THE INTERSECTION OF BANKRUPTCY AND MISSISSIPPI FAMILY LAW[1]

In Mississippi, issues of family law are handled exclusively by the chancery courts. However, the bankruptcy of a party to a chancery court action may disrupt family law proceedings. And "the intersection between bankruptcy law and divorce law is an especially dangerous place to be." *In re Campbell*, 649 B.R. 831, 842 (Bankr. S.D. Miss. 2023).

The Bankruptcy Code governs bankruptcy proceedings. 11 U.S.C. § 101 *et seq*. It was enacted in 1978 and went through its most thorough revision in 2005 with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). The Code is supplemented by the Federal Rules of Bankruptcy Procedure and local bankruptcy rules adopted by the bankruptcy courts in each federal district. The bankruptcy courts of the Northern and Southern Districts of Mississippi have adopted a single set of uniform local rules which can be found on the websites of both districts. Chapters 1, 3, and 5 of the Code contain general provisions, definitions, and procedures that apply to all bankruptcy cases. Chapter 7 provides for liquidation and is available only within the restrictions established by BAPCPA. Chapters 9, 11, 12, and 13 provide for reorganization where a debtor may keep assets in exchange for making a stream of payments to creditors. Under the U.S. Constitution's supremacy clause, federal bankruptcy law supersedes state law to the extent state law is inconsistent with bankruptcy law. U.S. Const. art. IV, cl. 2.

A. Family Law Matters Not Stayed by Filing Bankruptcy

In general, the filing of a bankruptcy petition operates as a stay of any action against the debtor to collect a debt. *See* 11 U.S.C. § 362(a). Certain actions, however, are excepted from the

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automatic stay. Regarding family law, actions "for the establishment or modification of an order for domestic support obligations; . . . concerning child custody or visitation; [or] . . . 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" are not stayed. 11 U.S.C. § 362(b)(2)(A)(ii)-(iv); *see also* Deborah H. Bell, *Bell on Miss. Family Law* § 21.03[1] (2d ed. 2011) ("[T]he stay does not apply to actions for divorce, paternity, custody, visitation, or protective orders. It does not apply to actions to establish or modify domestic support obligations (DSO), which include alimony, maintenance, and child support, including child support collected by the Department of Human Services."). The Supreme Court has held that "the domestic relations exception [to federal jurisdiction] . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). This exception is based "on narrower statutory, rather than broader constitutional, grounds." *Id.* at 696; *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 386 n.2 (5th Cir. 2001) (describing exception as "narrow"). The bankruptcy court is not the appropriate forum to re-examine divorce decrees and support orders. *Smith v. Smith (In re Smith)*, 114 B.R. 457, 465 (Bankr. S.D. Miss. 1990); *Mosley v. Bowie Cnty. Tex*, 275 F. App'x 327, 329 (5th Cir. 2008) (*Rooker-Feldman* doctrine bars federal review of a support order unless that judgment is void).

In addition, the following actions are not stayed:

1. Actions establishing paternity or involving claims of domestic violence. 11 U.S.C. § 362(b)(2)(A).
2. Collecting a domestic support obligation from property that is not property of the bankruptcy estate. 11 U.S.C. § 362(b)(2)(B).

3. Withholding the debtor's income for payment of a domestic support obligation under a judicial or administrative order or statute. 11 U.S.C. § 362(b)(2)(C); *In re Gellington*, 363 B.R. 497, 501-02 (Bankr. N.D. Tex. 2007) (post-petition garnishment of wages not violation of stay but can violate confirmation order); *Fla. Dep't of Revenue v. Gonzalez (In re Gonzalez)*, 832 F.3d 1251, 1258 (11th Cir. 2016) (Code allows withholding of income post-petition but not after confirmation if withholding is in violation of plan); *In re DeSouza*, 493 B.R. 669, 673 (B.A.P. 1st Cir. 2013) (Code requires wage withholding order, not merely court order requiring payment of support.); *In re Ojiegbe*, 512 B.R. 513, 524 (Bankr. D. Md. 2014) (Code does not allow garnishment of debtor's bank account).
4. Withholding, suspending, or restricting a debtor's driver's license, professional or occupational license, or recreational license. 11 U.S.C. § 362(b)(2)(D); 42 U.S.C. § 666(a)(16).
5. Reporting of overdue child support owed by a parent to any consumer reporting agency. 11 U.S.C. § 362(b)(2)(E); 42 U.S.C. § 666(a)(7).
6. Intercepting a debtor's federal or state income tax refund by or on behalf of a state or local child support enforcement agency to collect past-due spousal or child support in accordance with federal and state child support enforcement statutes. 11 U.S.C. § 362(b)(2)(F).
7. Enforcing a debtor's medical obligation in accordance with federal and state child support enforcement statutes. 11 U.S.C. § 362(b)(2)(G).
8. Commencement or continuation of a criminal contempt proceeding against a debtor based on the debtor's failure to pay a pre-bankruptcy spousal or child support debt if

