Dischargeability of Familial Obligations in Bankruptcy

(Outline)

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I. Dischargeability of Familial Obligations under Precursors to the Bankruptcy Code

A. **Bankruptcy Act of 1898:** The original act did not enumerate an exception to discharge for domestic support.

1. **Minority Interpretation**:

a. Alimony Discharged or

b. Past Due Alimony Dischargeable/Alimony to Accrue Not Discharged

2. **Majority Interpretation**: Alimony is not a Debt but is a Duty Not Discharged.

See William Miller Collier, *The Law and Practice in Bankruptcy Under the National Bankruptcy Act of 1898*, 438 (12th Ed. 1921).

B. Bankruptcy Act of 1898, 1903 Revision (32 Stat. 797, 798) Discharge Exception for Alimony, Maintenance or Support codified:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ... are liabilities for ... alimony due or to become due, or for maintenance or support of wife or child." 11 U.S.C. § 35(a)(7) (Emphasis Added)

C. Bankruptcy Act of 1898, 1970 Revision (84 Stat. 992): Family law disputes move to a federal court near you.

1. Bankruptcy Courts as a one-stop-shop for dischargeability and enforcement:

> "A creditor who contends that his debt is not discharged under clause (2), (4), or (8) or subdivision (a) of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision (b) of section 32 of this title and, unless an application is timely filed, the debt shall be discharged." 11 U.S.C. § 35(c)(2) (1970).

a. "Section 17(c) was added to the Act in 1970. P.L. 91-467, 84 Stat. 992 (1970). The new subsection places in the bankruptcy court all litigation concerning the dischargeability of a bankrupt's debts. *In re Merrill*, 594 F.2d 1064, (5th Cir. 1979) (quoting § 17(c) of the Bankruptcy Act) (emphasis added).

D. 'Alimony ... maintenance or support of wife or child' meets mid-century family jurisprudence

1. Alimony

a. Alimony had multiple meanings when incorporated into Bankruptcy law.

i. "The term is commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree in divorce." *Black's Law Dict.* 60 (1st ed. 1891); "The allowance which a husband by order of court pays to his wife living separate from him, for her

maintenance. It is also commonly used as equally applicable, to all allowances, whether annual or in gross, made to a wife upon a decree of divorce." *Bouvier's Law Dict.* 175 (3d ed. 1914).

ii. "Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings, and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction." *Audubon v. Shufeldt*, 181 U.S. 575, 578-579 (1901) (emphasis added).

iii. "The effect of a decree for permanent alimony is to be determined by the laws of Georgia, from which this case comes. In that state alimony is defined to be an allowance out of the husband's estate and is a fixed obligation, which cannot afterwards be altered or amended, even by the court which granted it...." *Westmoreland v. Dodd*, 2 F.2d 212, 213 (5th Cir. 1924).

iv. "[A]limony is founded upon the common law obligation of a husband to support his wife, which, in the absence of some saving statute, must necessarily end by the passage of a decree effectively dissolving the marriage tie...." *Dackman v. Dackman*, 250 A.2d 60, 64-65 (Md. 1969).

v. When the 1903 Amendment to the Bankruptcy Act was penned, Alimony was largely limited to Alimony *Pendente Lite* and Permanent Alimony in lieu of liquidation/division of marital assets. Absolute divorce was, in legal terms, still relatively new and was absolute. In 1903, the duties of marriage ended with the marriage--No marriage=No duty. In the decades that followed, state statutes allowed one element of the marriage to survive the dissolution of the marriage. One state after another chose to allow a divorce court to continue the matrimonial duty of support into the legal abyss beyond the marriage.

b. Wisconsin-centric history of 'Alimony'

i. "Upon every divorce from the bond of matrimony, for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board for any cause, if the estate and property restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself, and such children of the marriage as shall be committed to her care and custody, or if there be no such estate and property, the court may further adjudge to her such part of the personal estate of the husband, and such alimony out of his estate, as it shall deem just and reasonable, having regard to the ability of the husband and the character and situation of the parties, and all the other circumstances of the case." 111 Wis. Stat. 24 (1858).

ii. "In (*Donovan v. Donovan*) the distinction between alimony proper, payable out of the husband's estate, and division and distribution of his estate between the parties, is clearly pointed out." *Bacon v. Bacon*, 43 Wis. 197, 203 (1877) (citing *Donovan v. Donovan*, 20 Wis. 616 (1866)). *But see Campbell v. Campbell*, 37 Wis. 206, 216 (1875) ("Alimony is a maintenance afforded to the wife when the husband refuses to give it, or from his improper conduct compels her to separate from him.")

iii. "Upon every divorce from the bond of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, the court may further adjudge to the wife such alimony out of the estate of the husband, for her support and maintenance, and such allowance for the support, maintenance and education of the minor children committed to her care and custody as it shall deem just and reasonable, or the court may finally divide and distribute the estate, both real and personal, of the husband, and so much of the

estate of the wife as shall have been derived from the husband, between the parties and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case; but no such final decision shall impair the power of the court in respect to revision of allowances for minor children under the next preceding section." Wis. Stat. § 2364 (1895).

iv. "[B]efore 1935 ... a divorce judgment could not contain both a final division of property and an award of alimony...." *Trowbridge v. Trowbridge*, 114 N.W.2d 129, 132 (Wisc. 1962).

2. Maintenance: Species of Maintenance include:

a. Alimony *Pendente Lite*: The statute ... defines alimony *pendente lite*, insofar as it is pertinent to this case, as alimony ordered to be paid pending the final judgment on the merits in an action for alimony without divorce *Peeler v. Peeler*, 172 S.E.2d 915, 918 (N.C. Ct. App. 1970).

b. **Permanent Alimony (Vernacular) /Rehabilitative Alimony/Retributive Alimony:**

c. Maintenance "An award of maintenance ... may be made only upon a finding that the spouse seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment or is the custodian of a child who requires his or her presence at home." *Fye v. Zigoures*, 562 P.2d 1077, 1079 (Ariz. Ct. App. 1977).

3. Support

a. "[T]he bankruptcy law was never intended to affect the liability of the father for the support of his children." *Breeden v. State*, 191 S.W.2d 167, 168 (Tenn. 1945) (Citing *In re Baker,* 96 F. 954 (D. Kan. 1899)).

