

Bankruptcy and Divorce and/or SAPCR Actions

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October 19, 2001

I. Overview

Please begin your review of this outline knowing that its author learned the practice of law as a family practitioner, and who is learning a second area of practice - bankruptcy. The goal of this article, therefore, is to equip family practitioners with some practical information that should prove useful in getting family cases completed when a bankruptcy case brings it to a screeching halt. Hopefully the information likewise will strip enough of the mystery from bankruptcy practice to enable family practitioners to do what needs to be done in the Bankruptcy Court forum and return, job accomplished, to Family Court. Thus, this outline is tailored toward bankruptcy issues relating to individual debtors. This paper will help little the Family practitioner who is flirting with the idea of branching out his or her practice to include consumer bankruptcy. Rather, it is hoped that this paper will assist Family practitioners navigate through those parts of the Bankruptcy process that tend to surface with some degree of regularity in Family Practice.

II. The Automatic Stay

A. 11 U.S.C. § 362 (a) - The Onerous Reach and Effect of the Automatic Stay

A former bankruptcy judge for the Northern District of Texas recently described section 362 of the Bankruptcy Code¹ as the single most potent tool in the arsenal of the bankruptcy case toolbox because the automatic stay² is triggered and becomes effective immediately upon the filing of a bankruptcy case³ - whether that case is filed voluntarily⁴ or involuntarily⁵ - and is effective as to *all* entities⁶ irrespective of notice⁷ from, *inter alia*, taking any act to obtain possession of property of the debtor's estate⁸ or of property from the estate or to exercise control over property of the estate.⁹ That the automatic stay works *without* notice to creditors underscores its potency.¹⁰

In the Family Law context, that means, for example, if H files a bankruptcy petition at 10:00 a.m., September 30, 2001, and W files her petition for divorce 15 minutes later, that filing is prohibited by 11 U.S.C. § 362(a)(1), and thus technically is a nullity because the filing of a divorce action constitutes "the commencement... of a judicial... proceeding against [H] that... could have been commenced before the commence of the [bankruptcy] case..."¹¹ And this is so even though W had no notice when she filed her divorce action that H had filed his bankruptcy petition 15 minutes earlier. Which directs attention to 11 U.S.C. § 362(b), the exceptions to the automatic stay.

B. 11 U.S.C. § 362(b) - A Reprieve of Sorts

Just as section 362(a) of the Bankruptcy Code itemizes acts stayed automatically upon the filing of a bankruptcy case¹², so does section 362(b) direct those acts which are exempted

from the reach of the automatic stay.¹³ Among the laundry of acts excepted from the automatic stay are certain Family-Law-specific acts. Section 362(b)(2) states that "[t]he filing of a petition under section 301, 302, or 303 of [the Bankruptcy Code]...does not operate" to stay..."the commencement or continuation of an action or proceeding for the establishment of paternity; or the establishment or modification of an order for alimony, maintenance, or support; or the collection of alimony, maintenance, or support from property that is not property of the estate."¹⁴

Sections 362(b)(2)(A)(i)¹⁵ and (ii)¹⁶ permit SAPCR actions to establish the parent-child relationship and to modify existing child support and spousal maintenance orders to proceed.¹⁷ Section 362(b)(2)(B) permits enforcement of child support and spousal maintenance orders in effect prepetition.¹⁸

C. 11 U.S.C. § 362(d) - Relief from the Automatic Stay

Recall earlier the editorial comment that section 362 is probably the best example of the balance the Bankruptcy Code strikes between the protections afforded a debtor and protections afforded creditors.¹⁹ That is because while the draconian reach and effect of the automatic stay comes alive when a bankruptcy petition is filed and without any notice whatsoever to those against whom it operates, the automatic stay can be terminated, modified, or annulled for cause shown to the Bankruptcy Court. This great equalizer given to creditors of a debtor in bankruptcy is found in section 362(d). Section 362(d) provides in relevant part:

On request of a party in interest and after notice and a hearing, the [Bankruptcy Court] *shall* grant relief from the stay provided under subsection (a) of [section 362], such as by terminating, annulling, modifying, or conditioning such stay...for cause..."

The obvious question presented here is, if actions to establish paternity or establish, modify, or enforce child support and/or spousal maintenance are not stayed by 362(a),²⁰ then why need the Family Law practitioner be concerned about section 362(d)? At least two reasons come to mind. First, Family Law practitioners should note that the exemption afforded by section 362(b)(2) is narrow. The automatic stay does apply to matters involving the control over, possession of, and division of the marital estate.²¹ The other reason is that actions establishing, modifying or enforcing child support or spousal maintenance, though expressly excepted from the reach of the automatic stay, still involve economic issues - which is precisely what the Bankruptcy Court is concerned about.

