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Old Fourth of July Mine, near Eldora, Colorado. Photograph by Leslie C. Annand

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Protecting Marital Obligations From Bankruptcy

by Casey Frank

All things, by a law divine,
In one another's being mingle
—Shelley

Some bankruptcy petitions inevitably endanger financial obligations incurred at the time of divorce. This happens when one spouse (*debtor-spouse*) attempts to discharge marital debts. The effect on the other spouse (*creditor-spouse*) can be severe. More than once, a divorcing spouse has quit-claimed an interest in a marital home (held in joint tenancy). In return, the other spouse executed a promissory note. A subsequent bankruptcy discharged the note. When debts are discharged by the Bankruptcy Court, it serves as an injunction against efforts to collect those debts. What divorce gives, bankruptcy can take away.

There is no way to forestall a bankruptcy petition by a potential debtor-spouse, since a preemptive waiver of that right is unenforceable, except possibly in cases of fraud. Even reaffirmation of a specific debt must comply with procedural safeguards, including the right to rescind the reaffirmation even after the discharge of other debts has been granted.[1] However, there are ways to reduce the likelihood of losses caused by a bankruptcy petition of a debtor-spouse, although predicting that contingency is difficult. To preserve his or her rights, a spouse can take action at the time of divorce ("dissolution of marriage" in Colorado) and at the time a bankruptcy petition is commenced. In addition, certain remedies may be available even after a successful discharge of debts.

Understanding those elements of the Bankruptcy Code ("Code") that can affect marital agreements enables counsel to protect their clients through informed negotiating and drafting of marital agreements. The key is the application of commercial property law to marital agreements. To a great extent, the Code relies on property law to determine the extent of the dischargeable bankruptcy estate. Thus, choices made from the day a divorce action is filed can radically alter the effect a bankruptcy petition may have on the property rights of a debtor-spouse.

Some of the principles behind bankruptcy law and laws controlling dissolution are quite similar: both control the severing of relationships, relate to diverse areas of property law and enshrine the idea of a fresh start in life. However, the treatment of property law and ownership questions in the bankruptcy and marital forums diverge dramatically. In Colorado, the domestic relations court allocates marital property between two parties according to the principle of equitable division. In bankruptcy, multiple creditors contest a division of resources that is inherently inequitable—creditors typically receive only a fraction of what is otherwise their just due. Those conflicting demands, and the extraordinary power of the bankruptcy trustee to intervene in some property settlements, mean that the effect on the parties may be more unpredictable than in the marital arena when no bankruptcy is involved.

A general practitioner may be the first to consider these issues in responding to a client seeking a dissolution. However, counsel should consider consulting a bankruptcy specialist in certain circumstances, depending on their own familiarity with the field: (1) where the debtor-spouse is insolvent and the potential for bankruptcy high; and (2) where the property settlement is already in place and a petition for bankruptcy has been filed. While it is important to assess the likelihood of the bankruptcy of a debtor-spouse, a complete evalution of that contingency is beyond the scope of this article.

The interaction of marital and bankruptcy law is unsettled and poorly defined. Courts in both areas exercise great discretion and the results of court action are relatively unforeseeable. Thus, it is difficult to develop precise practice guidelines. This article provides a basic framework from which practitioners can address these issues. The primary emphasis is on discharge under Chapter 7 and the interests of the creditor-spouse.[2] It does not deal with the tax consequences of the suggested forms of relief.

Casey Frank, Denver, is an associate with the firm of Kramlich Anderson.

The points when bankruptcy issues are most likely to appear during the progression of a dissolution action are discussed in turn:

1) Filing of a notice of *lis pendens* at the commencement of an action for dissolution;
2) Drafting a dissolution agreement to protect property interests through reliance on commercial property law;
3) Enforcement of spousal support obligations, which are afforded special protection in the Code;
4) Enforcement of debts fraudulently induced at the time of dissolution;
5) Objection to a bankruptcy petition as being in bad faith;
6) Litigation in whole or in part in state court; and
7) Equitable relief in state court after discharge.

NOTICE OF *LIS PENDENS*

On the commencement of an action for dissolution, an injunction automatically goes into effect that prevents either party from "transferring, encumbering, concealing or in any way disposing of . . . martial property."[3] The rights of both spouses to marital property vest on the commencement of an action for dissolution, even though those rights are not specifically delineated until a property settlement is achieved.[4] Separate property is first set aside by the state trial court to the spouse who owns it, and it is not subject to division.[5] However, preemption by federal law prevents the injunction from obstructing a bankruptcy petition.[6] Accordingly, if a debtor-spouse petitions for bankruptcy after an action for dissolution has begun, the creditor-spouse can lose important property rights.

When a bankruptcy petition is filed, the bankruptcy trustee, acting on behalf of the debtor-spouse, assumes the status of a hypothetical judicial lienor, judgment creditor or bona fide purchaser as to the property of the debtor.[7] The trustee can then cut off the rights of subsequent or previous transferees (purchasers) who have not yet recorded or perfected their interests by the exercise of extraordinary "strong arm powers." Unfortunately, this can include a creditor-spouse.[8] However, subject to certain limitations,[9] previously perfected property interests will prevail over those of a bankruptcy trustee.[10]

Colorado law generally determines the priority of real property rights between creditors and the bankruptcy trustee.[11] Colorado's race-notice recording statute binds subsequent parties in interest to the recorded chain of title,[12] and protects any transferee who has already recorded an interest in real estate.[13] This will normally apply against the bankruptcy trustee, unless the trustee is able to avoid the transaction because it is preferential or fraudulent.[14]

These considerations converge into a straightforward course of action. If one party to a dissolution action does not have exclusive, recorded title to marital real property, that party's counsel should file a notice of *lis pendens* at the commencement of the action in the office of the county clerk and recorder.[15] A notice of *lis pendens* preserves the rights of the parties pending the outcome of the litigation. It also puts all other parties on notice of those rights. The interests of any subsequent transferees, or previous transferees who have not yet recorded, are subordinate to the interest that is eventually determined in the litigation.[16] A dissolution action is a proper subject for *lis pendens*.[17]

The *lis pendens* is only valid for forty-five days after the entry of a final judgment. In the dissolution context, this is at the entry of permanent orders or when a decree of dissolution is entered with an integrated property settlement. Creditor-spouses must record any subsequent property settlement within that time.[18] If they do not, they lose the protection of the *lis pendens* and risk the loss of any property interests that were awarded to them.

The case of *In re Harms* considered these issues.[19] At permanent orders, the trial court ordered the liquidation and division of certain real estate titled in the husband's name. Before the sale took place, the husband petitioned for bankruptcy.[20] The wife had not filed a *lis pendens* nor recorded the decree of dissolution. The court held that the bankruptcy trustee, as a bona fide purchaser, had superior rights to the unrecorded, and thus unperfected, interests of the creditor-spouse. These interests were discharged as a result. The court noted that the filing of a *lis pendens* or a copy of the decree would have perfected the creditor-spouse's rights and prevented the inclusion of those properties in the bankruptcy estate.[21] In that case, the creditor-spouse's interests would not have been subordinate to the bankruptcy trustee.

In the case of *In re Fischer*,[22] the wife filed for dissolution of marriage. Temporary maintenance was awarded in March. The husband petitioned for bankruptcy in April. In May, the court entered a decree of dissolution, but retained jurisdiction over the property division.[23] The wife had not filed a *lis pendens* nor had she recorded any subsequent judgment that set forth property interests. The Bankruptcy Court held that the bankruptcy cut off the interests of the wife in the marital property held solely in the name of the husband. The court noted that the filing of a *lis pendens* would have preserved the wife's property interests until they were later determined.[24]

The U.S. District Court recently analyzed the reasoning behind these findings in the case of *In re Ebel*.[25] A dissolution was granted to the Ebels, with the state trial court retaining jurisdiction for a later property division. The husband petitioned for bankruptcy on June 6. The trial court awarded the primary marital asset, a golf course, to the wife, on June 14. The Bankruptcy Court intervened and *avoided* (rescinded) the transfer of the golf course.

