

Bankruptcy and Child Support Enforcement: The Basics (and Maybe Just a Little Bit More) for IV-D Attorneys and Agencies

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I. Bankruptcy Basics

A. Bankruptcy Law

1. The purpose of the federal Bankruptcy Code is to allow an overburdened debtor to pay all of her creditors to the extent she is able to do so and in an organized and equitable manner and then permit her to make a “fresh start” by relieving her of all or most of her preexisting debts.
2. The federal Bankruptcy Code is codified as Title 11 of the U.S. Code. The Bankruptcy Code is supplemented by the federal Bankruptcy Rules and local bankruptcy rules adopted by bankruptcy courts in each federal court district.
3. The “new” bankruptcy reform statute applies to bankruptcy cases that are commenced on or after October 17, 2005. The “old” bankruptcy law applies to cases that were commenced before October 17, 2005 and are pending on or after October 17, 2005. This outline is based on the “new” law.
4. Under the U.S. Constitution’s supremacy clause, federal bankruptcy law supersedes state law to the extent state law is inconsistent with the federal bankruptcy law. In re Jackson, 55 B.R. 343 (Bankr. M.D.N.C. 1985).
5. Federal bankruptcy judges have original and exclusive jurisdiction over all bankruptcy cases, over the property of the bankruptcy estates of debtors, and over all “core proceedings” under the Bankruptcy Code. 28 U.S.C. 1334; 28 U.S.C. 157.
 - State courts, however, may exercise concurrent jurisdiction with respect to *some* issues that may arise in connection with pending bankruptcy cases and retain, subject to the Bankruptcy Code’s limitations, their jurisdiction with respect to family law or domestic relations matters, including child support enforcement, that may be “related to” a pending bankruptcy proceeding. *See also* 28 U.S.C. 1452 (removal of proceedings to bankruptcy courts); 28 U.S.C. 1334(c) (abstention and remand by bankruptcy courts).

B. Bankruptcy Cases

1. Chapter 7
 - a. A chapter 7 bankruptcy case is known as a “straight” bankruptcy or “liquidation.” Individuals usually file chapter 7 bankruptcy cases when they have few nonexempt resources, incomes that do not exceed their necessary living expenses, and large unsecured debts (like credit card or medical bills).
 - The “new” bankruptcy law, however, imposes a “means test” that will require more debtors (especially those with incomes that exceed the state’s median income) to file chapter 13, rather than chapter 7, bankruptcies. *See* 11 U.S.C. 707(b).
 - b. In a chapter 7 bankruptcy, the debtor’s equity interest in nonexempt property is liquidated by the bankruptcy trustee and the proceeds from the liquidation of the

debtor's nonexempt assets are used to pay all or part of the claims of the debtor's unsecured creditors.

- Unsecured creditors with "priority" claims are paid before general unsecured creditors. *See* 11 U.S.C. 507.
 - Secured creditors are paid through the liquidation of property securing their claims or, if the property is not liquidated, retain their security interests in the debtor's property unless those security interests are "avoided" under the Bankruptcy Code.
 - The debtor retains her interest in exempt property and generally is discharged from personal liability for all "dischargeable" pre-bankruptcy claims and debts.
- c. Most chapter 7 bankruptcies are "no asset" cases. In a "no asset" case, the debtor does not own any nonexempt assets that can be used to pay the claims of creditors. Creditors, therefore, are not required to file claims and do not receive payments because there is no nonexempt property that can be liquidated. Bankr. Rule 2002(e) and 3002(c)(5).
2. Chapter 13
- a. A chapter 13 bankruptcy case is known as a "wage earner" bankruptcy. Chapter 13 bankruptcies usually are filed by debtors who have enough regular income to pay their reasonable and necessary living expenses (including support of their spouses and children) and to cure their default in paying secured debts (such as home mortgages or car loans) and pay their unsecured debts in whole or in part over a period of up to five years.
- b. In a chapter 13 case, the debtor's nonexempt property is not liquidated to pay the claims of creditors unless the debtor's chapter 13 plan expressly provides for the liquidation of the debtor's property. 11 U.S.C. 1306(b).
- Instead, the debtor makes payments to the chapter 13 trustee from the debtor's "disposable income" for a period of up to five years and the trustee uses these payments to make payments to creditors in accordance with the debtor's chapter 13 plan (which must be confirmed by the bankruptcy court). 11 U.S.C. 1322, 1325, 1326.
 - In general, priority claims (including most but not all unsecured claims for domestic support obligations that were due and owing at the time the debtor filed for bankruptcy) must be paid in full. 11 U.S.C. 1322(a)(2).
 - A chapter 13 debtor may retain property that secures a claim if the debtor "cures" his or her default with respect to a long-term obligation (for example, a home mortgage loan) or, with respect to other secured claims, pays the secured claim in full.
3. Chapters 11 and 12
- Chapter 11 bankruptcy cases may be filed by businesses that need to reorganize their affairs and by individuals whose debts exceed the limits for chapter 13. Chapter 12 bankruptcy cases may be filed by farmers whose debts exceed the limits for chapter 13. The law and procedures in chapter 12 bankruptcy cases are similar to those in chapter 13 cases.

