
THE INTERSECTION OF DIVORCE & BANKRUPTCY
FROM MATRIMONY TO ACRIMONY

WHAT ARE COURTS TO DO WHEN DIVORCE AND BANKRUPTCY COLLIDE?



MATTERS NOT STAYED BY FILING BANKRUPTCY

- Proceedings to establish paternity
- Proceedings to establish or modify a DSO
- Proceedings regarding child custody or visitation
- Divorce proceedings
- Proceedings regarding domestic violence
- Certain methods used to collect DSOs
- Criminal contempt proceedings

COLLECTION OF DSOS

- Withholding income for payment of DSO
  - Code requires wage withholding order, not just DSO. *In re DeSouza*, 493 B.R. 669 (B.A.P. 1st Cir. 2013)
  - Must garnish wages, not bank account. *In re Ojiegbei*, 512 B.R. 513, 524 (Bankruptcy. D. Md. 2014)
  - Post-petition garnishment can violate terms of confirmed plan. *Fla. Dept. of Revenue v. Gonzalez (In re Gonzalez)*, 832 F. 3d 1251, 1258 (11th Cir. 2016); *In re Gellington*, 363 B.R. 497, 501-02 (Bankr. N.D. Tex. 2007)

COLLECTION OF DSOS

- Withholding, suspending or restricting certain licenses
- Reporting overdue support to a credit bureau
- Enforcing a medical obligation
- Intercepting a tax refund
  - This can violate the terms of a confirmed plan. *Fla. Dept. of Revenue v. Gonzalez (In re Gonzalez)*, 832 F. 3d 1251 (11th Cir. 2016).

COMMENCEMENT OR CONTINUATION OF CRIMINAL CONTEMPT PROCEEDING

- Generally bankruptcy courts should not interfere with state court criminal proceedings unless the charges are an attempt to collect a debt.
- Criminal contempt is punitive and imposed to uphold the dignity of the court
- Civil contempt coerces compliance with a court order or compensates the complainant

DIVISION OF MARITAL PROPERTY IS STAYED

- Federal courts have exclusive jurisdiction over property of the bankruptcy estate
- Includes all property titled in the debtor's name at the time of the bankruptcy filing.

DISCHARGEABILITY OF DEBTS FROM A DOMESTIC PROCEEDING

- In Chapter 7, 11, and 12, debts arising from a domestic proceeding are non-dischargeable
- In a Chapter 13, the debtor can discharge any debt that is not a DSO if the debtor makes all plan payments and does not receive a hardship discharge.
- No time limit for bringing dischargeability action for debts arising from a domestic proceeding.
- Bankruptcy court has concurrent jurisdiction with state court to determine dischargeability

DSO OR PROPERTY SETTLEMENT?

- Matter of federal bankruptcy law
- Court not bound by designation of a debt in a settlement agreement or divorce decree
- Courts look at intent of parties at time of divorce
- If agreement is ambiguous, Courts can look at extrinsic evidence to determine intent

FACTORS CONSIDERED BY COURTS TO DECIDE DSO V. PROPERTY SETTLEMENT WHERE THERE IS TRIVIAL OR NO ALIMONY

- Disparity in earning power of parties
- Parties' business opportunities
- Future need of spouse who receives payments
- Relative physical condition of the parties
- Recipient's educational background
- Benefits innocent spouse would have received had marriage continued

FACTORS CONSIDERED BY COURT WHERE AGREEMENT IS AMBIGUOUS AND THERE IS ALIMONY

- Whether the obligation fell within the property settlement or support obligation provisions of the divorce decree
- Whether the obligation ceases on debtor's death
- Whether the ex-spouse could assign the obligation
- Whether the obligation could be modified based on a change of circumstances
- Whether the payments were made over time as opposed to in one lump sum

EFFECT OF NON-PAYMENT OF DSO

- Court cannot confirm a plan if post-petition DSO not current
- Debtor subject to conversion or dismissal if post-petition DSO not current
- Chapter 12 and 13 debtors cannot receive discharge if post-petition DSO not current

DIVORCE DURING REORGANIZATION

- Should debtors remain in chapter 13?
- If so, how will plan be funded?
- Should case be severed and new counsel employed by each debtor?
- If severed, which debts will be paid in each case?
- Remember, any transfer of assets per property settlement agreement requires bankruptcy court approval

BANKRUPTCY-PROOF YOUR DIVORCE

- Eliminate debt by selling joint assets
- Assign debt to the spouse who is contractually liable
- Avoid future equalizing payments
- Secure any future performance with a lien

➢ SCENARIO #1

- Karen and Josh are in a contentious divorce.
- Josh ordered to pay mortgage, medical insurance and half of medical expenses for children, school and daycare expenses, insurance on cars, yard maintenance, Karen's college tuition, and $2,500 in attorney fees.
- Josh did not pay and was held in contempt by chancellor.
- Forensic accounting determined Josh was hiding or disposing of assets.
- Josh filed chapter 7 and then filed a suggestion of bankruptcy in chancery court.
- Chancery court issued show cause, entered order freezing $50,000 from a stock sale and directed Josh to file a motion for relief from stay in bankruptcy court to allow chancery court to proceed with divorce.
- The rest of the story…

SCENARIO #2

Sally and Joe decided not to hire an attorney to assist them with their divorce, but to do it themselves. They went to the Chancery Clerk's office and obtained the Irreconcilable Differences divorce packet, paid the filing fees and filed their paperwork, including their UCCR 8.05 financial declarations. On the hearing date, they appeared to present the paperwork to the Judge to obtain his signature on the Judgment of Divorce, both having taken off work to do so. Everything appeared to be in order.

