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ARTICLES

DIVORCE AND THE DISCHARGEABILITY OF DEBTS: FOCUSING ON WOMEN AS CREDITORS IN BANKRUPTCY

*Peter C. Alexander**

I. INTRODUCTION

In 1992, Professor Carrie Menkel-Meadow explored the relationship of “real world conditions”¹ to the development of feminist legal theory and challenged legal scholars to “‘mainstream[]’”² feminist legal theory into less obvious core and secondary fields of legal doctrine.³ In recent years, the bankruptcy field has been the focus of some feminist writing, with particular emphasis on women as debtors in bankruptcy.⁴ This Article is a continuation of those recent works, using feminist legal theory to concentrate on the marital debt discharge provision of the United States

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1. Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1495 (1992).

2. *Id.* at 1496.

3. *Id.*; see also Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506 (1990) (examining the bankruptcy system and providing a new “picture” of the bankruptcy debtor in her review of TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989)).

4. See, e.g., Zipporah B. Wiseman, *Women in Bankruptcy and Beyond*, 65 IND. L.J. 107 (1989) (responding to SULLIVAN, *supra* note 3).

Bankruptcy Code⁵ and how it impacts women as creditors. Specifically, this Article focuses on women who are adversely affected when their ex-husbands discharge marital debts in bankruptcy, and suggests that Congress, in enacting the marital debt discharge provision, and the bankruptcy courts, in determining whether to allow an ex-husband to discharge these debts, ignored gender-specific factors that render this particular provision of the Bankruptcy Code anything but gender-neutral. As a result, ex-wives and ex-husbands receive inconsistent redress in the bankruptcy courts.

This Article not only addresses the problem of one section of the Bankruptcy Code that impacts women unequally, but it also attempts to explain, in the language of feminist legal theory,⁶ “why” this apparent disparity exists. Assuming that women fare worse than men when marital debts are discharged in bankruptcy, what causes this disparate treatment when the courts are interpreting an ostensibly gender-neutral statute?

Professor Robin L. West, in her critique of feminist legal theory, argues that gender-specific pain cannot be communicated to an outside world unless it is first described in more accurate detail than it has been in the past. She suggests that “[i]t is hard to empathize with the pain of another, when the nature of that pain is not understood.”⁷ Hence, this Article attempts to articulate certain gender-specific results that occur when

5. Pub. L. No. 95-598, title I, Sec. 101, 92 Stat. 2549 (1978) (codified primarily as Title 11 United States Code), amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, and by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

6. The author recognizes that, although there are various strands of feminist legal theory, all are not represented in this Article. The depth with which certain branches of feminist jurisprudence are incorporated into this Article is not meant to marginalize, devalue, or reject any other branch. The particular strands chosen represent those which the author found most illuminating when trying to harmonize the theoretical with the practical, following Carrie Menkel-Meadow's instruction that “it is important to keep theory grounded in real world conditions, just as real world legal struggles cause us to change or modify our theories.” Menkel-Meadow, *supra* note 1, at 1495; see also Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) (explaining why the author chose to adopt one particular characterization of the strands of feminist jurisprudence over another).

An article purporting to analyze one aspect of the Bankruptcy Code by means of feminist legal theory must also include a recognition of women's historical roles in our society and must address their role today, focusing on the status of women in the bankruptcy system. A detailed discussion of the development of feminist legal theory in this piece is unnecessary because the existing scholarship in this area of the law more than adequately reviews the historical roles of women in American culture. See, e.g., MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* (1992).

7. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 85 (1987).

bankruptcy courts try to determine if marital obligations will be discharged in bankruptcy.

Finally, in response to the aforementioned problem, this Article proposes a change in the bankruptcy courts' analyses of marital debt discharge questions, suggesting that Congress amend section 523(a)(5) of the Bankruptcy Code and challenging bankruptcy judges and lawyers to rethink how ex-wives are treated in bankruptcy.

II. HYPOTHETICAL SITUATION

In order to explain the bankruptcy process and the specific problem women face with regard to the discharge of marital debts in bankruptcy, it is helpful to relate the predicament in which "Mary," a typical ex-wife, finds herself at the end of her marriage:

Mary is a twenty-six year old mother of one, who recently divorced her husband, John, also twenty-six, after five years of marriage. Both Mary and John have college degrees in business administration; however, Mary became pregnant just before graduation, and while she received her degree, she postponed starting her career to stay home and raise the couple's child. John, meanwhile, obtained an entry-level management position with a large corporation. Within four years, John had progressed up the corporate ladder to middle management.

Mary's and John's divorce was fairly amicable but certain issues had to be litigated; namely the division of the couple's assets and liabilities and spousal support. At the time of the divorce, the couple had very few assets. They were making payments on a house worth \$70,000 (with a \$63,000 mortgage), owned two cars (each worth approximately the same amount as their respective loan balances), and owned nearly \$5000 in miscellaneous property, all of which was free and clear of any lien or encumbrance. In addition to the mortgage and car loans, Mary and John owed approximately \$8000 in credit card debt and nearly \$2000 on an unsecured personal loan that the couple obtained from a finance company.

At trial, the divorce court heard testimony on the issue of support, finding that both Mary and John were young and well-educated. The court further found that both spouses had relatively the same earning capacity, concluding that Mary was not entitled to alimony or spousal support from John. The court held, however, that Mary would have sole custody of the couple's four year-old child, that John would have liberal visitation, and that John would pay a statutorily-prescribed percentage of his monthly income to Mary as child support. John did not contest these holdings, realizing that his management position required a significant

amount of travel and that Mary was therefore the better parent for their child.

In addition to its findings regarding the couple's child, the court ordered John to pay the credit card debts and the personal loan. The court also awarded each spouse a vehicle, but required John to make payments on both car loans. The allocation of debts to John was made because, as the court noted, "John was the only spouse who presently had an income." Regarding the couple's house, the court allowed John to maintain the home as his residence, but ordered him to pay Mary \$3500 (one-half of the equity in the home) in two annual payments of \$1750, with the first payment due nine months after the divorce judgment became final and nonappealable.

One day after the divorce decree was final and nonappealable, Mary received notice from the local bankruptcy court that John had filed for personal bankruptcy under Chapter 7 of the Bankruptcy Code.⁸ Ultimately, John successfully discharged all of his debts—including the divorce obligations to Mary as well as the debts that the couple owed to third parties—leaving Mary with sole responsibility for all of the couple's debts. In addition, John was able to retain the property he was awarded in the divorce, including his car and the house. Mary, on the other hand, could not afford to maintain the payments for the car she drove, forcing her to surrender it to the lienholder.

III. BANKRUPTCY LAW

A. History

Any discussion of the effect of bankruptcy on certain individuals necessarily involves a review of bankruptcy procedure and a detailed explanation of the statutory provision that is the subject of focus. The United States Bankruptcy Code (the Code), enacted in 1978, was intended to provide an equitable and orderly means by which to alter the relationship between debtors and creditors.⁹ Within the Code, there are several chapters under which a debtor may file for bankruptcy court protection. Each chapter provides a different form of relief, to wit: Chapter 7 (liquidation),¹⁰ Chapter 9 (adjustment of debts of a municipality),¹¹ Chapter 11

8. FED. R. BANKR. P. 2002(a) requires the bankruptcy clerk to notify creditors that a debtor has filed for bankruptcy.

9. *In re Pommerer*, 10 B.R. 935, 946 (Bankr. D. Minn. 1981).

10. 11 U.S.C. §§ 701-766 (1988).

11. *Id.* §§ 901-946.

(reorganization),¹² Chapter 12 (family farmer debt readjustment),¹³ and Chapter 13 (adjustment of debts of an individual with regular income).¹⁴ Most consumers file for either a Chapter 7 or Chapter 13 bankruptcy.¹⁵ In the hypothetical case described above, Mary's ex-husband filed for a Chapter 7 liquidation, also known as a "straight bankruptcy," seeking to retain as much of his property as the law allows while at the same time seeking to discharge as many debts as the law permits.

Bankruptcy courts have historically been perceived as courts of equity, with bankruptcy laws recognized as existing for the honest but unfortunate debtor.¹⁶ The courts' purpose is twofold: (1) to collect the nonexempt assets of the debtor and distribute them to her unsecured creditors; and (2) to provide the debtor with a fresh financial start, free from past financial mistakes.¹⁷ Debt forgiveness,¹⁸ the hallmark of bankruptcy law, is not an absolute right bestowed upon a debtor. Although Congress intended bankruptcy to shield debtors from their pre-bankruptcy unsecured creditors and provide them with a fresh start, there are provisions within the Code listing certain types of debts as nondischargeable.¹⁹ One such provision, section 523(a)(5), concerns debts owed to a spouse or former spouse,²⁰ and provides that certain debts owed to an ex-spouse be ex-

12. *Id.* §§ 1101-1174.

13. *Id.* §§ 1201-1231.

14. *Id.* §§ 1301-1330.

15. JAMES J. WHITE, *BANKRUPTCY & CREDITORS' RIGHTS* 55 (1985).

16. *See, e.g.,* *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904), *superseded by statute as stated in* *United States v. Sutton*, 786 F.2d 1305 (5th Cir. 1986); H.R. REP. NO. 5, 27th Cong., 1st Sess. 4 (1841).

17. Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1049-50 (1987).

18. Chapter 7 bankruptcies are completed, as far as the debtor is concerned, when a debtor receives a discharge from the bankruptcy court, relieving the obligation to pay unsecured debts. *See* 11 U.S.C. § 727; *see also In re Pody*, 42 B.R. 570 (Bankr. N.D. Ala. 1984) (imposing sanctions against a creditor for violating automatic stay in an attempt to collect a dischargeable debt).

19. 11 U.S.C. §§ 523, 1328 (1988 & Supp. III 1991) (listing nondischargeable types of debts); *id.* § 727 (1988) (establishing certain criteria which would prevent a debtor from discharging any debts).

20. 11 U.S.C. § 523(a)(5) (1988 & Supp. III 1991). Section 523(a)(5) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or

cepted from discharge.²¹ Specifically, the Code provides that those debts which are "in the nature of alimony, maintenance or support,"²² are deemed nondischargeable in bankruptcy. This exception is limited, however, in that under both the Code and its predecessor, the Bankruptcy Act of 1898 (the 1898 Act),²³ debts arising out of property settlements (or some other division of property by spouses who are parties to a divorce) are dischargeable in bankruptcy.²⁴

Alimony and similar marital debts became officially nondischargeable in 1903 by an amendment to the 1898 Act.²⁵ The new law stated: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part, except such as . . . (7) are for alimony due or to become due, or for maintenance or support of wife or child."²⁶ The amendment was a codification of the then-existing trend in common law whereby state courts denied debtors the right to discharge alimony debts.²⁷

Prior to the 1903 amendment, most courts viewed alimony not as a debt founded upon a contract, but as a penalty imposed for failure to perform a duty.²⁸ Moreover, because the amount of alimony to be paid was subject to modification if the parties' circumstances changed, even a calculable alimony arrearage was considered a nonprovable debt.²⁹ Therefore, because alimony was viewed as a duty and not a debt, and unpaid arrears were viewed as nonprovable debts, neither was dischargeable in bankruptcy under common law.³⁰ Both the 1903 amendment to

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

Id. (footnote omitted).

21. *Id.*

22. *In re Slingerland*, 87 B.R. 981, 985 (Bankr. S.D. Ill. 1988) (citation omitted).

23. Section 17 of the Bankruptcy Act listed the exceptions to discharge. Act of July 1, 1898, ch. 541, § 17, 30 Stat. 544, 550, *repealed by* Pub. L. No. 95-598, § 401, 92 Stat. 2549, 2682.

24. *Nichols v. Hensler*, 528 F.2d 304 (7th Cir. 1976) (construing the Bankruptcy Act); *In re Seidel*, 48 B.R. 371 (Bankr. C.D. Ill. 1984) (construing the Code).

25. Act of Feb. 5, 1903, § 5, 32 Stat. 797, 798 (repealed 1978).

26. *Id.*

27. *See, e.g., Barclay v. Barclay*, 56 N.E. 636 (Ill. 1900), *error dismissed*, 21 S. Ct. 923 (1901); *Romaine v. Chauncey*, 29 N.E. 826 (N.Y. 1892); *Noyes v. Hubbard*, 23 A. 727 (Vt. 1892); *see also Dunbar v. Dunbar*, 190 U.S. 340 (1903) (citing the Bankruptcy Act amendment to reveal the existing trend in state courts even though not enacted prior to the Court's holding).

28. *Wetmore v. Markoe*, 196 U.S. 68, 73 (1904) (stating that a husband has a natural and legal duty to support his wife), *superseded by statute as stated in United States v. Sutton*, 786 F.2d 1305 (5th Cir. 1986).

29. *Audubon v. Shufeldt*, 181 U.S. 575, 579-80 (1901).

30. *Dunbar*, 190 U.S. at 353.

the 1898 Act and the common law which preceded it reflected the societal norm of the time that it was a man's unavoidable duty to care for his wife and children, even after divorce.³¹

In 1977, section 17(a)(7) of the 1898 Act was struck down as a violation of the Equal Protection Clause of the United States Constitution.³² The following year, the Code was adopted and section 523(a)(5)³³ became the gender-neutral replacement for section 17(a)(7) of the 1898 Act.

B. Procedural Requirements

The process a creditor must follow in trying to prevent a debtor from discharging a debt is known, generically, as an adversary proceeding.³⁴ This adversary proceeding exists within the main bankruptcy case to which it relates, and is usually heard and adjudicated by the bankruptcy court in much the same way as any lawsuit would be.³⁵ Although there are other types of adversary proceedings within a bankruptcy case,³⁶ a challenge by a spouse or former spouse to the debtor's desire to discharge

31. The United States Supreme Court illustrated courts' views toward women generally in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), stating that:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Id. at 141 (Bradley, J., concurring); see also Barbara A. Brown, et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 937 (1971) (stating that at common law, a woman who married "lost virtually all legal status as an individual human being and was regarded by the law almost entirely in terms of her relationship with her husband").

32. *Schiffman v. Wasserman*, 13 Collier Bankr. Cas. 611 (MB) (D.R.I. 1977) (finding that forbidding men to discharge alimony debts in bankruptcy while allowing women to discharge such debts reflected archaic and overbroad stereotypes which were unconstitutional under the Equal Protection Clause).

33. 11 U.S.C. § 523(a)(5) (1988 & Supp. III 1991).

34. See FED. R. BANKR. P. 7001.

35. The bankruptcy court's jurisdiction over family law proceedings arising in or related to a case filed under Title 11 of the United States Code (the Bankruptcy Code) is not exclusive; the federal court's jurisdiction is concurrent with any other court, including family law courts, that could exercise jurisdiction over such proceedings. HENRY J. SOMMER & MARGARET D. MCGARITY, *COLLIER FAMILY LAW AND THE BANKRUPTCY CODE* ¶ 5.01[2][b][iii], at 5-11 (1993).

36. See FED. R. BANKR. P. 7001.

marital debts is known more specifically as a complaint "to determine dischargeability of a debt."³⁷

In the hypothetical situation presented at the beginning of this Article, Mary received notice that John had filed for bankruptcy, a proceeding in which he ultimately discharged his obligations both to Mary and to the couple's marital creditors. The discharge of John's obligations raises the question of what, if anything, Mary could have done to prevent it. The answer to this question is relatively simple: She could have filed a complaint to determine dischargeability of a debt pursuant to section 523(a)(5) of the Bankruptcy Code, seeking to have the marital obligations excepted from discharge.³⁸ The more difficult issues are why she did not take any action and what would have resulted *had* she filed a dischargeability complaint.

