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**CAVEAT: These materials were predominately**  
**provided for an NBI seminar for Family Law practitioners.**

### **A. Bankruptcy and Divorce**

The parties must be married to file a joint bankruptcy petition. Unlike the federal tax returns, where in the year of the divorce, the parties even if divorced may file a last joint return, this Federal Court will not allow divorced couples to file.

The best practice is to analyze all the assets and liabilities, as you would for the divorce case, as if you are the mediator, and impartial to either, to determine as a bankruptcy practitioner when to file. IF the parties have substantial debt, that will cause the Family Court to ask why these two didn't or should not file for bankruptcy relief, then the obvious time to file the bankruptcy is while the two are married and before the divorce.

If there is only debt to divide, and if the parties agree to a joint filing before the divorce, then the resulting divorce petition becomes a simple divorce filing without any ancillary matters. Ancillary matters include equitable division, and alimony exclusions. We will discuss Alimony and equitable division, a little later.

If the divorce petition has been filed, but there is a waiting period for the decree, the parties are still married and may file a joint petition. The Bankruptcy practitioner must be cautious about representing both. If all of the debts are to be extinguished by discharge, then the joint filing may commence, and a conflict-of-interest waiver will protect that attorney. Anytime, the Family Court issues arise, the first thought is "Does a conflict arise? and can it be overcome?" Many times, these parties will already have domestic counsel of their own and referral made to a bankruptcy attorney to take care of the debt obligations.

If there is a separation agreement or the like, or if there is a contention as to equitable distribution, then most times, the bankruptcy practitioner cannot represent both parties. Caveat: these agreements may have a provision stating that the parties are entering into this agreement with the intention of filing a joint bankruptcy case before divorce. This is a rare situation but it does occur.

Since the Agreement is consensual and not Court Ordered, does this matter? Depends on the agreement and the timing. Do the parties have joint debts? Or are all debts owed by each party to a third party and not cosigned? What is the

“Homestead” and occupancy? Is the property owned as Tenancy By The Entireties or is that presumed under State law but the deed says otherwise?

If one party files and the other does not, what happens to the debt, as the agreement or the Court order may declare the debt marital to be divided, even if only one party is obligated to a third party, and does that change whether a chapter 7 or a chapter 13 is filed?

Under BAPCPA (Bankruptcy Abuse Prevention and Consumer Protection Act of 2005), the Federal Code and Rules were significantly changed. Family Law practitioners were told that the code provisions were simplified, and this was true in part. In General, the qualifications for filing became, more burdensome, with the addition of the means test, credit counseling and debtor education. However, the basic underlying tests that were in place before BAPCPA still remain. There is no reason to burden you with all these technical details because you will encourage any potential client to seek consultation with a consumer bankruptcy practitioner, before you and your client make the leap into the divorce and bankruptcy arena.

## **B. What to know about Alimony, Support and Bankruptcy**

BAPCPA created a new defined term Domestic Support Obligation (the “DSO”)

### ***Title 11 USC section 101(14A):***

(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](#).

**DSO given priority** in 11 USC section 507(a)(1).

**Note:** Priority claims must be paid in full through the plan. DSOs are priority claims. See 11U.S.C. §§ 1322(a)(2), 507(a)(1). However, priority support obligations assigned to a governmental agency for collection do not have to be paid in full through the plan. See 11 U.S.C. §§ 1322(a)(4), 507(a)(1)(B).

11 USC section 541(a)(1) and (a)(5)(B) **include in the estate property** consisting of the debtor's legal or equitable interests at the time of the petition is filed (DOF) plus certain property that the debtor acquires (or becomes entitled to acquire) within 180 days of DOF through a spousal property agreement, settlement or divorce decree.

NOTE: Ch 7 does NOT include Post-petition wages; but these are included in ch 13 and 11 as property of the estate.

DSO as a priority under 1322(a)(2)—plan provides for the DSO priority claim unless agreement to provide otherwise. NOT priority status above Attorney fee admin claims.