The type of bankruptcy case pending in the Bankruptcy Court - whether a chapter 7, a chapter 11, a chapter 12, or a chapter 13 - can present sensitive questions for the Bankruptcy Court to answer in deciding whether it should accede when the outcome of establishing, modifying, or enforcing a debtor's support obligation undoubtedly will impact the other creditors of the debtor's estate.²² To underscore the delicate nature of this issue, post-petition earnings of a chapter 7 debtor are not considered property of the estate²³ and thus are available to pay support.²⁴ By contrast, the chapter 13 sweeps post-petition earnings into the estate.²⁵ Which necessarily invokes a different kind of scrutiny from the Bankruptcy Court, given its obligation to ensure fair and equitable treatment of all creditors

of a debtor's estate.²⁶

All of this to say, file a motion for relief from the automatic stay. As a sitting bankruptcy judge in the Northern District stresses, as a creditor or party in interest in a bankruptcy case, always assume that the automatic stay applies and get before the Court for relief. Few Bankruptcy Court judges will not appreciate a Family Law practitioner's desire to be safe instead of sorry.

1. Tailor the Motion for Relief - Name it So that the Court Knows Why You Want Relief

The stock motion filed with Bankruptcy Courts seeking relief under section 362 (d) of the Bankruptcy Code is entitled "Motion for Relief from the Automatic Stay, or Alternatively, Request for Adequate Protection."²⁷ Family Law practitioners are urged to "flag" your section 362(d) motion so that it grabs the Bankruptcy Court's attention (beginning with the Court's law clerk) right away. Some examples of what a section 362(d) motion may be entitled include:

Motion for Order Granting Permission to Enforce Child Support;²⁸
Motion for Order Granting Permission to Proceed with
Modification to Increase Temporary Spousal Support;
Motion for Order Granting Permission to Establish Paternity; and
Application for Determination that Automatic Stay will Not be
Violated.²⁹

2. Some of the Must-Do's in Prosecuting the Motion for Relief from the Automatic Stay

- (a) Don't forget the filing fee (right now it is \$75);
- (b) Negative-Notice Language is required.³⁰ To be safe, place the language *immediately* after the heading of the motion;
- (c) Confer with counsel for the debtor about the relief requested by the motion. A motion for relief from the automatic stay is considered a contested matter under the Federal Rules of Bankruptcy Procedure, which means a conference with debtor's counsel is required.³¹ Include a certificate of conference in the motion;
- (d) Get the Service List from debtor's counsel. While conferring with debtor's counsel, ask for a copy of the Service List; have it e-mailed, if possible. You may want to ask for the Service List early in the discussion in case matters get a bit testy.
- (e) Make certain the Service List actually is attached to the Motion (the original filed with the Court and *all* copies served out). Remember: always, always, always serve at least the debtor, debtor's counsel, the United States Trustee, the trustee appointed by the U.S. Trustee, if any, that person's counsel, the attorney for any official committee, usually unsecured creditors committee, the members of that committee, and any other party who has requested notice.³²

- (f) Call the calendar (deputy clerk) for the particular Bankruptcy Judge to whose court the bankruptcy case is assigned³³ to get a hearing date *before* you file and serve the motion. Most Bankruptcy Judge's preliminary hearing dates for his or her lift stay docket is pre-recorded;³⁴
- (g) Be certain that the Notice of Hearing makes clear that the hearing is a preliminary hearing (and not the final hearing);³⁵
- (h) Study the Local Rule(s) that govern the preliminary hearing and follow them strictly!³⁶

Practice Tip: Section 362(e) of the Bankruptcy Code imposes a 30-day rule to ensure that motions for relief are decided promptly and are not held on the Bankruptcy Court's docket for extended periods.³⁷ Watch the time closely; sometimes, though not often, the automatic stay terminates by operation of section 362(e) because debtor's counsel was asleep at the wheel.

D. Move Carefully in this Arena

Relief from the automatic stay is a heavily used strategy by creditors and parties in interest of a debtor. Because the automatic stay is the strongest and first line of defense in holding a debtor's creditors at bay while that debtor gets that needed breathing room from his or her creditors so that repayment or reorganization of debts can be effected. Some of the most strongly-fought battles in the bankruptcy context are fought through the section 362(d) mechanism. This paper does not begin to attempt to exhaustively discuss the strategy of the lift stay practice. Rather, the attempt is to arm Family Law practitioners with information that will allow successful and graceful navigation through the lift stay process. For certain, no other area of the law enjoys the head start for relief that section 362(b)(2) affords. Even so, the mind fields are there - procedurally and substantively.

III. Exceptions to Discharge - 11 U.S.C. §523

The reason a debtor seeks relief from bankruptcy is basic - to be relieved, whether by different repayment terms or reorganization of the debts, from the onerous burden his debts imposed prior to filing bankruptcy. Another way to put it is the debtor seeks a fresh start via a discharge.³⁸ The overarching policy that families should be protected and taken care of even in the face of financial difficulties continues in the context of what obligations may a debtor discharge in bankruptcy.

