As the House Report stated:

Other provisions of the Code likewise indicate that Congress used the term "fixing" to refer to the timing of an event. *Section 545(1)*, for example, provides:

"The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien --

"(1) *first becomes* effective against the debtor --

"(A) *when* a case under this title concerning the debtor is commenced;

"(B) *when* an insolvency proceeding other than under this title concerning the debtor is commenced;

"(C) *when* a custodian is appointed or authorized to take or takes possession;

"(D) *when* the debtor become insolvent;

"(E) *when* the debtor's financial condition fails to meet a specified standard; or

"(F) *at the time* of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien." *11 U. S. C. § 545(1)* (emphasis added).

> "The first right *[§ 522(f)(1)]* allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists **[*298]** to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions." H. R. Rep. No. 95-595, *supra, at 126-127*.

[1830]** One factor supporting the view that Congress intended *§ 522 (f)(1)* to thwart a rush to the courthouse is Congress' contemporaneous elimination of § 67a of the **[****14]** 1898 Bankruptcy Act, 30 Stat. 564. Prior to its repeal, § 67a invalidated any lien obtained on an exempt interest of an insolvent debtor within four months of the bankruptcy filing. The Bankruptcy Reform Act eliminated the insolvency and timing requirements. It is possible that Congress simply decided to leave exemptions exposed despite its longstanding policy against doing so. But given the legislative history's express concern over protecting exemptions, it follows instead that *§ 522(f)(1)* was intended as a new device to handle the old provision's job by "giving the debtor certain rights not available under current law with respect to exempt **[***346]** property." H. R. Rep. No. 95-595, *supra, at 126-127*.

[4] [4]Conversely, the text, history, and purpose of *§ 522(f)(1)* also indicate what the provision is *not* concerned with. It cannot be concerned with liens that fixed on an interest before the debtor acquired that interest. Neither party contends otherwise. *Section 522(f)(1)* does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the "fixing of a lien on an interest **[****15]** of the debtor." If the fixing took place before the debtor acquired that interest, the "fixing" by definition was not on the debtor's interest. Nor could the statute apply given its purpose of preventing a creditor from beating the debtor to the courthouse, since the debtor at no point possessed the interest without the judicial lien. There would be no fixing to avoid since the lien was already there. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. See *In re McCormick, 18 B.R. **[*299]** 911, 913-914 (Bkrtcy. Ct. WD Pa. 1982)*. For these reasons, it is settled that ***HN4*** a debtor cannot use *§ 522(f)(1)* to avoid a lien on an interest acquired after the lien attached. See, *e. g.*, *In re McCormick, supra*; *In re Stephens, 15 B.R. 485 (Bkrtcy. Ct. WD NC 1981)*; *In re Scott, 12 B.R. 613 (Bkrtcy. Ct. WD Okla. 1981)*. As before, the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he or she did not, *§ 522(f)(1)* does not permit the debtor to **[****16]** avoid the fixing of the lien on that interest.

III

[2B] [2B]We turn to the application of *§ 522(f)(1)* to this case.

Whether Sanderfoot ever possessed an interest to which the lien fixed, before it fixed, is a question of state law. Farrey contends that prior to the divorce judgment, she and her husband held title to the real estate in joint tenancy, each possessing an undivided one-half interest. She further asserts that the divorce decree extinguished these previous interests. At the same time and in the same transaction, she concludes, the decree created new interests in place of the old: for Sanderfoot, ownership in fee simple of the house and real estate; for Farrey, various assets and a debt of $ 29,208.44 secured by a lien on the Sanderfoot's new fee simple interest. Both in his briefs and at oral argument, Sanderfoot agreed on each point. Brief for Respondent 7-8; Tr. of Oral Arg. 39.

