Divorce Related Property Division v. Alimony, Maintenance and Support in the Bankruptcy Context: A Distinction Without a Difference?

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NOTE

DIVORCE RELATED PROPERTY DIVISION V. ALIMONY, MAINTENANCE AND SUPPORT IN THE BANKRUPTCY CONTEXT: A DISTINCTION WITHOUT A DIFFERENCE?

I. INTRODUCTION

What debts should individuals have to pay, even after they have filed a petition seeking relief under the Bankruptcy Code? Congress attempted to answer this question through section 523 of the Code, which lists those debts excepted from discharge. As a general rule, if a debt is not excepted from discharge, the debtor will be relieved of the obligation to pay the debt under the various discharge provisions of the Code. For example, a debtor must fulfill the obligation to pay certain debts incurred as a result of a divorce proceeding. Section 523(a)(5) provides that alimony, maintenance and support obligations for a spouse or a child shall not be dischargeable. While a husband is entitled to a fresh start free of past debts, the state has a great interest in requiring that the husband meet his support obligations to his ex-wife and children. Unfortunately, the actual application of section 523(a)(5) has been riddled with problems.

These application problems exist because § 523(a)(5) does not apply to divorce obligations characterized as property division. The

2. All debts not satisfied through liquidation or accounted for in a confirmed reorganization plan are discharged unless otherwise provided for in the Code. Section 363 provides that a creditor may take no action to collect or enforce a debt that has been discharged. Section 523 is the laundry list of debts which are excepted from the general discharge provisions.
3. For the purpose of clarity this Note refers to the debtor-spouse as the husband and the creditor-spouse as the wife, although the Code does not make such a distinction, and the situation could certainly be reversed.
distinction between support and property division obligations leads to manipulation at the time of divorce because the debtor-spouse can negotiate a greater portion of property settlement into obligations which would be characterized by the bankruptcy court as property division, which is not excepted from discharge. Additionally, the distinction between property division and alimony, maintenance and support takes on an artificial significance, resulting in unnecessary litigation at both the state and federal levels. The distinction is artificial because outside of the bankruptcy context, it affords no benefit to either spouse. A divorcing spouse does not care what the benefits are called as long as the spouse receives them.

Ironically, the Code requires a creditor-spouse to persuade a judge that a divorce obligation is in the nature of support when the trend in state courts is to use property division remedies to function as support. The distinction between support and property division has become blurred (if not altogether meaningless) because the characteristics and purpose underlying support payments and property division have become inextricably intertwined. Furthermore, the support/property distinction increasingly forces bankruptcy courts to perform tasks that traditionally belong to the state court system.

In order to determine dischargeability for a divorce-related debt, a bankruptcy judge must characterize an award as either support-based or property-based and, in doing so, must perform functions that properly should be handled by the state court judges.

These problems need not exist. If Congress were to recognize that the distinction between property division and support is no longer needed, both could be excepted from discharge. Part II of this Note analyzes why Congress drafted § 523 to include alimony, maintenance and support while excluding property divisions. Part III argues that the justifications for the support/property distinction no longer have any force. Part IV demonstrates that the application of the support/property distinction relies upon premises that no longer work.

6. Id.
8. Id. at 43.
9. Post-divorce obligations in the nature of alimony, maintenance and support are often simply called “support,” while property divisions are referred to as “property.” The distinction between the two is referred to as the support/property distinction.
Finally, this Note concludes that all divorce-created debts to an ex-spouse should be excepted from discharge.

II. CONGRESS HAS USED THE SUPPORT/PROPERTY DISTINCTION TO BALANCE CONFLICTING BANKRUPTCY AND FAMILY LAW POLICIES

The primary goal of bankruptcy law, dating back to 1898, is to provide a debtor with a “fresh start,” free from indebtedness. The primary tool for this fresh start is discharge from one’s debts. Once a debtor receives a discharge for debts incurred prior to petition for bankruptcy relief, the debts no longer exist and a creditor cannot make any attempt to collect them. Since discharge is the primary benefit and motivation for debtors to file for bankruptcy, Congress remains cautious in creating exceptions to the general discharge provisions. Congress has only done so when important policies conflict. A husband’s obligation to support his children and ex-wife have long been recognized as important social responsibilities with greater significance than ordinary debts. The policy of enforcing a husband’s divorce obligations to his ex-wife and children conflicts directly with bankruptcy’s fresh start policy.

In 1978, Congress passed the Bankruptcy Reform Act of 1978 to make bankruptcy relief more widely available to individual debtors. During Congress’ debate on how to reform the Bankruptcy Act, a number of competing proposals were introduced. One of the proposed bills came from a commission appointed by Congress to analyze and update the bankruptcy laws. The Commission recommended, among other alterations, a change in the exception to discharge provisions.

11. The primary policies embodied in the bankruptcy law to this day were established by the National Bankruptcy Act of 1898.
12. See Weintraub & Resnick, supra note 5, at 3-2.
15. Examples of other debts which the Code excepts from discharge under § 523 are: (1) taxes; (2) debts incurred through acts of fraud or misrepresentation; (3) debts incurred for willful and malicious injury by the debtor to another entity or property of another entity; (4) student loans; and (5) debts incurred for deaths or personal injury caused by a debtor driving while intoxicated.
16. See Wetmore v. Markoe, 196 U.S. 68, 74 (1904) (A husband’s obligation “is not [merely] a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children.”).
18. The old Bankruptcy Act provision read as follows:
The Commission proposed that all divorce-related debt to an ex-spouse be excepted from discharge.  

