

Bankruptcy and Family Law: The Basics

I. Bankruptcy Basics

A. Bankruptcy Law

1. The federal Bankruptcy Code is codified as Title 11 of the U.S. Code.
 - a. The Bankruptcy Code is supplemented by the federal Bankruptcy Rules and local bankruptcy rules adopted by bankruptcy courts in each federal court district.
 - b. Chapters 1, 3, and 5 of the Bankruptcy Code contain general provisions, definitions, and procedures that apply to all bankruptcy cases.
 - c. Chapters 7, 9, 11, 12, and 13 contain special provisions that apply to particular types of bankruptcy cases.
2. The “new” bankruptcy reform statute applies to bankruptcy cases that are commenced on or after October 17, 2005. The “old” bankruptcy statute applies to cases that were commenced before October 17, 2005 and are pending on or after October 17, 2005.
3. 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.

B. Bankruptcy Cases

1. Chapter 7

- a. A chapter 7 bankruptcy case is known as a “straight” bankruptcy or “liquidation.”
- b. 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.
- c. 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 is 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.
 - Secured creditors generally are not paid through the liquidation but retain their security interests in the debtor’s property.
 - The debtor retains his or her interest in exempt property and generally is discharged from liability for all “dischargeable” pre-bankruptcy claims and debts (but not from pre-bankruptcy claims arising from domestic support obligations).
- d. 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 and creditors do not file claims or receive payments because there is no nonexempt property that can be liquidated.

2. Chapter 13

- a. A chapter 13 bankruptcy case is known as a “wage earner” bankruptcy.
- b. Chapter 13 bankruptcies usually are filed by debtors who have enough regular income to pay their reasonable and necessary living expenses (including the 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 five-year period.
- c. 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 provides for the liquidation of the debtor’s property.
 - 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 secured, priority, and unsecured creditors in accordance with the debtor’s chapter 13 plan which must be confirmed by the bankruptcy court.
 - In general, priority claims must be paid in full and a chapter 13 plan will provide for any payments necessary to cure default on any claim that is secured by property that the debtor wishes to retain.
 - Unsecured creditors may be paid in full or in part depending on the total amount of the debtor’s unsecured debts and the amount of his or her disposable income.
 - Debtors who make all payments required under their chapter 13 plans are discharged from liability for almost all pre-bankruptcy claims (but not those arising from a domestic support obligation).

3. Chapters 11 and 12

- a. 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.
- b. 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.
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.
 - a. The bankruptcy estate generally consists of any legal or equitable interest of the debtor in any real, personal, tangible, or intangible property (including unmaturing or contingent claims against others) at the time the bankruptcy petition is filed.