There are a myriad of reasons why Mary may not have filed a complaint. In all likelihood, she did not know she could oppose John on an issue seemingly separate from their divorce proceeding.³⁹ She may not have been aware that the Bankruptcy Code provides safeguards to prevent a debtor, like John, from discharging debts that public policy dictates should not be discharged.⁴⁰ Moreover, it is entirely possible that Mary did not see John's bankruptcy filing as another move in a continuing chess game (his view), but instead as one more in a long series of painful events involving John (her view).⁴¹ From the facts given, it is impossible to determine what drove John to the federal bankruptcy court, and equally impossible to establish why Mary did not oppose his action. Perhaps he *was* being opportunistic and vindictive; on the other hand, perhaps he

37. FED. R. BANKR. P. 7001(6).

38. 11 U.S.C. § 523(a)(5) (1988).

39. See Gross, *supra* note 3, at 1532 (citing studies indicated that absence of power, in part, explains women's poverty).

40. *Id.*

41. In her thoughtful piece on the ways in which feminists "do law," Katharine T. Bartlett writes:

Some feminists have claimed that women approach the reasoning process differently than men do. In particular, they say that women are more sensitive to situation and context, that they resist universal principles and generalizations, especially those that do not fit their own experiences, and that they believe that "the practicalities of everyday life" should not be neglected for the sake of abstract justice.

Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849 (1990) (citing MARY BELENKY, ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Caitie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986)).

faced a legitimate financial threat because the divorce forced him to assume more debt than he could handle. By failing to file a complaint to determine the dischargeability of the couple's marital debts, however, Mary will really never know why John filed for bankruptcy.

Unfortunately, Mary's failure to take action against John in the bankruptcy court is quite possibly due to the fact that she lacked the legal and financial sophistication to know she had legal options with regard to John's bankruptcy.⁴² Regrettably, some women, due to their socialization or to inherent biological and/or psychological differences between the sexes, rely on the men in their lives to provide them with security, direction, and an identity.⁴³ These women perpetuate the cycle of hurt that has been visited upon them by divorce, which mandates that they break free from this cycle of reliance.⁴⁴

Assuming, however, that Mary *had* filed an adversary proceeding against John in the bankruptcy court, there are no assurances in the law that she would have prevailed and prevented him from discharging his obligations to her or to their marital creditors.

C. Dischargeability Analysis

In bankruptcy, the party asserting the nondischargeability of a marital debt has the burden of proof.⁴⁵ That party must establish by a preponderance of the evidence that the debt in question is in the nature of alimony, maintenance, or support, and is not a property settlement.⁴⁶ Such

42. See Gross, *supra* note 3, at 1532.

43. GILLIGAN, *supra* note 41, at 61.

44. Carol Gilligan has suggested that a woman's freedom from male domination and influence is, at best, illusory. *Id.* She writes that women's "morality hierarchy" simply does not allow women to place self above others without terrible moral and personal dilemmas. *Id.* at 136-37. The author illustrates these dilemmas in many ways but most effectively when put in the context of an unwanted pregnancy:

The conflict between self and other thus constitutes the central moral problem for women, posing a dilemma whose resolution requires a reconciliation between femininity and adulthood. In the absence of such a reconciliation, the moral problem cannot be resolved. The "good woman" masks assertion in evasion, denying responsibility by claiming only to meet the needs of others, while the "bad woman" forgoes or renounces the commitments that bind her in self-deception and betrayal.

Id. at 70-71.

45. FED. R. BANKR. P. 4005; see also *Hill v. Smith*, 260 U.S. 592 (1923) (holding that a creditor who would avoid the effect of a discharge must prove himself within an exception, while a debtor who would avoid that exception must prove himself within an exception to the exception); *In re Hall*, 119 B.R. 272 (Bankr. M.D. Fla. 1990); *In re Slingerland*, 87 B.R. 981 (Bankr. S.D. Ill. 1988); *In re Altavilla*, 40 B.R. 938 (Bankr. D. Mass. 1984).

46. *Grogan v. Garner*, 498 U.S. 279, 283 (1991) (rejecting the "clear and convincing" standard).

strict requirements to prevent discharge often present a formidable challenge for a creditor. The advantage for the debtor⁴⁷ arises because Congress clearly intended, in drafting the Code, to provide debtors with a fresh financial start.⁴⁸

In determining whether certain obligations created by a divorce court (or as a consequence of a divorce) may be discharged in bankruptcy, the bankruptcy court⁴⁹ makes an assessment and characterization of the evidence independent from the divorce court's previous findings.⁵⁰ In fact, although the bankruptcy court may often agree with the divorce court, the federal tribunal is not bound by state law in determining which marital/divorce obligations are dischargeable.⁵¹ Moreover, bankruptcy judges may look beyond the four corners of a divorce decree or property settlement agreement in trying to determine whether or not a debt is in the nature of alimony, maintenance, or support, and therefore undischARGE-

47. "[T]he analysis of dischargeability under Section 523 must begin with the assumption that dischargeability is favored under the Code unless the complaining spouse, who has the burden of proof, demonstrates that the obligation is actually in the nature of alimony, maintenance or support." *In re Quinn*, 97 B.R. 837, 839 (Bankr. W.D.N.C. 1988) (quoting *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986)).

48. *Slingerland*, 87 B.R. at 984. The Supreme Court has stated that "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan*, 498 U.S. at 286 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), *superseded by statute stated in In re Nadler*, 122 B.R. 162 (Bankr. D. Mass. 1990)).

49. Section 523(a)(5) disputes are not reserved for the federal courts exclusively: the dischargeability determination may be decided by state courts unless a complaint is filed by a debtor or by a creditor in the bankruptcy court. See Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, or False Start?*, 69 N.C. L. REV. 577 (1991). However, filing a complaint in state court provides only the illusion of independence from federal law because state courts must still apply federal law when determining section 523(a)(5) questions. *Id.* at 626.

50. To determine whether a debt was intended to be in the nature of alimony, maintenance, or support, the bankruptcy court relies primarily on: 1) the language and substance of the agreement in the context of the surrounding circumstances, and, if necessary, extrinsic evidence, which may be of limited use since the parties are not likely to have contemplated the impact of bankruptcy on the agreement; 2) the parties' financial circumstances at the time of the settlement; and 3) whether the function served by the obligation at the time of the settlement was to maintain daily necessities. *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990).

51. *In re Long*, 794 F.2d 928 (4th Cir. 1986) (holding a \$65,000 jury award to a wife in a Georgia divorce proceeding was intended to be alimony and, therefore, nondischargeable); *In re Dunn*, 10 B.R. 385 (Bankr. W.D. Okla. 1981); *In re Pelikant*, 5 B.R. 404 (Bankr. N.D. Ill. 1980) (holding an award of attorneys' fees in a divorce action to be a debt in the form of alimony and, therefore, nondischargeable); S. REP. NO. 595, 95th Cong. (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787-5865; H.R. REP. NO. 595, 95th Cong. (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320; *see also* U.S. CONST. art. I, § 8, cl. 4 (giving Congress the authority to establish uniform laws of bankruptcy throughout United States).

able.⁵² As one author notes, "Applying federal law provides the bankruptcy court with the flexibility to transcend the divorce decree's literal language and to focus on the substantive nature of the obligation involved."⁵³

The problematic issue for those in the bankruptcy community is trying to predict when the bankruptcy court will reach a conclusion on the characterization of a debt contrary to that of the divorce court. Often, in seeking to protect the rights of a debtor or to safeguard the claims of a creditor, the bankruptcy court is willing to invoke equity principles to reexamine issues assumed to have been resolved by a divorce court. Therefore, it is difficult for litigants to predict with any degree of certainty how a bankruptcy court will resolve their particular dispute. In all fairness to bankruptcy judges, however, the courts seem hesitant to tread on state courts' autonomy.

In pursuit of its independent determination on the classification of debt, as many as twenty factors have been articulated by bankruptcy courts to assist in determining whether a marital obligation may be discharged.⁵⁴ As one might imagine, the factors are weighted differently as

52. *Pelikant*, 5 B.R. at 406-07 (stating that both federal and state law will play a part in defining alimony, maintenance, and support); 3 BANKR. L. ED., CODE COMMENTARY AND ANALYSIS § 22.75 (1983 & Supp. 1992); see also *In re Carrigg*, 14 B.R. 658 (Bankr. D. S.C. 1981) (holding that even when a divorce decree includes a waiver of alimony under state law, a bankruptcy court may still determine that the debt was in fact in the form of alimony and, therefore, nondischargeable).

The court in *In re Diers*, 7 B.R. 18 (Bankr. S.D. Ohio 1980), held that section 523(a)(5)(B) of the Bankruptcy Code reflected a legislative intent to direct courts to look behind a designation of alimony and to determine the true nature of the liability. *Id.* at 20; see also *In re Quinn*, 97 B.R. 837 (Bankr. W.D.N.C. 1988). The bankruptcy court in *Quinn* held that payments were in fact alimony even though the divorce agreement expressly stated "[t]he parties agree that the cash payments described above shall not be considered alimony." *Id.* at 838. The *Quinn* court looked "[b]eyond the [p]arties' [f]inal [a]greement" to determine that the payments were in fact alimony and were nondischargeable. *Id.* at 839.

53. Timothy Kline, *Bankruptcy and Divorce*, 10 OKLA. CITY U. L. REV. 561, 568 (1985).

54. See *Daulton v. Daulton*, 139 B.R. 708 (Bankr. C.D. Ill. 1992), wherein the court cites the following twenty factors:

1. Whether the settlement agreement includes payment for the ex-spouse;
2. Whether there is any indication that provisions within the agreement were intended to balance the relative incomes of the parties;
3. The position of the assumption to pay debts within the agreement;
4. The character or method of payment of the assumption;
5. The nature of the obligation;
6. Whether children resulted which had to be provided for;
7. The relative future earning power of the spouses;
8. The adequacy of support absent debt assumption;
9. The parties' understanding of the provisions;
10. The label of the obligations;
11. The age of the parties;
12. The health of the parties;
13. Existence of "hold harmless" or assumption terminology;
14. Whether the assumption terminated upon death or remar-

courts across the country attempt to determine whether a marital debt is dischargeable.⁵⁵ A real concern is presented however, inasmuch as the provisions in section 523(a)(5) of the Code virtually have forced bankruptcy courts to "second-guess" state courts.

If a bankruptcy court must second-guess the determinations of a state's divorce court, however, should not the bankruptcy court—the court of equity—take into consideration the experiences and the changing roles of women in society? In particular, should not the court consider the effect a potential shift in the rights and responsibilities of the parties to a divorce will have on the emerging rights and responsibilities that women have with regard to themselves as female persons?⁵⁶ Is it not the role of a court of equity to do what is right and fair between the parties who are before it?⁵⁷ Many would argue that the bankruptcy courts are currently doing what is right and fair only for men. Assuming the validity of this

riage; 15. Whether the parties had counsel; 16. Whether there was a knowing, voluntary, and intelligent waiver of rights; 17. Length of the marriage; 18. Employment of the parties; 19. The demeanor and credibility of the parties; 20. Other special or unique circumstances of the parties.

Id. at 710.

55. For a more complete discussion, see *infra* part VII.

56. The field of feminist legal theory encompasses not just this rhetorical question but also the full range of experiences that women face in marriage and in society at large. Feminist legal theory concerns not only legal issues that directly affect or disproportionately impact women, but also the broader epistemological questions: e.g., what counts as legitimate knowledge in the analysis of legal questions? To feminists, personal experience is important because it is the foundation of our world views and because it affects all we do. Therefore, the personal is both political and legal. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

Feminism also aims to deconstruct the current legal system which is based on and embodies male norms. For example, it asks to what extent the problem (that has been identified in a given discussion) is a product of unstated male norms at work or is the product of unequal power and concentration of economic resources in men's hands. *Id.* at 590-92.

It is the author's view that Schneider's interpretation of feminist legal theory aids in a bankruptcy analysis of section 523(a)(5) of the Code. Consequently, the remainder of this Article intentionally incorporates nontraditional feminist legal theory into a traditionally "non-feminist" subject.

57. As Professor Dan B. Dobbs states:

In one sense, the word "equity" implies right, justice, or moral quality. Relatedly, it may mean flexibility rather than rigidity.

....

... Statutory law of divorce, bankruptcy and estate administration is partly the product of, partly the subject matter of, equity courts. In each case, the substantive rules of equity were made in response either to unduly rigid legal rules, or to their entire inadequacy, and in each case the substantive rules were purportedly based on higher moral principle.

DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.1, at 24-25 (1973) (footnote omitted).

argument, its basis is not necessarily in that the rules are unfair to women, but rather, because the impact of those rules is inequitable. Thus, a change will only occur when there is criticism of existing arrangements, policies, and practices.⁵⁸

IV. THE IMPACT OF DIVORCE AND BANKRUPTCY ON WOMEN

Women often must face the double-barreled emotional and financial impact of a divorce⁵⁹ followed by the filing of a bankruptcy petition by their ex-husband.⁶⁰ Therefore, it would be inappropriate to assess the inequities of the discharge provisions in bankruptcy without at least acknowledging the plight of women who are forced to cope with the emotional and financial trauma of divorce while embroiled in an adversary proceeding in bankruptcy court.⁶¹

58. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (commenting on the change in child custody policy due to the input offered by professionals such as social workers and mediators).

59. In 1988, there were 1,167,000 divorces granted in the United States. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 91, at 73 (113th ed. 1993) [hereinafter STATISTICAL ABSTRACT]. By 1991, that number had risen to 1,187,000. *Id.* The personal ramifications of these divorce statistics can be both financially and emotionally devastating. Scheible, *supra* note 49, at 577-78.

60. Scholars and authors acknowledge that bankruptcy frequently follows a divorce. See John F. Murphy, *The Dischargeability in Bankruptcy of Debts for Alimony and Property Settlements Arising From Divorce*, 14 PEPP. L. REV. 69 (1986) (examining the Bankruptcy Code dichotomy between the nondischargeability of alimony, maintenance, and support versus the dischargeability of obligations arising from apportionment of debts through divorce property settlements); Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 44-47 (1987) (providing statistics which show that the divorce rate is positively related to Chapter 7 Bankruptcy filings); Renee Heotis, Comment, *Bankruptcy and Divorce: The Countervailing Policy Concerns*, 13 WHITTIER L. REV. 723 (1992) (discussing the pre-1978 Bankruptcy Act and the impact of the Bankruptcy Code of 1978 on divorce and bankruptcy).

61. Divorce and bankruptcy, however, are only part of the problem of inequality affecting women in American society. Traditional gender roles themselves establish some of the concerns that a feminist critique (of the marital debt discharge provisions of the Code) tries to address:

Anthropologists have found that most societies, across historical periods, have tended to assign females to infant care and to the duties associated with raising children because of the biological ability to bear children. In contrast, men usually concentrate on interfamilial activities, . . . hence gender complementarity has usually led to political and economic dominance by men.

TERESA AMOTT & JULIE MATTHAEI, RACE, GENDER, AND WORK 14 (1991).

The dilemma for women is not just during marriage. Divorce also raises issues of inequality between the spouses and, conceivably, exacerbates the inequality. *Id.* at 139. As this Article reports, divorce often leaves an ex-wife in a worse position than the ex-husband, and bankruptcy (by one or both spouses) frequently follows a divorce.