Through 11 U.S.C. § 523, certain debts of an *individual* debtor are excluded from discharge under the Bankruptcy Code. Among the obligations protected from discharge by an individual debtor is child support and spousal maintenance.³⁹ The other kind debt in the Family Law context intended to be excluded from discharge by section 523 is an obligation created by a property settlement.

Like relief from the automatic stay, section 523(a)(5) and (15) are critical Bankruptcy Code provisions that impact significantly Family Law practice.⁴⁰ Though the breath of this

outline will not transform a Family Law practitioner into a bankruptcy practitioner, the goal is to direct attention to several important Bankruptcy Code provisions that can wreak havoc in a divorce or SAPCR action or before the ink dries on the divorce decree or SAPCR order.

A. Protecting Your Interests From Discharge - You Can Waive Exception

1. Notice that a Bankruptcy Case has Been Filed.

A cornerstone to bankruptcy is notice. When a debtor files his bankruptcy petition, he is required to also file with the Bankruptcy Court, *inter alia*, a list containing the name and address of each creditor or a list of liabilities,⁴¹ which itself requires names and addresses.⁴² Using that list, the Bankruptcy Court prepares and notifies each creditor identified by the debtor that the bankruptcy case has been filed.⁴³ The Notice of Commencement of Case is important not only because it officially notifies a creditor of a debtor that a bankruptcy case has been filed, that notice tells the creditor what kind of bankruptcy case has been filed, whether a chapter 7 (no asset), chapter 7 (asset), chapter 11 (individual), chapter 12, chapter 13 (individual), chapter 13 (joint).⁴⁴

That notice will tell creditors, *inter alia*, when the meeting of creditors will be held, the deadline by when a creditor must file his or her proof of claim, and the deadline by which an objection to discharge must be filed in cases involving an individual debtor. By implication, that Notice of Commencement of Case tells you that the debtor "scheduled" your client as a creditor in his case; otherwise, the creditor would not have received the notice.

In the context of 11 U.S.C. § 523(a)(5) and/or 11 U.S.C. § 523(a)(15), which are the mechanisms in the Bankruptcy Code to keep a debtor from discharging court-ordered child support and spousal maintenance obligations, knowing about the bankruptcy case is critical. Unless the spouse to whom child support or spousal maintenance is owed formally asks the Bankruptcy Court to determine whether these obligations should be excepted from discharge, they *will be discharged*.⁴⁵ Rule 4007(c) of the Federal Rules of Bankruptcy Procedure requires that the deadline by when a dischargeability action may be filed under section 523(c) is "60 days after the first date set for the meeting of creditors under section 341(a)."⁴⁶

The time fixed for filing a section 523(c) dischargeability proceeding is firm.⁴⁷ That is why information given on the Notice of Commencement of Case is critical and must be policed carefully.⁴⁸

And no reprieve is available if the spouse or ex-spouse (and maybe even child, if the child is old enough) will be given should that

FED.R.BANKR.P. 4007(c) imposed deadline be missed *if* the spouse, ex-spouse or (18-year old child who will graduate high school in a couple of months) has *actual* knowledge of the bankruptcy case.

The point here is, a support obligation or spousal support obligation wiped out through bankruptcy if one is not careful.

2. As a Practical Matter, Chances are Better than Not that the Obligee Will Get Notice Because the Debtor Knows it is Essential to Discharging the Obligation.

That means then, preparing and filing the objection to discharge or request to determine dischargeability should be queued up quickly. The Bankruptcy Court will appreciate getting issues involving court-ordered child support and spousal maintenance out of the way early in the case. Because section 523(a)(5) is considerably more self explanatory than section 523(a)(15), and considerably more case law to assist the practitioner, the following focuses on section 523(a)(15).

(a) Burden of Proof

To present a prima facia case under 523(a)(15), the obligee/plaintiff must show that the debt/property settlement sought to be excepted from discharge is the result of a court order incident to a divorce and that it is not alimony, maintenance or support as set forth under § 523(a)(5).

Once demonstrated, the burden shifts to the debtor to prove that one of the statutory exceptions should apply.⁴⁹ In deciding the question, the Bankruptcy Court must consider the debtor's ability to pay.⁵⁰ That means, that a distributive award is nondischargeable unless the debtor is able to demonstrate that he or she lacks the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.⁵¹

Courts have adopted various tests for the "ability to pay" standard mandated by the Bankruptcy Code. The minority position is the "undue hardship" test requires the debtor to demonstrate a long term probability for a poverty level standard of subsistence unless the debt is discharged.⁵² The majority position is the "disposable income" standard, which requires the court determines how much it is reasonably costs the debtor for items such as shelter, food, and clothing, which is then subtracted from the debtor's income, yielding the debtor's disposable debts.⁵³ Under this position the

