

BANKRUPTCY AND CHILD SUPPORT COLLECTION

Section I: Bankruptcy Basics and Definitions:

1. **What is Bankruptcy:** Bankruptcy is the immediate result of the filing of a bankruptcy petition in the bankruptcy court. Important concepts in bankruptcy:
 - a. **Automatic Stay:** The filing of the bankruptcy petition automatically stays *most* actions by the debtor's creditors by operation of 11 U.S.C. § 362. The stay requires that creditors cease all collection and enforcement actions against the debtor and the debtor's property, including having any kind of contact with the debtor attempting to collect on the debt. Bankruptcy law provides for the imposition of sanctions and awarding of damages against a creditor who violates the stay. A chapter 7 stay is approximately 90 days long, and a chapter 13 stay lasts for the duration of the bankruptcy, however long that may be. Whether or not a debt is dischargeable, a creditor cannot violate the stay. There are important exceptions to the automatic stay.
 - b. **Estate:** The filing of the bankruptcy petition results in the creation of an estate, which consists of all of the property a debtor has. Property in this sense is almost as broad as one could possibly imagine, including contingent rights of action or other contingent and nonvested rights, even including assets the debtor is unaware of, such as an unknown interest in real estate. Everything that the debtor owns when he or she files a bankruptcy is called the estate. The debtor's assets in the estate are either exempt – which means they are safe from the creditors, or non-exempt – which means the assets may be liquidated during the bankruptcy and the proceeds distributed to creditors.
 - c. **Trustee:** Upon the filing of Chapter 7 and Chapter 13 bankruptcy petitions, a Trustee is appointed to manage the estate. The Trustee is an attorney who specializes in bankruptcy. Every bankruptcy has a local trustee appointed to oversee the case. The Trustee administers the debtor's estate and it is his or her job to collect non-exempt assets, sell them off, and distribute the money to the creditors. The Trustee is not a judge, and he or she does not have any say in whether or not a certain debt is or isn't dischargeable.
 - d. **Discharge:** An order discharging the debtor is entered by the bankruptcy court at the successful completion of a debtor's bankruptcy. It means that all of the debts that are dischargeable, are now gone. This discharge is an injunction against any creditor taking

NOTES:

any action to collect on a debt that was discharged. Bankruptcy law provides for the imposition of sanctions and awarding of damages against a creditor who violates the discharge exemption. If a debt is not dischargeable, it survives the bankruptcy and the injunction does not apply to debts not discharged. The automatic stay terminates upon the entry of the order discharging the debtor.

2. Types of Bankruptcy:

- a. **Chapter 7** – also called a liquidation.
 - i. Typically takes approximately 90 days from the filing of the petition until he discharge order is entered.
 - ii. There is no repayment plan established in the bankruptcy, and the debtor does not typically make payments in this bankruptcy.
 - iii. Most of the time, there are no assets that are administered by the Trustee, and therefore, nothing is paid to creditors.
 - iv. If there are assets that are not exempt, the Trustee’s job is to liquidate those assets, notify creditors of the possibility of payment, and to distribute the funds to creditors.
 - v. Debtors usually have less income and less assets than a chapter 13 debtor
 - vi. Can only file once every 8 years
- b. **Chapter 13** – also called restructuring or repayment.
 - i. Together with the bankruptcy petition, the debtor must file a plan with the bankruptcy court proposing to make monthly payments to the Trustee to be distributed to creditors.
 - ii. The plan term is typically three to five years long.
 - iii. Plans must comply with certain requirements in the bankruptcy code relating to the payment of priority debts.