4. Obligations 'in the nature of' alimony, maintenance or support under the Bankruptcy Act:

a. Looking beyond the label-things not labeled Alimony may be Alimony: "'The real issue in this case is not ... whether the award of the divorce decree was (labeled) alimony or a property settlement, but rather whether the 'property settlement' was really an award for the support and maintenance of the defendant's (ex) wife.'" *Erickson v. Beardall*, 437 P.2d 210, 212 (Utah 1968)(Quoting *Lyon v. Lyon*, 206 P.2d 148 (Utah 1949)).

b. Court Costs Incidental to Alimony=Alimony: "[C]osts are accessory to the judgment and follow the nature of the liability on which the judgment is based. Therefore, since alimony comes within the exception made in subdivision a (2), § 17 Bankruptcy Act (11 USCA § 35), these costs come within the same exceptions." *Smith v. Smith*, 7 F. Supp. 490. 491 (W.D. N.Y. 1934).

c. Attorneys Fees Award payable to 3d Party Incidental to Alimony=Alimony: *In re Cornish*, 529 F.2d 1363, 1364-5 (7th Cir. 1976)(Citing *Nichols v. Hensler*, 528 F.2d 304, 308 (7th Cir. 1976)). Note that the court's definition of Alimony deviates from the definition enunciated by the Supreme Court in *Audubon v. Shufeldt.*

d. Allocation of marital debts contained in divorce decree= Alimony. *In re Waller*, 494 F.2d 447, 451 (6th Cir. 1974). This decision weighed on the minds of Congress when they changed the bankruptcy statute in 1978.

II. Dischargeability of Familial Obligations under the Bankruptcy Code

A. Domestic Support Obligations (Alimony, Maintenance or Support).

1903-September 30, 1979	October 1, 1979-October 16, 2005	October 17, 2005-
"A discharge ... shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ... are liabilities	"[A] discharge ... ~~shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ... are liabilities for~~ does not discharge... any debt:	"[A] discharge ... does not discharge... any debt
for ... alimony due or to become due or for maintenance or support of 11 U.S.C. § 35(a)(7)	for alimony to ~~due or to become due or for~~, maintenance for, or support of 11 U.S.C. § 523(a)(5) (1978).	for ~~alimony to, maintenance for, or support of both spouse or child~~ a domestic support obligation 11 U.S.C. § 523(a)(5) (2005)
wife or child." 11 U.S.C. § 35(a)(7)	~~wife~~ such spouse or child, 11 U.S.C. § 523(a)(5) (1978)	such spouse, former spouse, or child of the debtor or such child's parent 11 U.S.C. § 101(14A)(B) (2005)
The concept of 'in the nature of alimony, maintenance or support' under Bankruptcy Act-based cases eventually encompassed almost any debt that could have a financial impact on the (former) wife or child of the Bankrupt. *See e.g. In re Waller*, 494 F.2d 447, (6th Cir. 1974)(Bankrupt's obligation to pay debts allocated to him in the property division ancillary to a decree of divorce held nondischargeable as in the nature of alimony.). *Compare In re Calhoun*, 715 F.2d 1103, 1107 (6th Cir. 1983)).	but not to the extent that ... such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support. 11 U.S.C. § 523(a)(5)(B) (1978).	~~but not to the extent that ... such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually~~ in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of... without regard to whether such debt is expressly so designated.11 U.S.C. § 101 (14A)(B) (2005)
To whom the debt was payable did not matter under the Bankruptcy Act so long as payment of the debt benefitted the financially weaker former spouse. *See e.g. In re Cornish*, 529 F.2d 1363 (7th Cir. 1976) *Cf In reWatson*, 402 B.R. 294, 298 (Bankr. N. D. Ind. 2009) ("When *Cornish* was decided, the applicable bankruptcy statutes did not delineate the classes of 'allowable' claimants....").	to a spouse former spouse, or child of the debtor 11 U.S.C. § 523(a)(5) (1978).	owed to or recoverable by...a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or 11 U.S.C. § 101(14A)(A)(i) (2005)
"The (State's) duty to provide ... in AFDC funds for the support of the bankrupt's minor children did not	owed under State law to a State or municipality that is--(A) in the nature of support, and (B)	owed to or recoverable by ... a governmental unit; ~~(A) in the nature of support, and (B)~~

arise in a vacuum. 42 U.S.C. § 602(a)(7) requires state agencies determining need and eligibility for AFDC support to '. . . take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . .' Had the bankrupt met his common law and statutory support obligation reflected in the divorce court's support order, the need of his offspring and the level of AFDC payments which the Department was obligated to make to those dependents would have been correspondingly reduced. The (State's) payments, while mandated by statute and regulations, were substantially in lieu of the bankrupt's support obligations. The fact that the funds recovered flow to state and federal treasuries rather than directly to the bankrupt's children does not alter their character as obligations for maintenance or support." *Williams v. Department of Social and Health Services*, 529 F.2d 1264, (9th Cir. 1976) (emphasis added).	enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.) 11 U.S.C. § 523(a)(18) (1996). in connection with a separation agreement, divorce decree, or property settlement agreement, 11 U.S.C. § 523(a)(5) (1978) or other court of record 11 U.S.C. § 523(a)(5) (1984) (or a) determination made in accordance with State or territorial law by a governmental unit 11 U.S.C. § 523(a)(5) (1986). but not to the extent that ... such debt is assigned to another entity, voluntarily, by operation of law, or otherwise 11 U.S.C.§ 523(a)(5)(A) (1978) (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State) 11 U.S.C. § 523(a)(5)(A) (1984).	~~enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.)~~ 11 U.S.C. § 101(14A)(A)(ii) (2005) ~~in connection with~~ 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 State or territorial law~~ applicable nonbankruptcy law by a governmental unit; ~~but~~ not ~~to the extent that ... such debt is~~ assigned to ~~another~~ 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 ~~by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State)~~ for the purpose of collecting the debt. 11 U.S.C. § 101(14A)(D) (2005).