Bankruptcy Court also notes that §523(a)(15)(A) mandates the debtor be unable to pay "from income or property".⁵⁴ This standard purports that the debtor's ability to pay should be analyzed with a prospective view. The courts now consider the debtor's ability to pay both at the time of trial and into the future. The court may also take into consideration the income and assets of the debtor's new spouse. When supplemental income from a new spouse or live-in companion serves to alter the debtor's financial prospects, the Bankruptcy Court must factor that consideration into the evaluation of his ability to pay.⁵⁵

Only if the Court determines that the debtor has the ability to pay, may the Bankruptcy Court consider whether the benefit to the debtor in discharging the debt outweighs the detrimental consequences to the nondebtor obligee/plaintiff.⁵⁶ Section (a)(15)(B) provides that a distributive award is nondischargeable unless the debtor is able to demonstrate that discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.⁵⁷ A comparison between the financial positions and conditions of the debtor and nondebtor obligee is required. Some Bankruptcy Courts have applied a "totality of circumstances" tests to balance the equities of the concerned spouses, which includes evaluating the incomes and worth of the relative spouses, employment and potential for future employment, the present financial conditions of the parties, and nondebtor's spouses ability to pay.

IV. Claims - You as a Creditor

This paper will touch on but a couple of functional points about a non-debtor spouse or former spouse's claim in a bankruptcy case.

A. Filing a Proof of Claim

First, be aware that under 11 U.S.C. § 507(a)(7), the "allowed claims" for debts 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" is seventh in line for payment of allowed claims under the Bankruptcy Code.⁵⁸ Protecting pre-petition and unpaid spousal maintenance and/or child support claim in bankruptcy to ensure that the prepetition claims are treated in the bankruptcy case context requires vigilance. The deadline to file a proof of claim, though not construed as strictly as the deadline to object to discharge under section 523(c), is nonetheless policed closely by debtor's counsel. Creditors who know about a bankruptcy case who fail to protect their interests in that case, will loose out.⁵⁹

V. Miscellaneous

A. Notice of Appearance

Once you learn that your client's spouse or former spouse has filed bankruptcy, and you are going to assist that client, even in a limited capacity, in that case, you should file a Notice of Appearance. A Notice of Appearance enables you to keep up with what is going on in the case because you will receive all of the papers filed in the bankruptcy case. Of course, because bankruptcy practice is far more paper intensive than any Family Law practice, you will grow tired of seeing the papers. Because a bankruptcy case can move fast and in strange directions, the inconvenience of extra documents to review and paper to store is worth the trouble.⁶⁰

B. The Federal Rules of Bankruptcy Procedure

The Federal Rules of Bankruptcy Procedure govern bankruptcy cases, lawsuits filed in bankruptcy cases, and appeals from rulings in Bankruptcy Court. It would be wise to keep a current edition of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure at your finger tip.

C. Don't Forget the Local Rules and "Local Counsel"

The web site for each of the four Texas districts is provided earlier in this paper. Local Rules may be down-loaded from the following web sites:

[Eastern District of Texas](#)
[Northern District of Texas](#)
[Southern District of Texas](#)
[Western District of Texas](#)

Read the rules; the Bankruptcy Court's live by them. Having a local bankruptcy practitioner contact in each of the districts and each of the divisions within the four districts to call and ask what local rule applies is a good practice tool.

You also may access the local rules for the Eastern District, Northern District, Southern District and Western District via the [Bankruptcy Group Profile](#) at Thompson•Coe's website.⁶¹

D. Don't Forget the Local - Local Rules: Use What You Know as a Family Lawyer

A staple of Family Law practice skills will serve well a practitioner in Bankruptcy Court - the acquired skill of knowing that you have to know the Judge and to be astute at reading the Judge when you appear before her; bringing the right balance of confidence and deference to give the Bankruptcy Court. The Bankruptcy Bar is not unlike the Family Law Bar. The lawyers know one another and the Bankruptcy Judges know them, too. The judges will know you do not commonly practice in Bankruptcy Court. Confidence that you are a competent lawyer who is appearing before the Bankruptcy Court out of necessity to responsibly represent the interests of your client in Family Court is the message you will want the Bankruptcy Court to get from your appearance. Deference to the Court so that the Court will give you what you need.

