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Comments: The Bankruptcy Reform Act of 1978: Dischargeability of Obligations Incurred under Property Settlements, Separation Agreements, and Divorce Decrees

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THE BANKRUPTCY REFORM ACT OF 1978: DISCHARGEABILITY OF OBLIGATIONS INCURRED UNDER PROPERTY SETTLEMENTS, SEPARATION AGREEMENTS, AND DIVORCE DECREES

"It is the underlying policy of the Bankruptcy Act to give the bankrupt a fresh start and to relieve him of pre-existing debts. In many instances the determination of what is alimony, [maintenance, and support] comes into direct conflict with this policy."[1] *Under the Act these debts are nondischargeable. Thus, in an attempt to construe the Act narrowly and uphold the underlying policy of fresh start, courts are faced with the problem of determining how to characterize marital obligations.*

I. INTRODUCTION

On October 1, 1979 the Federal Bankruptcy Reform Act of 1978 (the Code) became effective. Section 523(a)(5) of the Code provides that any debt owed to a spouse, former spouse, or child of the debtor for alimony, maintenance, or support be nondischargeable.[2] This section continues the historical approach of protecting spouses or children from future adversities which they may face when the family unit is destroyed. Hence, section 523(a)(5) codifies the belief that upon divorce the former spouse, rather than society, should be responsible for the maintenance and support of the economically dependent spouse and child. Family support obligations have traditionally been considered a duty, not a debt, and therefore are deemed more important than the debtor's fresh start.

Under the Code, however, an equitable division of property is a dischargeable debt. Consequently, most of the litigation that arises under section 523(a)(5) requires the court to interpret property settlements and separation agreements to determine whether they represent alimony, support, maintenance, or an equitable division of property.

This comment discusses and compares the law as it existed under the prior Bankruptcy Act of 1898 (the Act) with the law as it presently exists under the Code. The primary focus is on the problems courts face in interpreting property settlements, separation agreements, and divorce decrees to determine the dischargeability of a debtor's debts. The problem arises because in making this determination courts must balance the policy of giving the debtor a fresh start against that of requiring the debtor to satisfy his marital obligations. Alimony is clearly nondischargeable; however, third party debts are dischargeable and consequently courts are faced with the problem of determining the nature of the debts in order to determine dischargeability.

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1. *In re Bomer,* Bankruptcy No. W-122-73 (S.D. Iowa, Oct. 30, 1973).
2. *See* 11 U.S.C. § 523(a)(5) (Supp. V 1981).

II. BACKGROUND

A. Definitions

The pivotal issue relevant to the discharge of marital debts in bankruptcy is whether an award in a divorce decree constitutes a grant of alimony or a division of property. Although the designation of property settlement or alimony in a divorce agreement is not conclusive it may be regarded as persuasive.[3] Hence, a brief discussion of the methods used by courts to determine the nature of awards in divorce settlements is warranted.

1. Alimony, Support, and Maintenance

At common law, courts found the justification for alimony, support, and maintenance in the general duty imposed upon the husband to support his wife and child.[4] Consequently, courts considered spousal obligations to be nondischargeable duties as opposed to dischargeable debts.[5] The United States Supreme Court explained this rationale when it noted that "the Bankruptcy law should . . . [not] deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce."[6]

The problem arises, however, in that neither the Bankruptcy Act of 1898 nor the Bankruptcy Reform Act of 1978 include a definition of the term alimony.[7] Consequently, a frequently litigated issue under the original Act and the Code involves the determination of exactly what constitutes alimony, support, and maintenance. In the early cases, courts viewed alimony as an allowance by which a husband paid for his wife's maintenance, as well as for the support of his minor children.[8] These courts automatically presumed the existence of a duty of spousal support that generally terminated upon the dependent spouse's remarriage or the supporting spouse's death.[9] Courts today adopt this

3. Martin v. Henley, 452 F.2d 295 (9th Cir. 1971); *In re* Avery, 114 F.2d 768 (6th Cir. 1940). One reason the designation is only persuasive is because many state courts assimilate the property division into the alimony decree, taking into account the same factors which are relevant in setting alimony when they are, in fact, dividing property. Thus, the courts have come to blur the distinction between alimony orders and divisions of property. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.8 (West 1968).
4. Wetmore v. Markoe, 196 U.S. 68 (1904); Audubon v. Shufeldt, 181 U.S. 575 (1901); Turner v. Turner, 108 F. 785 (D. Ind. 1901); *In re* Shepard, 97 F. 187 (D.N.Y. 1899).
5. *See* cases cited *supra* note 4.
6. Wetmore v. Markoe, 196 U.S. 68, 77 (1904).
7. *See* 11 U.S.C. § 35 (1976) (Bankruptcy Act of 1898); 11 U.S.C. § 523(a)(5) (Supp. V 1981) (Bankruptcy Reform Act of 1978).
8. Goggans v. Osborn, 237 F.2d 186, 188 (9th Cir. 1956); *see also* Wetmore v. Markoe, 196 U.S. 68 (1904); *In re* Adams, 25 F.2d 640 (2d Cir. 1928); Westmoreland v. Dodd, 2 F.2d 212 (5th Cir.), *cert. denied,* 267 U.S. 595 (1924).
9. *See* cases cited *supra* note 8.

same definition of alimony.[10] However, instead of automatically presuming a duty of support between the spouses, modern courts impose alimony only upon a finding based on relative need, the length of the marriage, and the presence of minor children.[11]

2. Property

Debts are considered dischargeable in bankruptcy if the court determines that they arise out of a division of marital property.[12] Whereas the primary purpose of alimony is to support the wife and children, the function of a property settlement is to divide what is considered property owned by each spouse.[13] Such a settlement is usually based on the equities that exist between the parties at the time of the divorce,[14] rather than on the wife's needs and the husband's income.[15] Since the rights of the parties in a property settlement are determined according to the law of contracts,[16] the agreement will remain in effect despite remarriage or changed financial conditions.[17] Hence, courts generally view an obligation which does not terminate upon death or remarriage of the spouse and does not appear to relate to living expenses as indicative of a property settlement.[18]

B. Cases Decided Prior to the Enactment of the 1978 Code

As originally enacted, the Bankruptcy Act of 1898 did not specifically except alimony or support obligations from the discharge of debts.[19] Rather, a debt had to be provable in order for it to be discharged.[20] Under section 63 of the original Act, a provable debt was a fixed liability evidenced by a judgment or instrument in writing.[21] The debt had to be absolutely owing at the time of the petition in bankruptcy, whether then payable or not, and founded upon an express or

10. *See, e.g., In re* George, 15 Bankr. 247 (N.D. Ohio 1981); *In re* Warner, 5 Bankr. 434 (D. Utah 1980).
11. *See* cases cited *supra* note 10.
12. Nitz v. Nitz, 568 F.2d 148 (10th Cir. 1977); Goggans v. Osborn, 237 F.2d 186 (9th Cir. 1956); *In re* Adams, 25 F.2d 640 (2d Cir. 1928); *In re* Loeber, 12 Bankr. 669 (D.N.J. 1981); *see also* 9A AM. JUR. 2D *Bankruptcy* § 801 (1981); Annot., 74 A.L.R.2d 758 (1960).
13. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.8 (West 1968). *See In re* Dirks, 15 Bankr. 775, 778 (D.N.M. 1981).
14. *See In re* Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958); *In re* Dirks, 15 Bankr. 775 (D.N.M. 1981).
15. Courts take these factors into account when determining the amount of alimony. *See supra* notes 8-11 and accompanying text.
16. *See In re* Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958).
17. *Id.*
18. *In re* Taff, 10 Bankr. 101 (D. Conn. 1981).
19. *See* Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (codified as amended at 11 U.S.C. § 35 (1976)).
20. *See id.* § 63 (codified as amended at 11 U.S.C. § 103 (1976)).
21. *Id.*

implied contract.[22] Generally, courts followed the rule that alimony and support payments were not provable claims, and thus a discharge in bankruptcy did not affect the bankrupt's obligation to pay accrued or future subsidies.[23]