C. Bankruptcy Terminology

1. **Automatic Stay.** The automatic stay generally takes effect as soon as a debtor files a bankruptcy case. It generally prohibits creditors from taking any action that affects the bankruptcy estate of the debtor or any action against the debtor involving a pre-bankruptcy claim or debt. *See* 11 U.S.C. 362. The automatic stay and its exceptions are discussed in section III of this outline.
2. **Bankruptcy Estate.** The bankruptcy estate is the property that is subject to the bankruptcy court's jurisdiction. The bankruptcy estate is created as soon as the debtor files a bankruptcy petition. Determining what is and isn't property of the bankruptcy estate may be important in determining the scope of the automatic stay.
 - a. The bankruptcy estate generally consists of any legal or equitable interest of the debtor in any real, personal, tangible, or intangible property (including property that the debtor owns jointly with another person) at the time the bankruptcy petition is filed (or, in certain instances, property acquired within 180 days of filing for bankruptcy and property that is brought into the estate by the trustee's avoidance of pre-bankruptcy transfers). *See* 11 U.S.C. 541.
 - b. In a chapter 13 case, the bankruptcy estate includes wages, income, and property that the debtor receives *after* she files for bankruptcy. 11 U.S.C. 1306.
 - In a chapter 7 case, a debtor's earnings for services performed after she files for bankruptcy are not property of the bankruptcy estate. 11 U.S.C. 541(a)(6).
3. **Claim.** In general, a claim is a creditor's right to payment from the debtor that exists at the time the debtor files for bankruptcy, regardless of whether the claim is disputed or undisputed, reduced to judgment, fixed or contingent. 11 U.S.C. 101(5), 502(b)(5). The Bankruptcy Code generally classifies claims as allowed or unallowed, secured or unsecured, and priority or nonpriority. The payment of claims for child support and other domestic support obligations through bankruptcy proceedings is discussed in section IV of this outline.
4. **Discharge.** The bankruptcy discharge releases the debtor from personal liability for all "dischargeable" claims.
 - a. Some claims, including claims for domestic support obligations and other obligations arising from divorce or separation, are not dischargeable in bankruptcy. *See* section V of this outline.
 - b. The bankruptcy discharge does not affect (i) valid security interests that have not been avoided in bankruptcy, (ii) claims that arose *after* the debtor filed for bankruptcy, (iii) most debts that were not "scheduled" by the debtor, or (iv) other claims that are nondischargeable under the Bankruptcy Code.
5. **Disposable Income.** In a chapter 13 case, a debtor's disposable income is the amount of her income that exceeds her reasonable and necessary living expenses (including expenses required to pay the debtor's current, ongoing spousal and child support obligations). A debtor's disposable income is considered in determining whether the debtor's chapter 13 plan is feasible and proposed in good faith. *See* sections IV(C) and IV(D) of this outline.
6. **Exempt Property.** Exempt property is property that may be retained by the debtor and is not subject to liquidation or distribution to creditors in a chapter 7 case. In a chapter 13 case, property that the debtor claims as exempt is not considered in determining the extent to which the claims of unsecured creditors must be satisfied.

- a. If the state of the debtor's residence does not "opt out" of the federal bankruptcy exemptions, the federal bankruptcy code determines what property the debtor may claim as exempt. *See* 11 U.S.C. 522.
- b. If the state of the debtor's residence has "opted out" of the federal bankruptcy exemptions, the property that the debtor may claim as exempt in a bankruptcy case is determined primarily by state law. For example, because North Carolina has "opted out" of the federal bankruptcy exemptions, a North Carolina debtor may claim as exempt (i) her interest in property that is exempt from the claims of creditors under G.S. 1C-1601, (ii) her interest in property that is exempt from the claims of creditors under other applicable state or federal nonbankruptcy laws, and (iii) her interest in property held with her spouse as tenants by the "entireties."
7. Priority Claim. In chapter 7 cases, priority claims must be paid in full before payments are made to general unsecured creditors, and priority claims with higher priorities must be paid in full before priority claims with lower priorities. In chapter 13 cases, priority claims generally must be paid in full through the debtor's confirmed chapter 13 plan. *See* 11 U.S.C. 507.
8. Secured Claim. A secured claim is a claim that is secured, at least in part, by a lien (judicial, statutory, or consensual) against the debtor's property. If the amount of the claim exceeds the value of the property securing it, the claim is secured up to the value of the property and unsecured to the extent it exceeds the value of the property. A claim, therefore, may be secured in part and unsecured in part.

II. Bankruptcy and Child Support Enforcement

A. Domestic Support Obligations (11 U.S.C. 101(14A))

1. A domestic support obligation is a claim that
 - a. arises before (or after) a debtor files for bankruptcy;
 - b. is in the nature of alimony, maintenance, or support for the debtor's spouse, former spouse, child, or the parent of the debtor's child (including public assistance paid on behalf of the spouse, former spouse, child, or parent of the debtor's child);
 - c. is recoverable from the debtor by or on behalf of a governmental entity, the debtor's spouse, former spouse, or child, or the child's parent, legal guardian, or responsible relative;
 - d. has been established or is subject to establishment by a court order, divorce decree, separation or property settlement agreement, or determination by a governmental unit in accordance with applicable nonbankruptcy law; *and*
 - e. has not been assigned to a nongovernmental agency except for the purpose of collection.
2. Federal bankruptcy case law, not state family law, determines whether a debt is or isn't a domestic support obligation.
 - a. For example, a debtor's obligation under a separation agreement to pay an adult child's college expenses *may* be considered to be support for the debtor's child even if state law would not consider it to be "child support."
 - b. Bankruptcy courts, however, often look to state law for guidance in determining whether a debt is in the nature of alimony, maintenance, or support for a spouse, former spouse, or child of a debtor.
3. The definition of "domestic support obligation" generally includes, but is usually broader than, claims for spousal or child support.