the purpose and effect of the criminal contempt proceeding is to punish the debtor's failure to pay spousal or child support and not to coerce or require the debtor's payment of spousal or child support. 11 U.S.C. § 362(b)(1); *see generally Stewart v. Hampton Co. Nat'l Sur., LLC (In re Stewart)*, 544 B.R. 859, 866 (Bankr. N.D. Miss. 2015) (court should not interfere in state court criminal proceedings unless charges are an attempt by creditor to extract payment or exact revenge); *see also Russell v. Caffey (In re Caffey)*, 384 F. App'x 882, 886-87 (11th Cir. 2010) (even if ex-wife had no affirmative duty to vacate outstanding contempt order, she violated stay by negotiating support payment in exchange for debtor's release from prison).

B. Family Law Matters Stayed by Filing Bankruptcy

Perhaps the most important family law matter that is subject to the automatic stay is the division of marital property. Federal courts "in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e)(1) (citation modified). This exclusivity of jurisdiction over property of the debtor is not affected by a previously pending divorce action in Mississippi chancery court.

> When bankruptcy is filed after a divorce petition is filed but before the judgment of divorce, all assets titled in the name of the debtor spouse become a part of the bankruptcy estate. The state court action is stayed with respect to a property division. In Mississippi, a spouse has no property interest in marital assets titled in the other's name until a judgment of divorce and equitable distribution. Under these circumstances, the nondebtor spouse becomes an unsecured creditor in the bankruptcy with regard to assets titled in the debtor's name.

Bell, *supra*, at § 21.06[2] (footnote omitted); *Id.* at § 21.03[3] ("A state court may not classify and divide marital property without permission of the bankruptcy court.").

The Mississippi Supreme Court has held that while a husband's primary asset (a partnership) was in bankruptcy, the value of that asset could not be determined, and therefore the chancellor's "decision to grant [the wife] a property settlement and/or lump sum alimony was premature." *Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995). The Mississippi Supreme Court further held that other than the question of the divorce itself, which was undisputed, "all the remaining issues should have remained in the trial court pending the conclusion of the bankruptcy proceedings." *Id.*; *see also Dunaway v. Dunaway*, 749 So. 2d 1112, 1120-21 (Miss. Ct. App. 1999) (automatic stay of bankruptcy proceeding enjoins actions affecting bankruptcy assets).

C. Relief from Stay

"On request of a party in interest and after notice and a hearing," a bankruptcy court may grant relief from the automatic stay "for cause." 11 U.S.C. § 362(d)(1). "Such 'cause' includes allowing an action to proceed to completion in another tribunal." *In re Armstrong & Guy Law Office, LLC*, No. 07-02459, 2007 WL 4571152, at *1 (Bankr. S.D. Miss. Dec. 21, 2007) (citing *In re Curtis*, 40 B.R. 795, 799 (Bankr. D. Utah 1984)); *see also* H.R. Rep. No. 95-595, at 341 (1977) ("[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere."). "Regarding family obligations, the Fifth Circuit has emphasized that '[i]n general, bankruptcy courts owe state courts deference in domestic matters.'" *McCloskey v. McCloskey (In re McCloskey)*, No. 06-3012, 2015 WL 1062102, at *15 (Bankr. S.D. Tex. Mar. 5, 2015) (quoting *Barnes v. Barnes (In re Barnes)*, 279 F. App'x 318, 319 (5th Cir. 2008)). Relief from the automatic stay should be "liberally granted in situations involving alimony, maintenance, or support in order

to avoid entangling the federal court in family law matters best left to state court." *Carver v. Carver*, 954 F.2d 1573, 1578 (11th Cir. 1992).