The courts relied primarily on two factors to determine that alimony, maintenance, and support obligations were nondischargeable. First, courts looked to the strong public policy that underlied the common law duty of the husband to support the wife and child.[24] Second, because such responsibilities were not considered debts, they were not deemed to be provable.[25] For example, in *Audubon v. Shufeldt,*[26] the issue before the United States Supreme Court was whether the debtor spouse was entitled to a discharge from the arrears of alimony due his former wife.[27] The Court concluded that "neither the alimony in arrears at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication were provable in bankruptcy, or barred by the discharge."[28] The Court further noted that: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife."[29]

Similarly, in *Wetmore v. Markoe,*[30] the Supreme Court held that the bankrupt husband's obligation to pay alimony is based on his common law duty of support.[31] Consequently, the Court ruled that the liability of alimony is saved from discharge in bankruptcy.[32] In reaching its decision, the Court relied upon the reasoning of *Audubon,*[33] and found that an alimony decree is not a debt, but rather a "legal means of enforcing the obligation of the husband and father to support and maintain his wife and children."[34] Furthermore, the Court held that this duty arises not from any contractual obligation, but from an obligation that the law automatically imposes upon the husband when he neglects or refuses to voluntarily discharge this responsibility.[35]

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22. *Id.*
23. Wetmore v. Markoe, 196 U.S. 68 (1904); Audubon v. Shufeldt, 181 U.S. 575 (1901); Turner v. Turner, 108 F. 785 (D. Ind. 1901); *In re* Shepard, 97 F. 187 (D.N.Y. 1899); *In re* Anderson, 97 F. 321 (D.N.Y. 1899). *Contra In re* Houston, 94 F. 119 (D. Ky. 1899); *In re* Van Orden, 96 F. 86 (D.N.J. 1899); *In re* Challoner, 98 F. 82 (D. Ill. 1899); Arrington v. Arrington, 131 N.C. 143, 42 S.E. 554 (1902).
24. *See* Wetmore v. Markoe, 196 U.S. 68 (1904); Dunbar v. Dunbar, 190 U.S. 340 (1903); Audubon v. Shufeldt, 181 U.S. 575 (1901).
25. *See* cases cited *supra* note 24.
26. 181 U.S. 575 (1901).
27. *Id.* at 576-77.
28. *Id.* at 580.
29. *Id.* at 577.
30. 196 U.S. 68 (1904).
31. *Id.* at 74.
32. *Id.* at 77.
33. *Id.* at 72-76.
34. *Id.*
35. *Id.* at 73-74.

In 1903, Congress amended the Bankruptcy Act to include a provision that specifically excepted alimony, maintenance, and support payments from discharge in bankruptcy.[36] Although merely declaratory of the true meaning and sense of the original Act,[37] the amendment was passed with a view toward settling the law and putting to rest any controversies that arose from conflicting decisions in both state and federal courts.[38] Although the 1903 amendment made it clear that alimony, maintenance, and support obligations were excepted from discharge in bankruptcy, the courts were still faced with interpreting divorce decrees and property settlement agreements to determine whether such obligations actually constituted alimony, support, or maintenance.[39] While some federal courts simply accepted the state court's terminology as indicative of alimony and property agreements,[40] other courts maintained that the bankruptcy court is required to look to the *substance* of the payment obligation in question and not to the labels imposed by state law.[41]

Schacter v. Schacter[42] and *In re Waller*[43] illustrate the different approaches taken by courts under the 1898 Act to determine the nature of the obligation in question. In *Schacter,* the husband contended that since the payments required by the separation agreement[44] did not meet the technical requirements of alimony under Maryland law, the debt constituted a property settlement and was therefore dischargeable.[45] The court rejected the husband's argument and stated: "Pay-

36. Act of Feb. 5, 1903, ch. 487, § 17, 32 Stat. 797 (codified as amended at 11 U.S.C. § 35(a)(7) (1976)). The section states that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (7) are for alimony due or to become due, or for maintenance or support of wife and child . . . ." *Id.*

37. *See* Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

38. *Id.* at 76-77; *see also* Audubon v. Shufeldt, 181 U.S. 575 (1901).

39. The problem arises because many state courts neglect to observe the alimony-property distinction in making financial provisions for the wife in the course of divorce. Further, the parties themselves do the same thing in drafting separation agreements in which alimony and property settlements are inextricably mingled — the amount agreed upon as alimony being arrived at in consideration for the amount to be transferred as property and vice versa. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.8 (West 1968).

40. *See, e.g.,* Nitz v. Nitz, 568 F.2d 148 (10th Cir. 1977); Nichols v. Hensler, 528 F.2d 304 (7th Cir. 1976); *In re* Waller, 494 F.2d 447 (6th Cir. 1974); *In re* Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958). *Cf.* Brown v. Felson, 442 U.S. 127 (1979) (by the express terms of the Constitution, bankruptcy law is federal law).

41. Schacter v. Schacter, 467 F. Supp. 64 (D. Md.), *aff'd mem.,* 610 F.2d 813 (4th Cir. 1979); *In re* Usher, 442 F. Supp. 866 (N.D. Ga. 1977); *In re* Warner, 5 Bankr. 434 (D. Utah 1980).

42. 467 F. Supp. 64 (D. Md.), *aff'd mem.*, 610 F.2d 813 (4th Cir. 1979).

43. 494 F.2d 447 (6th Cir. 1974).

44. The separation agreement provided in pertinent part that: "Husband shall pay to Wife for her support and maintenance, until she dies or remarries, the sum of Two Hundred Seventy-Five ($275.00) Dollars per month, beginning with the month of August, 1961." 467 F. Supp. at 65.

45. *Id.* at 66; *see In re* Nunnally, 506 F.2d 1024 (5th Cir. 1975) (amount awarded to

ments required by a contract for the support and maintenance of a wife are not dischargeable in bankruptcy even though they do not constitute payments for alimony under state law . . . and even though the separation agreement itself contains provisions concerning the settlement of property rights of the parties."[46] Thus, the *Schacter* court determined that merely because the payments do not meet the technical requirements of alimony under state law does not automatically mean that the payments are not intended for the wife's support.[47]

Conversely, in *In re Waller,*[48] the agreement at issue was incorporated into a divorce decree and provided that the husband pay, indemnify, and hold the wife harmless from all existing obligations.[49] The Sixth Circuit held that the obligation constituted support and, therefore, had not been discharged in the husband's bankruptcy proceed-

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debtor's spouse by divorce court, while not alimony under Texas law, constituted support payments which fell within the exception to discharge).

46. 467 F. Supp. at 66; *see In re* Ridder, 79 F.2d 524 (2d Cir. 1935), *cert. denied,* 297 U.S. 721 (1936); *In re* Adams, 25 F.2d 640 (2d Cir. 1928).