1. Alimony, Maintenance or Support:

a. Alimony: As discussed above, the term alimony has undergone a metamorphosis—to the point that lawyers using the term in the past would have difficulty recognizing how it used today.

1. Alimony-Original Definition: (Alimony *Pendente Lite*).

A. 1700s "Alimony"

B. 1800s "Alimony *Pendente Lite*"

C. 1900s "Temporary Alimony"

D. 2000s Wisconsin "Temporary Maintenance."

2. Alimony-Second Definition: (Alimony in lieu of Property Division/Alimony-in-gross)

A. 1800s-1900s "Alimony"

B. Late 1800s-Early 1900s "Permanent Alimony" *See Audubon v. Shufeldt*, 181 U.S. 575, 578-579 (1901).

C. 1900s to present Alabama "Alimony-in-Gross" *See* Hager v. Hager, 299 So.2d 743, 747-8 (Ala. 1974); *In re Stone*, 199 B.R. 753, 757 (Bankr. N.D. Ala. 1996).

D. 1900s to present South Carolina "Lump Sum Alimony" *See* Gregory S. Forman, *Lump Sum Alimony*, Am. J. Fam. Law (Fall 2009).

E. 1900s to present Oklahoma "Alimony-in-lieu of Property Division" *See* 43 Okla. Stat. § 121. (2006).

F. Late 1900s to present Wisconsin "Equalization Payments" or "Section 71 Payments."

i. 'Equalization Payments:' "The trial court directed Verdeen to pay Richard the sum of $3,954.94 within nine months of entry of judgment to "equalize" the property division in light of the award of the house to Verdeen." *Duffy v. Duffy*, 392 N.W.2d 115, 119 (Wisc. Ct. App. 1986).

ii. 'Section 71 Payments:' "Counsel for Jean Wright argues that if the installment payments are taxable under the federal law then they are also alimony under Wisconsin law. This argument would equate periodic payments under the Internal Revenue Code § 71 with alimony under state law. Although the definitions and applications may overlap in many cases, they clearly are not co-extensive for all purposes and in all events. The Internal Revenue Code addresses itself to periodic and installment payments. It is not the labels placed on the payments which are determinative under the federal tax law. It is the structure and effect of the payments which control the characterization.... Under the terms of the divorce judgment in this case, William Wright was required to pay his ex-wife $228,000 in installments. The payments were not to end on her death or remarriage and the full amount was to be paid even if he had died before all payments had been made. The judgment called it a division of estate and division of property. Under Wisconsin law this was a property division and as such it is not subject to modification under our statutes.." *Wright v. Wright*, 284 N.W.2d 894, 902 (Wisc. 1979). *See also* Charles J. Reichert, *Are substitute payments alimony?* 199 J. Accountancy 77 (2005).

F. Cases holding Alimony *in lieu* of Property Division nondischargeable (even if decided under different rationale)

i. *In re Messnick*, 104 B.R. 89, 94 (Bankr. E.D. Wisc. 1989).

ii *In re Whitnall*, 305 B.R. 854, 857-9 (Bankr. E.D. Wisc. 2004).

D. Cases holding that Alimony *in lieu* of Property Division discharged.

i. *In re Reines,* 142 F.3d 970 (7th Cir. 1998) (Alimony in lieu of property division held dischargeable because does not meet modern vernacular restriction on definition of Alimony).

ii. *In re Goodman,* 55 B.R. 32 (Bankr. D. S.C. 1985).

iii. *In re Stone,* 199 B.R. 753 , 757 (Bankr. N.D. Ala, 1996).

E. In light of 11 U.S.C. § 523(a)(15) (2005) why drag out a 1903 dictionary? Since 1994, and especially since 2005, it is unlikely that a debtor *in chapter 7* could escape the duty to make equalization payments by filing bankruptcy. The potential for mischief has not been removed from Chapter 13. Unfortunately, many cases interpreting the phrase "alimony, maintenance or support" rendered 'alimony' superfluous by restricting the definition to support alimony to the exclusion of alimony-in-gross. The digests are filled with cases premised on the assumption that alimony means only support alimony. While nearly universal, the cases do not explain *why* alimony should be read to exclude the traditional understanding of Alimony as defined in *Audubon v. Shufeldt*. A more comprehensive reading of the term alimony may ensure that a debtor cannot use Chapter 13 of the bankruptcy law to deprive a former spouse of the funds to support him or her self.

3. Alimony-Third Definition (Permanent Alimony/Maintenance). Ownership of the term "Alimony" was intensely debated around the time of the drafting of the 1903 revision to the Bankruptcy Act. "There are two opposing views of the nature of alimony ... (1) Alimony is a settlement of the property rights of the parties and a distribution of the assets of the quasi-partnership hitherto existing (2) Alimony is a right of the same character as the right of support lost by the dissolution of the marriage." F. Granville Munson, *Some Aspects of the Nature of Permanent Alimony*, 16 Columbia L. Rev. 217 (1916). Although the words surrounding "alimony, maintenance and support" have changed, and the legal requirements around it have waned and waxed, the terms "alimony, maintenance or support" have been passed down unscathed from the 1903 version of the Bankruptcy Act. Cases interpreting the varying legal standards in the Act and the Code should be taken with a grain of salt, but one should bear in mind that, in 1903 when 'alimony, maintenance or support' was codified, Alimony had different meanings in different jurisdictions—and still does. The term has been stricken from the laws of Wisconsin and yet the competing concepts survive—even here. The then-recent Supreme Court case *Audubon v. Schufeldt* quoted above shows that, at least in the mind of the supreme court, alimony meant alimony *in lieu* of property division. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken...." *Morissette v. United States,* 342 U.S. 246, 263 (1952). "When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" *Dessnup v, Timm,* 502 U.S. 410, 419 (1992). As the 20th century wore on, the term Alimony was again co-opted to mean a stream of payments to allow a financially weaker former spouse to maintain circumstances similar to that enjoyed during the marriage—labeled 'maintenance' in Wisconsin today. 11 U.S.C. § 101(14A) and its forerunner § 523(a)(5) adopted 'alimony, maintenance or support' straight from § 35(a)(7). The terms "alimony, maintenance or support" are used in the disjunctive. "It is our duty to give effect, if possible, to every clause and word of a statute." *Hoffman v. Connecticut Dept. of Income Maintenance,* 492 U.S. 96, 103 (1989) (quotes omitted). 'Alimony' must be understood to mean something other than "maintenance" or "support" so as

to give each a *raison d'être.* Substituting the mid 20th century understanding of Alimony for the 1903 understanding is an all-to-easy mistake.