- a. It isn't clear whether a debt arising from a court order requiring a debtor to pay support for her grandchild or stepchild (as opposed to her natural or adopted child) is a domestic support obligation.
 - b. The definition of domestic support obligation generally includes debts owed directly to governmental units for governmental assistance provided to a debtor's spouse, former spouse, or child (such as public assistance debts arising under G.S. 110-135).
4. Debts incurred in connection with a debtor's divorce or separation that are *not* in the nature of alimony, maintenance, or support for a debtor's spouse, former spouse, or child (for example, a distributive award in an equitable distribution proceeding) are *not* domestic support obligations.
- Under the "old" bankruptcy law, much of the litigation regarding the dischargeability of debts for spousal or child support involved distinguishing debts for alimony, maintenance, or support from property settlement debts. Under the "new" bankruptcy law, though, a property settlement debt that is incurred in connection with the debtor's divorce or separation is nondischargeable (except in chapter 13 cases in which the debtor receives a "superdischarge") even if it is not a domestic support obligation. 11 U.S.C. 523(a)(15).
- B. Preferential Treatment for Domestic Support Claims
1. The "new" bankruptcy law reflects the determination by Congress that
 - a. bankruptcy should interfere as little as possible with the establishment and collection of ongoing obligations for spousal and child support and family support arrearages with minimal need for the involvement family support creditors in bankruptcy proceedings; and
 - b. all claims for domestic support obligations should receive equal and favored treatment in the bankruptcy process.
 2. The automatic stay does not apply to certain actions to enforce or collect debts based on domestic support obligations. *See* section III of this outline.
 3. Allowed, *unsecured* claims based on domestic support obligations must be paid before other priority and nonpriority claims in chapter 7 cases. *See* section IV of this outline.
 4. A chapter 13 debtor generally must pay in full all pre-petition and post-petition domestic support obligations. *See* section IV of this outline.
 5. Claims based on domestic support obligations are not discharged by bankruptcy. *See* section V of this outline.
 6. Judicial liens based domestic support obligations may not be avoided in bankruptcy.
- C. Additional Resources
1. Sommer, McGarity, and King, *Collier Family Law and the Bankruptcy Code* (Newark: Matthew Bender & Co. [LexisNexis], 1991).
 2. John L. Saxon, "Impact of the New Bankruptcy Reform Act on Family Law in North Carolina," *Family Law Bulletin #20* (Chapel Hill: School of Government, The University of North Carolina at Chapel Hill, 2005) [available on-line at www.sog.unc.edu/pubs/electronicversions/pdfs/flb20.pdf].

III. Application of the Automatic Stay to Domestic Support Cases

A. Scope and Duration of the Automatic Stay (11 U.S.C. 362)

1. The filing of a bankruptcy petition generally acts as an automatic stay of any and all actions by creditors or others (including state and local child support enforcement agencies and state court judges) to
 - a. commence or continue *any* legal proceeding against the debtor that was or could have been commenced before the debtor filed for bankruptcy (including legal proceedings that do not seek to establish or enforce a pre-petition claim);
 - b. commence or continue any legal proceeding against the debtor to recover a claim that arose before the debtor filed for bankruptcy;
 - c. enforce a pre-petition judgment against the debtor;
 - d. enforce a pre-petition judgment against the debtor's bankruptcy estate;
 - e. obtain possession of property that is property of the debtor's bankruptcy estate;
 - f. create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate;
 - g. create, perfect, or enforce a lien against the debtor's property if the lien secures a pre-petition claim against the debtor;
 - h. collect, assess, or recover a pre-petition claim from the debtor; *or*
 - i. set-off a debt owed to the debtor against a pre-petition claim against the debtor.
2. The purpose of the automatic stay is two-fold: (i) to give the debtor sufficient "breathing room" to get her financial affairs in order; and (ii) to prevent creditors from seizing property or taking other actions that would interfere with the orderly and equitable payment of creditors' claims through bankruptcy and giving the debtor a "fresh start."
3. The scope of the automatic stay is extremely broad. The fact that a particular action is not prohibited by one particular provision of the automatic stay does not necessarily mean that the action is permissible, since it may be prohibited under another particular provision of the automatic stay.
4. The automatic stay comes into effect as soon as the debtor files her bankruptcy petition. It does not depend on whether a particular creditor or other person has received formal or informal notice that the debtor has filed for bankruptcy.
 - a. Actions taken by creditors or others in violation of the automatic stay are void or voidable, even if done without notice or knowledge that the automatic stay was in effect or without intent to violate the automatic stay. In re Stringer, 847 F.2d 549 (9th Cir. 1988).
 - b. A creditor or other person (including state and local child support enforcement agencies and attorneys) who willfully violates the automatic stay may be held liable for actual damages resulting from the violation, costs, attorneys fees, and, in some instances, punitive damages. 11 U.S.C. 362(k); Florida Dept. of Revenue v. Omine, 485 F.3d 1305 (11th Cir. 2007).
5. The provisions of the automatic that apply with respect to property that is property of the debtor's bankruptcy estate remain in effect as long as the property remains property of the debtor's bankruptcy estate.
 - a. When a debtor in a chapter 7 case claims property as exempt, that property ceases to be property of the bankruptcy estate when the time for objecting to the debtor's claim of exemption has expired. In re Hahn, 60 B.R. 69 (Bankr. D.Minn. 1985).

