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John Francis Murphy

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John Francis Murphy, Esq.*

As the practices of bankruptcy law and divorce law become more specialized, the practitioner of either discipline is less likely to be sufficiently familiar with the other. When a divorced spouse files bankruptcy, the expectations of either spouse may be thwarted by a practitioner's lack of experience in the other discipline. This article explores the area of dischargeability in bankruptcy of debts for alimony, maintenance, child support, and property settlements.

Section 523(a)(5) of the Bankruptcy Code provides an exception to the debtor's discharge for debts to a spouse, former spouse, or child for alimony, maintenance, or child support; such debts are *not* dischargeable in bankruptcy. However, obligations arising from a husband and wife's apportionment of debts through a property settlement agreement are dischargeable. This dichotomy generates numerous intricacies for counsel in the realm of divorce law and bankruptcy law.

Amended section 523(a)(5) of the Bankruptcy Act of 1978 is the current bankruptcy statute which governs dischargeability of debts for alimony and property settlements. The immediately preceding statute was the Bankruptcy Act of 1898.[1] In 1903, an amendment to the 1898 statute expressly provided in section 17a(2) that a discharge in bankruptcy did not discharge a debt from liability "for alimony

* The author is currently a member of the firm Adelman Lavine Krasny Gold and Levin, 1900 Two Penn Center Plaza, Philadelphia, Pa. 19102; telephone (215) 568-7515.

The author was formerly a law clerk to the Honorable Emil F. Goldhaber of the Bankruptcy Court for the Eastern District of Pennsylvania, 1983-86; to the Honorable Thomas C. Gibbons of the Bankruptcy Court for the Middle District of Pennsylvania at Wilkes Barre, 1982-83; and to the Honorable Thomas Wood of the Bankruptcy Court for the Middle District of Pennsyvania at Harrisburg, 1981-82.

1. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation . . . ."[2] In 1917, the exclusion from discharge in section 17a(2) was broadened by the addition of an exception "for breach of promise of marriage accompanied by seduction . . . ."[3] In 1970, the substance of the alimony exception was changed to section 17a(7).[4]

When the 1978 statute was passed, the alimony exception was incorporated at 11 U.S.C. section 523(a)(5), but the material on seduction, criminal conversation, and breach of promise to marry was not incorporated. Section 523(a)(5) then stated:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt —
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> . . .
>
> (5) 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 property settlement agreement, but not to the extent that —
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or
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> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support . . . .[5]

It is notable that the 1903 amendment provided an exception for liability to a "wife," while the 1978 statute renders certain debts nondischargeable when payable to a "spouse." Thus, husbands may find succor in the reciprocity of the new statute.[6]

A 1981 amendment to section 523(a)(5) added the following highlighted language to subsection "A": "(A) 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*) . . . ."[7] The Bankruptcy Amendments and Federal Judgeship Act of 1984 further augmented section 523(a)(5) with the following highlighted language exempting debts:

> (5) 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* or property settlement agreement, but not to the extent that —
>
> (A) 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*

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2. Act of Feb. 5, 1903, Pub. L. No. 57-62, § 5, 32 Stat. 797, 798.

3. Act of Mar. 2, 1917, Pub. L. No. 64-376, 39 Stat. 999.

4. Act of Oct. 19, 1970, Pub. L. No. 91-467, 1970 U.S. CODE CONG. & ADMIN. NEWS (84 Stat.) 1156, 1158.

5. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, 2590-91 (emphasis added) (current version at 11 U.S.C. § 523 (1982 & Supp. III 1985)).

6. *See also* Balthazor v. Winnebago County (*In re* Balthazor), 36 Bankr. 656 (Bankr. E.D. Wis. 1984) (paternity obligations are not dischargeable in bankruptcy).

7. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 1981 U.S. CODE CONG. & ADMIN. NEWS (95 Stat.) 357, 863 (emphasis added).