D. Dischargeability of Debt Arising from Domestic Proceeding

The Bankruptcy Code recognizes two kinds of post-marital obligations: debts that are within the definition of "domestic support obligation" and debts that are not.

A debt for a domestic support obligation ("DSO") cannot be discharged, period. 11 U.S.C. § 523(a)(5). The Code defines a DSO as:

> a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
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> (A) owed to or recoverable by—
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> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> (ii) a governmental unit;
>
> (B) *in the nature of alimony, maintenance, or support* (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
> (ii) an order of a court of record; or
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
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> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A) (emphasis added).

A marital debt that is not a DSO can be discharged, but only in chapter 13 and only if the debtor makes all payments under the plan, as opposed to receiving a "hardship discharge." 11 U.S.C. § 1328(a), (b). Non-DSO debts are those that fall outside the definition of a DSO but were incurred "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). This category may include obligations to pay marital debts. *See James v. Younes (In re Younes)*, 545 B.R. 591, 596 (Bankr. N.D. Iowa 2016) (debtor could discharge direct obligation to third-party creditor but not obligation in divorce decree to hold former spouse harmless and indemnify her on debt); *Walls v. Hicks (In re Hicks)*, 530 B.R. 912, 917 (Bankr. M.D. Fla. 2015) (although debts to third party for mortgage on former residence could be discharged, debtor's obligation to former spouse under divorce decree to pay mortgage was not discharged); *Stanley v. Stanley (In re Stanley)*, No. 11-00357, 2013 WL 1336103, at *4-5 (Bankr. N.D. Ala. Mar. 29, 2013). It also includes property settlements. *See Humphries v. Rogers (In re Humphries)*, 516 B.R. 856, 865 (Bankr. N.D. Miss 2014).

Bankruptcy courts are not bound by the chancery court's designation of a particular debt as in the nature of support or as a property settlement. *See Joseph v. J. Huey O'Toole, P.C. (In re Joseph)*, 16 F.3d 86, 88 (5th Cir. 1994) ("Thus, we must place substance over form to determine the true nature and purpose of the award, regardless of the label used."). "Whether a particular obligation constitutes alimony, maintenance, or support within the meaning of [§ 523(a)(5)] is a matter of federal bankruptcy law, not state law." *Biggs v. Biggs (In re Biggs)*, 907 F.2d 503, 504 (5th Cir. 1990).

When presented with a separation or divorce agreement, bankruptcy courts look at the intent of the parties at the time the agreement was executed to determine whether a payment is in

the nature of support or is a property settlement. *Milligan v. Evert (In re Evert)*, 342 F.3d 358, 368 (5th Cir. 2003). "A written agreement between the parties is persuasive evidence of their intent." *Id.* If an agreement clearly characterizes a debt as support or property settlement, that characterization controls. *Steele v. Wyly (In re Wyly)*, 525 B.R. 644, 655 (Bankr. N.D. Tex. 2015) (quoting *In re Evert*, 342 F. 3d at 368); *Littleton v. Littleton (In re Littleton)*, 189 F. App'x 294, 296 (5th Cir. 2006).

If the agreement is ambiguous, the bankruptcy court looks at extrinsic evidence to determine the intentions of the parties. *In re Evert*, 342 F.3d at 368. "If an agreement fails to provide explicitly for spousal support, a court may presume that a so-called 'property settlement' is intended for support when the circumstances of the case indicate that the recipient spouse needs support." *Id.* Bankruptcy courts look to state law when considering extrinsic evidence. *See, e.g., Nunnally v. Nunnally (In re Nunnally)*, 506 F.2d 1024, 1026-27 (5th Cir. 1975) (discussing Texas law factors); *see also* Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* ¶ 6.03[2] (Matthew Bender) ("[A]lthough state law is not dispositive, a court making a dischargeability determination can and should look to state law for guidance in making its decision.").

