

January 2009

## Shooing the Vultures Away from the Consumer Bankruptcy Carcass: Attorney Fees Owed by Debtors for Marital Dissolution are not Domestic Support Obligations

Christopher V. Davis

Follow this and additional works at: <http://scholarship.law.umassd.edu/umlr>

 Part of the [Bankruptcy Law Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Davis, Christopher V. (2009) "Shooing the Vultures Away from the Consumer Bankruptcy Carcass: Attorney Fees Owed by Debtors for Marital Dissolution are not Domestic Support Obligations," *University of Massachusetts Law Review*: Vol. 4: Iss. 1, Article 5.  
Available at: <http://scholarship.law.umassd.edu/umlr/vol4/iss1/5>

This Note is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in University of Massachusetts Law Review by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

# SHOOING THE VULTURES AWAY FROM THE CONSUMER BANKRUPTCY CARCASS: ATTORNEY FEES OWED BY DEBTORS FOR MARITAL DISSOLUTION ARE NOT DOMESTIC SUPPORT OBLIGATIONS

CHRISTOPHER V. DAVIS\*

*“[The] fundamental dilemma of bankruptcy law has always been whether it is about death or rebirth. Is it a system for picking a debtor's bones in a more orderly fashion? Or is it an economic and social safety net that allows debtors to return to the world? The fact that it is both has never slowed debate that it should be primarily one or the other”<sup>1</sup>*

## INTRODUCTION

A goal of modern American consumer bankruptcy is to give “the honest but unfortunate debtor . . . a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt”<sup>2</sup> – a fresh start – by discharging the debtor from personal liability on prepetition debts. A bankruptcy discharge permanently enjoins prepetition claimants from pursuing the debtor to satisfy their claims.<sup>3</sup> But there are exceptions to this general rule.<sup>4</sup> One such exception has been for support obligations owed to the debtor’s spouse and children.<sup>5</sup> The fresh start policy is clearly subordinate to a more compelling interest in maintaining the

---

\* The author is an attorney and a December 2009 graduate of the Southern New England School of Law, North Dartmouth, Massachusetts.

<sup>1</sup> BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 255 (Harvard Univ. Press 2002).

<sup>2</sup> *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

<sup>3</sup> 11 U.S.C. §§ 524(a)(1)–(2) (2009).

<sup>4</sup> *E.g.*, 11 U.S.C §§ 523(a)(1)–(19) (2009).

<sup>5</sup> 11 U.S.C. §§ 523(a)(5), (a)(15) (2009).

financial support of family members.<sup>6</sup> The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)<sup>7</sup> created a new term for this type of non-dischargeable debt: Domestic Support Obligations (DSOs).<sup>8</sup>

As a general rule, debts, including attorney fees, are dischargeable in consumer bankruptcy.<sup>9</sup> Before the enactment of BAPCPA, many courts found attorney fees owed by the debtor to the spouse's attorney incurred during familial litigation fell into this category of domestic support debt,<sup>10</sup> and, therefore, treated the fees as non-dischargeable.<sup>11</sup> This interpretation continued to follow the BAPCPA changes.<sup>12</sup> This Note argues, as a general rule, that courts should not grant DSO status to attorney fees incurred in prepetition divorce settlements because the language of the statute requires it. Further, the overly-broad interpretation that the majority of courts have adopted could lead to a super-creditor status for one type of attorney's fee over others and create an undesirable and unanticipated boon for marital law

---

<sup>6</sup> Bankruptcy Law Manual § 8A:10 (5th ed. 2002).

<sup>7</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 33, 27-29 (2005).

<sup>8</sup> 11 U.S.C. § 101(14A) (2009).

<sup>9</sup> *In re Clarkson*, 377 B.R. 283, 286 (Bankr. W.D. Wash., 2007) (Debts for attorney fees incurred prepetition are normally discharged in Chapter 7 proceeding). A debt is defined as "liability on a claim." 11 U.S.C. § 101(12) (2009). A claim is defined as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (2009).

<sup>10</sup> *See, e.g., In re Hart*, 130 B.R. 817, 849 (Bankr. N.D. Ind. 1991) (fee owed by debtor to former spouse's attorney pursuant to agreement incorporated into divorce decree was nondischargeable); *In re Maddigan*, 312 F.3d 589, 593 (2d Cir. 2002) (court held attorney fees for representation in custody litigation were debt for child support and did not need not be payable directly to a party listed in § 523(a)(5) in order to be nondischargeable), *but see In re Perlin*, 30 F.3d 39, 42 (6th Cir. 1994) (former spouse's attorney lacked standing to contest dischargeability because debtor owed fee to former spouse, not the attorney).

<sup>11</sup> *In re Maddigan*, 312 F.3d at 593.

<sup>12</sup> *See, e.g., In re O'Brien*, 339 B.R. 529, 531 n.2 (Bankr. D. Mass. 2006) ("Case law construing alimony, maintenance, and support has largely developed in respect of former § 523(a)(5) whose text is comparable to and largely mirrors section 101(14)(A)").

practitioners at the expense of the non-debtor spouse and the fresh start of “the honest but unfortunate” debtor.

This Note will focus on consumer bankruptcy<sup>13</sup> related to chapter 7 and chapter 13 filings. Section I provides an introduction to DSOs and the goals of enforcing them through bankruptcy. Section I also discusses the impact of DSO status on the automatic stay, discharge, priority status for property distribution of the bankruptcy estate, capability to reach exempt property, and application to attorney fees. Section II argues that, where attorney fees are not owed to a spouse, former spouse, or child, and do not fit within an impact exception, the fees are not DSOs, but instead are merely general non-secured claims. Finally, Section III argues that even when attorney fees are owed to, or have impact on, the spouse, former spouse, or child, courts should generally find attorney fees are not in the nature of support.

## SECTION I

### *A. Underlying Policy Behind the BAPCPA Changes to Domestic Support Obligations*

The BAPCPA revisions were roughly a decade in the making, involving several false starts.<sup>14</sup> For legislation that was so hotly contested, and took so long to pass, there is precious little documentation from Congress regarding the decision making process.<sup>15</sup> Four basic policies have been said

---

<sup>13</sup> The Code defines “Consumer debt” as “debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C § 101(8).

<sup>14</sup> For a thorough discussion of the history of BAPCPA, see Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (Summer 2005).

<sup>15</sup> *In re Sorrell*, 359 B.R. 167, 176 (Bankr. S.D. Ohio 2007) (noting that legislative history of act is limited, with no joint statement from a conference committee, nor reports by floor managers).

to underlie the BAPCPA changes involving family support obligations:<sup>16</sup>

1. Bankruptcy should interfere as little as possible with the establishment and collection of ongoing obligations for support, as allowed in state and family law courts.
2. The Bankruptcy Code should provide a broad and comprehensive definition of a Domestic Support Obligation, and all claims for Domestic Support Obligations should receive equal and favored treatment in the bankruptcy process.
3. The bankruptcy process should ensure the continued payment of ongoing spousal and child support and family support arrearages with minimal need for participation by support creditors in bankruptcy proceedings.
4. The bankruptcy process should allow a debtor to liquidate non-dischargeable debt to the greatest extent possible within the bankruptcy case, and emerge from bankruptcy with the freshest start feasible.<sup>17</sup>

Some of the predicted outcomes of the BAPCPA changes were reducing the necessity and cost of litigating family law issues in bankruptcy court,<sup>18</sup> greater consistency between the Bankruptcy Code and federal child support enforcement programs, and “a clear recognition . . . that all . . . [family] . . . support debts are entitled to preferential treatment in bankruptcy.”<sup>19</sup> Clearly, Congress wanted to prevent debtors from using bankruptcy as a means to avoid

---

<sup>16</sup> Philip L. Strauss & Karen Cordry, *Domestic Support Issues from a Governmental Perspective*, 41 FAM. L.Q. 321, 323–24 (2007).

<sup>17</sup> *Id.*

<sup>18</sup> Philip L. Strauss, Testimony before the U.S. Senate Committee on the Judiciary, February 10, 2005, [http://judiciary.senate.gov/hearings/testimony.cfm?id=1381&wit\\_id=3993](http://judiciary.senate.gov/hearings/testimony.cfm?id=1381&wit_id=3993) (last visited June 17, 2010).

<sup>19</sup> *Id.*

financial responsibilities to spouses, former spouses and children.

### *B. Domestic Support Obligations Defined*

Even before BAPCPA, the Bankruptcy Code contained an exception for debts relating to alimony, maintenance, or support under § 523(a)(5), which made such debts non-dischargeable.<sup>20</sup> In 1994, section 523(a)(15), discussed in detail *infra*, expanded the breadth of non-dischargeable marital debts.<sup>21</sup> BAPCPA amended sections 523(a)(5) and (a)(15). Sections 523(a) and 523(a)(5) now state:

---

<sup>20</sup> The pre-BAPCPA version of § 525(a)(5) excepted from discharge any debt “to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that . . . such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State) . . .” 11 U.S.C. § 523(a)(5)(2000). This language has been held to be sufficiently similar to the language in the 11 U.S.C 101(14A) definition of Domestic Support Obligation so as to make pre-BAPCPA case law interpreting § 523(a)(5) relevant. *Levin v. Greco (In re Greco)* 397 B.R. 102 (Bankr. N.D. Ill. 2008).

<sup>21</sup> The pre-BAPCPA version of § 523(a)(15) expanded nondischargeable debts to those “not of the kind described in paragraph (5) that [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 court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

“(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title [11 USCS § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt –

....