NOTES:

- iv. A chapter 13 debtor must have regular monthly income to make monthly chapter 13 plan payments, and may also propose to liquidate assets to pay additional funds into the plan.
- v. Less limitation on the frequency of filings

3. Claims:

- a. When a bankruptcy petition is filed, and it appears possible that the Trustee will have funds to pay to creditors, Trustee or the court will send out a notice to file claims to all listed creditors.
- b. A creditor must file a “proof of claim” with the bankruptcy court in order to get paid by the Trustee. In a chapter 7, the Trustee will send a notice to file claims to creditors. In a chapter 13, the bankruptcy court will send a notice to file claims to creditors. Once the notice to file claims has been issued, creditors have 90 days to file a claim, except that certain creditors have up to 180 days to file their claim.
- c. Chapter 7 and Chapter 13 petitions and the initial actions taken in each type of bankruptcy case are similar up until the point of payment by the Trustee.
- d. Chapter 7 payout of claims: Roughly 90% of Chapter 7 bankruptcies in MN are “no asset” cases in which there are no assets for the Trustee to liquidate and no opportunity for creditors to file claims. However, in the remaining 10% of cases, there are often significant assets for the Trustee to use to pay creditors.
 - i. When money is collected by the Trustee to pay claims, Federal law provides for a “priority” payment structure for who gets the money first. The first priority for payment in bankruptcy is domestic support obligation arrears. So file your claims!
 - ii. Unintentionally omitted assets may be discovered after the original bankruptcy case was closed, and a bankruptcy case can be reopened years after it was originally closed to notify creditors of new funds, liquidate the omitted asset, and repay creditors.
 - iii. The Chapter 7 estate is funded by one of two ways:

NOTES:

1. Assets that a debtor owns which are in excess of the allowed exempt property, can be liquidated by the Trustee, and the proceeds used to pay debts.
 - a. In Minnesota, Debtors have the option to choose from two sets of exemptions:
 - i. State exemptions, which protect equity in the homestead up to \$390,000, one vehicle per debtor with up to \$4,600 in equity, wedding ring set, household goods and personal effects and clothing, retirement funds, whole life insurance policy with some cash value, etc.
 - ii. Federal exemptions, which protect equity in the homestead up to \$23,675 for an individual, or \$47,350 for a married couple; household goods, personal effects, clothing, etc.; jewelry up to \$1600; one motor vehicle with equity of up to \$3,775 in value; retirement funds, etc; and general exemption ("wildcard") of any property of the debtor's choosing of \$1,250 plus any amount of the homestead exemption that is not used up to \$11,850. This can be used for anything, including cash, additional vehicles, etc.
 - b. It has been said by many bankruptcy Trustees that the greatest source of information about non-disclosed or fraudulently concealed assets is ex-spouses, ex-significant others, and the recipients of domestic support obligations. The bankruptcy Trustee would welcome a telephone call or letter from you or a recipient about possibly omitted assets.
2. The estate can also be funded by recovering certain payments or transfers that occurred before the bankruptcy petition (think Medical Assistance lookback):

NOTES:

- a. State law and federal Bankruptcy law prohibit “fraudulent conveyances” by persons who are insolvent. Minn. Stat. §§ 513.41-.51 allows creditors (and bankruptcy Trustees) to undo a transfer of property of the debtor if the debtor did not receive reasonably equivalent value in exchange.
- b. State and federal law also prohibit “preferences”, or repayments of debt to a close friend or family member within one year (bankruptcy law) or up to 6 years (state preference/fraudulent conveyance law) before the filing.
- e. Chapter 13 is a debt restructuring that requires the debtor to make payments to the Trustee each month for 3 or 5 years; the amounts of the payments are dependent upon a number of factors, including how much priority debt is owed, what the debtor’s income is, and what the debtor’s assets are. A debtor can also propose to liquidate assets during the plan and pay the proceeds to the Trustee for distribution to creditors. These regular monthly payments are what the Trustee pays creditors.

4. Notice of Filing:

- a. You will get a “Notice of Chapter 7/13 Bankruptcy Case” either immediately upon the debtor’s filing (if your organization has subscribed to electronic case filing notices) or by mail within a few days. This notice tells you what chapter the debtor filed and when and where there will be a brief meeting (called the “Meeting of Creditors”) between the debtor and the Trustee which creditors may attend.
 - i. This meeting is largely a formality for the Trustee to verify that the information in the bankruptcy petition is true and correct.
 - ii. Creditors are not required to attend, as nearly everything a creditor needs to do can be accomplished through electronic filing.
 - iii. The meeting is a chance to question the debtor about assets that he or she might have that haven’t been disclosed. If you know that this debtor has significant assets that they haven’t disclosed, you might want to go.
 - iv. You do not have to go to this meeting to try to protect your debt from being discharged. The trustee has no control over that.

