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DOMESTIC OBLIGATIONS IN BANKRUPTCY

PIERRE R. LOISEAUX*

Two ideas have been embodied in each of our bankruptcy acts. The first is that there should be an equal distribution of the non-exempt assets of the insolvent debtor among general creditors. Although this idea has been modified and qualified considerably by other competing interests and overriding policies, one basic goal in bankruptcy is equal distribution of the assets. The second idea of note is that the honest debtor shall be given a fresh start in the community. This rehabilitation idea is not solely for the benefit of the individual but for the benefit of the economic community as a whole. We all suffer if one individual is required to remain under an impossible debt load. It is feared that the individual will simply lose all ambition and social usefulness unless he is forgiven his debts and given an opportunity to show that the financial problems which put him in this situation were fortuitous. Given a new chance it is hoped that he can prove to be a productive and useful citizen. To this second basic idea we have also appended numerous exceptions, again resulting from competing ideas and interests which have been carefully weighed by Congress before being allowed to override the fresh-start idea. The evolving law of bankruptcy has demonstrated a pattern whereby discharge is increasingly available to the honest debtor, with a parallel development that the number of obligations not affected by bankruptcy discharge is gradually increasing. This results in a situation where the honest debtor will obtain a discharge almost as a matter of right, but the discharge will not relieve him of many of the troublesome obligations which plague everyone in our complex and ever-changing society.

Social attitudes about the family are also undergoing constant change. The patterns of our divorce laws have grown from the relatively rare legislative divorce as a matter of political grace to the present mail-order divorce business in some states and the short, fake-residence divorce in many another state. As is usually the case, the changing law reflects the attitudes of the people and it is apparent that our collective attitudes about marriage and divorce have changed considerably in the last two centuries. This is partly attributable to the changing attitude toward woman and her role in our society.

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For a number of reasons the female in our mid-twentieth century society is not entirely dependent upon the male. When a woman marries she does not lose her independence and identity as was once the case. Today a married woman is not only employable but preferred over the single employee in many cases. The number of double-income families has constantly increased in recent decades—statistical testimony to the independence of married women; many women have not lost their earning power and will not be rendered destitute by the loss of the husband. One might also read into modern divorce and re-marriage statistics the suspicion that the concept of the “used woman” has changed or is changing. To the ancient Anglo-American heritage that to each woman there shall be but one man, one might add “at one time.” The ancient idea of divorce as only a legally approved privilege to live apart from one’s spouse has been replaced by the concept of absolute divorce. However, in many of our states the idea of a continuing obligation to a divorced wife has remained. Even in some of the community property states which have leaned heavily on the partnership concept of marriage there remains hanging on the idea of continuing obligation for the support and maintenance of the former spouse. Does our law reflect accurately and properly the changing attitudes of our society?

No attempt will be made to answer the above question in any general sense. This paper is concerned only with a review of the background and development of the law in respect to the effect of bankruptcy of the husband upon domestic obligations incurred as a result of marriage.

The present Bankruptcy Act in section 17(2) provides in part “A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . are liabilities for . . . alimony due or to become due, or for maintenance or support of wife or child”¹ This language was added to the Bankruptcy Act by amendment in 1903; prior to that time the act made no mention of the effect of a discharge in bankruptcy on domestic obligations.

PROVABILITY OF CLAIMS FOR ALIMONY AND SUPPORT

Before the addition in 1903 of the present provisions of the Bankruptcy Act, which expressly excluded domestic obligations from

¹ Bankruptcy Act § 17(2), 52 Stat. 851 (1938), 11 U.S.C. § 35(a)(2) (1958).

bankruptcy discharge, the question of the effect of a discharge in bankruptcy had been raised in several cases. The United States Supreme Court faced the problem in *Wetmore v. Markoe*,² and although the amendment to the Bankruptcy Act had been passed at the time of the decision, the case arose before the amendment and the disposition was not made under the amended Bankruptcy Act. In *Wetmore* the bankrupt husband sought to enjoin all proceedings on behalf of his wife for the collection of alimony and child support. Counsel for the bankrupt husband argued that because the judgment for alimony was not subject to modification in New York, it was an absolute judgment, and such a judgment was a fixed liability, provable as such under the terms of the Bankruptcy Act and thus dischargeable. Mr. Justice Day, writing for the Court, agreed that judgments are provable claims if they are for debts, but that the nature of this obligation was such that it could not be and was not considered a debt. This is evidenced by the fact that traditionally courts have enforced alimony and support orders by imprisonment for contempt in the face of provisions against imprisonment for debt found in most of the states. The Court concluded that alimony is a penalty imposed for failure to perform a legal duty. To embody such a duty and penalty in a judgment cannot make it a debt within the meaning of the Bankruptcy Act.³ The Court had said substantially the same thing in the earlier cases of *Audubon v. Shufeldt*⁴ and *Dunbar v. Dunbar*.⁵ The latter case involved a settlement agreement whereby the husband was to pay a stated amount until the death or remarriage of the wife. The Court there found that the claim was too contingent to constitute a provable claim in the bankruptcy proceeding.

There are some earlier cases where the federal district courts permitted proof and allowance of claims for alimony and held that such claims would not be barred by the granting of a discharge in bankruptcy.⁶ However, even before the question was decided by

² 196 U.S. 68 (1904).

³ The Court followed the same reasoning and approach with reference to the child support, holding it too was not discharged by the bankruptcy.

⁴ 181 U.S. 575 (1901).

⁵ 190 U.S. 340 (1903).

