

# FAMILY LAW BULLETIN

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## IMPACT OF THE NEW BANKRUPTCY REFORM ACT ON FAMILY LAW IN NORTH CAROLINA

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On April 20, 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.<sup>1</sup> The 2005 bankruptcy reform legislation has been described as the most substantial revision of federal bankruptcy law since the enactment of the 1978 Bankruptcy Code and makes more than two dozen significant changes to the current bankruptcy statutes, including:

- establishing a “means test” (based on a debtor’s income) for eligibility for bankruptcy under chapter 7;
- creating a presumption that debts owed to a creditor in excess of \$500 for luxury goods incurred within 90 days (and cash advances in excess of \$750 within 70 days) of filing for bankruptcy are nondischargeable;
- prohibiting discharge of debts under chapter 13 if the debtor obtained a discharge under chapter 7 within four years (or under chapter 13 within two years) before filing the pending chapter 13 bankruptcy proceeding;
- prohibiting discharge of debts under chapter 7 if the debtor obtained a discharge under chapter 7 within eight years before filing the pending chapter 7 bankruptcy proceeding;
- capping, under certain circumstances, the value of the homestead exemption that debtors may claim;
- limiting the scope of the “superdischarge” in chapter 13 bankruptcy cases; and
- expanding the current law’s provisions regarding nondischargeability of student loans.



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Although bankruptcy's impact on family law was not the primary focus of the new bankruptcy reform act, the new law includes a number of provisions affecting bankruptcy's impact on the commencement and continuation of family law proceedings during bankruptcy, on the payment, collection, and dischargeability of spousal and child support and other domestic support obligations during bankruptcy proceedings, and on the dischargeability of other claims related to a debtor's separation or divorce. This *Family Law Bulletin* describes and analyzes these provisions of the new bankruptcy reform law in the context of the current federal Bankruptcy Code and North Carolina family law.<sup>2</sup>

## Overview: The Impact of Bankruptcy Reform on Family Law

### Effective Date of the New Bankruptcy Law

The provisions of the new bankruptcy reform act regarding family law are effective October 17, 2005, and apply with respect to bankruptcy cases commenced on or after that date.

The provisions of the current Bankruptcy Code regarding spousal and child support and other claims and proceedings involving family law issues will continue to apply in bankruptcy cases that were filed before October 17, 2005 and remain pending on or after that date. In addition, the current Bankruptcy Code's provisions regarding spousal and child support and other claims and proceedings involving family law issues will continue to apply in bankruptcy cases that are filed on or after October 17, 2005 to the extent that they are not amended or repealed by the new bankruptcy reform legislation.

District court judges, child support enforcement agencies, attorneys, and others, therefore, need to understand the impact on family law of the *current* Bankruptcy Code as well as that of the new bankruptcy reform act.

### Bankruptcy and Family Law: Principles Guiding Reform

According to Philip L. Strauss, one of the primary authors of the bankruptcy reform act's provisions dealing with spousal and child support, four basic principles guided the act's treatment of claims for domestic support obligations.<sup>3</sup>

1. Bankruptcy should interfere as little as possible with the establishment and collection of on-going obligations for spousal and child support.

2. The Bankruptcy Code should provide a broad and comprehensive definition of domestic support obligations and *all* claims for domestic support obligations should receive equal and favored treatment in the bankruptcy process.
3. The bankruptcy process should ensure the continued payment of on-going spousal and child support and family support arrearages with minimal need for participation by support creditors in bankruptcy proceedings.
4. The bankruptcy process should allow a debtor to liquidate nondischargeable debt to the greatest extent possible within the bankruptcy case and emerge from bankruptcy with the freshest start feasible.

And to the extent that these principles are reflected in and realized by the new bankruptcy reform law, the overall effect of the new law with respect to family law, according to Strauss, should be:

1. a reduction in the need for family support creditors to appear in bankruptcy court and a related reduction in the cost and uncertainty inherent in litigating family support issues in bankruptcy court;
2. greater consistency in law and policy between the Bankruptcy Code and the federal and child support enforcement program established by Title IV-D of the Social Security Act;
3. greater assurance that legitimate family support enforcement mechanisms will not be frustrated by the bankruptcy process; and
4. a clear recognition that all family support debts are entitled to preferential treatment in bankruptcy.<sup>4</sup>

Strauss and other child support advocates, including the National Child Support Enforcement Association, therefore believe that the new bankruptcy reform law will "revolutionize the enforcement of support obligations against debtors in bankruptcy."<sup>5</sup>

The new bankruptcy reform act, however, was opposed by the National Women's Law Center and other advocates for women and children who argued that, taken as a whole, the new law will be detrimental to women and children who are owed spousal and child support. According to these advocates, the new law, by increasing the rights of credit card companies, finance companies, auto lenders, and other creditors and expanding the scope of consumer debts that are not discharged in bankruptcy, will result in increased competition between women and children who are owed spousal and child support and commercial creditors for a debtor's limited financial resources both during and after bankruptcy.<sup>6</sup>

Strauss and other child support advocates, however, counter that “nonbankruptcy law has so tilted the field in favor of support creditors that competition with financial institutions for the collection of post-discharge debts [should not present any real] problems” for women and children who are owed spousal and child support.<sup>7</sup>

### **Bankruptcy and Family Law: Summary of the New Law’s Impact**

The bankruptcy reform act’s provisions regarding family law are found in Title II-B (sections 211 through 219) of the legislation. The new law

1. defines “domestic support obligation” as a debt that (a) accrues before or after a debtor files for bankruptcy; (b) is in the nature of alimony, maintenance, or support (including governmental assistance and interest on a debt for family support) for a debtor’s child, spouse, or former spouse or the parent of a debtor’s child; (c) is owed to or recoverable by the debtor’s child, spouse, or former spouse, a parent, legal guardian, or responsible relative of the debtor’s child, or a governmental unit (other than spousal or child support debts assigned to a nongovernmental entity except for the purpose of collection); and (d) has been established or is subject to establishment by a court order, divorce decree, separation agreement, property settlement agreement, or determination by a governmental unit in accordance with applicable nonbankruptcy law [section 211];
2. makes the automatic stay that results from filing bankruptcy inapplicable to actions to collect ongoing spousal or child support and spousal or child support arrearages through income withholding from the property of the bankruptcy estate during a pending bankruptcy proceeding [section 214];
3. makes the automatic stay inapplicable to the enforcement of a debtor’s spousal or child support obligation through proceedings to revoke the debtor’s licensing privileges or garnish the debtor’s federal or state income tax refund [section 214];
4. makes the automatic stay inapplicable to the commencement or continuation of civil actions for child custody or visitation, regarding domestic violence, and for dissolution of marriage (except to the extent that the action involves the division of