- It includes the debtor's interest in property that the debtor owns jointly with others.
 - It may include certain property that the debtor acquires within 180 days of filing for bankruptcy and property that is brought into the estate by the trustee's avoidance of pre-bankruptcy transfers.
- b. In a chapter 13 case, the bankruptcy estate includes wages, income, and property that the debtor receives after he or she files for bankruptcy.
 - In a chapter 7 case, a debtor's earnings for services performed after he or she files for bankruptcy are not property of the bankruptcy estate.
 - c. When a debtor 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.
 - d. 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.
3. Claim. 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, matured or unmatured, etc.
 - a. The Bankruptcy Code generally classifies claims as allowed or unallowed, secured or unsecured, and priority or nonpriority.
 - b. Claims include claims for past-due or ongoing child support or spousal support and claims for equitable distribution of marital property.
 4. Creditor. A creditor is any person or entity that has a claim against a debtor that arose before the debtor filed for bankruptcy.
 5. Debtor. In voluntary bankruptcy cases, the debtor is the person who files a bankruptcy petition. If a debtor is married, the debtor and his or her spouse may file a joint petition as co-debtors.
 6. 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.
 - b. The bankruptcy discharge does not affect valid security interests that have not been avoided in bankruptcy or claims that arose after the debtor filed for bankruptcy.
 7. Disposable Income. In a chapter 13 case, a debtor's disposable income is the amount of his or her income that exceeds his or her reasonable and necessary living expenses, including the debtor's current, ongoing spousal and child support obligations.
 8. Domestic Support Obligation. A domestic support obligation is a debt (a) that arises before or after a debtor files for bankruptcy; (b) that 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) that 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) that 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) that has not been assigned to a nongovernmental agency except for the purpose of collection. 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.
9. Exempt Property. Exempt property is property that may be retained by the debtor and not be liquidated or distributed to creditors in a chapter 7 case.
 - a. 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.
 - b. A North Carolina debtor may claim as exempt his or her interest in property that is exempt from the claims of creditors under G.S. 1C-1601 and other applicable state or federal nonbankruptcy laws and his or her interest in "entireties" property to the extent that it is exempt under applicable nonbankruptcy law.
 10. 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.
 - a. In chapter 13 cases, priority claims generally must be paid in full through the debtor's confirmed chapter 13 plan.
 - b. Claims for domestic support obligations have first priority in chapter 7 cases.
 11. Secured Claim. A secured claim is a claim that is secured 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.
 12. Trustee. The trustee is appointed by the bankruptcy court or elected by the creditors.
 - a. In a chapter 7 case, the trustee liquidates the bankruptcy estate and uses the proceeds to satisfy the claims of unsecured creditors.
 - b. In a chapter 13 case, the trustee receives payments from the debtor and makes payments to creditors pursuant to the debtor's confirmed chapter 13 plan.
- II. Nondischargeability of Domestic Support Obligations and Other Debts Incurred in Connection with Divorce or Separation
- 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 pre-bankruptcy claims.
 - 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).
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 he or 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).
4. Certain types of debts (including pre-bankruptcy debts for domestic support obligations and, in some instances, other pre-bankruptcy debts incurred in connection with divorce or separation), however, are not discharged in bankruptcy. 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.
5. A debtor or creditor may seek a judicial determination that a debt is or is not a debt for a domestic support obligation or a debt arising from divorce or separation that is discharged in bankruptcy.
 - a. To do so, the debtor or creditor may file a complaint in the bankruptcy court. A proceeding in the bankruptcy court to determine the dischargeability of a debt is an adversary proceeding.
 - b. The creditor has the burden of proving that the debt is not discharged.
 - c. There is no time limit for commencing a proceeding to determine whether a debt is or is not a debt for a domestic support obligation or a debt arising from divorce or separation. The proceeding may be commenced at any time while the bankruptcy case is pending or filed, along with a request to reopen the bankruptcy case, after the bankruptcy case has been closed.
 - d. A bankruptcy court, however, may defer to a state court with respect to whether a debt is or is not a debt for a domestic support obligation or a debt arising from divorce or separation.
 - e. State courts have concurrent jurisdiction to determine, usually in the context of a state court proceeding to enforce a spousal or child support order after an obligor has received a general discharge in bankruptcy, whether a debt is or is not a debt for a domestic support obligation or a debt incurred in connection with divorce or separation that was discharged in the obligor's bankruptcy case. But if the issue of dischargeability is raised in state court, either the debtor or creditor may remove the issue from the state court for determination by the bankruptcy court.
 - A state court may not determine whether a debt was or wasn't discharged in bankruptcy if a bankruptcy court has previously determined the issue of dischargeability.
 - If a state court makes a valid determination that a debt is a debt for a domestic support obligation or a debt arising from divorce or separation that is not

discharged in bankruptcy, that determination is binding on the debtor and may not be overruled by the bankruptcy court.