Primary opposition to the Commission’s proposals came from the National Conference of Bankruptcy Judges, which submitted a proposed version of the bill far more protective of the debtor-spouse and the fresh start policy. The judges argued that any non-support-related settlement lies outside of the policy goals of family law and therefore should not be treated as an exception to discharge.

The judges were also concerned with the effect the Commission’s proposal would have on consumer debts and “hold harmless” agreements for marital debts. The Commission’s broader proposal would enable a wife to require her husband to pay these debts to creditors or reimburse her for doing so. The bankruptcy judges argued that these debts were not support related but rather a division of property that did not require the exception to discharge. Furthermore, they argued that creditors whose debts were included in a couple’s property settlement agreement would ultimately receive the benefits of exception to discharge when they had no right to such

§ 17. DEBTS NOT AFFECTED BY A DISCHARGE.

a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . .

(b) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of a marriage accompanied by seduction, or for criminal conversion.

1A COLLIER ON BANKRUPTCY 24 (Lawrence P. King, et al. eds., 1991) (The first appendix to COLLIER reproduces the entire Bankruptcy Act).

19. REPORT OF THE COMM’N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., pt. II at 136 (1973). The provision provided exception from discharge for “any liability to a spouse or child for maintenance or support, for alimony due or to become due, or under a property settlement in connection with a separation agreement or divorce decree.”


21. If the ex-spouse forgoes alimony and takes everything in something entitled “property division,” the courts have had no difficulty in seeing through that property settlement title. If they find . . . an element of support, they are not troubled by that. Whatever they consider to be legitimate support will not be affected. It is only that part in excess of that support.


22. When a couple divorces, they need to divide up both the assets and the liabilities of the marriage. Under a hold harmless agreement, the husband agrees to pay the joint marital debt for the couple and not to seek any indemnification or reimbursement from the wife.
benefits. Testifying before Congress, Judge Lee expressed concern over a husband's ability to support his ex-wife and children when saddled with numerous marital debts for which discharge is unavailable. This begs the question—how would the wife get by if she is saddled with these very same debts that were to be paid by her ex-husband under the terms of their divorce? The answer from Judge Lee was clear—she should file for bankruptcy to obtain relief from her debts. The narrower exception proposed by the Conference in H.R. 32 was eventually incorporated into the Code.

A. The Current Exception to Discharge Affects Family Law Policies Aimed At Divorcing Spouses Whether or not the Spouses Eventually File for Bankruptcy

While the Judges' Conference specifically focused on joint debts to third parties, the language of § 523(a)(5) maintains discharge for any type of property division that is in the nature of alimony, maintenance or support. One example of such a property division would concern ownership of a house where the debtor would keep the house and the creditor-spouse would receive periodic payments and a lien on the property as compensation for her share in the ownership. The lien interest affords the wife greater protection against the husband's default, but loopholes exist for the husband to avoid these liens and strip the wife of her protection. Such risks are significant enough

23. This would occur under the Commission's proposed exception because the husband would remain liable for the debts enumerated in the hold harmless agreement. Hearings on H.R. 31 and H.R. 32, supra note 21, at 1288 (statement of Hon. Joe Lee, Bankr. J).

24. Id.

25. Id.


A discharge . . . does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse of 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 but not to the extent that—

(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;

3 COLLIER ON BANKRUPTCY, supra note 18, at 523-103. This exception is quite similar to the exception that was incorporated in the Bankruptcy Act of Feb. 5, 1903, ch. 487, § 17, 32 Stat. 797, 798 (1903). Cf. supra note 19.

27. Briefly, § 522(f) affords a debtor the right to avoid a judicial lien placed on exempt property. While homestead exemptions vary greatly from state to state, some courts have used
that a bill has been introduced in Congress to try to afford the creditor-spouse greater protection. The ultimate issue concerns whether the discharge provisions should even apply to such a transaction.

The current version of § 523(a)(5) can have an unintended effect upon divorce negotiations. The risk of default by a debtor-spouse is a disincentive for creditor-spouses to agree to a credit relationship with the debtor-spouse. For this reason, the creditor-spouse would not want to allow the debtor-spouse to retain marital property in exchange for future payments. Divorcing couples are thereby encouraged to sell property and split the proceeds, rather than agree that one of them retain the property while making payments to the other.

For example, the upheavals of divorce are exacerbated by bankruptcy risks that discourage a spouse from remaining in the primary residence. The Code should not add to the trauma of divorce by encouraging both spouses to move just to avoid a debtor-creditor relationship. This condition is worsened where the divorcing parties have children. One must choose between allowing the children to spend some of their time in the marital home (thereby accepting the risks of bankruptcy) and forcing both spouses to move so that a debtor-creditor relationship is not created between them (thereby adding to the upheaval the children must experience).