(5) for a domestic support obligation; . . . .”<sup>22</sup>

Attorney fees incurred during a divorce proceeding should not be treated as DSOs. To prove this summation, one must look at the elements which make up the definition of a DSO. DSOs are defined under § 101(14A) 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 –

(A) owed to or recoverable by –

(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;

---

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.” 11 U.S.C. § 523(a)(15) (2000).

As discussed, *infra*, in Section III, the two balancing tests laid out in parts (A) and (B) were removed by the BAPCPA amendments.

<sup>22</sup> 11 U.S.C. § 523(a)(5) (2009).

(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

(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.<sup>23</sup>

The definition contains four sections, A–D, which must be met for a debt to be deemed a domestic support obligation.<sup>24</sup> A DSO is most commonly a court order to make alimony, spousal maintenance, or child support payments.<sup>25</sup> These kinds of obligations are often designated as support in the divorce decree, and clearly meet the requirements of § 523(a)(5).<sup>26</sup> Whether debts owed to a third-party meet these criteria is less clear and a source of some litigation.<sup>27</sup>

---

<sup>23</sup> 11 U.S.C. § 101(14A) (2009); *see also* Wis. Dep't of Workforce Dev. v. Ratliff, 390 B.R. 607, 613 (Bankr. E.D. Wis. 2008) (“The definition [in § 101(14A)] has four separate requirements; all four must be met for an obligation to be considered a domestic support obligation.”).

<sup>24</sup> *See, e.g.*, Wis. Dep't of Workforce Dev. v. Ratliff, 390 B.R. 607, 613 (Bankr. E.D. Wis. 2008); *In re Forgette*, 379 B.R. 623, 625 (Bankr. W.D. Va. 2007).

<sup>25</sup> James L. Musselman, *Once Upon a Time in Bankruptcy Court: Sorting Out Liability of Marital Property for Marital Debt Is No Fairy Tale*, 41 FAM. L.Q. 249, 268 (2007).

<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.*, *In re Miller*, 55 F.3d 1487, 1490 (10th Cir. 1995) (fees to guardian ad litem and psychologist from divorce and child support proceedings were nondischargeable); *In re Wolfe*, 26 B.R. 781, 785 (Bankr. D. Kan. 1982) (even without a hold harmless agreement, an auto loan incurred as a gift for former wife was in the nature of child support and was nondischargeable), *compare with In re Stamper*, 131 B.R. 433, 436 (Bankr. W.D. Mo. 1991) (debtor's obligation to holder of auto loan

The elements of section 101(14A) germane to this Note are (A)(i), debts “owed to or recoverable by — a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative”, and (B), debts “in the nature of alimony, maintenance, or support . . . 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.”<sup>28</sup> These are discussed in detail in Sections II and III respectively.

*C. Impact of Domestic Support Obligations  
on Other Sections of the Bankruptcy Code*

*1. Automatic Stay and Discharge*

The automatic stay is one of the great protections for the debtor filing for bankruptcy, as it prevents creditors from collecting on debts as well as engaging in other activities.<sup>29</sup>

---

may be dischargeable, but hold harmless agreement is non-dischargeable, and to extent former spouse makes payments on car loan, she is entitled to recover those payments from debtor as a non-dischargeable obligation); *In re Forgette*, 379 B.R. 623, 625–26 (Bankr. W.D. Va. 2007) (divorce decree ordered debtor to pay car creditor; ex-spouse had no standing to bring claim since payments not ordered to her).

<sup>28</sup> Since attorney fees are usually established in the divorce agreement or by the court pursuant to a divorce proceeding, application of §§ 101(14A)(C) & (D) is straight forward and rarely if ever an issue in the types of cases analyzed in this Note. Likewise, § 101(14)(A)(ii) concerns governmental units, and is outside the scope of this Note.

<sup>29</sup> 11 U.S.C. § 362(a) states:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

The effect of the stay is automatic upon filing a bankruptcy proceeding.<sup>30</sup> Generally, the stay remains in effect until property is no longer property of the estate, or the case is discharged or dismissed.<sup>31</sup> Although, if a Chapter 7 or 13 case has been dismissed and the debtor re-files within one year, the stay may only extend for thirty days,<sup>32</sup> and willful violation of the automatic stay can result in actual damages and even punitive damages.<sup>33</sup> Upon a successful discharge, section 524 permanently enjoins actions for debts stayed under § 362(a).<sup>34</sup>

DSOs have special exemptions under sections 362(b)(2)(A)–(C). The stay is not applicable to commencement or continuation of a civil action “for the establishment or modification of an order for domestic support obligations;<sup>35</sup> . . . collection of a domestic support obligation from property which is not property of the

---

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning an individual debtor's tax liability for a taxable period ending before the order for relief under this title.

<sup>30</sup> *Id.*

<sup>31</sup> 11 U.S.C. §§ 362(c)(1)–(2) (2009).

<sup>32</sup> 11 U.S.C. § 362(c)(3) (2009).

<sup>33</sup> 11 U.S.C. § 362(k) (2009).

<sup>34</sup> 11 U.S.C. § 524 (2009).

<sup>35</sup> 11 U.S.C. § 362(b)(2)(A)(ii) (2009).

estate;<sup>36</sup> . . . [and] the withholding of income that is property of the estate or debtor for purposes of payment of a domestic support obligation under court order or statute; . . . .”<sup>37</sup>

## 2. *Priority Status for Property Distribution*

In addition to the non-dischargeability of DSOs, the policy in favor of protecting the non-debtor spouses and children is evidenced by Congress giving prepetition DSO claims first priority under section 507.<sup>38</sup> Prior to BAPCPA, debts owed for alimony, maintenance or support were only seventh on the section 507 priority list.

Under section 507(a)(1), prepetition DSOs are given first priority for property distribution of the bankruptcy estate subject only to the payment of trustee expenses.<sup>39</sup> Trustees are also required under sections 704(a)(10) and 1302(b)(6) to notify holders of DSOs in writing of their rights in collecting the obligations.<sup>40</sup> Under Chapter 7, priority distributions are meted out to the creditors at each level of priority.<sup>41</sup> So, first priority debtors are paid in full before second priority debtors, and so on, until all funds of the bankruptcy estate are exhausted.<sup>42</sup> If there is not enough to pay all of the creditors at a particular level, then the funds are distributed pro rata

---

<sup>36</sup> 11 U.S.C. § 362(b)(2)(B) (2009).

<sup>37</sup> 11 U.S.C. § 362(b)(2)(C) (2009). Under 11 U.S.C. § 362(b)(2)(A) the following additional domestic relations actions are not exempt from the stay:

1. establishment or modification of a domestic support obligation.
2. establishment of paternity
3. an action concerning child custody or visitation
4. an action for the dissolution of marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate
5. an action regarding domestic violence.

<sup>38</sup> 11 U.S.C. § 507(a)(1) (2009).

<sup>39</sup> 11 U.S.C. § 507(a) (2009).

<sup>40</sup> 11 U.S.C. § 704(a)(10) (2009); 11 U.S.C. § 1302(b)(6) (2009).

<sup>41</sup> 11 U.S.C. § 726(a) (2009).

<sup>42</sup> 11 U.S.C. § 726(b) (2009).

amongst all the creditors at that particular level.<sup>43</sup> For a Chapter 13 plan to be confirmed, it must provide for payment in full of all claims entitled to priority under section 507, unless the holder of the claim agrees to another arrangement.<sup>44</sup>

### 3. *Exempt Property*

Exempt property is property that cannot be reached by creditors, and is not considered part of the bankruptcy estate. A debtor declares exemptions under either state or federal law.<sup>45</sup> Exempt property can include, among others, value for a homestead<sup>46</sup> and retirement plans.<sup>47</sup> The Congressional purpose behind exemptions is to give the “unfortunate bankruptcy debtor” a base from which to make his fresh start.<sup>48</sup> Under 11 U.S.C. § 522(c), domestic support obligation debts may be recovered from exempt property:

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except –

---

<sup>43</sup> *Id.*

<sup>44</sup> 11 U.S.C. § 1322(a)(2) (2009).

<sup>45</sup> 11 U.S.C. § 522(b) (2009). § 522(b)(3)(A) spells out a calculus for determining which state’s exemptions may be used based on length of domicile. This calculus can lead to interesting results, but discussion and analysis are beyond the scope of this Note.

<sup>46</sup> 11 U.S.C. § 522(d)(1) (2009) (roughly \$20,000 in property used as a residence). Massachusetts allows for a \$500,000 homestead exemption. MASS. GEN. LAWS 188, § 1 (2009). While Texas has an unlimited homestead exemption. Tex. Prop. Code Ann. § 41.001(a) (West 2009).

<sup>47</sup> 11 U.S.C. § 522(b)(4)(A) (2009).

<sup>48</sup> Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 31 (1983) (discussing bankruptcy exemption policies).

(1) a debt of a kind specified in paragraph (1) or (5) of section 523 (a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523 (a)(5)).<sup>49</sup>

There is a similar protection against exemption for judgment liens for DSOs.<sup>50</sup>

*D. An Introduction to DSO  
Applicability to Attorney Fees*

A creditor is an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; . . . .”<sup>51</sup> Clearly, attorneys are creditors under the U.S. Bankruptcy Code (Code). However, a literal reading of the language of § 101(14A)(A)(i), debts “owed to or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative;” would appear to excluded attorney fees, or fees owed to any third party, from being included under § 523(a)(5).<sup>52</sup> But even before BAPCPA,<sup>53</sup> a majority of courts found that third-party fees, including fees for attorneys who represented clients in marriage dissolution, fell under the

---

<sup>49</sup> 11 U.S.C. § 522(c)(1) (2009).