Then, one of the following happens:

A. The Judge was about to sign the Judgment, when he noticed something under "installment payments" on Joe's 8.05: "Bankruptcy payment."

B. The Judge asked the parties if they knew they were entitled to have an attorney review their paperwork. Both nodded, and Joe said, "I can't afford one – maybe once I get my bankruptcy stuff settled."

SCENARIO #3

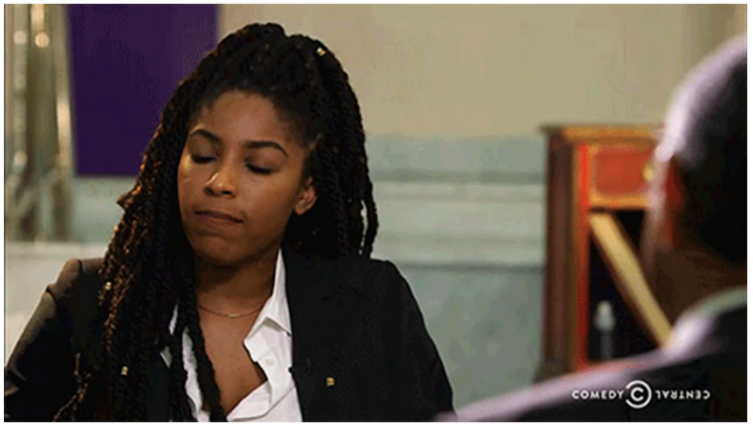
- After two years in litigation, Mitch and Cassie's divorce is finally set for trial.
- Trial begins and after a few other witnesses, Cassie is called as an adverse witness by Mitch.
- After a series of introductory questions, Mitch's attorney asks Cassie why she thinks Mitch is not a good father, to which she replies, "Other than the fact that he left us high and dry? Well, let me see, it could be because he hasn't paid half of the child support he was supposed to in the last year and a half. Or the house payment. I tried to keep up without it, but I finally just gave up and filed bankruptcy."

The Fallout…

SCENARIO #3

THE JUDGE:







SCENARIO #3

THE LAWYERS:

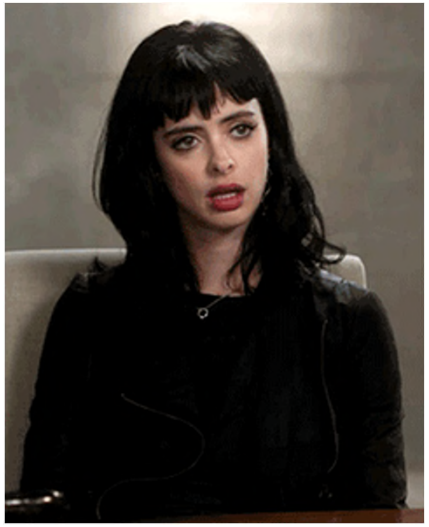






SCENARIO #3

THE LAW CLERK:







SCENARIO #4

- Cynthia and Lipton were married in 1992 and had two children
- They divorced in 2011
- Property Settlement Agreement:
  - Cynthia has custody of children
  - Lipton pays child support of $600/month
  - Cynthia gets title to house and pays first mortgage
  - Lipton pays second mortgage – only he is personally liable on debt
  - Parties waived alimony
- At time of divorce, Lipton made $61,895 as a lineman and Cynthia made $9,454 as a school bus attendant
- Is the second mortgage a DSO or property settlement?

SCENARIO #5

- Tom and Stephanie were married for 36 years
- They were divorced in 2010
- Property Settlement Agreement provided:
  - Stephanie remains in the home
  - Tom pays indebtedness on home and quit claims it to Stephanie
  - Tom pays alimony of $1200 per month until Stephanie reaches age 65

SCENARIO #5

D. **Bankruptcy and Hold Harmless Agreement:**

With respect to the parties' responsibility for the payment of those certain debts and liabilities and their obligations to hold each other harmless for payment thereof, as any such liabilities and obligations are described herein, the parties understand and agree that any such obligations are in the form of spousal support and are non-dischargeable debts under the Bankruptcy Code and are spousal support and in the event that either shall hereafter file for bankruptcy under any chapter of the code, they shall reaffirm any debt they have agreed to pay by the terms and conditions of this document, this obligation being part of the financial support settlement between the parties.

- Is the provision regarding the house a support obligation or property settlement?

SCENARIO #6

- James and Tiffany were married for less than three years
- Both parties were employed at the time of the divorce
- There were no children
- The final judgment of divorce provides:

Based on the above distribution and the Court's consideration of Tiffany's financial condition resulting therefrom, there is no significant disparity in the parties' respective estates. The Court has used equitable distribution to eliminate the need for permanent periodic payments and declines an award of periodic and/or lump sum alimony to Tiffany. However, pursuant to the equitable distribution above, Tiffany is awarded a monetary judgment against James in the total sum of $150,000 to be made in a lump sum payment or in monthly payments of $2,000 per month until paid in full.

- Support or property settlement?

SCENARIO #7

- Angelina sued Brad in state court to recover unpaid child support
- Brad failed to appear at the hearing and was held in contempt
- Shortly thereafter, Brad filed bankruptcy
- After the bankruptcy filing, the state court judge signed the child support order and executed a writ of arrest for the contempt
- Brad was arrested and held in custody for 10 days before he was released after he negotiated with and paid Angelina $80,000.
- Did Angelina violate the automatic stay?

SCENARIO #7