On appeal, the U.S. District Court, along with the majority of other bankruptcy courts that have considered this issue, held that the bankruptcy trustee could avoid any property transfer that an earlier bona fide purchaser could avoid under applicable state law. Since a bona fide purchaser prevails over the beneficiary of an unrecorded equitable interest under Colorado law, an unrecorded marital interest such as the golf course might be dischargeable.[26]

However, the Bankruptcy Court was reversed on the issue of the transfer of the golf course because the golf course was in receivership. The trustee's position is that of a bona fide purchaser *from the debtor*. Since the debtor could not have transferred the golf course to the trustee while it was in receivership, it was excluded from the bankruptcy estate and could be transferred to the wife, as had been done by the state trial court.[27]

Another approach to this issue was taken by the Tenth Circuit Court of Appeals in an Oklahoma case. In *Watkins v. Watkins*,[28] the debtor-spouse had been awarded real estate while the creditor-spouse received a lien on the real estate to secure the debtor's obligations. The judgment was not recorded before the bankruptcy petition, although title had vested in the debtor-spouse only through the divorce decree. The Tenth Circuit held that examination of the chain of title would have eventually led to the divorce decree and the lien and that, under Ok-

lahoma law, the bankruptcy trustee had constructive notice. Thus, the lien could not be superseded by the bankruptcy trustee, and it survived.[29]

This principle might be successfully applied under Colorado law. In Colorado, a party has constructive notice as to documents recorded in the county clerk's office.[30] Parties are required to search outside the chain of title if an irregularity appears.[31] If marital real property is conveyed to a debtor-spouse only by the divorce decree, the creditor-spouse would normally appear earlier in the chain of title, where, for example, the property had originally been titled in joint tenancy. Accordingly, there may be constructive notice to the bankruptcy trustee. However, filing a *lis pendens* and recording the property settlement is the best way to prevent exposure of a creditor-spouse to unnecessary risks, given the unsettled status of the law in this area.

There are two major qualifications to the protection afforded either by a *lis pendens* or any transfer of property at dissolution. First, a "preference" is a transfer that gives the creditor more than the *pro-rata* share that he or she would have received under an ensuing bankruptcy liquidation. Those transfers can be avoided by the bankruptcy trustee. Avoidance in the bankruptcy context means that the transaction can be rescinded or modified so that more property is available to creditors through the debtor's bankruptcy estate. This aspect of the Bankruptcy Code serves to ensure equal distribution of the debtor's assets among all creditors. This differs from liens or debts that are discharged or voided by the Bankruptcy Court in the final liquidation, after which the liens or debts are no longer valid.[32]

However, preferences can only occur "on account of an antecedent debt."[33] If a decree of dissolution creates a debt simultaneously with a transfer, there should not be a preference, as long as the interest is perfected within ten days. Creditor-spouses must protect against this challenge to property settlements within one year of the bankruptcy petition. The one-year period applies to spouses as insiders.[34] Bankruptcy courts rarely have avoided a property transfer made pursuant to a decree of dissolution as a preference.

Second, a "fraudulent" transfer also can be avoided within one year.[35] This is a transfer that meets one of several criteria: (1) it was intended to hinder, delay or defraud an actual or future creditor; (2) it was for less than the reasonably equivalent value of the property; and (3) the debtor was actually or potentially insolvent or under-funded as a result of the transfer. Note that only the first test requires intent. To help circumvent characterization as a fraudulent transfer, the property settlement should document the value of property transferred and the adequacy of consideration given.[36] A full treatment of the complex issues of preferential and fraudulent transfers is beyond the scope of this article.[37]

Recommendation

Practitioners should file a notice of *lis pendens* in an action for dissolution under the following circumstances: (1) when there is real property at issue; (2) when the real property is potentially marital; (3) when the property is titled at least partly in the name of the other spouse; and (4) when the other spouse is a potential candidate for bankruptcy.[38] Forty-five days after the court enters any judgment that determines the final rights to real property, the protection of the *lis pendens* expires, and the decree itself must be recorded,[39] unless deeds are already conveyed.

However, transfers not recorded within ten days are subject to challenge as a preference so they should be recorded within that shorter time frame. Further, to protect against challenge as a fraudulent transfer, document the adequacy of the consideration for the transfer.

TRANSFERS OF PROPERTY

Certain property transfers may be completed at the time of dissolution—pensions, express trusts, technical trusts and other transfers.

Pensions

Under Colorado and federal law, pensions earned or accrued by either spouse during a marriage are subject to division as marital property, including military pensions.[40] The Retirement Equity Act of 1984 created an exception to the anti-alienation provisions of certain "qualified" pension plans.[41] Those provisions would otherwise prevent the assignment or attachment of pension funds by creditors. A Qualified Domestic Relations Order ("Q.D.R.O.") allows the immediate transfer of part or full ownership from the spouse who participated in the plan to the other spouse, without adverse tax consequences.[42] This allows a division of the ownership interests of the pension plan at the time of dissolution,[43] although the actual payout of funds may still have to await the retirement of the participating spouse.

Execution of a Q.D.R.O. excludes the share awarded to the non-participating spouse from any subsequent bankruptcy estate of the other spouse.[44] Consequently, the share awarded to the creditor-spouse is not subject to discharge or other manipulation, although these transfers may be challenged within one year for being preferential or fraudulent, as discussed above.

A debtor's interest in a qualified pension is normally included in the bankruptcy estate but exempted from liquidation in bankruptcy.[45] Regardless of this protection afforded pension funds—really for the benefit of the debtor—the interests of a creditor-spouse are better served through execution of a Q.D.R.O. From the point of view of divorce law, a Q.D.R.O. provides unsurpassed protection (from transfer to subsequent spouses, for example) and is essential. From the point of view of bankruptcy law, a Q.D.R.O. provides added security, even if it is not the only means of protection. If a Q.D.R.O. is inapplicable, certain forms of trusts should be considered.[46]

Express Trusts

The Code excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity."[47] A creditor-spouse may be able to apply this provision to a marital debt if he or she can show that a fiduciary relationship arose from a "technical, express or statutorily imposed trust."[48] For example, an express trust may be created when the debtor-spouse holds a portion of an undivided retirement plan for the benefit of the creditor-spouse. Such an obligation would be nondischargeable. In another context, one court held:

> [The] general characteristics of an express trust are sufficient words to create a trust, a definite subject, a certain object or *res*, with intent to create the trust relationship being a key element.[49]

The debtor-spouse in *In re Eichelberger*, at the time of dissolution, was "appointed trustee for wife with respect to the [Retirement] Plan."[50] The court held that a trust was created, and the obliga-

tion to divide the pension was nondischargeable.[51]

Since, to the author's knowledge, there are no cases in this jurisdiction that have found an express trust in the marital context, this approach must be considered untested. Nevertheless, when faced with the division of a pension for which a Q.D.R.O. cannot be devised, or division of some other property not amenable to immediate division, creation of an express trust may afford valuable protection.

If a dispute arises over an existing property settlement drafted without a Q.D.R.O. or express trust language, the possibility of a technical trust should be explored.

Technical Trusts

In contrast to an express trust, a technical trust is one imposed by law.[52] Although bankruptcy law controls the determination of the underlying fiduciary relationship in this context,[53] bankruptcy courts regularly consult state law to make that finding.[54] A technical trust in the bankruptcy context is not a constructive trust used to prevent unjust enrichment. Instead, it requires a finding that a fiduciary relationship between the debtor and creditor already existed at the time the debt in question was incurred.[55] The contention that spouses are in a fiduciary relationship may be contestable, but it is not frivolous.

Colorado law gives some support for the proposition that spouses are in a fiduciary relationship with each other as to agreements for the division of property. The court in *Newman v. Newman* held: "By virtue of their betrothal, parties to an antenuptial contract are in a fiduciary relationship towards one another."[56] The questions are whether a fiduciary relationship continues throughout marriage and whether it is destroyed when an action for dissolution is commenced.