(A) a judicial lien (other than a judicial lien that secures a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of the 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, to the extent that the debt—

(i) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(ii) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony maintenance or support).

29. See infra text accompanying notes 114-15.
PROPERTY DIVISION V. SUPPORT

Any divorcing couple should be careful to minimize bankruptcy risks during divorce negotiations, including those risks related to divorce liens and the marital home. In addition, it may be in the couple's joint economic interest to have one spouse retain property and have the other one receive payments. Consider a couple that owns a family business and must either sell it and divide the proceeds, or create a debtor-creditor relationship. No reasonable justification exists for the bankruptcy system to wield such a strong influence over a divorce negotiation, especially since property division and support have become so intertwined that one cannot discern where support ends and property division begins.

III. UNDERSTANDING THE ORIGIN OF THE SUPPORT/PROPERTY DISTINCTION

Originally, practical justifications existed for treating alimony, maintenance and support differently from property division. First, characteristics of property division used to differ substantively from those characteristics described as support. Second, spousal support, and not distribution of marital property, represented the primary means of alleviating financial need and achieving economic equity at the time of divorce.

Today, property division has replaced alimony in its function of support, and widespread changes in the law make any distinction between the two insignificant. One prominent scholar stated "the alimony-property distinction is neither sensible nor workable, and in fact is largely illusory."

A. Alimony and Property Division as Originally Conceived

Alimony arose out of the duty of a husband to support his wife. The duty usually took the form of monthly payments continuing indefinitely until death or the wife's remarriage, when her new husband would assume the duty of support. Since no-fault divorce

30. Singer, supra note 7, at 44-45.
31. Id.
did not exist, a husband had the duty to support his ex-wife if he was at fault for allowing the marriage to dissolve. Conversely, if his wife was at fault for the failure of the marriage, she was not entitled to alimony. Therefore, alimony was originally punitive in nature. The purpose was to provide for the ongoing needs of the wife, and as such, alimony was purely forward-looking. Since alimony was need-based, a change in the circumstances of either spouse permitted the state court to modify the alimony obligations to reflect the changed circumstances.

On the other hand, property division was backward-looking. The purpose was to unscramble the property ownership interests in assets acquired during the marriage. Property division usually took the form of a one-time lump sum payment. Since these obligations stemmed from the disentanglement of property rights, no change in circumstances gave rise to a modification of a court-ordered division of assets.

Due to a revolution in state divorce law, these two distinct remedies have been merged into a new system that is based upon different premises and guided by different goals, requiring a reorientation of the bankruptcy discharge exception.

**B. The Divorce Law Revolution and Equitable Distribution**

One searches in vain for a concise, all-encompassing or universally applicable definition of equitable distribution. However, even the most cursory review of cases in various jurisdictions reveals general agreement among the courts with respect to the theory and concepts that underlie statutes that require or authorize the equitable distribution of property upon the dissolution of marriage.

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35. Scheible, * supra* note 10, at 583. Until the advent of no fault divorce, divorce was not available without one party having breached some marital duty which created fault. *Id.*; see also JOHNN D. GREGORY, THE LAW OF EQUITABLE DISTRIBUTION 9-12 (1989) [hereinafter GREGORY, EQUITABLE DISTRIBUTION] (stating that grounds for divorce have become irrelevant and that legislatures have abolished the concept of the matrimonial offense).


37. *Id.*

38. Singer, * supra* note 7, at 68.


41. *Id.*

42. Scheible, * supra* note 10, at 588.

43. *Id.*
The hallmarks of the system are broad discretion for trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a non-working spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce.44

Today, almost every state uses a system of equitable distribution in place of alimony, and the practice of no-fault divorce is commonplace.45 Under equitable distribution several factors, all relating to the needs of the spouses and fairness in dividing marital gains and losses, are used to produce a property settlement or divorce decree.46 While apportioning gains and losses is a stated goal of equitable distribution, the support policies of alimony along with the corresponding focus on the needs of the parties remains an integral part of equitable distribution statutes.47 A good example of this is section 307 of the Uniform Marriage and Divorce Act dealing with the disposition of property.48 A system of equitable distribution which utilizes

44. GREGORY, EQUITABLE DISTRIBUTION, supra note 35, at 1-6.
46. See GREGORY, EQUITABLE DISTRIBUTION, supra note 35 at 1-7 (citing Rothman v. Rothman, 65 N.J. 219 (1974)).

In Rothman v. Rothman, the Supreme Court of New Jersey stressed the remedial nature of equitable distribution, citing two aspects of public policy that are served by the authority of courts to distribute the parties’ marital assets equitably. First, divorced wives needing financial support are no longer limited to alimony, which may end if the husband dies or becomes financially unable to continue payments. Second, the equitable distribution statute recognizes “the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage.”

47. Therefore equitable distribution attempts to accomplish both the alimony goal of providing support and the property division goal of unscrambling property interests through one single remedial system.
48. (a) . . . In making apportionment the court shall consider the duration of the marriage . . . of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of
so many subtle factors necessitates a great deal of judicial discretion.\textsuperscript{49} Due to the numerous factors a judge must consider to order an equitable distribution, one cannot possibly determine how much of the distribution was intended as support and how much was merely property division.