What is the Order for relief?

A voluntary petition filed by the insolvent Debtor when commenced by filing a voluntary petition in Federal Bankruptcy Court defined as follows:

***Title 11 USC section 301: Voluntary Cases:***

(a) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.

(b) The commencement of a voluntary case under a chapter of this title constitutes an **order for relief** under such chapter.

Known as the Automatic Stay Order for Relief, this is the protection measure for all Debtors to stop all action from most creditors, to be able to breathe and reorganize, and the provisions of this Order and the process to get relief from this order, are found in ***Title 11 USC section 362: Automatic Stay.***

The most pertinent sections applicable at this juncture are:

(a) Except as provided in subsection (b) of this section, a petition filed under section [301](#), [302](#), or [303](#) of this title, or an application filed under section 5(a)(3) of the [Securities Investor Protection Act of 1970](#), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have

been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

What is **not stayed**: *Title 11 Section 362(b)(2), Bolded*

**(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the [Securities Investor Protection Act of 1970](#), does not operate as a stay—**

**(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;**

**(2) under subsection (a)—**

**(A) of the commencement or continuation of a civil action or proceeding—**

**(i) for the establishment of paternity;**

**(ii) for the establishment or modification of an order for domestic support obligations;**

**(iii) concerning child custody or visitation;**

**(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or**

**(v) regarding domestic violence;**

**(B) of the collection of a domestic support obligation from property that is not property of the estate;**

**(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;**

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under [section 546\(b\) of this title](#) or to the extent that such act is accomplished within the period provided under [section 547\(e\)\(2\)\(A\) of this title](#);

The "fresh start" provisions of the code all culminate in the Discharge Order upon completion of the case. A chapter 7 case without contest will usually result in the Discharge order being issued within the 4 months after the Order for Relief—or

the petition filing date. This is the final order for legal relief, and it means that the Debtor is relieved or discharged from all legal obligations to pay the debt and affected creditors may take no further action to collect the debt. This discharge may be limited in that some debts will not be discharged, as these have been carved out as exceptions, or there may have been an adversary case filed by a creditor to get a certain debt declared nondischargeable.

Title 11 section 727 is the applicable discharge provision for chapter 7 and 1328 is the chapter 13 discharge section. Conduct committed by the Debtor that may result in a denial of discharge, if a Trustee or creditor objects within the 60 days of the 341 meeting date as first set, such as: Having received a discharge under chapter 7 within the last 6 -8 years; fraudulent concealment of assets; inability to adequately explain a loss of assets to satisfy the debt and or transfers to insiders within the last year or for State law purposes the last 4 years. A spouse is an insider. **Title 11 section 101(31)(A)(i)** -- Insider includes, if the Debtor is an individual, a relative of the Debtor or a general partner of the Debtor...

The discharge granted upon completion of a chapter 13 reorganization plan, is called a "super discharge" because with relation to our topic, the purely property and debt division provisions of an Agreement between the Parties or a Court Order shall be discharged.

**Discharge:** In most cases, a Chapter 13 debtor does not receive a discharge until he or she completes making the payments required by the Chapter 13 plan. The Chapter 13 discharge is only slightly broader in scope than a Chapter 7 discharge. This is a significant change from prior law. A spousal obligation arising out of a dissolution agreement that is not a DSO (See § 523(a)(15)) is discharged under Chapter 13, but only upon the completion of a Chapter 13 plan. See 11 U.S.C. §§ 523(a)(15), 1328(a)(2). For example, property settlements can still be discharged in a Chapter 13 upon completion of the Chapter 13 plan even if the debtor pays less than 100% of the debt.