Government or to a State or any political subdivision of such State); . . .[8]

The addition of the language, "or other order of a court of record," has the effect, *inter alia*, of excepting from discharge obligations for paternity to the extent the order is for maintenance or support.[9]

Section 523(a)(5) currently reads as follows:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt —
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> . . .
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> (5) 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 or property settlement agreement, but not to the extent that —
>
> (A) 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); or
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> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; . . .[10]

One court has enunciated the purpose of section 523(a)(5) as follows:

> The rationale for the exemption from discharge for support obligations is threefold: the protection of the spouse who may lack job skills or who may be incapable of working, the protection of minor children who may be neglected if the custodial spouse entered the job market, and the protection of society from an increased welfare burden that may result if debtors could avoid their familial responsibilities by filing for bankruptcy.[11]

A debt is exempted from discharge only if four requirements are met: (1) the debt is owed to a spouse, former spouse, or child of the debtor; (2) it is for alimony, maintenance, or child support; (3) it arises under a property settlement agreement, divorce decree, or other order of a court of record; and (4) it can be assigned only under section 402(a)(26) of the Social Security Act or assigned to an entity other than the federal, state, or local government.[12] The determination of whether a debt is non-dischargeable as alimony, maintenance, or support is a question of federal law.[13]

Under the first element, the statute provides that the beneficiary of the provision must be a spouse, former spouse, or child of the

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8. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 333, 376 (emphasis added).

9. 3 COLLIER ON BANKRUPTCY, § 523.15 [4] (15th ed. 1981).

10. 11 U.S.C. § 523(a)(5) (1982 & Supp. III 1985).

11. Shaver v. Shaver, 736 F.2d 1314, 1316 n.3 (9th Cir. 1984) (citing Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 UCLA L. REV. 96, 96-97 n.7 (1977).

12. Rankin v. Alloway (*In re* Alloway), 37 Bankr. 420, 424-25 (Bankr. E.D. Pa. 1984).

13. Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 904-05 (11th Cir. 1985).

debtor. Where the debtor and the nondebtor have agreed that the debtor will be primarily liable for nondebtor spouse obligations, the debt is nondischargeable under section 523(a)(5) so long as: (1) the payment of the obligation is in the nature of alimony, maintenance or support; and (2) the nondebtor spouse remains secondarily liable on the debt *or* would lose something of value in the absence of the debtor's payment on the debt. This rule supports the result that when the debtor has agreed to pay a joint obligation of both spouses, that obligation may be nondischargeable even though the duty of payment runs from the debtor to a third party creditor.[14] As stated by one bankruptcy court:

> If the debtor has assumed an obligation of the debtor's spouse to a third party in connection with a separation agreement, property settlement agreement, or divorce proceeding, such debt is dischargeable to the extent that payment of the debt by the debtor is not actually in the nature of alimony, maintenance, or support of debtor's spouse, former spouse, or child.[15]

Where spouses are jointly liable on a debt secured by property which is transferred to the nondebtor spouse along with the primary obligation to repay the debt, the debt will likely be dischargeable.[16] Conversely, if the nondebtor gets the property while the debtor has assumed the primary duty to repay the joint debt, the debt will probably be nondischargeable.[17] For instance, the bankruptcy court may find that the debtor's agreement to be the primary obligor on a joint mortgage is a nondischargeable obligation.[18] In such a case, both the creditor and the nondebtor spouse have standing to bring an action for nondischargeability.[19]

The above stated rules apply to counsel fees awarded in a divorce action. Because federal bankruptcy law, as opposed to state law, determines what constitutes alimony, it has been argued that counsel fees awarded in a divorce action are nondischargeable.[20] Although most courts are unwilling to reach this absolute conclusion, the practical result is usually the same:

> The majority rule is that, except when it appears clearly that the award was a

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14. Lewis v. Lewis (*In re* Lewis), 39 Bankr. 842, 845 (Bankr. W.D.N.Y. 1984) (third party debt only nondischargeable if the underlying obligation was in the nature of alimony, maintenance, or support); Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1110 (6th Cir. 1983) (third party debt not alimony or support if amount assumed unreasonably exceeds traditional notions of support).