One Colorado court found that an exhusband had a fiduciary duty to his former spouse as to the division of property set forth in their separation agreement. The husband had agreed to hold and liquidate stock for the benefit of his former spouse. The court held that this "made him a fiduciary in a broad sense," even though no express trust language was used.[57] Another similar indication comes from the statute that imposes specific duties of care on divorcing spouses toward one another,[58] demonstrating that even divorcing spouses do not have a completely arms-length relationship.

Members of a business partnership are held to a fiduciary standard according to bankruptcy law,[59] which is similar to the relationship of spouses toward one another. The courts treat spouses as economic partners in interpreting Colorado's property division statute.[60] If a fiduciary relationship exists between divorcing spouses, arguably a technical trust is imposed by law over any marital debts, making them nondischargeable. Although this issue has yet to be litigated, it should be considered when confronted with an existing agreement for which other options are limited.

Other Transfers

The sooner property transfers are completed between divorcing spouses, the sooner exposure to the potentially disruptive effects of bankruptcy ends, unless the transfers are challenged as being preferential or fraudulent. Accordingly, counsel negotiating property settlements should place a premium on transfers which can be completed immediately. The value of that premium is in direct proportion to the risk of bankruptcy in a particular case. Obviously, the best solution is to get paid in cash. Another solution would be to obtain an irrevocable letter of credit for the benefit of the creditor-spouse. A bank, or other financial institution, could be authorized to pay the full amount of any financial obligations to the creditor-spouse, guaranteed by the credit of the debtor-spouse.

A spouse also might obtain a performance, contractor's or fidelity bond on the debtor-spouse that could guarantee performance of the obligations contained in the property settlement. If the debtor-spouse defaulted through bankruptcy, the surety would pay up to the limit of the bond. Alternatively, establishment of a pre-paid annuity plan from an insurance company would pay, without contingency, the full amount of the debtor-spouse's obligations.

Recommendation

If a qualified pension plan is to be divided, consider execution of a Q.D.R.O. If the plan is not subject to a Q.D.R.O., consider creation of a specific, express trust which sets forth particular duties of care for the benefit of the creditor-spouse. If an express trust is not present in an existing settlement, look for the hallmarks of a technical trust. Trusts also may provide protection from dis-

charge for obligations other than pensions. Finally, practitioners should complete other transfers of ownership immediately after the settlement agreement is approved.

SECURED CLAIMS AND OTHER GUARANTIES

Secured claims often cannot be discharged in bankruptcy, at least to the extent of the value of the collateral. An *in rem* action to recover the secured property can be brought even after discharge.[61] Secured claims are governed primarily by Uniform Commercial Code ("UCC") Article 9, as enacted in Colorado. A secured claim exists when a security interest is created and that interest is perfected prior to a bankruptcy petition.

Marital obligations related to real property can also be secured by an interest through use of a deed of trust given to the public trustee. This secures the debt under threat of foreclosure.[62] Note that security interests in securities are governed by UCC Article 8, and security interests in motor vehicles are governed by the Certificate of Title Act.[63] A state court ruling on a dissolution has the authority to require security to enforce a property settlement.[64] In short, a secured claim acts to increase the likelihood that a court-ordered division of marital property will actually be effected regardless of a bankruptcy petition. However, the protection provided by a secured claim is still subject to challenge as being preferential or fraudulent.

The protection afforded to a secured claimant is normally limited to the value of the related collateral. The amount of a claim beyond the value of the collateral is unsecured. The lien securing the secured claim remains valid, while the lien protecting the unsecured claim is discharged.[65] However, a mortgage secured only by a principal residence cannot be reduced or stripped down in Chapter 13.[66] The ultimate value of any unsecured claims will depend on the overall size of the debtor's estate and the size of other claims and administrative costs. Accordingly, their value at dissolution is in inverse proportion to the potential for bankruptcy.

Liens and Homestead Exemptions

A creditor attempting to enforce certain liens is limited by the exemptions defined by Colorado law and acknowledged by the Code that apply to either a judicial lien on real property or a non-possessory, non-purchase security interest in certain personal property.[67] A debtor can normally avoid those otherwise valid liens to the extent that they impair an exemption, such as a homestead exemption, assuming he or she files the claim of exemption in a timely manner. In other words, certain liens do not operate to the extent that they impair a valid exemption. However, to the extent the value of the lien exceeds the exemption, it may still be enforced.[68] Lien avoidance does *not* apply to secured interests and consensual liens.[69] The categorization of liens attendant to a dissolution as a matter of law is presently unsettled.[70]

The U.S. Supreme Court recently limited lien avoidance in the marital context. In *Farrey v. Sanderfoot*,[71] the marital home was previously held in joint tenancy by the husband and wife. The husband was awarded the home at dissolution and was ordered to pay one-half of the equity in the home to his wife. A lien on the home secured the debt. The husband attempted to avoid the lien after his petition for bankruptcy, to the extent it impaired his homestead exemption. The court held that since the husband took the lien simultaneously with the property interest, he could not avoid it to the extent that it encumbered the wife's former interest.[72]

In other circumstances, a bankruptcy debtor might "avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption. . . ."[73] In *Farrey*, the court cautioned that if the lien had encumbered only the husband's original interest, it would have been avoidable. A lien on property not originally owned by a creditor-spouse can still be avoided to the extent it impairs a homestead or other statutory exemption.[74] Accordingly, the protection afforded by *Farrey* is limited.

Defeasible Fees

Another intriguing, though speculative, means of protecting debts from discharge may lie in the use of defeasible fees. These are estates in property subject to later revocation by a grantor, in contrast with an ordinary fee simple.[75]

Vulnerability to discharge can arise when an ordinary fee simple in real property is conveyed to a future debtor-spouse, and the creditor spouse receives unsecured or undersecured pledges in return. The fee simple interest may be insulated from the claims of the creditor-spouse, at least to the extent of any exemptions, even though the debtor-spouse can discharge the unsecured or undersecured pledges. The real property interest in fee simple is independent of the other interests.

However, a fee simple *subject to a condition subsequent* can give the grantor—the creditor-spouse—the right to recapture the property if other obligations of the debtor-spouse are not paid. More precisely, this form of conveyance allows a grantor a right of reentry in order "to compel compliance with a condition by the imposition of a penalty for its breach."[76]

In Colorado, forfeitures of estates already in existence are normally disfavored.[77] A conveyance is presumed to be that of a fee simple estate unless it is clearly indicated otherwise.[78] However, a clear provision allowing reconveyance is enforceable. The recent case of *Jelen and Son v. Kaiser Steel* offers principles theoretically applicable in the bankruptcy and marital context.[79] In *Jelen*, the grantor of a mineral interest conveyed a fee simple subject to a condition subsequent. The condition was payment of annual royalties. The original grantee defaulted after conveying the mineral interest to several other parties. The Colorado Court of Appeals ruled that the grantee and all subsequent purchasers were bound by the condition subsequent and held that the condition whose breach allows reconveyance can entirely consist of an obligation for the payment of money. The property was then reconveyed to the grantor because of the default.[80]

In the marital context, both the property settlement and the deed which conveys real property could contain the following type of language:

> To the Grantee [the debtor-spouse] in fee simple, but if the Grantee does not pay his or her marital debts in full on or before the date due, then the Grantor [the creditor-spouse] shall be entitled to a reconveyance of the property, and exclusive possession of it, free of all encumbrances attributable to the acts of the Grantee.

Subsequent purchasers who have notice would be bound by these conditions.[81] This should include the bankruptcy trustee. Recording the decree of dissolution, any attendant agreements and any deeds will strengthen this protection. Breach of the condition subsequent does not result

in an automatic reversion of title to the grantor/creditor-spouse. The grantor must act affirmatively to regain the property, subject to the applicable statutes of limitation.[82] The grantor can bring a suit to quiet title, a suit for declaratory relief or an action for ejectment.[83]

Use of this form of property transfer apparently has yet to be litigated in the marital and bankruptcy context. In fact, defeasible fees have been rarely litigated in *any* context. Thus, its consideration must be tempered with caution. Still, it may provide another important resource in protecting marital debts from discharge. The characteristics of a condition subsequent seem remarkably applicable to the needs of creditor-spouses in the bankruptcy context.