- b. In a chapter 13 case, the debtor's income and property generally cease to be property of the bankruptcy estate when the debtor's chapter 13 plan is confirmed. 11 U.S.C. 1327(a); *In re Moore*, 22 B.R. 200 (Bankr. M.D.Fla. 1982).
 6. Unless the bankruptcy court grants relief from the automatic stay, the remaining provisions of the automatic stay generally remain in effect until the debtor is granted or denied a discharge or until the debtor's bankruptcy case is dismissed or closed.
 - a. In most chapter 7 cases, debtors receive a discharge approximately three months after they file for bankruptcy.
 - b. In chapter 13 cases, the automatic stay may remain in effect for up to five years.
- B. Domestic Support Exceptions to the Automatic Stay (11 U.S.C. 362(b)(2))
1. The automatic stay does not apply to the commencement or continuation of a legal proceeding against the debtor
 - a. to *establish or modify* an order for a domestic support obligation; *or*
 - b. to establish paternity (11 U.S.C. 362(b)(2)(A)).
 2. The automatic stay does not prohibit
 - a. "collecting" a domestic support obligation from property that is *not* property of the debtor's bankruptcy estate (11 U.S.C. 362(b)(2)(B));
 - b. withholding the debtor's income (regardless of whether the income is or isn't property of the debtor's bankruptcy estate) for payment of a domestic support obligation under a judicial or administrative order or statute (11 U.S.C. 362(b)(2)(C));
 - c. revoking a debtor's driver's license, recreational license, or professional or occupational license to enforce the debtor's spousal or child support obligation as specified in 42 U.S.C. 666(a)(16) and in accordance with applicable state law (11 U.S.C. 362(b)(2)(D));
 - d. attaching a debtor's federal or state income tax refund by or on behalf of a state or local child support enforcement agency as specified in 42 U.S.C. 664 or 666(a)(3) or analogous state law (11 U.S.C. 362(b)(2)(E));
 - e. reporting the debtor's overdue support obligation to a consumer reporting agency as specified in 42 U.S.C. 666(a)(7) (11 U.S.C. 362(b)(2)(F)); *or*
 - f. "enforcing" a debtor's medical support obligation as specified in Title IV-D of the Social Security Act (11 U.S.C. 362(b)(2)(G)).
 3. The automatic stay does not prohibit the commencement or continuation of a *criminal* contempt proceeding against a debtor based on the debtor's failure to pay a pre-petition spousal or child support debt *if and only if* the purpose and effect of the criminal contempt proceeding is to punish the debtor's failure to pay spousal or child support and not to coerce or require the debtor's payment of spousal or child support. 11 U.S.C. 362(b)(1); *In re Rook*, 102 B.R. 490 (Bankr. E.D.Va. 1989), *aff'd*. 929 F.2d 694 (4th Cir. 1991); *In re Kearns*, 168 B.R. 423 (D.Kan. 1994). *Cf.* *In re Dervais*, 81 B.R. 127 (Bankr. S.D.Fla. 1987).
 4. Although 11 U.S.C. 362(b)(2)(B) allows the "collection" of a domestic support obligation from property that is not part of the debtor's bankruptcy estate, it is not clear that this section allows the *enforcement* of a domestic support obligation when the enforcement action does not clearly fall within another exception to the automatic stay. *Cf.* *In re Johnston*, 321 B.R. 262 (Bankr. D.Az. 2005).
 - a. Thus, the commencement or continuation of civil contempt proceedings or the entry and execution of an order holding a debtor in civil contempt for failing to comply with a pre-petition spousal or child support order may violate the

automatic stay. *See* In re Bible, 110 B.R. 1002 (Bankr. S.D.Ga. 1990); In re Tipton, 257 B.R. 865 (Bankr. E.D.Tn. 2000).

