The Bankruptcy Automatic Stay: It's Not the End of the World— or of the Case

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I. Introduction

Bankruptcy and the concept of giving an honest debtor a fresh start are basic concepts of our legal system. Indeed, the United States is the only country in the world to have a reference to bankruptcy in its basic underlying document. Article I, section 8 of the United States Constitution authorizes Congress to establish "uniform Laws of the subject of bankruptcies throughout the United States." That power has been held to include all aspects of the distribution of a debtor's property and the discharge of the debtor's debts.[1]

Pursuant to that power, Congress enacted the Bankruptcy Code, which is Title 11 of the United States Code. The Code is divided into eight chapters numbered 1, 3, 5, 7, 9, 11, 12, and 13.[2] Chapters 1, 3 and 5 have general applicability to all bankruptcies. Chapter 9 applies exclusively to government debtors. The remaining chapters, 7, 11, 12, and 13, authorize individual bankruptcies of different types. Chapter 7 deals with liquidations. Chapters 11, 12, and 13 deal with various kinds of reorganization of the debtor's financial affairs. Each bankruptcy usually results

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1 *In re* Klein, 42 U.S. 277 (1843).

2 The types of bankruptcies are commonly referred to by their chapter numbers rather than their names, so that one would refer to a "Chapter 7" rather than to a liquidation.

in the discharge of some of the debtor's pre-petition debts. Common to all of them is the "automatic stay."[3]

A mumpsimus abounds that the automatic stay comes like a lightning bolt from on high stopping all state court proceedings. Somewhere in the matrimonial bar's institutional subconscious is a picture of United States marshals descending on unsuspecting state judges and trial lawyers to enforce the automatic stay by hauling them off to federal jail. The automatic stay, in fact, is considerably more limited, particularly in family law cases, than is generally thought. Although the automatic stay does stay most tort and other civil actions for money and ownership of property, most aspects of family law litigation are unaffected by the stay.

II. The Automatic Stay

Demystified, the automatic stay is a statutory, *ex parte*, temporary restraining order against the world that automatically goes into effect the moment a debtor files a bankruptcy case. The stay continues until the bankruptcy case concludes, without the customary findings such as irreparable injury or probability of success and without any action by the bankruptcy judge.[4] The "[p]urpose of the automatic stay is to give the debtor a breathing spell from his creditors, in which he may attempt a repayment or reorganization plan. The automatic stay also protects creditors by averting a scramble for assets and promoting instead an orderly liquidation procedure . . ."[5]

Merely filing a petition in bankruptcy, without any further action by the bankruptcy court or the debtor, stays the commencement or continuation of any state or federal litigation, including appeals against the debtor, including those for claims exempted from discharge, based on a cause of action which arose prior to the filing of the bankruptcy, other than those specifically

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[3] 11 U.S.C. § 362(a)(1) (1998).

[4] *In re* Delta Resources, Inc., 54 F.3d 722 (11th Cir. 1995), *cert. denied., sub nom*., Orix Credit Alliance, Inc. v. Delta Resources, Inc., 516 U.S. 980 (1995); Hudson Valley Cablevision Corp. v. Route 202 Developers, Inc., 169 B.R. 531 (S.D.N.Y. 1994). This is true of involuntary filings as well as filings by the debtor. *See also* Kommanditselskalb Supertrans v. O.C.C. Shipping, Inc., 79 B.R. 534 (S.D.N.Y. 1987).

[5] Farley v. Henson, 2 F.3d 273 (8th Cir. 1993). *See also* Koolik v. Markowitz, 40 F.2d 567 (2nd Cir. 1994); *In re* Atlas, 222 B.R. 656 (S.D. Fla. 1998).

excepted by statute.[6] The automatic stay precludes any action to collect a debt or enforce a judgment against the debtor,[7] create, enforce or perfect a lien against the debtor's property,[8] move to obtain possession of, or control over, the debtor's property,[9] or set off a debt owing to the debtor.[10]

The distribution of marital property will be stayed.[11] This is consistent with the modern view of marriage as an economic partnership. It allows the bankruptcy court, which has before it, not only the marital partners, but also the creditors who claim an interest in their property, to decide the respective interests in the property. Essentially, the bankruptcy estate becomes a de facto secured creditor in the debtor's property as of the date the bankruptcy is filed.[12] Its interest must be decided before the spouses divide their property.