B. Maintenance

1. Temporary Maintenance (Temporary Alimony/Alimony *Pendente Lite)*

a. "[I]n an action affecting the family the court may, during the pendency of the action, make just and reasonable temporary orders concerning ... the maintenance of the other party. Maintenance under this paragraph may include the expenses and attorney fees incurred by the other party in bringing or responding to the action...." Wis. Stat. § 767.225(1) & sub.(d).

2. Permanent Maintenance (Permanent Alimony in mid 20th century vernacular)

a. "[T]he underlying purpose of maintenance is to continue—to "maintain"—the payee spouse at the level and standard of living enjoyed during the marriage, or as close to that level as the circumstances of the parties will permit." *Gerrits v. Gerrits*, 482 N.W.2d 134, 140 (Wisc. Ct. App. 1992).

b. Maintenance is a creation of statute: "Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action (for maintenance or periodic family support), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering: (1) The length of the marriage; (2) The age and physical and emotional health of the parties; (3) The division of property made under s. 767.61; (4) The educational level of each party at the time of marriage and at the time the action is commenced; (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment; (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal; (7) The tax consequences to each party; (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties; (9) The contribution by one party to the education, training or increased earning power of the other; (10) Such other factors as the court may in each individual case determine to be relevant." Wis. Stat. § 767.56 (emphasis added).

C. Support

1. Child Support during action: "[I]n an action affecting the family the court may, during the pendency of the action, make just and reasonable temporary orders concerning ... the support of minor children...." Wis. Stat. § 767.225(1) & sub.(c).

2. Child Support : "Child support. (1) When ordered**.** When the court approves a stipulation for child support ..., enters a judgment of annulment, divorce, or legal separation, or enters an order or a judgment in a paternity action or in an action (for child support, periodic family support, or acknowledgement of paternity), the court shall do all of the following: (a) Order

either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child. The support amount must be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under (state statutes) are satisfied." Wis. Stat. § 767.511

3. Property Division *may* = Support

a. "The divorce judgment recited that the 140 acres of real estate, which had been inherited by debtor, shall be deeded by him and (Former Spouse) to their three children. The land was initially to be held in trust for the benefit of the children with the debtor as the designated trustee until the oldest child attains age 18, at which time the 140 acres would be conveyed outright to all three children free and clear of all liens and encumbrances.... The debtor's obligation to his three children in connection with his commitment to convey the 140 acres of real estate is a nondischargeable debt under 11 U.S.C. § 523(a)(5) as being in the nature of support." *In re Tadisch*, 220 B.R. 371, 372, 376 (Bankr. E.D. Wisc. 1998). This case raises the question-- Could the children have relied upon subsections (2) or (4) to achieve the same result without doing such violence to the definition of support?

D. In the nature of ... If Congress, by enacting 11 U.S.C. § 523(a)(5)(B) (1978), intended to limit the exception to discharge to debts designated as alimony, maintenance or support in the underlying state court order, it could not have chosen its words more poorly. That section incorporates the phrase "in the nature of" -- a phrase gleaned from cases interpreting § 17 of the bankruptcy act in an expansive, rather than in a restrictive, manner. Courts had invented the construct "in the nature of support" to expand 11 U.S.C. § 35(a)(7) to include debts not designated as alimony, maintenance or support but which were deemed to be acting like alimony, maintenance or support. *See e.g. Nichols v. Hensler (In re Hensler)*, 528 F.2d 304, 307 (7th Cir. 1976). Examples of how "in the nature of" has been interpreted in derogation of the 'to a spouse, former spouse or child of the debtor' requirement include:

1. Attorneys Fees incidental to order of Alimony, Maintenance or Support =Alimony, Maintenance or Support: Such interpretation is in keeping with cases interpreting the Bankruptcy Act but ignores the Code's "to a spouse, former spouse or child of the debtor" restriction.

a. "Ancillary obligations (such as attorneys fees incidental to an order of alimony, maintenance or support) incurred in a proceeding to enforce the primary obligation — "stand or fall (i.e. [are] dischargeable or nondischargeable) with the primary debt" *In re Chambers*, 36 B.R. 42, 46 (Bankr. W.D. Wisc. 1984)(Citation Omitted).

b. Attorneys fees incurred in connection with enforcement of an award of alimony maintenance or support are in the nature of support including those related to the dischargeability action. *See In re Scannell*, 60 B.R. 562 (Bankr. W.D. Wisc. 1986).

2. Debtor's agreement to pay vehicle payments, insurance, tuition, books for now adult children= Support: *In re Bell*, 357 B.R. 167, 172 (Bankr. M.D. Ala. 2006). *See also Boyle v. Donovan, (In re Boyle)*, 724 F.2d 681 (8th Cir. 1984); *In re Evans*, 278 B.R. 407 (Bankr. D. Md. 2002).

3. Hold-Harmless Provisions *may*=Support: "[P]utting aside assignments under the Social Security Act, Congress, beyond question, intended that all third party debt be discharged. However, if a debtor, explicitly or by implication, agreed to hold harmless and indemnify his or

her spouse, former spouse, or child against such a third party debt, that undertaking would survive discharge if and only if the underlying liability were *actually in the nature of alimony, maintenance or support.* Thus, for example, indemnity in terms of mortgage and tax payments on a home or rental and utility payments on an apartment necessary to provide shelter to a spouse and/or child would fit the statutory requirement. On the other hand, a promise to indemnify on joint third party debt, which debt is unrelated to past or present health, shelter or related support needs, would not survive. The logic, of course, being that a divorce or separation ought not preclude meaningful bankruptcy relief." *In re Lewis*, 39 B.R. 842, 845-846 (Bankr. W.D. N.Y. 1984).

2. Owed to or recoverable by...a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative;

A. Codification trumps Common-Law (The protected class is limited to enumerated persons)

1. "'[W]e start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee v. State of Illinois*, 451 U.S. 304, 316 (1981).