On the assumption that the parties characterize Wisconsin law correctly, Sanderfoot must lose. Under their view, the lien could not have fixed on Sanderfoot's pre-existing undivided half interest because the divorce decree **[****17]** extinguished it. Instead, the only interest that the lien encumbers is debtor's wholly new fee simple interest. The same decree that awarded Sanderfoot his fee simple interest simultaneously granted the lien to Farrey. As the judgment stated, he acquired the property "free and clear" of any claim "except as expressly provided in this [decree]. " App. to Pet. **[*300]** for Cert. 58a. Sanderfoot took the interest and the lien together, as if he had purchased an already encumbered estate from a third party. Since **[**1831]** Sanderfoot never possessed his new fee simple **[***347]** interest before the lien "fixed," *§ 522(f)(1)* is not available to void the lien.

The same result follows even if the divorce decree did not extinguish the couple's pre-existing interests but instead merely reordered them. The parties' current position notwithstanding, it may be that under Wisconsin law the divorce decree augmented Sanderfoot's previous interest by adding to it Farrey's prior interest. If the court in exchange sought to protect Farrey's previous interest with a lien, *§ 522(f)(1)* could be used to undo the encumbrance to the extent the lien fastened to any portion of Sanderfoot's previous **[****18]** surviving interest. This follows because Sanderfoot would have possessed the interest to which that part of the lien fixed, before it fixed. But in this case, the divorce court did not purport to encumber any part of Sanderfoot's previous interest even on the assumption that state law would deem that interest to have survived. The decree instead transferred Farrey's previous interest to Sanderfoot and, again simultaneously, granted a lien equal to that interest minus the small amount of personal property she

retained. Sanderfoot thus would still be unable to avoid the lien in this case since it fastened only to what had been Farrey's pre-existing interest, and this interest Sanderfoot would never have possessed without the lien already having fixed. [4]

The result, on either theory, accords with the provision's main purpose. As noted, the legislative history suggests that ***HN5*** Congress primarily intended *§ 522(f)(1)* as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's **[****19]** exemptions. That is not what occurs in a divorce proceeding such as this. Farrey obtained the lien not to defeat **[*301]** Sanderfoot's pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead that was fully equal to that of her spouse. The divorce court awarded the lien to secure an obligation the court imposed on the husband in exchange for the court's simultaneous award of the wife's homestead interest to the husband. We agree with Judge Posner that to permit a debtor in these circumstances to use the Code to deprive a spouse of this protection would neither follow the language of the statute nor serve the main goal it was designed to address.

IV

[1E] [1E]We hold that *§ 522(f)(1)* ***HN6*** of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with **[****20]** this opinion.

It is so ordered.

Concur by: KENNEDY

Concur

JUSTICE KENNEDY, with whom JUSTICE SOUTER joins, concurring.

I agree with the Court's holding that a debtor cannot use *§ 522(f)(1) of the Bankruptcy Code* to avoid a lien on an interest the debtor acquired **[***348]** after the lien attached. I agree also with the Court's determination that respondent conceded what we all now know to be the key point in the case. In describing the effect of the Outagamie County Circuit Court's decree on the real property in question, the husband stated in his brief before this Court:

> "Prior to the judgment of divorce, the parties held title to the real estate in joint tenancy, each holding a pre-existing undivided one-half interest. At the point that the divorce court issued its property division determination, those property rights were wholly extinguished and new rights were put into place." Brief for Respondent 7-8.

[*302] This concession is fatal to the argument respondent must make to prevail here, which **[**1832]** is that the judicial lien fixed upon his pre-existing interest in the property. With the case in this posture, though, the possibility arises that later cases, **[****21]** whether from Wisconsin or from some other jurisdiction, could yield a different result. This would depend upon the relevant state laws defining the estate owned by a spouse who had a pre-existing interest in marital property and upon state laws governing awards of property under a decree settling marital rights.