NOTES:

5. Access to Bankruptcy Documents:

- a. To look at all of the documents that the debtor filed, go to www.mnb.uscourts.gov this is the bankruptcy court's website where anyone can access the debtor's information. From there you will click on the case locator, or PACER, as the program is called, and you will have to create an account. PACER charges you when you look up a case or download or print documents, but it is very cheap – ten cents per page.
 - i. In the vast majority of Chapter 7 cases, there are no non-exempt assets, no claims to file, and therefore reviewing the bankruptcy documents are of little value unless you suspect omitted assets or fraudulent conduct by the debtor.
 - ii. In Chapter 13 cases, the Chapter 13 plan governs the administration of the case, and this is a critical document for a creditor to review. The plan tells you if your debt is listed, and how much you are going to get paid during the course of the bankruptcy. Different debts get different priorities, and some will get paid back 100%, while others might not get paid anything.

6. The Trustee:

- a. The Trustee's job is to ensure that the bankruptcy is administered properly and maximize the benefit of the estate for the creditors.
- b. Trustees in Minnesota are by and large very sympathetic to recipients of domestic support obligations, and if you or a recipient has concerns or believes that a debtor is not totally honest, the Trustee would be more than happy to speak with you.
- c. The Notice of Chapter 7/13 Bankruptcy Case you receive upon the filing of the case will give the Trustee's name, address, telephone number, and email address.

7. Special Provisions for Domestic Support Obligations in Chapter 13:

- a. Chapter 13 has special protections in place for domestic support obligations to be paid through the Chapter 13 plan. If a debtor owes a domestic support obligation, the debtor **must** both catch up all arrears **and** remain current on the obligation during the chapter 13. A debtor must certify at the end that they do not owe any child support in order to obtain their discharge.

NOTES:

Section II: Child Support and Bankruptcy: What is and is not dischargeable

1. Among other debts, domestic support obligations are categorically nondischargeable in bankruptcy. The bankruptcy code gives special treatment in several different ways to domestic support obligations.
 - a. Bankruptcy does not discharge debt for a “domestic support obligation.” Domestic Support Obligation (DSO) is defined by 11 U.S.C. § 101(14A) as: “a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law, that is—
 - i. owed to or recoverable by
 1. a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or
 2. a governmental unit; AND
 - ii. in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated; AND
 - iii. established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
 1. a separation agreement, divorce decree, or property settlement agreement;
 2. an order of a court of record; or
 3. a determination made in accordance with applicable nonbankruptcy law by a governmental unit; AND
 - iv. not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.”

NOTES:

- b. Practically speaking, a DSO includes the obvious--if the debtor was ordered to pay something by a family court, whether termed as child support, spousal maintenance, or contribution toward specific needs of a child, it is a domestic support obligation and is not dischargeable.
 - i. A nondischargeable DSO includes even DSOs established internationally—a recent case determined that the Hague convention established a nondischargeable DSO. *In re Weed*, 479 B.R. 533 (Bankr. D. Minn. 2012).
- c. However, Courts have expanded this definition to include some other things that are “in the nature of child support” which include
 - i. Guardian ad Litem fees (*See, e.g., Madden v. Staggs (In re Staggs)*, 203 B.R. 712 (Bankr. W.D. Mo. 1996); (*In re Kasscieh*, 467 B.R. 445, 451 (Bankr. S.D. Ohio 2012) *aff’d*, 482 B.R. 190 (B.A.P. 6th Cir. 2012)). This could also apply to other child representative fees.
 - ii. Awards of attorney's fees in divorce decrees and other family court orders can be considered to be "in the nature of" child support, and hence nondischargeable under § 523(a)(5). *In re Kline*, 65 F.3d 749, 750 (8th Cir. 1995).
 - iii. Child Custody Attorney’s fee awards if designated as something in the nature of support of the child’s parent by the family law court. *See In re Rugiero*, 502 F. App'x 436, 437 (6th Cir. 2012)).
 - iv. Medical expenses paid by Medical Assistance for child’s birth, and assessed against the father (*See Matter of Seibert*, 914 F.2d 102 (7th Cir. 1990)).
 - v. Medical Assistance parental fee for child in out-of-home placement (*See In re Carlson*, 176 B.R. 890 (Bankr. D. Minn. 1995)).
 - vi. Public assistance provided to a child (*See In re Morris*, 139 B.R. 17, 19 (Bankr. C.D. Cal. 1991)).
 - vii. Child’s costs of care while in court-ordered treatment (*See In re Carlson*, 176 B.R. 890 (Bankr. D. Minn. 1995)).