2. "Section 523(a)(5) excepts from discharge any debt to a spouse or former spouse for alimony, maintenance, or support, except 'to the extent that such debt is assigned to another entity, voluntarily, by operation of law, or otherwise.' 'This language [§ 523(a)(5)] . . . will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent.' 'The purpose of this limitation is to prevent persons other than the debtor's spouse and children from obtaining this privileged status.'" *In re Allen*, 4 B.R. 617, 619 (Bankr. E.D. Tenn. 1980) (citations omitted).

3. "Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language ... will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent." *In re Lewis*, 39 B.R. 842, 844 (Bankr. W.D. N.Y. 1984).

4. "With all due respect to all courts ... which have addressed the issue of whether a judgment for attorney's fees entered in favor of a third-party law firm (as contrasted to the debtor's spouse) in a dissolution of marriage action or an action for child support or maintenance falls within the parameters of 11 U.S.C. § 523(a)(5)/ § 507(a)(7) — those courts totally failed to give effect to the unambiguous language of the statutes under review, and instead adopted a construction of the law as they deemed it should be, rather than an interpretation of the law as Congress wrote it...." *In re Orzel*, 386 B.R. 210, 213 (Bankr. N.D. Ind. 2008).

5. "A predicate for a 'domestic support obligation' is that the debt is 'owed to or recoverable by [a person or entity described in 11 U.S.C. § 101(14A)(A)(I)].... Apart from a debt of the nature described in 11 U.S.C. § 101(14A) being owed to a person within the class defined by § 101(14A)(A)(I), it may be possible to sustain a priority claim if such a debt is 'recoverable by' a person within that class.... [A] debt payable to a person other than a member of the class ... is *recoverable by* a person within that class if the right to payment of a person not within that class can be reduced to a monetary judgment or independently collected by a person within the class (e.g. privity) for the benefit of the person within the class." *In re Watson*, 402 B.R. 294, 298-9 (Bankr. N.D. Ind. 2009) (Parenthetical added).

B. The Common-Law Strikes Back: (The protected class expands to fit the Chancellor's Foot).

"When I drive that slow, you know it's hard to steer.
And I can't get my car out of second gear...
I can't drive 55!"

Sammy Hagar, *I can't drive 55* (1984).

1. Some courts saw the new restrictions posted but floored-it anyway:

a. "When the debtor's spouse owes another entity and cannot pay such entity because of financial inability; if (in the decree of divorce) the debtor is ordered to pay that debt, the debtor's payment is in the nature of support or maintenance. Sometimes the debtor may be ordered to pay the entity directly. Sometimes the debtor may be ordered to pay the entity indirectly, by paying the debtor's spouse. This Court rejects the *notion* that the dischargeability of the debt was meant to hinge only on who the debtor is ordered to pay." *In re Rank,* 12 B.R. 418, 421 (Bankr. D. Kan. 1981) (emphasis added). The Court was not alone.

2. Others didn't seem to notice the new, lower posted limits

a. In interpreting what was then a not quite two year old U.S.C. § 523(a)(5) (1978) the 7th Circuit held debtor's obligation to pay a marital debt to a third party creditor to be nondischargeable maintenance. The court in *In re Maitlen,* 658 F.2d 466 (7th Cir. 1981) cited the new statute and the superseded statute in the same sentence without discussing the differences between the new and old legal standard: "Division of property pursuant to a dissolution decree is treated as a debt dischargeable in bankruptcy proceedings. However, a provision for alimony or support is not dischargeable. *See* 11 U.S.C. § 523(a)(5) and its predecessor, former 11 U.S.C. § 35(a). The question in this case is whether the obligation to make mortgage payments was a support obligation or a property division." *Ibid,* at 468. (statutory cite in original) The *Maitlen* court did not bother to analyze whether "to a spouse, former spouse or child of the debtor" was implicated.

3. Most just kept up with traffic

a. A long line of cases relied on common-law principles enunciated in cases interpreting the superseded Bankruptcy Act to render "to a spouse, former spouse, or child of the debtor" without meaning. "In construing § 523(a)(5)(B), the Second Circuit Court of Appeals rejected the *argument* that only debts payable directly to a spouse as distinguished from those payable to that spouse's attorney, are nondischargeable because such an interpretation "overlook[ed] the well-established principle of bankruptcy law that dischargeability must be determined by the substance of the liability rather than its form." *In re Glynn,* 138 B.R. 360, 362 (Bankr. D. Conn. 1992) (emphasis added) (citing *In re Spong,* 661 F.2d 6, 9 (2d Cir. 1981)).

4. Examples of cases nullifying 'to a spouse, former spouse or child of the debtor:' (This will come up again later in the discussion regarding the new subsection (a)(15)).

a. Debts owed to third parties *in lieu* of Alimony. "The bankruptcy court's finding that Betty Coil agreed to the hold-harmless provision in lieu of demanding more support is not clearly erroneous." *In re Coil,* 680 F.2d 1170, 1172 (7th Cir. 1982); s*ee also In re Maitlen,*

658 F.2d 466 (7th Cir. 1981)("Termination of an obligation of the husband (to pay a third party creditor) upon death or remarriage of the wife is an indication that the obligation is support rather than a division of property.").

b. Debts payable to third party guardians *ad litem* for attorneys fees "[A] presumption, open to rebuttal by the debtor, should exist that guardian *ad litem* fees incurred in performance of the guardian's statutory duty of advocacy of the child's best interests are nondischargeable as in the nature of support." *In re Coleman,* 37 B.R. 120, 125 (Bankr. W.D. Wisc. 1984) (emphasis added). *See also In re Lockwood,* 148 B.R. 45, 47 (Bankr. E.D. Wisc. 1992)(Incurred for the benefit of the children equated with "to ... a child.")