B. Domestic Support Obligations

1. Under the “old” bankruptcy law, a debt was not discharged if it was a debt to a debtor’s spouse, former spouse, or child for alimony, maintenance, or support for the debtor’s spouse, former spouse, or child pursuant to a separation or property settlement agreement, divorce decree or other court order, or determination by a governmental unit in accordance with applicable state law and had not been assigned to a nongovernmental entity except for the purpose of collection.
2. Under the “new” bankruptcy law, a debt is not discharged if it is a pre-bankruptcy debt for a domestic support obligation (as defined in I.C.8. of this outline).
 - a. Domestic support obligations include debts for alimony, maintenance, and support owed to a debtor’s spouse, former spouse, or child that were nondischargeable under the “old” bankruptcy law.
 - b. Under the “new” bankruptcy law, domestic support obligations include debts for maintenance or support of the parent of the debtor’s child.
 - c. Domestic support obligations also include 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).
 - d. Domestic support obligations do not include debts that have been assigned to nongovernmental entities unless the assignment is for the purpose of collection only.
3. Federal bankruptcy case law, not state family law, determines whether a debt is or isn’t nondischargeable as a debt for alimony, maintenance, or support. For example, a debtor’s agreement to pay an adult child’s college expenses may be considered to be child support even if state law would not consider it so. Similarly, a debtor’s obligation to make payments to a former spouse after the former spouse’s remarriage may be considered to be alimony even if state law would not consider it so. But bankruptcy courts should look to state law for guidance in determining whether a debt is in the nature of alimony, maintenance, or support.
 - a. Spousal or child support obligations arising solely by virtue of an antenuptial agreement are not exempted from discharge under 11 U.S.C. 523(a)(5) because they are not incurred pursuant to a separation or property settlement agreement, court order, divorce decree, etc. They may, however, be nondischargeable under 11 U.S.C. 523(a)(15).
 - b. It isn’t clear whether a debt arising from a debtor’s obligation to support his or her stepchild (as opposed to his or her natural or adopted child) is nondischargeable under 11 U.S.C. 523(a)(5). It may, however, be nondischargeable under 11 U.S.C. 523(a)(15). A debt arising from a court order requiring a debtor to support his or her grandchild is usually discharged in bankruptcy.
 - c. A court order requiring a debtor to pay his or her spouse’s or former spouse’s attorneys fees in a divorce, alimony, child custody, or child support proceeding may be an order for maintenance or support and the debtor’s liability is therefore

not discharged in bankruptcy even if the payment is owed directly to the spouse's or former spouse's attorney.

- d. The same may be true with respect to a separation or property settlement agreement, divorce decree, or court order that requires a debtor to make payments (such as payment of marital debts or mortgage payments on the marital home or educational or medical expenses for a child) directly to third parties on behalf of the debtor's spouse, former spouse, or child.
- e. 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 debt for alimony, maintenance, or support of the debtor's spouse, former spouse, or child (*see* II.C. of this outline).

C. Other Debts Incurred in Connection with Divorce or Separation

1. Under the "old" bankruptcy law, a debt that was not a debt for spousal or child support was nondischargeable in a chapter 7 case (but not in a chapter 13 case in which the debtor received a "superdischarge" after completing his or her Chapter 13 plan) if (a) the debt was owed to the debtor's spouse or former spouse; (b) the debt was incurred in connection with the debtor's separation or divorce; (c) the debtor's spouse or former spouse filed an adversary proceeding against the debtor in bankruptcy court within 60 days of the creditors' meeting; and (d) the bankruptcy court determined that the debtor had the ability to pay the debt and that the detrimental effects on the debtor's spouse, former spouse, or child from discharging the debt outweighed the benefits to the debtor.
2. Under the "new" bankruptcy law, a pre-bankruptcy debt incurred in connection with a debtor's divorce or separation is automatically nondischargeable in a chapter 7 bankruptcy (or in a chapter 13 case in which the debtor receives a "hardship" discharge) even if it is not a debt for alimony, maintenance, or support of the debtor's spouse, former spouse, or child and regardless of the debtor's ability to pay the debt or the impact of nondischargeability on the debtor. The creditor is not required to file an action asking the bankruptcy court to determine the debt to be nondischargeable.
3. An unsecured, pre-bankruptcy debt incurred in connection with a debtor's divorce or separation that is not a debt for a domestic support obligation, however, is discharged in a chapter 13 case if the debtor receives a "superdischarge" by completing payments under the chapter 13 plan.

D. Property Rights Arising from Marriage, Divorce, or Separation

1. A debtor's discharge in bankruptcy does not divest the property rights of the debtor's spouse or former spouse, including the spouse's or former spouse's vested, pre-bankruptcy, legal rights in property owned by or with the debtor or affect otherwise valid liens or security interests in the debtor's property.
2. A contingent or unmatured claim of a debtor's spouse or former spouse for equitable distribution of marital property is not discharged by the debtor's bankruptcy. A

contingent or unmatured claim for equitable distribution is not a pre-bankruptcy debt because it is a claim for distribution of property and not a claim involving a right to payment.