- b. The same may be true with respect to the attachment of a debtor's bank account (regardless of whether the account is property of the debtor's bankruptcy estate) based on her failure to pay child support under a pre-petition child support order.
 5. The automatic stay, however, does not prohibit the commencement of an action to enforce an order for spousal or child support *if* (i) the right to support first arose *after* the debtor filed for bankruptcy (for example, when a debtor and her spouse separate after the debtor files for bankruptcy), *and* (ii) the action does not seek possession of property that is part of the debtor's bankruptcy estate *or* seek to create, perfect, or enforce a lien against property that is part of the debtor's bankruptcy estate.
 6. Although the "new" bankruptcy law exempts many child support enforcement activities from the provisions of the automatic stay, it does *not* create a complete or "blanket" exception for child support enforcement activities. Instead, an action to enforce a spousal or child support obligation is exempted from the automatic stay *if and only if* it clearly falls within one of the exceptions specified in 11 U.S.C.362.
- C. Seeking Relief from the Automatic Stay
1. A creditor or interested party may request relief from the automatic stay by filing a motion with the federal bankruptcy court. The motion must be served on the debtor, the debtor's attorney, the trustee, and other interested parties. Service may be made via first-class mail. Bankruptcy Rules 4001(a) and 7004.
 - Child support creditors (including state or local child support enforcement agencies or attorneys) do not have to pay the \$150 filing fee if they have filed Bankruptcy Form 281.
 2. A bankruptcy court may, after notice and hearing, grant relief from the automatic stay for "good cause." 11 U.S.C. 362(d). The burden of proof in proceedings seeking relief from the automatic stay is generally on the debtor. 11 U.S.C. 362(g).
 - a. Bankruptcy courts generally will grant relief from the automatic stay to allow a creditor to collect or enforce spousal or child support that becomes due and payable after the debtor has filed for bankruptcy. *See* In re Raboin, 135 B.R. 682 (Bankr. D.Kan. 1991).
 - b. Bankruptcy courts, however, may refuse to grant relief from the automatic stay to enforce or collect spousal or child support that became due and payable before the debtor filed for bankruptcy and will be paid through the debtor's bankruptcy case. *See* Mudd v. Jacobson, 231 B.R. 763 (Bankr. D.Az. 1999); In re Fullwood, 171 B.R. 424 (Bankr. S.D.Ga. 1994).
 3. When a creditor or interested party files a motion requesting relief from the automatic stay and the bankruptcy court fails to make a final decision regarding the request or to continue the stay, the stay is automatically terminated or modified as requested without a court order 60 days after the date the motion was filed. 11 U.S.C. 362(e)(2).
 4. The federal bankruptcy court has exclusive jurisdiction to grant or deny a request for relief from the automatic stay. 28 U.S.C. 1334(a). A state court, however, may have concurrent jurisdiction with the federal bankruptcy court to determine whether the automatic stay applies to a legal proceeding in state court and whether a creditor or other person has violated the stay. *See* Singleton v. Fifth Third Bank, 230 B.R. 533 (B.A.P. 6th Cir. 1999); In re Martinez, 227 B.R. 442 (Bankr. D.N.H. 1998).
 5. In at least some districts, a debtor may consent to a creditor's request for relief from the automatic stay but the consent must be filed with the bankruptcy court, served on

or agreed to by the trustee, and approved by the bankruptcy court. If the trustee does not object, the debtor's stipulation to relief from the automatic stay may be approved without hearing.

IV. Payment of Child Support and Other Domestic Support Obligations Through Bankruptcy

A. Proof of Claim

1. Except in "no asset" chapter 7 bankruptcy cases, the spouse or former spouse of a debtor or any other person to whom the debtor owes a *pre-petition* debt based on a domestic support obligation must file a proof of claim with the bankruptcy court *if* the creditor wants the debt to be paid through the pending bankruptcy case. 11 U.S.C. 501(a); Bankr. Rule 3003(b)(1).
 - a. A pre-petition spousal or child support debt includes past-due spousal or child support payments that accrued and were payable *before* the date the debtor filed for bankruptcy.
 - b. Spousal or child support payments that are payable under a pre-petition spousal or child support order but first become due and owing *after* a debtor files for bankruptcy should not be included because they are unmatured, nondischargeable, domestic support obligations and, therefore, do not fall within the definition of an "allowable" claim. 11 U.S.C. 502(b)(5); U.S. v. Sutton, 786 F.2d 1305 (5th Cir. 1986).
2. A proof of claim (Bankruptcy Form B 10) generally must be filed within 90 days of the date of the creditors' meeting. Bankr. Rule 3002(c).
 - a. In a chapter 7 case, the creditors' meeting usually occurs within 20 to 40 days after the debtor files for bankruptcy. In a chapter 13 case, the creditors' meeting usually occurs within 20 to 50 days after the debtor files for bankruptcy.
 - b. State or local government agencies must file claims within 180 days after the debtor files for bankruptcy, but it is not entirely clear whether this provision applies to spousal or child support claims that are filed by a state or county child support enforcement agencies on behalf of the debtor's spouse, former spouse, or child and have not been assigned to the state as a condition of receiving public assistance. *See* 11 U.S.C. 502(b)(9).
 - c. Domestic support obligations entitled for priority in a chapter 7 case may be filed at any time before the trustee commences distribution of the bankruptcy estate. 11 U.S.C. 726(a).
 - d. The bankruptcy court has no jurisdiction to extend the time for filing a claim or to allow a creditor (other than an infant or incompetent person) to file a claim after the filing deadline has passed. Bankr. Rules 9006(b)(3) and 3002(c)(2); *In re Jensen*, 333 B.R. 906 (Bankr. M.D.Fla. 2005). *Cf.* *In re Davis*, 243 B.R. 127 (Bankr. M.D.Ala. 1999) (allowing child support agency to file late proof of claim on behalf of minor child).
3. Failure to file a proof of claim does not affect the nondischargeability of a nondischargeable claim.
4. *Unsecured* claims based on domestic support obligations that are due and owing at the time a debtor files for bankruptcy should be designated as *priority* claims in chapter 7 cases. 11 U.S.C. 507(a)(1).
5. Claims based on domestic support obligations that are secured, in whole or in part, by a judicial, statutory, or consensual lien should be designated as *secured* claims, to the extent the value of the property securing the claim does not exceed the amount of the claim. A claim may be secured in part and unsecured in part.