c. Debts owed to third parties-attorneys fees incidental to order of alimony, maintenance or support:

i. "In a case where an award of attorney's fees has been made for the purpose of providing support, their being payable directly to the attorney does not make the debt dischargeable." *In re Rodriguez,* 22 B.R. 309, 311 (Bankr. W.D. Wisc. 1982); *See also In re Wisniewski*, 109 B.R. 926 (Bankr. E.D. Wisc. 1990); *Cf. In re Zick,* 123 B.R. 825 (Bankr. E.D. Wisc. 1990) ("The award of fees to the wife's attorney is part of the property division and is not excepted from the discharge under 11 U.S.C. § 523(a)(5).").

d. Debts owed to third parties for 'necessaries' provided to a dependent of the debtor:

i. "[P]regnancy and confinement expenses (owed to the state) constitute a debt in the nature of support to the child." *E.g. In re Siebert,* 901 F.2d 102, 107 (7th Cir. 1990). *See also In re Balthazor*, 36 B.R. 656, 659 (Bankr. E.D. Wisc. 1984) ("The obligation due from the debtor ... (to) Winnebago County on behalf of the State of Wisconsin, for lying in expenses is in the nature of support.").

ii. "Legal fees incurred by the wife, whether in divorce or other contexts, are viewed under domestic relations law as necessities which the husband must provide under his duty of support. The court is of the view that this analysis makes eminent good sense. It is a frequent occurrence in divorce that one spouse cannot afford to hire an attorney out of his or her own resources. Such fees are a necessity for the indigent spouse in that court-supervised dissolution is the only legally recognized means of ending the martial relationship." *In re Knabe,* 8 B.R. 53, 56-57 (Bankr. S.D. Ind. 1980). (This opinion seems to imply that divorce is a legal right and that representation therein is too.).

C. Assignees could not stand in the shoes of the spouse, former spouse or child of the debtor:

1. Congress, by enacting the Bankruptcy Code, clearly intended to limit the protected class.

a. "It is clear from the case law, the legislative history, and the language of Section 523 of the Code itself that Congress intended to make debts owed to the state and federal governments dischargeable." *In re Morris*, 10 B.R. 448, 452 (Bankr. N.D. Iowa, 1981).

D. In 1984, Congress restored sovereign assignees to their pre-code stature.

1. The Bankruptcy Amendments and Federal Judgeship Act of 1984**.** Pub. L. 98-353, Sec. 454(b)(2), inserted ", or any such debt which has been assigned to the Federal Government or to

a State or any political subdivision of such State." http://vlex.com/vid/sec-exceptions-discharge-19223296#ixzz0k2y2J2WL

E. In 1996, Congress reinstated the holding of *Williams v. Department of Social and Health Services,* 529 F.2d 1264 (9th Cir. 1976), that debts in the nature of support owed to a state or municipality enforceable under Title IV-D are non-dischargeable.

1. The Personal Responsibility, Work Opportunity & Medicaid Restructuring Act of 1996 codified as "11 U.S.C. S 523(a)(18), ... prohibits the discharge of a debt owed under state law to a (state or) municipality that is "in the nature of support" and "enforceable under Part D of title IV of the Social Security Act." *In re Liebowitz,* 217 F.3d 799 (9th Cir. 2000).

F. In 2005 Congress restored the sovereign domestic support obligee to a level that would have been recognizable in Elizabethan England.

1. "[F]ood Stamp overpayments were for the support of (Debtor's) children (and are therefore domestic support obligations within the definition of 11 U.S.C. § 101(14A) (2005).") *State of Wisconsin Dept. of Workforce Dev. v. Ratliff (In re Ratliff),* 390 B.R. 607, 616 (E.D. Wisc. 2008)

2. "The broad principle that obligations to the sovereign are not discharged seems to exempt support or bastardy orders from the general rule that all provable disabilities are discharged." William Miller Collier, *The Law and Practice under the National Bankruptcy* Act, 439 (12th Ed. 1921).

3. "(The county may) levy ...sums of money and all arrearages of everyone that shall refuse to contribute (to the support of self or dependent family members) according as they shall be assessed, by distress and sale of the offenders goods, as the sums of money, or stock which shall be behind upon any account to be made as aforesaid, rendering to the parties the overplus, and in defect of such distress ... to commit him or them to the common Gaol of the County, there to remain without bail or mainprize, until payment of the said sum, arrearages and stock, and ... to send to the house of correction or common Gaol such as shall not employ themselves to work .... [T]he Father and grandfather, and the Mother and Grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person, not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person ... upon pain that every one them shall forfeit twenty shillings for every month which they shall fail therein." English Poor Law of 1601. *See* http://www.sochealth.co.uk/history/poorlaw.htm.

3. In connection with certain, enumerated legal actions:

A. The debt had to be incurred in connection with a divorce decree, separation or property settlement agreement.

1. "Debt ... arose from a court order (but) [i]t was not "in connection with a divorce decree, separation, or property settlement agreement." Therefore, the debt to the welfare department ... is dischargeable in bankruptcy." *In re Marino*, 29 B.R. 797, 801 (Bankr. N.D. Ind. 1983)(This case does not reach the issue that the debt was not payable to a spouse, former spouse or child of the debtor).

B. Or other order of a court of record

1. Some courts issued prescient opinions in advance of the effective date of the 1984 revision. "There is ... no apparent logic for not excepting any legitimate debt for alimony or child support simply because it arose in a manner not ... enumerated in the statute." *In re Balthazor*, 36 B.R. 656, 658 (Bankr. E.D. Wisc. 1984)(Quoting *In re Mojica*, 30 B.R. 925, 928-930 (Bankr. E.D. N.Y. 1983)).

2. Bankruptcy Amendments and Federal Judgeship Act of 1984**.** Pub. L. 98-353, Sec. 454(b)(1), inserted "or other order of a court of record" after "divorce decree," in provisions preceding subpar. (A). http://vlex.com/vid/sec-exceptions-discharge-19223296#ixzz0k2y2J2WL.