NOTES:

- viii. Foster care support fee assessed against parents (*See In re Huber*, 80 B.R. 531 (Bankr. D. Colo. 1987)).

Section III: Collecting on DSOs when the Obligor is in Bankruptcy

1. Payment from the bankruptcy in Chapter 7:
 - a. If there is a notice to file claims in a Chapter 7, and the debtor owes child support arrears, filing a claim is a no-brainer—the DSO is at the top of the list in terms of priority for payment, and there is little to no downside to filing a claim.
 - i. Chapter 7 bankruptcy does not include the payment of child support arrears as part of the bankruptcy plan so IW may continue at 120% whether or not a claim is filed.
 - ii. A new IW can be started during the bankruptcy.
2. Payment from the bankruptcy in Chapter 13: 11 U.S.C. § 1328 requires a debtor to have paid all continuing DSO payments and have cured all DSO arrears called for in the plan in order to receive a discharge at the end of the plan.
 - a. The bankruptcy code creates two levels of priority for payment of DSOs under the Chapter 13 plan:
 - i. 11 U.S.C. § 1322(a)(2) requires that a Chapter 13 plan “shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim.”
 - ii. But, 11 U.S.C. § 1322(a)(4) allows that a Chapter 13 plan “may provide for less than full payment of all amounts owed for a [DSO assigned to a governmental unit for purposes other than collection or are owed directly to the governmental unit] only if the plan provides that all of the debtor’s projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.”
 - iii. The plan must therefore specify that the debtor will continue to pay continuing DSO payments as and when due.

NOTES:

- iv. The plan must also specify that the DSO arrears are to be paid either through distributions by the Trustee OR through continuing 120% wage withholding.
 - 1. Practically speaking, the County holds considerable leverage over the debtor's proposed plan, as the County can object to a plan for failure to properly pay the DSO or being proposed in bad faith.
 - 2. If you don't like the plan provision, call the debtor's attorney to discuss how you would like the DSO arrears paid. The debtor is obligated to pay them in full to receive a discharge of other debts and so has an incentive to propose an acceptable plan.
- b. Whether to file a claim?
 - i. Filing a claim entitles you to have a seat at the table, so to speak, and object to items or provisions in the plan.
 - 1. A confirmed plan is res judicata and binds creditors to the terms of the plan under 11 U.S.C. § 1327, so if you have an objection, you must raise your objection prior to confirmation of the plan.
 - 2. If a plan does not satisfy the requirements for payment of a DSO, it cannot be confirmed and the case must be dismissed in 30 days unless a new confirmable plan is filed with the court. But, a creditor must object (or at least contact the Chapter 13 trustee) to bring issues to the court's attention.
 - ii. But, filing a claim can also limit non-bankruptcy collection
 - 1. If child support arrears are included in the bankruptcy repayment plan, the county cannot collect the additional 20% for arrears or initiate tax intercepts or collect lump sums unless those sums are coming from property that is not part of the bankruptcy estate.
 - 2. Balance between the right to receive child support with the right of NCP to proceed with bankruptcy. It is essential County does not withhold too much under the statute as the Court could view this as a violation of the stay in the bankruptcy proceeding.