III. Application of the Automatic Stay to Family Law Cases

A. General Rules Regarding Application, Scope, and Duration of the Automatic Stay

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 district 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 collect a pre-bankruptcy debt).
 - 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-bankruptcy judgment against the debtor.
 - d. Enforce a pre-bankruptcy judgment against the debtor's bankruptcy estate (as defined in I.C.2 of this outline).
 - 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-bankruptcy claim against the debtor.
 - h. Collect, assess, or recover a pre-bankruptcy claim from the debtor.
 - i. Set-off a debt owed to the debtor against a pre-bankruptcy claim against the debtor.
2. The purpose of the automatic stay is two-fold: (a) to give the debtor sufficient "breathing room" to get his or her financial affairs in order; and (b) to prevent creditors from seizing property or taking other actions that would interfere with the payment of creditors' claims through bankruptcy and affording the debtor a "fresh start."
3. The automatic stay comes into effect as soon as the debtor files his or 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.
4. 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 mean that the action is permissible, since it may be prohibited under another particular provision of the automatic stay.
5. Unless the bankruptcy court grants relief from the automatic stay, the automatic stay generally remains in effect until the debtor is granted or denied a discharge or until the debtor's bankruptcy case is dismissed or closed, whichever occurs first.
 - 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.

6. 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 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.
 - 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.
 7. 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.
 8. A creditor or other person 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.
- B. Family Law Exceptions to the Automatic Stay
1. Under the "new" bankruptcy law, the automatic stay does not apply to the commencement or continuation of a legal proceeding against the debtor:
 - a. 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.
 - b. Concerning child custody or visitation.
 - c. Regarding domestic violence.
 - d. To establish or modify an order for a domestic support obligation.
 - e. To establish paternity.
 2. Under the "new" bankruptcy law, the automatic stay does not prohibit:
 - a. 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.
 - b. Revoking a debtor's drivers license, recreational license, or professional or occupational license to enforce the debtor's child support obligation in accordance with state child support enforcement statutes.
 - c. Enforcing a debtor's medical support obligation in accordance with federal and state child support enforcement statutes.
 - d. Attaching a debtor's federal or state income tax refund by or on behalf of a state or local child support enforcement agency to collect past-due spousal or child support in accordance with federal and state child support enforcement statutes.
 - e. Reporting the debtor's child support debt to a consumer reporting agency in accordance with federal child support enforcement requirements.
 - f. Collecting a domestic support obligation from property that is not property of the debtor's bankruptcy estate.
 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-bankruptcy spousal or child support debt *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.

4. The automatic stay does not prohibit the commencement continuation of an action against the debtor for divorce, equitable distribution, alimony, child custody, or child support if the action accrued after the debtor filed for bankruptcy and could not have been commenced before the debtor filed for bankruptcy *and* does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.
5. The automatic stay does not prohibit the collection, through civil contempt or otherwise, of court-ordered spousal or child support that accrues after the debtor files for bankruptcy as long as such action does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.
6. The automatic stay does not prohibit the commencement or continuation of an action by the debtor for divorce, equitable distribution, alimony, child custody, or child support as long as it does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.

C. Family Law Proceedings That Are Barred by the Automatic Stay

1. The automatic stay bars commencement or continuation of a legal proceeding against the debtor for equitable distribution of marital property if (a) the proceeding involves property that is property of the debtor's bankruptcy estate *or* (b) the claim for equitable distribution arose before the debtor filed for bankruptcy and it is not joined in an action for divorce.
2. The automatic stay bars any action to establish, enforce, or collect a pre-bankruptcy debt incurred in connection with divorce or separation that is not a debt for a domestic support obligation.
3. The automatic stay prohibits collection of a pre-bankruptcy or post-bankruptcy domestic support obligation from property that is property of the debtor's bankruptcy estate by means other than income withholding, license revocation, or attaching the debtor's federal or state income tax refund.
4. The automatic stay prohibits creating, perfecting, or enforcing a lien for pre-bankruptcy or post-bankruptcy domestic support obligation against property that is property of the debtor's bankruptcy estate.
5. The automatic stay probably prohibits:
 - a. Issuing or executing a writ of execution or commencing or continuing supplemental proceedings against the debtor or property that is not property of the debtor's bankruptcy estate to collect a judgment for a pre-bankruptcy spousal or child support obligation or a debt incurred in connection with equitable distribution, divorce, or separation.
 - b. Attaching a debtor's bank account to collect a pre-bankruptcy child support obligation even if the account is not property of the debtor's bankruptcy estate.