⁶ *In re Challoner*, 98 Fed. 82 (N.D. Ill. 1899) (held that accrued alimony was a debt without passing on the status in bankruptcy of future alimony); *In re Van Orden*, 96 Fed. 86 (D.N.J. 1899) (bankruptcy court enjoined wife's suit to collect alimony from bankrupt husband because the claim was both provable and dischargeable); *In re Houston*, 94 Fed. 119 (D. Ky. 1899) (order to release a man held under state court contempt order because the

the Supreme Court in the *Wetmore* case, the majority of courts had found that such claims were not provable and were thus unaffected by the husband's bankruptcy.⁷

Although the 1903 amendment to the Bankruptcy Act has made further litigation unnecessary insofar as establishing the nondischargeability of obligations for alimony or support, the claim of a wife in bankruptcy proceedings based upon such an accrued obligation is very much in doubt, and the wife is generally not allowed to share in the bankrupt's estate.⁸ An argument can be made that the language of section 17, which states: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except . . ." implies that the listed exceptions are provable debts and can both share in the estate and seek satisfaction out of after-acquired assets. Such is the case with most of the claims found in the exceptions; they may share in the estate and also seek to enforce their claims against the bankrupt after discharge.⁹ Is this then a way to discriminate against the wife and children holding a decree for alimony or a support order? Judge Denison thought not and said so clearly in *Heimberger v. Joseph*¹⁰ where the court held that notes given by the husband for accrued alimony were provable claims. In so holding the court stated:

We find no authoritative holding that, since the amendment of 1903, alimony claims continue to be nonprovable. Both the

obligation was held to be dischargeable); *cf.* *Fite v. Fite*, 110 Ky. 197, 61 S.W. 26 (1901) (under Kentucky law alimony was a provable debt both accrued and unaccrued).

⁷ *Turner v. Turner*, 108 Fed. 785 (D. Ind. 1901); *In re Nowell*, 99 Fed. 931 (D. Mass. 1900); *In re Shepard*, 97 Fed. 187 (S.D.N.Y. 1899); *Welty v. Welty*, 195 Ill. 335, 63 N.E. 161 (1902) (alimony or support is not a debt but a penalty for failure to perform a duty); *Deen v. Bloomer*, 191 Ill. 416, 61 N.E. 131 (1901) (alimony is not a debt but an obligation imposed by public policy); *Barclay v. Barclay*, 184 Ill. 375, 56 N.E. 636 (1900) (alimony is not a provable claim and not dischargeable); *Young v. Young*, 35 Misc. 335, 71 N.Y. Supp. 944 (Sup. Ct. 1901) (bankruptcy has no effect upon alimony); *Maisner v. Maisner*, 62 App. Div. 286, 70 N.Y. Supp. 1107 (1st Dept. 1901) (a claim for alimony is not a debt).

⁸ *Audubon v. Shufeldt*, 181 U.S. 575 (1901) and *Wetmore v. Markoe*, 196 U.S. 68 (1904), indicated that the duty to support was not a debt, and hence not a provable debt even if evidenced by a judgment. When the 1903 amendment was passed, the courts viewed the amendment as declaratory of prior law, and hence the courts for the most part have continued to view alimony as a penalty instead of a debt. *But see Heimberger v. Joseph*, 55 F.2d 171 (6th Cir. 1931).

⁹ Many of the exceptions of § 17 of the Bankruptcy Act are specifically declared to be provable debt by § 63(a) of the Bankruptcy Act.

¹⁰ 55 F.2d 171 (6th Cir. 1931).

Dunbar and Wetmore Cases refer to this amendment, but from another point of view. Both involved cases arising before the amendment; neither has any bearing on provability since the change. Indeed, the public policy declared in these two cases inevitably requires that, for alimony accrued and certain, the wife and children should share in the estate, even if they may have no preference. With confidence equal to that of the Supreme Court in the Wetmore Case, we may say that Congress never intended a bankruptcy petition to be a means by which a man could exclude the past-due and adjudicated claims of wife and children for maintenance and support from getting any dividend payments out of his estate. That unfortunate result was to some extent necessary in avoiding the (supposed) greater evil of complete release (*Audubon v. Shufeldt*); that necessity ended with the statutory declaration of 1903.¹¹

It would seem that despite the uncertainty of judges and writers on this point, the law is that *accrued* alimony or support liabilities are provable claims and should share in the bankrupt's estate. The question of future liability for support or alimony is a more difficult one and here the reasoning of the *Dunbar*, *Wetmore*, and *Audubon* cases should still apply with the same force as when they were written. What about the future support or alimony order that is not contingent in the sense that it is not subject to modification? This claim is still too contingent because of possible remarriage, even if we accept statistical guessing on the life expectancy of the wife. Such may not be the situation of the children for whose support the husband is liable, for the age of majority is certain even though the time of emancipation may be subject to fluctuation. Perhaps in this situation the court should allow a provable claim from the present age of the child to the age legally allowed for marriage at the present place of residence.¹²

ALIMONY AND SUPPORT OR PROPERTY SETTLEMENT

When it is apparent that divorce will follow it is very common for husband and wife to make a settlement agreement. Such an

¹¹ *Id.* at 173.

¹² See generally 3 COLLIER, BANKRUPTCY § 63.13 (14th ed. 1961); Hartman, *The Dischargeability of Debts in Bankruptcy*, 15 VAND. L. REV. 13 (1961); Joslin, *Bankruptcy from a Family Law Perspective*, 9 VAND. L. REV. 789 (1956).

agreement in contemplation of divorce may make many different provisions as to the present property and rights of the spouses and as to future obligations of the husband for alimony or support of the wife and for support of the children. It may, on the other hand, relate solely to a division of the presently-owned property of the spouses making no mention of any future obligation of support. Such an agreement may bear many different labels or may not be labeled at all. It is apparent, however, that the courts should not be and are not bound by the presence or absence of a label or the connotation contained therein.¹³ If not found to be unfair, such a settlement will normally be incorporated into the decree of divorce, or approved by the judge when he enters a divorce decree which makes no reference to the property or future obligations of the parties. In the event that the parties have not made any agreement prior to the commencement of the action or in contemplation thereof, the court will enter a decree or order establishing the rights of the parties to the property accumulated and providing for future obligations of the husband if the state law so provides.