The problem for the matrimonial lawyer is that the bankruptcy judge usually will have a different approach from the domestic relations judge. The bankruptcy court's charge is to ensure that all creditors are dealt with fairly, while a domestic relations judge's principal concern is protecting the family. Those two perspectives might be enormously different, for example, when assessing debts between family members, or debts claimed to be due to those for whom services were rendered at reduced rates.[13]

The automatic stay has no substantive effect on state law cases. It neither extinguishes a debt nor creates rights in the debtor.[14] It does not affect trial or appellate jurisdiction.[15] The

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6 11 U.S.C. § 362(a) (1998).

7 11 U.S.C. §§ 362(a)(2) & 362(a)(6) (1998).

8 11 U.S.C. §§ 362(a)(4) & 362(a)(5) (1998).

9 11 U.S.C. § 362(a)(3) (1998).

10 11 U.S.C. § 362(a)(7) (1998).

11 *In re* Sokoloff, 200 B.R. 300 (Bankr. E.D. Pa. 1996); *In re* Roberge, 188 B.R. 366 (E.D. Va. 1995); *In re* Classe, 75 B.R. 543 (Bankr. E.D. Mo. 1987); Crowley v. Crowley, 715 S.W.2d 934 (Mo. Ct. App. 1986).

12 *In re* Stoops, 224 B. R. 205 (Bankr. M.D. Fla. 1998).

13 Lawyers representing the creditor spouse usually feel that they will receive a better hearing in the domestic relations court where the "untrustworthiness" of the debtor might be more apparent.

14 Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990); *In re* Synergy Dev. Corp., 140 B.R. 958 (Bankr. S.D.N.Y. 1992).

15 City of Middletown v. Holiday Syrups, Inc., 138 Misc. 2d 169 (N.Y. Sup. Ct. 1987).

stay merely suspends proceedings until explicitly lifted by the bankruptcy court or until the bankruptcy case ends. As a practical matter, however, many of those suits are either adjudicated or settled during the bankruptcy proceeding.

One possible, and troubling, effect of the stay may be to limit the ability of the debtor's lawyer to withdraw from the matrimonial case, even if the lawyer is not being paid. At least one state judge has so held and his reasoning, while unsettling, may be persuasive to other judges hearing motions to withdraw.[16] Of course, continuing to work on a case without being paid is not new to matrimonial lawyers. Having a client run out of money is one of a matrimonial lawyer's risks of doing business.[17]

III. Exception to the Stay

The non-economic aspects of the matrimonial action, such as the marital status itself, domestic violence, and the custody and visitation of children, are outside the ambit of the stay.[18] The interesting question of whether the automatic stay applies to a domestic violence proceeding excluding the debtor-spouse from the marital home is yet to be resolved. However, in appropriate cases, perhaps an argument can be made that the debtor's loss of the use of his property is only incidental to the state's exercise of its police powers to keep the peace.[19] Practically, it seems unlikely that either a domestic relations judge or a bankruptcy judge would allow a batterer back in the family home based on an allegation of economic hardship.

The obligation to support one's dependents is one of the oldest in the law of nations.[20] Even the cherished right of an honest

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16 Tremont Elec., Inc. v. Rampinelli Elec. Co., Inc., 142 Misc. 2d 80 (N.Y. Sup. Ct. 1988).

17 We note, anecdotally, that domestic relations lawyers appear to be the only lawyers less likely to be paid than bankruptcy lawyers.

18 *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); *In re* Cole, 202 B.R. 356 (Bankr. S.D.N.Y. 1996); *In re* Campbell, 185 B.R. 628 (Bankr. S.D. Fla. 1995); *In re* Ford, 78 B.R. 729 (Bankr. E.D. Pa. 1987).

