


WHY IS THIS IMPORTANT?

- A DSO is never discharged in any chapter
- DSO arrears enjoy priority treatment and must be paid in full through Ch. 13 plan
- Debtor must stay current on post-petition obligations in order to receive discharge in Chapters 11, 12, and 13



SO... HOW DO YOU KNOW IF IT'S A DSO?

- Pre-BAPCPA cases still valid
- Measured at the time of the divorce
- Examples:
 - Education Expenses
 - Mortgages
 - Child Care
 - Health Insurance
 - Car Payments
 - Attorney Fees To Opposing Counsel

DETERMINING FACTORS

No single factor controls, BUT if it is necessary in order for the recipient to meet basic needs then it is probably in the nature of support.

9th Circuit: foremost consideration is whether the recipient actually needed the support at the time of the divorce. See *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996), overruled on other grounds, *Marry v. Bammer (In re Bammer)*, 131 F.3d 788 (9th Cir. 1997) 101 B.R. 609 at 1405 (9th Cir. 1996).

OTHER FACTORS INCLUDE BUT ARE NOT LIMITED TO

- Need for support & relative income of the parties at the time of the agreement
- Financial condition of parties at time of agreement
- Function of obligation at time of agreement
- Length of marriage
- Language of agreement, BUT no magic words... language NOT binding on the bankruptcy court which may look behind the agreement



NON-DSO MARITAL DEBT

- Not specifically defined in the Code
- Referred to in § 523(a)(15):
A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
to a spouse, former spouse, or child of the debtor *and not of the kind described in paragraph (5)* that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

EXAMPLES

- Marital property settlements
- Orders to assume marital obligations, i.e. credit cards

NON-DSO MARITAL DEBT IN CHAPTER 7

- § 523(a)(15) Non-DSO marital debt is NOT dischargeable in Chapter 7
 - Self-executing— creditor spouse need not object to discharge

NON-DSO MARITAL DEBT IN
CHAPTER 13



- Pursuant to § 1328(a)(2), non-DSO marital debts ARE dischargeable in Ch. 13 (notwithstanding the language in § 523(a)(15))

§ 1328(a)(2): "...the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a)."

- No mention of § 523(a)(15) debts

MARITAL LIABILITIES
ESTABLISHMENT & ENFORCEMENT

- § 362(a): bankruptcy filing enjoins collection efforts *unless there is an exception*
- § 362(b): the filing of a petition *does not operate as a stay* of actions to:

Establish paternity
Establish or modify a DSO
Establish a parenting plan
Dissolve a marriage (*but not property division!*)
Collect a DSO from non-estate property (i.e. post-petition wages in Ch. 7)

• Most divorce-related actions will proceed in spite of the stay
*except division of property

• See, i.e. *In re Maggibon*, 383 B.R. 749 (Bankr. W.D.Wash. 2008) in which the debtor argued, among other things, that his former spouse violated the stay when she sought to modify an existing support order. The Court found this to fall squarely within the exceptions to the stay provided for under § 362(b)(2)(A).

PROPERTY OF THE BANKRUPTCY ESTATE

• § 541: commencement of the case creates "Bankruptcy Estate"

• Includes all legal or equitable interests of debtor *including all in community property*

• Community property is not defined in the Code— state law controls character

• ALL COMMUNITY PROPERTY IS PROPERTY OF THE ESTATE, REGARDLESS OF WHETHER BOTH SPOUSES FILE

- Common when spouses are separated but not divorced

DIVISION OF MARITAL PROPERTY DURING BANKRUPTCY

• *In re Teel*, 34 B.R. 762 (BAP 9th Cir. 1983): If petition is filed prior to or during the dissolution action, the Bankruptcy Court has exclusive jurisdiction over the property.

• Under § 362(a), division of estate property is stayed

- *must obtain limited relief from the stay for the purpose of dividing the property OR
- *decree should not be entered until after case closure
- *risk is that order is void or voidable See *In re Willard*, 15 B.R. 898 (BAP 9th Cir. 1981).

DIVISION OF ASSETS PRIOR TO BANKRUPTCY

- * Be mindful of the potential for preferential (§ 547) and fraudulent (§ 548) transfer issues
- * Fraudulent transfer if the debtor made the transfer with intent to hinder, delay, defraud creditor(s) OR
 - * Debtor received less than reasonably equivalent value in exchange AND
 1. Was insolvent at the time of the transfer or became insolvent as a result OR
 2. Made such transfer to or for the benefit of an insider
 - *2 year look-back under Bankruptcy Code, 4 years under WA Voidable Transfers Act
- * Both preferential and fraudulent transfers may be avoided by a bankruptcy trustee on behalf of the estate

- * If dissolution did not go to trial, courts may consider whether the transfers in the settlement reasonably reflect what would have happened at trial
- * 9th Circuit has held that in the case of fraudulent transfers, a state court's judgment following a regularly conducted contested proceeding conclusively establishes "reasonably equivalent value" in the absence of actual fraud

THIRD PARTY CREDITORS

- * Decree of dissolution is a contract between the parties
 - * not binding on 3rd party creditors
 - * creates considerable confusion, especially for pursued party
- * Hold harmless language ("indemnity clause") in the decree may be crucial
 - * creates equitable right to indemnification – new obligation independent of the original liability
 - * because the obligation is established by divorce decree

“If one spouse fails to pay a debt as ordered and the creditor attempts to collect from the other spouse, the spouse who was ordered to pay must hold the other spouse harmless from any collection action. This includes reimbursing the other spouse or any of the debt he or she paid and for attorney’s fees/costs related to defending the action.”

IS THE HOLD HARMLESS OBLIGATION DISCHARGEABLE?

- * Is it a DSO? → not dischargeable under § 523(a)(5)
 - * Look at intent of the obligation
 - * i.e. obligation to make mortgage payments
- * Is it a non-DSO obligation? → nondischargeable in Chapter 7 under § 523(a)(15) BUT DISCHARGEABLE IN CHAPTER 13 under § 1328(a)(2)

PUTTING IT ALL TOGETHER

- * Understand whether a DSO and/or non-DSO marital debt exists.
 - * explain what will or will not be discharged and how this can vary in different chapters
 - * DOCUMENT!
- * Know what constitutes property of the bankruptcy estate and ensure schedules are accurate
 - * Community property
- * Understand automatic stay and family law exceptions, i.e. collection and enforcement of DSOs
- * Be proactive
 - * document intent to create support obligation
 - * hold harmless provision in favor of your client
- * Is a joint bankruptcy prior to dissolution appropriate?
 - * possible conflict for bankruptcy counsel to represent both debtors
 - * chapter 13 not generally advisable
- * Watch for potential preferential or fraudulent transfer issues to arise
- * Get relief from stay to effectuate property division
- * For the creditor spouse in Chapter 7, remember that nondischargeability of DSO and non-DSO marital debts is self-executing
- * For creditor spouse in Chapter 13, carefully examine schedules to be sure all assets are disclosed/property valued. Understand how your client is provided for in the plan.
 - * object if appropriate
 - * timely file claim
 - * consider motion to dismiss if post-petition support obligations become delinquent