In this case, prior to the Circuit Court decree ordering the property division, respondent had a vested, present, and undivided interest in one-half the marital property. The relevant Wisconsin statutes, enacted when the State adopted substantial parts of the Uniform Marital Property Act, provide that "all property of spouses is presumed to be marital property," *Wis. Stat. § 766.31(2)* (1989-1990), and "each spouse has a present undivided one-half interest in each item of marital property." *§ 766.31(3)*. Absent respondent's concession, it would seem that the state court did not divest him of his pre-existing interest. At no place in its "Findings of Fact, Conclusions of Law, and Judgment of Divorce" did the court declare that respondent's predecree interests were extinguished. Rather, the decree declared that upon its effective date sole title to the property vested in respondent. **[****22]** It also gave respondent's wife a lien against the home to secure the debt he owed her to equalize the property settlement. Finally, it divested each party of "any and all right, title and interest in and to the property awarded to the other." App. to Pet. for Cert. 58a. As I read these provisions, respondent obtained from his wife her one-half interest in the home, while always retaining his one-half interest as well. Because no interest in the home, other than the lien, was awarded to respondent's wife, respondent was never divested of any interest.

[*303] This interpretation conforms to the result mandated if a marriage terminates without any decree for property division. Wisconsin law provides that "after a dissolution each former spouse owns an undivided one-half interest in the former marital property as a tenant in common." *Wis. Stat. § 766.75* (1989-1990). So too, if one spouse were to make a voluntary transfer of his or her one-half interest to the other spouse, I should not think it could be said that the transferee's prior interest had been extinguished. Rather, the transferee

[4] JUSTICE SCALIA does not join in this paragraph.

would retain his or her **[***349]** own interest, and the two interests would be merged into **[****23]** a single estate. See *Thauer v. Smith, 213 Wis. 91, 95, 250 N.W. 842, 844 (1933)*. A state-law scheme in this pattern is to be distinguished, of course, from a regime in which a tenancy by the entirety is recognized and is deemed a single interest owned by the marital entity, a regime in which the estate dissolves when the marriage does. See *McCormick v. Mid-State Bank & Trust Co., 22 B.R. 997 (WD Pa. 1982)* (applying Pennsylvania law). Thus, it is not at all clear that as a matter of state law the judicial lien could not attach to the husband's predecree interest in his one-half of the marital property. If so, respondent could use *§ 522(f)(1)* to avoid at least part of his wife's lien.

The result the Court reaches consists with fairness and common sense. Since the Outagamie County Circuit Court had the power to strip the husband of his interest altogether, it can be reasoned that the court granted him the entire property on the condition that his prior interest would terminate and that a lien would attach to a new interest in the whole. The problem with this argument, however, is that there is no indication in the record that the husband **[****24]** consented to the decree. A waiver of this sort may also be contrary to the nonwaiver provision of *§ 522(f)*.

Following this analysis, I believe the Bankruptcy Code may be used in some later case to allow a spouse to avoid otherwise valid obligations under a divorce court decree. **[*304]** Though adept drafting of property decrees or the use of court orders directing **[**1833]** conveyances in a certain sequence might resolve the problem, it appears that congressional action may be necessary to avoid in some future case the perhaps unjust result the Court today avoids having to consider only because of the fortuity of a litigant's concession. With these observations, I concur in the opinion and the judgment of the Court.

References

9A Am Jur 2d, Bankruptcy 1223; *24 Am Jur 2d, Divorce and Separation 864-866*, *934*

5 Federal Procedure, L Ed, Bankruptcy 9:316, 9:368

4 Federal Procedural Forms, L Ed, Bankruptcy 9:607

11 USCS 522(f)(1)

Bankruptcy Service, L Ed 4A:140, 4A:141, 22:52, 22:65, 71:234

Bankruptcy Desk Guide 13:140, 13:141

L Ed Digest, Bankruptcy 264

L Ed Index, Bankruptcy

Index **[****25]** to Annotations, Bankruptcy and Insolvency; Liens and Encumbrances

Annotation References:

Avoidance under *11 USCS 522(f)(1)* of the Bankruptcy Code of 1978 of judicial lien on debtor's exempt personal property. 47 ALR Fed 937.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK08-82078-TJM
	)	
SCOTT D. McFEE,	)	CH. 13
	)	
Debtor.	)	