Recommendation

Creditor-spouses who receive property settlements which are to be paid out over time should realize that the settlement is more vulnerable to discharge if it is not a perfected, secured claim. Even a secured claim is secure only to the extent it does not exceed the value of the collateral, and it is not preferential or fraudulent. The stability of the collateral's value is an important, underlying issue. For example, the value of stock as collateral in a closely held corporation is unpredictable.

If the record documents the balance of equities between the parties in the property settlement, it will be easier to evade a later challenge as a fraudulent or preferential transfer.

Moreover, an express lien created in favor of a creditor-spouse will be more secure if it attaches to property formerly owned by the creditor-spouse, in whole or in part. If the lien exceeds the value of the interest formerly owned by the transferor, it may be avoidable, at least to that extent.

Lastly, consider conveying title to real property by a fee simple subject to a condition subsequent. The condition would be the timely payment of marital debts. If a debtor-spouse defaults, the creditor-spouse may be able to retrieve the property.

SUPPORT OBLIGATIONS

Support obligations to children and spouses are prominently addressed in the Code and have been the subject of much litigation. Regardless of their description in an agreement at dissolution, marital obligations which are *in the nature of support* survive even after the discharge of other debts in bankruptcy.[84] In contrast, a property settlement can be discharged.[85] Disputes arise because support obligations take many, sometimes ambiguous forms.[86] Thus, there has been extensive litigation over whether a particular marital obligation is actually spousal support or part of a property settlement. Therefore, it is the emphasis here.

Bankruptcy law controls the determination of whether an obligation attendant to dissolution is in the nature of support, since it is a federal statute that is being construed.[87] Bankruptcy courts are not bound by state law definitions of what constitutes a property settlement as opposed to spousal maintenance. Bankruptcy courts must determine if a financial obligation to an ex-spouse is *actually* in the nature of spousal support. Although other jurisdictions have used a plethora of different tests, the most recent cases in this jurisdiction, *In re Goin*, *In re Sampson* and *In re Yeates*, articulate an emerging consensus about this issue.[88]

Bankruptcy courts must look behind the labels of the obligation to determine the intent of the parties and the substance of the agreement. A threshold test is whether there is other, explicit, court-ordered spousal support in the agreement between the parties, besides the obligation in question. If there is no support provision, but there is a need for support, "the court may presume that the property settlement is intended for support."[89] The determination that there was a need for support is accomplished by looking for several factors at the time of dissolution: (1) the presence of minor children; (2) an imbalance of incomes between the parties; (3) a disparity of earning potential between the parties; (4) payments made directly to the recipient spouse; (5) payments paid out over a long period of time; and (6) an obligation that terminates on death or remarriage.[90]

The dramatic difference in the way other federal courts of appeal treat this issue was highlighted in the recent case of *In re Brody*.[91] The Second Circuit Court of Appeals significantly broadened the type of obligation that could be construed as support. The debt in question was a $1 million distribution of the marital estate, to be paid out over four years. The wife testified that she intended to invest the money and live off the proceeds. The debt was characterized as support and held nondischargeable, even though the parties had separately provided for three years of alimony for the wife. This position is noticeably more protective of marital property settlements from discharge in bankruptcy than the precedents in this jurisdiction.

The whole area of spousal support obligations is retrospective: the needs of the creditor-spouse and the changed circumstances of the debtor-spouse at the time a petition is filed are not relevant. If they were relevant, the bankruptcy courts would be in the position of modifying state matrimonial decrees, making them alternative courts of domestic relations.[92] Clearly, this was not the intent of the drafters of the Code. Accordingly, the bankruptcy courts will not discharge an obligation that has been determined to have been in the nature of support.[93] Such an obligation can still be enforced just like any other judgment, even after discharge of other debts.

Recommendation

Be aware of the principles that the Bankruptcy Court may use to determine whether an obligation is in the nature of support. With these principles in mind, document the circumstances of the parties at the time of dissolution in the separation agreement or property settlement. This can strengthen a creditor-spouse's ability to later argue that marital debts are in the nature of support, if that is the case.

The structure and language of marital property agreements also are important. For example, payments made to the creditor-spouse over a long period of time, that terminate on death or remarriage, are evidence of support. Ironically, that form of obligation also exposes the creditor-spouse to the potential of bankruptcy over a longer period during the time payments are being made by the debtor-spouse and during which time the debtor-spouse may still attempt to discharge the remaining payments. Consequently, the value of that type of settlement has to be assessed, keeping the likelihood of bankruptcy in mind.

FRAUD EXCEPTION TO DISCHARGE

As in the case of support obligations, the provisions of the Code dealing with fraud are also retrospective and look back to the conduct of the debtor at the time an obligation was incurred. Obligations cannot be discharged if they were fraudulently induced. This is another exception to the general rule.[94] It may be possible to bring marital debts within the scope of this fraud exception if one spouse deceitfully induces the other to accept a certain property settlement at dissolution. Discharge of obligations so induced can be opposed on the basis of fraud.

In another context, one Bankruptcy Court ruled that a bankruptcy creditor must meet a seven-part test in order to establish a *prima facie* case of fraud:

> (1) The debtor made a false representation of fact; (2) the fact was material; (3) the debtor made the representation knowing it to be false; (4) the debtor made the representation with the intent that the creditor act in reliance on the representation; (5) the creditor relied on the representation; (6) the creditor's reliance was justified; and (7) the reliance caused damage to the creditor.[95]

In another instance, a decree of dissolution required a wife to transfer her interest in the marital home to her husband only after he had reimbursed her for the value of her interest.[96] Nevertheless, the husband later persuaded the wife to sign over her interest in exchange for an unsecured promissory note and then attempted to discharge the note. The court determined that the promissory note was fraudulently induced and was nondischargeable.[97]

Another debtor settled a claim for medical malpractice and promised not to discharge the debt. When he attempted to discharge it anyway, the court held it to be nondischargeable because the debtor had "[m]isrepresented his intent to pay the debt in full and not to seek discharge in bankruptcy."[98] The creditor had agreed to the settlement only because of the defendant's assurances.[99] This reasoning might apply to a property settlement that includes a promise not to discharge the obligations.

The important factor is detrimental reliance. In accepting a property settlement, parties forego other alternatives. If it can be shown that marital obligations were accepted because of fraudulent inducement at dissolution, a debtor-spouse may be prevented from discharging those debts. The counter argument may be that this functions like a waiver of the future right to petition, a waiver that is unenforceable under the Code.[100] At least one court has shown a reluctance to apply the fraud section of the Code to a promise not to seek discharge.[101] Still, inclusion of an explicit pledge not to seek discharge in a property settlement may provide added security against that contingency.

Recommendation

Practitioners should include a statement in all settlement agreements disclaiming any intention to seek bankruptcy. Elicit a disclaimer from the other spouse if he or she is deposed or questioned during the dissolution proceedings. Make sure reliance on the disclaimers is recorded. Note that all these actions have to take place at the time of dissolution, though their utility will arise at the time of the bankruptcy petition. This should be standard procedure.

BAD FAITH DISMISSAL

The actions discussed in the last several sections create an exception from discharge for the marital debts alone. The obvious advantage to creditor-spouses is to preserve their right to collect against debtor-spouses after other obligations are discharged in bankruptcy.

However, creditor-spouses who cannot obtain an exception from discharge can still attempt to block the entire bankruptcy petition, even though they may then have to compete with other creditors.

If a bankruptcy petition is motivated by animosity toward an ex-spouse, the attempted discharge of marital debts may be in bad faith and subject to dismissal. A recent Colorado case stated the purpose behind this rule:

> [The] good faith requirement also comports with the bankruptcy court's role as a court of equity, where those seeking relief must approach the court with clean hands and an honorable purpose.[102]

A bankruptcy petition made in bad faith can be dismissed under two different provisions of the Code (discussed below). They display similar flexibility and scope, but differ procedurally. Dismissal of a petition due to bad faith focuses on the conduct and intent of the debtor-spouses at the time of the petition, not at the time the debt was incurred, as in the preceding sections.