47. 467 F. Supp. at 66; *see also* Eigenbrode v. Eigenbrode, 19 Md. App. 597, 313 A.2d 569, *cert. denied,* 271 Md. 735 (1974) (a separation agreement which does not meet all the requirements for technical alimony is a "contractual agreement for support").

Although decided in 1981, the Fourth Circuit applied the law as it was prior to the enactment of the 1978 Code in the case of Melichar v. Ost, 661 F.2d 300 (4th Cir. 1981) (applying Illinois law). In *Melichar,* the separation agreement, which was executed in Illinois, provided that the husband pay the wife a lump sum settlement in lieu of alimony, payable in monthly installments for 121 months. *Id.* at 301. The agreement also provided that if the wife remarried, the husband remained liable for the monthly installments for nine years. *Id.* at 301-02. Subsequently, the husband filed for bankruptcy in the District of Maryland and sought to be discharged from further obligation under the agreement. *Id.* at 302. The issue presented to the court was whether the husband's obligation to make these payments to his former wife constituted a debt for alimony within the meaning of section 17(a)(7) of the prior Act so as to except it from discharge upon bankruptcy. *Id.* The bankruptcy court held the debt to be alimony, and therefore not dischargeable. 7 Bankr. at 966-68 (D. Md. 1980). The district court reversed the bankruptcy court and ruled that the debt was not alimony, and was dischargeable. 661 F.2d at 302-03. Ultimately, the Court of Appeals for the Fourth Circuit reversed and reinstated the judgment of the bankruptcy court. 661 F.2d at 303. The court of appeals determined that the district court's most significant error was its view that the intention of the parties to create alimony could only be proved by showing that the payments qualified as alimony under state law. *Id.* at 303. The Fourth Circuit noted that classification of an agreement under state law is an important factor in determining intent, but went on to hold that:

> [T]he agreement may be a hybrid of two means of paying alimony recognized by state law, and the fact that it combines features of both does not automatically destroy the nature of the payment as alimony. The proper test of whether the payments are alimony lies in proof of whether it was the intention of the parties that the payments be for support rather than as a property settlement.

Id. at 303. *See also* Nichols v. Hensler, 528 F.2d 304 (7th Cir. 1976); 3 COLLIER ON BANKRUPTCY ¶ 523.15, at 523-11 (15th ed. 1983).

48. 494 F.2d 447 (6th Cir. 1974).

49. *Id.* at 448.

ings.[50] The court stated that "[t]he law of Ohio must be resorted to in order to determine what constitutes alimony, maintenance, or support."[51] Hence, the court determined that in light of the state statute, history, and case law the husband's obligation constituted support and was therefore nondischargeable.[52]

III. ANALYSIS OF THE BANKRUPTCY REFORM ACT OF 1978

In cases decided under the original Act, courts were confronted with two conflicting policy considerations: requiring the bankrupt spouse to fulfill obligations arising out of the broken marriage and giving the debtor a fresh start unencumbered by the burdens of pre-existing debts.[53] Courts applied varying state standards and definitions in an effort to resolve this conflict, and consequently, federal case law evidenced varied and inconsistent results with regard to the dischargeability of maintenance and support obligations.[54] Congress addressed this problem through the enactment of the Bankruptcy Reform Act of 1978.[55]

The Code effectuates several changes in the former law as it related to the nondischargeability of alimony, support, and maintenance.[56] For example, it is well established that no federal domestic

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50. *Id.* at 451.
51. *Id.* at 448.
52. *Id.* at 448-51.
53. *See In re* Daiker, 5 Bankr. 348 (D. Minn. 1980); *In re* Warner, 5 Bankr. 434 (D. Utah 1980); Lee, *Dischargeability of Debt: Alimony, Maintenance or Support,* 5 AM. BANKR. L.J. 175 (1976) [hereinafter cited as Lee].
54. *See In re* Daiker, 5 Bankr. 348 (D. Minn. 1980).
55. *See* 11 U.S.C. § 523(a)(5)(Supp. V 1981). This section provides that:

> (a) A discharge . . . does not discharge an individual debtor from any debt —
>
> . . . .
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, 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 (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act); or
>
> (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. The major purpose of the Bankruptcy Reform Act was the modernization of bankruptcy law. H.R. REP. NO. 595, 95th Cong., 1st Sess. 304 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5787.

56. The Code abolished the concept of provability of debt contained in the original Act. Under the Code, a "claim" is defined as any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. 11 U.S.C. § 101(4)(a) (Supp. V 1981). Further, a "claim" includes an equitable right to performance that does not give rise to a right of payment. *Id.* § 101 (4)(b);

relations law exists separate from state divorce law.[57] Accordingly, jurisdiction over such matters as marriage, divorce, child custody, alimony and child support remain in the state courts.[58] However, the legislative history of the Code makes it clear that the intent of Congress is to allow federal courts to determine whether characterizations of alimony or support made by state courts could meet the meaning of such terms as they arise in the bankruptcy context.[59] Hence, under section 523(a)(5) of the Code, federal bankruptcy law, not state law, is applied to determine what constitutes alimony, support, or maintenance.[60] The primary effect of this provision is to overrule those cases decided under the original Act, which assumed that state law controlled the determination of the nature of these obligations.[61] Some courts today continue to examine state law despite the fact that the Code overruled those cases, decided under the prior Act, relying upon state law to make their determinations.[62] For example, in *In re Spong,*[63] the court recognized that determinations of alimony, maintenance, and support are made under federal bankruptcy law rather than state law.[64] Yet the court also found that reference to the well established state law is not precluded by the Code.[65] In his dissenting opinion, Judge Lombard noted

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see H.R. REP. NO. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5887. The definition of claim permits the broadest possible relief in a bankruptcy case and permits a complete settlement of the affairs of a bankrupt debtor, a complete discharge, and a fresh start. *Id.; see also* 3 COLLIER ON BANKRUPTCY ¶ 523.02 (15th ed. 1983).

57. De La Roma v. De La Roma, 201 U.S. 303 (1906); *accord In re* Dirks, 15 Bankr. 775 (D.N.M. 1981); *In re* Bishop, 13 Bankr. 304 (E.D.N.Y. 1981); *In re* Hughes, 16 Bankr. 90 (N.D. Ala. 1980). However, some courts have said that section 523 (a)(5) is an attempt by Congress to establish a new federal standard by which to determine the dischargeability of a debt. *See In re* Daviau, 10 Bankr. 201 (D. Mass. 1981); Williams v. Gurley, 3 Bankr. 401 (N.D. Ga. 1980).
58. *See In re* Dirks, 15 Bankr 775 (D.N.M. 1981); *In re* Bishop, 13 Bankr. 304 (E.D.N.Y. 1981); *In re* Hughes, 16 Bankr. 90 (N.D. Ala. 1980). "Federal bankruptcy law is not the source of these obligations, it takes them as it finds them and, when necessary, characterizes the legal relations existing between the parties for its own purposes." *In re* Albin, 541 F.2d 94, 97 (4th Cir. 1979).
59. H.R. REP. NO. 595, 95th Cong., 1st Sess. 364 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6320; S. REP. NO. 989, 95th Cong., 2d Sess. 79 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5865; *see also In re* Dirks, 15 Bankr. 775 (D.N.M. 1981).
60. H.R. REP. NO. 595, 95th Cong., 1st Sess. 364 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6320; S. REP. NO. 989, 95th Cong., 2d Sess. 79 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5865.
61. *See In re* Newman, 15 Bankr. 67 (M.D. Fla. 1981).
62. *See In re* Spong, 661 F.2d 6 (2d Cir. 1981) (nothing in the legislative history suggests that state law plays no part in making the determination); In re Lineberry, 9 Bankr. 700 (W.D. Mo. 1981) (same); *In re* Pelikant, 5 Bankr. 404 (N.D. Ill. 1980) (same).
63. 661 F.2d 6 (2d Cir. 1981).
64. *Id.* at 9. The court noted that the husband has an "unescapable duty," both at common law and by statute, to support his wife by providing her with the necessaries of life according to her station. *Id.*
65. *Id.*

that bankruptcy law is uniform and state law is diverse, and that "when Congress directs [the courts] to determine a matter under bankruptcy law, recourse to state law seems inappropriate."[66] Although other courts proffer the same reasoning as Judge Lombard,[67] it appears that most courts refer to state law to aid in the determination of the nature of a divorce decree.[68]