- property that is property of the bankruptcy estate) [section 214];
5. provides that a debtor’s interest in property claimed as exempt in bankruptcy is subject to a debt for a domestic support obligation even if the property would be exempt from the debt under applicable federal or state nonbankruptcy law [section 215];
6. prohibits a debtor from avoiding a judicial lien that secures the payment of any domestic support obligation (including those assigned or owed directly to governmental units) [section 216];
7. provides that bona fide, pre-petition payments for assigned, as well as unassigned, spousal or child support do not constitute preferential transfers that can be recovered for the bankruptcy estate [section 217];
8. increases from seventh to first the priority for payment of claims for spousal and child support in chapter 7 bankruptcy cases and extends this priority to all claims for domestic support obligations [section 212];
9. generally prohibits confirmation of a chapter 13 plan if the plan does not provide for full payment of all past-due priority claims for domestic support obligations [section 213];
10. prohibits confirmation of a chapter 13 plan if the debtor has failed to pay in full domestic support obligations that have accrued after the bankruptcy case was filed [section 213];
11. allows the dismissal of a chapter 13 bankruptcy case if the debtor fails to pay domestic support obligations that accrue after the bankruptcy case was filed [section 213];
12. prohibits discharge in a chapter 13 case if the debtor has failed to pay in full domestic support obligations that have accrued as of the date of discharge [section 213];
13. makes all claims for domestic support obligations (including those assigned or owed directly to governmental units) nondischargeable in bankruptcy [section 216];
14. provides that all debts incurred in connection with a divorce or separation that are not domestic support obligations (for example, debts related to the division of marital property) are nondischargeable regardless of the debtor’s ability to pay the debt or whether the creditor files a proceeding asking that the debt be determined to be nondischargeable [section 216]; and
15. requires bankruptcy trustees to provide specified information to family support

creditors when a bankruptcy case is filed or closed [section 219].

## Domestic Support Obligations

### Treatment of Spousal and Child Support Under the Current Bankruptcy Code

The current Bankruptcy Code provides preferential treatment for *some* claims for spousal or child support.

For example, section 523(a)(5) of the Bankruptcy Code (11 U.S.C. 523(a)(5)) generally exempts from discharge any debt that (a) is owed to a debtor's child, spouse, or former spouse, (b) is "in the nature of alimony, maintenance, or support" for the debtor's child, spouse, or former spouse, and (c) was incurred in connection with a court order, divorce decree, separation or property settlement agreement, or determination by a governmental unit in accordance with state law.

Section 523(a)(5) of the current Bankruptcy Code, however, does not apply to claims in the nature of spousal or child support that are owed directly to state or local governments (for example, claims arising from the payment of public assistance or foster care for a debtor's child) or to spousal or child support that is assigned to a nongovernmental entity.<sup>8</sup>

In addition, spousal and child support debts that are owed directly to or assigned to state or local governments or public child support enforcement agencies are not entitled to priority under the current bankruptcy law, are not protected against loss of secured status if they are secured by a judicial lien on exempt property, and are subject to the code's rules regarding recovery of preferential, pre-petition payments to creditors.

### Definition and Treatment of Domestic Support Obligations Under the New Law

"To ensure that *all* debts relating to the support of a debtor's spouse, former spouse, family or child are given similar [and preferential] treatment in bankruptcy, section 211 of the [bankruptcy reform act] provides a sweeping definition for the concept of a 'domestic support obligation.'"<sup>9</sup>

The new law defines "domestic support obligation"<sup>10</sup> as a debt that

- a) arises either before or after a bankruptcy petition is filed;<sup>11</sup>

- b) is in the nature of alimony, maintenance, or support (including governmental assistance and interest on a debt for family support) for a debtor's child, spouse, or former spouse or the parent of a debtor's child;
- c) is owed to or recoverable by the debtor's child, spouse, or former spouse, a parent, legal guardian, or responsible relative of the debtor's child, or a governmental unit (other than family support debts assigned to a nongovernmental entity except for the purpose of collection);<sup>12</sup> and
- d) has been established or is subject to establishment by a court order, divorce decree, separation agreement, property settlement agreement, or determination by a governmental unit in accordance with applicable nonbankruptcy law.<sup>13</sup>

Under the new bankruptcy law, the term "domestic support obligation" expressly includes a debt owed for support provided by a governmental unit for a debtor's child, spouse, or former spouse or for the parent of a debtor's child (for example, payments for public assistance or foster care provided on behalf of a debtor's child),<sup>14</sup> as well as spousal or child support assigned to state or local governments or public child support enforcement agencies.<sup>15</sup> The new law also includes within the definition of "domestic support obligation" child support that is owed or payable to the debtor's child or the parent, legal guardian, or responsible relative of the debtor's child.

The new law applies to spousal or child support that is owed to or recoverable by the debtor's spouse, former spouse, or child, the parent, legal guardian, or responsible relative of the debtor's child, or a governmental unit, thereby clarifying that the debt need not be owed to the person or entity that files a claim regarding the debt as long as it is recoverable by that person or entity.<sup>16</sup> The new law, however, continues to exclude from preferential treatment spousal or child support that has been assigned to a nongovernmental entity (such as an attorney or collection agency) *unless* the assignment is merely for the purpose of collecting the debt.<sup>17</sup>

Having created a new definition of "domestic support obligation," the new law uses it approximately twenty times throughout the revised Bankruptcy Code. As a result, the revised Bankruptcy Code generally treats spousal and child support debts similarly and preferentially regardless of "how the debt arose or to whom the debt is owed."<sup>18</sup>

## Family Law Exceptions to the Automatic Stay

### Scope and Duration of the Automatic Stay

Section 362 of the Bankruptcy Code creates an “automatic stay” that takes effect as soon as a debtor files for bankruptcy. The purposes of this automatic stay are, first, to give the debtor sufficient “breathing room” to get his or her financial affairs in order, and second, to prevent creditors from seizing a debtor’s property or property of the bankruptcy estate which might be needed to pay claims in the bankruptcy case or to give the debtor a “fresh start.”

Except as otherwise provided, the filing of a bankruptcy petition *automatically* stays

- the commencement or continuation of any judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the bankruptcy petition was filed;
- the commencement or continuation of any judicial, administrative, or other action or proceeding to recover a claim against the debtor that arose before the bankruptcy petition was filed;
- the enforcement against the debtor of a judgment obtained before the bankruptcy petition was filed;
- the enforcement against property of the bankruptcy estate of a judgment obtained before the bankruptcy petition was filed;
- any act to obtain possession of property of the bankruptcy estate;
- any act to create, perfect, or enforce a lien against property of the bankruptcy estate;
- any act to create, perfect, or enforce a lien against the debtor’s property to the extent that the lien secures a claim that arose before the bankruptcy petition was filed;
- any act to collect, assess, or recover a claim against the debtor that arose before the bankruptcy petition was filed; and
- the setoff of any claim against the debtor against any debt owing to the debtor that arose before the bankruptcy petition was filed.<sup>19</sup>

Because of its breadth, the automatic stay potentially extends to legal proceedings and other actions involving divorce, equitable distribution, child custody or visitation, domestic violence, spousal support, and child support. In the absence of the family law exceptions discussed below, the automatic stay would prohibit:

- the commencement or continuation of any legal proceeding for divorce, equitable distribution, child custody or visitation, or domestic violence that was or could have been commenced against the debtor before the debtor filed for bankruptcy;<sup>20</sup>
- *all* attempts to establish, modify, enforce, collect, or recover through judicial proceedings, administrative actions, civil or criminal contempt, income withholding, garnishment, execution, liens, setoff, etc. a *pre-bankruptcy* claim for spousal or child support (a spousal or child support claim is a “pre-bankruptcy” claim if it first accrued or arose before the debtor filed for bankruptcy *and* involves support that was or would have been due and payable for a period of time before the debtor filed for bankruptcy); *and*
- any attempt to enforce, collect, or recover a *post-bankruptcy* claim for spousal or child support (a spousal or child support claim is a “post-bankruptcy” claim if it first accrued or arose after the debtor files for bankruptcy *or* involves support that becomes due and payable after the debtor files for bankruptcy) by obtaining possession of or creating, perfecting, or enforcing a lien against property that is *property of the bankruptcy estate*.<sup>21</sup>