The seminal case in this area is *In re Boyd*.[103] That Bankruptcy Court held that the Chapter 7 petition was filed in bad faith and for an improper purpose—to escape payments to the debtor's ex-spouse of pension benefits awarded at the time of divorce. The court based its finding on two grounds: (1) the petitioner had the ability to pay the debts and fund a reorganization under Chapter 13; and (2) the debtor's ex-spouse was the primary creditor. The court not only dismissed the petition, but awarded more than $22,000 in sanctions to be paid by the debtor and his attorney.[104]

Creditor's Motion to Dismiss

Any creditor can bring a motion to dismiss for bad faith under 11 U.S.C. § 707(a).[105] In *In re Hammonds*,[106] the court dismissed a bankruptcy petition under this provision. The debtor transferred all of his non-exempt assets to his wife on the eve of the bankruptcy without consideration, maintained a "not uncomfortable lifestyle" and was able to pay a substantial portion of the debts. The petition seemed to be directed at one particular creditor. The court summarized the principles on which it based its dismissal:

> Certain characteristics of a Chapter 7 case ripe for dismissal on grounds of bad faith are present in the instant case. Those characteristics include (1) one or few creditors in number; modest debt in amount relative to assets or income; (2) lack of candor and completeness in debtor's statement and schedules; (3) improper or unexplained transfers, or absence, of debtor's prepetition assets; (4) multiple case filings or other extraordinary procedural gymnastics; and (5) existence of a predominate dispute between debtor and a single creditor.[107]

If a debtor-spouse attempts to retain assets at the expense of the creditor-spouse, *Hammonds* seems directly applicable. This fact pattern may be quite common. A significant disparity develops between spouses following dissolution. The income of ex-wives tends to decline, while the opposite is true for ex-husbands.[108] This suggests that there may be a significant number of bankruptcy petitions vulnerable to challenge on the grounds of bad faith. If the *Hammonds* tests are met, and the bankruptcy petition dismissed, all debts, including marital ones, would remain enforceable.

Trustee's or the Court's Motion to Dismiss

Bankruptcy Code § 707(b) differs procedurally from § 707(a). Neither the creditor-spouse nor any party in interest can directly bring a motion to dismiss a bankruptcy petition under § 707(b).[109] Only the court itself, on its own motion, or the U.S. Trustee can bring such an action.[110] However, at least one jurisdiction has held that the trustee can entertain suggestions from creditors for the trustee to make a motion for dismissal for "substantial abuse."[111]

"Substantial abuse" on the part of the debtor under this section is interpreted similarly to bad faith and is applied to consumer debts—those incurred for "a personal, family, or household purpose."[112] In the author's opinion, the plain language of the statute encompasses marital debts.

Several cases that have dismissed bankruptcy petitions for bad faith/substantial abuse have done so in similar circumstances that may be summarized as follows: (1) an actual ability to pay the debts to be discharged; (2) an extravagant lifestyle on the part of the debtor; and (3) favoring certain creditors at the expense of others.[113] Those circumstances might well be found in an acrimonious marital dispute.

Recommendation

Creditor-spouses should scrutinize the circumstances of the debtor-spouse to determine whether the elements of bad faith/substantial abuse are present. If the record demonstrates a vendetta on the part of the debtor-spouse toward the creditor-spouse, or uncovers other elements of bad faith/substantial abuse, a creditor-spouse may be able to block the petition. Consequently, marital debts would remain enforceable. Since objections to discharge because of bad faith/substantial abuse depend on circumstances at the time of the bankruptcy pe-

tition, prophylactic measures are limited in value.

STATE COURT LITIGATION

In actions involving spousal support obligations, state courts of marital relations and bankruptcy courts have concurrent jurisdiction over whether or not marital obligations are in the nature of support and are thus nondischargeable.[114] Both courts have accepted this parallel jurisdiction.[115] Once a determination is made in state court, the Bankruptcy Court is collaterally estopped from reconsidering that issue. Similarly, a determination made in the Bankruptcy Court would be respected in a state forum.[116]

After a bankruptcy petition has been filed, an automatic stay prohibits proceedings in state court. A motion must first be filed for relief from the stay before proceeding in state court,[117] although the stay does not apply to the collection of support from property outside the bankruptcy estate, which may proceed.[118]

Another choice presents itself in cases of fraud. The bankruptcy courts have exclusive jurisdiction to decide whether a debt is dischargeable based on allegations of fraud or misrepresentation.[119] However, the underlying question of fraud can first be litigated in state court. That finding of fraud can then have a binding effect on the Bankruptcy Court's subsequent adjudication of the issue of nondischargeability. Collateral estoppel prevents relitigation of settled facts necessary to a determination of a final state court judgment.[120]

If a debtor-spouse attempts to discharge a property settlement that was entered into in reliance on assurances to the contrary, the creditor-spouse should consider filing an action in state court to determine if the debtor-spouse acted fraudulently. Leave from the automatic stay must first be obtained from the Bankruptcy Court.

In the case of *In re Hansen*,[121] the bankruptcy debtor was estopped from raising defenses to a claim of nondischargeability based on fraud. The debtor had previously confessed fraud as the defendant in a state court action.[122] Consequently, a state court that issues a judgment of fraud lays the foundation for a subsequent claim of nondischargeability in the Bankruptcy Court. Appeals of judgments of fraud from state court would ascend in the state system, rather than proceeding to the Bankruptcy Court as the court of appeal.[123]

Recommendation

Recourse to state court may be beneficial to litigants in disputes involving spousal support or alleged fraud. Attorneys may have more experience in the state forum. Also, the state court may be more familiar with the nuances of a decree of dissolution and be more sympathetic to enforcing such previous judgments. If counsel chooses state court as the forum, they should be sure to first apply to the Bankruptcy Court for relief from the automatic stay. In any case, enforcement of a nondischargeable support obligation can proceed directly against the post-petition property of the debtor.

POST-DISCHARGE REMEDIAL RELIEF

Even if marital debts have already been discharged, a creditor-spouse may still have some viable options that can offset marital resources lost through bankruptcy.

Modification of Maintenance

Although a discharge generally voids any existing judgments or financial obligations of the bankruptcy debtor, support obligations are one exception to the rule. Importantly, unless the parties to a decree of dissolution have explicitly agreed to preclude future modification,[124] spousal maintenance is subject to adjustment by the courts.[125] A discharge of obligations by a debtor-spouse may justify a reciprocal increase in maintenance to a creditor-spouse.

One Bankruptcy Court concluded: "A husband's bankruptcy discharge can, under appropriate circumstances, impact upon the needs of the wife and thus constitute the change in financial condition required for a modification of a support decree."[126] That court allowed reconsideration of a former maintenance award in view of the changed circumstances caused by the bankruptcy.[127]

State courts in other jurisdictions have consistently modified support awards following the bankruptcy of one of the parties.[128] For example, in the case of *In re the Marriage of Meyers*,[129] the divorce decree between the parties required the husband to pay jointly owed debts, hold the wife harmless from them and make payments on the wife's automobile. Four months later, the husband discharged his obligations and left the wife solely responsible for the debts. The court considered these changes sufficient to justify an increase in spousal maintenance to offset the effect of the bankruptcy.[130] Where a bankruptcy has a negative impact on the creditor-spouse, courts have often modified spousal maintenance to compensate.