One of the more significant clarifications under the Code is the provision that excepts from discharge those debts that provide "maintenance for, or support of such spouse or child, *in connection with a separation agreement, divorce decree, or property settlement agreement. . . .*"[69] A plain reading of section 523(a)(5) indicates that contracted liabilities for goods, medical attention, or board, supplied by a spouse for the use and benefit of the ex-spouse or child, may not fall within the exception to discharge if it is not specifically provided for within the agreement or decree.[70] Courts that construed section 17(a)(7) of the original Act had expressed doubt as to whether a property settlement could ever be characterized as alimony.[71] Under the Code, section 523(a)(5) directs courts to initially determine whether the purpose of the agreement is to provide maintenance for, or support of, both spouse and child.[72] If the proper purpose is found, such obliga-

66. *Id.* at 11-12 (Lombard, J., dissenting).

67. *See, e.g., In re* Dirks, 15 Bankr. 775 (D.N.M. 1981); *In re* Newman, 15 Bankr. 67 (M.D. Fla. 1981).

68. *See, e.g., In re* Moyer, 13 Bankr. 436 (W.D. Mo. 1981); *In re* Rank, 12 Bankr. 418 (D. Kan. 1981); *In re* Pelikant, 5 Bankr. 404 (N.D. Ill. 1980); *In re* Allen, 4 Bankr. 617 (E.D. Tenn. 1980).

69. 11 U.S.C. § 523(a)(5) (Supp. V 1981) (emphasis added); *see* 124 CONG. REC. H11096 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 CONG. REC. S17406 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini); *see also In re* Leach, 15 Bankr. 1005 (D. Conn. 1981); *In re* Graham, 14 Bankr. 246 (W.D. Ky. 1981). *See generally,* 3 COLLIER ON BANKRUPTCY ¶ 523.15[2], at 523-109 (15th ed. 1983).

70. *See, e.g., In re* Ostrander, 139 F. 592 (E.D.N.Y. 1905); *see also* 3 COLLIER ON BANKRUPTCY ¶ 523.15[2], at 523-111 (15th ed. 1983).

71. *See, e.g.,* Goggans v. Osborn, 237 F.2d 186 (9th Cir. 1956); *In re* Adams, 25 F.2d 640 (2d Cir. 1928); *In re* Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958).

72. *See* 3 COLLIER ON BANKRUPTCY ¶ 523.15[3], at 523-111 to-113 (15th ed. 1983). The Code also makes some minor changes in the law. The Code explicitly provides that the designation of a debt as alimony, maintenance, or support will not bring it within the terms of the section unless the liability is actually in the nature of alimony, support, or maintenance. 11 U.S.C. § 523(a)(5)(B) (Supp. V 1981). This is considered a minor change because under the original Act most courts implicitly looked to the substance of an agreement rather than the label that was placed on a particular obligation. *See In re* Usher, 442 F. Supp. 866 (N.D. Ga. 1977); *In re* Thompson, 13 Bankr. 830 (M.D. Fla. 1981); *In re* Newman, 15 Bankr. 67 (M.D. Fla. 1981); *In re* Warner, 5 Bankr. 434 (D. Utah 1980). In addition section 523(a)(5) is more precise than the former section 35(a)(7) in that it substitutes the word "spouse" for "wife" and thus excepts from discharge alimony, support, or maintenance due to a husband from a debtor-wife. This was not a significant change either, since under the original Act most courts extended the coverage of the section to husbands. 11 U.S.C. § 523(a)(5)(Supp. V 1981). *See* Stephens v. Stephens, 465 F. Supp. 145 (W.D. Va. 1979); *In re* Crist, 460 F. Supp.

tions are deemed nondischargeable, even if they are in terms of a property settlement.

A. Tests to Determine Whether an Obligation is Dischargeable

It was originally thought that upon the Code's enactment, many of the inconsistencies that existed in bankruptcy decisions would be resolved. However, one of the most difficult problems federal courts encounter remains in distinguishing a contract for the division of property from a contract for maintenance and support.[73] Since there is no federal definition of alimony, maintenance, or support courts must look to state law where definitions of these words continue to be couched in broad terms, instead of in such a way as to be "sufficiently narrow in scope so as to minimize infringement of this exception to discharge on the objective of assuring the bankrupt a fresh start."[74] As a result, courts retain the same rationale they applied prior to the Code's enactment and the bankrupt spouse does not always receive a fresh start free from existing obligations.

Courts employ different tests in an attempt to determine the nature and dischargeability of an obligation. The intent test is most commonly applied by the courts.[75] If the parties expressly intend for the debt assumption to constitute alimony, maintenance, or support, the court will uphold that express intent.[76] When an agreement or decree is unambiguous, its purpose is determined by an analysis of the "four corners" of the instrument.[77] However, when the contract is ambiguous, the court will examine all the surrounding facts and circumstances of the case to determine the aim of the parties when the instrument was drawn.[78] Since the effect of filing for bankruptcy is usually not contemplated by the parties when an agreement is drafted, a court will not

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891 (N.D. Ga. 1978). *But see In re* Wasserman, 3 BANKR. CT. DEC. (CRR) 467 (D.R.I. 1977) (section 35(a)(7) was unconstitutional because it provided nondischargeability only for debts owing to the wife). *See generally* 3 COLLIER ON BANKRUPTCY ¶ 523.15 (15th ed. 1983).

73. *See In re* Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958); 1 NORTON, BANKRUPTCY LAW AND PRACTICE § 27.36 (1981); Swann, *Dischargeability of Domestic Obligations in Bankruptcy,* 43 TENN. L. REV. 231, 232 (1976).

74. Lee, *supra* note 53, at 178. The thrust of the Code is directed at rehabilitating the debtor and allowing him a fresh start. *In re* Brace, 13 Bankr. 551 (N.D. Ohio 1981). *See also In re* Hughes, 16 Bankr. 90, 92 (N.D. Ala. 1980) (the main problem in interpreting section 523(a)(5) comes with defining the words alimony, support, and maintenance); *In re* Bishop, 13 Bankr. 304, 306 (E.D.N.Y. 1981) (the Code fails to establish a specific standard for determining when a claim qualifies as alimony, support, or maintenance).

75. *See, e.g.,* Melichar v. Ost, 661 F.2d 300 (4th Cir. 1981) (decided under the 1898 Act); Schacter v. Schacter, 476 F. Supp. 64 (D. Md.), *aff'd mem.,* 610 F.2d 813 (4th Cir. 1979).

76. *See* cases cited *supra* note 74.

77. *In re* Usher, 442 F. Supp. 866 (N.D. Ga. 1977); *In re* Norman, 13 Bankr. 894 (W.D. Mo. 1981); *In re* Warner, 5 Bankr. 434 (D. Utah 1980).