In general, most of the provisions of the automatic stay remain in effect until the debtor is granted or denied a discharge in bankruptcy or until the debtor’s bankruptcy case is dismissed or closed, whichever occurs first.<sup>22</sup>

In chapter 7 bankruptcies, the automatic stay remains in effect until the debtor’s discharge is granted or denied and the case is closed (in most cases, about three months after the date the debtor filed for bankruptcy).<sup>23</sup> In a chapter 13 bankruptcy case, the automatic stay often remains in effect for three to five years, because the bankruptcy case usually is not closed until the debtor completes making payments under the chapter 13 plan.<sup>24</sup>

Provisions of the automatic stay that apply to property of the bankruptcy estate remain in effect as long as the property continues to be “property of the bankruptcy estate.”<sup>25</sup> Under the Bankruptcy Code, “the bankruptcy estate comes into being immediately upon the filing of a . . . bankruptcy petition” and “includes virtually all types of interests in property that the debtor had as of the [date the bankruptcy petition was filed].”<sup>26</sup>

In a chapter 7 case, the bankruptcy estate generally includes all of the property owned by the debtor at the time the bankruptcy petition is filed but, with certain exceptions, does not include property

acquired by the debtor after the bankruptcy petition is filed. In a chapter 13 case, the bankruptcy estate generally includes all property owned by the debtor at the time the bankruptcy petition is filed *and* all income and property received by the debtor *after* the bankruptcy petition is filed.<sup>27</sup>

In a chapter 13 case, property generally ceases to be property of the bankruptcy estate and vests in the debtor when the debtor's chapter 13 plan is confirmed (usually eight to ten weeks following the date the bankruptcy petition is filed).<sup>28</sup> In general, property that the debtor claims as exempt ceases to be property of the estate after the time for filing objections to the claim of exemption has passed (usually thirty days after the creditors' meeting or fifty to eighty days after the debtor filed for bankruptcy).<sup>29</sup>

Acts by creditors or others that violate the automatic stay, even if done without knowledge of the automatic stay, are void or, at least, voidable.<sup>30</sup> A creditor 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.<sup>31</sup> Under certain circumstances, the federal bankruptcy court, upon application by a particular creditor, may grant the creditor relief from the automatic stay.<sup>32</sup>

### Family Law Exceptions to the Automatic Stay under the Current Bankruptcy Code

The 1994 amendments to the current Bankruptcy Code created two family law exceptions to the automatic stay.

The first exception allows the commencement or continuation of an action or proceeding against the debtor to establish the debtor's paternity of a child or to establish or modify an order determining the debtor's legal obligation for spousal or child support.<sup>33</sup>

The second exception allows the "collection" of spousal or child support from property that is not property of the bankruptcy estate.<sup>34</sup> Whether the automatic stay applies to actions to collect spousal or child support, therefore, may depend on whether the property from which support is being collected is "property of the bankruptcy estate" as defined in 11 U.S.C. 541. And the answer to that question depends on the type of bankruptcy case the debtor has filed: one answer applies in chapter 7 bankruptcy cases and a different answer applies in chapter 13 cases.

In a chapter 7 case, property of the estate generally includes all property (including property owned jointly by the debtor and another person) in which the debtor had an interest at the time the bankruptcy petition was filed and, with certain exceptions, does not include

income or property acquired by the debtor after he or she files for bankruptcy. Thus, the continued implementation<sup>35</sup> of an income withholding order to collect ongoing spousal or child support or pre-bankruptcy support arrearages from a debtor's post-bankruptcy wages<sup>36</sup> does not violate the automatic stay.

In a chapter 13 case, however, property of the estate includes income and property acquired by the debtor after he or she files for bankruptcy as well as property in which he or she has an interest at the time he or she filed for bankruptcy. So absent an order from the federal bankruptcy court granting relief from the automatic stay, the continued collection of ongoing spousal or child support or pre-bankruptcy support arrearages from a debtor's post-bankruptcy wages under an income withholding order after the debtor files for bankruptcy and before the debtor's chapter 13 plan is confirmed does not fall within the exception created by section 362(b)(2)(B) and therefore violates the automatic stay.<sup>37</sup>

### Expanded Family Law Exceptions to the Automatic Stay under Bankruptcy Reform

Section 214 of the bankruptcy reform act expands the family law exceptions to the automatic stay.<sup>38</sup>

First, the new law allows the commencement or continuation of a civil action or proceeding against the debtor

- for divorce or dissolution of marriage *except* to the extent that the action seeks to determine the division of property that is property of the estate;
- concerning child custody or visitation;<sup>39</sup>
- regarding domestic violence;
- to establish or modify an order for a "domestic support obligation;" or
- for the establishment of paternity, as allowed under current law.

Second, the new law retains the exception allowing collection of spousal or child support from property that is not property of the estate and expands the exception to include collection of other "domestic support obligations."

Third, the new law also exempts from the automatic stay:

- the withholding of income that is property of the bankruptcy estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or statute (thereby allowing, for the first time, the continuation or commencement of income withholding against a debtor's post-

bankruptcy wages for current and past-due spousal or child support after a debtor files a chapter 13 bankruptcy case);

- the enforcement of a debtor's child support obligation through proceedings to revoke or suspend the debtor's drivers license, recreational license, or professional or occupational license in accordance with applicable federal and state law;
- the reporting by a state agency of past-due child support debts to consumer reporting agencies as required by 42 U.S.C. 666(a)(7);
- the enforcement by a state or local child support agency of spousal or child support through the attachment of a debtor's federal or state tax refund in accordance with applicable federal and state law; and
- the enforcement of a debtor's medical support obligation in accordance with Title IV-D of the Social Security Act and corresponding state law.

### **Family Law Proceedings That Remain Subject to the Automatic Stay**

Despite the 2005 amendments to the Bankruptcy Code, some acts involving the commencement or continuation of legal proceedings in family law cases or the collection or enforcement of spousal and child support obligations remain subject to the automatic stay and, unless the federal bankruptcy court grants relief from the stay, are therefore prohibited as long as the automatic stay remains in effect.

Under the new law, the automatic stay continues to bar the commencement or continuation of a legal proceeding against the debtor for equitable distribution of marital property

- to the extent that the property is property of the bankruptcy estate; *or*
- if the claim for equitable distribution arose before the debtor filed for bankruptcy and is not joined with an action for divorce.

Section 362 of the revised Bankruptcy Code also continues to stay

- the commencement or continuation of a civil contempt proceeding against a debtor for failure to pay a pre-bankruptcy domestic support obligation, even if the proceeding does not involve property of the bankruptcy estate;
- the commencement of a civil contempt proceeding against a debtor for failure to pay a post-bankruptcy domestic support obligation

*unless* the support will be paid from property that is not property of the estate;

- the creation, perfection, or enforcement of a lien against the debtor's property or property of the estate that secures a pre-bankruptcy domestic support obligation or order distributing marital property;
- the enforcement or collection of a post-bankruptcy domestic support obligation or distributive award through the creation, perfection, or enforcement of a lien on property of the estate;
- the commencement or continuation of a judicial or administrative proceeding or action to attach or garnish a debtor's bank account or other property to collect a pre-bankruptcy domestic support obligation; and
- the issuance or execution of a writ of execution or the commencement or continuation of supplemental proceedings to enforce a judgment for a pre-bankruptcy domestic support obligation or order for equitable distribution.