<sup>50</sup> 11 U.S.C. § 522(f)(1) (2009).

<sup>51</sup> 11 U.S.C. § 101(10)(A) (2009).

<sup>52</sup> Bankruptcy Law Manual § 8A:10 (5th ed. 2002).

<sup>53</sup> Because the language of § 101(14A) is essentially identical to the pre-BAPCPA language of § 523(a)(5), courts view much of the pre-BAPCPA case law involving support obligations as still valid. *See, e.g., In re Boller*, 393 B.R. 569, 574 (Bankr. E.D. Tenn. 2008) (“In determining what constitutes debt ‘in the nature of alimony, maintenance, or support’ under § 101(14A), the case law construing pre-BAPCPA § 523(a)(5), which utilized the same language, is relevant.”) Accordingly, this Note cites to pre-BAPCPA cases that have not been overturned and which appear to the author to be consistent with the BAPCPA revisions.

ambit of § 523(a)(5).<sup>54</sup> At least two courts held attorney fees owed by the debtor to the non-debtor spouse were a unique exception, and excluded other third parties.<sup>55</sup>

Many courts have held attorney fees related to divorce proceedings are in the nature of support.<sup>56</sup> The function the award was intended to serve is the crucial issue in making the determination.<sup>57</sup> The rationale behind some courts holding in this manner is if the debt were discharged, the non-debtor spouse would remain liable on the debt.<sup>58</sup> Thus, finding the debts to be non-dischargeable support furthers the policy of protecting spouses and children.<sup>59</sup>

---

<sup>54</sup> See, e.g., *In re Chang*, 163 F.3d 1138, 1141 (9th Cir. 1998) (limitation to spouse or child should not be literally applied); *In re Miller*, 55 F.3d 1487, 1490 (10th Cir. 1995) (guardian ad litem and psychologist fees incurred in connection with divorce and child support proceedings were non-dischargeable); *In re Will*, 116 B.R. 254, 255 (Bankr. D. Colo. 1990) (former spouse's attorneys were third-party beneficiaries with standing to contest dischargeability of fee); *In re Haas*, 129 B.R. 531, 535 (Bankr. N.D. Ill. 1989) (attorney "fees incurred in connection with an award of maintenance or support are not dischargeable, and it is irrelevant that the debt is due directly to the attorney rather than to the ex-spouse."); but compare *In re Perlin*, 30 F.3d 39, 42 (6th Cir. 1994) (wife's attorney lacked standing to contest dischargeability of debtor's obligation to pay attorney fees because the debtor owed the debt in question to his former spouse, not to the attorney).

<sup>55</sup> See *In re Wright*, 184 B.R. 318, 324 (Bankr. N.D. Ill. 1995) ("Generally, an obligation for support must be owed directly to the spouse to be nondischargeable under section 523(a)(5), (citation omitted) with an exception made for attorney's fees."); *In re Lewis*, 39 B.R. 842, 846 (Bankr. W.D.N.Y. 1984) (court limited non-dischargeable debts payable to third parties for attorney fees. Other third party debt was dischargeable as it was determined not to be in the nature of alimony and support).

<sup>56</sup> *In re Lawrence*, 237 B.R. 61, 85 (Bankr. D. N.J. 1999) (citing e.g., *Macy v. Macy*, 114 F.3d 1, 3 (1st Cir. 1997)); *In re Spong*, 661 F.2d 6, 9 (2d Cir. 1981); *In re Kline*, 65 F.3d 749, 751 (8th Cir. 1995).

<sup>57</sup> *In re Williams*, 703 F.2d 1055, 1057 (8th Cir. 1983).

<sup>58</sup> Bankruptcy Law Manual § 8A:10 (5th ed. 2002).

<sup>59</sup> *Id.* But where this policy does not apply, third-party creditors are not treated as beneficiary of a DSO. See *In re Linn*, 38 B.R. 762, 763 (B.A.P. 9th Cir. 1984) (where former spouse would incur no liability if debt owed directly to court-appointed attorney and psychiatrist in child custody battle was discharged, then policy of protecting child and spouse not implicated as only benefit to non-dischargeability would be to third-party creditor).

The following sections will show the majority of courts have been far too liberal interpreting the relationship between the DSO provision and attorney fees.

## SECTION II

*Attorneys Are Not a Debtor's "Spouse, Former Spouse, Child . . . or Such Child's Parent, Legal Guardian, or Responsible Relative"*<sup>60</sup>

This section looks at 11 U.S.C. § 101(14A)(A)(i), the “owed to” clause in the definition of the domestic support obligation. Many courts have either minimized or ignored this clause in favor of its sibling, 11 U.S.C. § 101(14A)(B), which deals with the nature of the debt.<sup>61</sup> However, this is folly. 11 U.S.C. § 101(14A)(A)(i) defines the class of entities to whom the definition of domestic support obligation applies. The three subsections below support this supposition. The first subsection looks at the plain meaning of the clause and finds attorney fees to be outside the ambit of the statutory language. In the second subsection, an impact exception to the plain meaning interpretation is explored and adopted. Finally, cases are reviewed from courts which have ignored the plain meaning of the statute, or supplanted it with the language from 11 U.S.C. § 101(14A)(B), and the error of these arguments is revealed.

---

<sup>60</sup> 11 U.S.C. § 101(14A)(A)(i) (2009).

<sup>61</sup> See *infra* Section II.C.

A. *Plain Meaning of Statute Does Not Include Attorney Fees*

As mentioned above, the Congressional policy favoring a fresh start for the debtor generally leads courts to construe discharge exceptions strictly and narrowly.<sup>62</sup> While under the Bankruptcy Code the debtor's fresh start is subservient to the debtor's responsibility to support family obligations<sup>63</sup> and many of the BAPCPA revisions were designed to protect receivers of support and alimony,<sup>64</sup> this does not mean that basic rules of statutory construction should be ignored. Where a statute's language is plain, then the court's obligation is to enforce the statute according to its terms, unless the result would be absurd.<sup>65</sup> Section 101(14A)(A)(i) specifically limits the scope of domestic support obligations to an identifiable class.<sup>66</sup> While the clause "debts owed to or recoverable by" in § 101(14A)(A) is broader than the pre-

---

<sup>62</sup> Shayna M. Steinfeld, *The Impact of Changes Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Family Obligations*, 20 J. AM. ACAD. MATRIMONIAL LAW. 251, 268 (2007) (citing to e.g., *In re Crosswhite*, 148 F.3d 879 (7th Cir. 1998); *Bellco Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358 (10th Cir. 1997); *Palmacci v. Umpierrez*, 121 F.3d 781 (1st Cir. 1997); *In re Ward*, 857 F.2d 1082 (6th Cir. 1988); *In re Belfry*, 862 F.2d 661 (8th Cir. 1988); *In re Van Horne*, 823 F.2d 1285 (8th Cir. 1987); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577 (11th Cir. 1986); *In re Black*, 787 F.2d 503 (10th Cir. 1986)).

<sup>63</sup> Bankruptcy Law Manual § 8A:10 (5th ed. 2002).

<sup>64</sup> See generally, *The Bankruptcy Abuse and Consumer Protection Act of 2005 and its Impact on the Practice of Family Law*, <http://www.abiworld.org/committees/newsletters/consumer/vol5num2/ConsumerComm3.pdf> (last visited June 17, 2010) adapted from Hon. Sandy Karlan, *New Act Enhances Protection of Support Recipients*, FLA. FAM. LAW REP. 2006, Issue 3 (March 2006).

<sup>65</sup> *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

<sup>66</sup> "A spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative . . ." 11 U.S.C. § 101(14A)(A)(i) (2009).

BAPCPA incarnation,<sup>67</sup> the new definition does not expand the class of entities to include attorneys.<sup>68</sup> The plain language of 11 U.S.C. § 523(a)(5) limits the discharge exception to a “spouse, former spouse, child . . . or such child’s parent, legal guardian, or responsible relative,” and does not include debts owed to third parties.<sup>69</sup>

### B. “Impact Exception” to Plain Meaning

Judge Robert Mark, in the pre-BAPCPA case *In re Gentilini*,<sup>70</sup> spelled out an exception to the plain meaning of § 523(a)(5) in cases where discharge of the third party debt would impact the former spouse.<sup>71</sup> This Note will refer to it as the Impact Exception.

While *Gentilini* was decided before BAPCPA, it deals with the language of 11 U.S.C. § 101(14A)(A)(i) discussed above, which in substance mirrors that of former § 523(a)(5). *Gentilini* involved a Chapter 7 bankruptcy in which the attorneys, who represented the former spouse in previous divorce proceedings, sought judgment from the bankruptcy court under 11 U.S.C. § 523(a)(5) to except from discharge fees awarded by the state court.<sup>72</sup>

---

<sup>67</sup> See *supra* note 20 for discussion of pre-BAPCPA language for § 523(a)(5), which was replaced by domestic support obligation definition in § 101(14A) (2009).