In the event of the husband's bankruptcy the exact nature of this settlement agreement or decree may be in issue. Is this a liability for support or alimony within the meaning of section 17(2) of the Bankruptcy Act? The general "pigeonholing" problem is to put this obligation, whether agreed by the parties or ordered by the court, into the area known as property settlement or into the area of alimony or support.

No restatement definition is available of the terms "alimony" and "support," and there are surprisingly few judicial definitions of these terms. It might be thought that the terms are self-evident, and that no serious problem could arise as to their content: this is not the case. In *Merriman v. Hawbaker*¹⁴ the following definition of alimony was given:

Alimony, a word derived from the Latin term *alere*, meaning to nourish or sustain, commonly means in law all allowances, whether partial or in gross, which a husband by order of court, in pursuance of his common-law or statutory duty to support his wife pays her for her maintenance while they are separated or divorced.¹⁵

¹³ *E.g.*, *Yarus v. Yarush*, 3 Cal. Rptr. 50 (Dist. Ct. App. 1960); *Remondino v. Remondino*, 41 Cal. App. 2d 208, 106 P.2d 437 (Dist. Ct. App. 1904).

¹⁴ 5 F. Supp. 432 (E.D. Ill. 1934).

¹⁵ *Id.* at 433.

Thus if alimony is to be defined in terms of maintenance and support, it is apparent that the Bankruptcy Act is redundant and that alimony is an obligation to support the wife. A study of the opinions discussing section 17(2) would indicate that for all purposes the terms "alimony" and "support" are used to mean the same thing.¹⁶

In deciding what constitutes an agreement or order for support, it is necessary to determine the essential attributes of such an obligation. The courts which have considered this problem, while not in complete accord as to the proper approach, have generally singled out certain characteristics as important. Most frequently discussed is the length of time that is provided for the payment of sums in the future. If the time period is short this may indicate a property settlement which is to be paid in installments. However, a short period of time alone will not be sufficient to demonstrate that the decree embodied a property settlement. The California courts, on several occasions, have been faced with this problem of distinguishing between a property settlement and a liability for support. In *Yarus v. Yarush*¹⁷ a divorce decree ordered a "property settlement" of \$16,200 which the husband was to pay in stated monthly installments for six years. The order contained a further provision that all liability of the husband, except as to payments accrued at that time, would cease upon the death or remarriage of the wife. The appellate court affirmed the trial court's declaratory judgment that this was a liability for support even though the divorce decree had labeled it a property settlement. It must be conceded, however, that the court was apparently more influenced by the termination provisions relating to death or remarriage than by the short period of time for which support had been ordered.

In cases where the agreement or order does not provide that periodic payments are to stop in the event of death or remarriage of the wife, it is likely that the court will conclude that such payments are in satisfaction of a property settlement and do not create a liability for support of the wife. In *Tropp v. Tropp*,¹⁸ an earlier California case, the contract entered into between the parties provided

¹⁶ Cf. *In re Adams*, 25 F.2d 640 (2d Cir. 1928). In *Adams* there was an agreement made before the divorce which provided that the husband would pay the wife an annuity. The court held that this could not be alimony for in New York the guilty party is not entitled to such; rather it was a liability for support and thus not dischargeable.

¹⁷ 3 Cal. Rptr. 50 (Dist. Ct. App. 1960).

¹⁸ 129 Cal. App. 62, 18 P.2d 385 (Dist. Ct. App. 1933).

for the payment of \$250 per month by husband to wife and \$50,000 to be paid in ten annual installments. By the terms of the contract the monthly payments were to stop upon the remarriage of the wife, but the annual payments were to be unaffected by remarriage. A further provision provided that the monthly payments were to decrease \$25 after each annual installment was paid. The wife remarried and shortly thereafter the husband went into bankruptcy and was duly discharged. In the action by the wife to recover the payments the court found that the obligation to pay monthly installments was terminated by the terms of the agreement itself and that the liability for annual payments was an ordinary debt within the meaning of the Bankruptcy Act and was discharged by the bankruptcy action. The attempt in *Tropp* to link what was clearly a liability for support to another liability found in the same contract which was clearly a property settlement caused the court considerable difficulty. Thus in drafting pre-divorce agreements, it would seem advisable for counsel to put clauses for future payments by husband to wife clearly into one category or the other.¹⁹

In *Remondino v. Remondino*,²⁰ another California case, the parties signed a contract providing that the husband would pay the wife \$100 per month for the rest of her life. The agreement further provided that he would keep his life insured in her favor in the amount of \$5,000, and that in the event the wife should commence divorce proceedings the husband would pay her attorney's fees of \$150. The contract also contained property releases executed by each spouse. Thereafter the husband obtained the divorce. The decree stated "that said property settlement agreement and each and all the terms and covenants thereof be, and the same are, by the court, confirmed."²¹ Some sixteen years later, when the husband was behind in the agreed payments to the extent of \$11,000, the husband was declared a bankrupt and discharged. Thereafter the wife brought this action to collect the back payments and the husband pleaded his discharge in bankruptcy. The trial court entered judgment for the wife and ordered execution to issue for the collection thereof. The appellate court affirmed, holding that this was an obligation for support. In so holding the court stated: "If, upon a consideration of the entire transaction the court determines that the

¹⁹ See *California Divorce Agreements—Alimony or Property Settlement?*, 2 STAN. L. REV. 731 (1950).

²⁰ 41 Cal. App. 2d 208, 106 P.2d 437 (Dist. Ct. App. 1940).