This is because the purpose of dividing marital property, under most equitable division schemes, involves more than sorting out the spouses' pre-existing ownership interests in marital assets; rather, it is to allocate those assets between the spouses in a fashion that is just, reasonable, or equitable. Moreover, in determining which distribution of property will satisfy these criteria, courts are typically directed to consider not only historical factors such as the spouses' economic and noneconomic contributions to the marriage, but also such \textit{forward-looking criteria as the spouses' post-divorce incomes, employment prospects, and financial needs}. Indeed, many equitable distribution statutes focus more on the parties' post-divorce circumstances than on factors relating to the acquisition of assets. These statutes justify the inference that the \textit{purpose of equitable distribution "is as much to provide for the financial needs of the spouses after the divorce as to award to each what he or she equitably owns."}\textsuperscript{50}

Equitable distribution does away with many of the alimony characteristics, such as permanent periodic payments to the wife, replacing them with a single lump sum or short series of substantial payments. As shown above, the change in character of the property settlement does not eliminate the support role of the remedy. Rather, property division replaces alimony while continuing to serve its functions.\textsuperscript{51}

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\texttt{49. JOHN D. GREGORY ET AL., UNDERSTANDING FAMILY LAW 345 (1993).}
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\texttt{50. Singer, \textit{supra} note 7, at 74 (emphasis added).}
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\texttt{§ 308. [Maintenance]}
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(a) In a proceeding for dissolution of marriage, legal separation, or maintenance following a decree of dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
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(1) lacks sufficient property to provide for his reasonable needs; and
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(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate
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PROPERTY DIVISION V. SUPPORT

C. State Law Preferences for Property Division

Even if one could distinguish easily between which portion of a settlement is support-based and which portion is a division of assets, the current system for marital dissolution contradicts the approach that the Bankruptcy Code uses in determining discharge. The bankruptcy approach determines what portion of the debt was intended as support; the balance falls outside of the exception and is discharged with any other unpaid debts. Since property division is now the preferred method of resolving the economic relationship of the parties, the family law system works in the other direction.

Many states require that all potential property division solutions be employed before any maintenance may be awarded to the spouse. Therefore, even if a spouse were to negotiate a settlement that resembles alimony and avoids the risk of bankruptcy discharge down the road, the state law may stand in her way because she must exhaust property remedies first.

Thus, the bankruptcy system protects a spouse's right to support awards but not her right to property awards, while the state system that the custodian not be required to seek employment outside the home.

Id. 52. This is a simplified explanation of the application of § 523(A)(5), and will be explained in greater detail below. See infra part IV.

53. See supra notes 40-43 and accompanying text.

54. See, e.g., MINN. STAT. § 518.552 (1990); TENN. CODE ANN. § 36-4-121 (1991). The relevant language of these statutes is:

MINN. STAT. § 518.552. Maintenance

subdivision 1. In a proceeding for dissolution of marriage . . . the court may grant a maintenance order for either spouse if it finds that the spouse seeking maintenance:

(a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education[,]•

TENN. CODE ANN. § 36-4-121(a) (1991).

In providing for a spouse's needs, these statutes require that methods of dividing property be employed before traditional ongoing support awards are used. Section 308 of the Uniform Marriage and Divorce Act also employs this method of utilizing property division prior to support payments to provide for the needs of the spouse. 9A U.L.A. 347.
does not afford spouses support-type remedies until property remedies have been exhausted. The Bankruptcy Code, is therefore, out of step with the state court system of equitable distribution.

D. Contract and the Support/Property Distinction

The substantive changes in state law have been coupled with procedural changes that further diminish the support/property distinction. Due to the increase in the number of divorces and a desire to encourage amicable dissolution of marriages, an increased flexibility exists to allow the parties to negotiate and draft their own settlement.\(^5\) This also fosters a greater degree of certainty in the process, since the parties can negotiate the settlement that they feel is best for themselves.\(^6\) Under these circumstances, the parties are not likely to concern themselves about whether their settlement is characterized as support or property division. Rather, they will only be concerned with the bottom line amount of their settlement. Since the parties cannot be sure how a bankruptcy court would characterize their settlement, the policy of discharging property division obligations undermines the certainty that the system provides the parties.

In addition, the contracting process is complicated further by the Code because of the greater risk attendant to deferred payments. Consider, for example, a situation where the couple must divide ownership in a family business. One spouse would like to keep the business and pay off the other spouse through installment payments, especially if the business is worth more to operate than it is to sell. As stated previously, the creditor-spouse has a disincentive to face the risk of discharge accompanying such an arrangement, and an incentive to force the sale of the business. Not only does this undermine family law policy of fostering amicable property settlements,\(^7\) ironically it

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55. Section 306(a) of the UMDA states:
\[\text{[t]o promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children.}\]

UMDA § 306(a), 9A U.L.A. 216; Scheible, supra note 10, at 591.