78. *See* cases cited *supra* note 77.

consider the agreement itself as evidence of their intent.[79]

The second test the courts apply to resolve the nature of an obligation is the necessaries test.[80] Necessaries include such items as housing, furniture, and food.[81] If these debts are included in the agreement, payment of them is held to constitute nondischargeable support.[82]

In addition to the tests and factors derived from case law, other courts interpret section 523(a)(5) as providing a two-fold test to determine the dischargeability of an obligation. First, pursuant to section 523(a)(5)(A), in order to be held nondischargeable the payment must be made directly to a spouse or dependent and must not have been assigned to another entity voluntarily, by operation of law, or otherwise.[83] Second, the obligation must actually constitute alimony, maintenance, or support or the debt will be held dischargeable under section 523(a)(5)(B).[84]

When the above tests are inadequate a court will explore several factors to further aid in its analysis of relevant obligations. Besides looking to the state's statutory definition of support,[85] a court will scrutinize the parties' relative incomes to determine if the debt assumption was meant to balance a wide disparity in income.[86] If such disparity is shown, the debt assumption is found to be in the nature of support.[87] Similarly, if the obligation is revocable upon the dependent spouse's death or remarriage,[88] or the spouse would be inadequately supported upon discharge of the debts,[89] the obligation will be considered alimony.[90] Nevertheless, courts may hold that even if a debt was originally imposed on the basis of the need of the spouse or children the debt can be discharged unless, at the time of filing for bankruptcy, there exists a present need by the spouse or children that the debt be

79. *See In re* Warner, 5 Bankr. 434, 441 (D. Utah 1980).
80. *See In re* Spong, 661 F.2d 6, 9 (2d Cir. 1981); *In re* Miller, 8 Bankr. 174, 176-77 (N.D. Ohio 1981); *In re* Henry, 5 Bankr. 342 (M.D. Fla. 1980); *accord* Poolman v. Poolman, 289 F.2d 332 (8th Cir. 1961); *In re* Baldwin, 250 F. Supp. 533, 534 (D. Neb. 1966).
81. *In re* Uhock, 15 Bankr. 695 (W.D. Mo. 1981).
82. *See* cases cited *supra* note 80.
83. *See In re* LaFleur, 11 Bankr. 26 (D. Mass. 1981); *In re* Drumheller, 13 Bankr. 707 (W.D. Ky. 1981).
84. *See* cases cited *supra* note 83.
85. *See In re* Jensen, 17 Bankr. 537 (W.D. Mo. 1982); *In re* Dirks, 15 Bankr. 775 (D.N.M. 1981); *In re* Lineberry, 9 Bankr. 700 (W.D. Mo. 1981). *See, e.g.,* MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05 (1981) (factors used by the court in determining property division/monetary awards in divorce cases).
86. *See In re* Woods, 561 F.2d 27 (7th Cir. 1977); *In re* Daiker, 5 Bankr. 348 (D. Minn. 1980); *In re* Diers, 7 Bankr. 18 (S.D. Ohio 1980).
87. *See* cases cited *supra* note 86.
88. *See In re* Taff, 10 Bankr. 101 (D. Conn. 1981); *In re* Travis, [1978—1981 Transfer Binder] BANKR. L. REP. (CCH) ¶ 67,520 (Bankr. W.D. Okla. June 2, 1980).
89. *See* Nitz v. Nitz, 568 F.2d 148 (10th Cir. 1977); *In re* Breaux, 8 Bankr. 218 (W.D. La. 1981).
90. *See In re* Taff, 10 Bankr. 101 (D. Conn. 1981); *In re* Breaux, 8 Bankr. 218 (W.D. La. 1981).

paid.[91] Other factors the court will look to are whether the payments are made in one lump sum or terminate upon some condition.[92] Additional considerations are whether there are children involved;[93] the length of the marriage;[94] the relative earning powers of the parties;[95] the location of the provision in the agreement or decree;[96] and the parties' negotiations and understanding of the provisions of the agreement.[97]

Although all these considerations are important in a court's analysis, different jurisdictions assign varying weights to each factor. Furthermore, because the facts of a case control its outcome, any "test" strictly enunciated by a court in one case might be liberally construed in the next.[98] Generally, courts take account of all relevant factors and employ a balancing approach to weigh the requirement that the debtor fulfill his marital obligations against that of giving the debtor a fresh start.[99]

B. Case Examples

A general review of recent cases decided under the Code evidences that courts are not deciding cases much differently then they had under the 1898 Act. The Code is considered to be much narrower in scope than the original Act;[100] however, it has been construed broadly by many courts. Case law demonstrates that courts still appear to favor the findings of maintenance and support when the rights and responsibilities of family relationships are involved. Consequently, the Code's policy of giving the debtor a fresh start is rendered less significant. The

91. *In re* Warner, 5 Bankr. 434, 442 (D. Utah 1980). The *Warner* court found that such a determination was necessary to enforce the general purpose of the bankruptcy laws in providing relief for the debtor. *Id.; accord In re* Miller, 17 Bankr. 717 (W.D. Wis. 1982); *In re* Bradley, 17 Bankr. 107 (M.D. Tenn. 1981); *In re* Nelson, 16 Bankr. 658 (M.D. Tenn 1981). *But see In re* Jensen, 17 Bankr. 537 (W.D. Mo. 1982) (the plaintiff's current need is an irrelevant consideration; the determination must be based upon the intended function of the award "*at the time of entry of the state court dissolution decree*").
92. *In re* Snyder, 7 Bankr. 147 (W.D. Va. 1980).
93. *In re* Maitlen, 658 F.2d 466 (7th Cir. 1981).
94. *In re* Cartner, 9 Bankr. 543 (M.D. Ala. 1981).
95. *In re* Maitlen, 658 F.2d 466 (7th Cir. 1981); *In re* Fox, 5 Bankr. 317 (N.D. Tex. 1980).
96. *In re* Maitlen, 658 F.2d 466 (7th Cir. 1981).
97. *In re* Lineberry, 9 Bankr. 700 (W.D. Mo. 1981).
98. *In re* Thompson, 13 Bankr. 830 (W.D. Ky 1981). *Compare In re* Beckwith, 17 Bankr. 816 (N.D. Ohio 1982) (mortgage obligations dischargeable) *and In re* Mineer, 11 Bankr. 663 (D. Cal. 1981) (same) *with In re* Ferrandino, 14 Bankr. 196 (D. Nev. 1981) (mortgage obligations nondischargeable) *and In re* Mullins, 14 Bankr. 771 (W.D. Okla. 1981) (same).
99. *See, e.g., In re* Dirks, 15 Bankr. 775 (D.N.M. 1981); *In re* Newman, 15 Bankr. 67 (M.D. Fla. 1981); *In re* Warner, 5 Bankr. 434 (D. Utah 1980).
100. *See In re* French, 9 Bankr. 464, 466 (S.D. Cal. 1981); *In re* Daiker, 5 Bankr. 348, 350-51 (D. Minn. 1980).

following cases illustrate the various approaches courts have taken in determining the nature of a bankrupt's obligations.

In *In re Miller,*[101] the terms of the separation agreement provided that the husband pay the second mortgage on the house, or in the alternative, pay the wife the monthly payments should she dispose of the property.[102] The wife sold the property and paid off the second mortgage.[103] The husband made no payments to the wife, and the wife claimed she was due $4,000 pursuant to the separation agreement.