Divorce signals an emotional upheaval which has been ranked as the second most stressful event in a person's life.⁶² This is supported by data on physical and mental health status suggesting that there is more emotional disturbance among divorced individuals than widows.⁶³ Divorce is viewed as a process that begins with the escalating distress of the marriage, often peaks at the separation and legal filing, and then ushers in several years of transition and disequilibrium⁶⁴ before confidence and continuity in adult roles and relationships are restored. This period of disequilibrium, fraught with anxiety and emotional stress, customarily lasts for a period of two years,⁶⁵ but many women find that the recovery takes much longer.⁶⁶

For many people, divorce signals their first extended dealing with the legal system, creating an anxiety compounded by their forced involvement with a bureaucratic system and the indifference displayed by judges and attorneys.⁶⁷ Legal delays and uncertainties, in addition to the burden of mounting attorney fees, serve to perpetuate the emotional disequilibrium of the parties and, furthermore, are exacerbated when a party is required to take further legal action to enforce the obligations imposed under their divorce decree.⁶⁸

Women are especially vulnerable following a divorce because, along with the psychological consequences of loss and separation, many must also deal with the emotional stress of being thrust into an economic abyss.⁶⁹ Unlike men, whose standard of living has been shown to rise dramatically following divorce, women often experience a sharp decline

62. Divorce ranked second behind death of a spouse in a ranking of 42 stressful life events. Thomas H. Holmes & Richard H. Rahe, *The Social Readjustment Rating Scale*, 11 JOURNAL OF PSYCHOSOMATIC RESEARCH 213, 213-18 (1967).

63. See generally Gay C. Kitson, et al., *Divorcees and Widows: Similarities and Differences*, AM. J. ORTHOPSYCHIATRY, Apr. 1980, at 291.

64. Judith S. Wallerstein & Joan B. Kelly, *Children and Divorce: A Review*, 24 SOCIAL WORK 468, 468 (1979).

65. *Id.*

66. After studying 60 middle-class mothers who were divorced for at least two years, Terry Arendell suggests that the two year period considered typical by researchers conducting psychological studies is understated because the emotional turmoil and stress caused by economic effects of divorce was not adequately considered. TERRY ARENDELL, *MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS* 150 (1986).

67. See *id.* at 9-14.

68. See *id.* at 9-35.

69. Even though female-headed households make up only 33% of all U.S. households, STATISTICAL ABSTRACT, *supra* note 59, tbl. 67, at 56, they comprise nearly half of all families living in poverty. *Id.* tbl. 745, at 473.

Of the 60 women in Arendell's study, 46 had frequent struggles with depression and despair directly attributable to their financial hardships following divorce, while 26 of the 60 admitted contemplating suicide. ARENDELL, *supra* note 66, at 46-47.

in their lifestyle.⁷⁰ This rapid deterioration in their standard of living often leaves women, who still identify with a middle class way of life, struggling with the reality that they now live near or below the poverty level.⁷¹

For those women who were not working outside of the home prior to divorce, many must cope with the anxiety and stress of searching for a job and becoming reacquainted to a professional work environment after years of absence.⁷² Unfortunately, years of gender discrimination in the work place have severely restricted a woman's ability to serve as a family's primary wage earner.⁷³ As a result of this societal wage discrimination, women are left in the precarious position of desperately relying on their ex-husband's court-ordered payments, which are all too often sporadically provided or totally ignored.

Consider again the hypothetical of Mary, who delayed entry into the job market in order to raise a child. Even though she is the same age as her husband and has the same college degree, Mary will have a much more difficult time obtaining a job and may encounter other problems because she never worked outside of the marital home.⁷⁴ It is doubtful that Mary has developed a professional network as John probably has. It

70. In Lenore Weitzman's 1981 California study, ex-husband standards of living rose an average of 42% percent while ex-wives suffered a 73% decline. Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards* 28 UCLA L. REV. 1181-1251 (1981).

Part of the reason for this dichotomy is, perhaps, that even in community property states such as California, the man's career development and professional attainments are not considered assets subject to division even when a woman has sacrificed her career in support of her ex-husband's.

71. In 1986 (the last year for which statistics are available), 42.4% of families with a female householder and no husband present lived below 125% of the poverty level. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 750, at 464 (111th ed. 1991). When these statistics are narrowed to include only such families with related children under 18 years old, 62.3% were living below 125% of the poverty level. *Id.*

Following divorce, many women are forced to face the humiliation, harassment, intimidation, and stigmatization of seeking public assistance for the first time. See ARENDELL, *supra* note 66, at 72.

72. See Alice H. Cook, *Working Women: European Experience and American Need*, in JOINT ECONOMIC COMM., 95TH CONG., 1ST SESS., AMERICAN WOMEN WORKERS IN A FULL EMPLOYMENT ECONOMY 271 (Comm. Print 1977). In 1988, the median age of women at first marriage was 23.6. STATISTICAL ABSTRACT, *supra* note 59, tbl. 143, at 101. At divorce, their median age was 32.6. *Id.* tbl. 144, at 101.

73. When a family has a man as a primary earner, the mean family income from all sources is \$26,329. For a family with a woman as the primary earner, that figure drops to \$14,122. Similarly, excluding other income sources, women as primary earners for a family earn a mean of \$9871 per year while their male counterparts earn \$18,524. SULLIVAN, *supra* note 3, at 151.

74. ARENDELL, *supra* note 66, at 54-61.

is equally unlikely that Mary will impress her interviewer with a resume of "job skills" that will prompt him or her (more often him) to hire her.⁷⁵ One explanation of this phenomenon is that, "when career-oriented women decide to bear and care for children in a traditional fashion (such as taking time off from employment while the children are young) rather than following the stereotyped male career pattern, it is interpreted as a decision to *disinvest* in the [workplace]."⁷⁶

Further compounding the problem, marriages that produce children usually are dissolved with the women assuming custody of the children.⁷⁷ Women are therefore encumbered with the primary responsibility of nurturing and parenting the children while at the same time being burdened with the costs of child care and the children's living expenses. Apart from the obvious temporal, financial, and emotional demands this places on the single mother, women must also cope with their new found contradictory identity as single woman and mother.⁷⁸

Both spouses are forced to confront their own emotional trauma resulting from the loss and separation of a divorce. For women, however, this grief is often intensified by the additional burdens they must bear because of their gender. Men usually preserve some stability in their lives by maintaining their standard of living and continuing in their same job following a divorce. Women, however, often must cope with a sharp drop in their standard of living because of their diminished earning capacity, primary child-rearing responsibilities, and re-entry into the job market. It is during this period of flux that the court-ordered alimony, support, or property settlement payments from their ex-husbands are most critical to women beginning their independent existence. Considering many women's fragile financial underpinnings following divorce, even slight disruptions in the receipt of these payments can prove to be financially and emotionally devastating.⁷⁹

Interestingly, some of the literature on this subject indicates that while women have not consciously chosen poverty, they have subconsciously allowed this phenomenon to exist.⁸⁰ Unlike information available con-

75. *Id.* at 54-55.

76. ROSANNA HERTZ, *MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES* 122 (1986).

77. Mavis Maclean & Lenore J. Weitzman, *Introduction to Income Support, in ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE* 187, 188-89 (Lenore J. Weitzman & Mavis Maclean eds., 1992) (stating that "[i]n most countries approximately two-thirds of divorcing couples currently have children of school age," and that usually the woman is responsible for these children).

78. ARENDELL, *supra* note 66, at 128.

79. *See id.* at 53, 76.

80. Professor Joan Williams writes:

cerning women and divorce, however, bankruptcy courts do not keep statistics on the number of section 523(a)(5) dischargeability complaints that are filed. Nonetheless, some information has been gathered independently of the courts regarding who uses the bankruptcy system.

Between 1979 and 1981, Professor Philip Shuchman surveyed nine federal jurisdictions⁸¹ to obtain a profile of the American debtor. His research revealed that personal bankruptcies accounted for 88% of all filings studied.⁸² Women constituted 31% of the personal bankruptcy filers, compared to 32% for men and 37% for joint filers.⁸³ More recently, Teresa Sullivan's work, *As We Forgive Our Debtors*,⁸⁴ has served as the statistical fount from which the most up-to-date bankruptcy numbers may be drawn. The author's research, completed largely between 1981 and 1985 and also obtained from several jurisdictions, revealed essentially the same basic results as Professor Shuchman's.⁸⁵

In the 1980s two phenomena have shifted feminists' attention from assimilationists' focus on how individual women are *like* men to a focus on gender *differences*, on how women as a group differ from men as a group. The first is the feminization of poverty, which dramatizes the chronic and increasing economic vulnerability of women. . . . The second phenomenon that plays a central role in the current feminist imagination is that of career women "choosing" to abandon or subordinate their careers so they can spend time with their small children. These phenomena highlight the fact that deep-seated social differences continue to encourage men and women to make quite different choices with respect to work and family. Thus, "sameness" scholars are increasingly confronted by the existence of gender differences.

Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 798-99 (1989) (footnotes omitted).

81. Philip Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COM. L.J. 288 (1983). The bankruptcy jurisdictions surveyed were the District of Arizona, the Eastern District of California, the District of Columbia, the Northern District of Georgia, the District of Maryland, the District of Massachusetts, the Western District of Missouri, the Western District of Pennsylvania, and the Eastern District of Virginia.

82. *Id.* at 289.

83. *Id.* "Joint filings" are bankruptcy petitions filed by a husband and wife together. 11 U.S.C. § 302 (1988).

84. SULLIVAN, *supra* note 3.

85. The authors report:

About 43% of our sample cases, 645 debtors, were bankruptcies filed by a single debtor, male or female. Of these lone filers, 261 were single-filing women. Thus single-filing women constituted about 40% of the single filings and about 17% of all the cases in the sample.

Joint bankruptcies comprise the larger share of consumer bankruptcies. In our sample, 858 women filed with their husbands, creating a group we refer to as "joint-filing women." . . . Altogether, 74% percent [sic] of our cases have a woman debtor. Our total number of petitioners is 2359, counting two petitioners for each joint petition, and the proportion of men and women is almost equal: 53% men, 47% women.

Id. at 149-50.

Empirical research, focusing on the gender of the parties in section 523(a)(5) (marital debt) disputes, indicates that the party seeking to discharge marital debts is more often the man rather than the woman. To illustrate this point, statistics were gathered⁸⁶ from the United States bankruptcy courts in the Central District of Illinois and the Middle District of Pennsylvania,⁸⁷ regarding the number of section 523(a)(5) adversary complaints filed in 1992 and the gender of the debtors and the plaintiffs in those cases. In the Central District of Illinois, 589 adversary complaints were filed in 1992. Twenty-eight of these complaints were filed pursuant to section 523(a)(5) of the Code, addressing the dischargeability of marital debts. Of those twenty-eight complaints, men were the debtors (the party seeking discharge of the debts) in twenty-six cases while women were the debtors in only two cases. Similarly, in the Middle District of Pennsylvania, 656 adversary complaints were filed in 1992. Of those complaints, eight were filed pursuant to section 523(a)(5) of the Code. Of those eight complaints, men were the debtors in six cases and women were the debtors in remaining two.

These statistics may not seem very important in light of the small number of adversary matters in the Central District of Illinois and the Middle District of Pennsylvania.⁸⁸ Courts have begun to recognize, how-

86. These statistics were obtained for this Article, in part, as an additional means of supporting the feminist legal theory subtheme of this piece. Original research was necessary largely because of the lack of statistics regarding gender reported by bankruptcy courts to the Administrative Office of the U.S. Courts, Bankruptcy Division. The frustration felt over this dearth of information was best articulated in Teresa Sullivan's work on the issue:

Much of what we think we know about bankruptcy comes from the data compiled by the Administrative Office of the Courts (the AO). Every bankruptcy court in the country regularly compiles data to transmit to the AO. Some of these data are published in an annual report, which details the number of bankruptcy filings, whether they were voluntary filings, in what chapter they were filed, and whether they were filed singly or jointly by a married couple. The AO report also classifies cases by whether they are business or nonbusiness bankruptcies. No other data are reported regularly, so that only the gross numbers and a few simple categories are known.

Even the few data available are of limited use.

SULLIVAN, *supra* note 3, at 15-16. The statistics compiled for this Article were obtained from a review of all adversary complaints filed in 1992 in the United States Bankruptcy Courts of the Middle District of Pennsylvania and the Central District of Illinois. After identifying the complaints raising a dischargeability issue under § 523(a)(5) of the Code, each complaint and answer was read to determine whether the ex-husband or the ex-wife was the party seeking to have the marital debt(s) in question discharged.

87. These jurisdictions were selected because of convenience for the author, not because they were statistically significant.

88. There is certainly a need for additional empirical research to be conducted in this area. The drawback is that, because the bankruptcy courts do not record the gender of those persons filing adversary complaints, all relevant information must be gathered by

ever, that there is a real distinction between the treatment of men and women in bankruptcy.⁸⁹ Moreover, the empirical data obtained for this Article indicates that the problem of disparate treatment involves more than just thirty-two debtors (and their ex-wives) in two federal judicial districts.⁹⁰ There are, after all, bankruptcy courts in ninety-one judicial districts in the United States and its territories;⁹¹ the broader topic of bankruptcy courts' involvement in domestic relations issues is one that is troubling to bankruptcy judges⁹² and to the federal judiciary in general.⁹³

V. DISCHARGING MARITAL DEBTS

In the context of discharging marital debts in bankruptcy, an analysis of gender difference is essential to understanding why section 523(a)(5) applies to men and women disparately.⁹⁴ Historically, and arguably currently, gender socialization in American culture directs, prefers, and

hand, which is an extremely time-consuming process. Notwithstanding the unavailability of information, one additional source was consulted in preparation for writing this Article. A review of the annotations listed after 11 U.S.C.A. § 523 (West 1993) reveals that of the 92 separate decisions reported therein, the man was the debtor in 84 cases, the woman was the debtor in five cases, and the remaining three cases were joint filings.

89. A report by the Ninth Circuit's Gender Bias Task Force states:

The Advisory Committee on Bankruptcy asked whether there were any distinctive characteristics of bankruptcy law and practice that implicated gender and concluded that women and men may indeed be differently affected. After learning about the large number of women who are creditors and debtors, the Advisory Committee reported its concerns in two areas. The first is that bankruptcy practice remains predominantly male. The second is the conflicts between obligations of support, imposed under state law, and federal bankruptcy protections accorded debtors. State efforts to enable collection of obligations owed to former spouses may be thwarted by federal bankruptcy interpretations of dischargeable debts. The failure to obtain such support may in turn trigger women's filing of bankruptcy.

NINTH CIRCUIT: GENDER BIAS TASK FORCE, PRELIMINARY REPORT 123 (Discussion Draft, July 1992) [hereinafter GENDER BIAS REPORT].

90. A more complete survey of adversary filings is necessary in order to provide the most accurate picture of the treatment of men and women in § 523(a)(5) dischargeability disputes; that task, however, is beyond the scope of this Article.

91. 28 U.S.C. § 152(a)(2) (1988).

92. Interview with Hon. Gerald D. Fines, U.S. Bankruptcy Judge for the Central District of Illinois (Dec. 29, 1992) (commenting that bankruptcy issues are being overtaken by nonbankruptcy issues such as quasi-divorce matters and that the phenomenon contributes to the increasing work load that bankruptcy judges face); Interview with Hon. Larry L. Lessen, Chief Judge, U.S. Bankruptcy Court for the Central District of Illinois (Jan. 11, 1993) (same); Interview with Hon. Robert J. Woodside, Chief Judge, U.S. Bankruptcy Court for the Middle District of Pennsylvania (Oct. 29, 1992) (same).