56. This certainty is undermined by the bankruptcy process because a spouse cannot be sure whether the bankruptcy judge would characterize her award as property division or support. See Scheible, supra note 10, at 592; see also UMDA § 306, 9A U.L.A. 216 (providing for parties to order their own lives through negotiated property settlement agreements).

also undermines bankruptcy’s own policy of preserving going-concern value. Divorcing parties are not like regular contracting parties that negotiate at arm’s length and implicitly agree to face the risks of default and discharge; rather, they have no choice but to come to some agreement or have the court fashion one for them.

Congress has addressed the difficulty in distinguishing support from property division, and has seen fit to eliminate the distinction for tax purposes. “Congress has recently recognized that the income tax treatment of payments made pursuant to a divorce settlement or decree should not depend upon whether the payments fit more neatly into the pigeonhole labeled property or the pigeonhole labeled support.” Moreover, in 1990 Representative Henry Hyde introduced a bill which would extend the alimony, maintenance and support exception to discharge to include divorce-related property division, but Congress failed to enact such a proposal for the second time. The proposed legislation, known as the Property Settlement Integrity Act of 1990, would have amended the Code to “make nondischargeable debts for liabilities under the terms of a property settlement agreement entered into in connection with a separation agreement or divorce decree.” Although the bill was not enacted, it indicates that some members of Congress understand the flaws inherent in the support/property distinction.

IV. APPLICATION OF THE SUPPORT/PROPERTY DISTINCTION

Since the passage of the Bankruptcy Code, the bankruptcy courts have been struggling to come up with a standard application, so that

58. A family business would presumably sell for less than the value of the income stream that it produces, thereby yielding less than the going concern value of the business. Bankruptcy law attempts to preserve the going concern value of businesses so as not to diminish the interests of creditors or equity holders. WEINTRAUB & RESNICK, supra note 5, at 8-3.


60. Singer, supra note 7, at 78-79. Ironically, the parties tax interests with regard to the support/property distinction run counter to their bankruptcy interests because the support payments are deducted from the debtor’s income tax return and added to the creditor’s return whereas property division would not affect their returns. Therefore, for tax purposes only, the debtor would want the award to be characterized as (non-dischargeable) support and the creditor would want the award to be characterized as (dischargeable) property division.


62. Id.
divorcing parties could have some idea of how a bankruptcy judge would characterize a claim that arose under a divorce decree. This section analyzes the bankruptcy courts’ struggle to develop a workable rule for the support/property distinction.

Although the exception dates back to 1903, the enactment of the Code in 1978 resulted in one major change in characterizing an award. No longer would the state court’s characterization of the award as support or property division govern the outcome; rather, the bankruptcy court would make its own determination as to the nature of the award. The wording of §523(a)(5)(b) makes clear that labels within a divorce decree or property settlement are not to govern the characterization. The section limits the exception to those awards that are “actually in the nature of alimony, maintenance, and support.”

A. The Intent Test and Present Circumstances Test

While courts have not applied §523 with any uniformity, there is a consensus among the circuits to use some form of an intent test. In characterizing an award, many courts look only to what the parties or state court judge intended the award to be at the time of the divorce. This test is a misnomer because the courts do not actually look at the parties’ intent. If courts used a true intent test, they would simply use the words and labels in the agreement or decree to determine whether an award was meant to be alimony, maintenance or support. Instead, in determining the intent of the parties or state court judge, the bankruptcy court looks at the circumstances at the time of divorce. If the obligation was reasonably necessary to maintain the spouse’s needs, it will be characterized as non-dischargeable support; if not, it will be treated as dischargeable property division.

64. See In re Waller, 494 F.2d 447 (6th Cir. 1974) (holding that the federal bankruptcy court must look to the state court’s determination to determine dischargeability).
66. 11 U.S.C. § 523(a)(5)(B). “[S]uch debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.”
67. See, e.g., Yeates v. Yeates, 807 F.2d 874, 878 (10th Cir. 1986); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984); In re Calhoun, 715 F.2d 1103, 1109 (6th Cir. 1983).
68. Throughout this section, “intent” refers to the parties to a property settlement agreement or to the judge who ordered the divorce decree.
69. Yeates, 807 F.2d at 878; Boyle, 724 F.2d at 683; Calhoun, 715 F.2d at 1109.
70. See Scheible, supra note 10, at 595.
Therefore the intent test is actually a “function” or “needs” test.\textsuperscript{71}

Some bankruptcy courts have taken the needs analysis in the intent test further, by analyzing the present circumstances of the parties as well as their circumstances at the time of divorce.\textsuperscript{72} This present circumstances test originated in \textit{Warner v. Warner}, in which the court, in an attempt to balance the equities and competing policies, analyzed whether the spouse still needed the support payments.\textsuperscript{73} Since the spouse's needs were the reason for the exception from discharge, the spouse was not entitled to the exception because she no longer needed the support.\textsuperscript{74} The \textit{Warner} approach has been criticized for improperly attempting to balance competing policies when it applied a present circumstances analysis.

By creating an exception to the general rule of discharge, Congress, implicitly, resolved the balancing of the very interests considered by the court below in favor of the [creditor] spouse. Congress did not, in any manner, manifest an intention that the bankruptcy courts should embark upon their own balancing of these policies. Under section 523(a)(5), the bankruptcy courts are free to determine whether a debt characterized by a state court as alimony, support, or maintenance is in fact just that. Upon finding that a debt is in fact support, alimony, or maintenance, however, the bankruptcy court is not free to discharge the debt. Section 523(a)(5) states clearly that such debts are not to be discharged.\textsuperscript{75}

\textsuperscript{71} \textit{Id.}; see Yeates, 807 F.2d at 878.