### ***Title 11 section 1328 Discharge:***

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, **and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter,** the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under [section 502 of this title](#), **except** any debt—

(1) provided for under section 1322(b)(5);

(2) of the kind specified in [section 507\(a\)\(8\)\(C\)](#) or in paragraph (1)(B), (1)(C), (2), (3), (4), **(5)**, (8), or (9) **of section 523(a)**;

The 523 exceptions are found in:

### ***Title 11 section 523: Exceptions to Discharge***

(a) A discharge under section [727](#), [1141](#), [1192\[1\]](#) 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section [507\(a\)\(3\)](#) or [507\(a\)\(8\)](#) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a [return](#), or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such [return](#), report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent [return](#) or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of [credit](#), to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or [credit](#) reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) (i) for purposes of subparagraph (A)—

(I) [consumer](#) debts owed to a single creditor and aggregating more than \$500 [\[2\]](#) for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than \$750 <sup>2</sup> that are extensions of [consumer](#) credit under an [open end credit plan](#) obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the [Truth in Lending Act](#); and

(II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under [section 521\(a\)\(1\) of this title](#), with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

**(5) for a domestic support obligation;**

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

**(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—**

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the [Internal Revenue Code of 1986](#), incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor’s operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance; .....

**(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;**

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the [Bankruptcy Act](#), under section 439A [3] of the [Higher Education Act of 1965](#), or under section 733(g) [3] of the [Public Health Service Act](#) in a prior case concerning the debtor under this title, or under the [Bankruptcy Act](#), is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) (1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless,

on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.....

**(d)** If a creditor requests a determination of dischargeability of a [consumer](#) debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

FRBP 4004—generally—Time to file complaint objecting to discharge is 60 days after the first date set for the meeting of creditors, unless discharge determination is not for exceptions under 11 USC section 523(c) describing sections 523(a)(2), (4) or (6).

**Section 523(a)(5): Under 523(b) -there is not a time limit for determination.** Dischargeability Issues - 11 U.S.C. § 523(a)(5) and § 523(a)(15)

All DSOs are excepted from discharge under the Bankruptcy Code. In addition, all other marital debts, such as property settlement debts, which are incurred in the course of a divorce or separation are now excepted from discharge in Chapter 7, Chapter 11 and Chapter 12 cases. The only exception is that § 523(a)(15) debts are dischargeable in Chapter 13 cases, but only upon completion of the plan.

**Note:** Divorce-related debts may be non-dischargeable in Chapter 13 cases on other grounds such as fraud or misrepresentation under 11 U.S.C. § 523(a)(2) and/or breach of fiduciary duty under 11 U.S.C. § 523(a)(4).

FRBP 4003—30 day period to file Objections to exemptions. An amended schedule of exemptions does not provide a renewed 30 day period for an original exemption, only the amendment.

**NOTE:** It is important to review a debtor's petition to determine whether a debt has been characterized as a DSO or a property debt, as well as whether the debt was listed as priority, secured or general unsecured. Since the nature and character of the debt affects the creditor's right to payment and other rights of the creditor in Chapter 7 asset cases and in cases under Chapters 11, 12 and 13, it is important to file claims asserting the nature and character of the debt, and take whatever other actions are necessary, to assure the creditor receives proper treatment.

### **C. Garnishments and Bankruptcy**

Just like any other DSO provision in the Code, wage attachments for child



support or alimony will not stop. A report is required by the Trustee to provide an affidavit as to the status of the support obligations and notice required to the payee that the support is being paid. If there is a current order, and a default order in place, this will be maintained. If there is a current order and the default is not being paid, then the Debtor must provide for the arrears to be cured inside the chapter 13 plan or outside the chapter 7 petition by indicating that a Family Court remedy is available and in process. The Automatic Stay will not affect these orders and shall take priority as to payment status. These payments are "voluntary" in this context and are not subject to avoidance as a preference.

If there is a wage attachment by other than a DSO spouse or dependent, then this wage attachment will be stayed by the Automatic Stay Order for Relief on petition filing automatically as the provision suggests. The creditor wage attachments may be able to be recovered as a refundable exempt asset, if so named and if qualified under the preference sections of the code as they are presumed non-voluntary.