- c. Creating, perfecting, or enforcing a lien for pre-bankruptcy spousal or child support against property that is not property of the debtor's bankruptcy estate by means other than attaching the debtor's federal or state income tax refund.
- d. Commencing or continuing a civil contempt proceeding against the debtor for failure to pay a pre-bankruptcy spousal or child support obligation.

D. Seeking Relief from the Automatic Stay

1. 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.
2. Although a state court has 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, a state court does not have jurisdiction to grant relief from the automatic stay. If the automatic stay applies to a particular legal proceeding in state court, the federal bankruptcy court has exclusive jurisdiction regarding requests for relief from the automatic stay.
3. 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.
4. If a creditor or interested party files a motion requesting relief from the automatic stay and no party objects or requests a hearing, the stay is automatically terminated or modified to the extent requested without court order 30 days after the date the motion was filed unless the bankruptcy court enters an order continuing the stay pending a preliminary or final hearing on the motion.
5. A bankruptcy court may grant relief from the automatic stay for "good cause."
 - a. The creditor or interested party has the burden of proving good cause.
 - b. Good cause may include the need to collect post-bankruptcy spousal or child support in situations that do not fall within an exception to the automatic stay.
 - c. The bankruptcy court, however, may refuse to grant relief from the automatic stay if the relief involves property that is property of the bankruptcy estate or pre-bankruptcy spousal or child support that will be paid through the debtor's bankruptcy case.
 - d. Good cause also may be found when an interested party seeks relief in order to commence or continue a legal proceeding against the debtor that does not involve the debtor's financial liability.

IV. Payment of Claims Through Bankruptcy

A. Filing 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-bankruptcy debt arising from separation or divorce or a pre-bankruptcy 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.

- a. A “pre-bankruptcy” debt is a debt that accrued or is payable with respect to a period of time before the date the debtor filed for bankruptcy.
- b. It includes past-due spousal or child support payments that accrued before the date the debtor filed for bankruptcy but does not include spousal or child support payments that accrue and are payable for periods of time after the debtor files for bankruptcy.
2. A proof of claim (Bankruptcy Form B 10) generally must be filed within 90 days of the date of the creditors’ meeting.
 - 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 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.
 - c. The bankruptcy court has no jurisdiction to extend the time for filing a claim or to allow a creditor to file a claim after the filing deadline has passed.
3. Failure to file a claim simply bars the creditor’s right to receive payment through the debtor’s bankruptcy case—it does not, in and of itself, affect the validity or dischargeability or nondischargeability of the debt.
4. All claims for domestic support obligations are priority claims and should be so designated.
5. If a claim for a domestic support obligation or a debt arising from divorce or separation is secured by a judicial, statutory, or consensual lien, it should be designated as a secured claim. All other claims are unsecured claims.
6. A claim for a domestic support obligation or a debt arising from divorce or separation should state the total amount of the claim that is due and owing as of the date the debtor filed for bankruptcy.
 - a. 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 timely filed, it is deemed to be an “allowed” claim unless the debtor, the trustee, or any creditor files a timely objection to the claim.
 - a. Filing an objection to a claim initiates a “contested” case which will be heard and determined by the bankruptcy court.
 - 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.
 - c. If a debtor files an objection to an unmatured, nondischargeable claim for a domestic support obligation, the bankruptcy court must sustain the objection and

the claim will have to be determined and paid outside the debtor's bankruptcy case.