\textsuperscript{73} \textit{Id.}; see also Scheible, \textit{supra} note 10, at 596-601 (describing and critiquing the \textit{Warner} approach).

\textsuperscript{74} \textit{Warner}, 5 B.R. at 442-43.

\textsuperscript{75} \textit{In re Nelson}, 20 B.R. 1008, 1011-12 (M.D. Tenn. 1982).

In an attempt to establish more concrete guidelines for distinguishing between alimony, maintenance, and support, and obligations in the nature of a property settlement, the bankruptcy court in \textit{In re Nelson} listed eleven factors usually taken into consideration when determining the true intentions of the parties or the state divorce court: (1) whether the obligations of payment terminate upon the death of either spouse or upon remarriage of the spouse benefitted by the payments; (2) whether the obligation terminates when the dependent children reach maturity age or are otherwise emancipated; (3) whether the payments are to be made directly to the spouse; (4) the relative earnings of the parties; (5) evidence that the spouse relinquished rights in property in return for the payment of the obligations; (6) the length of the parties' marriage and the number of dependent children; (7) the document itself and any inferences that can be drawn from placement of specific provisions within the document; (8) whether the debt was incurred for the immediate living expenses of the spouse; (9) whether the payments were intended for the economic safety of the dependent(s); (10) whether the obligation is enforceable by contempt; and (11) whether the payments are payable in installments over a sub-
The Warner approach is further discredited by comparing the alimony, maintenance and support exception to the student loan exception in the Code. The student loan exception specifically provides that if the debt "will impose an undue hardship on the debtor and the debtor's dependents[.]" then the bankruptcy court has the discretion to grant discharge. Thus, if Congress sought to provide such discretion as the present circumstances test for alimony, maintenance and support creates, it would have framed the language of the Code accordingly.

The present circumstances analysis was subsequently resurrected by the Sixth Circuit in In re Calhoun, considered by many scholars the most controversial opinion in this area. The Calhoun court set up a three step test for characterizing marital debts. First, the bankruptcy court should determine if the intent of the award was to support the creditor-spouse. Second, the court must determine if the spouse presently depends upon the satisfaction of the debt for her daily needs. Even if these are both satisfied, the bankruptcy court...
must then determine if the obligation is “manifestly unreasonable” in light of the debtor's general ability to pay. Only after consideration of all three steps may a bankruptcy judge permit a debt to be excepted from discharge under § 523(a)(5).

In reference to the third step in the test, the Calhoun court decided that allowing unreasonable obligations to be excepted from discharge would amount to allowing parties to contract their bankruptcy rights away. On these grounds, the Calhoun opinion also makes the point that a decree ordered by a state court should receive more weight than a property settlement agreement negotiated by the parties.

The facts of In re Calhoun concerned marital debts that were assumed by the husband through a hold harmless agreement. The Calhoun opinion states that the present circumstances test should be applied to cases involving marital debts assumed by the debtor-spouse, and that this approach is not intended to turn the bankruptcy court into a “super divorce court.” Nevertheless, the Sixth Circuit promptly extended the principles of the Calhoun test, noting that it had “general applicability in cases brought under § 523(A)(5).”

Five circuits have examined and rejected the Calhoun test for various reasons. In Harrell v. Sharp, the Eleventh Circuit was

84. Id. at 1110.
85. Id.
86. Id. at 1109-10 n.10.
87. Id. at 1105.
88. Id. at 1110-11 nn.12, 14.
89. In re Singer, 787 F.2d 1033, 1038 n.2 (6th Cir. 1986).
90. In re Gianakas, 917 F.2d 759, 763 (3d Cir. 1990); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801, 803 (2d Cir. 1987); Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986); Harrell v. Sharp, 754 F.2d 902, 906 (11th Cir. 1985). Interestingly, the marital debts covered in the hold harmless agreement at issue in Calhoun are just the type of obligations that the bankruptcy judges feared would interfere with the fresh start policy when they lobbied Congress to reject an expanded version of § 523(a)(5).
91. 754 F.2d 902 (11th Cir. 1985). In Harrell, the debtor and his spouse agreed in 1971 that the debtor would pay his ex-wife a fixed monthly sum for her and her child's support indefinitely, unless she remarried. Id. at 903-04. Furthermore, he would pay for the child's educational expenses in the future. Id. The debtor was in arrears in 1974, and the agreement was amended to waive the arrearages and the debtor would set up a trust fund for the child's education. Id. Subsequently, the debtor filed chapter VII and sought and received a discharge on grounds that his ex-wife no longer needed support. Id. The district court reversed on appeal, and the Eleventh Circuit affirmed the district court's reversal. The Eleventh Circuit actually referred more to the Warner decision than the Calhoun decision in rejecting the present circumstances test. Id. at 906.
the first to reject this new use of the present circumstances test in § 523(a)(5) cases.