²¹ *Id.* at 213, 106 P.2d at 440.

purpose of the judgment for support money is to guarantee the economic safety of the wife by the husband, then his discharge in bankruptcy does not affect his liability under the judgment."²²

In the *Remondino* case the court recognized that, under California law, if the divorce is granted to the husband for the wife's fault, she is not entitled to support or alimony.²³ But the court further pointed out that under the facts of the case this was not a bar to the wife's action. The agreement entered into between the parties in *Remondino* clearly intimated that the fault might be that of the husband; there was no evidence that the wife was guilty of any improper conduct. In a more recent California case the court took a much more doctrinaire approach to the problem of a husband getting the divorce. In *Smalley v. Smalley*²⁴ the parties, prior to divorce, entered into an agreement whereby the wife waived all rights to support and alimony and the husband agreed to pay the wife the sum of \$3,000 at the rate of \$50 per month. The husband subsequently obtained a divorce. The divorce decree approved the pre-divorce agreement, and ordered the husband to pay the \$3,000. The court reasoned that because in California the court has no power to grant alimony where the divorce is granted to the husband for the wife's fault, and that because in California any liability for support ends with divorce except as modified by an order for alimony, the \$50 monthly payments had to constitute a property settlement which was dischargeable in bankruptcy. Because this was so there was no need for any construction of the decree by the court.

Facing the property settlement or support dilemma again in the case of *Blair v. Blair*,²⁵ the California court found a situation in which the husband had promised in a pre-divorce agreement to create a trust fund of \$300,000. The annual income from the trust was to be paid to the wife at the rate of \$18,000 per year for the rest of her life, and if the income did not equal that amount the husband was to make up the difference from other sources. The court concluded that this contract created a liability for support in the face of the husband's claim of a discharge in bankruptcy. The opinion states that "the fact that the agreement was called a property settlement and was referred to as such in the decree divorcing the

²² *Id.* at 214, 106 P.2d at 441.

²³ *Id.* at 216, 106 P.2d at 442.

²⁴ 1 Cal. Rptr. 440 (Dist. Ct. App. 1959).

²⁵ 44 Cal. App. 2d 140, 112 P.2d 39 (Dist. Ct. App. 1941).

parties is immaterial. It is the substance of the contract that controls in a determination of the intent of the contracting parties."²⁶

In *In re Adams*²⁷ the husband, prior to divorce, had contracted to pay his wife an annuity until her death. The divorce was granted to the husband. The court found that the annuity could not be the equivalent of alimony because in New York the guilty party is not entitled to alimony. But this obligation was nevertheless found to be an obligation for support of the wife within section 17(2) of the Bankruptcy Act. An accepted policy of the state, to the effect that a wife guilty of conduct which gives her husband the right to obtain the divorce cannot receive alimony, might well be construed to include liability for support for the two terms are virtually identical.

In some situations the court may find that the award made to the wife represents both a property settlement and payments for support. When later considering the effect of a discharge in bankruptcy is it proper for a court to divide the award by holding that part of the award was for support and the rest was a property settlement and discharged by the bankruptcy proceeding? In *In re Avery*²⁸ such a result was reached. The Michigan divorce decree ordered the husband to pay his wife \$9,000 in installments of \$150 per month. The court looked into the record of the divorce proceeding and ascertained that of the \$9,000 total awarded, \$2,451.87 represented release of property rights. Collection was enjoined on that much of the total award which represented release of property rights. That part had been discharged by the husband's bankruptcy.

Examination of the above cited opinions leaves one with the impression that the essential element of support is a continuing obligation on the husband which will terminate either when the need ends or when the duty is assumed by another. In those cases where the terms of the settlement or decree do not provide for termination on death or remarriage, the court will usually find this to be a property settlement with the result that the obligation is a provable claim which may be discharged in bankruptcy. If the settlement or decree expressly provides that the liability will not be affected by death or remarriage, it is quite certain that the court will find the arrangement to be a property settlement.²⁹

²⁶ *Id.* at 143, 112 P.2d at 42.

²⁷ 25 F.2d 640 (2d Cir. 1928).

²⁸ 114 F.2d 768 (6th Cir. 1940).

²⁹ Compare INT. REV. CODE OF 1954, §§ 71, 215, 682. The taxing authorities are also faced with the problem of distinguishing between property settlements and liabilities for alimony or support.

ITEMS INCLUDED WITHIN ALIMONY AND SUPPORT

There has been no dissent to the proposition that counsel fees incurred in the divorce proceeding are a part of alimony and that liabilities therefor are not affected by the subsequent bankruptcy of the husband.³⁰ In many states this result has been codified in statutes which provide for alimony and expressly make counsel fees a part of alimony or part of the husband's statutory duty to the wife.³¹ It has also been held that costs of suit incurred in the divorce action are a part of alimony within the meaning of section 17(2) of the Bankruptcy Act.³²

An interesting question is presented in *In re Sullivan*.³³ There the defendant, whose brother had been sued for nonsupport by his wife and had executed a bond for security, was persuaded to sign the bond as surety. Later the brother's wife sued her husband and defendant on the bond. Upon being sued, defendant filed a petition in bankruptcy after which the wife argued that the bond was clearly an obligation for support of a wife within the express terms of the Bankruptcy Act. The court had no trouble deciding that section 17(2) is most certainly to be read as if the express language read "liability for alimony or support of [his] wife or child." With such a proper reading of the act the bond as to bankrupt surety was an ordinary debt and was dischargeable.

If, before the divorce is granted, a husband and wife execute an agreement which provides that the husband will purchase a house for the wife to live in and that he will also pay certain monthly payments, the obligation to purchase the house is part of the husband's obligation to support his wife and therefore unaffected by any subsequent bankruptcy of the husband.³⁴ Furthermore, the liability of a bankrupt husband to make mortgage payments on a residence which his wife occupies is nondischargeable. Such payments are on the same footing as the husband's agreement for maintenance and support, and thus unaffected by the bankruptcy of the husband.³⁵ Similarly in *Lyon v. Lyon*,³⁶ the court held that a contract or agreement

³⁰ *In re Brennen*, 39 F. Supp. 1022 (E.D.N.Y. 1941).

³¹ *Damon v. Damon*, 283 F.2d 571 (1st Cir. 1960); *Ross v. Keith*, 238 App. Div. 640, 265 N.Y. Supp. 246 (1st Dept. 1933).

³² *Smith v. Smith*, 7 F. Supp. 490 (W.D.N.Y. 1934). In *Smith* the court also pointed out that it was proper for the judge to look behind a judgment for costs to ascertain in what connection the costs were levied.

³³ 262 Fed. 574 (N.D.N.Y. 1920).

³⁴ *Battles v. Battles*, 205 Okla. 587, 239 P.2d 794 (1952).

³⁵ *In re Gorski*, 25 F. Supp. 551 (W.D.N.Y. 1938).

³⁶ 115 Utah 466, 206 P.2d 148 (1949).

requiring the husband to obtain or maintain certain life insurance policies is properly a part of the obligation to support the wife. In the *Lyon* case the court considered factors other than the agreement between the parties in determining what items were to be considered support under the circumstances. The present age of the wife, her training, and the use to which she would put the property awarded to her by the agreement, were all considered.

It can be said that almost any reasonable item of the wife's over-all expense can be properly included within the general terms alimony or support. It is not controlling that a particular item of continuing expense is singled out and expressly incorporated into the agreement or order of the court. When the court considers the dischargeability of a particular claim it should look to the entire situation between the parties to ascertain whether this one thing was a reasonable item in the wife's over-all maintenance.

LIABILITY OF DISCHARGED HUSBAND TO THIRD PARTIES

Several cases arose shortly after the amendment in 1903 raising questions as to the discharged husband's liability to third parties who are supplying or have supplied necessities to the wife or child. It became apparent that any broad ruling allowing third parties who supply necessities to obtain a nondischargeable claim would go a long way to defeat the "fresh-start" purpose of bankruptcy. Accordingly, it is held as a general proposition that those who supply necessary goods or services on contract to the wife or child do not obtain an obligation immune to the husband's future discharge in bankruptcy.⁸⁷ In order for any obligation to come within the exception in section 17(2), it must run directly to the wife or child from the husband and father. Thus in *Schellenberg v. Mullaney*⁸⁸ the seller of clothing argued that such clothing was for the bankrupt father's children and constituted a necessary item of the children's support and therefore the liability arising from the sale was not discharged. After considering this argument, the court simply stated that the father's purchase of the clothing left him free to do as he liked with it, and for this reason section 17(2) did not apply—the debt was discharged. Similarly, in several cases a discharged father has been sued by a boarding school for the cost of room and board

⁸⁷ *E.g.*, *In re Lo Grasso*, 23 F. Supp. 340 (W.D.N.Y. 1938); *Schellenberg v. Mullaney*, 112 App. Div. 384, 98 N.Y. Supp. 432 (2d Dept. 1906); *Schwoll v. Meeks*, 76 Ohio App. 231, 63 N.E.2d 831 (1944).

⁸⁸ *Supra* note 37.

supplied to his minor children. The usual result reached is that under section 17(2) the father's liability which is not discharged is the common-law liability for support running directly to wife or child; it is not a general exemption of obligations for necessities.³⁹ For the same reason, liabilities incurred for the services of doctors and dentists, although necessary, are not included within the meaning of liability for support of wife or child as found in section 17(2) of the Bankruptcy Act. Thus, in *In re Ostrander*,⁴⁰ an action was brought by a physician who had performed services upon the wife at the husband's request, during a time when the normal family relation still existed. The court held that the subsequent discharge of the husband in bankruptcy barred the physician's bill for services. The court felt that such a result was necessary, otherwise all professional persons or merchants who contributed to the support of a wife or child by furnishing goods or services, would be unaffected by bankruptcy. The fact that the bankrupt had made a contract for services in question indicates that there was in fact at that time no breach of the primary duty owed by the husband towards the one receiving the services.

There may, however, be situations in which a third party may recover for necessities supplied to the bankrupt's wife or child despite his discharge in bankruptcy. Such a situation was recognized by the court in *Ostrander*. The court qualified their holding by stating:

The provision has probable application to cases where the person applying for discharge from his debts had so betrayed his moral and legal duty as a husband or parent that another was justified in providing the maintenance and support denied by the one upon whom the law places the primary duty.⁴¹

In general when the husband or parent contracts with a third party for services or goods, the resulting obligation will be dischargeable. But the situations referred to by the court in *Ostrander* are those in which the husband and father failed to make any arrangements for his dependents and the third party supplied services or goods without the request or consent of the bankrupt. In such a situation the law will create a duty in the bankrupt husband to reimburse the third

³⁹ *General Protestant Orphans' Home v. Ivey*, 240 F.2d 239 (6th Cir. 1956); *In re Lo Grasso*, 23 F. Supp. 340 (W.D.N.Y. 1938).

⁴⁰ 139 Fed. 592 (E.D.N.Y. 1905).

⁴¹ *Id.* at 592.

party for the claim. Thus in *In re Myers*⁴² the wife was ill and in the hospital. When she was released from the hospital the husband refused to provide any home for his wife. She boarded with the plaintiff for \$7.00 a week. Subsequently, plaintiff-landlord secured judgment against the husband for the amount of the board furnished to his wife. The husband then filed bankruptcy proceedings and asked, under section 11(e) of the Bankruptcy Act, that the court enjoin garnishment proceedings commenced by the plaintiff on the basis that the plaintiff's claim was dischargeable in bankruptcy. The court refused to enjoin the plaintiff's proceeding because the claim was *not* dischargeable. In so holding, the court stated: "It was not incurred upon an express or implied contract of the husband to pay therefor, but arose out of the involuntary liability and primary duty growing out of the marriage relation."⁴³ In *In re Lo Grasso*⁴⁴ a father entered into an agreement with a school to provide for the maintenance of his two infant children. The father, upon being declared a bankrupt, sought to restrain the school from enforcing its claim against him on the grounds that he was discharged by bankruptcy. In holding that the father was discharged, the court stated: "Section 17 . . . was not intended to include a liability upon an agreement made by a parent to pay for the support and maintenance of his children. It was intended to include liability where a parent had failed or refused to make provision for maintenance and such was furnished by another."⁴⁵ A contrary result was reached in the later case of *Leib v. Auerbach*.⁴⁶ In *Leib* a father was sued on an express promise for expenses incurred by plaintiff in maintaining his daughter. The defendant father pleaded his discharge in bankruptcy as a defense to the action. The court held that the obligation was not discharged. The *Lo Grasso* case was distinguished on the basis that the plaintiff in *Leib*, who was the daughter's aunt, stood in loco parentis, and the home in *Lo Grasso* which was excluded from the exceptions of section 17(2) did not stand in loco parentis. But a home of the sort complaining in the *Lo Grasso* case would normally be considered just as much in loco parentis as the aunt in the *Leib* case, and further, when another stands in loco parentis the test is still whether this person agreed to assume that status or whether that

⁴² 12 F.2d 938 (W.D.N.Y. 1926).

⁴³ *Id.* at 938.

⁴⁴ 23 F. Supp. 340 (W.D.N.Y. 1938).

⁴⁵ *Id.* at 340.

⁴⁶ 10 N.J. Super. 391, 76 A.2d 726 (Super. Ct. 1950).

person assumed such status because of the need of the dependent without the request or knowledge of the bankrupt. If, as in the *Leib* case, there was an agreement that the aunt would occupy this status, it is difficult to understand why the aunt should be in any more favorable position than the doctor, grocer, or merchant discussed above.

The Supreme Court of Washington split in an opinion written on a matter somewhat analogous to the above proposition. In *Rape v. Lenz*⁴⁷ a divorce decree contained an order that the husband pay \$50 per month for the support of his minor children. Shortly after the entry of the decree the husband made an agreement with certain third parties whereby they would adopt the children and that thereafter the husband would pay \$50 per month to the third parties. The husband then went bankrupt and was duly discharged. In a subsequent suit by the third parties to recover payment in arrears under this contract, the husband pleaded his discharge in bankruptcy. The court, with two judges dissenting, held that this contractual liability of the husband was not discharged. The majority found this to be a liability for support within the exceptions contained in section 17.⁴⁸ The two dissenting judges, however, reasoned that the state statute on adoption placed the primary responsibility on the new parents and this same statute relieved the defendant of any liability for support. Therefore, this contract between defendant husband and the third parties was a simple contract for debt which should be dischargeable in bankruptcy. This case seems to stand as an anomaly in an area where the courts generally have been extremely reluctant to expand the exceptions contained in section 17(2) of the Bankruptcy Act. In other cases when the husband and father has made an express contract with a third party who is to supply goods or services which constitute items of support, the courts have refused to allow the third party the protection of the exception granted to claims for support.⁴⁹ It would certainly seem apparent that the

⁴⁷ 151 Wash. 675, 276 Pac. 868 (1929).

⁴⁸ In so holding, the court noted that the consideration for the adoption contract was (1) the agreement by the third parties that they would adopt the children, and (2) the agreement by the divorced mother of the children to waive the provisions of the divorce decree with reference to the maintenance and support of the children. The court felt that due to the direct and immediate connection between the contractual obligation to pay for maintenance and support, the adoption itself, and the divorce, the debt created should not be discharged.

⁴⁹ *In re Lo Grasso*, 23 F. Supp. 340 (W.D.N.Y. 1938); *Leman v. Locke*, 240 Mass. 551, 134 N.E. 343 (1922); *Schellenberg v. Mullaney*, 112 App. Div.

adopting parents should have a weaker claim on the bankrupt estate of the former father than the educational institutions or homes in some of the other cases.⁵⁰

Does it or should it make any difference in the application of the bankruptcy law if the claiming third party is the state? Two recent cases have considered the problem, each reaching different results for different reasons. The first is the New York case of *Hilliard v. DeCuiceis*.⁵¹ A New York statute provides that whenever welfare payments are made to support persons for whom the defendant is liable, and the welfare officials thereafter find the defendant possessed of assets, the welfare official may recover against the defendant the amounts which were spent in support of his dependents. In the *DeCuiceis* case the department had supplied support for defendant's dependents. Later, finding defendant possessed of assets, the Commissioner brought suit and recovered a judgment against him for the amount of benefits which had been supplied. The defendant then filed a voluntary petition in bankruptcy and listed the welfare department as his sole creditor. Defendant was discharged in due course. In a subsequent attempt to enforce the judgment in favor of the welfare department, the New York court held that the payments by the welfare department did not lessen the defendant's obligation to support his dependents, and for that reason the judgment was not one for support within the exception found in section 17(2) of the Bankruptcy Act. But under similar circumstances a private party who supplies support not under contract with the husband and father would have a nondischargeable claim.⁵² Is there any reason apparent why the state should not have rights equal to those of a private individual? The court's theory that the obligation of the bankrupt continued even though the state paid support does not seem to distinguish this situation from the cases when a private individual supplies room and board to a dependent when the husband or father has refused or neglected to do so.