The court found the husband's debt to be in the nature of support and maintenance for the wife and child, and therefore nondischargeable.[104] The court based its decision on earlier cases which held that debts associated with support and maintenance are nondischargeable when the payments are made upon the mortgage for a home that provides shelter for the beneficiaries.[105] The court looked to the wife's unemployment, the wife's custody of the minor child,[106] and the husband's monthly payments that enabled the wife to obtain and maintain suitable housing for herself and her child.[107] In reaching the conclusion that the debt in question was nondischargeable, the court decided that the husband's marital obligations outweighed his right to a fresh start.[108]

In contrast, in *In re Frey,*[109] the bankruptcy court held that the husband's obligation under a property settlement was dischargeable when he was required to pay one-half of the mortgage payments on a mobile home occupied by the wife.[110] In making its determination, the court looked to Indiana statutory law for the circumstances giving rise to an order for alimony, support, or maintenance.[111] The court found the obligation to be in the nature of a property settlement, since the wife never specifically asked for, nor did the divorce court order payment of, alimony, support, or maintenance in the divorce proceeding.[112] Thus, the court concluded that the agreement in question appeared to be made in consideration of the fact that the home was purchased as a marital asset by both parties, and it allowed the parties to keep the mortgage payments current in an equitable manner until the house could be sold.[113]

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101. 17 Bankr. 773 (N.D. Ohio 1982).
102. *Id.* at 774.
103. *Id.*
104. *Id.* at 776.
105. *Id.* at 775; *see* Poolman v. Poolman, 289 F.2d 332 (8th Cir. 1961); *In re* Massimini, 8 Bankr. 428 (W.D. Pa. 1981).
106. 17. Bankr. at 776.
107. *Id.*
108. *Id.*
109. 13 Bankr. 12 (S.D. Ind. 1981).
110. *Id.* at 14.
111. *Id.*
112. *Id.*
113. *Id.*

In *In re George*,[114] the court held that joint debts assumed by the husband pursuant to a separation agreement were dischargeable in bankruptcy. The separation agreement in this case contained a clause that stated that the assumption of the joint debts constituted alimony, and as such, "shall not be dischargeable in bankruptcy."[115] Nevertheless, the court found such a waiver of rights to conflict with the purposes of the Code.[116] Therefore, the court held that the clause would only be enforceable if the debts were actually in the nature of alimony, support, or maintenance.[117] The court looked to the substance of the agreement and found the clause was a division of property and thus was dischargeable.[118]

The issue in both *Miller* and *Frey* was whether mortgage payments by the debtor were in the nature of alimony, maintenance, or support. In *Miller,* the court weighed various factors in determining that the debt constituted support and was therefore nondischargeable. In *Frey,* the court found the debt to be dischargeable based upon state statutory law. In *George,* the court looked to the substance of the agreement and determined that joint debts owed by the debtor represented a property division and were dischargeable.

In re Newman[119] evidences that recourse to state law is not necessary to determine the nature of an obligation. In *Newman,* the bankruptcy court decided that the question of whether an obligation constitutes alimony, support, or maintenance should be determined under federal bankruptcy law.[120] The court looked to the substance of the agreement and determined that the husband's obligation under the property settlement to preserve the marital home by paying attendant expenses was in the nature of support, and therefore nondischargeable.[121] The factors the court held to be determinative in this case were whether the obligation terminated upon death or remarriage, whether the payment appeared to balance disparate incomes, whether it was payable in installments over a substantial period of time, and whether

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114. 15 Bankr. 247 (N.D. Ohio 1981).
115. *Id.* at 248.
116. *Id.* at 249.
117. *Id.*
118. *Id.* The debts in question were owed to several creditors including Beneficial Finance Co., Visa, and the O'Neil Co. *Id.* at 248.
119. 15 Bankr. 67 (M.D. Fla. 1981).
120. *Id.* at 69.
121. *Id.* at 69-70. The court quoted Poolman v. Poolman, 289 F.2d 332, 335 (8th Cir. 1961):

> It is safe to say that the obligation to maintain and support a family includes the obligation to keep a roof over their heads. It is obvious that this is what the bankrupt undertook to do when he agreed to keep up the installment payments on the trust deed upon the home in which his divorced wife and children were to live. That the obligation has become unduly burdensome cannot be considered in determining the legal effect of his discharge.

15 Bankr. at 70.

minor children were involved.[122]

Other courts follow the *Newman* decision and determine the nature of an obligation without any reference to state law.[123] These courts use the various tests established to determine whether a debt is dischargeable, and consider similar factors to those previously enumerated.[124] It is these courts that appear to be in accord with the legislative history of the Code when they maintain that federal law is controlling.

C. Third Party Debts

When the Code was first enacted, commentators were unsure how the courts would treat joint debts owed to third parties.[125] A literal reading of section 523(a)(5), which applies to "a spouse, former spouse, or child of the debtor," appears to allow debts owed to third parties to be discharged.[126] It is reported in the legislative history that only support owed directly to a spouse or dependent is nondischargeable under the Code.[127] However, the legislative history also provides that if the debtor undertakes to hold the spouse harmless from debts to third parties, and if the obligation is in the nature of alimony, support, or maintenance, the debt is nondischargeable.[128] Consequently, courts take different approaches and reach different conclusions when confronted with the issue of whether a debt owed to a third party is excepted from discharge in bankruptcy. Section 523(a)(5)(A) provides that debts found to be alimony, maintenance, or support are dischargeable if assigned to another entity.[129] A minority of jurisdictions expand section 523(a)(5)(A) to hold that debts payable to third parties are always dis-

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122. 15 Bankr. at 69-70.

123. *See, e.g., In re* Huggins, 12 Bankr. 850 (D. Kan. 1981); *see also supra* notes 75-99 and accompanying text.

124. *See supra* notes 75-99 and accompanying text; *see also In re* Petoske, 16 Bankr. 412 (E.D.N.Y. 1982). *Cf. In re* Fontaine, 14 Bankr. 11 (D.R.I. 1981); *In re* Stachowiak, 16 Bankr. 392 (D. Nev. 1982).

125. *See* 1 NORTON, BANKRUPTCY LAW AND PRACTICE §§ 27.37-.41 (1981). COWANS, BANKRUPTCY LAW AND PRACTICE § 6.6 (interim ed. 1980). *See generally* Shiffer, *The New Bankruptcy Reform Act: It's Implications for Family Law Practitioners,* 19 J. FAM. L. 1, 20-26 (1981); Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten,* 52 IND. L.J. 469, 480-83 (1977).

126. *See In re* Dirks, 15 Bankr. 775 (D.N.M. 1981); *In re* Daiker, 5 Bankr. 348 (D. Minn. 1980); H.R. REP. NO. 595, 95th Cong., 1st Sess. 363 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6320. *See generally* 1 NORTON, BANKRUPTCY LAW AND PRACTICE § 27.37 (1981).

127. *See* 1978 U.S. CODE CONG. & AD. NEWS 5865, 6320, 6454, 6522.

128. H.R. REP. NO. 595, 95th Cong., 1st Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6320; *see also* COWANS, BANKRUPTCY LAW AND PRACTICE § 6.6 (interim ed. 1980).

