

The Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Family Law Practitioner



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Introduction

The family law practitioner has been affected by some of the most sweeping changes to the Bankruptcy Code in over twenty-five years. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) has impacted family law practitioners by enhancing rights of the debtor spouse and increasing protection of other domestic support creditors under the new amendments, resulting in added protections to the families of a debtor spouse. New definitions of alimony and support were also created and adopted. Additionally, in determining the rights of domestic creditors, the recent amendments have given expanded jurisdiction over bankruptcy issues to the family courts.

The particular areas of enhancement to the Code are numerous and include many new changes. Notably, there is an expanded definition of “domestic support obligations,” with the priority of domestic support obligations being given an elevated status. The narrower interpretation of the automatic stay injunction eliminates family and domestic proceedings. Exemption charges allow domestic support creditors to proceed against exempt property under certain circumstances. Non-dischargeability of property settlement debts of the debtor spouse and the preference charge of domestic support obligations are strengthened. A petition under Chapter 13 requires certain conditions for domestic support obligations to be paid or made current, granting the domestic support creditor much more power. New trustee duties require heightened notice to state agencies and domestic support claimants. Lastly, the definition of “debt relief agencies” has been expanded, placing procedural and substantive requirements on attorneys while protecting debtors and their spouses even further.

Domestic Support Obligations – New Definition

The term “domestic support obligation” under 11 U.S.C. § 101(14A) now includes a new definition for alimony and support. The definition includes all obligations in the nature of support that can arise under a divorce decree, settlement agreement, or other court or administrative order involving support.

Support obligations under § 523(a)(15) are excepted from discharge. A debt obligation that is owed to or recoverable by a spouse, former spouse, or child of the debtor would be included under this section. The new legislative definition can also be extended to debts recoverable by the child’s parent, legal guardian, or responsible relative. Further, the definition appears to extend to assistance provided by governmental units.

It is important to note that a debt can be in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) for a spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether the debt is expressly designated as such. This included obligations that accrue before, on, or after the date of the bankruptcy filing, including interest that accrues on that debt as provided under non-applicable bankruptcy law. Also included are obligations that have been established before, on, or after the date of the order for relief by reason of a separation agreement, divorce decree, or property settlement agreement, an order of a court

of record, or a determination made in accordance with applicable non-bankruptcy law by a governmental unit. In addition, obligations assigned to a governmental unit are included if voluntarily assigned for purposes of collection.

Domestic Support Obligations – Elevated Status

The BAPCPA has created an elevated priority status for domestic support obligations, and has expanded the scope of protected obligations. Under 11 U.S.C. § 507(a)(1), domestic support obligations were moved from a seventh priority to a first priority. Section 507(a)(1)(A) states that the support obligations owed to a spouse or child of the debtor will have the first priority in distribution among all other creditors. Section 507(a)(1)(B) provides that domestic support obligations that have been assigned to or are owed directly to a governmental unit will have the next priority in distribution. Domestic support obligations in existence as of the date of filing receive first priority. Administrative expenses of the bankruptcy, including trustee professional fees and expenses for recovering funds to pay domestic support obligations, receive next priority, as set forth in § 507(a)(2).

It is important to note, however, that a trustee can have a higher priority when there are domestic support obligations. Section 507(a)(1)(C) was added, which provides that the trustee must be paid in advance of support obligations to the extent that the trustee administers assets that are otherwise available to pay such claims. The enhanced priority of support claims almost eliminates the need for the creditor of such obligation to file a proof of claim.

In summary, domestic support obligations have been granted higher priority than almost every other bankruptcy creditor. This makes domestic relations obligations much harder to discharge, perhaps to the extent that the obligations are unaffected by the Bankruptcy Code.

Automatic Stay Injunction Exceptions

The BAPCPA has added automatic stay exceptions under § 362(b), providing new exceptions for family court proceedings which concern child custody, visitation, domestic violence, and divorce. Exceptions to the stay for commencement or continuation of a civil action now include:

1. Establishing paternity;
2. Establishing or modifying a domestic support obligation;
3. Actions concerning child custody or visitation;
4. The dissolution of marriage, except to the extent the proceedings seek to determine the division of property that is property of the estate;
5. Actions regarding domestic violence;
6. Collection of a domestic support obligation from property that is not property of the estate;
7. Withholding of income that is property of the estate or property of the debtor, established for payment of a domestic support obligation under a judicial or administrative order or statute;
8. Withholding, suspending, or restricting a driver's, professional, occupational, or recreational license, due to nonpayment of support;
9. Reporting of overdue support to a credit reporting agency;
10. Interception of tax refunds for overdue support obligations;
11. Enforcement of a medical obligation, as defined under the Social Security Act.