93. See, e.g., GENDER BIAS REPORT, *supra* note 89, at 123-27.

94. *Id.* at 123.

expects women to remain home and "to give priority to the family."⁹⁵ Moreover, when women pursue careers outside of the home, they often find that the jobs they secure are lower in pay and/or lower in status than the jobs men hold.⁹⁶

Why are women more often than men living socially and economically impoverished lives? Perhaps it is in part because women have been conditioned to believe that jobs devoid of significant remuneration or station are the only jobs available to them.⁹⁷ In addition, it may be because true equality will never become a reality if men and women continue to try to resolve sexism in the workplace and in society by treating men and women identically.⁹⁸ As a result, "a proper understanding of equality must take into consideration differences, must focus on public-policy outcomes, and must see such public-policy issues within their social context."⁹⁹

The public policy underlying section 523(a)(5) of the Code insures that all honest debtors receive a fresh start despite their past financial mistakes, while at the same time protecting creditors from dishonest debtors.¹⁰⁰ Assuming for the purposes of this discussion that the debtor in question is an honest person, gender difference should not be used as a justification to award the wife the house and many of its contents and to "award" the husband the bills and debts attendant with running the household (i.e., the mortgage, car payments, and other consumer debts of the family). Likewise, gender difference should not be used to award each spouse relatively the same property and cash. Instead, courts should consider gender difference when examining the reasons underlying why the parties to a divorce are financially unequal in the first place.¹⁰¹

95. MARY LOU KENDRIGAN, *Understanding Equality: The Public Policy Consequences*, in GENDER DIFFERENCES: THEIR IMPACT ON PUBLIC POLICY 1, 4 (Mary L. Kendrigen ed., 1991).

96. *See id.* at 4-5.

97. *See id.* at 4.

98. *See* MARY L. KENDRIGAN, *Why Equality of Results?*, in GENDER DIFFERENCES: THEIR IMPACT ON PUBLIC POLICY, *supra* note 95, at 221, 221-22.

99. *See id.* at 222.

100. *See supra* part III.

101. Professor Karen Gross quotes Diana Pearce (who is recognized by many as having coined the phrase "feminization of poverty") to explain that poverty for men and women is not the same: "First, women's poverty is fundamentally different from that experienced by men and second, women are subjected to programs designed for poor men. Poor women find these programs are not only inadequate and inappropriate, but also lock them into a life of poverty." Gross, *supra* note 3, at 1533 n.97 (quoting Diana Pearce, *Welfare Is Not For Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*, 19 CLEARINGHOUSE REV. 412 (1985)).

For example, one of the factors cited by both divorce courts, in determining the division of marital assets, and bankruptcy courts, in determining whether to discharge marital debts, is the "relative future earning power of the spouse."¹⁰² Courts should reject the use of a mathematical approach in evaluating the spouses' relative financial positions, thereby arriving at some particular amount of debt, property, and/or cash that will balance the interests of the parties. Rather, the courts should examine the relationship that this particular husband and wife had and determine *why* this wife earns less than this husband.¹⁰³ If the wife earns less because she lacks the same level of education and/or job experience as her ex-husband due to the delay of her education and career to bear children, she should be given the opportunity to seek a promotion or to gain additional knowledge by returning to school. If she chooses to go back to school or wait for the next available and suitable promotion, the court should recognize fully the wife's participation in the marriage. The husband, therefore, would be required to support her for a reasonable period of time while she "retools" or pursues a promotion. The husband's acknowledgement of his ex-wife's contributions to their marriage should not necessarily take only the traditional form of support, that is, monthly payments for a set number of years. In addition, the fact that one partner in the marriage subordinated her personal needs to those of the marriage and family should be completely recognized.¹⁰⁴

In Mary's hypothetical situation, the bankruptcy court should require her ex-husband, John, to pay all of the marital debts, not allowing them to be discharged in bankruptcy. This should include debts related to the purchase of assets that are now in the wife's possession, even though he will not presently benefit from that arrangement. Otherwise, John will not have to pay anything to Mary or to their creditors and will, in all

102. *Daulton v. Daulton*, 139 B.R. 708, 710-11 (Bankr. C.D. Ill. 1992) (finding that the parties relative equal income was indicative that the fees in question were not in the nature of alimony, maintenance, or child support and that, therefore, the fees were dischargeable); *AT THE BOUNDARIES OF THE LAW* (Martha A. Fineman et al. eds., 1991).

103. See *AMOTT & MATTHAEI*, *supra* note 61, at 313 (asserting that an increasing number of women are on their own and in poverty and citing statistics to evidence that single-mother families have lower incomes and higher poverty rates than families headed by a husband and a wife).

104. An interesting example of this type of analysis is *Rump v. Rump*, 150 B.R. 450 (Bankr. E.D. Mo. 1993), where the court denied discharge of marital debt, relying in part on the disparity between the spouses' incomes. *Id.* at 454. Furthermore, the court recognized that the ex-husband had superior job skills, education, and training which demonstrated that the income disparity would continue in the future. *Id.*

likelihood, be able to keep the house, the car, and any other assets that he was awarded under the divorce decree.¹⁰⁵

The consideration underlying an order requiring John (or any ex-husband) to pay all of the marital debts is not limited to the present benefit to Mary, but includes the recognition of Mary's sacrifice during the marriage that allowed him to advance socioeconomically. This is not to say that men who make less than their wives should not be given the same opportunity; indeed, this proposal should apply to men and women equally. However, this problem is one which most men, for several reasons, simply do not have to face.¹⁰⁶

An alternative to the current system of discharging marital debts in bankruptcy involves redirecting the inquiry of the bankruptcy court. Bankruptcy courts created several tests utilizing various factors to determine whether an agreement or a document is "in the nature of alimony,

105. The reality that John would be able to keep the couple's house and not have to pay Mary her share of the equity is one that is lost on many women and men. The reason for his ostensible windfall is that debt forgiveness and asset distribution are mutually exclusive activities within bankruptcy. See generally JAMES J. WHITE & RAYMOND T. NIMMER, *CASES AND MATERIALS ON BANKRUPTCY* 720-21 (2d ed. 1992). John may keep all assets in which his equity interest does not exceed the applicable statutory exemption limit in his jurisdiction. For example, the Code provides for an exemption in a debtor's homestead of \$7500. 11 U.S.C. § 522(d)(1) (1988). As long as the debtor's equity does not exceed the exemption amount and as long as she is willing to continue making payments to any secured creditor holding the property as collateral, the debtor may keep the property in question. *Id.* Consequently, in John's case, he could keep the house in question (by claiming an exemption in his homestead), discharge his obligation to Mary (because of her failure to challenge the dischargeability of the marital debt) and not have to pay his ex-wife her share of the equity in their former home.

106. In Carol Gilligan's famous study of sex-stereotyping socialization processes, the author distinguishes the life experiences of women from those of men, calling on every woman to assert herself and to claim responsibility for herself. GILLIGAN, *supra* note 41, at 82-83. Gilligan challenges women to adopt a "new kind of judgment, whose first demand is for honesty." *Id.* She argues that women, who—because of socialization or because of inherent biological and psychological differences between the sexes—rely on the men in their lives to provide them with security, direction and an identity, are "perpetuating a cycle of hurt" that has been visited upon them by divorce and that these women must break free of that cycle. *Id.* at 61.

To be fair, not all feminists embrace Gilligan's view of the differences between men and women. See, for example, Catharine MacKinnon's exchange with Carol Gilligan at the State University of New York at Buffalo School of Law, which has been published as *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFF. L. REV.* 11, 73-75 (1985). However, most would agree that Gilligan's book and her continuing research in this area of feminist legal theory underscore the need for women's empowerment. The only way power will be transferred from men to women is if women take power and not wait for its conveyance. See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515 (1982); West, *supra* note 7.

maintenance, or support"¹⁰⁷ or whether it is just a property settlement, and thus dischargeable.¹⁰⁸ The factors that courts consider vary only slightly and seem to turn on a bankruptcy court's ability to divine the true intent of the divorcing parties and, arguably, the divorce court itself.¹⁰⁹ Considerable time and energy, however, is misdirected in this pursuit.

VI. CONFLICT BETWEEN STATE AND FEDERAL JURISDICTIONS

The dischargeability discussions have thus far avoided the troubling question of why the bankruptcy court should supplant its wisdom for that of a divorce court. This question raises even more complicated questions: Is the federal bankruptcy court violating the basic civil procedure principles of res judicata and collateral estoppel in addressing what appears to be the same issues and/or claims that the state divorce court already addressed in distributing marital assets and obligations?¹¹⁰ Do principles of equity extend so far as to void traditional legal doctrines, thereby (in the context of a bankruptcy after a divorce) permitting debtors to relitigate divorce issues with which they are unhappy?¹¹¹ When the bankruptcy court determines whether marital debt is dischargeable, is it not just substituting its beliefs for those of the divorce court, and in some cases, the parties?

Bankruptcy courts reason that they are not usurping the autonomy of state courts to rule on family law matters. Instead, the courts assert that

107. 11 U.S.C. § 523(a)(5)(B) (1988).

108. *Id.*

109. *See infra* notes 175-77.

110. The U.S. Supreme Court has rejected the res judicata argument in holding that "the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceedings when considering the dischargeability of respondent's debt." *Brown v. Felsen*, 442 U.S. 127, 138-39 (1979), *superseded by statute as stated in In re Rosenbaum*, 150 B.R. 994 (E.D. Tenn. 1993). The *Brown* Court reasoned that to hold otherwise would undercut Congress' intention to commit dischargeability issues to the jurisdiction of the bankruptcy court and would force premature litigation of speculative bankruptcy issues in state courts ill-equipped to decide them. *Id.* at 134-36.

111. A debtor is often benefitted by being able to litigate an issue in the bankruptcy court after receiving an unsatisfactory ruling in the state court. For example, the debtor in *In re Williams* entered into a divorce agreement where he and his ex-spouse agreed to divide up their debts. 3 B.R. 401 (Bankr. N.D. Ga. 1980). Pursuant to the divorce decree, he was obligated to pay for the \$2000 he owed on his car, \$500 for his health club membership, and about \$900 in his share of credit card bills. *Id.* at 402. Subsequent to the divorce, he filed a Chapter 7 bankruptcy and stopped paying the aforementioned debts. In a contempt proceeding, the Superior Court of Georgia specifically ruled that the debts were not a property settlement but were in the nature of support and maintenance and were thus nondischargeable (presumably because they were joint debts). *Id.* However, just several months later, the debtor was granted a discharge by a bankruptcy judge based on the same facts. The bankruptcy court refused to adhere to the state court's earlier resolution of the issue, citing *Brown v. Felsen* to refute the res judicata argument. *Id.* at 403-04.

they are independently reviewing facts that may or may not have been considered by the divorce court in order to resolve an issue that is peculiarly within the province of the Bankruptcy Code: the dischargeability of a debt. In resolving these issues, the bankruptcy courts are fulfilling Congress' intent that they "look behind" a divorce agreement that designated payments as alimony, maintenance, or support.¹¹² The issue before the bankruptcy court is the dischargeability of marital debts, not the division of marital property or whether or not one spouse is entitled to support from the other. Moreover, the Constitution provides the federal courts with exclusive jurisdiction to make this determination.¹¹³

While the issues may be separated in theory, in reality, the bankruptcy court's reasoning is open to debate because the court often reviews the exact facts and issues that the divorce court has already reviewed, albeit with its eye toward making sure there is an equitable distribution of financial responsibility between a debtor—who has submitted to the jurisdiction of the court for that purpose—and his or her creditors. Indeed, some of the factors created by the bankruptcy courts to assist in making their dischargeability decisions are mirror images of the factors created by the divorce courts to terminate marriages and divide marital assets.¹¹⁴ This argument notwithstanding, the more serious problem existing in society today is not just that the bankruptcy courts are affording a debtor

112. See 11 U.S.C. § 523(a)(5) (1988); *In re Diers*, 7 B.R. 18, 20 (Bankr. S.D. Ohio 1980).

113. U.S. CONST. art. I, § 8, cl. 4.

114. Compare the 20 factors listed in *Daulton v. Daulton*, 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992) (listed *supra* note 54), to the factors presented by Martha Albertson Fineman and recognized throughout American legal culture as relevant to determining property distribution at divorce. Those factors are:

1. The length of the marriage;
2. The property brought to the marriage by each party;
3. The "contribution" of each party to the marriage, often with the explicit admonition that appropriate economic value is to be given to contributions of homemaking and child-care services;
4. The contribution by one party to the education, training, or increased earning power of the other;
5. Whether one of the parties has substantial assets not subject to division by the court;
6. The age and physical and emotional health of the parties;
7. The earning capacity of each party, including educational background, training, employment skills, work experience, and length of absence from the job market;
8. Custodial responsibilities for children;
9. The time and expense necessary to acquire sufficient education or training to enable a party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

FINEMAN, *supra* note 6, at 40-41.

“two bites at the same apple”; rather, it is that men are more likely to receive the “two bites.”

VII. CONFLICT WITHIN THE FEDERAL JUDICIARY

Even if the hypothetical Mary *had* filed an adversary proceeding against John, she would have no assurance of prevailing against her ex-husband, even though the language of section 523(a)(5) seems straightforward.¹¹⁵ Reported cases provide specific examples of women who suffer twice when a marriage fails: first when they are divorced, and second when certain marital debts are discharged by their former spouses. As an illustration of the impact a discharge has on a woman following divorce, consider the case of *In re Seidel*.¹¹⁶ When Mr. and Mrs. Seidel divorced, an Illinois divorce court approved the parties' agreement, which provided for the following: Mr. Seidel was awarded the house and in exchange, he agreed to assume approximately \$10,500 in joint marital debts and hold Mrs. Seidel harmless therefrom. Mrs. Seidel was awarded some household items and a 1976 Oldsmobile, and the parties expressly waived maintenance.¹¹⁷

There were no children resulting from the Seidel marriage, but two children from a previous marriage lived with Mrs. Seidel. She earned \$80 per week as a maid, had no savings, and received food stamps as her only other source of income.¹¹⁸ At the time of the divorce Mr. Seidel earned \$250 per week but had subsequently become unemployed and earned \$202 per week in unemployment compensation.¹¹⁹ Three months after the divorce, Mr. Seidel filed a Chapter 7 bankruptcy petition and sought to discharge the debts he had agreed to pay pursuant to the divorce decree.¹²⁰ The bankruptcy court granted the discharge, holding that the Seidels' judgment of dissolution was not in the nature of alimony, maintenance, or support. The court's decision thereby made Mrs. Seidel solely responsible for the full amount of the couple's marital debts.¹²¹

Although the bankruptcy court stated that it considered nine separate factors¹²² in reaching its decision, the dispositive factors were the listing of Mr. Seidel's assumption of debts under a section in the agreement enti-

115. See *supra* part II; see also 11 U.S.C. § 523(a)(5) (1988).

116. 48 B.R. 371 (Bankr. C.D. Ill. 1984).

117. *Id.* at 372.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 373-74.