A bankruptcy court cannot confirm a plan if the debtor is not current on all post-petition DSOs. 11 U.S.C. §§ 1129(a)(14), 1225(a)(7), 1325(a)(8). A debtor in arrears on post-petition DSOs is also subject to conversion or dismissal. 11 U.S.C. §§ 1112(b)(4)(P), 1208(c)(10), 1307(c)(11); *see In re Guzman*, No. 13-06960, 2018 WL 3032862, at *7 (Bankr. D. Puerto Rico June 15, 2018) (chapter 11 debtor dismissed post-confirmation for failure to maintain post-petition DSO). In addition, a chapter 12 or 13 debtor will not receive a discharge of any debts unless the debtor is current on all post-petition DSOs. 11 U.S.C. §§ 1228(a), 1328(a); *In re Turner*, No. 09-

14476, 2014 WL 2203882, at *2 (Bankr. S.D. Miss. May 27, 2014) (debtor not current on post-petition DSO payments unable to receive discharge). These requirements include obligations to pay debts of an ex-spouse that are in the nature of support. *See In re Bright*, No. 11-10214, 2012 WL 346643, at *3-4 (Bankr. D. Kan. Feb. 1, 2012) (court could not confirm plan that did not provide for payment of ex-spouse's mortgage, which was support obligation).

There is no time limit to bring a non-dischargeability action under §§ 523(a)(5) and (15). Fed. R. Bankr. P. 4007; *In re Walls*, 496 B.R. 818, 826 (Bankr. N.D. Miss. 2013); *In re Bingham*, 163 B.R. 769, 771-72 (Bankr. N.D. Tex. 1994). And the bankruptcy court has concurrent jurisdiction with the state court to determine whether a domestic obligation is non-dischargeable. *In re Walls*, 496 B.R. at 826; *In re Bingham*, 163 B.R. at 772.

E. What to Consider when Divorce Occurs During a Reorganization

It is not unusual for the financial difficulties that resulted in a bankruptcy filing to be followed by the filing of a divorce between joint debtors or the debtor and a non-filing spouse. If a case is confirmed, debtor's counsel should determine if new counsel is needed due to the potential conflict because of the divorce. At a minimum, if counsel intends to remain in the case, an executed waiver from both debtors should be completed for counsel to proceed.

Other considerations for debtors and counsel are:

- Should debtors remain in chapter 13?
- If so, can the plan still be completed?
- How will the plan be funded?
- Are both debtors in agreement as to how the plan will be funded and how creditors will be paid?
- If not, should the chapter 13 case be severed and should new bankruptcy counsel be employed by each debtor?

- If severed, which marital debts will be paid in each case and which debtor is liable for those debt obligations? (This would include amended schedules for the debts to be paid in the original case.)

- The chapter 13 Trustee will need clarification and an order modifying any confirmed plan (in the original case for all debts to be paid).

- The severed case will proceed as a new filing with a proposed plan, schedules and related documents addressing the debts to be paid in that case.

- Any transfer of assets pursuant to a contemplated chancery court property settlement requires bankruptcy court approval, after notice and hearing.

F. What to Consider when Divorce Occurs Prior to a Bankruptcy Filing

Remember that all debts incurred as part of a divorce are nondischargeable in a chapter 7 bankruptcy. Only support obligations are nondischargeable in a chapter 13 bankruptcy. So, obligations related to property settlements and hold harmless agreements related to property settlements can be discharged in a chapter 13. Recognizing these potential issues, lawyers representing clients in divorce should consider ways to "bankruptcy proof" the divorce decree. These include:

- Eliminating debt by selling joint assets. For example, sell the residence, payoff the mortgage, and divide any equity.

- Assigning debt to the contractually liable spouse. The chancery court cannot modify the rights of a third-party creditor. So, avoid assigning the legal obligations of one spouse to the other because the contractually liable spouse may ultimately be responsible to pay the debt if the other spouse files bankruptcy.

- Avoiding uneven division of assets where one spouse pays an equalizing payment in the future. The equalizing payment could be subject to discharge in a chapter 13.

- Securing future performance under a divorce decree with a lien. *See Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (debtor could not avoid judicial lien on homestead created by divorce decree); *Potts v. Potts (In re Potts)*, 18-11882-SDM, 2020 WL 476592 (Bankr. S.D. Miss. Jan. 29, 2020) (same).