<sup>68</sup> *In re Brooks*, 371 B.R. 761, 768 (Bankr. N.D. Tex. 2007); but compare *In re Poole*, 383 B.R. 308, 313 (Bankr. D. S.C. 2007) (“Since the language of the new definition includes debts ‘owed to or recoverable by’ a spouse, debts to be paid directly to third parties such as the attorney’s fees and credit card payments would not necessarily be excluded if they are enforceable and recoverable by the spouse via further proceedings in the Family Court.”) (internal citations omitted).

<sup>69</sup> *Id.* at 764.

<sup>70</sup> *In re Gentilini*, 365 B.R. 251 (Bankr. S.D. Fla. 2007).

<sup>71</sup> *Id.* at 254–55.

<sup>72</sup> *Id.* at 251–52.

In his analysis, Judge Mark cited the Sixth Circuit case *In re Spong*,<sup>73</sup> and the Eight Circuit case *In re Kline*<sup>74</sup> for the proposition that an exception exists to the plain meaning interpretation of the statute where “the debt [is] in the nature of support *and* the former spouse would be financially impacted by discharg[e of] the debt.”<sup>75</sup> In *Spong*, the court found that whether a debt was owed to a former spouse should be a matter of substance rather than form,<sup>76</sup> and that an agreement by the debtor to pay the former spouse’s attorney for fees incurred during the divorce was in substance a debt arising from a “paradigmatic third party beneficiary contract . . . .”<sup>77</sup> Since such contracts are enforceable by both the third-party beneficiary and the promisee, denying the debt as owed to the spouse would be an illogical victory of form over substance.<sup>78</sup> In *Kline*, the court found a debt to the attorney of the former spouse non-dischargeable, where if the debt had been discharged the former spouse would have remained liable in *quantum meruit* for the debt.<sup>79</sup>

In *Gentilini*, Judge Mark found that the attorney fees owed by the debtor were in the nature of support.<sup>80</sup> However, the Impact Exception did not apply, because at the time of the bankruptcy petition, the statute of limitations had run on the retainer agreement between the attorneys and the former spouse, and the law firm could no longer enforce it.<sup>81</sup> As the former spouse would not be benefited by the paying of the fees, nor harmed by non-payment, the plain meaning of the statute applied.<sup>82</sup> The debt was not owed to the spouse, and thus the fees were dischargeable.<sup>83</sup>

---

<sup>73</sup> *In re Spong*, 661 F.2d 6 (2d Cir. 1981).

<sup>74</sup> *In re Kline*, 65 F.3d 749 (8th Cir. 1995).

<sup>75</sup> *In re Gentilini*, 365 B.R. at 254–55.

<sup>76</sup> *In re Spong*, 661 F.2d at 11.

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* at 10–11.

<sup>79</sup> *In re Kline*, 63 F.3d at 751.

<sup>80</sup> *In re Gentilini*, 365 B.R. 251, 253 (Bankr. S.D. Fla. 2007).

<sup>81</sup> *Id.* at 258.

<sup>82</sup> *Id.* at 259.

<sup>83</sup> *Id.*

The Impact Exception makes a great deal of sense. In a hypothetical case, where a debt to an attorney was created because the spouse had to bring suit to recover arrearages on a DSO, such as an alimony or child custody dispute, and the spouse remained liable to her attorney for the fee, then it makes sense that the attorney fee would be treated as a DSO itself.<sup>84</sup> Applying the logic of the court in *Spong*, that the debtor owes the fee directly to the attorney should not bar recovery. To cause the non-debtor spouse to bear the cost of enforcement would create an unfair burden. Another example would be a debtor who owes child support, but has not paid in several months, so the custodial parent brings suit to collect the funds, perhaps asking the state under state law to garnish wages of the non-custodial former spouse. If the custodial parent wins, and the state court awards attorney fees, it would seem antithetic to the purpose of enforcing the obligation to allow the debtor to discharge the attorney fee debt and leave the non-debtor spouse to bear the cost of enforcement.<sup>85</sup>

Thus, the Impact Exception should supersede the plain meaning of the statute and allow attorney fees to be held non-dischargeable where the fee debt is in the nature of support *and* the spouse, former spouse, child or child's parent, legal guardian or responsible relative remains liable on the fees. But where there is no impact on a former spouse or child, the attorney fee should be treated as a general non-secured dischargeable debt.

---

<sup>84</sup> See generally *In re O'Brien*, 367 B.R. 240 (Bankr. D. Mass. 2007) (holding that attorney fees owed by debtor for post-divorce custody proceeding was in the nature of support).

<sup>85</sup> Attorney fees, interest, and other costs meant to make the spouse or child whole after debtor's failure to uphold the support obligation should not be dischargeable. But purely punitive awards against the debtor, should be dischargeable, as they do not serve to support the familial obligation and thus only hinder the debtor in making a fresh start. See generally *In re Smith*, 398 B.R. 715 (B.A.P. 1st Cir. 2008) (the court held that a \$50 a day penalty for late alimony payments was not in the nature of support, and thus claim of former-spouses which consisted only of penalty fees was dischargeable). The issue of support is discussed in detail, *infra*, in Section III.

C. *Overly Broad Interpretation Erroneously  
Defeats Plain Meaning of the Statute*

Many courts have created expansive interpretations of the DSO.<sup>86</sup> These interpretations focus primarily, and in some cases exclusively, on the nature of the debt and minimize or ignore the “owed to” clause.<sup>87</sup> For these courts, finding that the debt is in the nature of support is in effect the *sin qua non* of the analysis, but all four elements of 11 U.S.C. § 101(14A) must be met, and the language of the statute does not imply one clause is to be given weight to the exclusion of another. This section looks at rulings of courts which have such broad interpretations, and discloses the shortcomings of their analysis.

The Eighth Circuit has one of the most overly-broad applications. Citing to its holding in *Kline*, mentioned *supra*, the Eighth Circuit in *In re Kemp* pronounced “[i]t is the nature of the debt, not the identity of the payee, that determines the debt’s dischargeability . . . .”<sup>88</sup> This statement omits the analysis in *Kline* which focused on the liability of the spouse, and the *per curiam* opinion was rendered with little analysis. Since *Kline*, the Eighth Circuit Bankruptcy Courts have focused on the “in the nature of support” clause as a kind of shorthand to all but eviscerate the “owed to” clause.<sup>89</sup> For example, *In re Cavaluzzi* is a 2007 Chapter 7

---

<sup>86</sup> See, e.g., *In re Staggs*, 203 B.R. 712, 722 (Bankr. W.D. Mo. 1996) (court held guardian ad litem fees to be nondischargeable as in nature of support); *In re Cavaluzzi*, 364 B.R. 363, 365–66 (Bankr. E.D. Mo. 2007) (court held attorney fees incurred in child-support modification were in nature of support, and thus nondischargeable); *In re Akamine*, 217 B.R. 104, 107–08 (Bankr. S.D.N.Y. 1998); *In re Miller*, 55 F.3d 1487, 1488 (10th Cir. 1995); *In re Chang*, 163 F.3d 1138, 1141 (9th Cir. 1998); *In re Lawrence*, 237 B.R. 61 (Bankr. D. N.J. 1999) (citing e.g., *In re Macy*, 114 F.3d 1 (1st Cir. 1997)).

<sup>87</sup> *In re Akamine*, 217 B.R. at 107 (“It is well-settled that as far as long as a debt is deemed to be ‘support’ it need not be payable directly to a child or spouse in order to be nondischargeable.”).

<sup>88</sup> *In re Kemp*, 232 F.3d 652, 653 (8th Cir. 2000).

<sup>89</sup> See, e.g., *In re Staggs*, 203 B.R. at 722 (court held guardian ad litem fees to be nondischargeable as in nature of support); *In re Cavaluzzi*,

case where the attorney for the debtor's former spouse brought an adversary complaint to have her fees declared nondischargeable.<sup>90</sup> The fees stemmed from a pre-petition child support modification hearing.<sup>91</sup> The court in *Cavaluzzi* correctly identified the attorney fees for child support actions can be considered in the nature of support, in part citing to the holding in the First Circuit case *In re Macy*.<sup>92</sup> The court then cites to *Kline* for the proposition that fees owed directly to an attorney are non-dischargeable if in the nature of the support.<sup>93</sup> However, the court's inquiry stops there. The court finds the fees were incurred in a child support order, they were in the nature of support, and they were reasonable.<sup>94</sup> Yet, the court never discusses the liability of the former spouse. The court in *Kline* reasoned it had no doubt the non-debtor spouse would be held liable in *quantum meruit*.<sup>95</sup> Thus, the *Kline* court's analysis was similar to the two-prong analysis required of the Impact Exception. The Bankruptcy Court in *Cavaluzzi* omits the liability step without comment (and with the un-cited, though applicable blessing of the Eighth Circuit in *Kemp*). However, this analysis fails to apply the law, either the plain language of the statute or the Impact Exception, correctly.

---

364 B.R. at 365 (court held attorney fees incurred in child-support modification were in nature of support, and thus nondischargeable).

<sup>90</sup> *In re Cavaluzzi*, 364 B.R. at 364.

<sup>91</sup> *Id.*

<sup>92</sup> *In re Cavaluzzi*, 364 B.R. 363, 365 (Bankr. E.D. Mo. 2007) (citing *In re Macy*, 114 F.3d 1 (1st Cir. 1997)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *In re Kline*, 63 F.3d 749, 751 (8th Cir. 1995).