15. *Lewis*, 39 Bankr. at 845.

16. Malone v. Hackworth (*In re* Hackworth), 27 Bankr. 638 (Bankr. S.D. Ohio 1982) (the intent of the parties to effect a distribution of property or to provide support may generally be indicated by the separation agreement).

17. *Id.*

18. *Lewis*, 39 Bankr. at 845.

19. Porter v. Gwinn (*In re* Gwinn), 20 Bankr. 233, 234-35 (Bankr. 9th Cir. 1982) (attorney had standing to obtain fees earned in a California marriage dissolution, since fees were in the nature of spousal support).

20. Pauley v. Spong (*In re* Spong), 661 F.2d 6, 11-12 (2d Cir. 1981) (Lumbard, J., dissenting).

> property settlement, attorney fees awarded to an ex-spouse in a divorce decree are so closely connected with an award for support as to be in the nature of support or alimony and, therefore, are nondischargeable.[21]

Nonetheless, where the debtor is solely liable for the attorney fees, the fees *are* dischargeable.[22]

Reserving for later discussion the second element of section 523(a)(5), the third element simply requires that the obligation arise under a property settlement agreement, separation agreement, divorce decree, or other order of a court of record.[23] The fourth element requires the obligation to be assigned either pursuant to section 402(a)(26) of the Social Security Act or to an entity other than a federal, state, or local government.[24]

Under the second element of nondischargeability, the debt must be for alimony, maintenance or child support and the obligation must actually be "in the nature of alimony, maintenance or support."[25] Most problems under section 523(a)(5) revolve around this second requirement. The theoretical underpinning of the problem is best understood in light of two conflicting federal policies:

> In determining the dischargeability of a debt under § 523(a)(5) we must be mindful of two competing federal policies. The first is that granting the debtor a fresh start with his discharge of debts is a fundamental goal of bankruptcy relief. The second is that the former spouse rather than society should be responsible for maintenance and support of members of the family which is split by divorce or separation. These two considerations must be balanced with an eye toward the burden of proof on the dischargeability of a debt which is placed on the party seeking such relief.[26]

The characterization of whether a debt is alimony, maintenance, or support is determined as of the time the agreement or decree creating the obligation arose. The bankruptcy court is not required to make continuing inquiries into changes in the financial condition of the parties.[27] Nonetheless, when a federal court determines the na-

21. Stanzione and Stanzione, P.A. v. Shenewolf (*In re* Shenewolf), 27 Bankr. 187, 188 (Bankr. M.D. Pa. 1982) (quoting Glover v. Glover (*In re* Glover), 16 Bankr. 213, 215 (Bankr. M.D. Fla. 1981)).

22. *See* Eisen v. Linn (*In re* Linn), 38 Bankr. 762, 763 (Bankr. 9th Cir. 1984).

23. 11 U.S.C. § 523(a)(5) (Supp. III 1985).

24. *Id.* § 523(a)(5)(A).

25. *Id.* § 523(a)(5)(B). *See also supra* notes 13-15 and accompanying text.

26. Rankin v. Alloway (*In re* Alloway), 37 Bankr. 420, 425 (Bankr. E.D. Pa. 1984) (citations omitted). *See also* Shaver v. Shaver (*In re* Shaver), 736 F.2d 1314 (9th Cir. 1984). In *Shaver*, the court stated that section 523(a)(5) "departs from the general policy of absolution, or 'fresh start', [sic] that is embodied in the federal Bankruptcy Act. It enforces an overriding public policy favoring the enforcement of familial obligations." *Id.* at 1315-16 (footnote omitted).

27. Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 906 (11th Cir. 1985); *contra* Warner v. Warner (*In re* Warner), 5 Bankr. 434 (Bankr. D. Utah 1980).

ture of an obligation imposed by a divorce decree, it must consider subsequent alterations in the decree made by the state court.[28]

A number of courts suggest that the sole consideration for determining whether an obligation is alimony, maintenance, or support is the intent of the parties.[29] As one court stated, "[T]he crucial question is what function did the parties intend the agreement to serve when they entered into it."[30]

Other courts believe that the intent of the parties is but one consideration, albeit a major one.[31] Although usually unstated, these courts seem to be basing their decisions on the parties' intent as well as each court's perception of whether the debt is in the nature of alimony, maintenance, or support.[32] Sufficient theoretical support for this position stems from the language of the statute, plus the presence of the competing federal policies of a fresh start in bankruptcy versus the need to support one's family.

Although in theory the two approaches differ, the distinctions blur in practical application. The statutory language provides sufficient latitude for each court to decide whether a particular marital debt is dischargeable.

Under either approach the issue of the parties' intent is a question of fact to be decided by a trial court, sitting without a jury, in light of all the facts and circumstances. This intent becomes fixed at the time the obligation is incurred and is not affected by subsequent events, barring the divorce court's increase or decrease in an award.[33] A determination of intent is particularly difficult since the designations used by the parties or the divorce court in establishing whether a debt is alimony or part of a property settlement are not conclusive, although due consideration for those labels is afforded by the bankruptcy court.[34]

The problem is further compounded because at the time alimony is awarded and the property divided, the parties often do not intend to differentiate between an alimony debt and a property settlement obligation, but rather view both merely as financial obligations arising from the separation or divorce. Without some awareness of the legal consequences of their choice, the parties would have no purpose or rationale in making such a distinction. Since the parties typically do

28. *Shaver*, 736 F.2d at 1317 n.5.

29. Melichar v. Ost (*In re* Melichar), 661 F.2d 300 (4th Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

30. Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984).

31. Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1109 (6th Cir. 1983) (intent is the threshold factor).

32. *Id.*

33. Williams v. Williams (*In re* Williams), 703 F.2d 1055, 1057-58 (8th Cir. 1983).

34. *See id.* at 1057. *See also* Stout v. Prussel, 691 F.2d 859, 861 (9th Cir. 1982).

not intend to distinguish the debts, a court usually must establish their constructive intent from the facts and circumstances of the case.

The amorphous state of the law in this area appears to result from an almost inevitable intermixing of fact and law in the adjudication process. A court resolving the issue finds the facts and applies the law without the aid of a jury.[35]

The factors — listed in order of this author's view of importance — for determining whether a debt is in the nature of alimony, maintenance, or support, rather than a property settlement, are as follows:

1. Whether the parties stated in the document creating the debt that, within the meaning of section 523(a)(5) of the Bankruptcy Code, the obligation in question was or was not intended to be support, alimony, or maintenance.[36]
2. Whether the creditor-spouse relinquished support or maintenance in exchange for the obligation at issue.[37]
3. Whether the obligation ceases or diminishes on the occurence of certain conditions, such as the remarriage or death of the spouse, or the attainment of majority age for a child.[38]
4. Whether the obligation is for a sum certain payable in fixed installments or whether the amount due is "open ended."[39]
5. The parties' treatment of the obligation under the tax laws, particularly if such intention is expressed in the document or order creating the obligation.[40]
6. The relative financial condition of the parties and their respective earning capacity:[41]

35. Questions on dischargeability are "core" matters within the meaning of 28 U.S.C. § 157(b)(2)(I) (Supp. III 1985). As such they fall within the equity jurisdiction of the Bankruptcy Court. The parties have no right to a jury trial on issues in equity. Billebault v. Schmid (*In re* Schmid), 54 Bankr. 520, 520-23 (Bankr. E.D. Pa. 1985).