B. Payment of Domestic Support Obligations in Chapter 7 Cases

1. In a "no asset" case, a person 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 for pre-bankruptcy domestic support obligations have first priority with respect to payment from liquidation of a debtor's nonexempt property. This means that unsecured claims for domestic support obligations must be paid in full before the claims of other unsecured creditors.
3. Secured claims for pre-bankruptcy domestic support obligations are paid in chapter 7 cases only to the extent that property to which the claim attaches is liquidated, in which case claims secured by a lien against the property are paid before the debtor's equity in the property is used to satisfy unsecured claims. If a secured claim is not paid through a chapter 7 bankruptcy and the creditor's claim 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.
4. If a 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 and may be enforced against the debtor or the debtor's property after the debtor's bankruptcy case is closed.
5. Claims for post-bankruptcy domestic support obligations are not paid through chapter 7 bankruptcy cases.

C. Payment of Post-Bankruptcy Domestic Support Obligations in Chapter 13 Cases

1. Payments for post-bankruptcy domestic support obligations (i.e., spousal or child support that becomes due for periods of time after the debtor files for bankruptcy) must be paid directly by the debtor, are not an allowable claim in the debtor's chapter 13 case, and should not be included in the debtor's chapter 13 plan.
2. In a chapter 13 case, the debtor's income must be sufficient to pay any post-bankruptcy domestic support obligations owed by the debtor taking into consideration the debtor's reasonable and necessary living expenses and payments due under the debtor's chapter 13 plan. If a debtor's income is insufficient to pay his or her post-bankruptcy domestic support obligations taking into consideration his or her reasonable and necessary living expenses and payments due under the debtor's chapter 13 plan, the person to whom the post-bankruptcy domestic support obligation 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.
3. The bankruptcy court does not have authority to modify, suspend, terminate, or reduce the amount of a debtor's post-bankruptcy domestic support obligation. The federal Bankruptcy Code, however, may prevent certain actions to enforce a post-

bankruptcy domestic support obligation against the debtor or property that is property of the debtor's bankruptcy estate.

4. The "new" bankruptcy law prohibits confirmation of a chapter 13 plan if the debtor has failed to pay in full all domestic support obligations that the debtor was required to pay by statute or judicial or administrative order and that accrued after the debtor filed for bankruptcy.
 - a. The "new" bankruptcy law also allows a bankruptcy court to dismiss a chapter 13 case if the debtor has failed to pay in full all domestic support obligations that accrued after the debtor filed for bankruptcy.
 - b. The "new" bankruptcy law also prohibits the discharge of a debtor in a chapter 13 case unless the debtor has paid in full all pre-bankruptcy domestic support obligations to the extent required by statute or judicial or administrative order and the debtor's chapter 13 plan.

D. Payment of Pre-Bankruptcy Domestic Support Obligations in Chapter 13 Cases

1. Unsecured pre-bankruptcy domestic support obligations are priority claims that generally must be paid in full under the debtor's chapter 13 plan.
 - a. There are two exceptions to this requirement.
 - The requirement does not apply with respect to claims that have been assigned to a governmental agency for purposes other than collection if the debtor's chapter 13 plan commits all of his or her disposable income for a period of five years to satisfying the claims of creditors.
 - The requirement does not apply if the creditor consents to less-than-full payment through the debtor's chapter 13 bankruptcy.
 - b. To the extent that a nondischargeable pre-bankruptcy domestic support obligation is not paid in full through the debtor's chapter 13 bankruptcy, 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 debtor's chapter 13 plan may provide for payment of pre-bankruptcy spousal or child support arrearages by payments by the debtor to the chapter 13 plan or by direct payments by the debtor to the creditor "outside" the chapter 13 plan.
 - a. In chapter 13 cases, priority and secured claims generally are paid before the claims of general unsecured creditors.
 - b. Although the Bankruptcy Code generally requires full payment of pre-bankruptcy claims for domestic support obligations, the debtor's confirmed chapter 13 plan may establish a schedule for paying satisfying pre-bankruptcy spousal or child support arrearages that is different from that ordered by a state court.
 - c. Confirmation of a debtor's chapter 13 plan operates as an injunction prohibiting action 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. 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.