The Eighth Circuit is not alone in this overly-broad interpretation. The Tenth Circuit, in *In re Miller*, held the fees owed by the debtor directly to a guardian *ad litem* and court appointed psychiatrist were nondischargeable.<sup>96</sup> The court found the proper emphasis was on the nature of the debt, and not the identity of the payee.<sup>97</sup> In doing so, the Tenth Circuit cited to the “precedent” of its holding in the case *In re Jones*.<sup>98</sup> However, as Judge Mark adroitly points out in *Gentilini*, “[t]he *Miller* court felt bound by *Jones*, even though it specifically noted that *Jones* did not address the issue of to whom the debt was payable.”<sup>99</sup> Similarly, the Ninth Circuit in *In re Chang* held “the identity of the payee is less important than the nature of the debt.”<sup>100</sup> But the court did not explain under what theory of statutory interpretation one necessary element of a statute becomes less important than another.<sup>101</sup>

The examples above make clear that many jurisdictions are basing their decisions on an incomplete analysis, and may be assessing fees to the debtor in ways that do not meet the stated goal of benefiting the spouse, former spouse, or child by enforcing the debtor’s familial obligations. Not only is it an unwarranted expansion of the plain meaning of the statute, but as one court aptly stated, “[e]xcluding these debts from discharge will not further the bankruptcy goal of a fresh start unburdened by old debts, [n]or will it protect spouses, former spouses and children from being injured by a debtor’s discharge.”<sup>102</sup> In the case of attorney fees, the benefit to the attorney would come completely at the expense of the debtor’s fresh start.

---

<sup>96</sup> *In re Miller*, 55 F.3d 1487, 1488 (10th Cir. 1995).

<sup>97</sup> *Id.* at 1490.

<sup>98</sup> *Id.* at 1489 (citing *In re Jones*, 9 F.3d 878 (10th Cir. 1993)).

<sup>99</sup> *In re Gentilini*, 365 B.R. 251, 256 (Bankr. S.D. Fla. 2007) (citing *In re Miller*, 55 F.3d at 1489).

<sup>100</sup> *In re Chang*, 163 F.3d 1138, 1141 (9th Cir. 1998).

<sup>101</sup> *In re Gentilini*, 365 B.R. at 256.

<sup>102</sup> *In re Linn*, 38 B.R. 762, 763 (B.A.P. 9th Cir. 1984) (citation omitted).

### SECTION III

#### *Attorney Fees Generally Are Not Support Obligations*

Having established attorney fees may be DSOs if the spouse or child remains liable *and* if the fees are in the nature of support, the next logical step is to discuss when attorney fees should be considered in the nature of support. Here the case law is fractured. Section 101(14A)(B) provides that the DSOs must be “in the nature of alimony, maintenance, or support . . . 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.”<sup>103</sup> But just what constitutes support is the subject of much litigation, and there is a general lack of agreement among the courts in the factors that should be used to resolve these cases.<sup>104</sup>

The term support is not defined in the Code, but most courts do agree on three principles of review. First, generally exceptions to discharge in bankruptcy should be viewed narrowly, the term “support” should be interpreted broadly as applied to domestic support obligations.<sup>105</sup> Second, what constitutes support is a matter of federal bankruptcy law, not controlled by the state court's interpretation.<sup>106</sup> And third,

---

<sup>103</sup> 11 U.S.C. § 101(14A)(B) (2009).

<sup>104</sup> See James L. Musselman, *Once Upon a Time in Bankruptcy Court: Sorting Out Liability of Marital Property for Marital Debt Is No Fairy Tale*, 41 FAM. L. Q. 249, 269–70 (2007).

<sup>105</sup> See, e.g., *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir.1998) (holding that the usual strict construction of exceptions to discharge is not applicable to support obligations, in light of a “longstanding . . . policy of protecting a debtor's spouse and children when the debtor's support is required.”); *In re Maddigan*, 312 F.3d 589, 596 (2d Cir. 2002) (“there is ample justification for construing certain statutory terms broadly, albeit with the confines of the narrow-construction rule. We have clearly stated that among the concepts to be given broad interpretation is the meaning of ‘in the nature of support.’”) (citation omitted).

<sup>106</sup> *In re Chase*, 392 B.R. 72, 81 (Bankr. S.D.N.Y. 2008) (“an independent inquiry to determine whether a debt characterized as alimony, maintenance, or support [is] actually in the nature of alimony,

based on various factors, the intent of the parties or the divorce court is the driving force in the bankruptcy court's examination.<sup>107</sup>

It is these varying factors, and the weight to be given to each, where the courts differ.<sup>108</sup> This results in courts looking at similar fact patterns to reach very different conclusions.<sup>109</sup> Courts have held that the crucial issue in making the determination of whether third-party debts, including attorney fees, are support is the function the award was intended to serve.<sup>110</sup> The following subsections argue that because the term support is amorphous and undefined in the Code, the plain meaning of the statute cannot be applied, and so the underlying policies drive the analysis. Then the policies for treating attorney fees as support obligations are weighed against reasons not to hold them as such. This analysis leads to the conclusion that attorney fees should generally not be treated as DSO obligations.

---

maintenance, or support . . . is made under federal, not state, law, and is not governed by state law treatment of the obligation nor by the label the parties have used to describe the obligation.”); *In re Hazelton*, 304 B.R. 145, 152 (Bankr. M.D. Pa. 2003) (“Federal standards, not state law, are used when determining whether a debt is in the nature of either alimony, maintenance or support.”).

<sup>107</sup> See, e.g., *In re Sanabria*, 275 B.R. 204, 207 (Bankr. D. N.J. 2002) (“whether an obligation falls within the category of support or alimony, as opposed to a property settlement depends upon the intent of the parties at the time of the settlement agreement.”); *In re Pulley*, 355 B.R. 611, 613 (Bankr. W.D. Ky. 2006) (In order to except debt from discharge, “[t]he creditor must show that the parties intended to create a support obligation and that the obligation actually provides necessary support.”); *In re Hammermeister*, 270 B.R. 863, 871 (Bankr. S.D. Ohio 2001) (“the obligation constitutes support only if the state court or parties intended to create a support obligation”); *In re Turner*, 266 B.R. 491, 497 (B.A.P. 10th Cir. 2001) (“whether the obligation is in the 'nature of support' requires examination of parties' or court's intent and the substance of obligation.”).

<sup>108</sup> See, *infra*, notes 108 and 109.

<sup>109</sup> Musselman, *supra* note 104, at 269.

<sup>110</sup> *In re Williams*, 703 F.2d 1055, 1057 (8th Cir. 1983).

*A. The Factors*

Factors that some circuits have used to guide their decisions as to whether attorney fees constitute a nondischargeable debt are: (1) the language of the divorce decree; (2) the parties' financial circumstances at the time of the divorce decree; and (3) the function served by the award of attorneys' fees at the time of the divorce decree.<sup>111</sup> But other circuits look at whether the support maintained daily necessities of the spouse or child,<sup>112</sup> or whether a property award appears to "assuage need."<sup>113</sup> These tests all seem to boil down to a "totality of the circumstances" analysis. Though, in this context, the totality of the circumstances might be as amorphous as the phrase "in the nature of support" itself.

Courts have held that attorney fees awarded for collection of alimony, maintenance and support obligations are so intertwined as to follow the underlying obligation.<sup>114</sup> For example, the Tenth Circuit has a broad interpretation that looks at the nature of the underlying action, not the intent of the parties or the court.<sup>115</sup> The Tenth Circuit Court held, in part, that absent unusual circumstances "court-ordered attorney fees arising from post-divorce custody action are deemed in the nature of support."<sup>116</sup> But this interpretation is too broad, and courts that have rejected this logic in other § 523(a) exemption situations.<sup>117</sup>

---

<sup>111</sup> *In re Hale*, 289 B.R. 788, 796 (B.A.P. 1st Cir.2003).

<sup>112</sup> *In re Gianakas*, 917 F.2d 759, 763 (3rd Cir. 1990).

<sup>113</sup> *In re Smith*, 398 B.R. 715, 721 (B.A.P. 1st Cir. 2008).

<sup>114</sup> *See, e.g., In re Macy*, 192 B.R. 802, 806 (Bankr. D. Mass. 1996).

<sup>115</sup> *See In re Jones*, 9 F.3d 878, 881 (10th Cir. 1993).

<sup>116</sup> *Id.* at 881.

<sup>117</sup> *In re Ziegler*, 109 B.R. 172, 175–77 (Bankr. W.D.N.C. 1989) (court ruling on attorney fees in § 523(a)(6) case stated that attorney fees should not be held non-dischargeable simply because of the underlying debt was non-dischargeable).

The appropriate analysis is expressed by Judge Isicoff in *In re Lopez*.<sup>118</sup> In that case, the former spouse argued that because the claim for attorney fees arose from a custody, parentage, or visitation matter, they were in the nature of support.<sup>119</sup> But the court found that interpretation of the support to be too broad, stating “not every obligation created in connection with, or arising out of, a domestic matter, *ipso facto*, qualifies as a domestic support obligation.”<sup>120</sup> The state court’s order stated the fees were awarded based on the bad faith of the debtor during the custody proceeding, and “not based upon the respective wages or ability of parties to pay.”<sup>121</sup> Thus, the fees were not in the nature of support.<sup>122</sup> In other words, just because the action arises from a divorce decree, does not mean the attorney fees assessed are domestic support obligations.

But that begs the question; under what conditions should attorney fees be considered in the nature of support? To answer, one must look at the policy arguments in favor of, and in opposition to, attorney fees as domestic support obligations.