36. *See supra* notes 13-15 and accompanying text.

37. *See* Tunny v. Ploski (*In re* Ploski), 44 Bankr. 911, 914 (Bankr. D.N.H. 1984); Anderson v. Anderson (*In re* Anderson), 21 Bankr. 335, 338 (Bankr. S.D. Cal. 1982). *See also* Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1108 (6th Cir. 1983).

38. Shaver v. Shaver (*In re* Shaver), 27 Bankr. 452, 453-54 (Bankr. D. Nev. 1983), *aff'd*, 736 F.2d 1314 (9th Cir. 1984); Williams v. Williams (*In re* Williams), 38 Bankr. 224, 226 (Bankr. N.D. Okla. 1984); Rankin v. Alloway (*In re* Alloway), 37 Bankr. 420, 425 (Bankr. E.D. Pa. 1984).

39. Basile v. Basile (*In re* Basile), 44 Bankr. 221, 223 (Bankr. M.D. Fla. 1984).

40. Coffman v. Coffman (*In re* Coffman), 52 Bankr. 667, 675 (Bankr. D. Md. 1985).

41. As one court has stated, "If an agreement fails to provide explicitly for spousal support, a court may presume that a so-called 'property settlement' is intended for sup-

a. The age, health, work skills, and educational levels of the parties;[42]

b. Whether the payment was fashioned in order to balance the disparate income of the parties;[43]

c. The financial resources of each spouse, including income from employment or elsewhere;[44]

d. Whether there was a need for support at the time of the decree, and whether the support award would have been inadequate absent the obligation in question;[45]

e. Whether there are minor children in the custody of the creditor spouse;[46]

f. The standard of living of the parties during their marriage;[47]

7. The duration of the marriage;[48]

8. And finally, of dubious validity, the circumstances contributing to the estrangement of the parties.[49]

Applying these factors, the United States Court of Appeals for the Sixth Circuit cogently stated:

> Fairly divergent dispositions have resulted from utilization of the above factors. The initial difficulty is that every assumption of a joint loan obligation in a divorce settlement at least indirectly contributes to support. The former spouse is relieved of payments on that debt and thus has funds for other purposes including necessary support. Support in this broad sense results even if the assumption of joint marital debts is actually a division of property.[50]

On a related front, even where state law does not provide for alimony, maintenance, or support, the bankruptcy court may find that an obligation is in the nature of those benefits within the meaning of the Bankruptcy Code.[51] Payment of child support beyond the age established by the state law definition of minority does not preclude an

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port when the circumstances of the case indicate that the recipient spouse needs support." *Shaver*, 736 F.2d at 1316.

42. Tsanos v. Bell (*In re* Bell), 47 Bankr. 284, 287 (Bankr. E.D.N.Y. 1985); Pody v. Pody (*In re* Pody), 42 Bankr. 570, 573 (Bankr. N.D. Ala. 1984); Anderson v. Anderson (*In re* Anderson), 21 Bankr. 335, 338 (Bankr. S.D. Cal. 1982).

43. Wesley v. Wesley (*In re* Wesley), 36 Bankr. 526, 529 (Bankr. S.D. Ohio 1983).

44. Holland v. Holland (*In re* Holland), 48 Bankr. 874, 876 (Bankr. N.D. Tex. 1984); Warner v. Warner (*In re* Warner), 5 Bankr. 434, 442 (Bankr. D. Utah 1980).

45. *See, e.g.*, Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1109 (6th Cir. 1983) (where debt assumed for automobile needed for transportation to work was in the nature of support).

46. *Shaver*, 27 Bankr. at 454.

47. Coffman v. Coffman (*In re* Coffman), 52 Bankr. 667, 675 (Bankr. D. Md. 1985).

48. Mencer v. Mencer (*In re* Mencer), 50 Bankr. 80, 83 (Bankr. E.D. Ark. 1985) (marriage of sixteen years helped establish that payments were intended as support); Altavilla v. Altavilla (*In re* Altavilla), 40 Bankr. 938, 941 (Bankr. D. Mass. 1984) (marriage of twenty years).