The second case involving the state as the claiming third party

384, 98 N.Y. Supp. 432 (2d Dept. 1906); *Schwoll v. Meeks*, 76 Ohio App. 231, 63 N.E.2d 831 (1944); *Wintrobe v. Connors*, 67 Ohio App. 106, 35 N.E.2d 1018 (1941).

⁵⁰ See note 39 *supra*.

⁵¹ 202 Misc. 197, 115 N.Y.S.2d 5 (Sup. Ct. 1952), criticized in Note, 53 COLUM. L. REV. 570 (1953).

⁵² *In re Myers*, 12 F.2d 938 (W.D.N.Y. 1926); cf. cases cited note 49 *supra*.

was *State v. Murzyn*.⁵³ The state of Connecticut had supplied room and board and medical care to the defendant's child in a state humane institution. Under the law of Connecticut the parents became liable for reimbursement to the state for this institutional support. While the child was still in the hospital the state obtained an order requiring the parents to pay \$40 per week for the support of the child, and \$30 per month to be applied to past expenditures for support and care. When the child was released from the hospital the state asked that the amounts then payable be continued and that the total amount be applied to the arrears. The parents then filed voluntary petitions in bankruptcy. Thereafter the state moved to hold defendant-father in contempt of court for failure to pay in accordance with the order above mentioned. In the meantime the father had been discharged in bankruptcy. The statute providing for reimbursement to the state also provides that the court which enters the order may at any time modify the order. The court concluded that this claim of the state was not a fixed liability. This was so because the state, under the statute involved, could ask that the amount of the obligation be changed at any time. Because this was not a fixed claim the court concluded that it was not a provable claim within section 63 of the Bankruptcy Act; and because it was not a provable claim it was not a dischargeable claim. This was held to be true of past amounts unpaid and future amounts to accrue. The court further found that the bankruptcy proceedings did not have the effect of purging the defendants of their contempt. Because of the result reached by the court, it is not known whether, if the court had found this a fixed liability, they would have found it a result of contract with the parents and dischargeable, or the result of state action without regard to parental consent and thus perhaps nondischargeable. This case, unlike the *DeCuiceis* case discussed above, gives the state an advantage that an individual would not have. It would seem that the same result should be reached in both cases as far as the Bankruptcy Act is concerned. In both the *Murzyn* and *DeCuiceis* cases the state supplied support when the bankrupt either could not or would not do so. The real difference in these two cases appears to be in the statutory remedy provided for collection of the state's right of reimbursement. In New York a simple judgment was available while in Connecticut a conditional judgment or order was provided. Is it proper that the substantive rights of a bankrupt should turn on the

⁵³ 142 Conn. 329, 114 A.2d 210 (1955).

niceties of state remedial procedure in collecting reimbursement for welfare activities?

In an early case, *In re Baker*,⁵⁴ it was determined that the obligation to support a bastard child was not a debt within the meaning of the Bankruptcy Act and thus not dischargeable. Such an obligation was not to be distinguished from an obligation to support a legitimate child. Although no recent cases were found on this point, it seems apparent that such an obligation would fall within the exception of section 17(2) as amended in 1903. The purpose of the support order is the same whether the child is born in or out of wedlock. In a much more recent New York case⁵⁵ a man and woman had celebrated a marriage and lived together as man and wife for fifteen years. The parties agreed to a separation under which the man would pay his "wife" monthly support. Thereafter it was discovered that the "wife" had a living husband at the time of her marriage to the man she had just separated from. The man asked for and received an annulment. Sometimes later the man received a discharge in bankruptcy. The "wife" sued for back payments under the separation agreement and obtained a judgment. The man resisted collection of the judgment by reason of his discharge in bankruptcy. The court held that the bankruptcy proceeding discharged the debt to the "wife" because the wife's judgment could not be within the exception of section 17(2) since she was not in fact a wife. One might remark that it seems difficult to see the difference between a child born without the benefit of clergy and an "illegitimate" spouse. Clearly, that policy which protects a woman from a discharge of her claim for alimony or support should also protect this woman. She lived for fifteen years as a wife and suffered the same economic and social disadvantages as the legitimate wife who has been married for the same period of time. In *Fife v. Fife*,⁵⁶ a case also involving an annulment, the court held that an order entered in an annulment proceeding requiring the former "husband" to pay off the mortgage on the parties' residence was a judgment for a debt and was thus discharged in bankruptcy. The case was expressly confined to its facts and the order requiring the "husband" to pay off the mortgage might well have been called a property settlement if the case had been the usual divorce situation.

⁵⁴ 96 Fed. 954 (D. Kan. 1899).

⁵⁵ *In re Collins*, 53 N.Y.S.2d 316 (Sup. Ct. 1945).

⁵⁶ 1 Utah 2d 281, 265 P.2d 642 (1954).

Although it is readily to be admitted that there are great and important legal distinctions between annulment and divorce, how important are these when we are determining whether or not a man should be able to escape liabilities for support of a woman who has become dependent upon him through living together for a period of time? The application of the bankruptcy laws should not turn on the niceties of the laws of marriage and divorce. It might be observed that in some countries, including England, it is perfectly proper to order alimony in cases of annulment as well as divorce.⁵⁷