VI. Appendix

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Endnotes

¹ The Bankruptcy Code is title 11 of the United States Code. [Return](#)

² Indeed, this same former bankruptcy judge suggests that the automatic stay is the single greatest equalizer between a debtor opining that its role is to act as a shield for the debtor and is not to be used by debtors as a sword. Thus, the Bankruptcy Code allows an entity, usually a creditor, to seek relief from the automatic stay, discussed *infra*. [Return](#)

³ See that portion of Bankruptcy Code section 362(a) (11 U.S.C. § 362(a), that reads as follows:

"Except as provided in subsection (b) of this section, *a petition filed under section 301, 302, or 303 of [title 11]....operates as a stay, applicable to all entities.*" (My emphasis) [Return](#)

⁴ See Bankruptcy Code section 301 (11 U.S.C. § 301), which governs the filing of voluntary cases under title 11. [Return](#)

⁵ See Bankruptcy Code section 303 (11 U.S.C. § 303), which governs the filing of involuntary bankruptcy cases. The automatic stay is effective on the filing of the involuntary petitions against a debtor even though the debtor will have an opportunity to challenge the involuntary filing, before an order of relief (this is a term of art, too) is entered. "Order of relief" will become important later in this discussion when we talk about time lines relating to filing objections to discharge.

Note: the Bankruptcy Code does not permit the filing of an involuntary chapter 13 against an individual. See 11 U.S.C. § 303(a) ("An involuntary case may be commenced only under chapter 7 or 11 of [title 11].").

Note: Bankruptcy Code section 302 (11 U.S.C. § 302) allows for spouses to jointly file their bankruptcy cases under one petition. [Return](#)

⁶ "Entity" is defined by 11 U.S.C. § 101(15), and "includes person, estate, trust,

governmental unit, and United States Trustee. "Person" is defined by 11 U.S.C. § 101, and "includes individual, partnership, and corporation, but does not include a governmental unit that (A) acquires an asset from a person (i) as a result of the operation of a loan guarantee agreement; or (ii) as receiver or liquidating agent of a person." [Return](#)

⁷ See 11 U.S.C. § 362(a). [Return](#)

⁸ The debtor's estate in the bankruptcy context is remarkably broad. See section 541 of the Bankruptcy Code, which defines "property of the estate," as being "comprised of all of the following property wherever located and by whomever held" including, *inter alia*, "[a]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is (A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable." See 11 U.S.C. § 541(a)(2). [Return](#)

⁹ 11 U.S.C. § 362(a) lists eight specific acts that are prohibited by the effectiveness of the automatic stay. They are:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [title 11], or to recover a claim against the debtor that arose before the commencement of the case under [title 11];
- (2) the enforcement, against the debtor or against property of the estate of a judgment obtained before the commencement of the case under [title 11];
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under [title 11];
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under [title 11];
- (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under [title 11] against any claim against the debtor; and
- (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor. [Return](#)

¹⁰ Indeed, the injunctive relief imposed by 11 U.S.C. § 362(a) is unlike every other injunction practitioners know and use. [Return](#)

¹¹ And because most divorce petitions, whether joined by a SAPCR, seek ex parte emergency injunctive relief to "obtain possession of the property of the [debtor's] estate or of property from the estate or to exercise control over property of the estate," the order a Family Court judge typically approves in these cases, too, is ineffective by virtue of the automatic stay. [Return](#)

¹² The word "case" is a word of art in the bankruptcy context. "Case" means the bankruptcy case filed under one of the relevant chapters of the Bankruptcy Code, *i.e.*, chapter 7, chapter 11, chapter 12, or chapter 13. (Municipalities must file for relief under chapter 9 of the Bankruptcy Code.) By contrast, a "proceeding" is an independent suit filed in the bankruptcy case, hence the term "adversary proceeding. *See* Part VII of the Federal Rules of Bankruptcy Procedure, which governs "Adversary Proceedings."[Return](#)

¹³ The list of acts excepted from the automatic stay is more than twice as many as those acts stayed under section 362(a). Section 362(b)(2) is the relevant provision for purposes of this discussion.[Return](#)

¹⁴ *See, infra*, for discussion on 11 U.S.C. 362(b)(2)(B).[Return](#)

¹⁵ an action to establish paternity.

But what about an action to determine parentage if the debtor is a believed-to-be-daddy? Does the literal reading of section 362 preclude the believed-to-be-daddy debtor from commencing or prosecuting an existing action once the bankruptcy petition is filed? The answer is "no." The automatic stay operates to stay acts of "entities." *See* 11 U.S.C. § 362(a) ("operates as a stay, applicable to all *entities*") (my emphasis));

Practice Tip: Even though section 362(b) (2)(A)(i) expressly exempts paternity actions from the imposing reach of the automatic stay, should a male debtor who wants initiate an action to have parentage determined obtain Bankruptcy Court permission to file the action in Family Court since the automatic stay does not apply to the debtor?