### **Enforcement of Domestic Support Obligations Against Exempt Property**

#### **11 U.S.C. 522(c)(1) and the *Davis* Decision**

Section 522(c) of the current Bankruptcy Code provides that, unless a bankruptcy case is dismissed, property that the debtor claims as exempt generally is not subject to the debtor's pre-bankruptcy debts. The current law, however, also provides that this rule does not apply to nondischargeable claims for spousal or child support.<sup>40</sup>

One federal appellate court, though, held that the Bankruptcy Code's exception allowing the enforcement of spousal and child support claims against a debtor's exempt property does not preempt state law exempting the property from spousal or child support claims.<sup>41</sup>

#### **Preemption of State Law Under Section 216 of the Bankruptcy Reform Act**

Section 216 of the new law nullifies the *Davis* decision and expands the exception to all nondischargeable "domestic support obligations." The new law expressly provides that "notwithstanding any provision of applicable [federal or state] nonbankruptcy law to the contrary, ... property [that has been exempted from the claims

of creditors in a bankruptcy case] shall be liable for a debt [for a domestic support obligation as defined] in section 523(a)(5)."<sup>42</sup> Because section 216 expressly preempts state law to the extent that state law is inconsistent with the provisions of section 216, the new law will allow enforcement of a domestic support obligation against any property that a debtor has claimed as exempt in a bankruptcy case even if the property would be exempt under state law from claims based on domestic support obligations.

Given the preemptive effect of section 216 on state law, the question is: What property, if any, is exempt in a bankruptcy case filed by a North Carolina debtor *and* is exempt, under North Carolina law, from claims based on domestic support obligations?

North Carolina is one of approximately thirty-four states that have exercised their right to "opt out" of the Bankruptcy Code provision that allows a debtor to claim either the exemptions created by the federal Bankruptcy Code or those available under state law.<sup>43</sup> A North Carolina resident who files for bankruptcy, therefore, may claim as exempt

- his or her interest, as of the date the bankruptcy case is filed, in any property that is exempt from the claims of creditors under applicable state law and under applicable federal nonbankruptcy law; and
- "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law."<sup>44</sup>

G.S. 1C-1601 exempts certain types and amounts of property owned by a debtor from the claims of creditors. G.S. 1C-1601 also provides that the exemptions set forth in that section, rather than those in 11 U.S.C. 522(d), apply in bankruptcy cases filed by debtors who are residents of North Carolina.<sup>45</sup> G.S. 1C-1601, however, also provides that these exemptions are inapplicable to claims arising from "child support [or] alimony ... order[s] pursuant to Chapter 50 of the General Statutes."<sup>46</sup>

G.S. 1C-1601, therefore, is consistent with section 216 of the bankruptcy reform act to the extent that it makes property claimed as exempt under G.S. 1C-1601 subject to spousal and child support obligations owed to the debtor's spouse, former spouse, or child, or to the parent, guardian, or responsible relative of the debtor's child. But G.S.

1C-1601 is inconsistent with, and therefore preempted by, section 216 to the extent it exempts property from domestic support obligations owed directly to governmental entities, such as debts arising under G.S. 108A-135 from the payment of public assistance on behalf of the debtor's child.

North Carolina law also exempts from the claims of creditors a debtor's interest in property held jointly with the debtor's spouse as tenants by the entirety if the debt owed to a creditor is owed by the debtor only and not jointly by the debtor and the debtor's spouse.<sup>47</sup> Thus, under North Carolina law, a home owned by John and his wife Jane as tenants by the entirety is not subject to execution to enforce a judgment against John for past-due alimony arrearages he owes to his former wife, Judy. If, however, John files for bankruptcy and claims his interest in the home as exempt, section 216 will preempt North Carolina law and allow Judy to enforce her judgment for pre-bankruptcy alimony arrearages, and perhaps for post-bankruptcy alimony as well, against John's interest in the marital home during or after the bankruptcy.

Section 216, therefore, will further limit the types of property that may be claimed as exempt from claims for domestic support obligations under North Carolina law.

## Nonavoidance of Judicial Liens for Domestic Support Obligations

Section 522(f)(1) of the current Bankruptcy Code generally allows a debtor to avoid (remove) a judicial lien on exempt property. This provision, however, does not apply to judicial liens that secure *unassigned* debts for spousal or child support.

Section 216 of the bankruptcy reform act extends this exception to any judicial lien that secures a "domestic support obligation" as defined in 11 U.S.C. 523(a)(5). Therefore, under the new law, a debtor will not be able to avoid a judicial lien that secures an unassigned debt for spousal or child support, an assigned debt for spousal or child support, or any other debt based on a domestic support obligation.

The new law does not affect the provisions of the current Bankruptcy Code that allow a debtor to avoid

- a judicial lien on exempt property if the lien secures a debt arising from divorce or separation other than a claim for a domestic support obligation; or
- a nonpossessory, nonpurchase money security interest in certain exempt property that secures a debt arising from divorce or



separation other than a claim for a domestic support obligation.<sup>48</sup>

### **Payments of Domestic Support Obligations Are Not Preferential Pre-Bankruptcy Transfers**

Section 547(c)(7) of the current Bankruptcy Code allows a bankruptcy trustee to recover for the bankruptcy estate a pre-bankruptcy payment to a creditor if the payment constitutes a “voidable preference.” This provision, however, does not apply to payments for *unassigned* spousal or child support obligations.

Section 217 of the bankruptcy reform act extends this exception to any payment by the debtor for a “domestic support obligation” as defined in 11 U.S.C. 523(a)(5). Therefore, under the new law, a trustee will not be able to recover any pre-bankruptcy payment for a domestic support obligation.

The new law does not affect the provisions of the current Bankruptcy Code regarding pre-bankruptcy payments on debts arising from divorce or separation other than those for domestic support obligations.

### **Priority of Domestic Support Obligations in Chapter 7 Cases**

In a chapter 7 bankruptcy case<sup>49</sup> (other than a “no asset” case),<sup>50</sup> the claims of unsecured creditors are paid from the assets of the bankruptcy estate in accordance with the priorities set forth in 11 U.S.C. 507, with higher priority claims being paid in full before those with a lower priority or no priority.<sup>51</sup>

Under current law, claims for past-due spousal or child support owed at the time the debtor files for bankruptcy<sup>52</sup> are entitled to seventh priority (one level higher than unsecured claims for unpaid taxes) *unless* the claim has been assigned, voluntarily, by operation of law, or otherwise, to a governmental entity, a nongovernmental entity, or individual other than the spouse, former spouse, or child to whom support is owed.<sup>53</sup> Under current law, an *assigned* and unsecured spousal or child support obligation is not entitled to priority and will be paid, if at all, pro rata with the claims of other general, unsecured creditors.