Exemption Changes

Certain exemption changes have been enacted under the BAPCPA. 11 U.S.C. § 522(f) allows a debtor to protect certain property as exempt from the bankruptcy trustee, as well as from creditors.

However, the BAPCPA restricts a debtor from protecting assets from domestic support creditors through the Bankruptcy Code's amended exemption provisions. Previously-exempt property of the debtor is now subject to execution for satisfying domestic support claims. Debtors are also *precluded* from avoiding liens which secure domestic support obligations.

The new § 522(c) provides that, notwithstanding any provision of applicable non-bankruptcy law, domestic support creditors are free to proceed against exempt property. Thus, property that would be exempt under state law can become subject to execution by filing a bankruptcy case.

Section 522(f) was amended to clarify that a judicial lien for a domestic support obligation (including those assigned to a governmental agency) cannot be avoided. The law may suggest that property otherwise exempt from creditors under 11 U.S.C. § 522, such as a retirement plan or homestead exemption, might be attacked.

Dischargeability Changes

Historically, all domestic support obligations were nondischargeable in all bankruptcy chapters under § 523(a)(5). Now, however, all property settlement debts are nondischargeable in Chapter 7. Section 523(a)(15) has also been amended with important changes. Further, the non-filing spouse is no longer required to file a complaint in bankruptcy court. Section 523(c) was also amended (note that the dischargeability of property division debts can survive under Chapter 13 bankruptcies). Nonsupport domestic-related debts in 11 U.S.C. § 523 are not among the exceptions to discharge under 11 U.S.C. § 1328(a)(2). These can be discharged upon completion of a Chapter 13 plan and discharge. Property settlements can still be discharged by the debtor if he/she files for Chapter 13 and pays less than 100% of unsecured debts.

Preference Changes

The BAPCPA affects the order of preference for domestic support obligations. All bona fide payments on domestic support obligations (including those assigned to a governmental agency) are protected from preference avoidance suits. Section 547(c)(7). The BAPCPA requires that post-petition payments must be current to confirm a Chapter 13 plan. Failure to make current or post-confirmation support payments is grounds for dismissal or conversion of a Chapter 13 case. Section 1307(c)(11). The debtor must certify that post-petition child support obligations have been paid to receive Chapter 13 discharge. Section 1328(a). A domestic support obligation owed to the government need not be paid in full during the life of the plan (it will still be nondischargeable), provided that the debtor proposes a 5-year plan committing all disposable income to make payments under the plan. Any other DSO must be paid in full over the life of the plan. The overall result is that between these provisions and the automatic stay exceptions, the domestic support creditor has much more power in a Chapter 13 case.

New Trustee Duties

The new trustee duties include expanded notice provisions under BAPCPA. Trustees must provide notice when there are domestic support obligations. Sections 704(c), 1106(d), 1202(c) and 1302(d) require a trustee to notify holders of domestic support claims of his or her rights to services of the state child support agencies, including the addresses and telephone numbers of the agencies. In Chapter 7, the trustee explains the claimant's right to payment and must provide written notice to the state agency of the claim, with the name, address, and telephone number of the child support claimant. Upon discharge, the trustee in all chapter cases must notify the state agency of:

- a. The granting of the discharge;
- b. The debtor's address;

- c. The last known name and address of the debtor's employer; and
- d. Creditors not discharged or reaffirmed.

Support creditors may request the debtor's address information from the creditor. Note that there is no requirement that the creditor comply with the request. Moreover, there is no liability to the creditor for making the disclosure.

Debt Relief Agencies – Definition Expanded

Section 319 of the BAPCPA was modified to include an added requirement that the debtor's attorney make reasonable inquiry to verify that the information is supported in fact.

Under 11 U.S.C. § 101(12A), attorneys who represent individuals with respect to bankruptcy matters may be subject to penalties and loss of fees for failure to meet the requirements of a "debt relief agency." The term includes "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration..." "Assisted person" is defined at 11 U.S.C. § 101(3) as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000." The definition of "bankruptcy assistance" is very broad and could include many types of advice not solely in connection with the filing of a bankruptcy case for a client. This could open the door to liability. Once the attorney is determined to be a "debt relief agency," there are added requirements under the Code.

Conclusion

The BAPCPA has influenced the family law practitioner in ways that are yet to fully unfold. Despite the fact that the Act took effect on October 17, 2005, the courts have yet to fully interpret the new provisions. A family law practitioner should pay close attention to becoming a "debt relief agency" under the Code. Bankruptcy assistance could be interpreted very generally. Beware – if you violate the requirements, you could be sued for the return of your fees. The imminent possibility of future class actions against the family law practitioner may be on the horizon.

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