129. 11 U.S.C. § 523(a)(5)(A) (Supp. V 1981). This section was amended by Pub. L. No. 97-35, § 2334(b), 95 Stat. 863 (1981), effective August 13, 1981. The amendment added "other than debt assignments pursuant to § 402(a)(26) of the Social Security Act." *Id.*

chargeable.[130] However, most courts severely limit the scope of this section and maintain that it pertains only to assignments to state welfare agencies and similar entities.[131]

Irrespective of the Code's provisions and the legislative history, numerous decisions apply the same rationale to both third party debts and to debts owed to a wife and child.[132] If a court finds a debt to be in the nature of alimony, support, or maintenance, it will be held nondischargeable.[133] For example, in *In re French,*[134] the court construed the legislative history of section 523(a)(5) as creating a nondischargeable obligation even though a debt is owed to a third party.[135] The *French* Court, as well as other courts,[136] decided that it is the substance of the obligation, not the manner of payment, that will determine its dischargeability.

Similarly, in *Stranathan v. Stowell,*[137] the issue before the bankruptcy court was whether amounts payable to third parties, on debts for which spouses are jointly liable, can be held nondischargeable as alimony, maintenance, or support.[138] The court noted that "[p]ayments to a third party for joint debts which release the nonpaying spouse from the financial obligation are actually indirect payments to the spouse."[139] Hence, as long as the required payments are determined to be alimony, maintenance, or support, and not a property settlement or division of debts, the payments can be held to be nondischargeable under section 523(a)(5) of the Code.[140] Likewise, in *In re Growney,*[141] the court held that the payment of medical and dental bills, although owed to third parties, constitutes support and therefore are nondis-

130. *See In re* Crawford, 8 Bankr. 552 (D. Kan. 1981); *In re* Allen, 4 Bankr. 617 (E.D. Tenn. 1981); *In re* Dirks, 15 Bankr. 775 (D.N.M. 1981).

131. *See In re* French, 9 Bankr. 464 (N.D. Cal. 1981); *In re* Wells, 8 Bankr. 189 (N.D. Ill. 1981); *In re* Knabe, 8 Bankr. 53 (S.D. Ind. 1980). One court noted that the test of whether a debt has been assigned under section 523(a)(5)(A) is whether or not the nonpaying spouse will receive any present benefit from the payment of the debt. Stranathan v. Stowell, 15 Bankr. 223 (D. Neb. 1981).

132. *See, e.g., In re* French, 9 Bankr. 464 (N.D. Cal. 1981); *In re* Warner, 5 Bankr. 434 (D. Utah 1980); *In re* Henry, 5 Bankr. 342 (M.D. Fla. 1980); *In re* Williams, 3 Bankr. 401 (N.D. Ga. 1980); *In re* Pelikant, 5 Bankr. 404 (N.D. Ill. 1980); *In re* Knabe, 8 Bankr. 53 (S.D. Ind. 1980).

133. *See In re* French, 9 Bankr. 464 (N.D. Cal. 1981); *In re* Pelikant, 5 Bankr. 404 (N.D. Ill. 1980); *In re* Henry, 5 Bankr. 342 (M.D. Fla. 1980); *In re* Warner, 5 Bankr. 434 (D. Utah 1980); *In re* Knabe, 8 Bankr. 53 (S.D. Ind. 1980).

134. 9 Bankr. 464 (N.D. Cal. 1981).

135. *Id.* at 466-67.

136. *See In re* Warner, 5 Bankr. 434 (D. Utah 1980); *In re* Henry, 5 Bankr. 342 (M.D. Fla. 1980); *In re* Williams, 3 Bankr. 401 (N.D. Ga. 1980); *In re* Pelikant, 5 Bankr. 404 (N.D. Ill. 1980).

137. 15 Bankr. 223 (D. Neb. 1981).

138. *Id.* at 225.

139. *Id.* at 225-26.

140. *Id.*

141. 15 Bankr. 849 (W.D.N.Y. 1981).

chargeable.[142] The court reasoned that "if the debtor fail[ed] to satisfy his obligations to the medical claimants, the debtor 'at the same time, fails to satisfy his obligation to his wife [and children].' "[143]

In re Daiker[144] and *In re Dirks*[145] are examples of cases which have held debts to third parties to be dischargeable. In *Daiker,* the court determined that under the Code it must first decide if a debt is payable directly to the spouse. If the debt is paid to a third person, the court held that it is dischargeable regardless of the characterization of the debt as alimony, support, or maintenance.[146] Thus, the court ruled that the husband's obligation under the divorce decree to pay certain household debts to third parties was dischargeable as a matter of law.[147] In addition, the court emphasized the fact that the debts were joint obligations incurred incident to the marriage relationship.[148]

The divorce decree in *Daiker* also provided that the husband was to "hold harmless and indemnify" the wife in the event a creditor pursued the ex-wife on any debts.[149] The wife argued that this obligation constituted maintenance and support and was therefore nondischargeable.[150] The court addressed the wife's contention and recognized that a hold harmless agreement could be an obligation subject to the nondischargeable provisions of section 523(a)(5).[151] However, the court maintained that such a determination must be made "within the framework of federal law and must be consistent with the fresh start goal of the Bankruptcy Act."[152] The court concluded that the hold harmless agreement was not in the nature of maintenance or support, since the wife waived any right to maintenance in the decree and there was no indication that the provision was intended to balance the relative income of the parties.[153] Of obvious paramount concern to the *Daiker* court was that the debtor be released from all obligations to be able to begin a fresh start.[154] The court stated:

> It is only in those cases when it is clearly discernible that the

142. *Id.* at 850 (citing *In re* Spong, 661 F.2d 6 (2d Cir. 1981)). The court so found even though the debts were paid directly to third parties.
143. 15 Bankr. at 850.
144. 5 Bankr. 348 (D. Minn. 1980).
145. 15 Bankr. 775 (D.N.M. 1981).
146. 5 Bankr. at 351. The court relied upon the legislative history of the code in interpreting the provision. *Id.* at 351 n.2.
147. *Id.* at 352. The court noted that it would be contrary to its primary goal to provide relief to the debtor if it was to accede to the state court's interest in the division of marital assets and obligations, maintenance, and support, and to deny the debtor his fresh start simply because his former wife chose not to seek the same relief on her own behalf. *Id.*
148. *Id.* at 351.
149. *Id.*
150. *Id.* at 352.
151. *Id.*
152. *Id.* at 351.
153. *Id.* at 352-53.
154. *Id.* at 352.

> divorce court intended to award support or maintenance to spouse or child that this court should set aside the policy of "fresh start" in the Bankruptcy Code in favor of the state court's judgment of necessity and need for spouse and child.[155]

A similar view was expressed in *In re Dirks*.[156] The *Dirks* court also recognized that the major policy concern under the Code is to give the debtor a fresh start.[157] Since the exceptions to discharge vitiate this fresh start, the court held that they must be interpreted narrowly,[158] and found that under section 523(a)(5)(A) a debt payable to a third party is dischargeable.[159] The court noted that "[c]ourts which allow creditors to take advantage of this exception under the guise of alimony contravene the fresh start policy as well as widen the supposedly narrow exceptions to dischargeability."[160] The court then proceeded to extensively discuss and interpret the sections of the Code relative to third party debts and assignments.