19 *See* 11 U.S.C. § 362(b)(4) (1998); *In re* Wade, 948 F.2d 1122 (9th Cir. 1991); *In re* Vines, 224 B.R. 491 (Bankr. M.D. Ala. 1998); *In re* Synergy Dev. Corp., 140 B.R. 958 (Bankr. S.D.N.Y. 1992).

20 "The duty of parents to provide for the *maintenance* of their children is a principle of natural law . . . By begetting them, therefore, they have entered

debtor to a fresh start must yield to that principle.[21] Federal courts, therefore, generally eschew matrimonial issues.[22] Congress is in accord. Thus, in addition to exempting child and spousal support from discharge,[23] among the areas Congress excepted from the automatic stay are proceedings to establish or modify an order for support,[24] collect support from property that is not part of a debtor's estate[25] and to establish paternity,[26]

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into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from their parents . . . The municipal laws of all well-regulated states have taken care to enforce this duty . . . " (emphasis in the original) 1 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 446 (Sharswood ed., 1891).

21 The philosophy running through the recent bankruptcy court decisions was best summed up in *In re Sinewitz*, "The United States Bankruptcy Court is not a sanctuary for the avoidance of child support obligations." 166 B.R. 786, 789 (Bankr. D.Mass. 1994).

22 Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992). "[T]here is a danger that bankruptcy will be used as a weapon in an on-going battle between former spouses over the issues of alimony and child support or as a shield to avoid family obligations. It is important that '[t]he Bankruptcy Code . . . not be used to deprive dependents, even if only temporarily, of the necessities of life.'" Id. at 1579 (*quoting* Caswell v. Lang, 757 F.2d 608, 610 (4th Cir. 1985)). *See also* Macy v. Macy, 114 F.3d 1 (1st Cir. 1997); *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); *In re* Cole, 202 B.R. 356 (Bankr. S.D.N.Y. 1996); *In re* Bain, 143 B.R. 715 (Bankr. W.D. Mo. 1992).

23 Although one of the purposes of bankruptcy is to discharge a debtor's pre-petition obligations in order to afford an honest debtor a "fresh start," Congress has excepted certain debts from discharge in bankruptcy. *In re* Jones, 9 F.3d 878 (10th Cir. 1993); *In re* Ianke, 185 B.R. 297 (Bankr. E.D. Mo. 1995); *In re* Raff, 93 B.R. 41 (Bankr. S.D.N.Y. 1988). Among them are 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, [and a] determination made in accordance with State . . . law by a governmental unit . . . . " 11 U.S.C. § 523(a)(5) (1998); *In re* Jones, 9 F.3d 878 (10th Cir. 1993); *In re* Frey, 212 B.R. 728 (Bankr. N.D.N.Y. 1996); *In re* Ianke, 185 B.R. 297 (Bankr. E.D. Mo. 1995).

24 11 U.S.C. § 362(b)(2)(A)(ii) (1998); *In re* Maloney, 204 B.R. 671 (Bankr. E.D.N.Y. 1996); *In re* Newman, 196 B.R. 700 (Bankr. S.D.N.Y. 1996); *In re* Campbell, 185 B.R. 628 (Bankr. S.D. Fla. 1995).

25 11 U.S.C. § 362(b)(2)(B) (1998); *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); *In re* Pope, 209 B.R. 1015 (Bankr. N.D. Ga. 1997); *In re* Campbell, 185 B.R. 628 (Bankr. S.D. Fla. 1995). (Commonly, post-petition earnings of Chapter 7 debt-

which most states treat as the beginning of a support proceeding. These exceptions are significant for several reasons.