G. Select Mississippi Cases

Fava v. Freeman, 3:26-cv-157-JDM, 2026 WL 3006913 (N.D. Miss. Oct. 6, 2026) (community property can only pay debts of community).

Freeman v. Freeman (In re Freeman), 664 B.R. 334 (Bankr. N.D. Miss. 2024) (Woodard, J.) (bankruptcy court has jurisdiction over community property even if it is in another state).

Burkhalter v. Burkhalter (In re Burkhalter), 635 B.R. 284 (Bankr. N.D. Miss. 2022) (Woodard, J.) (lump sum alimony, employment severance owed by debtor to ex-spouse, cell phone charges and health insurance premiums were all obligations owed under divorce decree and therefore nondischargeable in Chapter 7).

In re Hunsucker, 631 B.R. 610 (Bankr. N.D. Miss. 2021) (Woodard, J.) (sets out factors for bankruptcy court to consider when determining whether debt is support or property settlement).

Parker v. Miller (In re Miller), 589 B.R. 550 (Bankr. S.D. Miss. 2018) (Olack, J.) (holding issue of dischargeability in abeyance until resolution of state-court action in which former wife of debtor's boyfriend sought damages against debtor for fraud, embezzlement, intentional infliction of emotional distress, and alienation of affection).

Dumitrache v. New (In re New), 589 B.R. 288 (Bankr. N.D. Miss. 2018) (Woodard, J.) (fees incurred by former spouse in action seeking Order of Protection against harm and abuse were support and non-dischargeable under 523(a)(5)).

In re Ulrich, No. 15-51408-KMS, ECF No. 82 (Bankr. S.D. Miss. Aug. 24, 2016) (bankruptcy court not appropriate forum to re-examine parties divorce arrangements).

Robinson v. Robinson (In re Robinson), No. 15-06029-KMS, ECF No. 41 (Bankr. S.D. Miss. Aug. 15, 2016) (requirement to repay mortgage on marital home is support obligation under unambiguous language of settlement agreement).

In re Dezell, No. 15-10596-NPO, ECF No. 83 (Bankr. N.D. Miss. June 15, 2015) (requirement to pay auto insurance of former spouse is support obligation under unambiguous language of court order).

Anderson v. Anderson (In re Anderson), No. 13-05041-KMS, ECF No. 34 (Bankr. S.D. Miss. Sept. 17, 2014) (denying summary judgment where court could not determine amount of non-dischargeable medical expenses from documents submitted by non-debtor spouse).

Shankle v. Shankle (In re Shankle), 476 B.R. 908 (Bankr. N.D. Miss. 2012) (Houston, J.) (dissipating marital assets and violating chancery court order warrants finding of willful and malicious injury under 523(a)(6)).

Rustin v. Rustin (In re Rustin), No. 09-05100-NPO, 2011 WL 5443067 (Bank. S.D. Miss. Nov. 9, 2011) (lump-sum alimony is non-dischargeable support obligation).

In re White, No. 07-03870-NPO, 2008 WL 682422 (Bankr. S.D. Miss. Mar. 7, 2008) (debtor with only post-petition DSO not required to list recipient in schedules but is required to list debt on Schedule J and in plan).

Morin v. Rogers (In re Rogers), Adv. No. 00-0039-EE (Bankr. S.D. Miss. Dec. 6, 2000) (debt to ex-husband for attorney fees related to defense of child abuse allegation non-dischargeable as child support obligation), *aff'd* 189 F. App'x 299 (5th Cir. 2006).

McCaskill v. McCaskill (In re McCaskill), Adv. No. 94-00112-EE (Bankr. S.D. Miss. Nov. 3, 1994) (lump-sum and periodic alimony awarded by chancellor both in nature of support and non-dischargeable) (Memorandum Opinion available only on Bankr. S.D. Miss. website).

H. Select Resources

Deborah H. Bell, *Bell on Miss. Family Law* (2d ed. 2011).

Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* (Matthew Bender).

William Houston Brown, *Bankruptcy and Domestic Relations Manual* (2017).