ORDER

Hearing was held in Omaha, Nebraska, on May 11, 2009, on a Motion to Allow Amended Proof of Claim filed by creditor Kathy A. Mock (Fil. #69), and an Objection thereto by Debtor (Fil. #77). This hearing was consolidated with a hearing on Debtor's Amended Plan Post Confirmation (Fil. #75), an Objection by Kathy A. Mock (Fil. #76), and an Objection by the Chapter 13 Trustee (Fil. #73), together with a Motion to Avoid Lien filed by Debtor (Fil. #80), and a Resistance by Kathy A. Mock (Fil. #83). Van Schroeder appeared for Debtor, Henry N. Carriger appeared for Kathy A. Mock, and Tom Kenny appeared on behalf of the Chapter 13 Trustee.

Debtor and Ms. Mock entered into a Stipulation of Facts (Fil. #85) with respect to the pending matters. The facts, as laid out in the stipulation, as well as in evidence submitted in connection with prior hearings, are generally undisputed. Some of those undisputed facts are as follows:

1. Debtor and Ms. Mock were previously married. They were divorced on June 14, 2005, by virtue of a decree entered in the District Court of Sarpy County, Nebraska. That divorce decree provided for various judgments against Debtor and in favor of Ms. Mock. Ms. Mock asserts that the amount currently due to her pursuant to the divorce decree is approximately $41,000.00. The amounts due are not domestic support obligations.

2. Debtor subsequently remarried and, on July 16, 2008, he and his new wife closed on their purchase of a residence located at 15420 Cottonwood Street, Omaha, Nebraska.

3. This bankruptcy case was filed on August 18, 2008. Upon filing bankruptcy, Debtor scheduled the home to have a value of $200,000.00 with a purchase-money secured claim against it in the amount of $178,650.00. On Schedule C, Debtor claimed a homestead exemption for the equity above the first mortgage in the amount of $21,350.00. Debtor also claimed other exemptions, including exemptions totaling $4,500.00 in a 2007 Suzuki motorcycle. No timely objections to Debtor's exemptions were filed.

4. Ms. Mock, acting pro se, filed a timely proof of claim as a general unsecured claim in the amount of $40,865.79. She subsequently hired counsel and, on April 1, 2009, filed an amended claim asserting her interest to be secured by Debtor's residence to the extent of his equity.

The amended claim was filed after the claim filing deadline and after Debtor's plan was confirmed in this case. Debtor's plan was confirmed on October 9, 2008 (Fil. #22).[1]

I will first address the Motion to Avoid Lien (Fil. #80). Debtor seeks to avoid Ms. Mock's asserted judgment lien against his residence as impairing his homestead exemption pursuant to 11 U.S.C. § 522(f)(1)(A), which provides as follows:

> Notwithstanding any waiver of exemptions . . . the 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 of a kind that is specified in section 523(a)(5)[.]

Section 523(a)(5) provides for judicial liens with respect to domestic support obligations. The parties here are not arguing that this particular judgment lien constitutes a domestic support obligation. Accordingly, it is presumed to be in the nature of a property settlement. As such, it is not excepted from avoidance under 11 U.S.C. § 522(f)(1)(A).

Ms. Mock's counsel argues that according to a United States Supreme Court decision, a judgment lien cannot be avoided under § 522(f)(1)(A) unless Debtor had an interest in the property at the time the judgment lien came into existence. Specifically, in *Farrey v. Sanderfoot*, 500 U.S. 291, 301, 111 S. Ct. 1825 (1991), the United States Supreme Court stated: "We hold that § 522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest." In that case, the debtor was awarded real estate pursuant to a divorce decree and his ex-spouse was awarded a money judgment against him. The Court further found that Congress intended § 522(f)(1) to protect exempt property from a rush to the courthouse to collect debts. *Id.* at 297-298. The United States Supreme Court found that the property interest of the debtor and the judgment lien arose simultaneously (since they both arose out of the judgment itself). Therefore, the interest in the property did not exist before the lien "fixed," and the debtor could not avoid the lien. *Id.* at 301.