C. Or a determination made in accordance with State or Territorial Law by a Governmental Unit

1. Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986. Subsec. (a)(5). Pub. L. 99-554, Sec. 281, struck out the comma after "decree" and inserted ", determination made in accordance with State or territorial law by a governmental unit," after "record". http://vlex.com/vid/sec-exceptions-discharge-19223296#ixzz0k2xRMAwk

B. Obligations Other than Alimony, Maintenance or Support:

October 1, 1979-October 21, 1994	October 22, 1994-October 16, 2005	October 17, 2005 to ?
After October 1, 1979 and prior to the Bankruptcy Reform Act of 1994, the primary statute that an aggrieved ex spouse could use to challenge the discharge of familial obligations was 11 U.S.C. § 523(a)(5). For an example of the application of that section to debts that would now be challenged using subsection (15) *see* outline above.	"A discharge ...does not discharge an individual debtor from any debt--not of the kind described in 11 U.S.C. § 523(a)(15) (1994)	"A discharge ...does not discharge an individual debtor from any debt not of the kind described in 11 U.S.C. § 523(a)(15) (2005)
	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) (1994)	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) (2005)
		to a spouse, former spouse, or child of the debtor and 11 U.S.C. § 523(a)(15) (2005)
	unless ... the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or U.S.C. § 523(a)(15)(A) (1994).	~~unless -- (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or~~
	discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor 11 U.S.C. § 523(a)(15)(B) (1994).	~~(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;~~
	"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), (6), or (15) 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), (6), or (15) as the case may be, of subsection (a) of this section." 11 U.S.C. § 523(c) (1994).	"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), ~~(6), or (15)~~ 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), ~~(6), or (15)~~ or (6) , as the case may be, of subsection (a) of this section." 11 U.S.C. § 523(c) (2005).

1. Purpose of § 523(a)(15) (1994).

A. "Subsection (15) of § 523(a) was added to the Bankruptcy Code in the Bankruptcy Reform Act of 1994 to expand the § 523(a)(5) exception to discharge for marital debts…." *In re Crosswhite,* 148 F.3d 879, 882 (7th Cir. 1998).

B. "Congress, by enacting § 523(a)(15) (1994), *made it clear* that, even if the state courts did not use the traditional devices of (support) alimony and support, the long-term responsibilities of the debtor to those with whom he once had a familial relationship and to those who are dependent upon him because of that familial relationship are economic factors that must be weighed." *Ibid* at 888 (emphasis Added).

2. Shortcomings of § 523(a)(15) (1994). The 1994 statute allowed still more family law disputes, which are best left to state courts, to spill-over into the federal courts. More ominously, the ambiguous balancing test could, if it tilted the wrong way, result in an exception to discharge that was so broad as to deny a fresh start to an honest but unfortunate debtor who otherwise qualified for bankruptcy but was comparatively more fortunate than the aggrieved former spouse.

A. "(11 U.S.C.) § 523(a)(15) (1994) is a difficult provision to apply in the practical setting of bankruptcy administration." *In re Crosswhite,* 148 F.3d at 886.

B. "[T]he bankruptcy court and, in turn, the district court grappled with the *jello-like statutory language*…." *Ibid* (emphasis added).

C. "We appreciate the difficult role that this statute imposes on courts that are charged with applying that equitable balancing test. Bankruptcy courts have expressed their frustration over the lack of guidance from Congress with respect to this responsibility for balancing the benefit and the detriment in order to reach an equitable resolution." *In re Crosswhite,* 148 F.3d 879, 882 (7th Cir. 1998). For an example of how the balancing test forced re-litigation in federal court of issues that should have been decided in the underlying action s*ee e.g. In re Shteysel,* 221 B.R. 486 (Bankr. E.D. Wisc. 1998).

3. Features of 11 U.S.C. § 523(a)(15) (2005).

A. Elimination of the deadline to object to dischargeability of non-DSO familial debt

1. "The current version of section 523(a)(15) of the bankruptcy code specifies that obligations <u>to a spouse</u> resulting from separation agreements and dissolution judgments are not dischargeable. Spouses are no longer required to participate in the bankruptcy proceedings to preserve their rights to enforce such marital obligations." *Fast v. Fast*, 766 N.W.2d, 47, 49 (Minn. Ct. App. 2009) (Emphasis Added).

B. Addition of the requirement that the debt be "to a spouse, former spouse or child of the debtor"

1. Which would seem to mean that only debts owed to spouse, former spouse or child of the debtor are subject to § 523(a)(15) (2005).

a. "The addition (of the qualifier 'to a spouse, former spouse, or child of the debtor') has unambiguously limited the parties to whom a non-dischargeable divorce-related debt may be owed under section 523(a)(15)." *In re Brooks,* 371 B.R. 761, 766 (Bankr. N.D. Tex. 2007).

b. "The list of exceptions to discharge are found in § 523(a). As part of the Bankruptcy Reform Act of 1994, Congress added an additional exception to the list of the debts not discharged in bankruptcy, § 523(a)(15). Generally, the (1994) provision rendered debts incurred in the course of a divorce proceeding, or under the terms of a separation or property settlement agreement, nondischargeable. However, the (1994) exception to discharge offered a debtor two so-called "affirmative defenses" to an action seeking to except such a debt from discharge. If the debtor did not have the ability to pay the debt from income or property not reasonably necessary for the debtor's maintenance or support, or if the benefits to debtor of discharging the debt outweighed the detriment to a spouse, former spouse, or child of the debtor, then the debt could be discharged. With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress amended § 523(a)(15). Specifically, Congress deleted the affirmative defenses, or balancing test. <u>But it also narrowed the scope of the debts covered by the exception to those owed "to a spouse, former spouse, or child of the debtor...."</u> *In re Poppleton*, 382 B.R. 455, 456-457 (Bankr. D. Id. 2008) (citations omitted) (emphasis added).

c. "The (Marital Settlement Agreement) imposed upon (Debtor) a new liability, independent of her preexisting liability to those third party creditors, to indemnify and hold (Former Spouse) harmless from liability for the debt to (Creditors). This new liability runs to (Former Spouse) and, as such, represents a prepetition claim held by (Former Spouse) against (Debtor). Although an indemnity claim may be contingent upon the exercise of rights by the creditor against (Former Spouse), it is nevertheless a "claim" as defined in Section 101(5) … (Debtor's) obligation to hold (Former Spouse) harmless is a debt "to a spouse, former spouse, or child of the debtor" for purposes of Section 523(a)(15), that was incurred by (Debtor) in the course of a divorce or in connection with a separation agreement or divorce decree, that is nondischargeable under that provision." *In re Harn*, 2008 WL 130914; 2008 Bankr. Lexis 100 (Bankr. C.D. Ill. 2008).