Suppose a situation, admittedly within the exception provided in section 17(2), in which the wife has been awarded alimony. May the wife assign this right to a third party so as to preserve in the third party the nondischargeable nature of the claim? Will it make a difference whether the assignment is of accrued amounts or of amounts to become due in the future? The Minnesota Supreme Court answered a part of this problem in *Cederberg v. Gunstron*.⁵⁸ The case involved a settlement agreement providing for alimony to be paid for a period of three years at a stated amount. The money had all been paid except for \$240 which was overdue. At that time the wife assigned her claim for the overdue alimony payment to the plaintiff, and the plaintiff promptly secured a judgment against the husband for this amount. The husband later pleaded a discharge in bankruptcy as a bar to the enforcement of the plaintiff's judgment. On the issue of whether a claim for alimony is assignable, the Minnesota court said that it was as to amounts which had accrued, and they found it unnecessary to comment on unaccrued alimony payments because of the facts of the case. On the dischargeability issue, the court held that the judgment was one for alimony and was clearly unaffected by the husband's subsequent discharge in bankruptcy. A similar result with respect to assignability of accrued alimony was reached in a recent Iowa case. In *Siver v. Shebetka*⁵⁹ the court held that accrued alimony, even though not a debt, would pass by operation of law to the administratrix, and an action by the administratrix for accrued alimony could be maintained. Again in this case the court did not pass upon the question of future liability because, of course, the obligation ended with the demise of the wife. The attitude of the courts seems to be that unaccrued alimony is not

⁵⁷ See ROYAL COMMISSION ON MARRIAGE AND DIVORCE REP. pt. VII (1951-55).

⁵⁸ 193 Minn. 421, 258 N.W. 574 (1935).

⁵⁹ 245 Iowa 965, 65 N.W.2d 173 (1954).

assignable as a matter of public policy.⁶⁰ It would seem that insofar as accrued alimony payments are assignable, they should retain their nondischargeable nature in the hands of the assignee, not to protect the assignee but rather to preserve a market for the wife who is under pressure economically. One further qualification should be added. In cases where an assignee is seeking to enforce an assignment of accrued alimony after bankruptcy and discharge of the husband, the court should examine the actual consideration paid to the wife and enforce the post-bankruptcy claim only to that extent.

In *Hylek v. Hylek*,⁶¹ a case somewhat akin to the above discussion, a wife obtained a divorce decree which ordered the husband to make support payments for the benefit of their minor children. Later, the wife obtained a judgment for the accrued arrears of support payments and attempted to enforce the judgment against the husband. The husband defended on the grounds that he had since obtained a discharge in bankruptcy. He argued that the judgment for accrued support was a provable debt and hence discharged by bankruptcy. The bankrupt-husband further argued that the judgment should not be enforced because the children for whose benefit the support order was entered were now of age. The court, in holding that the judgment was not discharged, pointed out that it had the duty to look behind the judgment to ascertain the nature of the claim upon which the judgment had been based. It was felt that the judgment for the support was not a mere debt; rather the judgment was merely the means used to enforce the obligation to support. The court further stated that the fact that the children for whose benefit the support order was entered were now of age and emancipated made no difference upon the dischargeability of the claim which the wife had reduced to judgment. On the point made in this case to the effect that the court can go behind a judgment to ascertain the nature of the claim upon which the judgment was based, this is true of all the exceptions found in section 17.⁶²

CONCLUSION

To the reader who has come this far it will be apparent that the domestic liabilities exception found in section 17(2) of the Bank-

⁶⁰ See NELSON, DIVORCE AND ANNULMENT § 14.08 (2d ed. 1961); Annot., 97 A.L.R. 208 (1935).

⁶¹ 53 F. Supp. 657 (N.D. Ind. 1944).

⁶² *Gilchrist v. Cotton*, 83 Ind. App. 415, 148 N.E. 435 (1925); *Maier v. Maier*, 77 Misc. 145, 135 N.Y. Supp. 1038 (Sup. Ct. 1912).

ruptcy Act has, in a broad sense, served its office well. There are only a few problem areas which deserve reconsideration. The most important of the unsettled questions is the provability of the wife's claim for alimony or support of herself or child in the bankrupt's estate. Because of the history of the 1903 amendment to section 17 it has been thought by many judges and writers that the amendment did not change the nonprovability decisions of the United States Supreme Court. The highest court has never passed upon the issue of the provability of the wife's claim for alimony or support in the bankruptcy proceedings under the present section, and it is apparent that unless Congress intended to harm the standing of the wife in 1903 such claim should be provable. The distinction between accrued and future claims for alimony has not given the courts much trouble; the accrued claim is a fixed liability and the claim for future alimony or support is a contingent claim incapable of measurement with sufficient certainty to meet the requirements of the Bankruptcy Act. It might be advisable for Congress to consider treating the wife in somewhat the same manner as the landlord is treated in ordinary bankruptcy.⁶³ Thus it would be possible to allow the wife to claim for future alimony or support, but arbitrarily limit the extent of any allowable claim to an amount equal to one year's support or alimony.

The courts have also been troubled with allocating agreements or decrees into the nondischargeable alimony or support category, or the dischargeable property settlement. The rule here is clear but the trouble lies in the criteria for application. When we seek the reasons for allocation to one category or the other, many of the opinions leave much to be desired. In making its determination of the dischargeability of a settlement agreement or decree, the court should be free to look to all the circumstances in which the parties were at the time of the making of the agreement or order. It seems somewhat hasty, and perhaps overlooks the essential purpose of the Bankruptcy Act for a court, passing on the issue of discharge, to find that because alimony is not allowed in favor of the guilty party to a divorce proceeding, this particular agreement or order cannot be alimony or support within the meaning of section 17(2).

The claims of third parties which fall within the exception discussed in this article are for the most part given uniform treatment.

⁶³ Cf. Bankruptcy Act § 63(a) (9), 52 Stat. 873 (1938), 11 U.S.C. § 103 (a) (9) (1958).

If the third party contracted to give services or goods which are necessary to the support of a wife or child, that party does not obtain a claim which will survive bankruptcy. However, in those few instances when the third party supplies necessary goods or services without the consent of the bankrupt, under circumstances in which the law would create a duty of reimbursement, then such third party has a claim which is unaffected by bankruptcy. It should make no difference whether that third party is the state or a private citizen.