The support creditor's ability to collect from non-estate property is important. Individual debtors can file for bankruptcy protection under four chapters of the bankruptcy code. Three provide for some kind of reorganization and one for the liquidation of the debtor's property. A Chapter 7 proceeding liquidates most of the debtor's assets, with the proceeds distributed among the creditors. The bankruptcy estate's assets and liabilities are calculated as of the time the bankruptcy petition is filed. Commonly, post-petition earnings of Chapter 7 debtors are available to pay support while those of Chapter 12 and Chapter 13 debtors, who are attempting to use those earnings to reorganize and pay creditors, may not.[27] The status of the post-petition earnings of a chapter 11 debtor is less clear.[28] In addition, certain of the debtor's property, such as pension and retirement accounts, may be exempt in the bankruptcy but available as a source from which to collect support and support arrears.

The Bankruptcy Reform Act of 1994 grants seventh priority status to support claims, placing them ahead of priority taxes.[29] Accordingly, as a practical matter, reorganization plans, as contrasted with liquidation plans, in cases filed after October 22, 1994, the effective date of the Act, cannot become effective unless they provide for the payment of all pre-petition support debt. The issue is what is seventh priority, nondischargeable support and what is only a property settlement. The findings of fact of the state court, as contrasted with mere conclusions or rulings of law, are binding on the bankruptcy court under the doctrines

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ors would be available for support while those of Chapter 11, 12 and Chapter 13 debtors might not. Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992); *In re* Newman, 196 B.R. 700 (Bankr. S.D.N.Y. 1996)).

[26] 11 U.S.C. § 362(b)(2)(A)(i) (1998); *In re* Campbell, 185 B.R. 628 (Bankr. S.D. Fla. 1995).

[27] Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992); *In re* Newman, 196 B.R. 700 (Bankr. S.D.N.Y. 1996).

[28] *See, In re* Cooley, 87 B.R. 432 (Bankr. S.D. Tex. 1998); *In re* Keenan; 195 B.R. 236 (Bankr. W.D.N.Y. 1996); *In re* Altcheck, 124 B.R. 944 (Bankr. S.D.N.Y. 1991); *In re* Heberman, 122 B.R. 273 (Bankr. S.D. Tex. 1990); *In re* Fitzsimmons, 725 F.2d 1208 (9th Cir. 1984).

[29] 11 U.S.C. § 507(a); Pub. L. No. 103-304.

of *res judicata* and collateral estoppel.[30] Practically, that means that a state judge or support hearing examiner can commence or continue a support hearing and make findings of fact and issue orders of support that will bind the bankruptcy court in a dischargeability hearing, accrue interest and survive the bankruptcy.[31]

The automatic stay does not enjoin ministerial acts of state courts. For example, if the judge signed a judgment before the debtor filed bankruptcy, the clerk can enter the judgment after the stay goes into effect.[32] Similarly, if a state judge issues an order distributing a pension that is intended to be a qualified domestic relations order (QDRO) but ultimately does not qualify as one the judge may issue another order after the bankruptcy to docket a QDRO.[33]

As another example, once a judge decides an issue on the record, she may sign the judgment after the stay goes into effect.[34] However, that would only be true where the bench ruling included all the essential terms of the judgment. Where the

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30 Courts have held that bankruptcy courts must honor state court decisions expressly as required by statute 28 U.S.C. § 1738. *See, e.g.,* Bowers v. Connecticut Nat. Bank, 78 B.R. 388 (D. Conn. 1987), appeal dismissed, 847 F.2d 1019 (2nd Cir. 1988). *See also* Grogan v. Garner, 498 U.S. 279 (1991); *In re* Davis, 3 F.3d 113 (5th Cir. 1993); *In re* Hudson, 182 B.R. 741 (Bankr. N.D. Tex. 1995).

31 In domestic relations proceedings, attorneys often have the ability, if not the obligation, to provide the judge with proposed findings of fact or, at least, make suggestions as to what should be included. Often the findings of fact are taken from or based on a separation agreement or stipulation of settlement. The creditor spouse is best protected by property settlements that sound in support. Language that a support award is lower than it otherwise would be if there had been no property settlement may be the basis for a bankruptcy court finding the property award not dischargeable in a subsequent bankruptcy. See the endnotes for examples.

32 *In re* Papatones, 143 F.3d 623, (1st Cir. 1998); Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522 (2nd Cir. 1994); *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); *In re* Aultman, 223 B.R. 481 (Bankr. W.D.Pa. 1998).

33 *In re* Gendreau, 122 F.3d 815 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1187 (1998); *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). *But see In re* King, 214 B.R. 69 (Bankr. D. Conn. 1997).

34 *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).

bench ruling is only an outline, with specific amounts to be fleshed out in a written order or judgment, signing the judgment would be more than ministerial and probably stayed.

To fall outside the ambit of the stay, a judge must do more than merely make up her mind. The decision must be announced orally on the record, or a written opinion must be filed before the bankruptcy petition is filed.[35]

IV. The Court Contempt Proceedings

There are two types of contempt, civil and criminal. A criminal contempt proceeding is exempt from the automatic stay.[36] A civil contempt proceeding is not. A particular act, or failure to act, may constitute either or both. They have in common that they are based on a clear violation of an unequivocal, lawful court order.

Civil contempt has as its main aim the vindication of a private right of a party to a litigation.[37] Any penalty assessed is to compensate that party or to coerce compliance with a court order to that party's benefit, or both. Courts have an inherent power to enforce their orders through civil contempt.[38]

The purpose of criminal contempt is to vindicate offenses against public justice, rather than to enforce the rights of a party, and to compel respect for court orders.[39] Criminal contempt is, as the name implies, a crime.[40]

In 1911, the United States Supreme Court, analyzing whether a court-ordered incarceration was for civil or criminal contempt, introduced the keys-to-the-jailhouse test. Essentially, if a person may be released from prison by doing an ordered act,

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35 Bonilla v. Trebol Motors Corp., 150 F.3d 77 (1st Cir. 1998).

36 11 U.S.C. § 362(b)(1) (1998); *In re* Vines, 224 B.R. 491 (Bankr. M.D. Ala. 1998); *In re* Maloney, 204 B.R. 671 (Bankr. E.D.N.Y. 1996); *In re* Moon, 201 B.R. 79 (Bankr. S.D.N.Y. 1996), *rev'd on other grounds*, 211 B.R. 483 (S.D.N.Y. 1997); Skripek v. Skripek, 232 A.D.2d 397 (N.Y. 2 Dept. 1996).

37 *In re* Allison, 182 B.R. 881 (Bankr. N.D. Ala. 1995).

38 Shillitani v. United States, 384 U.S. 364 (1966).

39 Cooke v. United States, 267 U.S. 517 (1925); *In re* Palumbo Family Ltd. Partnership, 182 B.R. 447 (Bankr. E.D. Va. 1995); King v. Barnes, 113 N.Y. 476 (1889).

40 Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); *In re* Palumbo Family Ltd. Partnership, 182 B.R. 447 (Bankr. E.D. Va. 1995).

paying support arrears for example, that person holds the power to end the incarceration (in effect, holding the keys to the jailhouse). In such cases, the contempt is civil. If the person is sentenced to a finite term, then the contempt is criminal.[41]

A proceeding to hold a debtor in civil contempt for failing to make payments due a spouse generally will be stayed as a device to collect money from the debtor, while one for criminal contempt generally will be considered a proceeding to vindicate a state court's authority and therefore outside the ambit of the automatic stay.[42] A debtor may not be incarcerated until an obligation is paid.[43] Unfortunately, the distinctions between civil and criminal contempt are blurred.[44] Since state court findings are frequently unclear on the issue, the bankruptcy court will independently examine the underlying circumstances of each case.[45]

Proceedings to enforce non economic orders, such as those for custody and visitation, are generally outside the reach of the automatic stay, whether for civil or criminal contempt.[46]

V. State Courts May Decide if Actions are Stayed

Questions whether the automatic stay has stayed an action or proceeding can be resolved either in the bankruptcy court or the state court where the case is pending. State courts retain jurisdiction to decide whether they have jurisdiction.[47] Appeals

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41 Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911).

42 11 U.S.C. § 362(b)(1) (1998); *In re* Allison, 182 B.R. 881 (Bankr. N.D. Ala. 1995); *In re* Dunham, 175 B.R. 615 (Bankr. E.D. Va. 1994); *In re* Kearns, 168 B.R. 423 (D. Kan. 1994).