49. Seablom v. Seablom (*In re* Seablom), 45 Bankr. 445, 450-52 (Bankr. D.N.D. 1984); Carlile v. Fox (*In re* Fox), 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980).

50. Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1108 (6th Cir. 1983).

51. *See, e.g.*, Shaver v. Shaver (*In re* Shaver), 736 F.2d 1314, 1315 (9th Cir. 1984)

exception to discharge of that portion of an obligation.[52]

Finally, a few other pertinent factors should be considered: one portion of an award may be dischargeable while another portion may not;[53] and the interest on nondischargeable debts is not dischargeable.[54] Also, establishing specific dollar amounts for domestic obligations is not an appropriate task for a federal court; that duty is appropriately left to state courts.[55]

The Filing of Suit to Determine the Dischargeability of a Debt Under Section 523(a)(5)

For debts falling within sections 523(a)(2), (4), and (6), a creditor must file a *timely* complaint in the bankruptcy court to determine nondischargeability. Neither the Bankruptcy Code nor the Bankruptcy Rules provide for such a limitation in determining the nondischargeability of a debt under section 523(a)(5) or other provisions of section 523(a). Thus, there is no express limitation on the time for bringing an action under section 523(a)(5). It may be filed while the bankruptcy is pending or after the case has been closed. Furthermore, at least after the bankruptcy has been closed, a suit for a declaration of nondischargeability may be brought in the bankruptcy court, in state court, or in federal district court, so long as the respective courts have jurisdiction under the facts of the case.[56] Arguably, in the absence of relief from the automatic stay under 11 U.S.C. section 362(d),[57] a creditor's filing of suit in state or federal district court while the bankruptcy case is pending would be automatically stayed under 11 U.S.C. section 362(a).[58]

The Burden of Proof Under Section 523(a)(5)

Bankruptcy Rule 4005 provides that "on a complaint objecting to a discharge, the plaintiff has the burden of proving his objection."[59]

(where decree awarded wife $1500 per month child support and $2000 per month for "property rights" to last for 75 months, unless wife died earlier).

52. Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 905 (11th Cir. 1985).

53. Carlile v. Fox (*In re* Fox), 5 Bankr. 317, 320 (Bankr. N.D. Tex. 1980).

54. Frederickson v. Coleman (*In re* Coleman), 56 Bankr. 179, 180 (Bankr. N.D. Ind. 1986).

55. *Harrell*, 754 F.2d at 907 n.9.

56. Goss v. Goss, 722 F.2d 599 (10th Cir. 1983) (decided under the Bankruptcy Act of 1898).

57. 11 U.S.C. § 362(d) (1982 & Supp. III 1985).

58. *Id.* § 362(a).

59. R. BANKR. P. 4005 (West 1984). Bankruptcy Rule 4005.

While this rule addresses an "objection," rather than an "exception," to discharge under 11 U.S.C. section 727, some courts have construed it as meaning that under section 523(a) the burden of proof is on the party requesting an exception.[60] Independently of Bankruptcy Rule 4005, some courts have fashioned the principle that when an exception to discharge under section 523(a) is asserted, the burden of proof is on the creditor.[61] Under section 523(a)(5), many courts have placed the burden of proof on the creditor spouse.[62] This application of the burden of proof poses theoretical problems.