The language in a decree of dissolution or separation agreement may increase the court's willingness to modify maintenance after bankruptcy. In *Ganyo v. Engen*,[131] the court increased maintenance to the recipient-wife after the husband had discharged his marital obligations to her. The court specifically cited its reliance on language in the decree of dissolution allowing the reevaluation of maintenance if either spouse petitioned for bankruptcy. In Colorado, modification of maintenance may occur even after the payment in full of any maintenance originally awarded.[132]

Equitable Liens

A court can impose an *equitable lien* on property of a marital debtor following discharge. This type of constructive trust has been used to prevent unjust enrichment when a debtor discharged marital debts. In *Leyden v. Citicorp Industrial Bank*,[133] a wife quit-claimed her interest in the marital home and received a promissory note at dissolution. The husband discharged the note in bankruptcy. The state court imposed an equitable lien on the former marital home for the amount of the promissory note, in favor of the wife. The lien was enforceable even though no security instrument had been created at dissolution.[134]

This court held that the intention of the court of dissolution was relevant, but not dispositive. It also noted certain limitations of the equitable lien doctrine: (1) there must be a specific *res* to which the debt attaches (here, the marital home); and (2) the lien would not have been good against a bona fide purchaser. In *Leyden*, the husband mortgaged the marital home, and the mortgagee sold the property after foreclosure. However, the wife had recorded the original decree of dissolution and filed a *lis pendens* when she sued for the lien. Accordingly, the court held that the lien was enforceable even against subsequent parties in interest.[135]

Recommendation

Practitoners should insert language in any property settlement which allows modification of both maintenance and property settlement in case of bankruptcy. If the discharge of marital debts disadvantages a creditor-spouse, ask the state court to initiate, increase or resume maintenance as compensation. If a discharged marital debt relates to a specific property, attempt to impose an equitable lien.

CONCLUSION

Domestic relations practice demands some familiarity with bankruptcy law. Interestingly, the nexus between the two fields is primarily state property law. Even the rarely used principles of future interests/defeasible fees are relevant to the common needs of litigants. This article highlights the interdependence of these areas and accentuates the windows of opportunity for addressing the potentially disruptive effects that a bankruptcy petition may have on dissolution proceedings and judgments.

Although many general practitioners may feel qualified to deal with these issues, it would be prudent to consult a bankruptcy specialist in cases involving any particularly complex or acrimonious circumstances. This is all the more true because of the unsettled nature of the law in this area, which changes almost day-to-day.

The drafters of the Bankruptcy Code may not have fully appreciated the nuances of the Code's impact on domestic relations law.[136] There needs to be a better equilibrium between these fields of law that more closely reflects a public policy to safeguard family obligations.

NOTES

1. 11 U.S.C. § 727(a)(10); 11 U.S.C. § 524(c).

2. The Code is divided into eight chapters, 11 U.S.C. § 101, *et seq*. Chapters 1, 3 and 5 generally apply to all petitions for bankruptcy; Chapter 7, the liquidation of debts; Chapter 9 , municipal reorganizations; Chapter 11, general and business reorganizations; Chapter 12, adjustment of farm debts; Chapter 13, adjustment of debts of someone with regular income. Chapter 7 is emphasized in this article because it allows the complete elimination of unsecured or undercollateralized obligations. As as result, it has had the most damaging impact on the rights of creditor-spouses.

3. CRS § 14-10-107(4)(b).

4. *In re Questions Submitted by the United States District Court*, 517 P.2d 1331, 1332 (Colo. 1974), *aff'd*, *Imel v. United States*, 523 F.2d 853, 855 (10th Cir. 1975); CRS § 14-10-113(1).

5. CRS § 14-10-113(2)(a). *See In re the Marriage of Campbell*, 599 P.2d 275, 276 (Colo.App. 1976).

6. The U.S. Constitution confers exclusive authority on the federal government to make bankruptcy laws. U.S. Const. Art. I, § 8, cl. 4. *See also Perez v. Campbell*, 402 U.S. 637, 654-656 (1971).

7. 11 U.S.C. § 544(a)(3); *In re Harms*, 7 B.R. 398, 400 (Bankr. D.Colo. 1980).

8. *In re Fischer*, 67 B.R. 666, 669 (Bankr. D.Colo. 1986).

9. See text accompanying notes 32-36, *infra*.

10. *Loye v. Denver United States National Bank*, 341 F.2d 402, 403 (10th Cir. 1965); *In re Harbor Pointe Office Park, Ltd., I*, 83 B.R. 44, 49 (Bankr. D.Colo. 1988); *In re Bandell Investments, Ltd.*, 80 B.R. 210, 213 (Bankr. D.Colo. 1987).

11. *Harbor Pointe*, *supra*, note 10 at 47; *In re Harms*, *supra*, note 7 at 400.

12. CRS § 38-35-109; *Grynberg v. City of Northglenn*, 703 P.2d 601, 602-603 (Colo. App. 1985).

13. *Eastwood v. Shedd*, 442 P.2d 423, 424 (Colo. 1968).

14. See text accompanying notes 32-36, *infra*.

15. C.R.C.P. Rule 105(f); CRS § 38-35-110.

16. *Hammersley v. District Court*, 610 P.2d 94, 95 (Colo. 1980); *Perry Park Country Club v. Manhattan Bank*, 813 P.2d 841, 843 (Colo. App. 1991).

17. *Clopine v. Kemper*, 344 P.2d 451, 454 (Colo. 1959).

18. C.R.C.P. Rule 105(f)(1).

19. *Supra*, note 7.

20. The petition was filed under Chapter 11, but the strong arm powers for both Chapters 7 and 11 are set forth in the same provision of the Code. 11 U.S.C. § 544.

21. *In re Harms*, *supra*, note 7 at 400. *See also Sky Harbor v. Jenner*, 435 P.2d 894 (Colo. 1968) (bona fide purchaser cuts off the rights of an unrecorded transferee).

22. *Supra*, note 8.

23. *Id.* at 667.

24. *Id.* at 669. *See also Leyden v. Citicorp Indus. Bank*, 782 P.2d 6, 13 (Colo. 1989) (*lis pendens* allowed enforcement of marital lien against subsequent purchaser).

25. 144 B.R. 510 (D.Colo. 1992). The case is presently on appeal to the 10th Circuit Court of Appeals.

26. *Id.* at 514-15.

27. *Id.* Compare and contrast *In re Glass*, 138 B.R. 272, 273 (Bankr. D.Colo. 1992) (properties awarded to wife excluded from bankruptcy estate by operation of law). *Glass* was overturned by Judge Kane in *Ebel*. *See In re the Marriage of Ebel*, 22 Colo.Law 2436 (Nov. 1993)(App. No. 90CA1864, *annc'd* 9/9/93) (affirming the property division by the trial court).

28. 922 F.2d 1513, 1513-1515 (10th Cir. 1991). The Court of Appeals relied on *Brad-*

bury v. Green, 251 P.2d 807, 809 (OK 1952) with respect to Oklahoma law.

29. *Id.* at 1513-15.

30. *Arnove v. First Federal Sav. & Loan*, 713 P.2d 1329, 1331 (Colo.App. 1991).

31. *Nile Valley Fed. S & L v. Security Title*, 813 P.2d 849, 852 (Colo.App. 1991).

32. 11 U.S.C. § 547.

33. *Id.*

34. 11 U.S.C. § 101(30). *See also In re Dews*, 152 B.R. 982, 984-985 (D.Colo. 1993) (challenge to transfer of partnership interest to ex-spouse rejected because more than one year had elapsed). *See generally In re Polk*, 125 B.R. 293, 295 (Bankr. D.Colo. 1991) (determination as to whether trust was an insider could not be made as a matter of law in this case).

35. 11 U.S.C. § 548(a). *See, e.g., In re Lange*, 35 B.R. 579, 583, 586 (Bankr. E.D.Mo. 1983) (transfer of one-half interest in marital home by divorce decree was voidable). *Compare* The Uniform Fraudulent Transfer Act, CRS § 38-8-101.

36. 11 U.S.C. § 548(c) protects a transferee who takes for value and in good faith from a claim of fraudulent transfer. *See, e.g., Britt v. Damson*, 334 F.2d 896, 901, 903 (9th Cir. 1964)(transfer of marital home by divorce decree was for adequate consideration because of other property transferred); *In re Falk*, 88 B.R. 957, 962-968 (Bankr. D.Minn. 1988) (debtor-spouse estopped by dissolution decree from claiming fraudulent transfer).

37. For an exhaustive treatment of fraudulent and preferential transfers, *see* King and Cook, *Creditors' Rights, Debtors' Protection and Bankruptcy* (N.Y.: Matthew Bender, 1989) at 333-438 and 890-961.

38. If a creditor-spouse files a *lis pendens* without valid grounds for doing so, he or she may be liable for malicious prosecution, *Westfield Dev. v. Rifle Inv. Assoc.*, 786 P.2d 1112, 1118 (Colo. 1990), or for slander of title under CRS § 38-35-109(3).