## *B. Policy Argument for Finding DSO is Weighed Against Potential Harm to Debtor and Family*

### *1. A Look at the Policy Arguments for Making Attorney Fees DSOs*

There are two basic policy arguments favoring the treatment of attorney fees arising from divorce, separation, and the like and owed by the debtor to either the former spouse’s attorney or the former spouse as DSOs:

---

<sup>118</sup> *In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009).

<sup>119</sup> *Id.* at 384.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 385.

<sup>122</sup> *Id.*

(1) protecting the non-debtor spouse and children—which has been reviewed in length in the sections above,<sup>123</sup> and (2) to prevent depleting the pool of attorneys willing to take on such cases. As will be shown in the following section, these arguments are unpersuasive especially in light of the changes to BAPCPA which make 11 U.S.C. § 523(a)(15) a much more salient provision to apply to attorney fees in Chapter 7 cases. In the first case, treating attorney fees as DSOs may actually hurt rather than help the non-debtor spouse or child. In the second instance, the policy does not hold up to close scrutiny. The rationale of the courts that have held attorney fees related to divorce proceedings to be in the nature of support, is that if the debt were discharged, the non-debtor spouse would remain liable on the debt.<sup>124</sup> Thus, finding the debts to be non-dischargeable support furthers the policy of protecting spouses and children.<sup>125</sup>

Another argument put forth is that to find attorney fees as non-support obligations would lead to a depletion of the pool of attorneys willing to take on these cases.<sup>126</sup> The gist of the second argument is that courts fear if attorney fees are not treated as support obligations, spouses and children may not find adequate counsel. “[A] spouse's need for adequate legal representation in a lawsuit affecting the marital status is not materially different from those other needs—from

---

<sup>123</sup> See Section I.D., *supra*.

<sup>124</sup> Bankruptcy Law Manual § 8A:10 (5th ed. 2002); *see also generally* *In re Lawrence*, 237 B.R. 61 (Bankr. D. N.J. 1999) citing *e.g.*, *Macy v. Macy*, 114 F.3d 1 (1st Cir. 1997); *In re Spong*, 661 F.2d 6 (2d Cir. 1981); *In re Kline*, 65 F.3d 749 (8th Cir. 1995).

<sup>125</sup> Bankruptcy Law Manual § 8A:10 (5th ed. 2002); But where this policy does not apply, third-party creditors are not treated as beneficiary of a DSO. *See In re Linn*, 38 B.R. 762 (B.A.P. 9th Cir. 1984) (where former spouse would incur no liability if debt owed directly to court-appointed attorney and psychiatrist in child custody battle was discharged, then policy of protecting child and spouse not implicated as only benefit to non-dischargeability would be to third-party creditor).

<sup>126</sup> Sheryl L. Scheible, *Defining “Support” Under Bankruptcy Law: Revitalization of the “Necessaries” Doctrine*, 41 VAND. L. REV. 1, at 44 (1988) (citing to *In re Dupont*, 19 Bankr. 605 (Bankr. E.D.N.Y. 1982); *Richards v. Loncar*, 14 Bankr. 276, 278 n.2 (Bankr. N.D. Ill. 1981)).

subsistence to the education of children—which fall within the more common meaning of alimony or support . . . .”<sup>127</sup>

This second argument is persuasive on the surface, but it fails for three reasons: (1) The adequacy of counsel argument can be shared by all other attorneys; (2) there is nothing in the historical record to indicate that Congress intended to give a higher priority over all other advocates to marital law attorneys who represent divorce clients whose spouses end up owing them attorney fees; and (3) because non-support attorney fees can be considered non-dischargeable marital debt under 11 U.S.C. § 523(a)(15), family law practitioners in this situation can still avoid discharge in the vast majority of bankruptcies without necessitating a declaration of the debt as a DSO.

#### *a. Adequacy of Counsel*

First, as a general rule in bankruptcy, attorney fees are dischargeable.<sup>128</sup> That a client who owes a practitioner money might declare bankruptcy and be able to discharge his fee debt is a risk most practitioners take. The debtor’s family law practitioner’s fees are dischargeable,<sup>129</sup> as are the fees of

---

<sup>127</sup> *In re Soforenko*, 203 B.R. 853, 862 (Bankr. D. Mass. 1997) (quoting *Goldman v. Roderiques*, 349 N.E.2d 335, 337 (Mass. 1976)).

<sup>128</sup> *In re DeRoche*, 434 F.3d 1188, 1191 (9th Cir. 2006) (“Consistent with this philosophy, we have held that, absent bad faith or harassment, attorney’s fees are not recoverable in bankruptcy for litigating issues ‘peculiar to federal bankruptcy law.’ The Bankruptcy Code does contain some fee provisions. However, it does not contain any provisions that create a general right for the prevailing party to be awarded attorney’s fees in federal bankruptcy litigation. Thus, we have held that ‘[t]here is no general right to recover attorney’s fees under the Bankruptcy Code’”) (citations omitted); *Rittenhouse v. Eisen*, 404 F.3d 395, 396 (6th Cir. 2005) (debt for pre-petition legal fees not excluded from discharge under § 523(a)).

<sup>129</sup> *In re O’Brien*, 367 B.R. 242, 244 (Bankr. D. Mass. 2007) (debtor’s divorce attorney cannot claim fee award as domestic support obligation).

attorneys whose clients have earned malpractice awards.<sup>130</sup> Even a judgment lien that an attorney may have acquired against a former client can be discharged if it is levied against exempt property.<sup>131</sup>

The same adequacy of counsel argument made for family law practitioners who represent a client who ends up the holder of a Domestic Support Obligation can be made by practitioners in any number of areas where the judgments and accompanying attorney fees are dischargeable.<sup>132</sup> Yet attorney fees owed in these other cases are deemed dischargeable.

*b. No Congressional Intent*

Secondly, nowhere in the definition of DSO in 11 U.S.C. § 101(14a), nor in its application in 11 U.S.C. § 523(a)(5), nor in the congressional history of 1978, or the amendments in 1986, 1994, or 2005, does it appear that attorney fees were contemplated as domestic support obligations.<sup>133</sup> This is court-invented interpretation, and as discussed in the sections below, the results of holding attorney fees as DSOs could have far reaching and undesirable results.

---

<sup>130</sup> Hughes v. Sanders, 469 F.3d 475, 479 (6th Cir. 2006) (default malpractice award was dischargeable).

<sup>131</sup> 11 U.S.C. § 522(f)(1) (2009).

<sup>132</sup> Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998) (holding that medical negligence is not “willful and malicious injury” under § 523(a)(6) exemption, the phrase only applies to intentional torts, and therefore debt remains dischargeable).

<sup>133</sup> *In re Brooks*, 371 B.R. 761, 768 (Bankr. N.D. Tex. 2007) (“[I]n going out of its way to define, in newly enacted section 101(14A), the list of entities . . . that may assert claims related to a ‘domestic support obligation,’ Congress did not add attorneys to the list, though it certainly could have.”).

*c. Non-Support Obligations Arising from  
Divorce Proceedings are Not Dischargeable*

Section 523(a)(15) of the Code applies to all divorce related debts owed to the spouse, former spouse, or child of the debtor that are not domestic support obligations.<sup>134</sup> The operative clause of 11 U.S.C. § 523(a)(15) related to applicability changed under BAPCPA to essentially mirror that of the pre-BAPCPA § 523(a)(5).<sup>135</sup> Like a DSO under § 523(a)(5), a non-domestic support obligation, owed to a spouse, former spouse, or child which arose under a divorce decree or settlement agreement, under § 523(a)(15) does not require a complaint to be filed.<sup>136</sup> Whereas other debts which may be excepted from discharge must be filed within sixty days of the first set meeting of creditors.<sup>137</sup> Thus, attorney fees can be argued as non-dischargeable non-support obligations under § 523(a)(15). This would minimize the inadequate support argument because the debts would still remain non-dischargeable, so the marital law attorneys could still get paid.

---

<sup>134</sup> 11 U.S.C. § 523(a)(15) (2009).

<sup>135</sup> 11 U.S.C. § 523 (a)(15) (2009) reads “to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . .”; *compare with* “to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . .” 11 U.S.C. § 523(a)(5) (1994).

<sup>136</sup> 11 U.S.C. § 523(c) (2009). FED. R. BANKR. P. 4007(c) provides that a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors. Section 523(c) encompasses § 523(a)(2), § 523(a)(4), and § 523(a)(6). Previous to the 2005 BAPCPA changes, § 523(c) had also included § 523(a)(15).

<sup>137</sup> *Id.*

As is discussed below, while the 11 U.S.C. § 523(a)(15) exception does not have the same breadth as 11 U.S.C. § 523(a)(5), particularly in Chapter 13 cases, neither does it carry with it all of the power of a DSO which can potentially harm the debtor and the family member to which obligations are owed.<sup>138</sup>

## 2. *A Policy Argument Against Treating Attorney Fees as DSOs*

Even before BAPCPA, support obligations under the old 11 U.S.C. § 523(a)(5) were exempt from discharge, but the BAPCPA changes to the provisions for exemptions<sup>139</sup> and priorities<sup>140</sup> give domestic support obligations unprecedented reach into the bankruptcy estate and beyond for collection. Congress did not contemplate treating attorney fees as DSOs, moreover, it runs counter to the goal of protecting the spouse and child, and does so at the expense of other creditors and the “honest but unfortunate” debtor’s “fresh start.” The following subsections review the potential negative impact on the debtor and his spouse, former spouse, and child if DSO status is extended to attorney fees.