43 *In re* Walters, 219 B.R. 520 (Bankr. W.D. Ark. 1998); Redmond v. Redmond, 123 Md.App. 405, 718 A.2d 668 (Md. Ct. Spec. App. 1998)

44 *See, e.g.*, McCormick v. Axelrod, 59 N.Y.2d 574 (1983), *amended on other grounds*, 60 N.Y.2d 652 (1983).

45 Indeed, it is not unusual for a state court to punish for both civil and criminal contempt in the same order and sentencing to overlapping or concurrent terms.

46 *In re* Vines, 224 B.R. 491 (Bankr. M.D. Ala. 1998); *In re* Altchek, 124 B.R. 944 (Bankr. S.D.N.Y. 1991).

47 Erti v. Paine Webber Jackson & Curtis, Inc. (*In re* Baldwin-United Corp. Litig.), 765 F.2d 343 (2nd Cir. 1985); *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); *In re* Weller, 189 B.R. 467 (Bankr. E.D. Wis. 1995); Hilsen v. Hilsen, 161 A.D.2d 459

from a decision about whether the stay applies are through the state appellate system.

The state judge must address the automatic stay issue on the record. Merely continuing or starting a hearing will probably not be enough.[48] In coming to a decision, the state judge must apply federal law.

Once a state court holds that the stay applies, only the bankruptcy court may lift or modify it. However, an aggrieved party can move before the bankruptcy court for relief from the stay. Relief is granted liberally in domestic relations cases.[49]

VI. A Practical Approach

The overwhelming majority of divorce cases settle. Even though judges sign the final orders, lawyers, not judges, control the financial aspects of the case. One way to keep the property due a creditor spouse out of bankruptcy court is to vest title to the debtor's assets due the creditor in the creditor, even if the debtor has physical possession.

As a general rule, distributed property, including cash, to which title has vested in the creditor spouse before the bankruptcy petition was filed, does not become part of the bankruptcy

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(N.Y. 1 Dept. 1990), *lv. den*., 76 N.Y.2d 714 (1990). In February 1999, the 9th Circuit issued a 2-1 opinion in *In re* Gruntz, 166 F.3d 1020 (9th Cir. 1999) that appeared to be a sweeping disagreement with the rule and contrary to what was the generally accepted across the country. Judge Fletcher filed a strong dissent. There was also considerable criticism from the bar and bench. *See, for example, In re* Singleton, 230 B.R.533 (6th Circuit BAP 1999); Haines, "Ninth Circuit Divests State Courts of Jurisdiction to Construe and Apply the Automatic Stay," NORTON BANKRUPTCY LAW ADVISOR, April 1999, p.1. Thereafter, the same 9th Circuit panel filed a second opinion superceding and substantially restricting the scope of its original opinion. *In re* Gruntz, 177 F.3d 728 (9th Cir. 1999). Judge Fletcher again dissented. That order was then withdrawn by an order reported at 177F.3d 729, which granted en banc review.

[48] Bonilla v. Trebol Motors Corp., 150 F.3d 77 (1st Cir. 1998).

[49] 11 U.S.C. §§ 105(a) & 362(d) (1998); *In re* Robbins, 964 F.2d 342 (4th Cir. 1992); Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992); *In re* Long, 148 B.R. 904 (Bankr. W.D. Mo. 1992); *In re* Bain, 143 B.R. 715 (Bankr. W.D. Mo. 1992); *In re* Dunlap, 15 B.R. 737 (Bankr. W.D. Mo. 1981).

estate and is not subject to the automatic stay, even if the property is still in the possession of the debtor.[50]