Rule 6009 of the Federal Rules of Bankruptcy Procedure is the practice rule that makes clear that a debtor is not subject to the automatic stay. FED.R.BANKR.P. 6009 expressly states that a debtor may, with or without Bankruptcy Court approval, commence and prosecute any action or proceeding in behalf of the estate before any tribunal. However, because a SAPCR establishment order imposes a child support obligation, the safe step is to file a "comfort" motion that alerts the Bankruptcy Court of what daddy-to-be intends to do and gets the Court's blessing.[Return](#)

¹⁶ an action to establish or modify an order existing before the bankruptcy petition is filed for alimony, maintenance, or support.[Return](#)

¹⁷ *See* 11 U.S.C. § 362(b)(2).[Return](#)

¹⁸ The word "prepetition" is used heavily in the bankruptcy context and relates to any happening before the date a bankruptcy petition is filed.[Return](#)

¹⁹ Indeed, the automatic stay is different from any other injunctive remedy given its "no-notice required" component in making it effective against just about everyone. [Return](#)

²⁰ See 11 U.S.C. § 362(b)(2). [Return](#)

²¹ See, e.g., *In re Taylor*, 216 B.R. 366 (Bankr.S.D.N.Y. 1998), *rev'd on other grounds*, 216 B.R. 366 (S.D.N.Y. 1999). [Return](#)

²² The Bankruptcy Court's duty is to ensure that all creditors of a debtor's estate are treated fairly and equitably incident to giving a debtor a fresh start. The Family Court, by contrast, is concerned about protecting the family. [Return](#)

²³ What makes chapter 7 an easier row to hoe in this discussion, added to the fact that post-petition earnings of a chapter 7 debtor are not property of the estate (*see M.H. Clark v. First City Bank*, 891 F.2d 111, 115 (5th Cir. 1989)), is the additional reality that the purpose of a chapter 7 case is to liquidate the chapter 7 debtor's estate assets and distribute them, based on the priority scheme established by the Bankruptcy Code (11 U.S.C. § 507), to the debtor's creditors. [Return](#)

²⁴ See 11 U.S.C. § 541 (imposes the petition date as a cut-off for purposes of defining property of a debtor's estate). Section 541 governs chapter 11 and chapter 12 debtors, too. *But see In re Colley*, 87 B.R. 432 (Bankr.S.D.Tex. 1998); *In re Heberman*, 122 B.R. 273 (Bankr.S.D.Tex. 1990). [Return](#)

²⁵ See 11 U.S.C. § 1306(a) ("Property of the estate includes, in addition to the property specified in section 541...(1) all property of the kind specified in [section 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed or converted,...and (2) earnings from services performed by the debtor after the case is commencement."). [Return](#)

²⁶ Of course, Bankruptcy Courts are inclined, usually, to yield to Family Courts in matters involving the support of children and spousal maintenance. But that inclination is not mandated or absolute. And because a Bankruptcy Court is afforded broad discretion in whether to grant relief from the automatic stay, cautious and careful navigation through this process is critical. Relying, therefore, that section 362(b)(2) takes care of the issue with the Bankruptcy Court, is unwise, and, indeed, may set the stage for considerable aggravation in the Family Law case. [Return](#)

²⁷ A plain-vanilla Motion for Relief from the Automatic Stay is attached as Appendix B to this Outline, as a starter go-by for Family Law practitioners. [Return](#)

²⁸ It should be noted that case law regarding relief from the automatic stay to prosecute a contempt action divides along whether the contempt action seeks criminal contempt or civil contempt. *Compare Gunther v. Glabb (In re Glabb)*, 261 B.R. 170 (Bankr.W.D.Pa. 2001) to *In re Allison*, 182 B.R. 881 (Bankr.N.D.Ala 1995). [Return](#)

²⁹ Such a request arguably would have to be filed as an adversary proceeding (which is an independent lawsuit filed in a pending bankruptcy case, and is governed largely by the Federal Rules of Civil Procedure and Local District Court Rules made applicable to the adversary proceeding by Part VII of the Federal Rules of Bankruptcy Procedure), rather than a contested matter (motion). Rather than guess about this, before filing, attempt to get some indication from the Bankruptcy Judge's law clerk. If that proves difficult, then you may elect to throw the dice, file the request as a motion (it's cheaper), understanding that you may be required to re-file the matter as an adversary and pay the full filing fee for the adversary proceeding. [Return](#)

³⁰ The negative-notice language used in the Northern District is:

BE ADVISED THAT NO HEARING WILL BE CONDUCTED ON THIS MOTION UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, ROOM 12A24, DALLAS, TEXAS 75242 BEFORE THE CLOSE OF BUSINESS ON _____ 2001, IS 15 DAYS FROM THE DATE OF SERVICE BY MAIL OF THIS MOTION. ANY RESPONSE TO THIS MOTION MUST BE IN WRITING AND FILED WITH THE CLERK OF THE BANKRUPTCY COURT, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE CLOSE OF BUSINESS ON _____ 2001. IF A RESPONSE IS FILED, A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY. SHOULD NO WRITTEN RESPONSE TO THIS MOTION BE TIMELY FILED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN. [Return](#)

³¹ See FED.R.BANKR.P. 9014 and the corresponding Local Rule. [Return](#)

³² See [Appendix A - Notice of Appearance](#).