2. Decisions cursing the new fences

"Oh, give me land, lots of land under starry skies above,
Don't fence me in.
Let me ride through the wide open country that I love,
Don't fence me in.
Let me be by myself in the evenin' breeze,
And listen to the murmur of the cottonwood trees,
Send me off forever but I ask you please,
Don't fence me in."

Cole Porter & Robert Fletcher *Don't Fence Me In* (1934).

"Ridin' the range once more
Totin' my old .44
Where you sleep out every night
And the only law is right
Back in the saddle again."

Gene Autry, *Back in the Saddle Again* (1939).

a. "(Former Spouse) is the intended beneficiary of the obligation and possesses both the rights and remedies at state law to enforce the Order. It is immaterial that the debt is payable to (her lawyer).... [T]he Court finds that attorneys fees were divorce-related debt incurred by the debtor in the course in the course of the divorce proceedings between the parties and are nondischargeable pursuant to 11 U.S.C. § 523(a)(15)." *In re Prensky*, 416 B.R. 406, 411-412 (Bankr. D. N.J. 2009).

b. "[T]he debt for the 2005 Dodge Grand Caravan in connection with the parties' divorce decree and property settlement agreement is Non-dischargeable." *In re Beale,* 381 B.R. 727 (Bankr. S.D. Ind. 2007).

c. "[T]he joint debts (owed to third party creditors) which the state court ordered Debtor to pay in his divorce … are nondischargeable in this Chapter 7 bankruptcy." *In re Douglas,* 369 B.R. 462, ____(Bankr. E.D. Ark. 2007).

d. "(Debtor)'s obligation to hold (Former Spouse) harmless with respect to the (allocated marital) indebtedness … (is) nondischargeable. Whether (the affected Creditors) may enforce a deficiency judgment against (Debtor) and (Former Spouse), or are precluded from doing so by virtue of (non-bankruptcy law) is an issue that should be resolved by the state court that issued the judgment….Whatever the extent of (Debtor) and (Former Spouse)'s liability to (the affected Creditors) may be, (Debtor)'s obligation under the Separation Agreement to hold (Former Spouse) harmless on the (allocated marital) indebtedness is a debt excepted from discharge by § 523(a)(15)." *In re Schweitzer,* 370 B.R. 145, 154 (Bankr. S.D. Ohio 2007). This case invites collateral attack of debts included in bankruptcy and ignores longstanding principles of federalism.

e. "Although (11 U.S.C. § 523(a)(15)) speaks of debts 'to a spouse, former spouse, or child of the debtor,' courts have held that joint credit card debt allocated to one spouse in a property settlement agreement or court decree may fall within the scope of the statute." *Rogers v. Rogers,* 656 S.E.2d 436, 441 (Va. Ct. App. 2008).

4. Venue

a. Concurrent jurisdiction: "A critical aspect of dischargeability procedure separates the grounds for objecting to dischargeability into two general categories. The first category comprises those objections that require a creditor to show that a debt is not dischargeable in whole or in part because the debtor was guilty of wrongful conduct, other than drunk driving—namely fraud, false financial statement, fraud or defalcation by a fiduciary, embezzlement or larceny, or willful and malicious injury to persons or property. This is the 'exclusive jurisdiction' group. The second category includes all other grounds for objecting to the dischargeability of a claim such as nondischargeable tax claims, unscheduled debts, debts for alimony, child support or property divisions arising in a divorce, fines and penalties owed to governmental units, student loans, drunk driving injuries and debts that survived previous bankruptcies for any reason other than they were unscheduled in a previous bankruptcy. This is the 'concurrent jurisdiction' group." *Ginsberg & Martin on Bankruptcy*, § 1107(A). (Aspen Publishers Online Rev. 2007)(Emphasis Added).

b. Abstention: Although the issue of dischargeability is subject to concurrent jurisdiction, think twice before re-fighting the battle of "Who was the worse spouse?" in federal court. In a case decided before the enactment of 11 U.S.C. 523(a)(15), the Bankruptcy Court for the

Eastern District of Wisconsin hit the nail on the head. "The state divorce court may decide that the hold harmless provision is itself a form of support and maintenance, thereby making it a nondischargeable debt under § 523(a)(5). The state court has concurrent jurisdiction with the bankruptcy court to decide the issue of whether obligations are to be construed as a property settlement or as maintenance and/or support. Where the state court is more familiar with the facts and circumstances, the bankruptcy court should abstain, pursuant to 28 U.S.C. § 1334(c)(1) in order to promote comity between state and federal courts." *In re Reak*, 92 B.R. 804, 807 (Bankr. E.D. Wisc. 1988). *Accord In re Lewis*, 423 B.R. 742, 758 (Bankr. W.D. Mich. 2010)("With limited exceptions, there is no longer any reason for this bankruptcy court to continue to be involved in the divorce and domestic relations proceedings.").

III. Conclusion

Familial Obligations are one of the major financial events that push people into Bankruptcy. "There are some obvious financial problems that come with divorce. Two people who had one monthly housing bill suddenly have two, and they have legal bills to pay, and possibly new child care costs, plus alimony and child support payments.... Divorce does not necessarily cause financial disaster immediately, but can do so years later when savings are finally depleted or mandated alimony or child support payments become too great to bear.... [P]er capita bankruptcy filing rates and divorce rates match well at all geographic levels tested...." Stuart A. Feldstein, *The Rise in Personal Bankrupcy: Causes and Impact* Presentation to the Subcommittee on Commercial And Administrative Law, U.S. House of Representatives 3/10/98 http://www.icba.org/files/PDFs/attachment2.pdf. Alimony, Maintenance and Support have long been excepted from a discharge under the Bankruptcy Code and its antecedents. Since 1994 other types of familial obligations have (officially) entered the mix. When counseling a debtor or the aggrieved spouse, former spouse or child of the debtor, bear in mind the history of not only the Code but the terms that have been incorporated into that Code. Deciding which forum in which to continue the battle of a lifetime should be weighed with an eye toward which court is better equipped to decide the legal issues, and to host the parties' continuing mutual grievances.