The statutory language [of § 523] suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change.92

Significantly, the Harrell opinion criticizes the present circumstances test because it interferes with state domestic relations law. In this sense, the Eleventh Circuit rejected the Calhoun court's contention that the present circumstances test need not lead to bankruptcy courts acting as super-divorce courts. The Eleventh Circuit did not want to "embroil federal courts in domestic relations matters which should properly be reserved to the state courts."93 Consequently, the federal courts should conduct a limited "inquiry into whether or not the obligation at issue is in the nature of support."94 The Harrell court further stated "there will be no necessity for a precise investigation of the spouse's circumstances to determine the appropriate level of need or support."95

In Forsdick v. Turgeon,96 the Second Circuit's analysis of the Calhoun test was somewhat different, but the result was the same. Congress created an exception to discharge based upon the support/property distinction. If the state court assessed the debtor with an obligation intended to provide support for his wife, then the bankruptcy court's job is to protect the creditor's right to support through the exception to discharge.97 There may be no disruption of state law mechanism absent "an unmistakable mandate from Congress to do so in order to achieve a valid federal objective."98 The Third Circuit

92. Id. at 906.
93. Id. at 907.
94. Id.
95. Id.
96. 812 F.2d 801 (2d Cir. 1987). In 1981, the Connecticut Superior Court awarded the debtor's wife $100,000 in "non-modifiable alimony" paid over seven years in monthly installments. Debtor filed chapter 7 three years later, and the bankruptcy court held the award was non-dischargeable under § 523(a)(5). Both the district court and the circuit court affirmed. Id. at 801, 802.
97. Id. at 804.
98. Id.
agreed with the Second Circuit’s reasoning and added that a present circumstances test would “serve essentially as a penalty for a former spouse who may have struggled to gain self-sufficiency.” 99

A Pennsylvania district court put it best when it explained how a present circumstances test would serve to write the exception out of the Code.

To allow a bankruptcy court to take into consideration the parties’ changed financial circumstances in determining whether an obligation constitutes ... support would be to rule that such agreements are dischargeable in nearly every case. In most cases, by the time a debtor has filed for bankruptcy, the economic condition of his or her ex-spouse will be at least on par with, if not more favorable than, that of the debtor, who, after all, has been driven to bankruptcy by his debts. The debtor’s proper remedy in this case is not to avoid this debt through bankruptcy, but to petition to the court with jurisdiction over his or her divorce decree for a modification of any such agreement in light of changed circumstances.100

B. Why Neither Test is an Acceptable Solution

The premise behind using only an intent test is based on the assumption that the state court or divorcing parties intended to create an award that is either support or property division related. However, as stated above, property division and alimony share the same purpose and characteristics.101 Therefore, bankruptcy courts are applying § 523(a)(5) under two failed standards. Either the bankruptcy judge attempts to interpret whether the state court judge intended the award as support or property division,102 or the bankruptcy judge replaces the state court judge by making an independent needs analysis based upon the circumstances that are present.103 Under the first scenario, the bankruptcy judge faces an impossible task of interpreting distinctions that do not exist, and under the second scenario the bankruptcy court intrudes on the province of the state courts by assessing the proper needs of the parties.

101. See supra text accompanying notes 44-51.
102. This happens through the application of the intent test in most circuits. See supra text accompanying notes 67-71.
103. This is done through the application of the Calhoun test in the Sixth Circuit. See supra text accompanying notes 79-89.
Congress' effort to reconcile conflicting policies has led to a system that is both unworkable and damaging to state family law policy. The bankruptcy courts are forced to act as "super-divorce" courts and thereby intrude on the province of the state courts.\textsuperscript{104} Rejection of the Calhoun test in five Circuits advanced comity with state law as a significant concern for federal bankruptcy courts.\textsuperscript{105} The problem is that, even when a bankruptcy court is limiting its analysis to an intent test, it is still interpreting the function of an award made by the state court judge rather than allowing the state courts to make that determination themselves. This means that even the circuits applying a mere intent test run the risk of acting as super-divorce courts, despite recognizing that this is not their role.

Under an intent test, the needs of divorcing parties must be litigated both at divorce proceedings and again at the bankruptcy dischargeability hearing. This leads to litigating twice the issue of the respective parties' needs at the time of divorce.\textsuperscript{106} Even if federal intrusion on state law policies were not an issue, this would provide bankrupt debtors with a "second bite at the apple" in proving that the creditor-spouse did not need the state court award in the first place.