In re Caffey, 384 B.R. 297 (Bankr. S.D. Ala. 2008). This case should lead to caution on the part of enforcers of DSOs and their counsel. A Chapter 11 debtor who was jailed post-petition for his failure to pay past-due child support, filed an adversary complaint against the creditor-mother of a child for whom he owed support, seeking damages for the creditor's alleged violation of the automatic stay.

Although the Code contains an exception to the stay for collection of support obligations, pursuant to § 362(b)(2)(B) it only pertains to non-estate property. The court thus found that the state-court contempt order issued in connection with Chapter 11 debtor's past-due child support obligation, as well as writ of arrest issued by state court, both of which were issued postpetition, willfully violated the automatic stay and, thus, were void ab initio and were without force or effect. The court awarded the debtor significant damages for emotional distress, lost income, attorney's fees and punitive damages. The target of the court's wrath was not any particular conduct by the creditor herself, but that of the creditor's attorneys who with full knowledge of the effect of the automatic stay allowed the debtor to be jailed and money to be taken from the estate that belonged to all the creditors.

An advantage found in **Title 11 USC section 1301**, in a chapter 13 filing, is the automatic cosigner stay:

Use *Culver* example.

### **1301 Stay of action against codebtor**

**(a)** Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

**(1)** such individual became liable on or secured such debt in the ordinary course of such individual's business; or

**(2)** the case is closed, dismissed, or converted to a case under chapter [7](#) or [11](#) of this title.

**(b)** A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

**(c)** On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

**(1)** as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

**(2)** the plan filed by the debtor proposes not to pay such claim; or

**(3)** such creditor's interest would be irreparably harmed by continuation of such stay.

**(d)** Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

Therefore, a chapter 13 filing, with a plan of reorganization, may be preferable if the spouses are cosigners on debt, and any Court action naming both spouses as parties filed prior to the Bankruptcy petition, will be stayed for both under 1301, even if only one spouse has filed bankruptcy under the Order for Relief. This applies only with a chapter 13 filing. A chapter 13 filing using this code section may assist the couple in curing arrearage to save an asset, to sell an asset, or to resume a contract for a non-filing spouse where there was a lapse in payments due to the party's separation into two households and the adjustment to this new budget.

## **Additional terms related**

**Marital Settlement Agreement/MSA:** Codified in statute and defined in case law and practice as an agreement involving the division of property/debts/custody/spousal and child support. Generally incorporated and merged into the judgment of dissolution

**Automatic Temporary Restraining Order/ATRO:** Immediately effective restraining orders upon proof of service of divorce summons -- restrains both parties from: removing child from state, cashing, borrowing against, cancelling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage including life, health, automobile, and disability for other spouse or children or transferring, encumbering, hypothecating, concealing or in any way disposing of any property, real or personal, whether community, quasi-community, or separate without the written consent of the other party or order of the court, except in the usual course of business or for necessities of life.

## **Relevant Bankruptcy Code Sections**

11 U.S.C. § 101-----Definitions (selected portions)

11 U.S.C. § 109-----Who may be a debtor - eligibility 11 U.S.C. § 362           Automatic stay

11 U.S.C. § 507-----Priorities

11 U.S.C. § 522-----Exemptions

11 U.S.C. § 523-----Exceptions to discharge

11 U.S.C. § 524-----Effect of discharge

11 U.S.C. § 541-----Property of the estate - See also 11 U.S.C. § 1115 re: Chapter 11 and 11 U.S.C. § 1306 re: Chapter 13 property of the estate issues

11 U.S.C. § 544-----Trustee as lien creditor and as successor to certain creditors and purchasers

11 U.S.C. § 727 -----Discharge - See also 11 U.S.C. § 1141 re: Chapter 11 discharge provisions and 11 U.S.C. § 1328 re: Chapter 13 discharge issues

11 U.S.C. § 1129-----Confirmation of a Chapter 11 plan

11 U.S.C. § 1325-----Confirmation of a Chapter 13 plan - See also 11 U.S.C. § 1322

This presentation of Family Law and Bankruptcy Law is presented by Tiffany Poole and Erin K. Brignola