39. The recording of court decrees is authorized under Colorado law. CRS § 38-35-109.

40. *In re Marriage of Grubb*, 745 P.2d 661, 665 (Colo. 1987) and CRS § 14-10-113(2); *In re Marriage of Gallo*, 752 P.2d 47, 54 (Colo. 1988) and CRS § 14-10-113(2); 5 U.S.C. § 8345(j)(1); 10 U.S.C. § 1408.

41. 26 U.S.C. §§ 72, 401, 402, 1054, 6057; 29 U.S.C. §§ 1025, 1052-1056.

42. The requirements for a Q.D.R.O. are set forth in 26 U.S.C. § 414(p).

43. 29 U.S.C. §§ 401, 414; 29 U.S.C. § 1056.

44. As defined by 11 U.S.C. § 541.

45. *In re Starkey*, 116 B.R. 259, 265 (Bankr. D.Colo. 1990); 11 U.S.C. § 522(b)(2)(A).

46. Some municipalities have retirement plans that cannot be divided by means of a Q.D.R.O., pursuant to exceptions found in 26 U.S.C. § 411(e)(1)(A) and 26 U.S.C. § 1003 (b)(1). *See generally* Douglas, "Property Settlement 'QDRO's' and Money Purchase Plans," 20 *The Colorado Lawyer* 2077 (Oct. 1991).

47. 11 U.S.C. § 523(a)(4).

48. *In re France*, 138 B.R. 968, 971 (D.Colo. 1992) (no fiduciary relationship imposed by Worker's Compensation Act on employer).

49. *In re Anzman*, 73 B.R. 156, 166-167 (Bankr. D.Colo. 1986) (no fiduciary duty imposed on merchant toward wholesaler).

50. 100 B.R. 861, 862 (Bankr. S.D.Tex. 1989).

51. *Id.* at 864.

52. *In re Romero*, 535 F.2d 618, 621 (10th Cir. 1976).

53. 11 U.S.C. § 523(a)(4).

54. *In re Schwenn*, 126 B.R. 351, 353 (D. Colo. 1991); *In re Thorsen*, 98 B.R. 527, 529 (Bankr. D.Colo. 1989); *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th Cir. 1986).

55. *Schwenn, supra*, note 54 at 353.

56. 653 P.2d 728, 732 (Colo. 1982).

57. *Marshall v. Grauberger*, 796 P.2d 34, 37 (Colo.App. 1990).

58. CRS § 14-10-107(4)(b).

59. *Schwenn, supra*, note 54 at 353.

60. *In re Marriage of Gallo, supra*, note 40 at 52-53. *See also Conner v. Conner*, 468 N.Y.S.2d 482, 490 (A.D.2d 1983) ("partnership theory prevails in the distribution of the fruits produced through the efforts of either spouse during marriage").

61. 11 U.S.C. § 506; *Chandler Bank of Lyons v. Ray*, 804 F.2d 577, 579 (10th Cir. 1986) (lien on automobile that predated bankruptcy petition was still enforceable after discharge).

62. CRS § 38-27-101.

63. CRS § 42-6-101.

64. CRS § 14-10-118(2).

65. 11 U.S.C. § 506; *United Savings Assn. v. Timbers of Inwood Forrest Associates, Ltd.*, 484 U.S. 365, 371 (1988). *See also In re Hermansen*, 84 B.R. 729, 734 (Bankr. D.Colo. 1988).

66. *Nobelman v. American Savings Bank*, 113 S.Ct. 2106, 2109 (1993). *See also In re Sloan*, 56 B.R. 726, 726 (Bankr. D.Colo. 1986).

67. *See* CRS § 13-54-107 and 11 U.S.C. § 522(b)(2)(A).

68. *In re Weiss*, 51 B.R. 224, 226 (D.Colo. 1985). Colorado has opted out of the federal exemption provisions and substituted its own, CRS § 13-54-107; *In re Leonard*, 866 F.2d 335, 337 (10th Cir. 1989). The Colorado homestead exemption, for owner-occupied homes, is currently $30,000, CRS § 38-41-201. Other exemptions are listed in CRS § 13-54-102. Exemptions apply against a bankruptcy trustee as well as a creditor. *Baker v. Allen*, 524 P.2d 922, 925 (Colo.App. 1974).

69. 11 U.S.C. § 522(f) allows avoidance of certain liens that impair the exemptions set forth under CRS § 13-54-102.

70. *Compare In re Donahue*, 862 F.2d 259, 266, 266 n.10 (10th Cir. 1988) (unavoidable consensual lien implied by dissolution decree) *with Maus v. Maus*, 837 F.2d 935, 937 (10th Cir. 1988) (avoidable judicial lien implied by dissolution decree).

71. 111 S.Ct. 1825 (1991).

72. *Id.* at 1830-31.

73. 11 U.S.C. § 522(f).

74. *Farrey, supra*, note 71 at 1831.

75. *See generally Restatement of Property (1936)*, §§ 44-58 (estates in fee simple determinable); §§ 153-240 (future interests). *See also* Campbell, "Future Interests," 2A *Colorado Methods of Practice* 92 (St. Paul: West Publ., 1991).

76. *School District No. 6, County of Weld v. Russell*, 396 P.2d 929, 931-932 (Colo. 1964) (title to land, conveyed exclusively for use as a school, reverted to heirs of grantor when it ceased to be used for that purpose). This type of estate is also referred to as a *fee simple subject to a power of termination* in the *Restatement of Property* § 155 (1936).

77. *Nielsen v. Woods*, 687 P.2d 486, 489 (Colo.App. 1984).

78. CRS § 38-30-107. *See also Farmers Reservoir & Irr. Co. v. Sun Production Co.*, 721 P.2d 1198, 1200 (Colo.App. 1986).

79. 807 P.2d 1241, 1244 (Colo.App. 1991) (property reconveyed to grantor because royalties were not paid).

80. *Id.* at 1244.

81. *Id. See also Arnove, supra*, note 30 at 1331.

82. *Kanarado Mining & Development Co. v. Sutton*, 539 P.2d 1325, 1328 (Colo.App. 1975). *See also* CRS § 13-80-101.

83. *Jelen, supra*, note 79 at 1244. *See also Cole v. The Colorado Springs Co.*, 381 P.2d 13, 17-18 (Colo. 1963).

84. The scope and effect of discharge are set forth in 11 U.S.C. § 524. The exception to discharge of support obligations is set forth in 11 U.S.C. § 523(a)(5). *See generally* Annot., "Debts for Alimony, Maintenance, and Support as Exceptions to Bankruptcy Discharge, Under § 523(a)(5) of Bankruptcy Code of 1978 (11 USCS §§ 523(a)(5))," 69 A.L.R. Fed 803 (1984 & Supp. 1992).

85. *In re Yeates*, 807 F.2d 874, 877 (10th Cir. 1986).

86. *See, e.g., In re Teter*, 14 B.R. 434, 436 (Bankr. N.D.Tex. 1981) (obligation to employ an ex-spouse construed as support); *In re Mattern*, 33 B.R. 566, 569 (Bankr. S.D.Ala. 1983) (obligation to pay all outstanding family bills construed as support); *In re Jackson*, 27 B.R. 892, 893 (Bankr. W.D.Ky. 1983) (prenuptial agreement construed as support). Attorney's fees can also be considered in the nature of support, and be nondischargeable. *In re Will*, 116 B.R. 254, 256 (D.Colo. 1990) (fees for work on support issue are nondischargeable); *Accord In re the Marriage of Barber*, 811 P.2d 451, 454 (Colo.App. 1991).

87. *In re Sampson*, 142 B.R. 957, 959 (D. Colo. 1992).

88. *In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987); *Samson, supra*, note 87; *Yeates, supra*, note 85.

89. *See In re Goin, supra*, note 88.

90. *Id.* at 1392-1393; *In re Yeates, supra*, note 88 at 877-878; *In re Sampson, supra*, note 88 at 959-961. *See also Shaver v. Shaver*, 736 F.2d 1314, 1316-1317 (9th Cir. 1984).