122. *Id.* at 373. These factors were similar to the 20 factors outlined by the court in *Daulton v. Daulton*, 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992) (listed *supra* note 54).

tled "Property Settlement" and the specificity of the property division itself.¹²³ The court reasoned that the disparity in incomes did not indicate that Mr. Seidel's assumption of debts was in the nature of support.¹²⁴ Furthermore, when considering the adequacy of support absent the debt assumption, the court held that, "there was nothing to indicate that the parties were concerned with alimony or maintenance. Mrs. Seidel appeared to have possessed the wherewithal to provide for herself and her children."¹²⁵

Likewise, in *In re Norton*,¹²⁶ a Florida bankruptcy court reviewed the request of the debtor's ex-wife (in her role as creditor) to except certain marital debts from discharge. Again, the court ruled in favor of the debtor/ex-husband, citing two specific factors in reaching its decision.¹²⁷ The *Norton* court stated the oft-repeated mantra in bankruptcy that "[t]he question of what constitutes alimony or support is to be determined under the federal law and not state law," but then conceded that "[the] [c]ourt must attempt to ascertain the parties' and the divorce court's intent in determining whether an obligation created in a divorce decree is dischargeable in bankruptcy."¹²⁸ The court seemed most persuaded by the fact that the marital settlement agreement in question made no mention of alimony provisions for Mrs. Norton,¹²⁹ and that the agreement clearly indicated that it was a settlement in cash to compensate Mrs. Norton for a loss in equity in a condominium property which had been sold (the loss being attributable Mr. Norton's failed business venture).¹³⁰

123. *Seidel*, 48 B.R. at 373. The agreement listed each household item that Mrs. Seidel was to receive including, *inter alia*, "Tappan microwave oven and stand, a spinning wheel, Gibson stereo, movie camera and projector, World Book set . . . pots and pans, silverware, white cabinet, 18-foot diameter above-ground swimming pool, [and a] 1976 Olds 98 automobile." *Id.* at 372.

124. *Id.*

125. *Id.*

126. 65 B.R. 140 (Bankr. M.D. Fla. 1986).

127. *Id.* at 142.

128. *Id.*

129. *Id.* It is arguable that the failure of Mrs. Norton's divorce lawyer to include a specific mention of alimony provisions and to safeguard her interests could constitute malpractice, which would explain the reason why these two women lost their dischargeability challenges. However, it is also arguable that there were reasons other than malpractice that motivated the lawyers to act as they did. In *Rump v. Rump*, for example, the ex-wife testified before the bankruptcy court that she agreed to her ex-husband paying marital debts in lieu of receiving any maintenance to which she would have been entitled because "she believed that state and federal authorities would tax an award of maintenance, and thereby reduce the amount of funds she would have had to pay the [debts] and the other expenses of her and [her] two minor children." 150 B.R. 450, 454 (Bankr. E.D. Mo. 1993).

130. *Norton*, 65 B.R. at 142.

Like the Florida court in *Norton*, the United States Court of Appeals for the Fourth Circuit was called upon in *Tilley v. Jessee*¹³¹ to ascertain the intent of the parties to a divorce decree in order to determine the dischargeability of marital debt. Even though the divorce occurred fifteen years earlier and both the bankruptcy court and the district court previously held that the parties intended to create support payments, the Fourth Circuit reversed, discharging the payments.¹³²

The Fourth Circuit case involved William Tilley and Joyce Jessee, married in 1963 in Bristol, Tennessee. Eight years later, in 1971, they divorced, at which time Tilley agreed in one provision of the post-nuptial agreement to pay Jessee \$1000 per month in alimony.¹³³ In another section of their post-nuptial agreement entitled "Property Interest of Wife in Husband's Property and Estate," Tilley agreed to execute and deliver a note to Jessee for \$125,000 payable in quarterly installments at seven percent interest.¹³⁴ He was required to secure the note by obtaining life insurance and naming Jessee as the beneficiary. Fourteen years after the divorce, Tilley filed for bankruptcy and sought to discharge the remaining debt on the note, which totaled \$32,000.¹³⁵

In the bankruptcy court hearing, Tilley conceded that he assumed Jessee was using his payments on the note as support; the bankruptcy court held these payments to be in the nature of support and thus nondischargeable.¹³⁶ In making its determination, the bankruptcy court relied on several factors, including: 1) the parties' intent at the time the post-nuptial agreement was executed; 2) Jessee's ongoing medical requirements; 3) Jessee's perceived need to maintain her status in the community; and 4) the fact that the note was secured by a life insurance policy instead of the traditional mechanism of liens on real property utilized in property settlements.¹³⁷

Tilley appealed the bankruptcy court's decision to the district court, which upheld the ruling.¹³⁸ Tilley then appealed the decision to the Fourth Circuit, which reversed the bankruptcy and district court decisions

131. 789 F.2d 1074 (4th Cir. 1986).

132. *Id.* at 1078.

133. *Id.* at 1075.

134. *Id.* at 1076.

135. *Id.*

136. *Id.* at 1077.

137. *Id.*

138. *Id.* at 1077 n.2 (considering the factors of "(1) the financial circumstances and needs of the parties when the obligation was created; (2) the function, purpose and substance of the obligation; and (3) whether the obligation is associated with the maintenance or support of the non-debtor spouse." (citing *In re Hawkins*, 25 B.R. 430 (Bankr. E.D. Tenn. 1982))).

and held the debts to be dischargeable.¹³⁹ The circuit court ignored the factors utilized by both the bankruptcy and district courts, instead considering only the intent of the parties at the time the agreement was signed.¹⁴⁰ The court opined that while Jessee intended the payment on the note to be support, Tilley did not.¹⁴¹ Therefore, the parties lacked the "mutual intent" necessary to make these payments in the nature of alimony, maintenance, or support and the \$32,000 debt Tilley owed Jessee was discharged.¹⁴²

A fourth and more recent example of the inequitable impact that bankruptcy can have on women is found in *Baker v. Baker*.¹⁴³ In that case, the bankruptcy court faced the question of whether to discharge a debtor/ex-husband's obligation to pay a portion of his retirement income to his ex-wife.¹⁴⁴ The ex-wife's attorney drafted the sixteen-page divorce decree in question, which contained a number of topic headings.¹⁴⁵ Under the heading, "Maintenance," the agreement required Mr. Baker to pay Ms. Baker \$400 monthly for two years following the effective date of the agreement. Under another heading, "Retirement Benefits," the agreement provided that, "at the time the Debtor elects to retire and thus become eligible for pension and profit sharing annuity benefits, the husband shall pay to the wife 50% of his retirement pension and profit sharing annuity benefits accrued as of the date of the dissolution of the marriage."¹⁴⁶ Subsequently, Mr. Baker retired and began to receive his retirement pay.¹⁴⁷ A short while later, he filed for bankruptcy protection and his ex-wife sought an order in bankruptcy requiring Mr. Baker to pay her the portion of the retirement and annuity that he was required to pay under the divorce decree, notwithstanding the bankruptcy filing.¹⁴⁸

139. *Id.* at 1077-78.

140. *Id.* The circuit court was forced to ascertain what the intent of the parties had been 15 years before, when they divorced. *Id.* at 1078. Even though both the bankruptcy and district courts considered the intent of the parties at the time of the agreement, the circuit court held their findings to be clearly erroneous. *Id.*

141. *Id.*

142. *Id.*

143. 146 B.R. 862 (Bankr. M.D. Fla. 1992).

144. *Id.* at 863.

145. *Id.* at 864-65. The topic headings include: "Grounds for the Agreement," "Maintenance," "Property Settlement," "Furniture and Furnishings," "Bank Accounts," "Automobiles," "Miscellaneous Personal Property," "Retirement Benefits," "Debts," "Counsel Fees," and various other provisions. *Id.* at 865 (quoting marital separation agreement).

146. *Id.*

147. *Id.* at 864.

148. *Id.* at 864-65.

The bankruptcy court held that the retirement pay was not in the nature of alimony, maintenance, or support, and was therefore dischargeable.¹⁴⁹ Although the court cited several factors that it claimed to have considered in reaching its decision,¹⁵⁰ the court seemed most persuaded by the fact that Ms. Baker's attorney drafted the divorce decree.¹⁵¹

Although they rely on different factors to determine that a debtor/ex-husband may discharge marital obligations that he was required to pay by a divorce decree, *Seidel*, *Norton*, *Tilley* and *Baker* stand as reaffirmations that the bankruptcy court is not the most appropriate place to determine whether a marital debt should be discharged.¹⁵² Bankruptcy judges are not the judges who heard the parties' testimony in the original divorce proceeding, nor do they know with certainty how the parties intended to characterize their obligations. Likewise, the bankruptcy court was not able to observe the spouses when they testified so as to appreciate the nonverbal messages communicated by the parties as well as the verbal. These facts leave the bankruptcy court at a significant disadvantage in trying to determine, at a later date, whether to deny discharge of marital debts because they are in the nature of alimony, maintenance, or support, or to discharge them because they are merely part of a property settlement.¹⁵³

This Article does not suggest that the judges in each of the aforementioned cases were wrong in their analyses or that they misunderstood the facts before them. This Article *does* suggest that, at best, bankruptcy

149. *Id.* at 866.

150. *Id.* The factors cited by the court are: "whether the obligation appears to balance disparate incomes, whether the obligation is payable in installments or in a lump sum, whether there was an actual need for support at the time it was awarded, and whether there was a division of property and allocation of debts between the parties." *Id.*

151. *Id.* In concluding its Order, the court wrote:

The difficulty in this particular case is that the Agreement which, as noted earlier, was prepared by Ms. Baker's attorney . . . expressly waives any further claim for maintenance other than the provisions of the Agreement which awarded to her rehabilitative maintenance of \$400.00 per month for a period of 24 consecutive months. Moreover, the provision dealing with the Debtor's right to retirement benefits was placed in a section of the Agreement dealing with the division of the parties' property and debts. For these reasons, this Court is satisfied that the obligation in question is in the nature of a property settlement and, therefore, dischargeable.

Id.

152. See *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986); *Baker*, 146 B.R. at 865-66; *In re Norton*, 65 B.R. 140, 141-42 (Bankr. M.D. Fla. 1986); *In re Seidel*, 48 B.R. 371, 373-74 (Bankr. C.D. Ill. 1984).

153. There is no doubt that people may make the same claim about divorce courts and divorce court judges. In fact, it is arguable that state court judges are no "closer" to a controversy between ex-spouses than federal judges are. However, that topic is best left to another article.

courts are making educated guesses about what the parties to the divorce intended and, at worst, that Congress enacted a provision in the Code that allows the traditional interpretations of *res judicata* and collateral estoppel to be circumvented.¹⁵⁴ The foregoing examples are not meant to suggest that petitioning creditor ex-wives never win dischargeability disputes in bankruptcy court,¹⁵⁵ nor is it meant to suggest that wives are never the debtors who successfully discharge marital debts.¹⁵⁶ The case law and statistics suggest, however, that ex-husbands are the debtors more often than ex-wives and that men seek to discharge marital debts more frequently than women.¹⁵⁷

Case law also illustrates another problem: inconsistent rulings involving cases with similar fact patterns. For example, in *In re Elder*,¹⁵⁸ a Kentucky bankruptcy court heard a complaint filed by a creditor ex-wife, seeking to have her ex-husband's marital debt deemed nondischargeable in his bankruptcy. The divorce decree in *Elder* provided, in part:

The Court further finds that Petitioner [ex-wife] is entitled to part of Respondent's military retirement pay and that a just and

154. See *supra* part VI for a discussion of *res judicata* and collateral estoppel.

155. See, e.g., *Rump v. Rump*, 150 B.R. 450 (Bankr. E.D. Mo. 1993). There, the bankruptcy court held as nondischargeable the ex-husband's obligation to pay child support, marital debts owed to third-party creditors, and his ex-wife's attorney's fees. *Id.* at 456. In so ruling, the court relied on the disparity of income between the spouses, the fact that (after the divorce) Ms. Rump had to support herself and the couple's two children while Mr. Rump had to support only himself, and the ex-husband's "superior job skills, education and training that would cause [the] marked disparity in incomes to continue into the foreseeable future." *Id.* at 454; see also *English v. English*, 146 B.R. 874 (Bankr. S.D. Fla. 1992) (finding that the husband's divorce decree obligations for alimony, insurance premiums, child support, and children's medical expenses were nondischargeable); *Kearns v. Liebner*, 146 B.R. 847 (Bankr. D. Kan. 1992) (holding that the husband's divorce decree obligations for past due child support and maintenance were nondischargeable); *In re Stamper*, 131 B.R. 433 (Bankr. W.D. Mo. 1991) (stating that the husband's obligation to make his ex-wife's car payment and maintain her car insurance was nondischargeable); *In re Borzillo*, 130 B.R. 438 (Bankr. E.D. Pa. 1991) (stating that the husband's obligation to maintain life insurance for his ex-wife as beneficiary was nondischargeable); *In re Kaufman*, 115 B.R. 435 (Bankr. E.D.N.Y. 1990) (holding that the husband's obligation to pay joint credit card debts and his ex-wife's legal fees expended to collect these payments was nondischargeable); *In re Brand*, 108 B.R. 319 (Bankr. N.D. Ala. 1989) (finding that the husband's obligation to pay off joint credit card debts was nondischargeable).

156. See, e.g., *In re Rios*, 901 F.2d 71 (7th Cir. 1990) (finding that order of support was not in the nature of child support); *In re Lever*, 137 B.R. 243 (Bankr. N.D. Ohio 1992) (stating that creditor ex-husband's attorney's fees had both dischargeable and nondischargeable components); *In re Mallin*, 137 B.R. 673 (Bankr. N.D. Ohio 1992) (finding that debtor's hold-harmless obligation was dischargeable in light of her ex-husband's greater earning potential).

157. See *supra* part IV for a more complete discussion on the statistical information relating to this point.

158. 48 B.R. 414 (Bankr. W.D. Ky. 1985).

equitable distribution of this retirement pay would be \$100.00 per month to Petitioner, with Petitioner to pay income tax on that portion of retirement pay awarded to her, and that Respondent . . . is entitled to the balance.¹⁵⁹

In *Elder*, the bankruptcy court was persuaded by several key facts to hold that the obligation to pay part of the ex-husband's retirement pay to the wife was nondischargeable. First, the petitioner (ex-wife) was a native of Germany and had only the equivalent of a high school education; second, the petitioner married her ex-husband in Germany in 1957, emigrated to the United States a year later, and became a citizen in 1970; third, the petitioner had never worked outside of the home during the couple's marriage and had no source of income other than that supplied by her ex-husband; fourth, the petitioner was in poor health; and fifth, the petitioner neither read nor wrote English well.¹⁶⁰ On the other hand, the debtor was a retired career serviceman who worked throughout the marriage and received a military pension in addition to his current wage earnings.¹⁶¹ The *Elder* court held that the obligation to pay one-fourth of the debtor's retirement pay to his ex-wife was in the nature of support and was therefore nondischargeable.¹⁶²

In *In re Hall*,¹⁶³ however, where an ex-wife petitioned a Florida bankruptcy court to hold the debtor's obligation to pay pension benefits to the ex-wife as nondischargeable in bankruptcy, the court reached the opposite conclusion from the *Elder* court. In *Hall*, the total marital estate was approximately \$304,500, of which \$250,000 was the actuarial value of the debtor's pension.¹⁶⁴ The divorce court found that the ex-husband made an irrevocable election to take the pension benefits in lifetime payments and therefore could not receive a lump sum distribution. Thus, the court ordered that, in addition to alimony already ordered in the case,¹⁶⁵ the petitioner (who earned approximately \$600 per month) would receive an additional \$93,000 to be paid by conveyance of title to the marital home and to certain other marital assets and by payments from the debtor to his ex-wife of \$400 per month for 156 months.¹⁶⁶

In later holding that the debtor's obligations were in the nature of a property settlement and thus dischargeable in bankruptcy, the bank-

159. *Id.* at 415.