Under the new law, unsecured claims for “domestic support obligations,” including those assigned to a government agency or owed directly to governmental units, are entitled to first priority with respect to the distribution of payments in a chapter 7 case.<sup>54</sup>

Increasing the priority of claims for spousal and child support from seventh to first, however, is more symbolic than substantive since most chapter 7

bankruptcies are “no asset” cases and “the debts that have second through sixth priority [under the current bankruptcy law] rarely appear in consumer cases.”<sup>55</sup>

### **No Priority for Other Claims Arising from Divorce or Separation**

Unsecured claims arising from divorce or separation that are nondischargeable under section 523(a)(15) of the revised Bankruptcy Code are *not* entitled to priority and are paid pro rata with the claims of other general unsecured creditors in chapter 7 cases in which the debtor’s nonexempt property is liquidated.

### **Payment of Domestic Support Obligations in Chapter 13 Cases**

#### **Payment of Spousal and Child Support Under the Current Bankruptcy Code**

The current Bankruptcy Code distinguishes claims for *pre-bankruptcy* spousal or child support from claims for *post-bankruptcy* spousal or child support.<sup>56</sup> Pre-bankruptcy spousal or child support is support that has accrued before, and is due, owed, or payable by the debtor for a period of time before, he or she files for bankruptcy. A claim for post-bankruptcy spousal or child support is for the ongoing or future payment of spousal or child support that has not accrued or matured at the time a debtor files for bankruptcy or is owed for a period of time after the date the bankruptcy case is commenced.

Both types of debts fall within the Code’s definition of “claim,” since they are rights to payment of money, even if contingent and unmatured. However, under section 502(b)(5), only the prepetition portion of the obligation can be an “allowed claim.” \* \* \* Thus, the Bankruptcy Appellate [P]anel for the Tenth Circuit, in *In re White*, held that a nondebtor spouse’s claim for support arrearages had to be disallowed to the extent that the arrearages accrued postpetition.<sup>57</sup>

Payments for post-bankruptcy spousal and child support are made directly by the debtor in a chapter 13 case rather than through the bankruptcy trustee pursuant to the debtor’s approved chapter 13 plan.<sup>58</sup> The current Bankruptcy Code, however, *indirectly* provides for the payment of post-bankruptcy spousal and child support by requiring that the debtor’s disposable income remaining *after* payment of the debtor’s ongoing spousal and child support obligation be sufficient to make required payments to creditors under the chapter 13 plan.<sup>59</sup> (This remains true under the new bankruptcy law.) And case law suggests that

federal bankruptcy courts do not have the authority to modify, suspend, or terminate a debtor's post-bankruptcy spousal or child support obligations in a chapter 13 case.<sup>60</sup>

Under current law, allowed claims for pre-bankruptcy spousal and child support owed to the debtor's spouse, former spouse, or child must be paid in full by a chapter 13 debtor *unless* the claim has been assigned or the creditor agrees to accept less than full payment.<sup>61</sup>

To receive payments under the chapter 13 plan, however, a creditor must file a timely proof of claim with the bankruptcy court and the claim must be allowed.<sup>62</sup> If the debtor disputes the validity or amount of a claim for spousal or child support arrearages, he or she may object to the claim, in which case the bankruptcy court will determine the validity and amount of the claim.<sup>63</sup>

Although current law generally requires the full payment of unassigned, pre-bankruptcy spousal and child support arrearages, a confirmed chapter 13 plan may modify the requirements of a state court order regarding the schedule for liquidating the debtor's spousal or child support arrearage.<sup>64</sup> In many instances, a chapter 13 plan will provide for the payment of spousal or child support arrearages by the debtor directly, or "outside the plan," rather than through the bankruptcy trustee.

### Payment of Domestic Support Obligations Under the New Bankruptcy Law

The new bankruptcy law makes several changes regarding the payment of domestic support obligations in chapter 13 bankruptcies. It does *not* affect the payment of debts arising from divorce or separation that are not spousal or child support obligations.

By enacting a broader definition of "domestic support obligation" and extending priority status to domestic support obligations assigned or owed directly to governmental units, the new law requires, with two exceptions, that a chapter 13 plan provide for full payment of *all* pre-bankruptcy domestic support obligations.<sup>65</sup> The first exception to this rule allows a chapter 13 plan to provide for less than full payment of unsecured priority claims for pre-bankruptcy domestic support obligations if the affected creditor consents. The second exception allows a debtor to pay less than the full amount of a priority claim for a domestic support obligation without the creditor's consent (known as a "cram down") *if* the claim has been assigned to a governmental entity (other than a

voluntary assignment for the purpose of collection only) *and* the debtor's plan commits all of his or her disposable income to payments required by chapter 13 for the maximum five-year period allowed for completion of a chapter 13 plan.<sup>66</sup>

The new law also adopts three new requirements designed to ensure that chapter 13 debtors satisfy their pre- and post-bankruptcy domestic support obligations. Section 213 of the new law

- prohibits the confirmation of a chapter 13 plan if the debtor has failed to pay in full all domestic support obligations that have accrued *after* the debtor filed for bankruptcy, if required to do so by statute or by a judicial or administrative order;<sup>67</sup>
- allows the bankruptcy court to dismiss a debtor's chapter 13 case if the debtor has failed to pay in full all domestic support obligations that have accrued *after* the debtor filed for bankruptcy;<sup>68</sup> and
- denies a bankruptcy discharge to a chapter 13 debtor if the debtor has failed to pay all pre-bankruptcy and post-bankruptcy domestic support obligations to the extent required by a judicial or administrative order and, in the case of pre-bankruptcy domestic support obligations, to the extent provided in the debtor's chapter 13 plan.<sup>69</sup>

Lastly, section 213 of the new law allows, but does not require, a debtor to include in the debtor's chapter 13 plan a provision for payment of post-bankruptcy interest on a pre-bankruptcy domestic support obligation or other nondischargeable debt (including a claim arising from divorce or separation that is not dischargeable under section 523(a)(15)) if the debtor's income is sufficient to do so while satisfying other chapter 13 requirements regarding payments to creditors.<sup>70</sup>

### Nondischargeability of Domestic Support Obligations

After a debtor's nonexempt property is liquidated to satisfy the claims of creditors in a chapter 7 bankruptcy case or the debtor makes the payments to creditors required by the court-approved plan in a chapter 13 bankruptcy case, the debtor usually receives a "discharge" from the bankruptcy court. Except as otherwise provided by the Bankruptcy Code, the discharge relieves the debtor of personal liability for all pre-bankruptcy debts and operates as a permanent injunction prohibiting creditors from attempting to collect dischargeable debts (a) from the debtor, or (b) from the debtor's property except to the extent that the

creditor retains a valid security interest in the debtor's property after bankruptcy.<sup>71</sup>

Certain types of debts, however, are not dischargeable in bankruptcy. In some, but not all, cases, state courts have concurrent jurisdiction with federal bankruptcy courts to determine whether a particular debt is nondischargeable under the federal Bankruptcy Code.<sup>72</sup> If a debt is nondischargeable and has not been fully paid through a debtor's bankruptcy case, the creditor holding the nondischargeable debt may seek to enforce the debt against the debtor or the debtor's property after the bankruptcy case is closed.

As noted above, section 523(a)(5) of the current Bankruptcy Code provides that a pre-bankruptcy debt is nondischargeable if

- it is in the nature of alimony, maintenance, or support for the debtor's spouse, former spouse, or child,
- in connection with a separation agreement, property settlement agreement, divorce decree, court order, or determination by a governmental unit, made in accordance with state law by a governmental unit,
- except to the extent that the debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or one that has been assigned to the federal government or to a state or a political subdivision of a state).<sup>73</sup>

Thus, under current law, spousal and child support debts that are owed to a debtor's spouse, former spouse, or child are nondischargeable, as are spousal and child support debts that have been assigned to a state or local government as a condition of receiving public assistance pursuant to 42 U.S.C. 608(a)(3) and those that have been assigned to a state or local child support enforcement agency for collection only. Current law, however, does not exempt from discharge spousal and child support debts that are assigned to nongovernmental entities or individuals (such as collection agencies and attorneys)<sup>74</sup> or debts related to the support of a spouse or child that are owed directly to a governmental unit (for example, debts arising from statutes, such as G.S. 108A-135, requiring a parent to reimburse state or local governments for public assistance paid to support the parent's child).<sup>75</sup>

Section 215 of the bankruptcy reform act amends 11 U.S.C. 523(a)(5) to make *all* "domestic support obligations" nondischargeable. Under the new law, therefore, a debt is nondischargeable if it is

- for a domestic support obligation owed directly to a governmental unit;

- for spousal or child support that has been voluntarily assigned to a nongovernmental entity or individual for the purpose of collection only; or
- for spousal or child support that is nondischargeable under the current Bankruptcy Code.

## Nondischargeability of Other Debts Related to Separation and Divorce

Under the 1994 amendments to the current Bankruptcy Code, a debt that is *not* a debt for spousal or child support may be nondischargeable in a chapter 7 bankruptcy case if it is owed to a debtor's spouse or former spouse and was incurred in connection with a debtor's separation or divorce (for example, a debt incurred under a property settlement agreement or a court order distributing marital property).<sup>76</sup>

In order to prevent the discharge of a debt under 11 U.S.C. 523(a)(15), current law requires the creditor to file, within sixty days after the creditors' meeting, an adversary proceeding requesting that the bankruptcy court determine the debt to be nondischargeable. The bankruptcy court may determine the debt to be nondischargeable if it finds that the debtor has the ability to pay the debt and the detrimental effects to the debtor's spouse, former spouse, or child from discharging the debt outweigh the benefits to the debtor.<sup>77</sup>

Section 216 of the bankruptcy reform act rewrites 11 U.S.C. 523(a)(15) to make *all* debts incurred in connection with a debtor's separation or divorce (other than domestic support obligations that are nondischargeable under 11 U.S.C. 523(a)(5)) nondischargeable regardless of the debtor's ability to pay, the benefit to the debtor from discharging the debt, or the benefit to the debtor's spouse or former spouse from denying discharge. Under the new law, therefore, these debts (for example, debts based on a distributive award entered in an equitable distribution proceeding) will *not* be discharged in bankruptcy (unless they are fully paid through the bankruptcy proceeding) *without* requiring the bankruptcy court to determine their dischargeability.

## Duties of Bankruptcy Trustees

Section 219 of the bankruptcy reform act imposes additional responsibilities on bankruptcy trustees with respect to cases involving claims for domestic support obligations.

Under the new law, bankruptcy trustees will be required to

- inform an individual who files a claim for a domestic support obligation that he or she may receive assistance in collecting child support during and after the bankruptcy from a state or local child support enforcement agency and provide the agency's address and phone number to the claimant;
- explain the claimant's right to payment of domestic support obligations under the applicable chapter of the Bankruptcy Code;
- provide notice of the claim and the claimant's name, address, and telephone number to the appropriate state child support enforcement agency; and
- notify the claimant and the appropriate child support enforcement agency when the debtor is granted a discharge, provide the discharged debtor's last known address and the name and address of the debtor's last known employer to the claimant and agency, and provide the claimant and agency with the names of creditors who hold certain nondischarged or reaffirmed debts.<sup>78</sup>

## Notes

<sup>1</sup> Pub. Law 109-8, \_\_\_ Stat. \_\_\_ (April 20, 2005). The bill (S. 256) passed the Senate on March 10, 2005 and the House of Representatives on April 14, 2005. In this bulletin, the act generally will be referred to as the new bankruptcy reform act or the "new" law. Provisions of the federal Bankruptcy Code as it existed before enactment of the new bankruptcy reform act generally will be referred to as the "current" bankruptcy law.

<sup>2</sup> This bulletin does not provide a comprehensive analysis of other provisions of the new bankruptcy reform act or of the impact of bankruptcy on debts arising under North Carolina family law. For a more detailed and comprehensive analysis of bankruptcy and family law, see Henry J. Sommer, et al., *Collier Family Law and the Bankruptcy Code* (Newark: Matthew Bender, 1991). This bulletin focuses on bankruptcy cases filed under chapters 7 and 13 of the federal Bankruptcy Code. Bankruptcy cases filed by family farmers under chapter 12 of the Bankruptcy Code generally are treated similarly to bankruptcies filed under chapter 13.

<sup>3</sup> Philip L. Strauss, Legislative Analysis of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Subtitle [II-]B, Priority Child

Support, February 10, 2005 (copy obtained by author from the National Child Support Enforcement Association).

<sup>4</sup> Philip L. Strauss, Testimony before the U.S. Senate Committee on the Judiciary, February 10, 2005 ([http://judiciary.senate.gov/print\\_testimony.cfm?id=1381&wit\\_id=3993](http://judiciary.senate.gov/print_testimony.cfm?id=1381&wit_id=3993)).

<sup>5</sup> *Id.*

<sup>6</sup> Letter to Senators from the National Women's Law Center, February 23, 2005 ([www.moranlaw.net/nwlc256.pdf](http://www.moranlaw.net/nwlc256.pdf)).

<sup>7</sup> Strauss, *supra* note 3.

<sup>8</sup> Unless otherwise noted, the term "assigned" means the absolute and irrevocable assignment of a spouse's, former spouse's, or child's right to spousal or child support to a governmental or nongovernmental entity (for example, a state or local social services agency, a private collection agency, or an attorney) rather than an assignment that is made only for the purpose of collecting spousal or child support on behalf of and for the benefit of a spouse, former spouse, or child.

<sup>9</sup> Strauss, *supra* note 3.

<sup>10</sup> 11 U.S.C. 101(14A).

<sup>11</sup> A claim against a debtor for spousal or child support may be filed in a bankruptcy case and paid through bankruptcy only to the extent that it accrued and is owed for a period of time before the date the debtor filed for bankruptcy (regardless of whether the claim was reduced to judgment or otherwise determined before that date). 11 U.S.C. 502(b)(5).

<sup>12</sup> According to Philip Strauss, the new law was intended to preserve the nondischargeability of debts that are in the nature of spousal or child support even if they are owed to and recoverable by attorneys or other persons who have provided assistance to the debtor's spouse or child. Strauss, *supra* note 3, citing *In re Chang*, 163 F.3d 1138 (9<sup>th</sup> Cir. 1998) (fees owed to child's guardian ad litem in connection with child custody proceeding); *In re Hudson*, 107 F.3d 355, 357 (5<sup>th</sup> Cir. 1997) (attorneys fees owed to attorney in connection with legal proceeding to determine child's paternity); *In re Kline*, 65 F.3d 749 (8<sup>th</sup> Cir. 1995) (attorneys fees owed to spouse's attorney in connection with divorce proceeding).

<sup>13</sup> Under the current bankruptcy law, it could be argued that a debt for spousal or child support is not exempt from discharge unless it has been actually adjudicated or determined by a court order, separation agreement, etc. that was entered or executed *before* the debtor files for bankruptcy. Strauss, *supra* note 3. The new law makes it clear that a spousal or child support debt that accrues and would have been payable before

the date a debtor files for bankruptcy is nondischargeable if it is *subject* to establishment *either before or after* the date the bankruptcy petition is filed. Strauss, *supra* note 3.

<sup>14</sup> The current bankruptcy law does not consider debts owed directly to a governmental unit to be in the nature of spousal or child support as defined by 11 U.S.C. 523(a)(5).

<sup>15</sup> The new definition includes spousal and child support that is assigned to a public child support enforcement agency for the purpose of collection *or* permanently or temporarily assigned to a state or local government as a condition of receiving public assistance.

<sup>16</sup> Strauss, *supra* note 3.

<sup>17</sup> See *In re Beverly*, 196 B.R. 128, 132-133 (Bankr. W.D.Mo. 1996).

<sup>18</sup> Strauss, *supra* note 3.

<sup>19</sup> 11 U.S.C. 362(a).

<sup>20</sup> The automatic stay does not prohibit the commencement of a family law proceeding *by* (rather than *against*) the debtor or the continuation of a family law proceeding commenced *by* the debtor. Nor does it prohibit the commencement of a family law proceeding if the cause of action arises *after* the debtor files for bankruptcy and the proceeding does not involve property that is property of the bankruptcy estate.

<sup>21</sup> The automatic stay does not prohibit the commencement of a legal proceeding to establish a spousal or child support obligation that first arises and accrues after, and is due and payable for a period of time after, the debtor files bankruptcy (i.e., a post-bankruptcy claim for spousal or child support).

<sup>22</sup> 11 U.S.C. 362(c)(2). The new bankruptcy law also limits the duration of the automatic stay in cases involving “serial” bankruptcy filings by a debtor.

<sup>23</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code*, ¶ 1.03[6].

<sup>24</sup> *Id.* The automatic stay also terminates if the debtor’s case is dismissed before he or she completes making payments under the chapter 13 plan.

<sup>25</sup> 11 U.S.C. 362(c)(1). Other provisions of the automatic stay *may* prohibit acts against the debtor’s property even if the property is *not* property of the bankruptcy estate.

<sup>26</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 2.02[2]. See 11 U.S.C. 541.

<sup>27</sup> 11 U.S.C. 1306(a).

<sup>28</sup> In a chapter 13 case, property that is no longer property of the estate is not subject to provisions of the automatic stay that apply only to property of the estate, but may be protected under other provisions of the

automatic stay and, under 11 U.S.C. 1327(c), is not subject to a pre-bankruptcy claim for spousal or child support that is “provided for” in the debtor’s chapter 13 plan.

<sup>29</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 5.03[3][a][1]. Cf. *In re Summerlin*, 26 B.R. 875 (Bankr. E.D.N.C. 1983).

<sup>30</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 1.03[6].

<sup>31</sup> 11 U.S.C. 362(h).

<sup>32</sup> 11 U.S.C. 362(d).

<sup>33</sup> 11 U.S.C. 362(b)(2)(A).

<sup>34</sup> 11 U.S.C. 362(b)(2)(B).

<sup>35</sup> It is important to note that section 362(b) refers to actions to “establish” or “modify” court orders for spousal or child support but does not expressly allow the commencement or continuation of legal proceedings to *enforce* spousal or child support orders. Section 362(b)(2)(B), of course, does allow the “collection” of spousal or child support from property that is not property of the bankruptcy estate. “At a minimum, the term ‘collection’ in [section 362(b)] must include the passive receipt of funds.” Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 5.03[3][b][i]. But it is less clear whether “collection” includes the *commencement* or *continuation* of a legal proceeding to *enforce* a spousal or child support order when enforcement involves some affirmative action against the debtor or debtor’s property rather than the passive receipt of funds from property that is not property of the estate. Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 5.03[3][b][ii], citing *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990). “Since proceedings to enforce alimony or support orders are normally *continuations* of earlier proceedings, the absence of language in section 362(b) excepting the continuation of enforcement proceedings from the stay casts significant doubt on whether such proceedings are included in the exception to the automatic stay, even when they do not seek to collect from property of the estate.” Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 5.03[3][b][iii].

<sup>36</sup> “Technically, wages earned by the debtor prior to the [bankruptcy] filing, but not paid until after filing the petition [for bankruptcy] constitute property of the estate. However, in most jurisdictions such fine distinctions are disregarded and, in any case, the dependent spouse relying on the attachment could argue that, absent any clear tracing principle, the postpetition portion of the wages should be allocated to ongoing support to further the purpose of the stay

exception.” Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 5.03[5].

<sup>37</sup> Carver v. Carver, 954 F.2d 1573 (8<sup>th</sup> Cir. 1992); Colon v. Rivera, 265 B.R. 639 (B.A.P. 1<sup>st</sup> Cir. 2001).

<sup>38</sup> 11 U.S.C. 362(b).

<sup>39</sup> The exception regarding legal actions involving child custody or visitation may include juvenile actions involving child abuse or neglect or termination or parental rights and adoption proceedings brought against a debtor (as parent or putative parent of a child). See G.S. 50A-102(4) (definition of “child-custody proceeding under the Uniform Child-Custody Jurisdiction and Enforcement Act.)

<sup>40</sup> 11 U.S.C. 522(c)(1).

<sup>41</sup> In re Davis, 105 F.3d 1017 (5<sup>th</sup> Cir. 1999) (holding that the purpose of section 522(c)(1) was to create an exception to the general rule protecting exempt property from pre-bankruptcy claims and did not extend a creditor’s rights beyond those which existed before the bankruptcy).

<sup>42</sup> 11 U.S.C. 522(c)(1), as amended by section 216(1) of Pub. Law 109-8.

<sup>43</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 1.05[1]; 11 U.S.C. 522(b)(1); G.S. 1C-1601(f); In re McRae, 308 B.R. 572 (N.D. Fla. 2003).

<sup>44</sup> 11 U.S.C. 522(b)(2).

<sup>45</sup> G.S. 1C-1601(f).

<sup>46</sup> G.S. 1C-1601(e)(9). See also Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922) (holding that a husband’s obligation to pay alimony is not a “debt” for the purpose of the property exemptions created by N.C. Const. Art. X, §§ 1 and 2).

<sup>47</sup> See Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963); In re Banks, 22 B.R. 891 (Bankr. W.D.N.C. 1981); Southern Nat’l Bank v. Woolard, 13 B.R. 105, 107 (Bankr. E.D.N.C. 1981).

<sup>48</sup> See Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 7.04.

<sup>49</sup> In a chapter 13 bankruptcy case, the chapter 13 plan confirmed by the bankruptcy court generally will classify the different types of claims that will be paid under the plan and set forth the priority by which each class of allowed claims will be paid.

<sup>50</sup> A “no asset” chapter 7 bankruptcy is a case in which all of the debtor’s property is exempt and there is no property of the estate that can be liquidated to satisfy the claims of unsecured creditors. In recent years, about 95 percent of all chapter 7 cases have been “no asset” cases. J. Christopher Marshall, “The Questions Behind the Numbers” ([www.usdoj.gov/ust/press/articles/nabtalksummer2001.htm](http://www.usdoj.gov/ust/press/articles/nabtalksummer2001.htm)). In a “no asset” chapter 7 bankruptcy, a creditor is not required to file a

proof of claim unless the bankruptcy court provides notice to do so.

<sup>51</sup> See also 11 U.S.C. 726(a). Secured creditors are not paid from the property of the bankruptcy estate to the extent their claims are secured by an interest in the debtor’s property but may enforce the secured portion of their claims via foreclosure or repossession of the property securing their claim (or via the trustee’s payment of the secured portion of the claim if the bankruptcy estate also has an interest in the property and the property is liquidated to pay claims against the bankruptcy estate). In order to receive a distribution from the bankruptcy estate, a creditor must file a proof of claim with the bankruptcy court. Fed. R. Bankr. P. 3002. In general, claims must be filed within 90 days after the creditors’ meeting (or within 180 days after the date the bankruptcy was filed if the claim is owed or has been assigned to a governmental entity). Fed. R. Bankr. P. 3002(c).

<sup>52</sup> A claim against the bankruptcy estate for spousal or child support includes only spousal or child support that is owed by the debtor at the time the bankruptcy is filed, *not* claims for current or future spousal or child support that may be required under a court order entered before the debtor filed for bankruptcy but that becomes due and payable after the bankruptcy is filed. See 11 U.S.C. 502(b)(5) (claims for future support are disallowed in chapter 7 and 13 bankruptcy cases).

<sup>53</sup> 11 U.S.C. 507(a)(7).

<sup>54</sup> 11 U.S.C. 507(a)(1), as amended by section 212 of Pub. Law 109-8. A claim is not entitled to priority unless payments to a governmental unit on the claim are distributed in accordance with applicable federal and state nonbankruptcy law. Claims for domestic support obligations owed to a debtor’s spouse, former spouse, or child, to the parent, guardian, or responsible relative of the debtor’s child, or voluntarily assigned by one of these persons to a government agency for the purpose of collection only must be paid before claims for domestic support obligations assigned or owed directly to a governmental unit. Claims for spousal or child support obligations assigned (other than voluntarily and for the purpose of collection only) or owed directly to nongovernmental entities or other individuals are not entitled to priority. The payment of claims for domestic support obligations is subject only to the payment of administrative expenses incurred by the trustee in administering assets to pay these claims.

<sup>55</sup> Sheila M. Williams, et al., *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Law and Explanation* (Chicago: CCH, Inc., 2005) ¶ 210. The “means test” for chapter 7 bankruptcies

established under the new bankruptcy law will require some debtors to file chapter 13, rather than chapter 7, bankruptcies.

<sup>56</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 8.03[1].

<sup>57</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 8.03[1] (footnotes omitted); see also *In re White*, 212 B.R. 979 (B.A.P. 10<sup>th</sup> Cir. 1997).

<sup>58</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 8.03[2][b]. Because post-bankruptcy support cannot be an “allowed claim,” payment of post-bankruptcy support through a chapter 13 plan would be improper under Fed. R. Bankr. P. 3021.

<sup>59</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶¶ 8.03[2], 8.04[3][d]; 11 U.S.C. 1325(a)(6); *In re Dorf*, 219 B.R. 498 (Bankr. N.D.Ill. 1998) (denying confirmation of chapter 13 plan because debtor’s income was insufficient to pay necessary living expenses, current alimony, past-due alimony, and minimum payments to creditors required under chapter 13).

<sup>60</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 8.03[2]; *In re Garrison*, 343 F.2d 802 (1<sup>st</sup> Cir. 1965). Cf. Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 8.03[3]; 11 U.S.C. 1327(a).

<sup>61</sup> 11 U.S.C. 1322(a)(2); *Mudd v. Jacobson*, 231 B.R. 763 (Bankr. D.Ariz. 1999). Cf. *Caswell v. Lang*, 757 F.2d 608, 610 (4<sup>th</sup> Cir. 1985).

<sup>62</sup> These provisions continue to apply under the new law.

<sup>63</sup> The bankruptcy court does not have jurisdiction to determine the amount of a claim for spousal or child support if a state court has issued a valid and binding pre-bankruptcy determination regarding the amount of the debtor’s spousal or child support arrearage. *In re Audre, Inc.* 202 B.R. 490 (Bankr. S.D.Cal. 1996), *aff’d*, 216 B.R. 19 (B.A.P. 9<sup>th</sup> Cir. 1997). In the absence of such a determination, the bankruptcy court also may choose to abstain from determining the amount of a claim for spousal or child support and allow a state court to do so.

<sup>64</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 8.04[3]; *In re Lanham*, 13 B.R. 45 (Bankr. C.D.Ill. 1981). Cf. *In re Griffith*, 203 B.R. 422 (N.D. Ohio 1996) (denying confirmation of chapter 13 plan that proposed lower payments on support arrearages than required under a state court order). The maximum period for completing a chapter 13 plan is five years.

<sup>65</sup> 11 U.S.C. 507(a)(1), as amended by section 212 of Pub. Law 109-8; 11 U.S.C. 1322(a)(2).

<sup>66</sup> 11 U.S.C. 1322(a)(4), as added by section 213(8)(C) of Pub. Law 109-8. To the extent that a priority claim for a domestic support obligation is not paid in full, the balance of the claim is nondischargeable and may be collected by the creditor after the bankruptcy case is closed.

<sup>67</sup> 11 U.S.C. 1325(a)(8), as added by section 213(10)(C) of Pub. Law 109-8.

<sup>68</sup> 11 U.S.C. 1307(c)(11), as added by section 213(7)(C) of Pub. Law 109-8. If the debtor cannot afford to pay his or her ongoing spousal or child support obligation, he or she may seek modification of the support order in state court. The federal bankruptcy court does not have jurisdiction to modify the debtor’s ongoing spousal or child support obligation.

<sup>69</sup> 11 U.S.C. 1328(a), as amended by section 213(11) of Pub. Law 109-8.

<sup>70</sup> 11 U.S.C. 1322(b)(10), as added by section 213(9) of Pub. Law 109-8.

<sup>71</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶¶ 1.06 and 6.02; 11 U.S.C. 524(a).

<sup>72</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 6.07[1]; see also 11 U.S.C. 523(c)(1).

<sup>73</sup> See also 11 U.S.C. 523(a)(18) (repealed by section 215 of Pub. Law 109-8) and 42 U.S.C. 656(b).

<sup>74</sup> Cf. *In re Beverly*, 196 B.R. 128 (Bankr. W.D.Mo. 1996); *In re Smith*, 180 B.R. 648 (D. Utah 1995); *In re Beggin*, 19 B.R. 759 (Bankr. W.D.Wash. 1983) (holding that a spousal or child support debt assigned to a nongovernmental entity only for the purpose of collection is nondischargeable).

<sup>75</sup> *In re Ramirez*, 795 F.2d 1494 (9<sup>th</sup> Cir. 1986). Cf. *In re Stovall*, 721 F.2d 1133 (7<sup>th</sup> Cir. 1983).

<sup>76</sup> Sommer, et al., *Collier Family Law and the Bankruptcy Code* ¶ 6.07A; 11 U.S.C. 523(a)(15). Under current law, section 523(a)(15) applies to “hardship” discharges under chapter 13 but not to the “superdischarge” granted when a debtor completes a chapter 13 plan.

<sup>77</sup> 11 U.S.C. 523(a)(15).

<sup>78</sup> The new law allows a domestic support creditor to request the debtor’s last known address from creditors who hold certain nondischarged or reaffirmed debts.

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