6. A claim for a domestic support obligation should state the total amount of the claim that is due and owing as of the date the debtor filed for bankruptcy.
 - a. As noted above, it should not include spousal or child support that first accrues and is payable for periods of time after the debtor files for bankruptcy.
 - b. If the debtor is or may be liable for spousal or child support for a period of time before the debtor files for bankruptcy but the amount of the claim has not yet been adjudicated or determined, the claim should state that the amount is *contingent* or *unliquidated*.
 7. When a claim is filed, it is deemed to be an *allowed* claim unless the debtor, the trustee, or any creditor files a timely objection to the claim. 11 U.S.C. 502(a).
 - a. Filing an objection to a claim initiates a “contested” case which will be heard and determined by the bankruptcy court. Bankr. Rule 3007.
 - Child support enforcement attorneys who have not been admitted to practice before the bankruptcy court may appear and represent child support enforcement agencies in connection with proceedings regarding contested claims for child support if they have filed Bankruptcy Form 281.
 - b. If the validity or amount of a claim has been conclusively adjudicated by a state court before the debtor files for bankruptcy, the debtor may not collaterally attack the state court’s determination by objecting to the claim in bankruptcy court. *McKenna v. Dupree*, 285 B.R. 759 (Bankr. M.D.Ga. 2002); *In re Hanes*, 248 B.R. 136 (Bankr. W.D.Mo. 2000); *In re Audre, Inc.*, 202 B.R. 490 (Bankr. S.D.Cal. 1996), *aff’d*, 216 B.R. 19 (B.A.P. 9th Cir. 1997); *In re Johnson*, 210 B.R. 1004 (Bankr. W.D.Tn. 1997). *Cf. In re Garrett*, 315 B.R. 431 (Bankr. E.D.Tx. 2004).
- B. Payment of Domestic Support Obligations in Chapter 7 Cases
1. In a “no asset” case, the creditor to whom the debtor owes a domestic support obligation will not receive any payment through the debtor’s bankruptcy case. The debt, however, will not be discharged by the debtor’s bankruptcy and the creditor will be able to attempt to collect the debt from the debtor or the debtor’s property after the debtor’s bankruptcy case is closed.
 2. In other chapter 7 cases, *unsecured* claims based on pre-petition domestic support obligations have first priority with respect to payment from liquidation of a debtor’s nonexempt property. 11 U.S.C. 507(a)(1). This means that unsecured claims for domestic support obligations must be paid in full before the claims of other creditors.
 - If a chapter 7 debtor owes debts for domestic support obligations to one or more individuals and to one or more governmental entities, the support debts owed to individuals have priority over the support debts owed to governmental entities. 11 U.S.C. 507(a)(1).
 3. If a chapter 7 debtor’s nonexempt property is insufficient to pay in full an unsecured claim for a domestic support obligation, the balance of the claim is not discharged by the debtor’s bankruptcy (11 U.S.C. 523(a)(5)) and may be enforced against the debtor or the debtor’s property after the debtor’s bankruptcy case is closed.
 4. Notwithstanding 11 U.S.C. 522(c)(1) (which provides that a debtor’s exempt property is liable, during and after the debtor’s bankruptcy, for pre-petition domestic support claims), a chapter 7 trustee may not liquidate the debtor’s exempt property in order to satisfy a claim for domestic support. *In re Covington*, 368 B.R. 38 (Bankr. E.D.Cal. 2006); *In re Quezada*, 368 B.R. 44 (Bankr. S.D.Fla. 2007).
 - a. A domestic support creditor, however, may enforce a pre-petition domestic support claim against a debtor’s exempt property by filing an adversary

proceeding in the federal bankruptcy court during the pendency of the debtor's bankruptcy case or by attempting to attach the property through proceedings in state court after the debtor's bankruptcy case is closed. 11 U.S.C. 522(c)(1); *In re Quezada*, 368 B.R. 44 (Bankr. S.D.Fla. 2007).

- b. Because the 2005 amendment to 11 U.S.C. 522(c)(1) appears to have statutorily "overruled" *In re Davis*, 170 F.3d 475 (5th Cir. 1999), property that is claimed by the debtor as exempt is *not* exempt from a nondischarged domestic support claim brought against the debtor during or after the bankruptcy even if the property would have been exempt from the domestic support claim under otherwise applicable state or federal nonbankruptcy law.
5. Secured claims based on pre-petition domestic support obligations are paid in chapter 7 cases if the property to which the claim attaches is liquidated, in which case claims secured by a lien against the property are paid from the proceeds from the sale of the property before the debtor's remaining equity is used to pay unsecured claims.
 - If a secured claim is not paid through a chapter 7 bankruptcy and the creditor's lien is not avoided by the debtor or trustee, the creditor's lien against the debtor's property survives the debtor's bankruptcy case and may be enforced against the property after the debtor's bankruptcy case is closed even if the debtor's personal liability is discharged.
- C. Payment of Pre-Petition Domestic Support Claims in Chapter 13 Cases
1. A chapter 13 debtor's plan generally must provide for full payment of an *unsecured* claim for domestic support that became due and payable before the debtor filed for bankruptcy. 11 U.S.C. 1322(a)(2); 11 U.S.C. 507(a)(1).
 - a. This requirement does not apply if (i) the creditor consents to less-than-full payment through the debtor's chapter 13 plan, *or* (ii) to the extent that the claim has been assigned to a governmental agency for purposes other than collection if the debtor's chapter 13 plan commits all of her disposable income for a period of five years to satisfying the claims of creditors. 11 U.S.C. 1322(a)(4).
 - b. To the extent that a nondischargeable pre-petition domestic support claim is not paid in full through the debtor's chapter 13 plan, the creditor may enforce the claim against the debtor or the debtor's property after the debtor's bankruptcy case is closed or dismissed.
 2. A chapter 13 debtor's plan generally must provide for the full payment of a *secured* claim for pre-petition domestic support or surrender to the creditor of the property securing the claim. 11 U.S.C. 1325(a)(5).
 3. Unless otherwise provided by local bankruptcy court rules and subject to the approval of the bankruptcy judge, a debtor's chapter 13 plan may provide for payment of pre-petition domestic support arrearages by payments by the debtor through the chapter 13 trustee or by direct payments by the debtor to the creditor "outside" the chapter 13 case. *Alabama Dept. of Human Resources v. Boler*, 34 F.L.R. 1151 (Bankr. M.D.Ala. 2008). *Cf.* *Florida Dept. of Revenue v. Talley*, 34 F.L.R. 1295 (Bankr. M.D.Fla. 2008).
 - In chapter 13 cases, priority and secured claims generally are paid before the claims of general unsecured creditors. Unless otherwise provided in the order confirming a debtor's chapter 13 plan, the fact that a domestic support claim is entitled to priority under 11 U.S.C. 507(a)(1) does *not* mean that the claim must be paid before the claims of other chapter 13 creditors. *Alabama Dept. of Human Resources v. Boler*, 34 F.L.R. 1151 (Bankr. M.D.Ala. 2008).