Counsel for Ms. Mock then cites to Nebraska law for the proposition that Ms. Mock's judgment lien attached to Debtor's residence at the instant Debtor obtained his ownership interest in his residence. *See Hein v. W.T. Rawleigh Co.*, 167 Neb. 176, 190, 92 N.W.2d 185, 193 ("Real property purchased by a judgment debtor subsequent to the rendition of judgment against him is subject to the lien of such judgment as soon as the title vests in the debtor.") (quoting *Lessert & Steele v. Sieberling & Co.*, 59 Neb. 309, 80 N.W. 900 (1899)).

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[1]On January 26, 2009, this Court denied Ms. Mock's efforts to revoke the confirmation order and/or to convert this case.

Although Ms. Mock's counsel has accurately stated the rules of law issued by the United States Supreme Court and the Nebraska Supreme Court, the application of those rules does not lead to the result Ms. Mock requests. Ms. Mock's judgment did precede Debtor's purchase of his residence with his current spouse. Since it preceded his purchase of the residence, it became a judgment upon his residence "immediately upon the title thereto vesting in him." Thus, it seems clear that under Nebraska law there are two steps when the judgment exists prior to the acquisition of the property interest. First, the vesting of title in the judgment debtor. Second, and immediately thereafter, the fixing of the judgment lien. This is not the same situation as in the *Farrey* case presented to the United States Supreme Court. There, the lien and the property interest arose out of the same transaction – the divorce decree.

Accordingly, since the foregoing issue was the only challenge Ms. Mock had to the applicability of § 522(f)(1)(A), I find that her judgment can be avoided pursuant to the terms thereof. However, since this is a Chapter 13 proceeding and Debtor is far from completing plan payments and receiving a discharge, it is not appropriate to avoid the lien at this time. The lien shall be avoided if and when Debtor completes plan payments and is entitled to receive a discharge.

In her amended claim, Ms. Mock seeks to have part of her claim allowed as a secured claim to the extent of the equity in the residence. In light of the foregoing finding that her lien can be avoided, her motion to amend the claim in that manner must be denied. Her claim can be treated as unsecured during the course of this Chapter 13 proceeding. However, her amendment also seeks to modify the amount of the claim and Debtor does not appear to object to that portion of the amendment. Therefore, the Motion to Allow Amended Proof of Claim (Fil. #69) should be granted in part to allow the amended claim as a wholly unsecured claim.

Finally, Ms. Mock objects to the amended plan post confirmation. One basis for objection to the plan is that it fails to treat her secured claim. As a result of the foregoing, that objection is overruled. Ms. Mock also objects on a "disposable income" basis because Debtor claimed exemptions in a motorcycle, including a tool-of-trade exemption, despite the fact that Debtor has another vehicle (fully encumbered) that can be used. However, no objections to Debtor's claimed exemptions were filed. Also, a plan has been confirmed and Debtor is only seeking amendment to address a tax claim. It is too late for Ms. Mock to raise the disposable income issue.

The Chapter 13 Trustee's objection to the amended plan post confirmation was based only on the fact that the plan would be under-funded if Ms. Mock has a valid secured claim. As a result of the foregoing ruling, the Chapter 13 Trustee's objection is overruled.

IT IS, THEREFORE, ORDERED as follows:

1. The Motion to Avoid Lien filed by Debtor (Fil. #80) is granted. However, the lien shall remain in place until such time as Debtor completes plan payments and is entitled to a discharge;

2. The Motion to Allow Amended Proof of Claim (Fil. #69) is granted in part for the sole purpose of allowing the amended claim as a wholly unsecured claim; and

3. The Objection to Plan by Kathy A. Mock (Fil. #76) is overruled as is the objection by the Chapter 13 Trustee (Fil. #73). The First Amended Chapter 13 Plan Post Confirmation (Fil. #75) is approved.

DATED: May 14, 2009.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*Van Schroeder
*Henry N. Carriger
Tom Kenny/Kathleen Laughlin
U.S. Trustee

Movant(*) is responsible for giving notice to other parties if required by rule or statute.