The difficulty stems from the fact that the burden of proof is properly placed on the creditor in cases involving the 523(a)(2), (4), or (6) exceptions to discharge, for the simple reason that granting a discharge supports the federal policy that an honest debtor in bankruptcy should receive a "fresh start," and should be exonerated from his pre-existing debts. Nevertheless, the "fresh start" principle is at odds with the federal principle embraced by section 523(a)(5) that a former spouse, rather than society, should be responsible for maintenance and support of members of a family which is split by divorce or separation.[63]

This commentator suggests that under section 523(a)(5) the burden of proof is not squarely on the creditor spouse, as many courts have stated, but is in fact almost evenly balanced between the parties. Some courts have gone so far as to say that the burden of proof under section 523(a)(5) weighs in favor of the creditor spouse in certain instances.[64]

The Standard of Review on Appeal

Regarding the standard of review on appeal of a determination made under section 523(a)(5), one court has stated: "[T]he crucial question is what function did the parties intend the agreement to serve when they entered into it. This is a question of fact for the bankruptcy court to decide, and the appellate courts can set aside the bankruptcy court's finding only if clearly erroneous."[65] This is

60. *See, e.g.*, National Bonding and Accident Ins. Co. v. Peterson (*In re* Peterson), 51 Bankr. 486 (Bankr. D. Kan. 1985). A successful objection to discharge results in a complete denial of discharge; none of the debtor's debts are discharged. A successful exception to discharge does not prohibit the debtor from obtaining a discharge, but the discharge will not be effective against the creditor prevailing on the exception to discharge.

61. *See, e.g.*, Kleppinger v. Kleppinger (*In re* Kleppinger), 27 Bankr. 530, 531 (Bankr. M.D. Pa. 1982).

62. Rankin v. Alloway (*In re* Alloway), 37 Bankr. 420, 425 (Bankr. E.D. Pa. 1984).

63. *Id.*

64. *Id.* at 425-26.

65. Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984) (citations omitted). *See also In re* Coil, 680 F.2d 1170, 1172 (7th Cir. 1982) ("clearly erroneous standard" is the proper standard of review).

clearly the proper scope of review if the issue for resolution in the bankruptcy court is the intent of the parties.[66]

As stated above, some courts have adjudicated the issue of dischargeability under section 523(a)(5) on the assumption that the intent of the parties is not the sole question for resolution in the trial court. These trial courts based their decisions on the intent of the parties *plus* certain concerns of public policy. If these courts are correct,[67] the "abuse of discretion" standard is proper, rather than the "clearly erroneous" standard.[68]

Suggestions For Practitioners

When representing a party in a divorce or similar action, review the document or proposed court order establishing alimony, maintenance, support, or a property settlement, and determine if the parties expressly state whether *each obligation* is "intended as alimony, maintenance, or support within the meaning of 11 U.S.C. section 523(a)(5) of the Bankruptcy Code."

Thus, a settlement agreement, divorce decree or similar document could provide, *inter alia*, that:

> The obligations specified in sections 1, 3, 5, 10, and 11 of this document *are* intended by the parties as alimony, maintenance or support within the meaning of 11 U.S.C. section 523(a)(5) of the Bankruptcy Code.
>
> Contrarywise, the obligations specified in sections 2, 4, 6, 7, 8, 9, and 12 of this document *are not* intended by the parties as alimony, maintenance, or support within the meaning of 11 U.S.C. section 523(a)(5) of the Bankruptcy Code.

CONCLUSION

Whether an agreement or court order, in a particular case, apportioning debt between spouses or former spouses will be construed by a court as creating a dischargeable debt, does not appear highly predictable. The exceptions to this perceived rule appear to be instances where the parties to an agreement or court order consciously evaluate the possible issue of bankruptcy and express in the agreement or order their intent as to whether the obligation is a property settle-

66. *Cf.* Shaver v. Shaver (*In re* Shaver), 736 F.2d 1314, 1316 (9th Cir. 1984) ("[I]f 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.").

67. *See, e.g., id.* ("gross abuse of discretion" required for reversal on appeal).

68. *See, e.g.*, Troup v. Troup (*In re* Troup), 730 F.2d 464, 466 (6th Cir. 1984) (clearly erroneous standard applied).

ment, or whether, in fact, it is intended as alimony maintenance, or support.