160. *Id.* at 416.

161. *Id.*

162. *Id.* at 417.

163. 40 B.R. 204 (Bankr. M.D. Fla. 1984).

164. *Id.* at 205.

165. The previously ordered alimony was \$240.00 per month. *Id.* at 206.

166. *Id.* at 205-06.

ruptcy court in *Hall* stated that there was “no evidence to suggest that the plaintiff [ex-wife] had significant medical problems, heavy personal debt, or other unusual drains on her income. Therefore, it does not appear that the plaintiff had a compelling need for support to meet her daily needs.”¹⁶⁷

It is difficult to imagine why the *Elder* court would find an award of retirement income to be in the nature of alimony, maintenance, or support while the *Hall* court would not. One possible explanation is that the *Elder* court felt that Ms. Elder lacked financial and/or social skills and truly needed to be “supported.” Another reason might be that the court simply wanted to exercise its equitable powers to do what it thought was fair under the circumstances, without really ever defining what “fairness” meant. In *Hall*, on the other hand, the court may have felt that Ms. Hall was self-sustaining and did not need additional financial “support.” To put it another way, the court in *Elder* was saying that Ms. Elder needed to be “taken care of by her ex-husband” while the court in *Hall* found that Ms. Hall did not.

The *Elder* and *Hall* cases notwithstanding, the primary justification for vesting the bankruptcy courts with jurisdiction over the section 523(a)(5) dischargeability issues is the promotion of a uniform application of the law, thereby reducing forum shopping and uncertainty.¹⁶⁸ However, as the federal courts of the various circuits are forced to resolve these dischargeability conflicts, a patchwork of approaches results that is anything but uniform.

To resolve the ultimate conflict of whether a debt is a property settlement or represents alimony, maintenance, or support, most courts rely to some extent on extrinsic factors beyond the couple’s divorce decree. In articulating what factors they consider to be important in determining the dischargeability of a debt, the federal courts reveal divergent approaches.

Some courts consider the “totality of the evidence” when resolving a dischargeability question under section 523(a)(5) and do not list any specific factors relied on to reach their decision.¹⁶⁹ Other courts rely on relatively short lists of specific factors that they consider to be pertinent in

167. *Id.* at 206.

168. *See supra* notes 49-55 and accompanying text; *supra* part VI.

169. *See, e.g., In re Gibson*, 61 B.R. 997, 999 (Bankr. D.N.H. 1986).

resolving the dischargeability issue,¹⁷⁰ while some rely on more comprehensive lists of factors.¹⁷¹

170. See *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990). The *Gianakas* court rejected the 15 factors utilized in a prior Pennsylvania state court decision. See *Buccino v. Buccino*, 580 A.2d 13 (Pa. Super. Ct. 1990). Instead, it relied on the following three principal indicators: 1) the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; 2) the parties' financial circumstances at the time of the settlement; and 3) the function served by the obligation at the time of the divorce or settlement. *Gianakas*, 917 F.2d at 762-63.

Similarly, the United States Court of Appeals for the Tenth Circuit relied on four factors in making its determination. *In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987); see also *In re Palm*, No. 91-8072, 1992 U.S. App. LEXIS 18025 (10th Cir. Aug. 5, 1992) (using the four factors listed in *Goin*). But see *Sylvester v. Sylvester*, 865 F.2d 1164, 1166 (10th Cir. 1989) (listing seven factors used to determine dischargeability). The four *Goin* factors are:

- (1) if the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support; (2) when there are minor children and an imbalance of income, the payments are likely to be in the nature of support; (3) support or maintenance is indicated when the payments are made directly to the recipient and are paid in installments over a substantial period of time; and (4) an obligation that terminates on remarriage or death is indicative of an agreement for support.

Goin, 808 F.2d at 1392-93 (citing *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984)).

171. *In re Stone*, 79 B.R. 633, 638 (Bankr. D. Md. 1987) (utilizing the 18 factors listed in *In re Coffman*, 52 B.R. 667, 674-75 (Bankr. D. Md. 1985)). The 18 factors listed by the *Stone* court were:

- (1) Whether there was an alimony award entered by the state court.
- (2) Whether there was a need for support at the time of the decree; whether the support award would have been inadequate absent the obligation in question.
- (3) The intention of the court to provide support.
- (4) Whether debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances.
- (5) The age, health, work skills, and educational levels of the parties.
- (6) Whether the payments are made periodically over an extended period or in a lump sum.
- (7) The existence of a legal or moral "obligation" to pay alimony or support.
- (8) The express terms of the debt characterization under state law.
- (9) Whether the obligation is enforceable by contempt.
- (10) The duration of the marriage.
- (11) The financial resources of each spouse, including income from employment or elsewhere.
- (12) Whether the payment was fashioned in order to balance disparate incomes of the parties.
- (13) Whether the creditor spouse relinquished rights of support in payment of the obligation in question.
- (14) Whether there were minor children in the care of the creditor spouse.
- (15) The standard of living of the parties during their marriage.
- (16) The circumstances contributing to the estrangement of the parties.
- (17) Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties.
- (18) Tax treatment of the payment by the debtor spouse.

Not only do the circuits differ as to factors they rely on,¹⁷² courts within a circuit also use differing criteria.¹⁷³ Perhaps the clearest example of the lack of uniformity is when federal courts disagree on the analysis to be utilized within the same case.¹⁷⁴

This lack of consistency between federal courts in relation to the number of factors they utilize to assess section 523(a)(5) dischargeability issues frustrates the objective of a uniform application of bankruptcy law. The goal of uniformity is further eroded by the methods these courts use to apply the factors they list as critical. Courts that list a set of factors they rely on are not required to hear and assess evidence on every one.¹⁷⁵ Conversely, the factors that courts lay out often do not represent a comprehensive list of all the factors they may consider.¹⁷⁶ Additionally, bankruptcy courts are not constrained by any fixed hierarchy in considering what importance should be placed on each factor.¹⁷⁷ The lack of con-

Stone, 79 B.R. at 638 (citing *Coffman*, 52 B.R. at 674-75); see also *In re Combs*, 101 B.R. 609, 615-16 (Bankr. 9th Cir. 1989) (listing eight factors); *In re Calhoun*, 715 F.2d 1103, 1108 n.7 (6th Cir. 1983) (listing nine factors); *Friedman v. Silberfein*, 138 B.R. 778, 780 (Bankr. S.D.N.Y. 1992) (listing eight factors); *In re Peterson*, 133 B.R. 508 (Bankr. W.D. Mo. 1991) (listing 18 factors); *In re Hall*, 119 B.R. 272, 275-76 (Bankr. M.D. Fla. 1990) (listing eight factors).

172. See *supra* note 170 for a comparison of differing circuits.

173. The United States Court of Appeals for the Seventh Circuit provides an example of a jurisdiction with conflicting analysis. A comparison of a few cases addressing the dischargeability provision under section 523(a)(5) indicates the less-than-uniform application of factors. *In re Woods*, 561 F.2d 27, 30 (7th Cir. 1977) (utilizing four factors); *In re Coil*, 680 F.2d 1170, 1172 (7th Cir. 1982) (stating the *Woods* factors are not sufficient); *Daulton v. Daulton*, 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992) (listing 20 factors to be considered); *In re Mitchell*, 132 B.R. 585, 587 (S.D. Ind. 1991) (utilizing six factors).

174. As an example, the bankruptcy court in *In re Davidson*, 104 B.R. 788, 794-95 (Bankr. N.D. Tex. 1989), *aff'd*, 133 B.R. 795 (N.D. Tex. 1990), *rev'd on other grounds*, 947 F.2d 1294 (5th Cir. 1991), relied on 12 factors drawn from several cases to find a debt to be dischargeable. On appeal, the district court affirmed, citing eight factors in its analysis. *In re Davidson*, 133 B.R. 795, 798-99 (N.D. Tex. 1990), *rev'd on other grounds*, 947 F.2d 1294 (5th Cir. 1991).

Similarly, in *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986), the United States Court of Appeals for the Fourth Circuit discussed how the district court took into consideration "certain additional factors" which had been utilized by other courts but had not been addressed in the bankruptcy court's decision. *Id.* at 1077. The Fourth Circuit then reversed on other grounds. *Id.*

175. *In re McCauley*, 105 B.R. 315, 319 (E.D. Va. 1989).

176. *In re Coil*, 680 F.2d 1170, 1172 (7th Cir. 1982) (considering four factors from *Woods*, 561 F.2d at 30, but indicating that these factors were not all inclusive); *In re Balvich*, 135 B.R. 327, 333 (Bankr. N.D. Ind.) (identifying four factors but stating that they were not "exhaustive or necessarily determinative"), *aff'd*, 135 B.R. 323 (N.D. Ind. 1991); *In re Mitchell*, 132 B.R. 585, 587 (S.D. Ind. 1991) (listing six factors but stating that these were not exhaustive).

177. *McCauley*, 105 B.R. at 319 (assigning no precise weights to the factors; determination was held to be within the discretion of the trier of fact).

sistency in the factors federal courts use to assess section 523(a)(5) issues, coupled with the wide discretion courts possess to create ad hoc hierarchies of importance, strongly contravenes the notion that the federal courts are applying the law uniformly or that there is one federal standard.

Aside from the discrepancies concerning the use of the various factors, other inconsistencies also arise. The intent of the parties at the time of divorce or settlement is a key element in resolving the dischargeability issue in most of these cases. This element, however, is given varying treatment in different federal courts. Many courts rely on their lists of factors to find the intent of the parties,¹⁷⁸ while others consider the intent of the parties a threshold issue which may preclude further inquiry.¹⁷⁹ This dichotomy of approaches was confronted by the United States District Court for the District of Colorado in *Sampson v. Sampson*.¹⁸⁰ The *Sampson* court was forced to reconcile two conflicting decisions within its own circuit.¹⁸¹ Ultimately, the court chose to look behind the parties' written agreement even though it was unambiguous—in accordance with one conflicting decision and in contravention of the other.¹⁸²

As the previous paragraph indicates, "intent" is a critical element in resolving the issue of dischargeability. There are, however, conflicting

178. See, e.g., *In re Gianakas*, 917 F.2d 759, 762 (3rd Cir. 1990); *Sylvester v. Sylvester*, 865 F.2d 1164, 1166 (10th Cir. 1989); *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984); *Friedman v. Silberfein*, 138 B.R. 778, 780 (Bankr. S.D.N.Y. 1992); see also *In re Calhoun*, 715 F.2d 1103, 1109 (6th Cir. 1983) (recognizing the intent of the parties as a threshold issue but utilizing an assessment of the factors to establish intent).

179. *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986). In *Tilley*, both the bankruptcy court and the district court considered numerous factors from which they concluded that the parties had intended to create a nondischargeable support obligation. The Fourth Circuit however reversed, finding no proof of mutual intent in the record. *Id.* at 1078. Because the circuit court was not convinced that the parties mutually intended to create support payments, it found it unnecessary to consider the factors relied on by the district court. *Id.* at 1078 n.4. The Fourth Circuit court reasoned that, "[i]ntent clearly remains the threshold that must be crossed before any other concerns become relevant." *Id.*

The United States Court of Appeals for the Tenth Circuit in *In re Yeates*, 807 F.2d 874 (10th Cir. 1986), also viewed the intent of the parties as a threshold issue. The *Yeates* court reasoned that if the parties' written agreement unambiguously showed their intent, then that evidence was persuasive and normally controlling, thus requiring no further inquiry into extrinsic evidence. *Id.* at 878.

180. 142 B.R. 957 (D. Colo. 1992), *aff'd*, 997 F.2d 717 (10th Cir. 1993).

181. The *Sampson* court considered *In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987) (focusing on the extrinsic evidence to find intent of the parties), and *Yeates*, 807 F.2d at 874 (stating that no extrinsic evidence should be considered if the parties' intent is unambiguously stated in the written agreement), as irreconcilable. *Sampson*, 142 B.R. at 958. The *Sampson* court saw these decisions as two "ships passing in the night" and opined that further clarification by the court of appeals would be of great help. *Id.* at 959.

182. *Sampson*, 142 B.R. at 958.

views among the federal courts as to whose "intent" the reviewing court must establish. Many courts agree that it is the intent of the parties that is dispositive,¹⁸³ while others focus on the intent of the state divorce court.¹⁸⁴ Still others look to both the parties' and the state court's intent in varying degrees.¹⁸⁵

Most federal courts do not consider the parties' changed circumstances at the time of the bankruptcy filing in making their dischargeability determinations. This approach, however, is not uniformly followed. The United States Court of Appeals for the Sixth Circuit now stands alone as the only circuit that considers this factor.¹⁸⁶

Other legal doctrines underscore the likelihood that the uncertainty and nonuniformity among the circuits will be maintained in this area of the law, namely, collateral estoppel and abstention.¹⁸⁷ The Fifth Circuit held that collateral estoppel may bar debtors from claiming a debt to be dischargeable as a property settlement when they have deducted the payments as alimony on their tax returns.¹⁸⁸ Cases in other jurisdictions have made no mention of whether debtors were deducting payments from earned income on their tax returns. This threshold defense that the

183. *In re Combs*, 101 B.R. 609, 615 (Bankr. 9th Cir. 1989); *Sylvester v. Sylvester*, 865 F.2d 1164 (10th Cir. 1989); *In re Crist*, 632 F.2d 1226, 1229 (5th Cir. 1980), *cert. denied*, 451 U.S. 986, and *cert. denied*, 454 U.S. 819 (1981); *In re Hall*, 119 B.R. 272, 276 (Bankr. M.D. Fla. 1990).

184. See *In re Mitchell*, 132 B.R. 585, 587 (S.D. Ind. 1991); *In re McCauley*, 105 B.R. 315, 318 (E.D. Va. 1989) (finding that the bankruptcy court's task was to ascertain the intent of the state court judge while the intent of the parties was irrelevant); see also *In re Peterson*, 133 B.R. 508, 512 (Bankr. W.D. Mo. 1991) (holding that the state court's intent is only one of many factors to be considered).

185. Compare *In re Coil*, 680 F.2d 1170, 1172 (7th Cir. 1982) (stating that the intent of the parties or the state court must be determined) and *In re Haas*, 129 B.R. 531, 536 (Bankr. N.D. Ill. 1989) (holding that the intent of the parties or the state court must be determined) with *In re Hart*, 130 B.R. 817, 849 (Bankr. N.D. Ind. 1991) (holding that the intent of parties and state court must be determined).

186. *Frisbee v. Frisbee*, 144 B.R. 839, 840 (Bankr. W.D. Tenn. 1992) (citing *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983)); see also *In re Stone*, 79 B.R. 633, 641-50 (Bankr. D. Md. 1987) (rejecting *Calhoun's* doctrine of consideration of a party's present ability to pay and, in Appendix "A" of the decision, surveying all circuits to conclude that the Sixth Circuit stood alone with the possible exception of the Tenth Circuit). The United States Court of Appeals for the Tenth Circuit, however, rejected the *Calhoun* doctrine in *Sylvester*, 865 F.2d at 1164. See also William H. Brown, *The Impact of Bankruptcy on Alimony, Maintenance, and Support Obligations: The Approach in the Sixth Circuit*, 56 TENN. L. REV. 507, 508 (1989) (stating that the Sixth Circuit was unique in its approach).