Practice Tip: If you subscribe to PACER, all of this information can be gotten from PACER. However, suspecting that most Family Law practitioners do not subscribe to PACER since it is a federal practice resource tool, getting a copy of the Service List from debtor's counsel is the easiest way to get the information. If debtor's counsel is recalcitrant, however, go to the Bankruptcy Clerk's Office and ask for a copy of the Service List. Don't fudge on this, however. Notice is a big deal in bankruptcy practice and can turn a mild-manner jurist into a maniac if you have skirted the rules of notice! [Return](#)

³³ In Texas, the Bankruptcy Courts are grouped into the four Districts established for the United States District Courts - Eastern District, Northern District, Southern District, and Western District. Each of these Districts have multiple divisions. The web site for each of the Bankruptcy Court Districts is an excellent source for getting telephone numbers, etc. The web sites for the four districts in Texas are: www.txeb.uscourts.gov; www.txnb.uscourts.gov; www.txsb.uscourts.gov; and www.tswb.uscourts.gov. [Return](#)

³⁴ For example, the prerecorded message for Judge Steven A. Felsenthal here in the Dallas will give tell the caller that if a motion for relief from stay is filed by a certain date, use the date given as the preliminary hearing date for the motion. [Return](#)

³⁵ 11 U.S.C. § 362(e) provides that a hearing under that provision may be a preliminary hearing and a final hearing or the two hearings may be combined. Custom and practice differs from jurisdiction to jurisdiction. In the Northern District, Dallas Division, for example, the Bankruptcy Judges typically require the motion first be set on the Court's preliminary hearing docket. If between the time the motion is filed and the hearing date (usually about three weeks) the parties are able to resolve the motion, then the Court's time will be spent at the preliminary hearing docket call hearing that an agreement has been reached.

It is worth it to spend a little time cozying up to the Bankruptcy Judge's coordinator to have that person walk you through the procedural nuances of that particular Bankruptcy Court! [Return](#)

³⁶ For example, in the Northern District, the purpose for the preliminary hearing, assuming the parties fail to resolve the matter, is to allow the Bankruptcy Court to determine whether it may decide the motion without the necessity of a full-evidentiary hearing. Thus, the Bankruptcy Court will only entertain affidavit evidence at the preliminary hearing. Local Rule 4001.1(e) requires the party requesting the relief to file and serve his or her evidentiary affidavits supporting the motion not later than seven days before the hearing. Failure to timely comply with Local Rule 4001.1(e) is usually fatal to your motion.

I must admit, however, that the same is not necessarily the case if the debtor fails to comply with Local Rule 4001.1(e) and get his or her evidentiary affidavits filed and served not later than 48 hours before the hearing. The reason? Remember, the debtor in bankruptcy is a fiduciary for his or her creditors in those instances in which a trustee is not appointed. Because the impact of the debtor's failure to timely file affidavits reaches beyond the debtor personally and touches the creditors of that debtor, the Court can and often refrains from imposing a harsh remedy.

Of course, this all presumes the debtor filed a written objection to the motion for relief. If not, as provided by the "negative-notice" given in your motion for relief, you may ask the Bankruptcy Court to grant your motion by default. Again, for reasons discussed earlier in this note, the Court may find justification to not grant the relief immediately, but instead, maybe set the case for final hearing. [Return](#)

³⁷ Section 362(e) states that, 30 days after a request for relief under section 362(d) is made, the automatic stay will terminate as to the party seeking relief, unless the Bankruptcy Court orders that the stay remain in effect pending final resolution of the motion. The final hearing must be concluded within 30 days after the conclusion of the preliminary hearing unless the additional 30-day period is extended for a specified time by consent of the parties in interest or the Bankruptcy Court finds compelling circumstances to extend the time the automatic stay shall remain in effect. [Return](#)

³⁸ See 11 U.S.C. § 727, 11 U.S.C. § 1141, 11 U.S.C. §§ 1228(a) and 1228(b), and 11 U.S.C. § 1328(b). [Return](#)

³⁹ See 11 U.S.C. § 523(a)(5), which reads, in relevant part:

A discharge under...[the Bankruptcy Code] does not discharge an individual debtor from any debt...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 government unit, or property settlement agreement... [Return](#)

⁴⁰ It would be wise to befriend a seasoned bankruptcy practitioner, consumer bankruptcy practitioner if you can, who will answer some of the more basic questions. [Return](#)

⁴¹ See FED.R.BANKR.P. 1007(a). See also 11 U.S.C. § 101(12), which defines debt to mean "liability on a claim."; and 11 U.S.C. § 101(5), which defines claim to mean, among other things, a "right to payment"; and 11 U.S.C. § 101(10), which defines a creditor to mean, among others, an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor"; and 11 U.S.C. § 101(15), which defines an entity to include, among others, a "person."

Together, these definitions make known that a spouse or former spouse or child for whose benefit a court-ordered support or spousal maintenance obligation is ineffective, whether temporary or final, is a creditor of a debtor in a case filed under the Bankruptcy Code.