### *a. Reaching through to Exempt Property*

Exempt property is one of the great protections of bankruptcy; it ensures the debtor exits after a discharge with enough assets to begin his “fresh start.” A judgment lien for a malpractice case, and the accompanying contingency fees,

---

<sup>138</sup> Section III.C., *infra*, looks at the breadth of § 523(a)(15) in the context of chapter 13 bankruptcy; Section III.B. looks at the dangers of treating attorney fees as DSOs.

<sup>139</sup> 11 U.S.C. § 522 (2009), discussed, *supra*, in Section I.C.3.

<sup>140</sup> 11 U.S.C. § 507 (2009), discussed, *supra*, in Section I.C.2.

may be discharged.<sup>141</sup> However, if the family law practitioner's fees are owed, not by his client, but by a bankrupt opponent, they are treated as a DSO, and the practitioner can then gain access to the debtor's exempt property.<sup>142</sup>

While courts have held that a trustee cannot seek to collect exempt property to satisfy a DSO,<sup>143</sup> former spouses have successfully brought such actions.<sup>144</sup> Ostensibly, if attorney fees are DSOs, then attorneys will be able to pilfer the coffers of exempt property to recover their fees. No cases directly on this point have been recorded since 2005. The expansive language of 11 U.S.C. § 522(c)(1), "notwithstanding any provision of applicable non-bankruptcy law to the contrary", implies this could even allow the attorney to avoid state law exemptions for homestead and other property.<sup>145</sup> One author has opined that DSO creditors must exhaust all exempt assets before reaching down into

---

<sup>141</sup> See *Hughes v. Sanders*, 469 F.3d 475 (6th Cir. 2006) (default malpractice award was dischargeable).

<sup>142</sup> Claude R. Bowles, *Expecting the Unexpected: Unusual Domestic Relations Law Issues That May Arise Under the BAPCPA*, 41 FAM. L.Q. 343, 352–53 (2007).

<sup>143</sup> *In re Ruppel*, 368 B.R. 42, 42 (Bankr. D. Or. 2007) (Chapter 7 debtor's exempt property was not property of his bankruptcy estate subject to administration by trustee, and thus trustee had no authority to liquidate exempt non-estate property for benefit of DSO claimant.); *In re Quezada*, 368 B.R. 44, 45 (Bankr. S.D. Fla. 2007) (Code provision added by BAPCPA, to render exempt property liable for certain tax debts and DSOs, did not limit debtor's right to claim all exemptions otherwise available to him, and did not provide basis for disallowance of homestead exemption. While property might be subject to execution by DSO creditor, this did not mean that trustee could administer this exempt homestead property for benefit of DSO creditors); *In re Vandeventer, Jr.*, 2007 368 B.R. 50, 54 (Bankr. C.D. Ill. 2007) (The trustee cannot reach the exempt property, because it is not part of the estate), *but see In re Galtieri*, 172 Fed. Appx. 397 (3d Cir. 2006).

<sup>144</sup> *In re Crum*, 414 B.R. 103, 110–11 (Bankr. N.D. Tex.) (slip opinion) (holding debtor's IRA account to be generally exempt, but not exempt from domestic support obligation); *In re MacGibbon*, 383 B.R. 749 (Bankr. W.D. Wash. 2008) (neither former wife nor the State violated the automatic stay in enforcing, assessing, and collecting support from exempt assets).

<sup>145</sup> Bowles, *supra* note 142, at 352–53.

nonexempt property.<sup>146</sup> While the rationale behind avoiding exemptions to obtain funds for support debts like alimony and child support fits with the policy discussed previously,<sup>147</sup> and many may applaud allowing a former spouse or child to pursue exempt property of a deadbeat father who refuses to pay child support or alimony, there are many debts related to the dissolution of a marriage that bear no such social stigma, and there is no compelling policy explanation for extending this power to attorney fees.

There may be an even more far-lasting and detrimental result for the family members to which a DSO is owed. Allowing the attorney to raid the equity in a home or the retirement account of a debtor will mean that the debtor is hindered that much more in her attempt at a fresh start. If, as a result of this hindrance, the debtor is unable to meet domestic support obligations to the spouse or child, payment of the attorney fees will have acted to thwart the very changes BAPCPA seeks to ensure.

*b. Priorities: Pro Rata Distribution  
might hurt the non-debtor client*

Treating attorney fees as DSOs means that the attorney fees will share priority status with other DSOs which may have arrearages, such as child support and alimony. If attorney fees are given domestic support obligation status by the bankruptcy court, then in Chapter 7 cases where the debtor's bankruptcy estate lacks sufficient funds to pay both the DSO owed directly to the family member and the DSO owed to the attorney, the pro rata distribution would have the effect of diminishing the amount recoverable by the spouse and child.<sup>148</sup> Certainly, diminishing the support payments

---

<sup>146</sup> Edward W. Vopat, *Domestic Support Obligations Under the Revised Bankruptcy Code*, 17 J. BANKR. L. & PRAC. 3, 20 (June 2008).

<sup>147</sup> See Sections I.D. and III.B.1., *supra*.

<sup>148</sup> 11 U.S.C. § 726 (2009) (“[P]roperty of the estate shall be distributed . . . first, in payment of claims of the kind specified in, and in

was not an objective of Congress, nor a desirable result as a matter of policy.

It is true this result will not occur often because in most Chapter 7 bankruptcies there is nothing left to distribute once the secured creditors have been satisfied.<sup>149</sup> However, it can occur and will occur in at least some circumstances, thus it is reason enough to seek another avenue for collection of these fees.

Therefore, as a general rule, conferring DSO status to attorney fees does not enhance the policy of protecting the spouse, former spouse, or child.

*c. Solution: Apply Impact Exception and  
Treat Attorney Fees as § 523(a)(15) debts*

Attorney fees generally need not be treated as DSOs to protect the support due to a debtor's family. In cases where the debtor's spouse, former spouse, child or the party responsible for the child remains liable for attorney fees, the impact exception should be applied to the debt, but rather than holding the debt in the nature of support, the attorney fees should be treated as nondischargeable divorce-related debt under 11 U.S.C. § 523(a)(15).

---

the order specified in, section 507 of this title . . . .”). This is not true of Chapter 13 cases, though. A Chapter 13 plan, under § 1322(a)(2), must “provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title[11 USCS § 507], unless the holder of a particular claim agrees to a different treatment of such claim; . . . .” So, under Chapter 13, the debt must be paid, but the order of priority doesn't appear to be specifically enforced as it is in Chapter 7.

<sup>149</sup> See *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and its Impact on the Practice of Family Law* 5–6, <http://www.abiworld.org/committees/newsletters/consumer/vol5num2/ConsumerComm3.pdf> adapted from Hon. Sandy Karlan, *New Act Enhances Protection of Support Recipients*, FLA. FAM. LAW REP. 2006, Issue 3 (March 2006).

*i. Some Courts have used  
§ 523(a)(15) for attorney fees*

Section 523(a)(15) was added to the Bankruptcy Code in 1994, and expanded the marital debts that could be made dischargeable beyond support obligations.<sup>150</sup> But it contained a balancing clause that was difficult for courts to apply.<sup>151</sup> BAPCPA revised the language of 11 U.S.C. § 523(a)(15), which now reads:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

. . . .

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit; . . . .<sup>152</sup>

---

<sup>150</sup> 11 U.S.C. § 523(a)(15) (1994). H.R. REP. 103-835, P.L. 103-394, Bankruptcy Reform Act of 1994.

<sup>151</sup> *In re Klem* 362 B.R. 585, 592 (Bankr. W.D.N.Y. 2007) (“sorting out the various burdens ‘of going forward’ under 11 U.S.C. § 523(a)(15) as it appeared prior to October 17, 2005 is to solve a Gordian’s Knot”). The following is a very cursory explanation of the balancing test: Once the court determined that the debt would fall within the parameters of § 523(a)(15), the court would then have to determine “whether the debtor has the ability to pay the obligation in question out of income not reasonably necessary for the debtor’s support or the support of a dependant or for the operation, preservation, or continuation of the Debtor’s business . . . . [If not,] the inquiry ends; the debt is dischargeable. However, if the debtor does have the ability to pay the debt at issue, the Court must then weigh the benefit to the debtor of discharging such debt against the detriment to the nondebtor spouse or child of nonpayment . . . . If the benefit to the debtor outweighs the detriment to the nondebtor spouse or child, the debt is dischargeable.” *In re Soforenko* 203 B.R. 853 (Bankr. D. Mass. 1997) (citations omitted).

<sup>152</sup> 11 U.S.C. § 523(a)(15) (2009).