Pension interests assigned, but not yet mature, may vest in the creditor spouse and not become property of the bankruptcy estate.[51] Federal courts have recognized this issue and generally found that where a judge intends to assign an interest in a pension, even if imperfect, the assignment will take the property out of the bankruptcy estate.[52] The issuance by a state court of an order intended to be a QDRO vests an interest in the debtor's pension in the creditor spouse, even though the order is ultimately not effective as a QDRO. A replacement QDRO may be issued by the state court after the filing of the bankruptcy case.[53] However, if no order has been issued, a separation agreement alone is not sufficient to remove the creditor spouse's share of the pension from the estate.[54]

Where a debtor is holding a creditor spouse's property, such as part of a periodic pension payment or money in a bank account, that property is held in trust for the creditor spouse and is not part of the bankruptcy estate.[55] The creditor spouse may move to enforce support rights against non-estate property.[56]

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50 *In re* Pope, 209 B.R. 1015 (Bankr. N.D. Ga. 1997); *In re* Piasecki, 171 B.R. 49 (Bankr. N.D. Ohio 1994); *In re* Greenwald, 134 B.R. 729 (Bankr. S.D.N.Y. 1991). *See also*, 11 U.S.C. § 541 (1998); *In re* Rocky Mountain Trucking Co., Inc., 47 B.R. 1020 (D.Colo. 1985).

51 *In re* McCafferty, 96 F.3d 192 (6th Cir. 1996); *In re* Teichman, 774 F.2d 1395 (9th Cir. 1985); *In re* Gomez, 206 B.R. 663 (Bankr. E.D.N.Y. 1997); *In re* Potter, 159 B.R. 672 (Bankr. N.D.N.Y. 1993); *In re* Long, 148 B.R. 904 (Bankr. W.D. Mo. 1992).

52 "We doubt that Congress ever intended that a former wife's judicially decreed sole and separate property interest in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving debtors a fresh start." Bush v. Taylor, 912 F.2d 989, 994 (8th Cir. 1990).

53 *In re* Gendreau, 122 F.3d 815 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1187 (1998) ; *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). *But see, In re* King, 214 B.R. 69 (Bankr. D. Conn. 1997).

54 *In re* Zeitler, 213 B.R. 457 (Bankr. E.D.N.C. 1997).

55 *In re* Teichman, 774 F.2d 1395 (9th Cir. 1985); *In re* Brown, 168 B.R. 331 (Bankr. N.D. Ill. 1994).

56 *In re* Pope, 209 B.R. 1015 (Bankr. N.D. Ga. 1997); *In re* Newman, 196 B.R. 700 (Bankr. S.D.N.Y. 1996); *In re* Brown, 168 B.R. 331 (Bankr. N.D. Ill. 1994).

If the title to the property did not vest in the nondebtor spouse prior to the bankruptcy filing, the property becomes part of the estate and is subject to the automatic stay and the rights of other creditors.[57] Too often this important issue is ignored. Indeed, failure to consider the bankruptcy ramifications of a matrimonial settlement is probably malpractice.[58]

VII. Conclusion

Matrimonial proceedings are an exception to the rule that the filing of a bankruptcy proceeding stops related state court litigation. Except for the distribution of marital property, virtually everything else continues in the state court. Family law jurisdiction remains with the states.

Indeed, to the extent that state court judges make specific findings of fact before or during the bankruptcy case, those findings bind the bankruptcy court as to the spouses. More often than not, the state judge's findings of fact are drafted by the lawyers for the parties. Carefully drafted, those findings can avoid a creditor's losing in the bankruptcy court what was won in the matrimonial proceeding.

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[57] *In re* Reines, 142 F.3d 970 (7th Cir. 1998); *In re* Ellis, 72 F.3d 628 (8th Cir. 1995); *In re* Palmer, 78 B.R. 402 (Bankr. E.D.N.Y. 1987).

[58] *See* Meyer V. Wagner, 429 Mass. 410, 709 N.E.2d 784, n.15 (Sup. Ct. Mass. 1999).

Appendix A

The drafting of judgments and agreements often substantially influence whether the rulings of a state or federal judge will control the distribution of marital property and the dischargeability of marital obligations. We offer the following sample language to lawyers who would prefer that their disputes not be federalized.