187. In addition to the employment of the doctrine of collateral estoppel, discussed in this paragraph, the doctrine of abstention has been employed by bankruptcy courts to refuse to hear marital debt dischargeability questions. For a more complete discussion of this issue, see *infra* part X.

188. See *In re Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991); *In re Robinson*, 122 B.R. 502, 506 (Bankr. W.D. Tex. 1990).

Fifth Circuit recognized provides an ex-spouse creditor with a new weapon that may or may not become useful in other jurisdictions.

VIII. CASE LAW ILLUSTRATIONS

Case law also provides examples of how a woman's participation in the adversary bankruptcy procedure can exact a tremendous toll. Women often lose in bankruptcy even when they "win" the dischargeability issue. The discretion that section 523(a)(5) vests the bankruptcy court with in designating payments as either alimony or as a property settlement is an open invitation to debtors to at least attempt to discharge the marital debts in question. Debtors pondering this decision can only be encouraged by the tremendous uncertainty created by the conflicting court decisions in this area. Many male debtors who file for bankruptcy following divorce realize that their ex-wives often will not have the financial resources to challenge their discharge and use this fact as leverage to force favorable settlements. The ambiguity of section 523(a)(5), the uncertainty and unpredictability of court decisions, and the weak financial position of many ex-wives following a divorce are all factors which seem to entice the debtor to seek the discharge.

For example, on March 30, 1983, David and Nancy Davidson were divorced.¹⁸⁹ Pursuant to their divorce decree, Mr. Davidson agreed to pay his ex-wife \$7732 per month for 121 months.¹⁹⁰ After making thirty-seven payments, Mr. Davidson stopped making payments in July of 1986, and in March of 1988 he filed for bankruptcy.¹⁹¹ Even though: 1) the divorce decree expressly stated the support obligation was not a property settlement;¹⁹² 2) Mr. Davidson labelled his checks to Nancy as "alimony"; 3) Mr. Davidson deducted the payments as alimony on his income tax returns; and 4) Mrs. Davidson declared the checks as alimony income on her tax returns, Mr. Davidson nonetheless argued that the money was not alimony and attempted to discharge the debt as a property settlement.¹⁹³

On July 1, 1988, (after going two years with no support payments), Mrs. Davidson initiated an adversary proceeding in bankruptcy court to object to her ex-husband discharging the marital debts. On August 30, 1989, (after thirty-seven months without support), the bankruptcy court found

189. See *In re Davidson*, 133 B.R. 795, 796 (N.D. Tex. 1990), *rev'd on other grounds*, 947 F.2d 1294 (5th Cir. 1991).

190. *Id.* at 797.

191. *Id.*

192. The divorce decree stated: "The support obligation . . . is unrelated to the division of marital property . . . and is not intended in any way to constitute a form of payment to Wife for any rights or interest she may have in the marital properties of the parties." *Id.*

193. *Id.*

the entire debt to be dischargeable.¹⁹⁴ Mrs. Davidson appealed to the federal district court, which affirmed the bankruptcy court's ruling.¹⁹⁵ She further appealed the decision to the United States Court of Appeals for the Fifth Circuit, which held on December 2, 1991 (after sixty-five months with no support payments) that the debt was in fact nondischargeable¹⁹⁶ and ordered payment.¹⁹⁷

Under a purely statistical analysis, the *Davidson* case would represent a "win" for a female ex-spouse creditor because the debt was ultimately ruled to be nondischargeable, but at what cost? Considering the fragile financial underpinnings upon which many women stand following a divorce, how many could have mustered the financial resources to sustain such a prolonged battle? The current language of section 523(a)(5) promotes litigation and, as a consequence, women in dire financial straits are often forced to expend time and money just to preserve the status quo when an ex-husband seeks to discharge his obligations. Unlike those women who ultimately find some solace in the fact that they successfully prevented the discharge, women who are unsuccessful in preventing a discharge are often left destitute.¹⁹⁸

The assertion that section 523(a)(5)'s discharge provision perpetuates unfair economic discrimination against women does not depend on proving that ex-husbands discharge more debts in post-divorce bankruptcies than ex-wives. While this statistical disparity might provide insight into the fairness of the adversary proceeding rulings themselves, it ignores the devastating practical impact each of these legal confrontations has on the participants. Therefore, even when a woman "wins" by preventing an ex-husband from discharging the debt he had agreed to pay her in their di-

194. *Id.* at 797-98.

195. *Id.* at 795.

196. The court found that David had set up "an intricate and unambiguous divorce settlement" and had taken advantage of the characterization of the payments as alimony for tax purposes. Because of his actions, the court reasoned that David was collaterally estopped from now arguing that the payments were not alimony. *In re Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991).

197. Because the divorce decree stipulated that a party who defaulted on an obligation must pay the other party's legal fees in pursuing compliance, the court awarded Nancy's legal fees and held that these fees were so intertwined with the support payments that they were also nondischargeable. *Id.* at 1297-98. *But see Adams v. Zentz*, 963 F.2d 197 (8th Cir. 1992) (finding that legal fees awarded to an ex-husband who successfully challenged his ex-wife's refusal to comply with custody agreement was a dischargeable debt when the ex-wife filed for bankruptcy).

198. The author does not suggest that women are the only victims under § 523(a)(5) of the Code. However, there appears to be no literature reporting the same kind of injustice or inequity affecting men.

voiced decree, her requisite temporal and financial costs often result in a hollow victory.

IX. RESHAPING MARITAL DEBT DISCHARGE

To examine gender and its social significance requires that equal value be conferred on the different ways in which humans speak and that appropriate consideration be afforded to all of the various experiences that men and women bring to identification of issues and to problem solving. This consideration is not limited to spouses or their lawyers, but also extends to the persons making the decisions that affect the parties. In the context of bankruptcy law, the participants in the judicial appointment process need "to seek [bankruptcy] judges with varied life experiences [and] judges with the potential for a better understanding of the multitude of perspectives that are likely to be placed before them in the courtroom."¹⁹⁹ While women systematically have been denied choices and power by the legal system in this country, to give them access to the seats of power, yet limit their method of exercising it, is to give them no choice at all.²⁰⁰

199. Patricia A. Cain, *Good and Bad Bias: A Comment On Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1950 (1988).

200. Indeed, one explanation for the apparent disparity between ex-wives and ex-husbands under § 523(a)(5) concerns the perceptions and perspectives of the bankruptcy bench. Their gender may not allow for a recognition and complete examination of the "female experience" in our culture. In 1992, there were 291 bankruptcy judges in the United States. 28 U.S.C. § 152 (1988). The Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106 Stat. 965, authorized the creation of 35 additional permanent and temporary judgeships. Until just recently, however, Congress had not appropriated funding for those new positions. See Pub. L. No. 103-121, 107 Stat. 1153 (1993). In 1992, only 40 of the 291 bankruptcy judges were women. Telephone Interview with Susan Dorwaldt, Administrative Office of the United States Courts, Bankruptcy Division (Oct. 24, 1992). Inclusion of this statistic is not intended to dismiss the discussion concerning inequality as simply a "number problem" or to suggest that only women are qualified to bestow equal treatment upon women. Rather, it is to state that many experiences of women are so unique to women that they are the only ones who can truly understand the woman's position in the world and the second-class treatment women receive. As Professor Catharine MacKinnon asserts:

A few husbands are like most wives—financially dependent on their spouse. . . . [However,] [t]o be poor, financially dependent, and a primary parent constitutes part of what being a woman means. . . . A gender-neutral approach to those circumstances obscures, while the protectionist approach declines to change, the fact that women's poverty, financial dependency, motherhood, and sexual accessibility . . . substantively make up women's status *as women*.

CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 73 (1987).

Professor MacKinnon does not suggest, nor would it be reasonable to propose, that *all* bankruptcy judges be women because that is the only way ex-wives can successfully challenge their ex-husbands' attempts to discharge marital debts. However, she *does* argue

In the context of a bankruptcy and, more particularly, the discharge of marital debts, differences between men and women must be acknowledged and accepted. Those differences notwithstanding, the woman in an inferior bargaining position must be able to access and engage competent counsel for advice concerning not only the immediate (divorce) ramifications of the termination of her marriage and settlement with her ex-husband, but also the potential long term (bankruptcy) ramifications of the dissolution.²⁰¹

that women are clearly victims of a male-oriented, male-dominated interpretation of equality and therefore, a significant change is necessary. Immediately adding women to the bankruptcy bench can only improve women's overall fortune in bankruptcy. The percentage of female bankruptcy judges (currently 13.75%) should equal the percentage of women in the United States (currently 51.2%, STATISTICAL ABSTRACT, *supra* note 59, tbl. 13, at 14), or at least mirror the percentage of women who utilize the bankruptcy system.

The "dominance" discussion, as it has been characterized by legal scholars, is as much about consciousness raising as it is about immediate change. Realistically, it is unlikely that such a change in the bankruptcy judiciary will occur soon. The bankruptcy court system is but one of many institutions where males seem firmly entrenched and where radical change, such as making the next 126 bankruptcy appointments all women, would be vigorously opposed. Compare the problem of fully integrating the judiciary to Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) (holding that a state law requiring "business establishment[s]" not to exclude persons on the basis of gender, was not violative of the First Amendment's freedom of association clause), and *Isbister v. Boys' Club, Inc.*, 707 P.2d 212 (Cal. 1985) (excluding females from private all-male associations successfully challenged on equal protection grounds).

The number of female bankruptcy judges, however, clearly represents a problem in our society. For a court of equity to be of "right, [just] or moral quality" requires that all members of the society be given an opportunity to participate and to be heard. See *Fineman*, *supra* note 58, at 730 (arguing in the context of child custody determinations). Indeed, judges should not be disqualified from a case because they cannot be totally impartial to the controversies before them; they should not be automatically disqualified for being partial and dependent. See *Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations For Our Judges*, 61 S. CAL. L. REV. 1877 (1988). Professor Resnik states that judges should be involved, engaged, and interdependent so that there is less distance between judges and their judgments. *Id.* at 1943-44. Institutional insulation of decision-makers from their decisions does not necessarily lead to "more justice" because the present system is fraught with examples of racial and gender bias, notwithstanding the claimed impartiality of the judiciary. *Id.* at 1903-04.

201. Women are entitled to education by competent counsel to discuss alternatives when their marriages are being dissolved and their lives disassembled. "Competence" requires divorce counsel to be knowledgeable in both family law and bankruptcy law, and it requires bankruptcy counsel to be familiar with family law. "Competence" also requires family law and bankruptcy counsel to ask what Professor Katherine Bartlett has identified as "Asking the Woman Question." Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

"Asking the Woman Question" requires one to view situations in terms of the gender-based pain and oppression experienced by women in society. *Id.* at 847. Professor Bartlett actually characterizes "Asking the Woman Question" as being comprised of seven questions:

This entire discussion of the value of "maleness" versus "femaleness" should not be construed to mean that one gender's experiences must be "brought up to the level of" another gender's experiences.²⁰² Rather, it requires that both parties to a divorce protect themselves while balancing personal protection against the need to serve their underlying goal: to work together to end a marriage and to divide the remnants of that marriage in an equitable manner.

"(1) What have been and what are now all women's experiences of the 'Life Situation' addressed by the doctrine, process, or area of law under examination? (2) What assumptions, descriptions, assertions and/or definitions of experience—male, female, or ostensibly gender neutral—does the law make in this area? . . . (3) What is the area of mismatch, distortion, or denial created by the differences between women's life experiences and the law's assumptions or imposed structures? . . . (4) What patriarchal interests are served by the mismatch? . . . (5) What reforms have been proposed in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically? . . . (6) In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation? . . . and (7) How do we get there from here?"

Id. at 837 n.24 (quoting Heather R. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 72-77 (1985) (omissions in original)). "Asking the Woman Question" does not require all problems to be resolved in favor of the female participant in a dispute. Rather, it compels people to analyze the social significance of gender, considering the impact of women's experiences. As Professor Bartlett writes:

Asking the woman question does not require decision in favor of a woman. Rather, the method requires the decisionmaker to search for gender bias and to reach a decision in the case that is defensible in light of that bias. It demands, in other words, special attention to a set of interests and concerns that otherwise may be, and historically have been, overlooked. The substance of asking the woman question lies in *what* it seeks to uncover: disadvantage based upon gender.

Id. at 846-47. Moreover, bankruptcy reform in this area also requires changing the types of questions that are asked by the bankruptcy court. As previously discussed herein, bankruptcy courts create tests with various factors to determine whether an agreement or document is "in the nature of alimony, maintenance or support" or whether it is just a property settlement. The factors which the courts consider vary only slightly and seem to turn on a bankruptcy court's ability to divine the true intent of the divorcing parties and, arguably the divorce court. Considerable time and energy is misdirected in this pursuit. The courts should adopt a test that mirrors Professor Bartlett's "Asking the Woman Question."

202. Historically, differences between the sexes are not defined in terms of distinctions between men and women, but in terms of how women are unlike men. Many battles are waged over whether women should be allowed to compete as equals to men notwithstanding their "differences." See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding the constitutionality of exclusion of women from draft registration because women are not fit for combat); *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (stating that the exclusion of pregnancy from risks covered by state employees' insurance plan does not constitute sex discrimination under the Equal Protection Clause because the plan did not discriminate between women and men but between "pregnant women" and "non-pregnant persons"); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that the state of Idaho could not presumptively deny women the right to administer estates).

However, in recent years the debate has been refined. See *supra* note 80 (quoting Professor Joan Williams).

For example, student advocates at The Dickinson School of Law Family Law Clinic in Carlisle, Pennsylvania, have become increasingly more sensitive to the plight of women after divorce and the likelihood that bankruptcy, which might negatively affect their client, may follow. Consequently, the students have added "protective" language in the document that determines the distribution of assets in a divorce. Their "Order of Court re: Equitable Distribution of Marital Property" affords an extra measure of security to the client (usually the woman) against a devastating bankruptcy which could cause an ex-spouse to assume certain joint obligations from the marriage, subsequently forcing her to file for bankruptcy. That language states: "Should defendant [ex-spouse] discharge any or all joint debts in bankruptcy, this agreement shall become void and plaintiff will maintain her right to assert her alimony claim notwithstanding finality of divorce."²⁰³ This language is not intended as a cure-all;²⁰⁴ it is, however, intended to enlighten both spouses to the reality that the end of their marriage, or their physical and emotional bond, is not necessarily the end of their financial bond. The clause also functions to inform them that counsel must safeguard against the premature or inequitable destruction of this financial bond.

If the bankruptcy bench and bar are unable to "re-think" the way(s) in which women are affected by bankruptcy, particularly as creditors, then the entire marital-debt-dischargeability process must be restructured. Congressional legislation of a division of responsibility regarding the discharge of marital debts would serve as a viable alternative in the attempt to raise the consciousness of all interested parties.

The bankruptcy court is simply not the proper forum within which to address family law issues. Too much time often passes between the divorce and the bankruptcy filing. Moreover, the bankruptcy courts do not want to crowd their dockets with matters that seem only tangentially related to bankruptcy law, and the divorced couple must often expend substantial time and money in order to bring the bankruptcy court "up to speed" before it can even consider the bankruptcy/divorce question involved in any adversarial dispute. The responsibility to make additional inquiry into the marital relationship at issue should be borne by the divorce court, not the federal judiciary. The *quid pro quo* must be, how-

203. See The Dickinson School of Law Family Law Clinic Form: "Order of Court re: Equitable Distribution of Marital Property."