Just like in 11 U.S.C. § 523(a)(5) cases, there is no requirement that an adversary proceeding be filed, so debtors are not able to discharge debts that fit into § 523(a)(15) based on a failure of the creditor to object.<sup>153</sup> This section was originally treated as only applying to property settlements, but with the BAPCPA changes, the provision need not be read so narrowly.<sup>154</sup> As the plain language of the statute states, it applies to all divorce-related debt not described in § 523(a)(5).<sup>155</sup> The only difference is § 523(a)(15) debts are not excepted from discharge under 11 U.S.C. § 1328(a).<sup>156</sup> This is due to a logical inconsistency in the Code, and is considered in the next subsection.<sup>157</sup>

Some courts have already found attorney fees in Chapter 7 cases to apply under 11 U.S.C. § 523(a)(15). For example, in a case where the divorce decree awarded only a share of the marital property to the non-debtor spouse, the attorney fees were held non-dischargeable.<sup>158</sup> Another court found attorney fees to be non-dischargeable under § 523(a)(15), even though a portion of the debt owed was for a child support obligation that was non-dischargeable under § 523(a)(5).<sup>159</sup> In that case, the court held it did not have to determine whether obligations imposed were in the nature of support or property settlements, because the distinction served no practical purpose.<sup>160</sup> The court held that child support arrearage was non-dischargeable under § 523(a)(5),

---

<sup>153</sup> 11 U.S.C. § 523(c) (2009). *See supra* note 135.

<sup>154</sup> *In re Johnson*, No. 07-5054, 2007 WL 3129951, 3 (Bankr. N.D. Ohio 2007) (“The plain language of the statute now provides that all debts which do not qualify as domestic support obligations are nondischargeable.”).

<sup>155</sup> *Id.*; 11 U.S.C. § 523(a)(15) (2009).

<sup>156</sup> *See*, 11 U.S.C. § 1328(a) (2009) text, *infra*, at Section III.C.2.

<sup>157</sup> *See, infra*, Section III.C.2.

<sup>158</sup> *In re Cunningham*, 2008 WL 6192259, 3 (Bankr. N.D. Ohio 2008) (slip opinion).

<sup>159</sup> *In re Golio*, 393 B.R. 56, 63 (Bankr. E.D.N.Y. 2008).

<sup>160</sup> *Id.* at 62 (“[T]his Court need not make a determination on whether the amounts awarded under the Judgements at issue constitute domestic support obligations under 11 U.S.C. § 523(a)(5) if the Plaintiff can demonstrate that the Judgments would be nondischargeable in any event under 11 U.S.C. § 523(a)(15) . . .”).

and without clearly elaborating its reasons why, the court then found the judgment for the attorney fees in the state court proceedings to be non-dischargeable under § 523(a)(15).<sup>161</sup>

Under 11 U.S.C. § 523(a)(15) in Chapter 7 cases, just like with a § 523(a)(5) debt,<sup>162</sup> the attorney can still proceed with collection activity against non-exempt property of the debtor once the debtor is out of bankruptcy. While, the attorney won't have the potential to avoid the automatic stay, or raid the debtor's exempt property during the bankruptcy process, as she might be able to as a DSO,<sup>163</sup> the marital practitioner is provided a level of security for fees. This should help quell the policy concerns of those who fear that if attorney fees are not DSOs then a dependent spouse may not receive adequate counsel. But what about Chapter 13 cases discharged under § 1328(a)?

## ii. Chapter 13 Contingency

Unlike a DSO, a § 523(a)(15) debt may be discharged in Chapter 13 cases.<sup>164</sup> 11 U.S.C. § 1328(a), which lists non-dischargeable debts, omits 11 U.S.C. § 523(a)(15) debts from the list.<sup>165</sup> This is a logical inconsistency that Congress needs to fix. This leaves courts with the unappetizing choice between finding attorney fees to be DSOs in Chapter 13 cases

---

<sup>161</sup> *Id.* at 63.

<sup>162</sup> 11 U.S.C. § 727(b) excludes allowed 523 exceptions from discharge. Non-discharged debts remain actionable after the bankruptcy case is discharged.

<sup>163</sup> See discussion, *supra*, at Section I.C. regarding the automatic stay and exemptions.

<sup>164</sup> James L Musselman, *Once Upon a Time in Bankruptcy Court: Sorting Out Liability of Marital Property for Marital Debt Is No Fairy Tale*, 41 FAM. L. Q. 249, 270–71 (2007).

<sup>165</sup> 11 U.S.C. § 1328(a) (2009). Debts owed under § 523(a)(15) differ in Chapter 13 from DSOs in another way, the failure of the debtor to pay DSOs that become due after a Chapter 13 petition is filed is cause for a Chapter 13 case to be converted to Chapter 7 or dismissed. 11 U.S.C. § 1307(c)(11) (2009).

or treating them as dischargeable non-support obligations. However, this flaw is minimized because so few bankruptcies are actually discharged under 11 U.S.C. § 1328(a).<sup>166</sup> Section 1328(a) provides:

“(a) . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

. . . .

(2) of the kind specified in section 507 (a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523 (a); . . . .”

11 U.S.C. § 523(a)(15) is noticeably, and illogically excluded from this list. Non-support divorce-related debts are non-dischargeable in Chapter 7 cases, and also under § 1328(b), which is the hardship discharge under Chapter 13.<sup>167</sup> 11 U.S.C. § 1328(c) provides:

“(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt –

. . . .

(2) of a kind specified in section 523 (a) of this title.”

This inconsistency between Code sections makes little sense and should be corrected by Congress.

---

<sup>166</sup> Based on the Federal Judiciary Bankruptcy Statistics, which states that only thirty percent of bankruptcies are historically filed as Chapter 13 cases, and of these only one-third of Chapter 13 cases are discharged, or roughly ten percent of the whole. See, *infra*, page 30 and notes 167–68.

<sup>167</sup> 11 U.S.C. § 1328(b) (2009).

In the meantime, the number of bankruptcies falling into this inconsistency are very limited. Of the roughly one million Chapter 7 and Chapter 13 consumer bankruptcies filed in 2008, a little over thirty percent were filed under Chapter 13.<sup>168</sup> Since historically only one-third of Chapter 13 bankruptcies are discharged under 11 U.S.C. § 1328(a),<sup>169</sup> it means that roughly only ten percent of consumer bankruptcy cases will fall under § 1328(a). Thus, the vast majority of divorce-related claims involving attorney fees fall cleanly into the 11 U.S.C. § 523(a)(15) exception.

In the small minority of cases that remain, the courts would be left with two choices, treat the debt as a non-dischargeable support and give the attorney a set of keys to the domestic support kingdom, or find the debt as a § 523(a)(15) and risk discharge. If the court chooses the latter course, the attorney fees would only be dischargeable after the debtor finished his payment period of three to five years.<sup>170</sup> As a result, in many of these Chapter 13 cases, the attorney would receive at least some of the money owed by the debtor. In any case, under Chapter 13, the attorney would be no worse off than any other practitioner seeking to collect fees from a consumer debtor in bankruptcy. Of course, this leaves open the possibility that the spouse or former spouse could still remain liable on whatever debt remained. As stated before, because neither of the solutions is appealing,

---

<sup>168</sup> Raw numbers from *Federal Judiciary Bankruptcy Statistics*, [http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2008/1208\\_f2.xls](http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2008/1208_f2.xls) (last visited June 17, 2010). All calculations are the author's interpretation of those numbers.

<sup>169</sup> "Chapter 13 filing rates remain relatively stable over time at about 30% of total filings. Completion rates hover nationally at about one-third of confirmed plans . . . ." U.S. DEP'T OF JUST., *Bankruptcy by the Numbers*, [http://www.usdoj.gov/ust/eo/public\\_affairs/articles/docs/abi082000ch13.htm](http://www.usdoj.gov/ust/eo/public_affairs/articles/docs/abi082000ch13.htm) (last visited June 17, 2010). These are albeit rough and less than scientific calculations, but if thirty percent of consumer bankruptcies are Chapter 13 filings, and of those confirmed plans only one-third are completed, then the author calculates that roughly ten percent of consumer bankruptcies are discharged under Chapter 13.

<sup>170</sup> Confirmation of a Chapter 13 plan requires the debtor to use all disposable income for the three to five year duration of the plan to pay off debts. 11 U.S.C. § 1325(b)(4) (2009).

Congress should modify the Code to fix this logical inconsistency.

### CONCLUSION

While some believe BAPCPA was directed in part to limit the effectiveness of bankruptcy attorneys,<sup>171</sup> if interpreted too broadly it may have created an unexpected boon for domestic relations practitioners. If courts continue to find that attorney fees are DSOs, as it seems the majority of courts want to do, then enterprising firms may try to use the apparently expansive language of BAPCPA to get their claws into estate and exempt property.

Allowing all marital attorney fees awarded against the debtor to be treated as DSOs could give divorce lawyers unprecedented access to the bankruptcy estate, hindering the debtor's "fresh start" without necessarily helping in supporting the spouse, former spouse, or child of the debtor. This need not occur. In ninety percent of cases, attorney fees owed to the spouse, former spouse, or child of the debtor upon which the spouse, former spouse, or child remains liable, can be held as exempt from discharge under 11 U.S.C. § 523 (a)(15),<sup>172</sup> thus enhancing the promise of payment for the attorney, without turning a payment that goes into an attorney's pocket into a domestic support obligation.

---

<sup>171</sup> See generally, Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283 (2005).

<sup>172</sup> Only roughly ten percent of consumer bankruptcy cases are discharged under Chapter 13. See *discussion supra* page 139 and notes 167–68.

Often the purpose of assessing opponents' attorney fees is to balance out the payment between parties who are economically unequal, where one spouse has a financially superior position. But filing for bankruptcy is a clear indication of financial insecurity. The underlying domestic duty recognized by society in general and codified in the various provisions of the Bankruptcy Code to support the spouse, former, spouse or child must as a policy remain, despite the honest but unfortunate debtor's financial situation. But in the majority of divorce cases, there is no similarly compelling societal policy argument for the debtor to support the attorney of the beneficiary of the domestic support obligation.