91. 3 F.3d 35, 38-39 (2d Cir. 1993).

92. *Sylvester v. Sylvester*, 865 F.2d 1164, 1166 (10th Cir. 1989). *See also In re McCray*, 62 B.R. 11, 12 (Bankr. D.Colo. 1986). The rationale for this position has been stated by the courts: "It is appropriate for bankruptcy courts to avoid incursions into family law matters 'out of consideration of court economy, judicial restraint, deference to our State Court brethren and their established expertise in such matters.'" *In re McDonald*, 755 F.2d 715, 719 (9th Cir. 1985).

93. The court in *Carver v. Carver*, 954 F.2d 1573, 1579 (11th Cir. 1992), stated the reasoning behind this exception: "It is important that '[t]he Bankruptcy Code . . . not be used to deprive dependents, even if only temporarily, of the necessities of life.'"

94. 11 U.S.C. § 523(a)(2)(A). A preponderance of the evidence standard applies to exceptions from dischargeability under § 523(a). *Grogan v. Garner*, 111 S.Ct. 654, 659 (1991). The same standard applies to objections to discharge under 11 U.S.C. § 727. *In re Serafini*, 938 F.2d 1156, 1157 (10th Cir. 1991).

95. *In re Wade*, 43 B.R. 976, 980 (Bankr. D.Colo. 1984). Fraudulent intent can be established by circumstantial evidence or inferred from a course of conduct. *Farmer's Co-op. Ass'n v. Strunk*, 671 F.2d 391, 395 (10th Cir. 1982).

96. *Edelkind v. Alderman*, 106 B.R. 315 (Bankr. N.D.Ga. 1989).

97. *Id.* at 318.

98. *In re Baldwin*, 578 F.2d 293, 294 (10th Cir. 1978).

99. *Id.* This was a pre-Code case construing the precursor to the present provision, 11 U.S.C. § 523(a)(2)(A). Even where there has not been an explicit promise to refrain from the discharge of debts through bankruptcy, at least one court has held that oral communications and even silence can constitute "false pretenses." A debt induced in this manner can also be nondischargeable. *See In re Dunston*, 117 B.R. 632, 641 (Bankr. D.Colo. 1990)(loans from mother to son induced by unwritten false understanding were nondischargeable).

100. 11 U.S.C. § 727(a)(10); 11 U.S.C. § 524 (c).

101. *In re Minor*, 115 B.R. 690, 696 (D. Colo. 1990) (breach of promise not to seek discharge of judgment insufficient to deny discharge of debt).

102. *In re Hammonds*, 139 B.R. 535, 541 n.23 (Bankr. D.Colo. 1992).

103. 143 B.R. 237 (Bankr. C.D.Cal. 1992).

104. *Id.* at 239-242.

105. 11 U.S.C. § 707(a) provides the grounds for dismissal "for cause." Good faith is not explicitly mentioned, but the courts have held that "good faith is an implicit jurisdictional prerequisite to the filing of a case under the Bankruptcy Code." *See, e.g., In re Hammonds, supra,* note 102 at 541.

106. *In re Hammonds, supra*, note 102.

107. *Id.* at 542-543. The court made the distinction between an "honest but unfortunate" debtor who is deserving of the protection afforded by bankruptcy and an individual not seeking a "fresh start" but actually "requesting the court to permit him to continue living 'like a king.'" *Id.* at 541, 543.

108. *See* Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (N.Y.: Macmillan, 1985) at 337-343 n.2); Garrison, "The Economics of Divorce: Changing Rules, Changing Results," in Sugarman and Hill, eds., *Divorce Reform at the Crossroads* (New Haven: Yale Univ. Press, 1990) at 76 n.5.

109. 11 U.S.C. § 707(b).

110. *In re Frisch*, 76 B.R. 801, 803 (Bankr. D.Colo. 1987).

111. *In re Clark*, 927 F.2d 793, 797 (4th Cir. 1991); *In re Busbin*, 95 B.R. 240, 242 (Bankr. N.D.Ga. 1989).

112. 11 U.S.C. § 101(8).

113. *In re Frisch, supra,* note 110 (ability to pay debts and egregious circumstances grounds for dismissal); *Matter of Ploegert*, 93 B.R. 641, 644 (Bankr. N.D.Ind. 1988) (dismissed where debtor had ability to pay debts but kept extravagant lifestyle); *In re Dubberke*, 119 B.R. 677, 681 (Bankr. S.D.Iowa 1990) (dismissed where debtor had ability to pay unsecured creditors and favored certain creditors).

114. Bankruptcy courts have concurrent jurisdiction with "any appropriate non-bankruptcy forum," in order to determine dischargeability. Bankruptcy Rule 4007, Advisory Committee Note (1973).

115. *In re the Marriage of Barber, supra*, note 86 at 454-455 (determining the nondischargeability of child support obligation and attendant attorney's fees); *Accord In re Aurre*, 60 B.R. 621, 624-627 (Bankr. S.D.N.Y. 1986).

116. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 463 (1982); *Goss v. Goss*, 727 F.2d 599, 604 (10th Cir. 1983). *See* 28 U.S.C. § 1738 (federal courts must give full faith and credit to state court judgments). *See also Barber, supra*, note 86 at 455.

117. 11 U.S.C. § 362 (d)(1). *See also* Local Rule of Bankruptcy Procedure, District of Colorado, L.B.F. 407 (effective July 1, 1993). Motions for relief of the automatic stay can be analyzed under the standards set forth by *In re Peterson*, 116 B.R. 247, 249-250 (D.Colo. 1990). *See also In re Claughton*, 140 B.R. 861, 867-870 (Bankr. W.D.N.C. 1992) (relief granted to allow state court to complete divorce).

118. 11 U.S.C. § 362(b)(2). These obligations can be enforced without delay against post-petition earnings and property acquired 180 days after petition. 11 U.S.C. § 541(a)(5).

119. *Goss, supra*, note 116.

120. *Klemens v. Wallace*, 840 F.2d 762, 765 (10th Cir. 1988).

121. 131 B.R. 167, 170 (D.Colo. 1991).

122. "The requirements to prove common law fraud in Colorado are the same as the elements to establish non-dischargeability under [11 U.S.C.] § 523. . . ." *Hansen, supra*, note 121 at 170.

123. *In re Aurre, supra*, note 115 at 627.

124. CRS § 14-10-112(6). However, child support is always subject to modification. CRS § 14-10-112(6); *Brown v. Brown*, 283 P.2d 951, 957 (Colo. 1955).

125. The standard for modification of spousal maintenance is: "Upon a showing of changed circumstances so substantial and continuing as to make the [present] terms unconscionable." CRS § 14-10-122. *See also Sinn v. Sinn*, 696 P.2d 333, 335 (Colo. 1985).

126. *In re Danley*, 14 B.R. 493, 495 (Bankr. D. N.M. 1981). *See also In re McCracken*, 94 B.R. 467, 470 (Bankr. S.D.Ohio 1988) ("The bankruptcy statute . . . expressly contemplates the adjustment of alimony and support obligations in the event of bankruptcy").

127. The court concluded that support obligations are the kind of exception to discharge that "Congress considered more important than the fresh start [provisions of the Bankruptcy Code]." *Danley, supra*, note 126 at 495.

128. *See Dorr v. Newman*, 785 P.2d 1172, 1179 (Wyo. 1990); *Beckstead v. Beckstead*, 663 P.2d 47, 48 (Utah 1983); *In re the Marriage of Clements*, 184 Cal.Rptr. 756, 761 (1982). *See generally* Annot., "III. Increase in Support Award, § 4. Discharge of property settlement debt to dependent spouse," 87 A.L.R. 4th 359.

129. 773 P.2d 118, 121 (Wash.App. 1989).

130. *Id.*

131. 446 N.W.2d 683, 686 (Minn.App. 1989).

132. *Aldinger v. Aldinger*, 813 P.2d 836, 840 (Colo.App. 1991).

133. 782 P.2d 6 (Colo. 1989).

134. *Id.*

135. *Id.* at 9-13.

136. This has been noted by at least one court. *See Sampson, supra*, note 87 at 959 n.1.