1) *Sample judgment language*:

Pursuant to the terms of their Stipulation, Defendant is to pay to Plaintiff, as and for her spousal support, the sum of $8,000 per month, taxable to plaintiff and deductible to Defendant. This amount combined with the income which it is assumed will be generated by the equitable distribution agreed to in the Stipulation is necessary in order to allow Plaintiff to maintain the standard of living to which she is entitled.

OR

Pursuant to the terms of their Stipulation, Defendant is to pay to Plaintiff the sum of $8,000 per month, taxable to plaintiff and deductible to defendant. This level of support is inadequate to allow Plaintiff to maintain the standard of living to which she is entitled, but when combined with the equitable distribution award is adequate. Until such time as Defendant has completed the payments due to the Plaintiff for her equitable distribution, the Defendant shall hold his interest in the cooperative apartment located at 893 Park Avenue in trust for the benefit of Plaintiff, as security for his equitable distribution obligation.

OR

Pursuant to the terms of their Stipulation, Defendant is to pay Plaintiff the sum of $4,000 per month taxable to Plaintiff and deductible to Defendant as spousal support and $4,000 per month as child support. These amounts have been determined based in part on the additional obligations assumed by Defendant, as set forth in Article VI of the Stipulation and on the distributive awards to which Plaintiff is entitled. Support would have been higher had those obligations not been assumed.

2) *Sample agreement language*:

a) The payments under ARTICLE IV, SPOUSAL SUPPORT and ARTICLE V, CHILD SUPPORT are intended by the parties to be in the nature of support and as such shall not be subject to discharge in the event of the Husband's voluntary or involuntary bankruptcy.

b) The payments to be made by the Husband to third parties or as reimbursement to the Wife under ARTICLE V, CHILD SUPPORT, in the nature of educational and related expenses, medical and dental expenses, payments to camps, and for extra curricular activities and lessons, are intended by the parties to be in the nature of additional child support and as such shall not be subject to discharge in the event of the Husband's voluntary or involuntary bankruptcy.

c) The Husband acknowledges that he is indebted to the Wife in the sum of $25,000 representing unpaid support and maintenance for her and the children (tax free to the Wife and non-deductible to the Husband) and promises to repay said sum on or before September 22nd, 2002 with interest at the rate of .5% per month on any unpaid amount. Since this debt represents past due support and maintenance, it is the parties' intention that it not be subject to discharge in the event of the Husband's voluntary or involuntary bankruptcy.

d) The Husband has assumed sole responsibility for the payment of certain debts incurred by the parties as identified in Schedule C of the Agreement and certain debts of the Wife as identified in Schedule D of the Agreement and has agreed to indemnify the Wife and hold her harmless from any responsibility for payment of such debts, including reasonable attorneys' fees incurred in connection with defending against or negotiating the payment of these debts. In consideration thereof the Wife has agreed to accept lower support and maintenance then would otherwise be appropriate. This indemnification and hold harmless clause is therefore considered part of the Husband's support obligation and shall not be subject to discharge in the event of the Husband's voluntary or involuntary bankruptcy.

e) The Husband agrees to pay the Wife's counsel fees to relieve the Wife of the need to use any funds being paid to her by the Husband for her support and for the support of the children. The payment of these fees is intended to be part of the support

arrangement entered into between the parties and shall not be subject to discharge in the event of the Husband's voluntary or involuntary bankruptcy.

f) In the event that any of the Husband's obligations set forth in Paragraphs a) through e) above of this Agreement are discharged in bankruptcy and as a result of such discharge third parties make any claims against the Wife for payment of these obligations, these circumstances shall constitute a significant unforeseen change of circumstances warranting an upward modification of any non-discharged spousal or child support obligations.

g) The parties have been advised of their rights and obligations under the United States Bankruptcy Code, Title ll of the United States Code and, in particular, ll U.S.C. §523 (a)(5) relating to the dischargeability of debts to a former spouse or child and have agreed to the provisions of this article with full knowledge that their intentions are herein made clear for the purpose of any future controversy relating to what constitutes support, for bankruptcy purposes or otherwise.