First, the court ruled that since obligations in the nature of alimony terminate upon death or remarriage of the spouse, finding a debt to a third party nondischargeable does not comport with the intention to award support, since a third party creditor can enforce collection of debts regardless of the future circumstances of the ex-wife.[161] Thus, the court reasoned that in order to accomplish the purpose of section 523(a)(5), such a debt to a third party is dischargeable.[162] However, the

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155. *Id.*

156. 15 Bankr. 775 (D.N.M. 1981). The wife sought to have the court declare that certain debts ordered to be paid by the debtor in a prior divorce proceeding were nondischargeable. The divorce decree provided in pertinent part:

> Petitioner . . . is ordered to assume and pay as his sole and separate obligation the following community debts:
>
> (a) The indebtedness to Rio Grande Valley Bank. . .
> (b) The indebtedness to Cessna Aircraft . . .
> (c) The indebtedness to First National Bank . . .
> (d) The indebtedness to Harold Dirks . . .
> (e) The indebtedness to Frank Skarritt . . .
> (f) The indebtedness to Master Charge . . .
> (g) The indebtedness to VISA . . . .

Id. at 776-77.

157. *Id.* at 779.

158. *Id.*

159. *Id.* The court reasoned that such a debt is in fact assigned to, and thus payable to, another entity. *Id.*

160. *Id.* The court believed that the purpose of the section 523(a)(5) exception is to protect spouses and children, not creditors. *Id.*

161. *Id.* at 780. Not discharging third party debts totally defeats the policy of fresh start since creditors are the very parties against whom the debtor is given protection. *Id.* at 779. *But cf. In re* Duckson, 13 Bankr. 373 (S.D. Ohio 1981) (creditor does not have standing to object to debtor's discharge).

162. 15 Bankr. at 780. *But see In re* Bell, 5 Bankr. 653 (W.D. Okla. 1980) (finding payments made to third parties in lieu of alimony nondischargeable); *In re* Pelikant, 5 Bankr. 404 (N.D. Ill. 1980) (same); *In re* Knabe, 8 Bankr. 53 (S.D. Ind. 1980) (same).

court did express concern for the ex-spouse and noted that she could file a proceeding in bankruptcy court for a determination of whether the payment to the third party was intended to be alimony or support.[163] The bankruptcy court could then order the payment of alimony to the spouse in an amount measured by the payment to the third party creditor.[164]

Second, the court interpreted section 523(a)(5)(A) to apply to more than technical assignments.[165] The court held that this section should be read as a whole unit with each part accorded no greater weight than any other part.[166] Subsection A provides that a debt which is "assigned to another entity voluntarily, by operation of law, or otherwise" is dischargeable.[167] Subsection B provides that a debt is dischargeable "unless such liability is actually in the nature of alimony, maintenance, or support."[168] Thus, the court concluded that jurisdictions which find debts to third parties nondischargeable on the grounds that the payments are meant to be alimony in effect read subsection B to the total exclusion of subsection A.[169]

IV. RECOMMENDATIONS AND PLANNING TIPS

A. Recommendations

A plain reading of section 523(a)(5) evidences Congress' intent for the judiciary to balance the right of a person to begin fresh after he has filed for bankruptcy against that person's obligations to his family in determining the dischargeability of a marital debt. Many courts defeat the policy of fresh start and disallow the discharge of third party debts. In addition, courts still rely on state law rather than federal bankruptcy law to determine whether an obligation is in the nature of alimony, support, or maintenance, or whether it is a property settlement.

Unfortunately, the result is that courts apply the same rationale today as they did under the 1898 Act. Thus, it is apparent that the enactment of section 523(a)(5) did not bring about all of the intended results. A possible solution is for Congress to amend the Code to make

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163. 15 Bankr. at 780.
164. *Id.*
165. *Id.* The court reasoned that since Congress inserted the words "or otherwise" in section 523(a)(5), these words are intended to broaden the scope of the meaning of assignment to include more than just technical assignments. *Id.* Thus, the *Dirks* court rejected cases holding that section 523(a)(5)(A) does not apply to assignments which are informal. 15 Bankr. at 781; *see, e.g., In re* Spong, 661 F.2d 6 (2d Cir. 1981); *In re* Rank, 12 Bankr. 418 (D. Kan. 1981). Further, the court criticized those cases which limited the scope of the section to welfare agencies, since the term "entity" as defined in 11 U.S.C. § 101 (14) (Supp. V 1981) includes more than just welfare agencies. 15 Bankr. at 781. *See, e.g., In re* Pelikant, 5 Bankr. 404 (N.D. Ill. 1980); *In re* Knabe, 8 Bankr. 53 (S.D. Ind. 1980).
166. 15 Bankr. at 781.
167. *See* 11 U.S.C. § 523(a)(5)(A)(Supp. V 1981).
168. *Id.* § 523(a)(5)(B).
169. 15 Bankr. at 781.

section 523(a)(5) more specific with regard to what types of debts are dischargeable. This appears to be a feasible solution since Congress has done this with other sections of the Code. For example, in section 522 Congress has set forth specific exemptions to which the debtor is entitled under federal law.[170] The purpose of the exemption section is the same as that of section 523(a)(5)—it is for the benefit of the debtor's family, who may be destitute, and for the benefit of the public, who might otherwise be burdened with support of an insolvent debtor's family.[171] Debts which should be addressed are attorney's fees, medical expenses for children, mortgage payments, debts for household items and automobiles, and debts incurred through general hold harmless agreements. The Code should also be amended to include narrow definitions of the terms "alimony," "maintenance," and "support," for the purpose of federal bankruptcy law.

However, since no bills are currently on the floor in Congress, it does not appear likely that this section of the Code will be amended in the near future. Consequently, courts could begin to narrowly interpret the exceptions to discharge and thereby preserve the Bankruptcy Code's underlying policy of giving a debtor a fresh start.

B. Planning Tips

Although the goal of the Bankruptcy Code is to allow the debtor a fresh start free from pre-existing obligations, it is clear that the law favors family support obligations. In drafting a property settlement agreement or divorce decree, the attorney must make certain that the actual intent of the parties is clear. Further, the agreement should be drafted so that it clearly distinguishes alimony and support obligations from property settlements.

If the parties have a great number of debts from the marriage, the attorney should consider the feasibility of both parties filing for bankruptcy before the divorce is final. The Code provides that two qualified debtors or a qualified debtor and a spouse may file a joint bankruptcy petition.[172] Under the Code, there is no requirement that the parties be living together at the time of filing.[173] In order to insure compliance with the procedural aspects of the Code, attorneys should also be aware of the automatic stay provisions,[174] removal provisions,[175] and provisions relating to the powers of the trustee.[176]

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170. *See* 11 U.S.C. § 522 (Supp. V 1981).
171. *See In re* Swartz, 18 Bankr. 454 (D. Mass. 1982).
172. *See* 11 U.S.C. § 302(a) (Supp. V 1981).
173. *Id.*
174. *See* 11 U.S.C. § 362 (Supp. V 1981).
175. *See* 28 U.S.C. § 1478(a) (Supp. V 1981).
176. *See, e.g.,* 11 U.S.C. §§ 363, 541 (Supp. V 1981).

V. CONCLUSION

In enacting section 523(a)(5) of the Bankruptcy Reform Act, Congress attempted to ease the confusion surrounding the dischargeability of marital obligations. A review of the case law decided under the Code indicates that this attempt was only partially successful. Courts are still faced with the difficult task of interpreting divorce decrees and property settlement agreements in order to determine the nature of the debtor's marital obligations under bankruptcy law. Since there is no federal domestic relations law, courts must resort to state law in interpreting these agreements. Unfortunately, state law definitions of marital obligations differ, and at times appear to be in direct conflict with the underlying policy of the Code. Consequently, attorneys should be careful in drafting divorce decrees and settlement agreements, clearly stating the intent of the parties. In addition, courts must narrowly interpret such agreements to accomodate the fresh start policy of the Code.

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