204. Cf. *In re Reichuber*, 104 B.R. 377 (D. Kan. 1989) (stating that the mere fact that the wife had the option of converting property settlement payments from her husband into maintenance in the event of his a default was not sufficient to except those payments from her husband's bankruptcy discharge).

ever, to rewrite section 523(a)(5) of the Code to remove completely the federal court's involvement in this issue.²⁰⁵

A simplified marital-debt-dischargeability provision would serve women, men, and the bankruptcy court system more effectively. The modified approach would surrender traditional "family law" disputes to the divorce courts and require bankruptcy courts to decide only the "bankruptcy" question: whether the debt in question is dischargeable. Divorced women would be in an improved position if the discussion of whether a divorce decree or marital settlement agreement was "fair" was conducted in the courtroom where the document was first approved. There, an acute examination into the relationship of the divorcing parties could be conducted. A more appropriate version of section 523(a)(5) would require the bankruptcy court to refuse to discharge any debt to a spouse, ex-spouse, or child of the debtor, which was reduced to judgment by a court of competent jurisdiction and which arose out of a separation or divorce or out of an action for alimony or support.

By redefining section 523(a)(5) as a provision that recognizes divorce courts as the final arbiters of marital disputes, a bankrupt spouse must return to the divorce court for modification or elimination of alimony, maintenance, or support. There would be no "second bite at the apple" in bankruptcy court. The bankruptcy court's involvement in the marriage or dissolution of the marriage of the debtor and his or her former spouse would be minimal.²⁰⁶ Jurisdiction over the issue of the extent to which the marital debt in question should be reduced or forgiven altogether would lie solely with the divorce court.²⁰⁷ The bankruptcy court would

205. Jane Singer recently called for similar amendments to the Code, asserting that recent developments in family law undermine the Code's attempt to differentiate between alimony and/or support obligations and property settlements. See Jane B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J. ON LEGIS. 43, 45-47 (1993).

206. The inquiry of the bankruptcy court would be, "Was this debt the result of a judgment entered by a court of competent jurisdiction? If so, the debt is nondischargeable. If not, the debt is discharged, unless some other provision of the Code applies and would prevent the debt from being discharged."

207. Currently, marital debt dischargeability questions are generally resolved in the bankruptcy court, but the court's jurisdiction over these matters is held concurrently by the bankruptcy court and "any appropriate nonbankruptcy forum." FED. R. BANKR. P. 4007(b) (advisory committee's note) (1988); see also Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, or False Start?*, 69 N.C. L. REV. 577, 625 (1991). The dischargeability issues usually reach a state court (the most common "nonbankruptcy forum") after the debtor's bankruptcy is complete, hence the bankruptcy court never addresses the nature of the marital debt(s) in question. *Id.* at 626. Therefore, it is already possible for a divorce court to hear and resolve dischargeability questions. This Article is not proposing to increase the power of the divorce courts, but to limit the power of the bankruptcy courts.

simply order that the debtor must pay all of the debts that the divorce court ordered paid. If the debtor is without funds to pay the debt, or if a modification of the divorce court's order is necessary to provide the debtor with temporary or permanent relief, the debtor spouse would be free to return to the state divorce court and ask for such relief.²⁰⁸

This proposed shift in the focus of section 523(a)(5) from the bankruptcy court to a state court is not unprecedented. One need only look to neighboring subsections of section 523 of the Code for comparison.²⁰⁹ Unlike the marital obligations covered by section 523(a)(5), other debts excepted from discharge are more straightforward; the dischargeability analyses with regard to these debts does not seem to require a second inquiry into a subjective matter such as the intent of the parties.

Section 523(a)(7) for example, excepts from discharge debts for fines, penalties, and forfeitures payable to and for the benefit of a governmental unit.²¹⁰ The bankruptcy court is not required to evaluate the underlying reason for the debt, but denies the discharge after it objectively determines that such a debt exists.²¹¹ Thus, section 523(a)(7) reflects the "Congressional policy that bankruptcy should not shield an individual from the consequences of his wrongful behavior."²¹² By exempting from discharge fines and penalties owed to the government, Congress has

208. Normally, creditors involved in a bankruptcy suit are barred from returning to state court to resolve disputes concerning a debtor's obligation to pay a debt that arose prior to bankruptcy, because the filing of a petition in bankruptcy "automatically stays" collection efforts directed at prepetition debts. See 11 U.S.C. § 362(a) (1988). However, the proposed change to § 523(a)(5) of the Code would allow the *debtor*, and not the creditor, to return to state court for modification or elimination of an alimony, maintenance, or support obligation. There is no prohibition under the Code against the debtor returning to state court to modify or eliminate a prepetition debt. See, e.g., *In re White Motor Credit Corp.*, 37 B.R. 631, (N.D. Ohio 1984) (explaining that automatic stay provisions were intended as a stay of proceedings against the debtor and no other), *aff'd*, 761 F.2d 270 (6th Cir. 1985).

209. See 11 U.S.C. § 523(a)(7)-(8) (1988 & Supp. III 1991); see also *infra* notes 210-16 and accompanying text.

210. 11 U.S.C. § 523(a)(7). Although the Bankruptcy Act of 1898 "made no specific provision concerning the dischargeability of fines and penalties due to a governmental unit, but it became well settled that such obligations were not provable and therefore . . . not dischargeable." *In re Tauscher*, 7 B.R. 918, 919 (Bankr. E.D. Wis. 1981) (citing 3 COLLIER ON BANKRUPTCY § 523.17 (Lawrence P. King ed., 15th ed. 1979)).

211. See, e.g., *Kelly v. Robinson*, 479 U.S. 36, 51 (1986) (reaffirming that the Code clearly and unequivocally provides that fines and penalties owed to a governmental unit, which are not assessed for compensation, are not affected by bankruptcy discharge). Congress has provided, however, that section 523(a)(7)-type debts are dischargeable in a Chapter 13 bankruptcy. See 11 U.S.C. § 1328 (1988 & Supp. III 1991); see also *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (holding that a penalty in form of restitution is a dischargeable debt in a Chapter 13 bankruptcy proceeding).

212. *In re Ryan*, 15 B.R. 514, 520 (Bankr. D. Md. 1981).

reached a compromise between its desire to provide a bankrupt individual with a fresh economic start, and government's need to control reprehensible conduct.

Similarly, section 523(a)(8)²¹³ forecloses dischargeability of debts resulting from educational loans made, insured, or guaranteed by a governmental unit unless they: 1) first became due more than seven years before the filing of the bankruptcy petition; or 2) the debt would impose an undue hardship on the debtor.²¹⁴ Again, unlike section 523(a)(5), the dischargeability test under section 523(a)(8) concerning the seven-year waiting period is self-executing²¹⁵ and does not require the bankruptcy court to assess the parties' original intentions at the time they entered into their debtor/creditor relationship.

Likewise, the test for determining whether an educational loan is dischargeable pursuant to the undue hardship standard also avoids an inquiry into what the parties "intended" when they incurred the debt in question. The appropriate inquiry is merely, "whether a debtor's income is adequate to maintain a minimal standard of living and to pay the educational loan."²¹⁶ This inquiry clearly does not rise to the level of the bankruptcy court's probing of the minds of the debtor and his or her spouse. In contrast to section 523(a)(5), Congress has removed virtually all of the bankruptcy court's discretion in discerning the dischargeability of debts under sections 523(a)(7)-(8) of the Code. Whereas section 523(a)(5) seems to mandate inquiry into what the parties involved in the adversary dispute were thinking and feeling at the time the debt in question arose, sections 523(a)(7)-(8) avoid such an inquiry altogether.

213. 11 U.S.C. § 523(a)(8).

214. *Id.* This section, adopted in 1978, was the congressional response to perceived abuses resulting from graduating students with well paying jobs discharging large amounts of student debts before they acquired any significant assets. H.R. REP. NO. 595, 95th Cong., 1st Sess. 133 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094.

215. S. REP. NO. 989, 95th Cong., 2d Sess. 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865. The lender is not required to file a complaint to determine nondischargeability of any student loan. *Id.*

216. *In re Lekowicz*, 119 B.R. 237, 237 (D. Colo. 1990); *cf. In re Webb*, 132 B.R. 199, 202 (Bankr. M.D. Fla. 1991) (requiring a poverty-level standard of living and the debtor's attempts to minimize living expenses before discharging a student loan); *see also In re Gustafson*, 111 B.R. 282 (Bankr. 9th Cir. 1990) (stating that a student loan is presumptively nondischargeable until a complaint is filed to determine its dischargeability), *rev'd on other grounds*, 934 F.2d 216 (9th Cir. 1991). *But see In re Berthiaume*, 138 B.R. 516 (Bankr. W.D. Ky. 1992) (explaining that a relevant inquiry when assessing dischargeability of student loans includes any evidence of an "intent" to abuse the bankruptcy system).

X. ABSTENTION

It is important to note that, even though Congress allows the bankruptcy courts to determine whether an agreement between ex-spouses is in the nature of alimony, maintenance, or support, historically, federal courts have been reluctant to enter the field of family law.²¹⁷ In fact, as recently as 1992, in *Ankenbrandt v. Richards*,²¹⁸ the United States Supreme Court reaffirmed the "domestic relations exception" under which the federal courts decline jurisdiction in certain cases.²¹⁹ The *Ankenbrandt* case, involving child abuse,²²⁰ established that the federal diversity jurisdiction statute²²¹ contains an "exception" that divests federal courts of their jurisdiction to adjudicate certain cases regarding divorce, alimony, or child custody.²²² However, the issues in *Ankenbrandt* did not fall directly within the "exception."²²³ Discussing the historical reluctance of federal courts to hear family law cases, the Court reasoned that, even though Article III of the United States Constitution "does not mandate the exclusion of domestic relations cases from federal-court jurisdiction, [this] does not mean that the [federal] courts necessarily *must* retain and exercise jurisdiction over [domestic relations] cases."²²⁴ Indeed, the long-standing practice of the Supreme Court and other federal courts as well is to refrain from hearing such matters.²²⁵

217. See, e.g., *In re Burrus*, 136 U.S. 586, 594 (1890); *In re Baker*, 75 B.R. 120, 121 (Bankr. D. Del. 1987); *In re Heslar*, 16 B.R. 329, 332 (Bankr. W.D. Mich. 1981); cf. *In re Wilson*, 85 B.R. 722 (Bankr. E.D. Pa. 1988) (noting that it is appropriate for bankruptcy courts to avoid incursions into family law matters; however in this jurisdiction, equitable distribution of the marital estate does not implicate abstention concerns).

218. 112 S. Ct. 2206 (1992).

219. *Id.* at 2210-15.

220. *Ankenbrandt*, a resident of Mississippi, alleged that her children were subjected to child abuse at the hands of their father and his female companion, who were residents of Louisiana. *Id.* at 2208-09.

221. 28 U.S.C. § 1332 (1988).

222. *Ankenbrandt*, 112 S. Ct. at 2213.

223. *Id.* at 2215. The factual situation in *Ankenbrandt*, however, gave rise to a tort, which does not fall within the domestic relations exception. *Id.*

224. *Id.* at 2212 (emphasis added).

225. *Id.* at 2209-10. The *Ankenbrandt* Court held that it did have jurisdiction to hear the *Ankenbrandts'* claim, based upon an historical review of the domestic relations exception to federal court jurisdiction, concluding that the exception encompasses only matters of divorce, alimony, or child custody decrees and further finding that the case *sub judice* was outside of the list. *Id.* at 2216. Justice Blackmun, however, in a separate concurrence provided an even more persuasive reason for hearing the *Ankenbrandts'* case inasmuch as he rejected the majority's interpretation of the domestic relations exception as being an exception to federal diversity jurisdiction. *Id.* at 2217 (Blackmun, J., concurring). Instead, Justice Blackmun referred to the domestic relations exception as evolving out of the ever-developing doctrine of abstention. *Id.* at 2217-22.

While it is conceded that not all family law matters result in the federal court's abstention, Congress has legislated that "[n]othing . . . prevents a [bankruptcy] court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 [of the U.S. Code]."²²⁶ In fact, abstention is one of the key devices used by bankruptcy courts to manage overcrowded dockets.²²⁷ For example, a bankruptcy court may elect to abstain from deciding a case when the issue could be effectively addressed by a court of concurrent jurisdiction.²²⁸

In light of the traditional policy of the federal judiciary to enter the family law arena with reluctance, Congress, through grants of legislative authority, should not enable bankruptcy courts to become "pseudo-family law courts." Insofar as Congress has legislated authority to the federal judiciary to resolve matters involving alimony, maintenance, and support, state appellate courts are not necessarily the courts of last resort for divorced spouses. In the course of adjudicating bankruptcy cases, bankruptcy courts are forced to address divorce-related concerns, a role the federal courts are reluctant to undertake themselves, and one that they are not fully-equipped to perform.

XI. CONCLUSION

This Article is about change. It not only addresses the continuing struggle to change perceptions that feminist scholarship must be limited to "female issues," but also serves as a catalyst to change established notions of how bankruptcy law treats women. The change that is mandated is the deconstruction of institutional biases and the wholesale reshaping of thinking and behavior so that law, in this case bankruptcy law, is reflective of and responsive to all members of the population.

"The reasons for federal abstention in these cases are apparent: the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts."

Carver v. Carver, 954 F.2d 1573, 1578 (11th Cir.) (quoting *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978)), *cert. denied*, 113 S. Ct. 496 (1992).

226. 28 U.S.C. § 1334(c)(1) (1988).

227. Henry J. Sommer, *The Impact of Bankruptcy on Family Law Cases*, in *DIVORCE & BANKRUPTCY* 40-61 (Pennsylvania Bar Inst. ed., 1991).

228. *See, e.g., In re Mitchell*, 132 B.R. 585 (S.D. Ind. 1991). The district court accepted the bankruptcy court's recommendation of abstention, noting that the state court had concurrent jurisdiction over this matter, there were ongoing proceedings in state court related to the divorce obligations, and that the state court was in a better position to discern the nature of those divorce obligations. *Id.* at 588.

In the context of bankruptcy law, women have been historically regarded as extensions of their husbands and, upon divorce, they have not been regarded at all. Such treatment will no longer suffice. Society must acknowledge women as equal to men and must incorporate into legal problem-solving analyses the perspectives of women and the effect the law has on women. Additionally, women must educate themselves and must seize responsibility for their own financial destinies when ending marriages. They must not leave the key decisions concerning alimony, maintenance, and support to ex-husbands, attorneys, or even judges.

Likewise, the bankruptcy bench and bar must transcend the simple application of an arbitrary list of factors to determine when a marital debt is dischargeable. If, however, the legal system is unable to change its thinking and attitude toward women and bankruptcy law, the bankruptcy courts should abstain from considering marital debt discharge questions, leaving this role to the state divorce courts. Otherwise, Congress should intervene and divide the bankruptcy and divorce responsibilities between bankruptcy courts (which would decide only if a debt is the result of a judgment in a dissolution or a support action) and the state courts (which would decide if the underlying judgment should be modified or set aside based upon the spouse's financial condition due to bankruptcy).

This Article does not suggest that a divorce court is the perfect place for the resolution of marital debt questions when one spouse files for bankruptcy. If a divorce court is able to review a couple's finances, however, assess the relative culpability in causing the break-up of the marriage, and determine the amount of money and property that will counterbalance fairly the effects of the divorce, then that decision should not be disturbed by the arbitrary and varied factors that bankruptcy courts develop to determine if such debts are dischargeable in bankruptcy. All too often those factors fail to take into consideration the needs of and the differences between ex-husbands and ex-wives.