- d. The debtor, the trustee, or a creditor who has a pre-bankruptcy claim for a domestic support obligation against a chapter 13 debtor 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.
 - e. A creditor who has a pre-bankruptcy claim for a domestic support obligation against a chapter 13 debtor 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.
3. The "new" bankruptcy law prohibits the discharge of a debtor in a chapter 13 case unless the debtor has paid in full all post-bankruptcy domestic support obligations to the extent required by statute or judicial or administrative order and the debtor's chapter 13 plan.
 4. 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-bankruptcy interest on a pre-bankruptcy domestic support obligation or other nondischargeable debt (including a debt in connection with divorce or separation) if the debtor's income is sufficient to do so while satisfying other chapter 13 requirements regarding payments to creditors.
- E. Payment of Other Debts Arising from Divorce or Separation
1. Unsecured, pre-bankruptcy debts arising from divorce or separation that are not domestic support obligations will not be paid in a "no asset" chapter 7 case.
 2. Unsecured, pre-bankruptcy debts arising from divorce or separation that are not domestic support obligations are general unsecured, not priority, claims and will be paid in part or in full in a chapter 7 case only to the extent that the debtor's equity in nonexempt property is sufficient, after the payment of priority claims, to pay general unsecured claims in whole or pro rata. However, to the extent that these debts are not paid through a debtor's chapter 7 bankruptcy, they are not discharged and may be enforced by the creditor against the debtor or the debtor's property after the debtor's bankruptcy case is closed.
 3. Pre-bankruptcy debts arising from divorce or separation that are not domestic support obligations are not priority claims and therefore need not be paid in full through a debtor's chapter 13 plan.
 4. An unsecured, pre-bankruptcy debt incurred in connection with divorce or separation that is not a domestic support obligation is not discharged in a chapter 13 case if the debtor receives a "hardship" discharge.
 5. An unsecured, pre-bankruptcy debt incurred in connection with divorce or separation that is not a domestic support obligation is discharged in a chapter 13 case if the debtor completes payments under the chapter 13 plan and receives a "superdischarge."
 6. Unless or to the extent that a pre-bankruptcy debt incurred in connection with divorce or separation that is not a domestic support obligation is secured by a lien against the debtor's property, the claim will be paid as a general unsecured claim (usually pro rata with other general unsecured claims) through payments to the chapter 13 trustee after payment of priority and secured claims.

V. Other Issues

A. Appearance by Child Support Creditors and Representatives in Bankruptcy Proceedings

1. The Bankruptcy Reform Act of 1994 allows a child support creditor or his or her representative to appear and intervene without paying any filing fee and without meeting any special local rule for appearances by attorneys in connection with a claim for child support in any bankruptcy case in any bankruptcy court if the creditor or his or her representative completes and files a form (Bankruptcy Form 281) with the bankruptcy court.
2. This provision, however, does not apply to spousal support creditors or claims for debts incurred in connection with divorce or separation that are not domestic support obligations.

B. Liens for Domestic Support Obligations and Debts Incurred in Divorce or Separation

1. Bankruptcy proceedings do not affect the validity or enforceability of statutory pre-bankruptcy liens against a debtor's property that secure payment of a domestic support obligation or other debt incurred in connection with the debtor's divorce or separation except to the extent that execution of such liens is subject to the automatic stay or stayed through confirmation of the debtor's chapter 13 plan.
2. The Bankruptcy Code allows a debtor to avoid a pre-bankruptcy judicial lien on exempt property that secures a debt incurred in connection with divorce or separation that is not a domestic support obligation.
3. The Bankruptcy Code allows a debtor to avoid a pre-bankruptcy consensual lien on exempt property that secures a debt incurred in connection with divorce or separation that is not a domestic support obligation if the lien is nonpossessory and does not involve a purchase money security interest in the property.
4. The "new" bankruptcy law prevents the debtor from avoiding a judicial lien that secures a domestic support obligation, regardless of whether the domestic support obligation has or has not been assigned.

C. Enforcement of Domestic Support Obligations Against Exempt Property

1. Under the "new" bankruptcy law, a nondischargeable domestic support obligation may be enforced against property that the debtor has claimed as exempt in a bankruptcy proceeding, including the debtor's interest in property held with the debtor's spouse as joint tenants by the entirety.
2. This provision preempts state law to the extent that state law provides a general exemption of entirety property from claims for domestic support obligations owed by the debtor spouse only.
3. Notwithstanding this provision, a creditor generally may not enforce a nondischargeable domestic support obligation against a debtor's interest in exempt property during a bankruptcy proceeding unless the creditor obtains relief from the automatic stay.