4. Although the Bankruptcy Code generally requires full payment of pre-petition domestic support claims, a debtor's confirmed chapter 13 plan may establish a schedule for paying pre-petition spousal or child support arrearages that is different from that ordered by a state court.
 5. Confirmation of a debtor's chapter 13 plan operates as an injunction prohibiting action by creditors against the debtor or the debtor's property with respect to any claim that has been provided for or is being paid under the debtor's chapter 13 plan. 11 U.S.C. 1327.
 - In addition, the provisions of the automatic stay (other than those prohibiting actions against property that is property of the bankruptcy estate) remain in effect following confirmation of the debtor's chapter 13 plan. *See* 11 U.S.C. 362.
 6. The debtor, the trustee, or a domestic support creditor may file a motion asking the bankruptcy court to modify the debtor's chapter 13 plan to increase or decrease payments under the plan, to extend or reduce the time for paying a claim, or to change the amount to be distributed to a creditor who has been paid. 11 U.S.C. 1329.
 - a. A domestic support creditor whose claim is provided for or is required to be paid through a debtor's chapter 13 plan may file a motion asking the bankruptcy court to dismiss the debtor's chapter 13 case if the debtor materially defaults in making payments as required by the chapter 13 plan.
 - b. Child support enforcement attorneys who have not been admitted to practice before the bankruptcy court may appear and represent child support enforcement agencies in connection with motions to modify or dismiss a debtor's chapter 13 plan and without paying the \$150 filing fee if they have filed Bankruptcy Form 281
 7. The "new" bankruptcy law allows, but does not require, a debtor to include in the debtor's chapter 13 plan a provision for payment of post-petition interest on pre-petition domestic support or other nondischargeable claims if the debtor's income is sufficient to do so while satisfying other chapter 13 requirements regarding payments to creditors. 11 U.S.C. 1322(b)(10).
 8. The "new" bankruptcy law prohibits the discharge of a debtor in a chapter 13 case unless the debtor certifies to the bankruptcy court that she has paid in full domestic support obligations that she was required to pay by statute or by judicial or administrative order (including pre-petition domestic support arrearages to the extent required by the debtor's chapter 13 plan). 11 U.S.C. 1328(a).
- D. Payment of Post-Petition Domestic Support in Chapter 13 Cases
1. Post-petition domestic support (i.e., domestic support that first becomes due and payable *after* the debtor filed for bankruptcy) must be paid directly by the debtor to the domestic support creditor and may not be paid through the debtor's chapter 13 plan. *In re White*, 212 B.R. 979 (B.A.P. 10th Cir. 1997).
 2. The "new" bankruptcy law, however, contains a number of provisions that are designed to ensure that chapter 13 debtors comply with their legal obligations to pay post-petition domestic support.
 - a. Chapter 13 continues to require that a debtor's income be sufficient to pay any post-petition domestic support owed by the debtor after taking into consideration the debtor's reasonable and necessary living expenses and payments due under the debtor's proposed chapter 13 plan. 11 U.S.C. 1325(b)(2)(A)(i). If a debtor's income is insufficient to pay post-petition domestic support along with her reasonable and necessary living expenses and payments under the debtor's proposed plan, the person to whom the post-petition domestic support is owed

- may object to confirmation of the debtor's chapter 13 plan and the bankruptcy court may deny confirmation of the debtor's chapter 13 plan. 11 U.S.C. 1325(b)(1)(B); 11 U.S.C. 1325(a)(6).
- b. The bankruptcy court may not confirm a debtor's chapter 13 plan if the debtor has failed to pay in full all domestic support obligations that (i) the debtor was required to pay by statute or judicial or administrative order, and (ii) became due and payable between the date the debtor filed for bankruptcy and the date of the confirmation hearing. 11 U.S.C. 1325(a)(8).
 - c. The bankruptcy court may dismiss a chapter 13 case if the debtor has failed to pay in full all domestic support obligations that became due and payable *after* the debtor filed for bankruptcy. 11 U.S.C. 1307(c)(11).
 - d. A chapter 13 debtor may not receive a chapter 13 discharge unless she certifies to the bankruptcy court that she has paid in full all domestic support obligations that she was required to pay by statute or by judicial or administrative order and that became due and payable before the date of certification (including domestic support obligations that became due and payable after the date the debtor filed for bankruptcy). 11 U.S.C. 1328(a).
3. A bankruptcy court should not confirm a proposed chapter 13 plan that would decrease a debtor's post-petition domestic support obligation below the amount required by an existing order of a state court. In re Garrison, 5 B.R. 256 (Bankr. E.D.Mich 1980).
 - A confirmed chapter 13 plan that modifies a debtor's post-petition domestic support obligation, however, will be binding on the domestic support creditor if the creditor fails to object to or appeal confirmation.
 4. An order by a bankruptcy court requiring the debtor's employer to withhold part of the debtor's wages and make payments to the chapter 13 trustee may preempt an income withholding order entered by a state court or child support enforcement agency requiring the debtor's employer to make payments from the debtor's wages to satisfy the debtor's post-petition obligation to pay domestic support. In re Garrison, 5 B.R. 256 (Bankr. E.D.Mich 1980).
 5. As long as the automatic stay remains in effect, however, a domestic support creditor is prohibited from seeking enforcement of a post-petition domestic support obligation in state court against property that is part of the bankruptcy estate unless the action falls within one of the exceptions to the automatic stay or the bankruptcy court grants relief from the stay.

V. Nondischargeability of Domestic Support Obligations and Post-Bankruptcy Issues

A. General Rules Regarding Discharge

1. Unless a debtor's bankruptcy case is dismissed, bankruptcy generally discharges a debtor's personal liability with respect to most pre-petition claims. *See* 11 U.S.C. 523, 727, and 1328.
 - a. In chapter 7 cases, debtors generally are granted a discharge after the time for creditors to object to discharge has expired (usually 60 days after the creditors' meeting and within a few months after the debtor files for bankruptcy).
 - b. In chapter 13 cases, debtors generally are granted discharges after they have completed making all payments required under their chapter 13 plans (up to five years after they filed for bankruptcy). The "superdischarge" in a chapter 13 case is broader in scope than the discharge under chapter 7.

2. A discharge, however, does not void a creditor's lien or security interest in the debtor's property nor does it affect debts that the debtor incurred *after* she filed for bankruptcy.
3. A debtor's discharge in bankruptcy operates as a permanent injunction barring creditors from taking any action to collect or attempt to collect a discharged debt from the debtor or from the debtor's property (except to the extent that the creditor has retained a valid lien or security interest in the property). 11 U.S.C. 524.
4. Certain types of debts (including domestic support obligations), however, are not discharged in bankruptcy. 11 U.S.C. 523. If a debt is not discharged and has not been fully paid through a debtor's bankruptcy case, the creditor may attempt to collect the debt from the debtor or the debtor's property after the bankruptcy case is closed.

B. Nondischargeability of Domestic Support Obligations

1. The discharge that a debtor receives in a chapter 7 or chapter 13 case does not discharge the debtor's liability for a domestic support obligation that was not paid in full through the debtor's bankruptcy. 11 U.S.C. 523(a)(5).
 - Because a domestic support obligation is not discharged by a debtor's bankruptcy, the creditor may enforce it against the debtor or the debtor's property following the debtor's discharge to the extent that it was not paid in full through the debtor's bankruptcy.
2. If there is any doubt whether a claim against a debtor is a claim based on a domestic support obligation, the debtor or creditor may, at any time during or after the bankruptcy, seek a judicial determination regarding the dischargeability of the debt from the bankruptcy court or from a state court (which has concurrent jurisdiction to determine the issue of dischargeability under 11 U.S.C. 523(a)(5)). *Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005).

C. Post-Bankruptcy Enforcement of Domestic Support Claims Against Exempt Property

1. The Bankruptcy Code (11 U.S.C. 522(c)(1)) provides that although a debtor's exempt property is exempt from most claims, the debtor's exempt property is liable, during and after the debtor's bankruptcy, for claims based on the debtor's obligation to pay domestic support.
2. And because the 2005 amendment to 11 U.S.C. 522(c)(1) appears to have statutorily "overruled" *In re Davis*, 170 F.3d 475 (5th Cir. 1999), property that is claimed by the debtor as exempt is *not* exempt from a nondischarged domestic support claim brought against the debtor during or after the bankruptcy even if the property would have been exempt from the domestic support claim under otherwise applicable state or federal nonbankruptcy law.

D. Post-Bankruptcy Modification of Spousal or Child Support

- Although a state court has the authority to modify a debtor's current spousal or child support obligation based on the changed circumstances of the parties after the debtor's bankruptcy case has been closed, increasing (or refusing to decrease) a debtor's spousal or child support obligation on the sole basis that the debtor has received a discharge with respect to marital or other debts may violate 11 U.S.C. 524(a)(2) (prohibiting actions to collect a discharged debt) or 11 U.S.C. 525(a) (discriminating against a debtor based on a discharged debt). *See Pellitteri v. Pellitteri*, 628 A.2d 784 (N.J. Super. 1993); *Mosley v. Mosley*, 450 S.E.2d 161 (Va. App. 1994). *Cf. In re Siragusa*, 27 F.3d 406 (9th Cir. 1994).