The term "order for relief" should be read to mean the date on which a voluntary petition is filed and, as for an involuntary case, the date on which the Bankruptcy Court enters an order for relief. [Return](#)

⁴² See FED.R.BANKR.P. 1007(b) and (c). [Return](#)

⁴³ See [Appendix E](#). [Return](#)

⁴⁴ *Id.* [Return](#)

⁴⁵ See 11 U.S.C. § 523(c)(1). [Return](#)

⁴⁶ See FED.R.BANKR.P. 4007(c). [Return](#)

⁴⁷ The only breathing room afforded in this 60-day time frame is also found in Fed.R.Bankr.P. 4007(c), which states that "[t]he [C]ourt shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided by Rule 2002."

FED.R.BANKR.P. 2002 is the provision that directs the Bankruptcy Court to get notice that a case has been commenced out to the creditors of that particular

debtor. Again, the Bankruptcy Court is relying on the debtor for the list of creditors to whom this notice should be mailed. [Return](#)

⁴⁸ Practice Tip: The 60-day time period begins to run under FED.R.BANKR.P. 4007(c) from the "first date set" for the meeting of creditors under section 341 - not the first date when the creditors meet under section 341. Sometimes this date gets changed. Sometimes the creditors meeting is not concluded at the first meeting. The language "first date set" has been enforced strictly by Bankruptcy Courts. [Return](#)

⁴⁹ See *In re Jodoin*, 209 B.R. 132 (Bankr. App. Panel 9th Cir. 1997). This is the majority position, for which courts have now acknowledged to be "consensus". See *In re Huddleson*, 194 B.R. 681 (Bankr. N.D. Ga. 1996). [Return](#)

⁵⁰ See 11 U.S.C. § 523(a)(15)(A). [Return](#)

⁵¹ *Id.* [Return](#)

⁵² See, e.g., *In re Webb*, 132 B.R. 199 (Bankr. M. D. Fla. 1991). [Return](#)

⁵³ See, Bernice B. Donald and Jennie D. Latta, THE DISCHARGEABILITY OF PROPERTY SETTLEMENT AND HOLD HARMLESS AGREEMENTS IN BANKRUPTCY: AN OVERVIEW OF §523(A)(15), 31 Fam.L.Q 409 (1997) and cases cited therein. [Return](#)

⁵⁴ See 11 U.S.C. § 523(a)(15)(A). [Return](#)

⁵⁵ See, e.g., *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). [Return](#)

⁵⁶ See *In re Anthony*, 190 B.R. 433 (Bankr. N.D. Ala. 1995, *mot. to amend judgment denied*, 190 B.R. 429; *In re Becker*, 185 B.R. 567 (Bankr. W.D. Missouri 1995). [Return](#)

⁵⁷ See 11 U.S.C. § 523(a)(15)(B). [Return](#)

⁵⁸ Section 507 sets out the priority scheme for claims to be paid by a debtor, assuming funds exist with which to pay allowed unsecured claims. Court-ordered spousal maintenance and child support are ranked seventh in priority. 11 U.S.C. § 502, a claim is deemed allowed if "proof" of that claim is filed within the time fixed for filing proofs of claim or is scheduled by the debtor as uncontested, liquidated, and undisputed, and the debtor does not object to the claim. Attached to this outline as Appendix D is a sample of a Proof of Claim form. The Proof of Claim form usually is included with the Notice of Commencement of the Case received from the Bankruptcy Court. The form also may be obtained from the Bankruptcy Clerk's Office.

Practice Tip: Even if your client receives a Notice of the Commencement of the Case (which indicates your client is included on the debtor's schedules as a creditor), it is worth the trip to the Bankruptcy Court to look at the debtor's schedules to see, first hand, how your client's claim is scheduled. If your client

agrees with the treatment the debtor has given, no need to file a proof of claim exists. However, out of an abundance of caution, a proof of claim should be filed on your client's behalf. [Return](#)

⁵⁹ This paper does not discuss the differing rules that apply in perfecting a creditor's claim depending on whether the kind of bankruptcy case filed. Know that the rules vary depending on whether a bankruptcy case is a no-asset chapter 7, or an asset chapter 7, or a chapter 11, chapter 12, chapter 13. You are advised to consult with a bankruptcy practitioner should the need arise for a client to need to protect a claim in a bankruptcy case. [Return](#)

⁶⁰ A copy of a Notice of Appearance is attached to this Outline at [Appendix A](#). [Return](#)

⁶¹ You may also access this outline at the [Thompson•Coe](#) website. [Return](#)

Presented at the Family Law Practice Seminar 2001 | University of Houston Law Foundation • October 11-12, 2001, Houston, Texas and October 18-19, Dallas, Texas

Article Date: Friday, October 19, 2001

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