This system is unfair for another reason. In state court, support awards can be modified if circumstances change and the state judge decides that support must be either increased or decreased.\textsuperscript{107} But when a bankruptcy court recharacterizes an award as property division under an intent test or a present circumstances test, the debtor can gain the benefits of a downward modification of support without any risks of an upward modification of support as could occur in state court.\textsuperscript{108}

Of greater concern is the fact that spouses receiving an award in state court face increased uncertainty in relying on that award to support themselves. This does not allow a divorcing spouse to reorder

\textsuperscript{104} See Weintraub & Resnick, supra note 5, at 3-62; Scheible, supra note 10, at 581; Singer, supra note 7, at 47.
\textsuperscript{105} See supra note 90.
\textsuperscript{106} In referring to present circumstances, the Eleventh Circuit criticized this circumstance. "Thus limited to its proper role, the bankruptcy court will not duplicate the functions of state domestic relations courts, and its rulings will impinge on state domestic relations issues in the most limited manner possible." Harrell v. Sharp, 754 F.2d 902, 907 (11th Cir. 1985).
\textsuperscript{107} See supra note 39.
\textsuperscript{108} This is so because discharge can only reduce the debtor's obligations, and therefore the bankruptcy would never increase a spouse's award as the state court system could do in a post divorce proceeding. See supra text accompanying notes 33-43.
her life, knowing that she can depend upon the award that a state divorce court has granted her.109

The fundamental flaw in the structure of the alimony, maintenance and support exception is that it still views divorcing parties in a support/dependency relationship. Today, modern domestic law views marriage as a "partnership between co-equals."110 If Congress would recognize this change in perspective, it would see that the need to limit exception from discharge to support awards is inappropriate.

V. PROPOSED CHANGE IN § 523 AND A TEMPORARY SOLUTION

The problems surrounding § 523(a)(5) of the Code result from the fact that distinguishing alimony, maintenance and support from property division is both meaningless and unworkable at the federal level. Contrary to the federal bankruptcy approach, state law by and large favors property division over alimony, maintenance, and support. The states no longer view the functions of each as distinct and, therefore, the Bankruptcy Code must eventually change to reflect this reality. This Note concludes that the alimony, maintenance and support exception to discharge should be expanded to make non-dischargeable debts for liabilities under the terms of a property settlement entered into in connection with a separation agreement or divorce decree. Congress has twice failed to enact such an exception.

However, since state law no longer views divorce obligations as arising out of a husband’s duty to support his wife, an issue that must be addressed is whether the bankruptcy system is justified in excepting any divorce obligations from discharge, let alone all of them.

Even though family law scholars agree that the purpose of property division is to assess the marital gains and losses of the spouses,111 state law still treats these awards as duties of greater significance than ordinary contractual duties.112 Any of these obligations

109. See Scheible, supra note 10, at 592. Homer Clark refers to such uncertainty when he advises that:

Although bankruptcy should be considered by the parties as a possibility when they are negotiating a separation agreement, the cases create so much uncertainty about its impact on the financial provisions in divorce decrees that they can do little more than attach the label they wish to have applied and hope that the bankruptcy court will be persuaded by it.

Clark, supra note 32, at 306.

110. See Singer, supra note 7, at 100.

111. See Clark, supra note 32, at 181.

112. In fact, most equitable distribution statutes still use need for support as a factor in
come with the threat of contempt for violating court orders.\textsuperscript{113} In addition both Congress and state legislatures are constantly trying to find ways to close the enforcement loopholes in this area of the law.\textsuperscript{114}

These obligations also do not arise in the way that an ordinary contract arises. A divorce obligation only occurs with the force of state court approval behind it. In addition, these are never arms length negotiations that a divorcing party may enter into or forego, as a normal contracting party has the right to do. The property settlement is a necessary step to ending the marital relationship, and therefore bankruptcy risks can only be avoided by rejecting an award altogether.

One scholar points out that analysis of the fresh start policy was not meant to protect divorce obligations at all.\textsuperscript{115} Rather the fresh start policy was designed to protect debtors in their role as “consumers and commercial beings,” and not in their role as spouse.\textsuperscript{116} Lastly, society’s interest in protecting obligations arising out of marriage is justified by the spouses’ mutual dependence upon each other throughout the marriage, as well as the unique position marriage has in providing for the care and nurturing of children.\textsuperscript{117} Therefore, Congress should extend the exception to all post-marital obligations rather than eliminate the exception from discharge altogether.

\section*{VI. CONCLUSION}

Congress must amend the Bankruptcy Code to reflect changes in state divorce law. To enforce a husband’s traditional obligations of support to his ex-wife and children, § 523(a)(5) affords creditor-spouses the right to exception from discharge in bankruptcy for all debts in the nature of alimony, maintenance or support. This exception to discharge is faulty because it does not include debts characterized as property division among the debts that an ex-spouse may still enforce after a bankruptcy filing by her husband. The Bankruptcy

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{113}] See id. at 181-82. Clark also states that equitable distribution gives “each spouse that property which he or she equitably owned, recognizing that in marriage the title to property often does not correspond to the rights of ownership.” Id. at 181.
\item[\textsuperscript{114}] See, e.g., supra note 28.
\item[\textsuperscript{115}] Singer, supra note 7, at 105.
\item[\textsuperscript{116}] Id.
\item[\textsuperscript{117}] Id. at 101.
\end{itemize}
\end{footnotesize}
Code should be amended to include these debts for three reasons. First, due to changes in state divorce law, it is now quite difficult for a judge to differentiate between property division and support awards because they share the same features and functions. Second, where a distinction is possible, the current system is unfair to the creditor-spouse because that spouse must first utilize property division remedies before being awarded non-dischargeable support awards. Finally, the federal courts have been unable to develop a workable rule that will provide divorcing parties with the security of knowing how their award would be characterized. The best way to correct this problem is to expand the exception to include divorce-related property division awards.

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