

2017 Convention
**Champions
for Justice**

10. Bankruptcy – How It Affects Family Law Cases

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**Virginia Trial Lawyers Association
Annual Convention
March, 2017**

Bankruptcy - How it Affects Family Law Cases

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I. The Automatic Stay

Upon filing for bankruptcy relief under any Chapter an automatic stay is imposed pursuant to 11 U.S.C. §362. The stay prevents action being taken against the debtor until such time as he may be discharged in bankruptcy, the bankruptcy case is dismissed or relief from stay is granted, including (a) commencing or continuing claims against the debtor that arose before the filing of the bankruptcy action, (b) enforcing a judgment taken before the commencement of the bankruptcy against the debtor or assets of his bankruptcy estate, (c), moving to take possession or control of property belonging to the bankruptcy estate, (d) any act in furtherance of a lien against property of the bankruptcy estate, (e) any act to enforce a lien against the debtor's property that arose before the commencement of the bankruptcy, (f) any act to collect a claim against the debtor that arose before the commencement of the bankruptcy, (g) setoff any debt that owing to the debtor that arose before the commencement of the bankruptcy, and (h) commencing or continuing a proceeding before the United States Tax Court regarding tax liabilities of a corporation or individual for a tax period ending before entry of an order for relief from stay.

The automatic stay does not apply to the commencement or continuation of a civil action or proceeding (a) for the establishment of paternity, (b) for the establishment or modification of an order for domestic support obligations, (c) concerning child custody or visitation, (d) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate, (e) regarding domestic violence (f) for the collection of a domestic support obligation from property that is not property of the estate, (g) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute, (h) the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, (i) the reporting of overdue support owed by a parent to any consumer reporting agency, (j) the interception of a tax refund, or (k) the enforcement of a medical obligation.

If the obligation of the debtor is nondischargeable in bankruptcy, then the automatic stay does not apply and the creditor may pursue actions against the debtor in state court without obtaining relief from stay.

II. Nondischargeable Obligations

Pursuant to 11 U.S.C. §523(a)(5), Domestic Support Obligations are nondischargeable in bankruptcy. A Domestic Support Obligation is a debt that (a) accrues before, on, or after the date of the order of stay, including interest that accrues on that debt, (b) is owed to or recoverable by a spouse, former spouse, or child of the debtor or a governmental unit, (c) is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) established before, on, or after the date of the commencement of the stay (d) by a separation agreement, divorce decree, or property settlement agreement, an order of a court of record or a determination made in accordance with applicable nonbankruptcy law by a governmental unit and (e) which is not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the obligee for the purpose of collecting the debt. 11 U.S.C. § 101(14A).

Merely describing an obligation as a DSO is not binding on the bankruptcy court. The court will look to the actual nature of the obligation to determine whether it is a DSO. *In Re: Cummings*, 244 F.3d 1263.

Attorney fees awarded to a spouse or former spouse in a support proceeding are generally not going to be dischargeable in bankruptcy because it is in the nature of support, even if the fees are to be paid directly to the law firm representing the spouse. However, where the fees are incurred for such thing as bad faith conduct during litigation may be discharged because they were not intended to be in the nature of support.

Property Settlement Debts are nondischargeable in a Chapter 7 bankruptcy under 11 U.S.C. §523(a)(15). They can be discharged in a completed Chapter 13 payment plan, however. Property Settlement Debts are owed (a) to a spouse, former spouse or child of the debtor, (b) are not otherwise determined to be a DSO, and (c) are 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 state court.

III. Relief from Stay

A creditor may obtain relief from the stay to proceed certain circumstances by filing a Motion for Relief From Stay in the bankruptcy court. Where a spouse is seeking equitable distribution of the marital estate, she is considered a creditor of the debtor spouse and must obtain relief from stay before proceeding in equitable distribution. Similarly, where an obligee of a support obligation seeks to collect a domestic support

obligation by taking property that otherwise is the property of the bankruptcy estate, relief from stay must be obtained before the taking can occur.

IV. Priority

Unsecured claims for domestic support obligations are entitled to first priority over all other unsecured claims. 11 U.S. §507. However, administrative expenses of the bankruptcy trustee are paid before the DSO.

V. Chapter 13 Relief

Chapter 13 plans may include a DSO, but they must be paid in full through the payment plan and the debtor must certify that all amounts due on the obligation have been paid before they can obtain discharge in Chapter 13. 11 U.S.C. §1328(a).

Property Settlement Debts are dischargeable in a Chapter 13 Plan under certain circumstances. They are not dischargeable unless the debtor shows that he "does not have the ability to pay such debt from income or property ... not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor" or that "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to ... a former spouse...." Metzger v. Hardey, 2005 Bankr. LEXIS 2030 E.D. Va. "With regard to ability to pay, the test is not whether the debtor has the ability to pay the debt as of a particular time -- such as the date of trial -- but whether the debtor can pay the debt over time. A debtor is able to pay if, 'after taking into account all reasonably necessary living expenses of the debtor and his or her dependents, there exists disposable income from which the debt could be paid.'" Id. "In applying the balancing test, courts consider the totality of the circumstances, including the income and expenses of both parties, whether the nondebtor spouse is jointly liable on the debts, the number of dependents, the nature of the debts, the reaffirmation of any debts, the nondebtor spouse's ability to pay, and whether the debt can actually be collected from the nondebtor spouse." Id.