NOTES:

iii. Considerations for filing a Proof of Claim

1. Is this an abusive filing? A plan must be proposed in good faith, and a court will deny confirmation if it can be shown that it is not proposed in good faith.
 - a. Courts are quite sympathetic to objections based upon bad faith of the debtor, especially when a history of nonpayment or evasion is shown.
 - b. Consider demanding a "poison pill" clause in the plan for debtors with a history of egregious avoidance or nonpayment, which would result in the dismissal of a case in the event that the debtor fails to make child support payments as and when due during the plan.
2. Is there PA interest or PA arrears that should be forgiven?
3. Has NCP been paying regularly for the past 2-3 years?
4. Did the NCP indicate the correct amount of child support arrears in the plan?
5. How long would the County wait to receive payments under the plan?
6. How much are the arrears and does the County already have IW in place?
7. What is the NCP's employment situation--steady long-term employment may be more likely to yield 120% IW payments consistently, whereas collection by filing a claim may be better for NCP with spotty work history because the chapter 13 requires consistent monthly payments.
8. How soon does the DSO start to pay out under the provisions of the plan?

c. Filing the claim

- i. Use the official bankruptcy court claim forms found on the website of the Bankruptcy Court for the District of Minnesota.

NOTES:

- ii. Pay attention to where the claim should be filed, which is based on where the debtor lives.
- iii. Who in your office files the claim?
 - 1. CSO
 - 2. Attorney (attorney must be registered with federal court)
- iv. Consider including an affidavit, DSO account ledger, or printout as supporting documentation for the claim.

3. Chapter 7, PRISM, and Enforcement Remedies

- a. CSO will update BAND screen when information is received regarding a bankruptcy filing
- b. PRISM will continue these Enforcement Remedies
 - i. tax intercepts
 - ii. monthly billing statements (if IW is not in place);
 - iii. IW and if arrears will continue at 120%;
 - iv. credit bureau reporting;
 - v. occupational license suspension;
 - vi. rec license suspension is still allowed but this process is not automatic
- c. PRISM stops the following enforcement remedies:
 - i. DL Suspension;
 - ii. student grant holds
- d. Enforcement Remedies Prohibited
 - i. FIDM and
 - ii. civil contempt

NOTES:

- iii. No new judgments can be entered, no revoking stays on judgments
 - e. Criminal contempt and criminal non-support may continue
- 4. Chapter 13, PRISM, and Enforcement Remedies
 - a. CSO will load BAND; a request for bankruptcy plan will be automatically generated
 - b. Enforcement Remedies will continue
 - i. Tax intercepts
 - ii. Monthly billing statements if no IW
 - iii. IW and if arrears will continue at 120%
 - 1. If there are arrears and county does not file a proof of claim and the debt is not listed in the bankruptcy plan the county can continue to collect the additional 20% towards arrears. (*In re Gellington*, 363 B.R. 497 (2007))(Income withholding is an exception under 11 U.S.C. § 362(b)(2)(C)). *impacts arrears only cases the most*
 - 2. If the plan includes payments toward arrears then IW can be for 100% of the continuing obligation but the additional 20% must be suppressed. (*In re Gellington*, 363 B.R. 497 (2007))(If arrears are to be paid through the confirmed plan, the arrears cannot also be collected through income withholding)).
 - iv. Credit Bureau Reporting
 - v. Occupational License Suspension
 - vi. Passport Denial
 - vii. Recreational License Suspension
 - c. Enforcement Remedies that terminate on PRISM
 - i. DL Suspension

NOTES:

1. Although the bankruptcy law allows DL suspension during bankruptcy, PRISM has not been updated
 - ii. Student Grant Holds
- d. Prohibited Enforcement Remedies
 - i. FIDM
 - ii. Constructive civil contempt
 - iii. Entering new judgments
- e. Criminal non-support cases may continue
- f. Relief from the automatic stay
 - i. If the plan proposes that the debtor will voluntarily continue to pay the DSO during the plan, and fails to do so, the County may bring a motion for relief from the automatic stay seeking to garnish the debtor's wages to enforce payment of the DSO.
- g. Motion to Dismiss
 - i. The plan terms bind both creditor and debtor; if the debtor fails to abide by the DSO payment terms established in a confirmed plan, the County has grounds to move to dismiss the debtor's Chapter 13 case.

NOTES:
