UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 69 | Number 2 Article 1

1-1-1991

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BANKRUPTCY AND THE MODIFICATION OF SUPPORT: FRESH START, HEAD START, OR FALSE START?

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The dischargeability in bankruptcy of debts arising from dissolution of a marriage depends on whether the debts are "in the nature of alimony, maintenance, or support." Debts so characterized are not dischargeable. Unfortunately, the nature of marital debts is not always clear. While Congress has charged the federal courts with the task of determining the dischargeability of marital debts, it has failed to establish whether the debt's nature attaches irrevocably at the time of divorce, or whether dischargeability depends on circumstances exisiting at the time of bankruptcy. If a federal court considers the parties' present circumstances in discharging all or a portion of a marital debt, the result, in effect, is a modification of a state court order and a usurpation of the state courts' traditional role in modifying support obligations.

In this Article, Professor Sheryl Scheible examines the interplay of divorce and bankruptcy, first outlining state law principles of support obligations and their modification, and then analyzing the bankruptcy courts' approaches to the dischargeability of marital debts. After examining the effect of a former spouse's bankruptcy on subsequent state court modification actions, Professor Scheible concludes that bankruptcy courts should abstain from determining the nature of disputed marital debts and defer to the more appropriate state court forum.

I. INTRODUCTION

Bankruptcy and divorce are legal events that have become increasingly common features of American life.[1] Both proceedings are expensive, not only in financial terms, but in emotional cost as well. Although either bankruptcy or divorce can afford the participants an apparent "fresh start," the interplay between the two events may make such a "fresh start" quite illusory. Similarly, the unpredictability of the relationship between state divorce law and federal bankruptcy law may result in one of the former spouses acquiring an unfair advantage at the other's expense in the event of a bankruptcy.

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1. Data collected by the Administrative Office of the U.S. Courts reveals that in 1988, 594,567 bankruptcy petitions were filed and 815,497 were pending. Statistics compiled by the U.S. Department of Commerce, Bureau of the Census, from the U.S. National Center for Health Statistics indicate that during that same year, 1,183,000 divorces were granted in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 86, 532 (110th ed. 1990); *see also* Schiffer, *The New Bankruptcy Reform Act: Its Implications for Family Law Practitioners*, 19 J. FAM. L. 1, 3 (1980-81) (citing statistics on bankruptcy).

Divorce can be financially devastating. Moreover, rather than severing the parties' economic relationship, divorce frequently results in the creation of various types of post-marital financial obligations.[2] A former spouse may be required, by court order or by contract, to pay support for the other spouse or their children or both; division of marital assets may require one former spouse to reimburse the other through a series of payments; one spouse may become obligated to pay third parties for debts incurred during the marriage.[3] Not uncommonly, the parties' post-marital fiscal predicament may be worse than it was during marriage.

Bankruptcy and divorce are frequently interrelated.[4] Financial difficulties that lead to bankruptcy may contribute to the dissolution of marriage; similarly, the cost of divorce and its consequences may force one or both former spouses into bankruptcy within a short time after the marital break-up.[5] Just as the divorce action involves both spouses and their children, a bankruptcy action not only affects the individual debtor, but also may have an impact on the debtor's former spouse and children, who suddenly may find that certain marital debts established by the divorce decree are nullified by the debtor's discharge in bankruptcy.[6] Furthermore, if the bankrupt spouse is discharged from liability on debts owed to third party creditors, which were assigned to the debtor in the divorce action, the nonbankrupt spouse may become directly responsible for repayment of those debts.[7]

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2. The term "marital debts" generally will be applied in this Article to refer to payments owed to one spouse by the other as an incident of divorce, whether the obligation is support, property division, or another type of award, including an assumption of indebtedness owed to a third party.

3. Debts incurred during marriage often exceed a couple's net assets. On occasion, because of generosity, guilt, or a desire to expedite the divorce, a spouse may assume marital debts that greatly exceed his or her ability to pay. Similarly, a spouse might exchange financial rights for a more favorable custody arrangement. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 964 (1979).

4. *See* Schiffer, *supra* note 1, at 3.

5. *Id.* (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. I, at 42 (1973) (citing R. Hermann, Causal Factors in Consumer Bankruptcy: A Case Study, Institute of Gov't Affairs Occasional Paper No. 6, Univ. of Calif., Davis, at 29 (1965), which indicated that one-third of the parties in bankruptcy proceedings had been divorced within the previous or following year); *see, e.g.*, Catlett v. Jackson (*In re* Jackson), 58 Bankr. 72 (Bankr. W.D. Ky. 1986) (husband filed for bankruptcy two weeks after divorce); Loyko v. Loyko, 200 N.J. Super. 152, 490 A.2d 802 (1985) (husband filed for bankruptcy four months after divorce); Fitzgerald v. Fitzgerald, 144 Vt. 549, 481 A.2d 1044 (1984) (husband filed for bankruptcy one month after divorce).

6. Although, theoretically, spousal support and child support are distinct concepts, as a practical matter the distinction frequently is blurred, and awards for spousal support often are interrelated and blended with child support. Although child support is ordered for the benefit of the children, it is administered by the custodial spouse. One court noted, "[a]s an observation on reality, however, there are no doubt cases where a mother uses child support for her own benefit to the disadvantage of the children, and, having that in mind, a trial judge sometimes looks with skepticism at some claims for child support and becomes wary." Macy v. Macy, 714 P.2d 774, 777 (Wyo. 1986). Characterizing the nature of an obligation for child support for bankruptcy purposes generally is not a complicated determination. *See* White, *Strange Bedfellows: The Uneasy Alliance Between Bankruptcy and Family Law*, 17 N.M.L. REV. 1, 28 (1987). Therefore, this Article focuses primarily on spousal support and refers to child support only to the extent that it relates to spousal support.

7. When a pre-existing marital debt owed to a third party is assigned to or is assumed by one of the spouses upon divorce, two related but distinct debts actually exist at the time of bankruptcy: one owed to the third party creditor and one owed to the spouse. *See* Long v. Calhoun (*In re*

Bankruptcy law has long struggled to find a balance between affording a debtor a fresh start on the one hand, and protecting the debtor's family members on the other.[8] Marital debts that a bankruptcy court determines are "in the nature of alimony, maintenance or support" are nondischargeable pursuant to the Bankruptcy Code;[9] thus, the debtor's obligation with respect to those sup-

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Calhoun), 715 F.2d 1103, 1107 (6th Cir. 1983). The first, the original debt owed jointly by both spouses to a third party, will not be affected by the assignment or assumption, absent the unlikely event of a release from liability by the creditor granted to one of the spouses. The second type of debt is a promise by one spouse to the other, or indemnification, that the former will pay the debt. Typically, that promise is made in conjunction with an express or implied hold-harmless provision. Bankruptcy discharge generally relieves the debtor of direct liability to the third party creditor. If the debtor is *not* discharged with respect to the second debt, the promise to the spouse, the discharge may be virtually meaningless. Although the creditor could not seek recourse from the bankrupt spouse, the creditor could collect from the nonbankrupt spouse, who in turn could proceed against the debtor on the basis of his nondischarged hold-harmless agreement. If, however, the debtor is discharged of *both* the debt to the creditor and the secondary obligation to the former spouse, the former spouse would become directly and primarily liable to the third party creditor. *See* Scheible, *Defining "Support" Under Bankruptcy Law: Revitalization of the "Necessaries" Doctrine*, 41 VAND. L. REV. 1, 41-46 (1988) (analysis of bankruptcy law regarding discharge of marital debts owed to third parties); *see also* Robbins, *The Advantages of a Timely Bankruptcy*, FAM. ADVOC., Winter 1983, 14-16, 41-42 (generally discussing bankruptcy in family context); Schiffer, *supra* note 1, at 9 (effect on one former spouse's bankruptcy on nondebtor former spouse). *See generally* Annotation, *Debts for Alimony, Maintenance, and Support as Exceptions to Bankruptcy Discharge, Under § 523(a)(5) of Bankruptcy Code of 1978 (11 U.S.C. § 523(a)(5))*, 69 A.L.R. FED. 403 (1984 & Supp. 1990).

8. *See generally* Brown, *The Impact of Bankruptcy on Alimony, Maintenance and Support Obligations: The Approach in the Sixth Circuit*, 56 TENN. L. REV. 507 (1989); Fibich & Floyd, *Impact of Bankruptcy on Family Law*, 29 S. TEX. L.J. 637 (1988); Freeburger & Bowles, *What Divorce Court Giveth, Bankruptcy Court Taketh Away: A Review of the Dischargeability of Marital Support Obligations*, 24 J. FAM. L. 587 (1985-86); Hoffman & Murray, *Obligations That Cannot Be Erased*, FAM. ADVOC., Winter 1983, at 18; Luster, *Alimony and Child Support: Are They Dischargeable in Bankruptcy in the Fifth Circuit?*, 58 MISS. L.J. 155 (1988); Ravin & Rosen, *The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations*, 60 AM. BANKR. L.J. 1 (1986); Scheible, *supra* note 7; Schiffer, *supra* note 1; Staggs, *Bankruptcy After Divorce: Rights and Liabilities of Former Spouses in Texas*, 23 S. TEX. L.J. 173 (1982); Swann, *Dischargeability of Domestic Obligations in Bankruptcy*, 43 TENN. L. REV. 231 (1976); Tucker, *The Treatment of Spousal and Support Obligations Under Chapter 13 of the Bankruptcy Reform Act*, 45 TEX. B.J. 1359 (1982); Weintraub & Resnick, *From the Bankruptcy Courts: The Bankruptcy Court's Role in Determining Nondischargeability of Obligations Owed to a Former Spouse*, 18 U.C.C. L.J. 272 (1986); White, *supra* note 6; White, *Spousal and Child Support Payment Provisions in Chapter 13 Plans*, 16 CAP. U.L. REV. 369 (1987) [hereinafter White, *Spousal and Child Support*]; Comment, *Alimony and Child Support: Are They Dischargeable in Bankruptcy in the Fifth Circuit?*, 58 MISS. L.J. 155 (1988) [hereinafter Comment, *Alimony and Child Support*]; Comment, *Dissolution of Marriage After Discharge in Bankruptcy: The Not-So-Fresh Start Doctrine*, 10 PAC. L.J. 861 (1979); Comment, *The Bankruptcy Reform Act of 1978: Dischargeability of Obligations Incurred Under Property Settlements, Separation Agreements, and Divorce Decrees*, 12 U. BALT. L. REV. 520 (1983) [hereinafter Comment, *Bankruptcy Reform Act*]; Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 UCLA L. REV. 96 (1977); Note, *Discharge of Post-Marital Support Obligations Under the New Bankruptcy Code*, 4 HARV. WOMEN'S L.J. 177 (1981) (authored by Mark P. Munson) [hereinafter Munson Note]; Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L.J. 469 (1977); Note, *The Effect of the Indiana Divorce Law upon the Application of Section 17a(7) of the Bankruptcy Act*, 12 IND. L. REV. 379 (1979); Note, *Bankruptcy: Dischargeability of Divorce Related Expenses Under 11 U.S.C. § 523(a)(5)*, 35 OKLA. L. REV. 799 (1982).

9. 11 U.S.C. § 523(a)(5) (1988) provides an exception from discharge for debts

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—
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> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise

port[10] debts continues despite the bankruptcy action.[11] However, marital debts that are not deemed to constitute support are regarded as property division and, thus, are dischargeable; therefore, those debts are extinguished by the bankruptcy action and are no longer enforceable through the divorce decree or by other means.[12] Unfortunately, it is not always clear which debts are "in the nature of support."

Congress clearly indicated that, in determining the dischargeability of marital debts in bankruptcy, federal law, not state law, must dictate the characterization of the debt as "support" or "property division."[13] Congress failed, however, to clarify whether the debt's nature attaches irrevocably at the inception of the debt at the time of the parties' divorce, or whether that nature depends on the circumstances existing at the time of bankruptcy.

Currently, the federal courts are divided as to whether present circumstances are relevant to determining dischargeability of marital debts. A majority of federal appellate courts that have addressed the issue have concluded that if a debt had the necessary features of support at its inception, then the obligation retains that character for bankruptcy purposes and may not be discharged.[14] Conversely, a minority position, advanced primarily by the Sixth Circuit,[15] adopts the view that at least a limited inquiry into the parties' circumstances at the time of bankruptcy is necessary to categorize accurately certain types of marital debts. Under this "present circumstances" approach, a debt that originated as support may have become unreasonable over time and lost the characteristic of support; hence, the debt will be totally or partially discharged.

Application of a present circumstances test has serious implications because of its potential to transform all or a portion of an otherwise nondischargeable support debt into a debt that is dischargeable. Such a transformation or recharacterization by the bankruptcy court essentially constitutes a modification

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. . . or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5) (1988).

10. For bankruptcy purposes, the courts rarely distinguish between the terms "alimony," "maintenance," or "support" when referring to obligations to a former spouse, but, instead, use the terms interchangeably. *See* Yeates v. Yeates (*In re* Yeates), 807 F.2d 874, 876 n.1 (10th Cir. 1986). *But see* Crist v. Crist (*In re* Crist), 632 F.2d 1226, 1233 n.11 (5th Cir. 1980), *cert. denied* 451 U.S. 986, 454 U.S. 819 (1981). As used in this Article, the word "support" generally will be applied to refer to the type of marital debt that is nondischargeable pursuant to § 523(a)(5).

11. Bankruptcy law gives preferential treatment to alimony, maintenance, and support in other contexts. For example, such payments constitute exempt property under 11 U.S.C. § 522(d)(10)(D) (1988) and collection of those debts is not affected by the automatic stay of 11 U.S.C. § 362.

12. Section 524 of title 11 releases the debtor from further liability on a discharged debt and prohibits the creditor from attempting to enforce the debt. 11 U.S.C. § 524 (1988). See White, *supra* note 6, for a detailed description of a bankruptcy action.

13. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320; *see infra* note 211 and accompanying text.

14. Gianakas v. Gianakas (*In re* Gianakas), No. 90-3258 (3d Cir. Oct. 19, 1990) (LEXIS, Genfed library, USAPP file); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801, 803-04 (2d Cir. 1987); Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986); Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 905 (11th Cir. 1985); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984).

15. *See* Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1110 (6th Cir. 1983); *infra* notes 142-65 and accompanying text.

of a state court support order. Both the creation and modification of support obligations, in turn, traditionally have been regarded as exclusively a function of the state courts.[16] The crux of the controversy, therefore, is whether the bankruptcy courts should usurp the state courts' interest by determining modification issues.

The overlay of federal law onto state law regarding modification produces a variety of complications and potential inequities. Although state courts vary with respect to the appropriate criteria for modification, they generally consider traditional forms of alimony and child support to be modifiable if the parties' relative financial circumstances or needs change substantially following the divorce.[17] Thus, the bankruptcy of either former spouse may alter the parties' financial conditions sufficiently to justify a state court modification action.[18] Consequently, the bankruptcy action may drive the parties back into state court to seek a modification of the divorce decree, in an attempt to reestablish a balance of the parties' post-divorce financial relationship that was disrupted by the bankruptcy action.

Whether a specific debt is modifiable by a state court depends largely on how the debt originally was structured.[19] Because not all types of marital obligations are modifiable under state law, a state court may be powerless to alleviate the effects of bankruptcy. Therefore, if a bankruptcy court refuses to consider present circumstances in classifying a debt, the debtor may be burdened with an unreasonable or inequitable debt, frustrating the underlying fresh start policy of bankruptcy law. Conversely, state family law principles may preclude the debtor's dependents from securing a remedy when the obligor's discharge of marital debts in bankruptcy has affected adversely their own financial situation.

In either case, inequity may occur as the consequence of a former spouse's bankruptcy. The interrelationship between bankruptcy and modification of marital debts must be reevaluated to strike an appropriate balance between two competing policies, providing the debtor with an economic fresh start on the one hand, and protecting a debtor's dependents by preventing him from gaining an *unfair* head start on the other.

This Article analyzes the interplay of bankruptcy and support modification. Part II outlines the principles of spousal support obligations and their modification under state family law. Part III analyzes the development and rejection of a present circumstances test by the bankruptcy courts. The state courts' reaction to bankruptcy in modification actions is examined in Part IV. Finally, Part V suggests an integrated approach to the modification problem, recommending an active role by both state and federal courts in bankruptcy proceedings that involve marital debts.

16. *See, e.g.*, Chedrick v. Chedrick (*In re* Chedrick), 98 Bankr. 731, 734 (Bankr. W.D. Pa. 1989); Jenkins v. Jenkins (*In re* Jenkins), 94 Bankr. 355, 360 (Bankr. E.D. Pa. 1988); Levy v. Levy (*In re* Levy), 63 Bankr. 449, 451 (Bankr. W.D. La. 1986).

17. *See infra* notes 37-47 and accompanying text.

18. *See infra* notes 254-69 and accompanying text.

19. *See infra* notes 71-78 and accompanying text.

II. STATE LAW PRINCIPLES OF SUPPORT

A. *Traditional Alimony as Support*

Traditional alimony awards, though not as common today as in previous decades,[20] have several characteristics that make them relatively easy to identify for bankruptcy classification purposes. First, they derive from the duty of spousal support. Second, because of that underlying origin, they are generally payable periodically for an indefinite period of time. Finally, state courts have regarded provisions for future installments of traditional alimony as modifiable under appropriate circumstances.

The duty to support a spouse is perhaps the most important legal consequence of marriage.[21] That duty requires a spouse to provide housing, food, clothing, medical care, and other necessities for the marital partner.[22] Until quite recently, the duty of support was imposed solely on the husband, for the benefit of the wife.[23] Largely as a result of the women's movement and equal protection claims based on gender discrimination,[24] today the obligation is mutual.[25]

While a marriage is intact, the courts rarely dictate the extent of the duty of support; rather, the spouses themselves must determine the family's standard of living.[26] In extreme circumstances, the general practice of noninterference is

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20. *See* McGraw, Sterin & Davis, *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443, 473 (1981-82) (indicating a significant decline in alimony awards); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1221 (1981) (noting that approximately 18% of divorcing women are awarded alimony).

21. The duty to support one's children exists regardless of the parents' marital status. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 176-77, 200 (2d ed. 1988); H. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 4-5 (1981); Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367, 384-85.

22. The duty of support arises solely from the marital relationship and does not attach to unmarried cohabitation. *See* H. CLARK, *supra* note 21, at 250. The extent of the duty is generally defined with respect to the parties' standard of living or in accordance with "station in life." *Id.* at 251. For discussions of the duty of spousal support, see Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 559-84 (1974); Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709, 710-32 (1956); Note, *Support of the Wife: Statutory Rights and Remedies*, 28 BROOKLYN L. REV. 108, 108-27 (1961).

23. Historically, the husband had the duty to support his wife, who in turn had a duty to provide household services. Today each spouse has a legal duty to support the other. H. CLARK, *supra* note 21, at 250-51.

24. *See* Orr v. Orr, 440 U.S. 268, 283 (1979) (state statute authorizing alimony for wives but not husbands violates equal protection clause of the fourteenth amendment); *see also* H. CLARK, *supra* note 21, at 251 (duty of support must rest equally on both spouses to be constitutional).

25. *See, e.g.*, CAL. CIV. CODE § 5100 (West 1983); CONN. GEN. STAT. ANN. § 46b-37 (West 1986); UNIF. CIVIL LIABILITY FOR SUPPORT ACT, 9 (Part 1) U.L.A. 333 (1988) (adopted by California, Maine, New Hampshire, and Utah). As a practical matter, the husband generally still remains the primary source of support. *See* Bianchi, *Wives Who Earn More Than Their Husbands*, AMERICAN DEMOGRAPHICS, July 1984, at 9, *cited in* I. ELLMAN, P. KURTZ, & A. STANTON, FAMILY LAW 269 (1986).

26. *See, e.g.*, Shilling v. Shilling, 16 Fam. L. Rep. (BNA) 1381 (Pa. Super. Ct. 1990) (physical or financial separation necessary for alimony or child support); McGuire v. McGuire, 157 Neb. 226, 238, 59 N.W.2d 336, 342 (1953).

tempered by family expense statutes,[27] criminal nonsupport laws,[28] and to some extent, the necessaries doctrine.[29] Once the marriage breaks down, however, the courts will intervene and define the support obligation in precise terms.[30] Alimony has been the traditional vehicle for continuing the duty of support owed to a dependent spouse once the couple's legal relationship has terminated.

Historically, courts awarded alimony to a wife when they granted her a divorce because of the husband's marital fault.[31] In addition to its punitive aspects, alimony was intended to provide a means of support to the former wife who, through no offense of her own, was unable to support herself as a single person.[32]

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27. *See, e.g.*, CAL. CIV. CODE §§ 5120.130, 5120.140 (West 1983 & Supp. 1990); MASS. ANN. LAWS ch. 209, § 7 (Law. Co-op. 1981); MINN. STAT. ANN. § 519.05 (West 1990).

28. *See, e.g.*, FLA. STAT. ANN. § 856.04 (West 1976); ILL. ANN. STAT. ch. 40, para. 1101 (Smith-Hurd 1980); MICH. COMP. LAWS ANN. § 28.358 (West 1990); MODEL PENAL CODE § 230.5 (1974).

29. The doctrine of necessaries protected wives from nonsupport by creating liability in the husband to third parties who furnished the wife basic goods and services when her husband failed to do so himself. The necessaries doctrine applied to children and their fathers as well. *See* H. CLARK, *supra* note 21, at 265-66; I. ELLMAN, P. KURTZ, & A. STANTON, FAMILY LAW 97-98 (1986). The extent of the doctrine depended on the family's standard of living and the husband's means and, therefore, was not limited to bare essentials. *See* Long v. Carter, 39 N.M. 255, 255, 44 P.2d 1040, 1040 (1935); State v. Clark, 88 Wash. 2d 533, 536-39, 563 P.2d 1253, 1255-56 (1977). The husband incurred no liability if a third party gratuitously furnished goods or services to the wife, if the husband had already supplied necessaries, or if the wife had abandoned the husband. I. ELLMAN, P. KURTZ, & A. STANTON, *supra*, at 97-98. Although the common law only applied the necessaries doctrine to husbands, most states now have extended it to both spouses. *See* Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 151-52, 417 A.2d 1003, 1008-09 (1980); Richland Memorial Hosp. v. Burton, 282 S.C. 159, 161, 318 S.E.2d 12, 13 (1984). At least one state regards the husband as primarily liable, with the wife only secondarily liable. *See* Marshfield Clinic v. Discher, 105 Wis. 2d 506, 508-09, 314 N.W.2d 326, 328 (1982); *In re* Estate of Stromsted, 99 Wis. 2d 136, 144, 299 N.W.2d 226, 230 (1980); *see also* Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221, 237-61 (1983-84) (traditional doctrine of necessaries wherein only the husband was held responsible for spousal support is expanded to a reciprocal duty of spousal support by equal protection mandate); Scheible, *supra* note 7, at 8-12 (discussing doctrine of necessaries and alimony); Comment, *The New Doctrine of Necessaries in Virginia*, 19 U. RICH. L. REV. 317, 322-31 (1985) (discussing alternatives to doctrine of necessaries in light of the Virginia Supreme Court holding that it violated equal protection); Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1774-80 (1984) (discussing the modern necessaries doctrine and its flaws); Annotation, *Necessity, in Action Against Husband for Necessaries Furnished Wife, of Proving Husband's Failure to Provide Necessaries*, 19 A.L.R.4th 432 (1983) (discussing creditor's burden of proof in action against the husband for payment of necessaries furnished to wife).

30. Even in the absence of an absolute divorce, courts will order support in other types of the family dissolutions, for example, actions pendente lite and legal separations or divorces from bed and board. *See* W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 1119-20 (2d ed. 1990).

31. Traditionally, alimony was used to punish a husband who caused the marriage to fail; a wife was denied alimony if she was at fault. *See* Remondino v. Remondino, 41 Cal. App. 2d 208, 216, 106 P.2d 437, 442 (1940) (wife who is guilty of immoral or unsocial conduct or who unreasonably refuses to conform to husband's place or mode of living barred from alimony under then-existing statute); Martin v. Martin, 366 So. 2d 475, 475 (Fla. Dist. Ct. App. 1979) (alimony was properly *reduced* due to wife's extramarital affair); cases collected in Annotation, *Allowance of Permanent Alimony to Wife Against Whom Divorce is Granted*, 34 A.L.R.2d 313, 321 (1954 & Supp. 1989); *see also* H. CLARK, *supra* note 21, at 496-528 (discussion of fault grounds and defenses).

32. Historically, a woman's economic prospects depended almost entirely on marriage. *See* Bartke & Zurvalec, *The Low, Middle and High Road to Marital Property Law Reform in Common Law Jurisdictions*, 7 COMMUNITY PROP. J. 200, 202-03 (1980); Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 146-47 (1980); Comment, *The*

Today, alimony, like the underlying duty of marital support, has become gender-neutral.[33] If a spouse is eligible for alimony, the amount of alimony awarded is calculated by balancing the dependent spouse's needs against the supporting spouse's ability to pay, in view of the standard of living enjoyed during the marriage.[34] The amount of alimony awarded in an individual case is left

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Development of Sharing Principles in Common Law Marital Property States, 28 UCLA L. REV. 1269, 1272-76 (1981). In addition to safeguarding dependent wives, alimony benefited society as a whole by assuring that former wives would not become public charges. *See* Burtoff v. Burtoff, 418 A.2d 1085, 1092 (D.C. 1980); Alibrando v. Alibrando, 375 A.2d 9, 13 (D.C. 1977).

33. The United States Supreme Court declared unconstitutional state statutes that allowed only wives, but not husbands, to obtain alimony. Orr v. Orr, 440 U.S. 268, 283 (1979). Most states' alimony statutes now are framed in gender-neutral terms. *See, e.g.*, FLA. STAT. ANN. § 61.08 (West Supp. 1990); MICH. COMP. LAWS ANN. § 25.103 (West 1984 & Supp. 1990); OHIO REV. CODE ANN. § 3105.18 (Anderson 1989); WASH. REV. CODE ANN. § 26.09.090 (1986 & Supp. 1990). In practice, most alimony still is awarded to wives. Munson Note, *supra* note 8, at 177.

34. Some states require a spouse seeking alimony to satisfy a threshold eligibility requirement before the form or amount of an award is considered. Section 308 of the Uniform Marriage and Divorce Act is typical:

> (a) [T]he court may grant a maintenance order for either spouse, only if it finds that the spouse seeking maintenance:
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> (1) lacks sufficient property to provide for his reasonable needs; and
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> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
>
> (b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:
>
> (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (3) the standard of living established during the marriage;
>
> (4) the duration of the marriage;
>
> (5) the age and the physical and emotional condition of the spouse seeking maintenance; and
>
> (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 347-48 (1987); *see e.g.* COLO. REV. STAT. § 14-10-114 (1987); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd 1980 & Supp. 1990); KY. REV. STAT. ANN. § 403.200 (Baldwin 1984 & Supp. 1990); MINN. STAT. ANN. § 518.552 (West 1990). Statutes in some jurisdictions are less explicit, and simply authorize the trial court, for instance, to grant alimony "in such amounts as the circumstances render necessary," N.C. GEN. STAT. § 50.16.5 (1987), or "as from the circumstances of the parties and the nature of the case may be just." S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976). Common factors considered in awarding alimony include the age, health, education, and work skills of the dependent spouse; the value and income-producing capacity of his or her separate property; that person's role as custodian of minor children; and contributions to the marriage. *See* H. CLARK, *supra* note 21, at 644-49. Ability to pay is measured not only in terms of actual earnings and assets, but in some instances, earning potential if the supporting spouse deliberately depresses his income. *See, e.g., In re* Marriage of McCarthy, 533 P.2d 928, 928 (Colo. Ct. App. 1975) (not released for official publication); *In re* Marriage of Smith, 77 Ill. App. 3d 858, 864, 396 N.E.2d 859, 864 (1979). Marital fault continues to play a role in alimony awards in a significant, although diminishing, number of states. *See, e.g.*, Mees v. Mees, 325 N.W.2d 207, 208 (N.D. 1982); Mahne v. Mahne, 147 N.J. Super. 326, 329, 371 A.2d 314, 315 (1977); FLA. STAT. ANN. § 61.08 (West Supp. 1990) (adultery may be considered); MASS. ANN. LAWS ch. 208, § 34 (Law. Co-op. Supp. 1990) (conduct of parties during marriage may be considered).

essentially to the discretion of the trial judge.[35]

Sometimes alimony is ordered as a lump sum, payable in money or property, or in installment payments for a fixed period.[36] However, because alimony is a continuation of the duty of support, the amount of which may fluctuate over time, the courts typically favor "periodic" or "permanent" alimony, payable at intervals over an indefinite time period.[37] If either party dies, the support obligation usually ends and alimony terminates.[38] Similarly, if the alimony recipient remarries, thus securing a new source of support, the alimony obligation of the former spouse generally ends.[39]

Correspondingly, if the balance of need and ability to pay fluctuates significantly over time, the court may modify or terminate the amount of periodic

35. *See, e.g.*, Clark v. Clark, 236 Kan. 703, 707-08, 696 P.2d 1386, 1389 (1985); Quick v. Quick, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982); Bahr v. Bahr, 107 Wis. 2d 72, 77, 318 N.W.2d 391, 395 (1982).

36. *See* Atkinson v. Atkinson, 279 S.C. 454, 456-57, 309 S.E.2d 14, 15 (1983) (factors to be considered in ordering lump sum alimony); H. CLARK, *supra* note 21, at 653-54 (noting that additional forms are possible and that individual states have different preferences with respect to the form of alimony). Alimony and child support are sometimes combined; an undifferentiated sum was structured to provide favorable tax consequences prior to the Tax Reform Act of 1984, although such treatment is more difficult to obtain since that legislation. *See* DuCanto, *The Strange and Untimely Death of Lester*, 63 TAXES 9, 11-13 (1985).

37. *See, e.g.*, Green v. Green, 41 Ill. App. 3d 154, 162, 354 N.E.2d 661, 669 (1976); O'Neill v. O'Neill, 293 S.C. 112, 117, 359 S.E.2d 68, 71 (1987); Millis v. Millis, 282 S.C. 610, 612, 320 S.E.2d 66, 67 (1984).

38. Statutes in a number of states provide that, absent a divorce decree or written agreement to the contrary, alimony terminates upon the death of either party. *See, e.g.*, CAL. CIV. CODE § 4801 (West 1983); ILL. ANN. STAT. ch. 40, § 510 (Smith-Hurd Supp. 1990); MINN. STAT. ANN. § 518.64 (West 1990); *see also* UNIF. MARRIAGE AND DIVORCE ACT § 316(b), 9A U.L.A. 147, 490 (1987) ("Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party . . . ."). Absent statutory authority, other states have concluded that courts have no power to order alimony beyond death of the parties. *See, e.g.*, Kuhns v. Kuhns (*In re* Estate of Kuhns), 550 P.2d 816 (Alaska 1976); Dolvin v. Dolvin, 248 Ga. 439, 284 S.E.2d 254 (1981); *see also* Annotation, *Death of Husband as Affecting Alimony*, 39 A.L.R.2d 1406, 1418-20 (1955) (Supp. 1989) (supplementary survey of state cases holding that arrears of installments accruing during the life of the payor may be collected after death), updating 18 A.L.R. 1040, 1054-55 (1922).

39. Termination upon the remarriage of the recipient occurs automatically under some states' statutes. *See, e.g.*, CAL. CIV. CODE §§ 4801(b), 4801.5 (West 1983 & Supp. 1990); ILL. ANN. STAT. ch. 40, para 510 (Smith-Hurd 1980 & Supp. 1990); MINN. STAT. ANN. § 518.64 (West 1990); *see also* UNIF. MARRIAGE AND DIVORCE ACT § 316(b), 9A U.L.A. 147, 490 (1987) ("Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon . . . the remarriage of party receiving maintenance."). Absent such a statute, the payor must obtain a modification from the court. *See, e.g.*, Bean v. Bean, 86 R.I. 334, 340, 134 A.2d 146, 149 (1957); *see also* H. CLARK, *supra* note 21, at 663-64 (discussing effect of remarriage on alimony payments). Although an unmarried cohabitant does not incur a duty of support, a number of states also require or permit termination of alimony when the recipient cohabits. *See, e.g.*, CAL. CIV. CODE § 4801.5 (West 1983 & Supp. 1990); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd Supp. 1990); N.Y. DOM. REL. LAW § 248 (McKinney 1986) (additionally requiring that the wife be "holding herself out as [the other man's] wife"); *see also* H. CLARK, *supra* note 21, at 665-68 (discussing effect on alimony payments of cohabitation by recipient); Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Along or with Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453, 461-67 (1980 & Supp. 1986) (survey of statutory provisions and case law regarding effect of cohabitation on support obligation). *See generally* Note, *Alimony, Cohabitation, and the Wages of Sin: A Statutory Analysis*, 33 ALA. L. REV. 577, 581-88 (1982) (comparison of anti-cohabitation statutes); Note, *Domestic Relations: Oklahoma's Live-In Lover Statute: § 1289(D) of Title 12*, 36 OKLA. L. REV. 906 (1983) (analysis of Oklahoma's "live-in lover" statute and anticohabitation case law).

alimony.[40] Either party may petition for a modification of alimony; the movant must demonstrate that a substantial change of circumstances has occurred,[41] justifying a reduction or increase in the amount of support previously ordered.[42] Generally, only future payments can be modified,[43] and arrearages frequently are regarded as final judgments,[44] although equitable defenses may bar collection of past due alimony.[45] Similarly, if no alimony was authorized at the time of divorce by a court with proper jurisdiction,[46] none can be ordered in the

40. A modification action is a continuation of the original divorce decree. H. CLARK, *supra* note 21, at 659. In most states, express statutory authority extends the court's jurisdiction to modify periodic alimony. *See, e.g.*, CAL. CIV. CODE §§ 4801, 4801.5 (West 1983 & Supp. 1990); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd Supp. 1990); MINN. STAT. ANN. § 518.64 (West 1990); *see also* Elliott v. Elliott, 14 Conn. App. 541, 543-44, 541 A.2d 905, 907 (1988) (Section 46b-86 of the Connecticut General Statutes allows modification of future alimony, but not arrearages, upon change of circumstances, unless decree provides otherwise.); UNIF. MARRIAGE AND DIVORCE ACT § 316(a), 9A U.L.A. 147, 489-90 (1987) ("provisions of any decree respecting maintenance or support may be modified only as to installments . . . upon a showing of changed circumstances"). States generally permit modification or termination of alimony without specific statutory authorization when the divorce court expressly retains jurisdiction. *See, e.g.*, Vomacka v. Vomacka (*In re* Marriage of Vomacka), 36 Cal. 3d 459, 470, 683 P.2d 248, 255, 204 Cal. Rptr. 568 (1984); Baker v. Baker, 53 Ill. App. 3d 186, 190, 368 N.E.2d 379, 382 (1977). *See generally* Note, *Domestic Relations: Modification of Future Alimony Payments Due to Changed Circumstances*, 20 WASHBURN L.J. 66 (1980). Lump sum alimony, in contrast, is not modifiable. *See* Hartsfield v. Hartsfield, 384 So. 2d 1097, 1098-99 (Ala. Civ. App. 1980), *cert. denied*, 384 So. 2d 1110 (Ala. 1980); Olson v. Olson, 114 Ill. App. 3d 28, 31, 448 N.E.2d 229, 233 (1983); Doerflinger v. Doerflinger, 646 S.W.2d 798, 801 (Mo. 1983) (en banc).

41. To avoid duplicative litigation, parties to a modification proceeding may only present evidence of events that occurred since the previous petition for modification. H. CLARK, *supra* note 21, at 659.

42. Courts are reluctant to modify an alimony award upward when the payor's ability to pay improves. *See id.* at 662-63 (alimony not intended to provide wife with "lifetime profit sharing plan"). Modification is sometimes effective from date of filing of the petition, rather than the date of the order. *See* Green v. Green, 21 Ill. App. 3d 396, 400-01, 315 N.E.2d 324, 328 (1974); McHann v. McHann, 383 So. 2d 823, 826 (Miss. 1980); UNIF. MARRIAGE AND DIVORCE ACT § 316(b), 9A U.L.A. 147, 490 comment (1987).

43. *See* CAL. CIV. CODE §§ 4801, 4801.5(c) (West 1983 & Supp. 1990); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd Supp. 1990); *see also* UNIF. MARRIAGE AND DIVORCE ACT § 316(b), 9A U.L.A. 147, 490 (1987); Elliott v. Elliott, 14 Conn. App. 541, 545, 541 A.2d 905, 907 (1987) (to allow retroactive modification would encourage delay, as well as create hardship for a spouse who had relied on the payments; applies to alimony pendente lite as well as permanent alimony). *But see* Adair v. Martin, 595 S.W.2d 513, 515 (Tex. 1980) (unpaid child support not a debt until reduced to judgment). A few states expressly authorize retroactive modification. *See* MINN. STAT. ANN. § 518.64 (West 1989); N.Y. DOM. REL. LAW §§ 236, 244 (McKinney 1986 & Supp. 1990); *see also* Bledsoe v. Bledsoe, 344 N.W.2d 892, 895 (Minn. Ct. App. 1984) (trial court did not abuse discretion by refusing to forgive arrearages). Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified at 42 U.S.C. § 666(a) (1988)), requires states, as a condition for federal funding, to prohibit retroactive modification of child support.

44. *See, e.g.*, Sanchione v. Sanchione, 173 Conn. 397, 405, 378 A.2d 522, 526 (1977); Bean v. Bean, 86 R.I. 334, 340, 134 A.2d 146, 149 (1957).

45. *See, e.g.*, Ross v. Ross, 592 P.2d 600, 602-03 (Utah 1979) (estoppel may bar collection of alimony arrearages); Bagshaw v. Bagshaw, 788 P.2d 1057, 1059 (Utah Ct. App. 1990) (same); Annotation, *Laches or Acquiescence as Defense, So As to Bar Recovery of Arrearages of Permanent Alimony or Child Support*, 5 A.L.R.4th 1015 (1981) (citing cases).

46. A court with personal jurisdiction over either of the parties may grant a divorce. *See* Williams v. North Carolina, 325 U.S. 226, 228 (1945); Williams v. North Carolina, 317 U.S. 287, 296 (1942). A court must have jurisdiction over the defendant, however, to adjudicate financial matters, including alimony. Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957); Estin v. Estin, 334 U.S. 541, 547 (1948). *See generally* Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 504 (1980) (discussing jurisdictional problems involved when couples move to another state after marriage).

future because alimony presupposes an existing duty of support. Hence, no modification can occur when nothing exists to be modified.[47]

The significance of traditional alimony has declined in recent decades, having been replaced to a large extent by new forms of support awards.[48] As a result, the distinction between alimony and property division has become increasingly difficult to draw.

B. Blurring the Lines Between Support and Property Division

The divorce reforms that began in the 1970s,[49] which included the demise of fault-based divorce,[50] rapidly signaled the decline of traditional alimony.[51] Even the term "alimony" itself has been replaced in many jurisdictions by the label "maintenance" or "spousal support" to remove the connotation of fault.[52] Although the concept of fault continues to play a role in some states,[53] many states now focus exclusively on need and ability.[54]

Contemporary divorce law not only terminates a couple's marital status, but encourages conclusion of their economic interrelationship as well.[55] In-

47. *See, e.g.*, Stolp v. Stolp, 383 N.W.2d 409, 411 (Minn. Ct. App. 1986); Benavidez v. Benavidez, 99 N.M. 535, 538, 660 P.2d 1017, 1020 (1983). Child support, however, generally is regarded as always modifiable prospectively, even if none was ordered previously. *See, e.g.*, Cannon v. Morris, 407 So. 2d 372, 373 (Fla. Dist. Ct. App. 1981); Bucholt v. Bucholt, 152 Vt. 238, 242, 566 A.2d 409, 411 (1989). Child support arrearages usually are not modifiable, although some states will modify under specific circumstances, and equitable defenses to collection may be raised. *See* Hoffman v. Foley, 541 So. 2d 145, 146 (Fla. Dist. Ct. App. 1989) (laches or estoppel may preclude recovery of accrued child support payments); Annotation, *Laches or Acquiescence as Defense, So As to Bar Recovery of Arrearages of Permanent Alimony or Child Support*, 5 A.L.R.4th 1015 (1981); *see also* The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (amending the Social Security Act, Title IV-D, 42 U.S.C. § 651-665 (1982)) (§ 666(a) discusses support obligations, including child support and alimony as well as the appropriation of funds for the enforcement of support obligations).

48. *See infra* notes 55-70 and accompanying text.

49. *See generally* J. BERNARD, THE FUTURE OF MARRIAGE 85-176 (1972) (noting the liberalization of the grounds upon which divorce may be based); M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); Foster, *Divorce Reform and the Uniform Act*, 18 S.D.L. REV. 572 (1973); Levy, *Introduction to a Symposium on the Uniform Marriage and Divorce Act*, 18 S.D.L. REV. 531 (1973); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974).

50. South Dakota was the final state to adopt a no-fault ground for divorce in 1985. S.D. CODIFIED LAWS ANN. § 25-4-2 (1984). For a survey of current divorce grounds, see Freed & Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 515-16 (1990).

51. *See* Freed & Walker, *supra* note 50, at 544, 546-47. *See generally* McGraw, Sterin & Davis, *supra* note 20, at 443 (examining the broad implications of the 1974 Ohio Divorce Reform Act); Weitzman, *supra* note 20, at 1184 (study of the economic basis of the no-fault divorce); Weitzman & Dixon, *supra* note 32, at 159 (discussing the effects of the abolition of fault as a basis for alimony awards).

52. *See, e.g.*, ILL. ANN. STAT. ch. 40, para. 504 (Smith-Hurd Supp. 1990); MINN. STAT. ANN. § 518.55 (West 1990); MO. ANN. STAT. § 452.335 (Vernon Supp. 1990); UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 490 (1987).

53. *See, e.g.*, MO. ANN. STAT. § 452.335 (Vernon Supp. 1990); *see also* Freed & Walker, *supra* note 50, at 546-47 (survey of criteria for awarding alimony).

54. *See, e.g.*, CAL. CIV. CODE § 4801 (West 1983 & Supp. 1990); MINN. STAT. ANN. § 518.55 (West 1990); UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 347 (1987); *see also* Freed & Walker, *supra* note 50, at 546-47 (survey of criteria for awarding alimony).

55. The Uniform Marriage and Divorce Act attempts to promote finality whenever practical by encouraging property division and temporary support rather than permanent alimony. *See* UNIF. MARRIAGE AND DIVORCE ACT prefatory note, 9A U.L.A. 147, 149 (1987).

creasingly, since the widespread adoption of equitable distribution of property schemes,[56] property division is employed as a substitute for alimony and provides a dependent spouse a means of self-support.[57] Although the theory of property division is based on an allocation of assets acquired during marriage,[58] equitable division principles frequently take into account factors traditionally considered in awarding alimony.[59] Moreover, if division of marital assets in kind is impractical, courts may direct a spouse who receives a greater amount of property to repay the other in cash, often by means of a series of periodic payments.[60] Although such payments resemble alimony, they represent ownership interests rather than support and are ordered as a definite, liquidated sum, and, thus, are nonmodifiable.[61]

Often, both spouses are liable to third party creditors for debts incurred during the marriage. Customarily, responsibility for payment of specific debts will be allocated to one of the divorcing parties. While the assumption of responsibility by one spouse does not relieve the other of liability to the third party

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56. All common law property jurisdictions currently allocate property on divorce by equitable distribution, rather than title. *See* Freed & Walker, *supra* note 50, at 523-24 (survey of property division schemes). All of the community property states, except California, New Mexico, and Louisiana, also authorize equitable, rather than strictly equal, division of property on divorce. *Id.*

57. *See* H. CLARK, *supra* note 21, at 589. Property division generally precedes determination of eligibility for alimony and need is evaluated in light of property distributed. *See, e.g.*, MINN. STAT. ANN. § 518.55 (West 1990); TENN. CODE ANN. § 36-5-101(d)(7) (1984 & Supp. 1990); UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 347-48 (1987).

58. Although some states require or presume an equal division of marital assets, the majority of states apportion assets in an equitable procedure. *See* Freed & Walker, *supra* note 50, at 523-24 (breakdown of property division systems). Professor Clark has noted that the distinction between community property states and common-law marital property states has blurred to a significant extent. H. CLARK, *supra* note 21, at 591. Even in community property states which require equal division of community assets, the courts have noted that property division frequently reflects support as well. *See* Roberts v. Roberts, 261 Cal. App. 2d 424, 427-28, 68 Cal. Rptr. 59, 61-62 (1968).

59. Section 307 (Alternative A, intended for common-law property jurisdictions) of the Uniform Marriage and Divorce Act directs the court to apportion a divorcing couple's assets equitably by considering

> the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 147, 238 (1987); *see also* DEL. CODE ANN. tit. 13, § 1513 (1988); MO. ANN. STAT. § 452.330 (Vernon Supp. 1990); TENN. CODE ANN. § 36-4-121 (1984 & Supp. 1990).

60. *See, e.g.*, Fink v. Fink, 25 Cal. 3d 877, 879, 603 P.2d 881, 883, 160 Cal. Rptr. 516, 518 (1979) (in-kind division not required; result of division must be equal); Hellwig v. Hellwig, 100 Ill. App. 3d 452, 463-64, 426 N.E.2d 1087, 1092 (1981) (where property not susceptible to division in kind or such division would be inequitable, court may award property to one spouse, subject to repayment to nonacquiring spouse); Ashraf v. Ashraf, 134 Wis. 2d 336, 342-43, 397 N.W.2d 128, 131 (1986) (all major assets awarded to husband and husband required to pay wife value of half of marital assets).

61. *See, e.g.* Wilhelm v. Wilhelm, 397 N.E.2d 1079, 1082 (Ind. Ct. App. 1979); Drummond v. Drummond, 209 Kan. 86, 91, 495 P.2d 994, 997-98 (1972); Mamalis v. Bornovas, 112 N.H. 423, 429, 297 A.2d 660, 663 (1972).

creditor,[62] courts generally order the assuming spouse to hold harmless and indemnify the other spouse.[63] The assumption results in the creation of a new marital debt, owed by one spouse to the other. Typically, these assumptions of debt are regarded as part of the property division under state law and, thus, are not modifiable.[64]

If property division results in significant economic disparity, due to disproportionate needs, education, or earning capacity, spousal support also may be awarded to the disadvantaged spouse.[65] Most states prefer short term, "rehabilitative" or "transitional" alimony over permanent periodic alimony whenever feasible, in theory, to encourage the formerly dependent spouse to become self-supporting.[66] Some controversy exists regarding the modifiability of rehabilitative alimony, although the developing trend is to permit modification in extreme circumstances.[67]

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62. *See* Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1106 n.4 (6th Cir. 1983); Hopkins v. Hopkins, 109 N.M. 233, 238, 784 P.2d 420, 425 (1989).

63. Some courts have held that an assumption implies an agreement to indemnify and hold harmless. *See, e.g.*, Lewis v. Lewis (*In re* Lewis), 39 Bankr. 842, 846 (Bankr. W.D.N.Y. 1984); Jensen v. Jensen (*In re* Jensen), 17 Bankr. 537, 539-40 (Bankr. W.D. Mo. 1982). *But see* Lineberry v. Lineberry (*In re* Lineberry), 9 Bankr. 700, 708 (Bankr. W.D. Mo. 1981) (holding assumption to be in the nature of a property settlement and thus dischargeable).

64. *See* Cadwell v. Cadwell, 126 Ariz. 460, 461-62, 616 P.2d 920, 921-22 (1980); Schweizer v. Schweizer, 301 Md. 626, 636, 484 A.2d 267, 272-73 (1984); Freed v. Freed, 454 N.W.2d 516, 521 (N.D. 1990); H. CLARK, *supra* note 21, at 606; Annotation, *Spouse's Liability, After Divorce, for Community Debt Contracted by Other Spouse During Marriage*, 20 A.L.R.4th 211 (1983).

65. The Uniform Marriage and Divorce Act requires that property division precede the determination of eligibility for support. UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 348 comment (1987); *see also* MINN. STAT. ANN. § 518.55 (West 1990) (issue of whether one party in a divorce is entitled to support may be reserved for determination at a later date even if property division already has been determined).

66. *See* Tishkevich v. Tishkevich, 131 N.H. 404, 407, 553 A.2d 1324, 1326 (1989); Lovato v. Lovato, 98 N.M. 11, 13, 644 P.2d 525, 527 (1982); W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 320 (1983). Rehabilitative, rather than permanent, alimony is more likely to be awarded when the marriage is of short duration, and the recipient spouse is in good health and has a marketable skill, despite having been out of the job market for some time. *See* Akers v. Akers, 518 So. 2d 292, 293 (Fla. Dist. Ct. App. 1987); Martin v. Martin, 358 N.W.2d 793, 797 (S.D. 1984). Preference for rehabilitative alimony does not limit courts from awarding traditional alimony when the dependent spouse is unlikely to be able to become self-supporting, however. *See* Walter v. Walter, 464 So. 2d 538, 539 (Fla. 1985); Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 579 (1988) (arguing that time limits are not justifiable as mechanisms merely to allow spouse to adjust to lower standard of living). *See generally* Marshall, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 REV. L. & SOC. CHANGE 667, 673-79 (1985) (discussing development and significance of rehabilitative alimony); Comment, *Rehabilitative Alimony—A Matter of Discretion or Direction?*, 12 FLA. ST. U.L. REV. 285, 289-303 (1984) (discussing factors for award and review of rehabilitative alimony).

67. *See* Larson v. Larson, 661 P.2d 626, 628 (Alaska 1983) (modifications permitted when original prediction proved erroneous); Mann v. Mann, 523 So. 2d 804, 805 (Fla. Dist. Ct. App. 1988); *In re* Marriage of Garelick, 168 Ill. App. 3d 321, 326, 522 N.E.2d 738, 742 (1988); Gunderson v. Gunderson (*In re* Gunderson), 408 N.W.2d 852, 853 (Minn. 1987); Naylor v. Naylor, 700 P.2d 707, 709-10 (Utah 1985); *In re* Marriage of Williams, 115 Wash. 2d 202, 206, 796 P.2d 421, 425 (1990) (contractual alimony for specific term or until spouse completes education terminates upon remarriage unless express provision to contrary); Cross v. Cross, 363 S.E.2d 449, 451 (W. Va. 1987); Molnar v. Molnar, 314 S.E.2d 73, 78 (W. Va. 1984); *see also* Krauskopf, *supra* note 66, at 579; Annotation, *Power to Modify Spousal Support Award for a Limited Term, Issued in Conjunction with Divorce, so as to Extend the Term or Make the Award Permanent*, 62 A.L.R.4th 180, 201-35 (1988) (generally discussing factors relevant to modification). *But see* Ressler v. Ressler, 17 Ohio St. 3d 17, 18, 476 N.E.2d 1032, 1033 (1985) ("sustenance" alimony, conditionally terminable by death, cohabitation, or remarriage, ordered for specific term of years not modifiable).

Recently, many jurisdictions have fashioned innovative, hybrid awards, sometimes designated "reimbursement" or "restitutional" alimony, to compensate a spouse for contributions to the other's education or career enhancement.[68] These novel grants, usually awarded as a sum certain payable in installments, have attributes of both support and property division, but do not fit neatly into either category.[69] Unlike traditional periodic alimony, restitutional forms of alimony generally are not modifiable, but are treated like installment payments of lump-sum alimony, which, like property divisions, are regarded as final.[70]

The various marital debts created by a divorce decree are integrally related. All function, to some extent, to provide support for the recipient: to the extent that the recipient receives other funds or assets from a former spouse, or is relieved from responsibility for making payments on debts, she has greater resources available to her for purposes of support. A prominent scholar has stated that it is "fiction that there is some perceptible difference between awards of alimony and property. There is no such difference."[71] Unfortunately, some critical practical consequences continue to hinge on the distinction. Determining whether or not a marital debt is modifiable is, at the state court level, virtually the only occasion for inquiry into the nature of a marital debt as property or support.[72] Furthermore, several developments have occurred that have made even this limited inquiry more difficult to undertake at the state level.

First, a divorce decree or separation agreement frequently does not designate precisely whether a specific marital debt represents a division of property,

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68. *See, e.g., In re* Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989); Bold v. Bold, 524 Pa. 487, 574 A.2d 552, 556 (1990); Lehmicke v. Lehmicke, 339 Pa. Super. 559, 566, 489 A.2d 782, 784-86 (1985); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 260-61 (S.D. 1984); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 10-12, 318 N.W.2d 918, 922-23 (1982); *see also* Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 767-69 (1988) (discussing reimbursement alimony approach); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 416 (1980) (concluding that concepts of human capital and family dynamics cause spouse to invest in education of other spouse and provide a legal basis for compensation).

69. *See* Mahoney v. Mahoney, 91 N.J. 488, 499-501, 453 A.2d 527 (1982); Lynn v. Lynn, 153 N.J. Super. 377, 382, 379 A.2d 1046, 1048 (1977), *rev'd on other grounds*, 165 N.J. Super. 328, 398 A.2d 141 (1979).

70. *See* Smith v. Smith, 224 N.J. Super. 559, 562, 540 A.2d 1348, 1349 (1988) (reimbursement alimony intended as compensation rather than support); Zullo v. Zullo, 395 Pa. Super. 113, 118, 576 A.2d 1070, 1075 (1990) (reimbursement alimony not subject to termination on remarriage).

71. H. CLARK, *supra* note 21, at 658; *see also* Roberts v. Roberts, 261 Cal. App. 2d 424, 427, 68 Cal. Rptr. 59, 61 (1968) (recognizing three types of property settlements).

72. Traditionally alimony and child support were enforceable by the contempt powers of the court, *see, e.g.*, MICH. COMP. LAWS ANN. § 552.631 (West Supp. 1987); N.M. STAT. ANN. § 40-4-19 (1978 & Supp. 1989); WIS. STAT. ANN. § 767.305 (West 1981), and property division was not, *see* Luna v. Luna, 125 Ariz. 120, 126, 608 P.2d 57, 63 (Ariz. Ct. App. 1980). Today, in recognition of the interrelationship of support and property division, many courts also authorize enforcement of property division through contempt or by specific performance. *See In re* Marriage of Ramos, 126 Ill. App. 3d 391, 396, 466 N.E.2d 1016, 1020 (1984), *cert. denied*, 471 U.S. 1017 (1985); Smoot v. Smoot, 329 N.W.2d 829, 832 (Minn. 1983); *see also* Feder, *The Contempt Dilemma: Support vs. Property and Third Party Debts (Part 2)*, FLA. B.J., Jan. 1985, at 67-69 (describing basis for using contempt power); Krause, *supra* note 21, at 371-77 (discussing federal law reforms in child support enforcement legislation); Note, *Domestic Relations—Enforcement of Contractual Separation Agreements by Specific Performance*—Moore v. Moore, 16 WAKE FOREST L. REV. 117, 120 (1980) (observing that North Carolina courts will enforce support obligations through contempt proceedings).

spousal support, or some combination of the two.[73] The blending of terminology mirrors the interrelationship between support and property division; consequently, form, rather than substance, plays a significant role in categorizing a marital debt to determine its modifiability. Thus, if an award is structured to resemble a property division and is designated as a fixed amount, not subject to contingencies, it typically resists modification even if it was intended to function as support.[74]

Second, state courts increasingly allow couples to contract with respect to the modifiability or finality of specific terms, or to designate the circumstances controlling future modification.[75] Some courts have held that contractually determined spousal support or alimony that has been approved by a court and incorporated into a decree may be nonmodifiable, at least when the court has not expressly reserved continuing jurisdiction,[76] even if the court would not have had authority to order the payments absent the parties' contract.[77] Therefore, under state family law principles, debts that clearly were intended to provide for spousal support may not be modifiable by a state court despite a drastic change in the parties' circumstances. Permitting divorcing couples to determine contractually their post-marital financial relationship reflects a state family law policy of encouraging amicable dissolution and fostering certainty.[78]

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73. *See* Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819, 826-27 (1981) [hereinafter Sharp, *Divorce and the Third Party*].

74. *See* Annotation, *Divorce: Power of Courts to Modify Decree for Alimony or Support of Spouse Which Was Based on Agreement of Parties*, 61 A.L.R.3d 520, 589-90 (1975).

75. *See* S. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS § 4.08, at 225-26 (1984); A. LINDEY & L. PARLEY, LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS §§ 28.01-.05 (1989); Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C.L. REV. 319, 319-20 (1991) [hereinafter Sharp, *Semantics*] (noting that "private ordering" of divorce consequences has been approved almost unanimously by commentators, courts, practitioners, and the parties); Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1401 (1984) [hereinafter Sharp, *Fairness Standards*]; Sharp, *Divorce and the Third Party*, *supra* note 73, at 848; Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 207, 228-34 (1982) (suggesting that marital contracts contribute to new model of marriage).

76. *See* Kaiser v. Kaiser, 290 Minn. 173, 180, 186 N.W.2d 678, 683 (1971); Ressler v. Ressler, 17 Ohio St. 3d 17, 18, 476 N.E.2d 1032, 1033 (1985) (unless jurisdiction is reversed, a debt fixed for a number of years, even if it terminates on death or remarriage, cannot be modified). *But see* Bramson v. Bramson (*In re* Marriage of Bramson), 83 Ill. App. 3d 657, 661, 404 N.E.2d 469, 471 (1980) (statutory terminating events are mandatory, despite spouses' contractual agreement to the contrary); Gunderson v. Gunderson (*In re* Gunderson), 408 N.W.2d 852, 853 (Minn. 1987); Spingola v. Spingola, 91 N.M. 737, 741, 580 P.2d 958, 962 (1978) (alimony provisions may be modified despite contrary contractual terms); *In re* Williams, 115 Wash. 2d 202, 206, 796 P.2d 421, 425 (1990) (decree, based on agreement, must contain specific language to contrary to overcome automatic statutory termination on remarriage). A contract between spouses does not bind a court in child support matters, however. *See Kaiser*, 290 Minn. at 178, 186 N.W.2d at 683; Hudson v. Hudson, 299 N.C. 465, 470, 263 S.E.2d 719, 722 (1980); Williams v. Patton, 16 Fam. L. Rep. (BNA) 1541, 1541 (Tex. Ct. App. 1990) (settlement and release agreement forgiving child support arrearages held void); UNIF. MARRIAGE AND DIVORCE ACT § 306(f), 9A U.L.A. 147, 217 (1987).

77. *See* Aldredge v. Aldredge, 477 So. 2d 73, 74 (La. 1985) (agreement for modification of child support without evidence of changed circumstances enforceable); Beard v. Worrell, 158 W. Va. 248, 264, 212 S.E.2d 598, 607 (1974) (contractual alimony upheld, although court could not have ordered alimony in light of wife's fault); *see also* H. CLARK, *supra* note 21, at 766-68.

78. *See* UNIF. MARRIAGE AND DIVORCE ACT prefatory note, 9A U.L.A. 147, 149 (1987) (act attempts to "reduce the adversary trappings of marital litigation" and encourage parties "to make amicable settlements of their financial affairs"); *see also id.* § 308 (describing property division as

Thus, the relevance of characterizing a debt as either support or property division has declined considerably at the state law level. The distinction remains critical at the federal level,[79] however, as dischargeability in bankruptcy depends upon the federal court's characterization of a marital debt as either property division or support. Because classification of a marital debt for federal bankruptcy purposes remains unpredictable, the possibility of later bankruptcy significantly reduces the potential for certainty at divorce. State law policy of encouraging certainty and finality through contractual freedom thereby is undermined by bankruptcy law. Much of the difficulty lies with bankruptcy law's approach to the modification of support awards.

III. BANKRUPTCY LAW AND MODIFICATION OF SUPPORT

A. The Definition of Support for Bankruptcy Purposes

Bankruptcy law is grounded on the policy of affording debtors fresh economic starts by permitting discharge of existing debts.[80] Countervailing policies demand that debtors remain responsible for certain types of financial obligations beyond discharge in bankruptcy.[81] Primary among those nondischargeable debts are obligations owed by the debtor to a former spouse or children that are "in the nature" of support.[82] The policy of the exception reflects Congress's

primary method of providing future spousal support); Sharp, *Semantics*, *supra* note 75, at 319-20 (private agreements reduce psychological and economic costs of divorce, foster post-divorce cooperation, decrease the impact of the divorce on children of the marriage, and promote judicial economy).

79. Prior to the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 793 (1984), § 71 of the Internal Revenue Code distinguished between alimony and property division payments for deductibility purposes. The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, further revised the provisions relating to post-marital payments. Now either type of payment may be deductible to the payor and taxable as income to the recipient if structured according to the appropriate formula. *See* 26 U.S.C. § 71 (1988). *See generally* H. WREN, L. GABINET, & D. CARRAD, TAX ASPECTS OF MARITAL DISSOLUTION (1987); O'Connell, *The Domestic Relations Tax Reform Act: How We Got It and What We Can Do About It*, 18 FAM. L.Q. 473, 474-97 (1985) (describing legislative history); *see also* East v. Commissioner of Internal Revenue, 16 Fam. L. Rep. (BNA) 1100, 1101 (U.S. Tax Ct. Memo 1989-658) (nature of payments for federal income tax purposes must be characterized under federal law rather than state law).

80. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915); Wetmore v. Markoe, 196 U.S. 68, 77 (1904); *see also* Fibich & Floyd, *supra* note 8, at 640-43 (consequences of filing bankruptcy petition); Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) (psychological and economic analysis of bankruptcy discharge policy).

81. Section 523(a) of the Bankruptcy Code enumerates the types of debts that are not dischargeable by an individual debtor, including certain debts related to taxes or custom duties, debts incurred by fraud or misrepresentation, breach of fiduciary duty, fine or forfeitures, educational loans, and debts that were not discharged in a previous bankruptcy action. 11 U.S.C. § 523(a) (1988). The provisions apply whether the bankruptcy action is pursued under a Chapter 7 liquidation, 11 U.S.C. § 727(a) (1988), a Chapter 13 wage earner plan, 11 U.S.C. § 1328(a)(2) (1988), or a Chapter 11 reorganization, 11 U.S.C. 1141(d)(2) (1988). *See generally* Ravin & Rosen, *supra* note 8, at 3-5 (describing general procedure in dischargeability issues); White, *Spousal and Child Support*, *supra* note 8, at 401 (discussing inclusion of past-due spousal and child support in Chapter 13 plans).

82. 11 U.S.C. § 523(a)(5) (1988) (quoted, in pertinent part, *supra* at note 9). Underlying the exception are the notions that debtors, rather than the public, should support their dependents, Voss v. Voss (*In re* Voss), 20 Bankr. 598, 601 (Bankr. N.D. Iowa 1982), and that Congress intended that dependents not be left destitute by debtors' discharge in bankruptcy, Hund v. Miller (*In re* Miller), 17 Bankr. 773, 775 (Bankr. N.D. Ohio 1982).

recognition of the importance of the support obligation both to the recipient and to society.[83]

Although to be embraced within the exception a debt may not have been assigned to another, except for certain governmental entities,[84] the obligation need not be payable directly to the dependent spouse. Even though a marital debt is owed to a third party, if its payment benefits the dependent, the obligation still may be regarded as in the nature of support and thus avoid discharge.[85] The Bankruptcy Code's express exception for support debts, however, does not extend to debts incurred strictly as part of a division of property,[86] despite the reality that virtually all marital debts function, to some extent, as support to the recipient.[87]

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83. In Williams v. Holt (*In re* Holt), 40 Bankr. 1009, 1011 (Bankr. S.D. Ga. 1984), the court declared:

> Bankruptcy legislation is rehabilitative in nature and must be construed strictly in favor of its salutary purpose, debtor relief. Nevertheless, such law cannot be applied so as to render an equally well-intended body of state law to be nugatory. That alimony and child support obligations be recognized as unavoidable liabilities, is a principle just as valuable to society, if not more so.

See also Balthazor v. Winnebago County (*In re* Balthazor), 36 Bankr. 656, 658 (Bankr. E.D. Wis. 1984) (payments arising from paternity suit, although not literally excepted from discharge, are nondischargeable in light of history and policy of exception). For a historical overview of the support exception, see Scheible, *supra* note 7, at 19-28; Schiffer, *supra* note 1, at 4-26; Swann, *supra* note 8, at 237-43; Comment, *Bankruptcy Reform Act*, *supra* note 8, at 521-26.

84. Section 523(a)(5)(A) of title 11 originally excepted specified support-related debts from discharge, "but not to the extent that-(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise." 11 U.S.C. § 523(a)(5)(A) (1988). A 1981 amendment, Pub. L. No. 97-35, qualified the subsection to add "other than debts assigned pursuant to section 402(a)(26) of the Social Security Act." A further amendment in 1984, Pub. L. No. 98-353, added "or any such debt which has been assigned to the Federal government or to a State or any political subdivision of such State." 11 U.S.C. § 523(a)(5)(A) (1988).

85. The majority of courts have held that payments made to third parties for the benefit of a former spouse or children, such as medical, educational, and insurance payments, or payment of certain living costs, such as rent, mortgage, and utility bills, may qualify for exemption from discharge. *See, e.g.*, Williams v. Holt (*In re* Holt), 40 Bankr. 1009, 1012 (S.D. Ga. 1984); Newkirk v. Thomas (*In re* Thomas), 21 Bankr. 571, 572-74 (Bankr. E.D. Pa. 1982); Tope v. Tope (*In re* Tope), 7 Bankr. 422, 425-26 (Bankr. S.D. Ohio 1980). Most courts find attorney fees awarded to a spouse in divorce-related actions are nondischargeable. *See, e.g.*, Silansky v. Brodsky (*In re* Silansky), 897 F.2d 743, 744 (4th Cir. 1990); Porter v. Gwinn (*In re* Gwinn), 20 Bankr. 233, 234 (Bankr. 9th Cir. 1982); Marks v. Catlow (*In re* Catlow), 663 F.2d 960, 963 (9th Cir. 1981); Pauley v. Spong (*In re* Spong), 661 F.2d 6, 11 (2d Cir. 1981). Most frequently, the issue arises in the context of one spouse's assumption of a debt owed to a third party incurred during the marriage, in conjunction with a provision indemnifying or holding harmless the nonassuming spouse. Two debts actually exist for bankruptcy purposes: the debtor's liability to the third party, which generally will be dischargeable, and the subsidiary obligation to the former spouse, which will not be dischargeable if it is determined to have been intended to be in the nature of support. *See* Hopkins v. Hopkins, 487 A.2d 500, 504-05 (R.I. 1985). In this context, the ensuing interspousal obligation is analyzed in the same manner as direct debts to a spouse. *See, e.g.*, Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1107 (6th Cir. 1983); Williams v. Williams (*In re* Williams), 703 F.2d 1055, 1057 (8th Cir. 1983); Stevens v. French (*In re* French), 19 Bankr. 255, 256 (Bankr. M.D. Fla. 1982); *see also* Scheible, *supra* note 7, at 41-46 (obligation to pay dependents' future expenses, assumption of joint marital debt, and obligation to pay divorce debt to third party analyzed similarly for dischargeability); Comment, *Bankruptcy Reform Act*, *supra* note 8, at 534-38 (analysis of bankruptcy treatment of marital debts owed to third parties).

86. *See* Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984); Maitlen v. Maitlen (*In re* Maitlen), 658 F.2d 466, 468 (7th Cir. 1981).

87. *See Calhoun*, 715 F.2d at 1108; Warner v. Warner (*In re* Warner), 5 Bankr. 434, 443 (Bankr. D. Utah 1980).

Like the state courts, the bankruptcy courts have acknowledged the interrelationship between support and property division.[88] However, the label attached to the debt will not govern its classification for dischargeability purposes, for federal law, not state law, controls the classification of a marital debt for bankruptcy purposes.[89] Since the enactment of the current Bankruptcy Code in 1978,[90] the courts have struggled to develop a federal standard for defining support, seeking guidance from general state law principles of support.[91]

The bankruptcy courts now concur that they should apply some version of an "intent" test to determine the nature of a marital debt.[92] Although the precise formulation of the intent test is not yet uniform, essentially that analysis requires the bankruptcy court to discern whether the debt was intended by the divorce court or the parties themselves to constitute support.[93] Because original intent frequently is ambiguous and disputed,[94] the bankruptcy courts tend to

88. *See, e.g., Calhoun,* 715 F.2d at 1107-08; *Williams,* 703 F.2d at 1057-58; *In re* Coil, 680 F.2d 1170, 1172 (7th Cir. 1982); *see also* Benich v. Benich (*In re* Benich), 811 F.2d 943, 945 (5th Cir. 1987) (debt may be in nature of support even when alimony not allowed under state law). *See generally* Staggs, *supra* note 8, at 176-80 (acknowledging that even though Texas courts do not award alimony, the federal courts are not bound by this label in determining dischargeability).

89. The legislative history of the current Bankruptcy Code expressly states that bankruptcy law, not state law, will determine the nature of a marital debt. H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320; *see also* Goin v. Rives (*In re* Goin), 808 F.2d 1391, 1392 (10th Cir. 1987) (federal law, not state law, determines whether an obligation arising out of a divorce settlement is support); Pauley v. Spong (*In re* Spong), 661 F.2d 6, 7-8 (2d Cir. 1981) (Though bankruptcy law determines what constitutes support, the federal courts are not to exclude state law principles in formulating the bankruptcy law of alimony and child support.).

90. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

91. Courts frequently have noted that there is no federal law of domestic relations. *See* DeSylva v. Ballantine, 351 U.S. 570, 580 (1956). Therefore, bankruptcy law has had to turn to general state family law principles for guidance. *See Calhoun,* 715 F.2d at 1107-08; *Spong,* 661 F.2d at 9; Freeburger & Bowles, *supra* note 8, at 604-09; Ravin & Rosen, *supra* note 8, at 7-9, 12-15; Scheible, *supra* note 7, at 46-50; Comment, *Bankruptcy Reform Act, supra* note 8, at 526-28. One court has noted, "What has emerged is an amalgam of federal bankruptcy law and state domestic relations principles." Buccino v. Buccino, __ Pa. Super. __, 580 A.2d 13, 17 (1990).

92. *See, e.g.,* Yeates v. Yeates (*In re* Yeates), 807 F.2d 874, 878 (10th Cir. 1986); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984); Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1109 (6th Cir. 1983); *In re* Coil, 680 F.2d at 1171; *see also* Scheible, *supra* note 7, at 41-46 (nature of the debt, not identity of creditor, should control classification); Comment, *Bankruptcy Reform Act, supra* note 8, at 529-31 (discussion of tests applied by bankruptcy courts to determine nature of marital debts).

93. If the debt was ordered by the state divorce court in a litigated action, the intent of the court controls; if the obligation arose in a negotiated settlement agreement, the intent of the parties must be established. *Calhoun,* 715 F.2d at 1109; *see also* Long v. West (*In re* Long), 794 F.2d 928, 931 (4th Cir. 1986) (when a jury decides the issue of alimony and property division, bankruptcy courts must determine jury's intent in making the award); MacDonald v. MacDonald (*In re* MacDonald), 69 Bankr. 259, 268 (Bankr. D.N.J. 1986) ("The crucial inquiry is whether the assumption of that debt was intended to provide support"); Walter v. Walter (*In re* Walter), 50 Bankr. 523, 524 (Bankr. D. Del. 1985) (same); Bedingfield v. Bedingfield (*In re* Bedingfield), 42 Bankr. 641, 646 (S.D. Ga. 1983) (court must "ascertain whether the state court or the parties intended to create an obligation to provide support"); Brown, *supra* note 8, at 539-44 (analysis of intent test).

94. The bankruptcy court in Schroeder v. Schroeder (*In re* Schroeder), 25 Bankr. 190 (Bankr. N.D. Ill. 1982), noted that the dischargeability question arises "almost every time a bankruptcy and divorce befall a debtor within close proximity. Unfortunately, attorneys drafting divorce property settlements and judgments do not usually anticipate . . . a subsequent bankruptcy by one of the parties. As a result, questions such as [these] arise time and again in the bankruptcy courts." *Id.* at 191; *see also* Rankin v. Alloway (*In re* Alloway), 37 Bankr. 420, 425 (Bankr. E.D. Pa. 1984) ("very often the parties have no intent to differentiate between an alimony debt and a property settlement

place significant weight on the form of the award and its placement in the decree itself,[95] although the courts disagree on the extent to which the language of the decree itself will affect the determination of intent.[96]

In addition, to ascertain the underlying intent, the bankruptcy courts consider factors that state courts typically apply in ordering an award of support.[97] Accordingly, the courts commonly examine the family circumstances at the time of the decree to determine whether the obligation was reasonably necessary to maintain the spouse's needs and was reasonable in light of the debtor's ability to pay.[98] The court is more likely to find that a debt is dischargeable if its assumption by the debtor exceeds the amount necessary for the support of the dependents.[99] Pursuant to such an inquiry, the bankruptcy courts generally conclude that if the debt has the effect of providing support, the necessary intention is present and the obligation is not dischargeable in bankruptcy.[100] In other words, the bankruptcy courts' application of an "intent" test is equivalent to a "function" test.

The development of an intent test based on the function of a debt has done much to standardize the method for characterizing debts in bankruptcy. At the same time, however, the evolution of the function/intent test has created a fresh controversy involving the relevance of the parties' present economic circumstances at the time of bankruptcy.[101] At issue is whether a debt that functioned

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debt and will view both as merely financial obligations arising from the separation or divorce"); Graham v. Jenkins (*In re* Jenkins), 32 Bankr. 978, 981 (Bankr. S.D. Ohio 1983) (parties gave no thought to possibility of bankruptcy).

95. *See, e.g.*, Stout v. Prussel, 691 F.2d 859, 861 (9th Cir. 1982); Gebhardt v. Gebhardt (*In re* Gebhardt), 53 Bankr. 113, 115 (Bankr. W.D. Mo. 1985); *Alloway*, 37 Bankr. at 425.

96. Most courts hold that the language of the decree or agreement is not determinative. *See Calhoun*, 715 F.2d at 1111; Jenkins v. Jenkins (*In re* Jenkins), 94 Bankr. 355, 360 (Bankr. E.D. Pa. 1988); Myers v. Myers (*In re* Myers), 61 Bankr. 891, 894 (Bankr. N.D. Ga. 1986); Tsanos v. Bell (*In re* Bell), 47 Bankr. 284, 287 (Bankr. E.D.N.Y. 1985); 3 L. KING, COLLIER ON BANKRUPTCY § 523.15 (15th ed. 1989). *But see Yeates*, 807 F.2d at 878 (clear, unambiguous language generally controls); *Stout*, 691 F.2d at 861 (no gross abuse of discretion to look solely at property settlement as whole); Clark v. Clark (*In re* Clark), 113 Bankr. 797, 801 (S.D. Ga. 1990) (no further investigation necessary when intent clear from face of agreement; wife's waiver of alimony precludes nondischargeable classification of husband's agreement to make home mortgage payments); *Gebhardt*, 53 Bankr. at 115 (bankruptcy court may not look behind unambiguous decree).

97. State law principles in general, not the law of the state that granted the divorce, should guide the federal courts in determining dischargeability. *See* Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 904 (11th Cir. 1985); Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1108 (6th Cir. 1983); *see also* Pauley v. Spong (*In re* Spong), 661 F.2d 6, 9 (2d Cir. 1981) (federal courts are not precluded from referring to the "law of the States").

98. *See, e.g.*, *Calhoun*, 715 F.2d at 1109; Williams v. Williams (*In re* Williams), 703 F.2d 1055, 1057 (8th Cir. 1983); MacDonald v. MacDonald (*In re* MacDonald), 69 Bankr. 259, 278 (Bankr. D.N.J. 1986); Graham v. Jenkins (*In re* Jenkins), 32 Bankr. 978, 980-81 (Bankr. S.D. Ohio 1983).

99. *See Bell*, 47 Bankr. at 287; Altavilla v. Altavilla (*In re* Altavilla), 40 Bankr. 938, 941 (Bankr. D. Mass. 1984).

100. *See, e.g.*, *Calhoun*, 715 F.2d at 1109 (once intent is established, two other queries remain: does the assumption of debt have the effect of providing support necessary to insure that daily needs of dependents are met, and is the amount of support reasonable); *Williams*, 703 F.2d at 1057; *MacDonald*, 69 Bankr. at 278; *Myers*, 61 Bankr. at 894-95; Mandel v. Goodman (*In re* Goodman), 55 Bankr. 32, 35 (Bankr. D.S.C. 1985).

101. The question clearly is irrelevant when a court applies a strict "intent" test, for the determinative inquiry is to discern the intention of the parties or the court at the time the debt was created. *See, e.g.*, Tilley v. Jessee, 789 F.2d 1074, 1078 (4th Cir. 1986) (despite wife's clear demonstration of need, court found no mutual intent to treat payments as support). But when a version of a "func-

as support at the time of its origination must be classified as support regardless of its current function or whether the present function of an obligation ultimately determines its nature for bankruptcy purposes.

If the recipient no longer needs the payment of the debt as support, or if the obligor's ability to pay has declined significantly, disagreement continues as to whether a debt that originated as support is nondischargeable per se or whether a debt may be reevaluated in light of the parties' circumstances at the time of bankruptcy. To recharacterize a debt that originated as support as a dischargeable, non-support debt unavoidably has the effect of modifying a preexisting state court support award.[102] Hence, the core of the current controversy is whether the bankruptcy court is the appropriate forum for a modification action.

B. The Present Circumstances Test

1. The *Warner* Approach

Prior to the enactment of the present Bankruptcy Code in 1978, bankruptcy courts generally assumed that the only relevant time for evaluating a marital debt was the time at which the debt arose. As the function/intent test for determining the nature of a marital debt began developing, however, the bankruptcy court in the 1980 case of *Warner v. Warner (In re Warner)*[103] introduced the notion that the present nature of a debt is relevant in determining its character for dischargeability purposes.

The *Warner* court held that the competing policies, protecting dependents and safeguarding the debtor's fresh start, must be balanced when determining the nature of a debt under either section 17a(7) of the earlier act or section 523(a)(5) of the new Code.[104] Without reference to any specific language in the statute, its legislative history, or case law precedent, the *Warner* court decided to foster bankruptcy law's policy of relieving a debtor of his obligations by requiring a debtor's dependents to establish a present need for the disputed payments to avoid discharge.[105] The court reasoned that because "any debt, not just traditional alimony payments, can be found to be support and thus nondischargeable, the potentially unfair burden on the debtor, if only the original circumstances were considered, might effectively abrogate his fresh start in a situation where no

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tion" or "needs" test is used, a court must decide whether to consider the current effect of the payment on the former spouse's or children's ability to continue to meet their daily living expenses, or whether simply to conclude that if an obligation arose as support, it remains support and necessarily is nondischargeable. *See also* Ravin & Rosen, *supra* note 8, at 9-11 (courts are in conflict as to the effect on dischargeability of changed circumstances).

102. *See* Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1109 & n.10 (6th Cir. 1983); *infra* notes 153-165 and accompanying text. For discussion of modification of payments of support pursuant to Chapter 13 plans, see Tucker, *supra* note 8, at 1359-61; Note, *Bankruptcy Court Jurisdiction to Modify Alimony Payments of Chapter 13 Debtors*, 14 U. MICH. J.L. REF. 587 (1981).

103. 5 Bankr. 434, 442-43 (Bankr. D. Utah 1980).

104. *Warner* consolidated two cases, Warner v. Warner (*In re* Warner), Bankr. No. B-78-00046, and Long v. Long (*In re* Long), Bankr. No. 79-01597. *Warner* arose under the previous Bankruptcy Act, former 11 U.S.C. § 35a(7) (1976), while the Bankruptcy Code, 11 U.S.C. § 523(a)(5) (1988), applied to *Long*. The court resolved the issues under both statutory versions in the same manner. *Warner*, 5 Bankr. at 438, 442-43.

105. *Warner*, 5 Bankr. at 442-43.

countervailing necessity of support exists."[106] Thus, because the concept of support is inextricably associated with need,[107] a payment to a former spouse whose need has ended could no longer satisfy bankruptcy law criteria for nondischargeability under the *Warner* test.

Warner enjoyed a brief endorsement by the bankruptcy courts.[108] Most courts limited their application of the present circumstances test to determining the nature of an ambiguous debt;[109] some merely sought evidence of a continued need by the recipient in order to qualify the debt as support,[110] while other cases balanced the recipient's current need against the debtor's present ability to pay.[111] A few courts took a broader view of *Warner* and applied the present circumstances test to debts that clearly had originated as support;[112] several extended the analysis even to arrearages of support.[113]

In several subsequent cases, courts applied the *Warner* test restrictively, limiting application of a present circumstances test to identification of the dependents' current need.[114] Courts have ignored the fact that a debtor's financial situation has worsened, so long as the recipient's need for support continues.[115] One court noted that absent a significant improvement in the recipient's circumstances, a support debt would not be discharged because bankruptcy policy was not intended to drive the debtor's former wife into bankruptcy along with the debtor.[116] This narrow application of a present circumstances test was not inconsistent with *Warner*, because that opinion had focused primarily on the recipient former wife's continued need rather than on the debtor ex-husband's current ability to pay those obligations.

The *Warner* court, however, had in fact framed the issue considerably more broadly, asserting that a bankruptcy court "should consider evidence of the parties' *relative* financial circumstances"[117] since the divorce, and concluding that

106. *Id.* at 443. The court further supported its decision to consider present circumstances with the language of § 17a(7), which excepted from discharge debts that "are" for support, emphasizing the use of the present tense verb, but noted an absence of any specific tense in the language of § 523(a)(5). The court apparently overlooked or considered irrelevant the use of the present tense "is" in subsection (B). *See infra* text accompanying notes 207-08.

107. *See supra* note 34 and accompanying text.

108. *See infra* notes 114-130 and accompanying text.

109. *See* Stranathan v. Stowell (*In re* Stranathan), 15 Bankr. 223, 226 (Bankr. D. Neb. 1981).

110. *See, e.g.*, Lesher v. Lesher (*In re* Lesher), 20 Bankr. 543, 544 (Bankr. W.D. Pa. 1982); Singer v. Singer (*In re* Singer), 18 Bankr. 782, 787 (Bankr. S.D. Ohio 1982), *aff'd*, 787 F.2d 1033 (6th Cir. 1986); Miller v. Miller (*In re* Miller), 17 Bankr. 717, 720 (Bankr. W.D. Wis. 1982); Brace v. Moran (*In re* Brace), 13 Bankr. 551, 554 (Bankr. N.D. Ohio 1981).

111. *See* Schroeder v. Schroeder (*In re* Schroeder), 25 Bankr. 190, 192 (Bankr. N.D. Ill. 1982); Tillett v. Tillett (*In re* Tillett), 22 Bankr. 907, 910 (Bankr. W.D. Okla. 1982); Stranathan v. Stowell (*In re* Stranathan), 15 Bankr. 223, 228 (Bankr. D. Neb. 1981).

112. *See, e.g., Tillett*, 22 Bankr. at 910-11.

113. *See, e.g.*, Miller v. Miller (*In re* Miller), 17 Bankr. 717, 720 (Bankr. W.D. Wis. 1982); *In re* Lovett, 6 Bankr. 270, 272 (Bankr. D. Utah 1980).

114. *See, e.g., Lesher*, 20 Bankr. at 544; *Singer*, 18 Bankr. at 787; *Miller*, 17 Bankr. at 720; *Brace*, 13 Bankr. at 554.

115. *See Singer*, 18 Bankr. at 786-87; Hund v. Miller (*In re* Miller), 17 Bankr. 773, 775 (Bankr. N.D. Ohio 1982).

116. *Brace*, 13 Bankr. at 554.

117. Warner v. Warner (*In re* Warner), 5 Bankr. 434, 442 (Bankr. D. Utah 1980) (emphasis added).

relevant evidence of "*any* change in circumstances" of either spouse could be introduced.[118] Accordingly, some courts interpreted *Warner* to authorize examination of a debtor's changed circumstances as well as the recipient's, with results that favored the debtor over his dependents.[119]

When the debtor's present circumstances are taken into account the scales tip heavily in his favor because his bankruptcy action itself is persuasive evidence that his financial situation has deteriorated. For example, in *Stranathan v. Stowell (In re Stranathan)*,[120] the bankruptcy court focused primarily on the debtor's inability to pay the debts at the time of divorce[121] and held that the former wife's clear need for continued support must be balanced against the debtor's inability to pay.[122] Despite the probability that the wife would be forced into bankruptcy if the debtor's assumption of marital debts were discharged, the court reasoned that her "desire to avoid bankruptcy can only be satisfied by sacrificing [the debtor's] right . . . to a fresh start and by burdening him with debts which are far beyond the capacity of either . . . to pay."[123]

The *Stranathan* court limited its inquiry into present circumstances to situations in which the underlying nature of the debt was uncertain and rejected that inquiry when no question existed as to the original intent in the creation of the debt.[124] Other courts, however, had employed the test to analyze marital obligations that clearly had originated as support. One court went so far as to reduce a debtor's obligation to his former wife despite a state court's previous description of the debt as "support alimony," not "alimony in lieu of property division."[125] The court implicitly concluded that the debt no longer retained the characteristics of support because of the debtor's subsequent financial impairment, despite a lack of significant change in the wife's continued need.[126] Such an overt modification of a state court award, in essence, expressly reforms the original decree, clearly ranks the debtor's equities as superior to those of his

118. *Id.* at 443 (emphasis added).

119. *See* Schroeder v. Schroeder (*In re* Schroeder), 25 Bankr. 190, 192 (Bankr. N.D. Ill. 1982); Tillett v. Tillett (*In re* Tillett), 22 Bankr. 907, 910-911 (Bankr. W.D. Okla. 1982); Stranathan v. Stowell (*In re* Stranathan), 15 Bankr. 223, 228 (Bankr. D. Neb. 1981).

120. 15 Bankr. 223 (Bankr. D. Neb. 1981). *Stranathan* consolidated five cases to determine dischargeability under § 523(a)(5).

121. The court observed that the debts incurred by the debtor "greatly exceeded any reasonable prospects of [his] abilities to pay." *Id.* at 228.

122. The court noted that although § 523(a)(5) does not contain a "needs test," need is significant in determining the parties' original intent. *Id.* at 227.

123. *Id.* at 228.

124. The *Stranathan* court refused to consider present circumstances with respect to installment payments on lump sum alimony that had been awarded to compensate a wife for her contribution to the husband's professional degree and license. *Id.* at 227.

125. Tillett v. Tillett (*In re* Tillett), 22 Bankr. 907, 909 (Bankr. W.D. Okla. 1982).

126. The court viewed the weekly payment, which the debtor had been ordered unconditionally to pay his ex-wife for 520 weeks, as more in the nature of child support than alimony because the payment had been ordered to permit the wife to retain the present home for the couple's children, at least until they reached the age of majority. *Id.* Despite its interpretation of the debt as support, the court reduced the payment to half of the previously ordered amount and specified that the obligation should terminate upon the earlier of the children's attaining the age of majority or the wife's death or remarriage. *Id.* at 910-11. It is not evident from the opinion that the husband's circumstances actually had changed, but, rather, perhaps he had been too generous in his original agreement. *See id.* at 910.

dependents and usurps the authority of the state court.[127]

Moreover, not only did some courts apply *Warner* to unambiguous support obligations, but some subsequent cases applied the doctrine to past-due support arrearages as well. The same judge who decided *Warner* extended the present circumstances test to an action involving child support arrearages for which a judgment had been obtained after the debtor had filed his bankruptcy petition.[128] Another court applied the *Warner* approach to a case dealing directly with child support arrearages where the child in question had already reached the age of majority, concluding that "the present circumstance of the person to whom and the person on whose behalf the support was ordered paid" must be considered, and the arrearages would be nondischargeable only if a present need for that amount was found.[129] Such decisions clearly authorized retroactive modification of direct support obligations.[130]

More significantly, applying a present circumstances test to arrearages of debts that clearly originated as support can lead to the illogical and unjust result of permitting discharge of past-due support whenever external events, such as emancipation of a child or remarriage of a former spouse, occur.[131] Permitting retroactive modification of support by the bankruptcy court allows, and indeed encourages, a debtor to benefit by delaying his bankruptcy action until such events occur. The bankruptcy court could discharge the debtor of past support obligations regardless of the degree of necessity that existed at the time the payments were due and without regard to how his dependents managed to pay their living expenses when they arose.[132]

As unsatisfactory as *Warner* may have been in the area of present obligations, it was this expansion of its analysis to support arrearages that contributed to the *Warner* doctrine's demise. Some courts began to reject the *Warner* test completely, declaring that only the original nature of an obligation is relevant to

127. *Cf.* Gebhardt v. Gebhardt (*In re* Gebhardt), 53 Bankr. 113, 115 (Bankr. W.D. Mo. 1985) (intent must be discerned through construction and interpretation, not reformation of the instrument).

128. *In re* Lovett, 6 Bankr. 270, 271-72 (Bankr. D. Utah 1980). *Lovett* was decided on the issue of the application of the automatic stay, however, and the case was continued for a later dischargeability hearing. *Id.* at 272.

129. Miller v. Miller (*In re* Miller), 17 Bankr. 717, 720 (Bankr. W.D. Wis. 1982) (child support arrearages nondischargeable because evidence showed payments still necessary). Curiously, the court in *Miller*, in adopting the *Warner* analysis, stated that its decision was "compelled by the cases cited in [that case]," *id.* at 720, although *Warner* itself cited no case authority for its application of a present circumstances test.

130. Another bankruptcy court rejected the prospect of retroactive modification by applying the doctrine of collateral estoppel to disallow discharge when arrearages of child support had been reduced to judgment by a state court. Perry v. Norfolk (*In re* Norfolk), 29 Bankr. 377, 378 (Bankr. W.D.N.Y. 1983). The *Norfolk* court did not address whether the result would have been different if the arrearages had accrued under a contractual obligation rather than a court decree or if no judgment had been entered. *See id.* at 379. It did, however, apply the changed circumstances doctrine to the debtor's default on an agreement to pay a third party for the benefit of the former wife, concluding that the wife's remarriage had terminated any support obligation by her ex-husband. *Id.*

131. *See* Sheffield v. Sheffield (*In re* Sheffield), 27 Bankr. 504, 505 (Bankr. N.D. Ga. 1983).

132. *See id.*

its dischargeability.[133] One court commented: "It is a basic premise that [the bankruptcy court] does not have de novo jurisdiction; the Court is not to consider the rights or equities of the parties with a view toward modifying or creating the rights which were established by the dissolution decree itself."[134] Any recognition of a change in circumstances with respect to a support obligation, it held, should be made by the appropriate state court.[135]

Warner's present circumstances test was renounced firmly when the issue reached the appellate courts. In *Benz v. Nelson* (*In re Nelson*),[136] the District Court for the Middle District of Tennessee concluded that the bankruptcy court improperly had attempted to balance competing policies when it applied a present circumstances test:[137]

> By creating an exception to the general rule of discharge, Congress, implicitly, resolved the balancing of the very interests considered by the court below in favor of the spouse. Congress did not, in any manner, manifest an intention that the bankruptcy courts should embark upon their own balancing of these policies. Under section 523(a)(5), the bankruptcy courts are free to determine whether a debt characterized by a state court as alimony, support, or maintenance is in fact just that. Upon finding that a debt is in fact support, alimony or maintenance, however, the bankruptcy court is not free to discharge the debt. Section 523(a)(5) states clearly that such debts are not to be discharged.[138]

The *Nelson* court further supported its conclusion by comparing the support exception to section 523(a)(8), which prohibits discharge of certain educational loans unless exception from discharge "will impose an undue hardship on the debtor and the debtor's dependents."[139] Had Congress intended a similar balancing process to be applied with regard to support related debts, the court reasoned, it would have framed the language of section 523(a)(5) accordingly.[140] Thus, the *Nelson* court concluded that the language of the Code and its legislative history prohibit consideration of the parties' present circumstances.

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133. *See* Jensen v. Jensen (*In re* Jensen), 17 Bankr. 537, 540 (Bankr. W.D. Mo. 1982); Fritz v. Daiker (*In re* Daiker), 5 Bankr. 348, 351-52 (Bankr. D. Minn. 1980).

134. *Fritz*, 5 Bankr. at 351.

135. *Id.* at 352; *see also* Gentile v. Gentile (*In re* Gentile), 16 Bankr. 381, 383 (Bankr. S.D. Ohio 1982) (evidence of present financial situation disregarded in deciding dischargeability of support payments).

136. 20 Bankr. 1008 (M.D. Tenn. 1982).

137. The bankruptcy court had determined that a judgment against the debtor for $16,550 plus interest was "clearly in the nature of support, maintenance, or alimony," Benz v. Nelson (*In re* Nelson), 16 Bankr. 658, 661 (Bankr. M.D. Tenn. 1981), *rev'd in part, aff'd in part*, 20 Bankr. 1008 (M.D. Tenn. 1982), as it was based on arrearages from an unsegregated order to pay the former wife $500 per month as alimony and child support. *See id.* at 659, 651. The bankruptcy court, however, adopted the *Warner* reasoning and discharged the debt because the youngest child had reached majority and the former wife had remarried. *Id.* at 662. Because none of the parties for whom the support had been ordered would be left impoverished, and appropriate state remedies had existed during the period of actual need, the bankruptcy court had concluded that the fresh start policy should prevail. *Id.*

138. *Nelson*, 20 Bankr. at 1011-12 (footnote omitted).

139. *See id.* at 1011 n.3 (quoting 11 U.S.C. 523(a)(8)(B) (1988)).

140. *Id.* at 1011.

Although the *Nelson* court could have restricted its rejection of *Warner* to cases involving arrearages or unambiguous debts that clearly had originated as support, it chose instead to discredit the present circumstances doctrine entirely. Other courts promptly adopted *Nelson*'s analysis.[141] *Nelson* thereby apparently signalled the demise of the *Warner* doctrine and retired the notion that present circumstances are relevant in any context. That retirement, however, proved to be temporary.

2. The *Calhoun* Test

The case of *Long v. Calhoun* (*In re Calhoun*),[142] decided by the United States Court of Appeals for the Sixth Circuit in 1983, revived the controversy that *Nelson* appeared effectively to have laid to rest. Unlike *Warner*, which attempted to balance overall equities and competing policies,[143] *Calhoun* set out a three-part test for determining the nature of ambiguous marital debts. In so doing, however, it laid new groundwork for an expanded controversy over the relevance of present circumstances in a bankruptcy court proceeding.

The *Calhoun* court was faced with the recurring problem of determining the dischargeability of a debtor-husband's assumption of marital debts owed to third parties and his related agreement to hold his former wife harmless on those debts.[144] Noting that all assumptions of marital debts affect the other spouse's ability to support herself to some extent,[145] the *Calhoun* court formulated a three-step test to determine dischargeability.[146]

Discerning the divorce court's or the parties' intent in creating the obligation is merely the initial step of the *Calhoun* test.[147] If the bankruptcy court does not find that the debt was intended to be support, the inquiry ends and the debt is discharged.[148] If, however, the appropriate intent to create a support debt is discerned, the court must proceed to the second step.

The second phase of the *Calhoun* test begins the inquiry into present cir-

141. *See* Comer v. Comer (*In re* Comer), 27 Bankr. 1018, 1020 (Bankr. 9th Cir. 1983) (rejecting *Warner*'s balancing test and adopting *Nelson* analysis), *aff'd on other grounds*, 723 F.2d 737 (9th Cir. 1984); Aurre v. Kalaigan (*In re* Aurre), 60 Bankr. 621, 628-29 (Bankr. S.D.N.Y. 1986) ("better reasoned" cases reject present circumstances doctrine); Rombold v. Department of Human Resources (*In re* Rombold), 34 Bankr. 396, 398 (Bankr. D. Or. 1983) (*Nelson* gives "well-stated basis" for rejecting present circumstances test); Vickers v. Vickers (*In re* Vickers), 24 Bankr. 112, 116 (Bankr. M.D. Tenn. 1982) (finding *Warner* test convincing, but constrained to follow *Nelson*).

142. 715 F.2d 1103 (6th Cir. 1983).

143. *See supra* text accompanying notes 103-107.

144. The husband had assumed debts for construction of a swimming pool at the wife's home, a loan to consolidate other marital debts, charge card accounts relating to the husband's training and business, and the lien on the husband's vehicle. The court distinguished the debts owed directly to the third party creditors from the obligation to hold the wife harmless on those debts. *Calhoun*, 715 F.2d at 1105, 1106 & n.4.

145. *Id.* at 1108.

146. *Id.* at 1109-10. Some courts have interpreted *Calhoun* to require additional steps. *See* Helm v. Helm (*In re* Helm), 48 Bankr. 215, 221 (Bankr. W.D. Ky. 1985) (four-part test); Lewis v. Lewis (*In re* Lewis), 39 Bankr. 842, 846 n.6 (Bankr. W.D.N.Y. 1984) (five-part test); *see also* Brown, *supra* note 8, at 520-26 (four-part test); Freeburger & Bowles, *supra* note 8, at 609-13 (four-part test).

147. *Calhoun*, 715 F.2d at 1109. *Calhoun* allowed the courts to consider any relevant evidence, including the traditional factors used by state courts in awarding support, to determine intent. *Id.*

148. *Id.*

cumstances. The bankruptcy court must determine the effect of the debt on the recipient's actual needs, evaluating that spouse's current dependency on the payment. The court must focus on the practical result that discharge would effect on the dependent spouse's ability to provide for her daily needs: "If without the loan assumption, the spouse could not afford daily necessities, such as food, housing and transportation, the effect of the loan assumption may be found 'in the nature of' support for purposes of the Bankruptcy Act."[149] If "drastic changes in the former spouse's capabilities for self-support" have occurred, the debt that originated as one for support may have been altered sufficiently to permit total or partial discharge.[150] Thus, without reference to *Warner*[151] or its progeny, the *Calhoun* court held that the recipient's present circumstances are a mandatory consideration once the intent to create a support debt is found.

Having survived the first two stages in a dischargeability determination, the debt is subjected to the third inquiry: whether the amount is reasonable in light of the debtor's general ability to pay. If the debt is "manifestly unreasonable," it must be reduced or eliminated.[152] The *Calhoun* court emphasized that the determination of reasonableness should focus primarily on the debtor's circumstances at the time the obligation was created. Significantly, however, the court further authorized consideration of the debtor's current financial circumstances at the time of bankruptcy as well.[153] Although a debt may have represented a reasonable amount of support at its creation, if the debtor's financial condition has declined to the extent that the continuing obligation has become "inequitable," the bankruptcy court must reclassify and discharge any amount that is excessive, setting a "reasonable limit" on the nondischarged continuing obligation.[154] The *Calhoun* court justified its consideration of present circumstances by noting that state courts consider the debtor's ability to pay when ordering support.[155] Conceding that such a factual inquiry is difficult, the *Calhoun* court believed that to hold otherwise would be tantamount to allowing a debtor to contract away his bankruptcy rights, which is impermissible.[156]

The court cautioned, however, that this final inquiry into the debtor's financial circumstances should be limited to determining whether such an agreement was clearly unreasonable, constituting "an excessive degree of support beyond that which any state court would reasonably allow given the parties' relative circumstances."[157] The court added:

> It is not intended that the Bankruptcy Court sit as a "super-divorce" court. Rather, the purpose of such inquiry is to ensure that the degree of support represented by the loan assumptions, particularly in uncon-

149. *Id.*
150. *Id.*
151. Warner v. Warner (*In re* Warner), 5 Bankr. 434 (Bankr. Utah 1980).
152. *Calhoun*, 715 F.2d at 1110.
153. *Id.* at 1110 n.11.
154. *Id.* at 1110.
155. *See id.*
156. *Id.*; *see also* Jackson, *supra* note 80, at 1398-1404 (justifications for nonwaivable right of discharge).
157. *Calhoun*, 715 F.2d at 1110 n.12.

> tested cases, does not clearly exceed that which might reasonably have been awarded as support by a state court after an adversarial proceeding.[158]

In making such an inquiry, the bankruptcy court conducts what is equivalent to a state court hearing for modification of support. Thus, *Calhoun* reintroduced the idea, albeit in the limited context of third party debt assumptions, that the present circumstances of both parties are relevant in determining the nature of a marital debt. *Calhoun* clearly authorizes bankruptcy courts to modify certain types of state court support decrees.

The *Calhoun* court acknowledged that, in some cases, an inquiry into reasonableness will have the effect of modifying a state court decree or judgment, but found such a result unavoidable in creating a federal standard for determining the nature of the debt.[159] However, in contrast to a state court modification proceeding, which can adjust a support debt either upward or downward,[160] the bankruptcy court modification action pursuant to the *Calhoun* test can only decrease or eliminate the support obligation.[161]

The *Calhoun* court discounted the impact of its decision by noting that a state court rarely would award unnecessary support in a contested case; thus litigated support obligations seldom would be affected by the bankruptcy action.[162] Additionally, the court declared that affording comity to state court decrees is less important in the more common situation where the support award is the result of parties' private agreement that has been incorporated into a decree, rather than the result of a true adversary action.[163]

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158. *Id.*

159. *Id.* at 1109 n.10; *see also* Brown, *supra* note 8, at 555 (any support not meeting *Calhoun* criteria may be modified).

160. *See supra* notes 37-47 and accompanying text (discussion of state court modification principles).

161. *But cf.* Brown v. Brown (*In re* Brown), 37 Bankr. 295, 300 (Bankr. W.D. Ky. 1983) (when debtor discharged of obligations to make credit card payments, for which he had been allowed set-off against child support payments, obligation to make those support payments in full was "resurrected" because only the right to set-off had been discharged).

162. *Calhoun*, 715 F.2d at 1109 n.10. The court's observation seems to imply that relatively few support awards would be affected by its decision. In fact, most divorces today are negotiated rather than litigated. *See* H. CLARK, *supra* note 21, at 755 (estimating that about 90% of divorces are uncontested and that more than half are resolved by contract); Levy, *Comment on the Pearson-Thennes Study and on Mediation*, 17 FAM. L.Q. 525, 530 (1984) (an estimated 85-90% of divorce actions are resolved by negotiation). Those agreements generally are conducted "in the shadow of the law"; that is, they are settled on terms comparable to those that a court likely would have reached had litigation been necessary. *See* Mnookin & Kornhauser, *supra* note 3, at 950 (1979). If privately negotiated support settlements are exposed to greater risk of discharge, divorcing parties will be encouraged to litigate and the state public policy of promoting private resolution of divorce, *see supra* text accompanying note 78, will be thwarted, and an enormous caseload burden will be placed on state divorce courts.

163. *Calhoun*, 715 F.2d at 1109 n.10. The court noted that to allow the parties' agreement to control impermissibly would allow the debtor to contract away his bankruptcy rights. *Id.* The *Calhoun* court's observation largely disregards the fact that when the parties have settled their financial matters by private agreement, the agreement frequently receives at least implicit judicial approval by being merged or incorporated into the divorce decree; thus, the contract becomes part of the court order itself. *See* Sharp, *Fairness Standards*, *supra* note 75, at 1408-10; *see also* Sharp, *Semantics*, *supra* note 75, at 326 (urging courts to impose mechanisms for meaningful judicial approval or review of marital settlement agreements). By regarding privately settled support payments as less deserving of protection, certainty and stability are undermined. In the case of either a private

Calhoun regards present circumstances as critical to determining whether ambiguous debts are nondischargeable, with the potential for modification merely an inevitable result of this definitional process. The *Calhoun* court repeatedly emphasized that it intended examination of the parties' present circumstances only in the context of evaluating the nature of subsidiary obligations in the form of loan assumptions, and that such examination should be limited to exceptional circumstances in which the support obligation has become grossly and unreasonably inequitable.[164] Furthermore, the court cautioned that the bankruptcy court should exercise restraint in examining the dependent spouse's economic circumstances and discharge only amounts that *clearly* exceed those which a state court reasonably might have awarded in an adversarial proceeding.[165]

3. Extension of the *Calhoun* Test

Despite its qualifications and caveats, the *Calhoun* case resurrected the specter of the *Warner* doctrine. Unlike *Warner*, however, *Calhoun* expressly limited inquiry into present circumstances to cases involving continuing obligations based on hold-harmless provisions in connection with assumptions of joint marital debts,[166] not debts owed directly to a spouse or to arrearages. Nonetheless, if a marital obligation on a third-party debt that originated as support can be transformed into a dischargeable debt by changed circumstances, *Calhoun*'s rationale would appear to be equally applicable to support debts in other forms. Accordingly, although most courts have applied the *Calhoun* test conservatively,[167] a significant minority extended the *Calhoun* doctrine to a broader category of debts.[168] The Sixth Circuit Court of Appeals itself noted, in a subsequent case, that *Calhoun*'s analysis clearly applies to other types of cases, and, indeed, that it had "general applicability in cases brought under § 523(a)(5)."[169]

The bankruptcy court case of *Helm v. Helm* (*In re Helm*)[170] best illustrates a broad interpretation of *Calhoun*. The court in *Helm* considered application of

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agreement or a court-ordered award, it will be unlikely that the parties will have considered the impact of a later bankruptcy on the debt in question.

164. *Calhoun*, 715 F.2d at 1110.

165. *Id.* at 1110 n.11; *see also* Helm v. Helm, (*In re* Helm), 48 Bankr. 215, 218 (Bankr. W.D. Ky. 1985) (importance of state court having independently assessed need and nature of debt).

166. *Calhoun*, 715 F.2d at 1109 n.9.

167. *See infra* text accompanying notes 181-88.

168. *See, e.g.*, Caughenbaugh v. Caughenbaugh (*In re* Caughenbaugh), 92 Bankr. 255, 258 (Bankr. S.D. Ohio 1988) (periodic alimony payments reduced from $130 to $80 per week, despite former wife's continued need); Erler v. Erler (*In re* Erler), 60 Bankr. 220, 223 (Bankr. W.D. Ky. 1986) (car loan assumption too excessive in light of debtor's present circumstances; reduced by more than half); *Helm*, 48 Bankr. at 221-25 (applying *Calhoun* test to direct payment to spouse); Perkins v. Perkins (*In re* Perkins), 36 Bankr. 618 (Bankr. M.D. Tenn. 1983) (remanding for determination of nature of arrearages per *Calhoun* criteria).

169. Singer v. Singer (*In re* Singer), 787 F.2d 1033, 1038 n.2 (6th Cir. 1986) (Guy, J., concurring); *see also* Brown, *supra* note 8, at 526-28 (discussing *Singer*).

170. 48 Bankr. 215 (Bankr. W.D. Ky. 1985); *see also* Brown, *supra* note 8, at 528-29 (discussing *Helm*).

the present circumstances test mandatory, not merely permissive,[171] stating that "a bankruptcy court would be remiss in *not* considering the remarkably changed circumstances worked by bankruptcy." [172] Consideration of the debtor's current ability, according to the *Helm* court, "establishes the dominance of federal bankruptcy policy over traditional state law concepts of support," and the reasonableness of support payments must be measured against the fresh start policy of bankruptcy law.[173] The *Helm* court thus reformulated the *Calhoun* test[174] and applied that revised version to analyze a debt owed directly to a former spouse.[175] However, the court urged bankruptcy courts to exercise restraint in establishing a "reasonable limit" on the dischargeability of a debt, noting that such an inquiry may stretch the boundaries of the controlling statute, section 523(a)(5).[176] The *Helm* court further interpreted *Calhoun* to apply only to privately negotiated agreements, not to fully litigated court orders for support, and explicitly encouraged litigation in divorce cases in which a potential for bankruptcy exists.[177]

The *Helm* court also took a slightly different approach to the issue of need. The *Calhoun* test for determining the nature of a debt examines the debt's present nature by segregating the recipient's present need from the debtor's ability to pay, and by evaluating that need in isolation before considering the debtor's ability to pay.[178] Thus, the *Calhoun* court either assumed that needs may be calculated in a vacuum or that only a uniform, subsistence level of need is rele-

171. The *Helm* court interpreted *Calhoun* merely to *permit*, not to require, an evaluation of present circumstances. *Helm*, 48 Bankr. at 225 n.30. *But see* Angel v. Angel (*In re* Angel), 105 Bankr. 825, 833 (Bankr. S.D. Ohio 1989) (review of debtor's current ability to pay is "permissive, not mandatory").

172. *Helm*, 48 Bankr. at 225 n.30 (emphasis in original). In *Helm*, the former wife's net worth was between $300,000 and $500,000, with an annual income of $55,000 and $28,000 during the two years preceding the bankruptcy action. *Id.* at 217-18. At that time, the debtor owned only nominal assets, plus debts of over $1.4 million, and had yearly net incomes of $3,000 and $9,227. *Id.* The court reduced the question to whether the debtor's agreement to pay the wife $1,000 a month was necessary to provide for her daily needs under the circumstances. *Id.* at 224. The *Helm* court stated, "Judge Kennedy's writing is a carefully detailed construct, a literal handbook for bankruptcy judges, and to perceive it only as a narrow assumption-of-debt case is to view the world through the wrong end of a telescope. We take *Calhoun* as having general applicability to all support cases." *Id.* at 220.

173. *Id.* at 225; *see also* Caughenbaugh v. Caughenbaugh (*In re* Caughenbaugh), 92 Bankr. 255, 257 (Bankr. S.D. Ohio 1988) (reasonableness of continuing obligation determined by weighing against debtor's right to fresh start).

174. The court in *Helm* restated the *Calhoun* test as being comprised of four elements, "intent, effect, amount and apportionment." *Helm*, 48 Bankr. at 221 (emphasis omitted). The court added, "We have also taken a necessary editorial liberty in our summary of the four-part analysis. *Calhoun* used the phrase 'loan assumption' several times in the formula . . . . Having held that *Calhoun* applies to all support cases, we have eliminated that phrase as unduly restrictive." *Id.* at 221 n.17.

175. Although the court concluded that the case could be determined on the basis of intent alone, it addressed each step of the *Calhoun* test in an attempt to "facilitate the inevitable appeal" and relitigation on remand. *Id.* at 221.

176. *Id.* at 225.

177. *Id.* at 225-26; *cf.* Catlett v. Jackson (*In re* Jackson), 48 Bankr. 616, 617 (Bankr. W.D. Ky. 1985) (award in contested case "not to be treated lightly"), *aff'd on reconsideration*, 58 Bankr. 72 (Bankr. W.D. Ky. 1986).

178. *See* Johnson v. Seta (*In re* Seta), 45 Bankr. 8, 9 (Bankr. S.D. Ohio 1984) (although former wife's earning power was considerably less than debtor's, in light of her remarriage her needs were "currently being met more than adequately;" therefore, it was unnecessary to determine reasonableness of debt).

vant.[179] Despite its expansion of the present circumstances test, however, the *Helm* court recognized that need is a relative concept, correlated to both parties' circumstances. Although noting that the marital standard of living generally enters into the calculation of need, the court cautioned that the bankruptcy court should not "force the perpetuation of an artificially grand life style."[180]

4. Limitations and Clarifications of the *Calhoun* Test

Although some cases extended the *Calhoun* test, most bankruptcy courts within the Sixth Circuit have applied the doctrine conservatively.[181] One court emphasized that, unlike the earlier discredited *Warner* test, the *Calhoun* test does not authorize modification in order to balance the equities at the time of bankruptcy;[182] rather, the test is applied solely to determine whether an ambiguous debt qualifies as support, thereby avoiding discharge.[183]

Other courts stressed that the present needs test has no application in cases in which the obligations fall clearly within traditional concepts of support.[184]

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179. This author has argued that need should be defined in terms relative to the marital standard of living. *See* Scheible, *supra* note 7, at 60-61; *see also* Krauskopf, *Theories of Property Division/ Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 257 (1989) (arguing that benefits and burdens should be allocated according to the "gains and losses of the marriage that are capable of being shared when it ends"). To view need as an absolute leads to absurd results, as illustrated by the case of Costell v. Costell (*In re* Costell), 75 Bankr. 348 (Bankr. N.D. Ohio 1987). In *Costell*, a bankruptcy court, applying the *Calhoun* test, held that the husband's obligation to pay first and second mortgages on the family residence were in the nature of support because the former wife and children still lived in the home. However, the court stated that the husband's additional agreement to make repairs on that residence was dischargeable unless those repairs were "necessary for the safety and well-being" of the family, taking a narrow view of the concept of "need." *Id.* at 356. Even more oddly, the court classified as dischargeable the husband's obligation to pay credit card debts that had been incurred for his own and his girlfriend's benefit, holding that the wife must show that each underlying expenditure was necessary for her and the children's support to avoid discharge, rather than analyzing the effect on the dependents should the wife be required to pay that debt. *Id.*

180. Helm v. Helm (*In re* Helm), 48 Bankr. 215, 224 (Bankr. W.D. Ky. 1985).

181. *See, e.g.*, Angel v. Angel (*In re* Angel), 105 Bankr. 825, 833 (Bankr. S.D. Ohio 1989) (review of debtor's current ability to pay permissive, not mandatory; insufficient evidence to support finding that support has become inequitable); *see also* Brown v. Brown (*In re* Brown), 46 Bankr. 612, 614 (Bankr. S.D. Ohio 1985) (rejecting present circumstances portion of *Calhoun* analysis, viewing abstention from modification as mandated by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333).

182. Gerdes v. Gerdes, 33 Bankr. 860, 869-70 (Bankr. S.D. Ohio 1983).

183. *Id.* at 870. *Gerdes* applied the *Calhoun* test in a Chapter 11 proceeding to determine the nature of a former wife's lien on real property that the debtor sought to sell free from encumbrances. The bankruptcy court noted that the process of weighing the wife's current support needs against the debtor's present circumstances does not entail an application of "general equitable considerations." *Id.* The *Gerdes* court applied the present circumstances test to refuse discharge of a lien against the debtor's real property, which it found to be in the nature of temporary support, but relieved the debtor of his personal guarantee of the debt. Based on the parties' current financial status, however, the court felt "constrained to conclude that the provisional alimony must be reduced accordingly and the Plaintiff should no longer be required as alimony to guarantee the future funding of the monthly lease payments over the amount of the income realized from the leases." *Id.*; *see also* Deatherage v. Wallace (*In re* Deatherage), 55 Bankr. 268, 271 (Bankr. E.D. Tenn. 1985) (*Calhoun* test applies only to distinguish support from property division aspects of hybrid debt).

184. *See* Troxell v. Troxell (*In re* Troxell), 67 Bankr. 328, 331 n.3 (Bankr. S.D. Ohio 1986) ("[T]he *Calhoun* test is appropriate only for ongoing support obligations, not past child support arrearages."); McArtor v. Rowles (*In re* Rowles), 66 Bankr. 628, 631 (Bankr. N.D. Ohio 1986) (memorandum opinion); White v. White (*In re* White), 55 Bankr. 878, 884-85 (Bankr. E.D. Tenn.

Although there are some cases to the contrary,[185] most courts that have relied on *Calhoun* have agreed that bankruptcy courts may not modify support awards except in determining their dischargeability.[186] Any modification by the bankruptcy court is to be made only at the time discharge is considered and only under appropriate circumstances; the bankruptcy court retains no continuing jurisdiction to modify support at a later time.[187] Moreover, most courts have rejected application of *Calhoun*'s present circumstances test to support arrearages. Application of a present circumstances test in that context theoretically permits a debtor to "control the character of debts owed to a former spouse simply by not paying amounts clearly due for support so that the spouse is forced to be self-supporting."[188]

Several appellate courts outside of the Sixth Circuit initially accepted portions of *Calhoun*'s changed circumstances test.[189] Although declaring that the bankruptcy court has no authority to balance competing policies, the federal

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1985) (no modification of future alimony payments, although *Calhoun* applies to hold-harmless agreement related to educational loans).

185. *See* Johnson v. Seta (*In re* Seta), 45 Bankr. 8, 9 (Bankr. S.D. Ohio 1984) (debtor's obligation to pay second mortgage on marital residence was not in nature of support because home had been sold; even though sale price of home was insufficient to pay off second mortgage, former wife's needs were being more than adequately met and debt lacked necessary effect as support); Perkins v. Perkins (*In re* Perkins), 36 Bankr. 618, 621 (Bankr. M.D. Tenn. 1983) (remanding for determination of nature of arrearages per *Calhoun* criteria); *cf.* Brandstadt v. Brandstadt (*In re* Brandstadt), 45 Bankr. 538, 543 (Bankr. N.D. Ohio 1984) (emphasizing that present need is relevant only if the threshold *Calhoun* factors, intent and effect, are fulfilled; therefore, debts which unambiguously were not intended to provide support are not to be evaluated in light of present circumstances); Lelak v. Lelak (*In re* Lelak), 38 Bankr. 164, 168-69 (Bankr. S.D. Ohio 1984) (same); Plaugher v. Plaugher (*In re* Plaugher), 37 Bankr. 760, 765 (Bankr. N.D. Ohio 1984) (same).

186. *See, e.g.*, Hund v. Miller (*In re* Miller), 36 Bankr. 403, 405 (Bankr. N.D. Ohio 1984); *see also* Ramus v. Ramus, (*In re* Ramus), 32 Bankr. 67, 68 (Bankr. N.D. Ga. 1983) (bankruptcy court abstained from deciding debtor's action to modify alimony as part of Chapter 13 proceeding; identical action was pending in state court).

187. *Rowles*, 66 Bankr. at 631; *see also* Winders v. Winders (*In re* Winders), 60 Bankr. 746, 746 (Bankr. N.D. Iowa 1986) (court "recharacterized" portion of lien against home as support, leaving to state court any further questions as to appropriate level of support after bankruptcy); *Lelak*, 38 Bankr. at 169 (court advised the former spouse to apply to the state court for modification of support if necessary because of the effect of discharge); Graham v. Jenkins (*In re* Jenkins), 32 Bankr. 978, 985 (Bankr. S.D. Ohio 1983) (enforcement of nondischargeable debts is matter for state court). *But cf.* Brown v. Brown (*In re* Brown), 37 Bankr. 295, 299-300 (Bankr. W.D. Ky. 1983) (discharge of debtor's obligation on credit payments "resurrects" his obligation to make child support payments; debtor was to receive set-off against those payments only while paying third party creditor).

188. *Rowles*, 66 Bankr. at 631. *But see* Migliarese v. Migliarese (*In re* Migliarese), 38 Bankr. 978, 979-80 (Bankr. E.D.N.Y. 1984) (bankruptcy court discharged debt clearly intended for support for period after former wife's remarriage, despite state court judgment on arrearages).

189. *See* Yeates v. Yeates (*In re* Yeates), 44 Bankr. 575, 580 (D. Utah 1984), *aff'd on other grounds*, 807 F.2d 874 (10th Cir. 1986). The Tenth Circuit court acknowledged *Calhoun*'s present circumstances test, but concluded that it did not need to address that issue because the plaintiff-wife's circumstances had not changed since the divorce. Yeates v. Yeates, 807 F.2d 874, 878 n.3 (10th Cir. 1986). The Tenth Circuit later rejected the *Calhoun* test in Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989) (per curiam). *See infra* notes 238-242 and accompanying text. Another District Court extensively cited *Calhoun* with approval, agreeing that the debtor's current ability to pay is relevant in determining the nature of an obligation. Bedingfield v. Bedingfield (*In re* Bedingfield), 42 Bankr. 641, 647 (S.D. Ga. 1983). The *Bedingfield* court cautioned, however, that a debtor "should not be able to escape his familial obligations by receiving a discharge in bankruptcy," avoiding his "moral and legal obligations." *Id.* at 647. *Bedingfield*'s authority in this regard has been overruled by a subsequent Eleventh Circuit decision. *See* Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 906 (11th Cir. 1985).

district court in *Yeates v. Yeates (In re Yeates)*[190] agreed that an improvement in the recipient spouse's financial condition at the time the bankruptcy is filed may change the underlying nature of the payment, making it "superfluous, and dischargeable."[191] The *Yeates* court emphasized that such a change must indicate a "material and substantial" improvement that alters the nature of the payment from necessary support to merely an increase in income.[192] This inquiry does not require consideration of general equitable factors because the current financial condition of the debtor is irrelevant, the bankruptcy action itself indicating a "constantly worsening financial condition."[193] The limited version of the present circumstances test in *Yeates* regards as relevant only a significant decrease in the recipient's need, but still constitutes a modification of a state support decree.

Even among courts that have adopted the *Calhoun* analysis, little tendency to expand the test beyond its initial context has surfaced. Most of the cases, moveover, have added little to the analysis of the test.[194] The preponderance of evaluation is found in the opinions that reject the *Calhoun* test.

5. Rejection of the *Calhoun* Test

Calhoun's revival of the present circumstances test soon met with strong disapproval. Five Circuit Courts of Appeal, in addition to the Sixth Circuit, have directly addressed the issue and have flatly denied that present circumstances have any relevancy in dischargeability determinations.[195] Although the

190. 44 Bankr. 575 (D. Utah 1984).

191. *Id.* at 580. In affirming the district court, the Tenth Circuit declined to address the issue of changed circumstances, as none existed in this case. *Yeates*, 807 F.2d at 878 n.3.

192. *Yeates*, 44 Bankr. at 580. The court suggested that a significant event such as remarrying or securing a much higher-paying job might evidence a material, substantial improvement, but not the mere fact that the recipient was able to " 'keep the wolf from the door' by obtaining financial help from relatives, the government, or charitable institutions." *Id.* at 581. *But see* Boyd-Leopard v. Douglass (*In re* Boyd-Leopard), 40 Bankr. 651, 656 (Bankr. D.S.C. 1984) (fact that former wife sold residence and was living with father indicated that debtor's obligation to pay second mortgage no longer necessary and therefore dischargeable).

193. *Yeates*, 44 Bankr. at 580.

194. *See, e.g.*, Troup v. Troup (*In re* Troup), 730 F.2d 464, 466 (6th Cir. 1984) (court affirmed in light of *Calhoun*); Leupp v. Leupp (*In re* Leupp), 73 Bankr. 33, 35 (Bankr. N.D. Ohio 1987); Pitzen v. Pitzen (*In re* Pitzen), 73 Bankr. 10, 12-13 (Bankr. N.D. Ohio 1986) (former spouse's need continued, debtor's position improved); Brock v. Barlow (*In re* Brock), 58 Bankr. 797, 806-07 (Bankr. S.D. Ohio 1986); Taylor v. Lineberry (*In re* Lineberry), 55 Bankr. 510, 516 (Bankr. W.D. Ky. 1985) (no change in circumstances had occurred); Sanders v. Sanders (*In re* Sanders), 51 Bankr. 695, 697 (Bankr. S.D. Ohio 1985) (only portion of debtor's assumption of home mortgage nondischargeable because wife only deprived of four month's occupancy by debtor's failure to make payments); Wright v. Wright (*In re* Wright), 51 Bankr. 630, 632 (Bankr. S.D. Ohio 1985); Elder v. Elder (*In re* Elder), 48 Bankr. 414, 417 (Bankr. W.D. Ky. 1985) (not excessive or unreasonable); Holland v. Holland (*In re* Holland), 48 Bankr. 874, 877 (Bankr. N.D. Tex. 1984) (no material change of circumstances between divorce and bankruptcy); Lewis v. Lewis (*In re* Lewis), 39 Bankr. 842, 845 (Bankr. W.D.N.Y. 1984) (promise to indemnify must be related to past or present support needs to survive discharge); Chambers v. Chambers (*In re* Chambers), 36 Bankr. 42, 45 (Bankr. W.D. Wis. 1984) (court need not decide whether to balance equities in this case because of insufficient evidence regarding parties' current financial health; disparity in opportunity between spouses sufficient to conclude debt was in nature of support); Brown v. Brown (*In re* Brown), 37 Bankr. 295, 299 (Bankr. W.D. Ky. 1983); Wesley v. Wesley (*In re* Wesley), 36 Bankr. 526, 529-30 (Bankr. S.D. Ohio 1983) (direct application of *Calhoun* test); Graham v. Jenkins (*In re* Jenkins), 32 Bankr. 978, 985 (Bankr. S.D. Ohio 1983).

195. Gianakas v. Gianakas (*In re* Gianakas), No. 90-3258 (3d Cir. Oct. 19, 1990) (LEXIS,

other circuits remain split, enthusiasm for the *Calhoun* test has waned in recent years.[196]

The Eleventh Circuit, most notably in the 1985 case of *Harrell v. Sharp (In re Harrell)*,[197] has been the strongest critic of the present circumstances test, unequivocally refuting that the present circumstances of either former spouse should play a role in determining dischargeability. Unlike *Calhoun*, which addressed classification of continuing liability to a former spouse pursuant to an assumption of joint marital debts,[198] *Harrell* dealt with accrued alimony and child support arrearages, as well as the debtor's agreement to pay his son's future post-majority educational expenses.[199]

The bankruptcy court in *Harrell* had found that the debt representing alimony arrearages unquestionably had been in the nature of support at its creation.[200] Relying on *Warner*, however, the bankruptcy court held that the debt had lost its support characteristics because of changed circumstances, because the wife had remarried and no longer depended upon her former husband for support.[201] Although the bankruptcy court noted that the exception from discharge for support debts would be subverted if debtors were allowed merely to wait for their former spouses to remarry in order to avoid their support obligations, it concluded that the fresh start policy overrode such concerns in certain factual contexts.[202] Because the child support arrearages and the agreement to pay educational expenses were unaffected by the wife's remarriage, the bankruptcy court found those obligations non-dischargeable; however, it recalculated the amount of the debtor's continuing obligation on those debts and indicated

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Genfed Library, USAPP file); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801, 804 (2d Cir. 1987); Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986); Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 906 (11th Cir. 1985); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984).

196. *See infra* notes 243-252 and accompanying text.

197. 754 F.2d 902 (11th Cir. 1985).

198. *See supra* notes 142-144 and accompanying text.

199. The spouses in *Harrell* had entered into a 1971 separation agreement that required the debtor to pay his former wife $100 per month for her support and maintenance until her death or remarriage, and $100 per month as child support until their son became self-supporting, married, or reached age 21. *Harrell*, 754 F.2d at 903. The amounts were to fluctuate according to the debtor's income. He also agreed to pay his son's educational expenses for college and post-graduate education, with a reduction in child support during periods in which he paid educational expenses. The debtor further assumed the couple's joint debts and responsibility for mortgage payments on the residence awarded to the wife. *Id.* Although by 1974, the debtor's salary had increased to the extent that he would have been required to pay $400 a month for each support obligation, *id.* at 903 n.1, by that time he was substantially in arrears and the agreement was amended to reduce both support payments to $200 a month each. *Id.* at 903. The wife agreed to waive the arrearages in consideration of the debtor's agreement to establish a trust for the son's educational expenses, but the debtor failed to establish that trust. *Id.*

200. Harrell v. Sharp (*In re* Harrell), 23 Bankr. 423, 424 (Bankr. N.D. Ga. 1982), *aff'd in part, rev'd in part*, 33 Bankr. 989 (N.D. Ga. 1983), *aff'd*, 754 F.2d 902 (11th Cir. 1985).

201. Harrell v. Sharp (*In re* Harrell), 33 Bankr. 989, 993 (N.D. Ga. 1983), *aff'd*, 754 F.2d 902 (11th Cir. 1985).

202. In *Harrell*, the wife was a CPA with an anticipated 1982 income of $30,000, was married, and co-owned a house with a mortgage of $52,000. She and her new husband had a net worth of about $42,000. *Harrell*, 23 Bankr. at 424. The former husband earned approximately $24,000 a year, had living expenses of $1,300 per month, and was subject to certain tax liabilities arising out of a business, plus legal expenses arising from the tax obligation and the bankruptcy action. *Id.* at 425.

that his son could seek an increase of that award if the debtor's financial condition improved.[203]

The district court reversed both the bankruptcy court's discharge of the alimony arrearages and its translation of the agreement to pay educational expenses into specific terms, holding that the bankruptcy court's inquiry must end upon classification of the debt.[204] The Court of Appeals for the Eleventh Circuit affirmed,[205] rejecting an application of a present needs test under either a *Warner* or *Calhoun* type analysis.[206] The Eleventh Circuit offered three grounds for its rejection of the present circumstances test: (1) the statutory language of section 523(a)(5); (2) the legislative history of the support exception; and (3) the policy of deferring to state courts in domestic relations matters.

First, the Court of Appeals for the Eleventh Circuit in *Harrell* interpreted the statutory language of the Bankruptcy Code to require only a determination of whether the denomination of an obligation as support accurately reflects its true nature:

> The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change.[207]

Although the *Harrell* court declared that the statutory language clearly negates examination of present circumstances, the statute does not explicitly require that interpretation. Section 523(a)(5) excepts from discharge a marital debt only where "such liability *is* actually in the nature of alimony, maintenance, or support."[208] The use of the present tense, "is," supports *Calhoun*'s implicit conclusion that the statute directs discharge of support-related debts unless they are *currently* in the nature of support at the time discharge is sought, that is, when the bankruptcy petition is filed. No other clues are provided by the express language of the statute.

The *Harrell* court also read the legislative history of section 523(a)(5) as supporting its interpretation of the statutory language. It concluded that Congress had resolved the conflicting policies in favor of the debtor's dependents when it enacted the exception from discharge, making it inappropriate for the

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203. The separation agreement stipulated that the husband would provide "the most excellent and suitable education within the husband's means" for the son. *Id.* At the bankruptcy proceeding he offered to pay $300 a month, a figure the court found "reasonable" and in "good faith." *Id.* The court noted that if the debtor's economic situation improved, the son might seek an increase. *Id.* at 426.

204. *Harrell*, 33 Bankr. at 995.

205. Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 907 (11th Cir. 1985).

206. After first declaring that the absence of a state-law duty is not determinative of the nature of an obligation for bankruptcy purposes, *id.* at 904-05 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 364 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 6319), the *Harrell* court interpreted *Calhoun* as not expressly requiring inquiry into present circumstances: "*Calhoun* does not expressly require consideration of present need." *Id.* at 906.

207. *Id.* (emphasis in original).

208. 11 U.S.C. § 523(a)(5)(B) (1988) (emphasis added).

courts to balance the equities of an individual case.[209] Rather, the court concluded, Congress intended only a process of distinguishing support from property division.[210]

The final congressional reports,[211] however, did not address the issue of the appropriate time for analyzing a debt to determine its nature for bankruptcy purposes. Instead, Congress merely clarified that federal law would control classification of marital debts and that hold-harmless agreements would be nondischargeable when such provisions, in fact, fell within the federal definition of support.[212] The legislative history, therefore, adds little towards resolving the present circumstances controversy.[213]

Finally, the *Harrell* court further relied on principles of comity to reinforce its conclusion that present circumstances are not relevant to determining dischargeability.[214] Noting that state courts commonly permit modification of support obligations upon demonstrating a change of circumstances,[215] the court decided that such an inquiry by bankruptcy courts would "embroil federal courts in domestic relations matters which should properly be reserved to the state courts."[216] While the financial equities of the parties may be important, the federal courts are not the proper forum to resolve them.[217] Thus, a bankruptcy court should limit its involvement in state domestic relations issues, confining its inquiry to the "narrow issue" of whether an individual obligation is

209. *Harrell*, 754 F.2d at 906 n.6.

210. *Id.* at 906-07 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 364 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 6319).

211. The part of the report addressing paragraph (5) states, in its entirety:

> Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (43 U.S.C. 656(b)) by section 327 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. *See Hearings*, pt. 2, at 942. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy laws, not State law. Thus, cases such as *In re Waller*, 494 F.2d 447 (6th Cir. 1974); *Hearings*, pt. 3, at 1308-10, are overruled, and the result in cases such as *Fife v. Fife*, 1 Utah 2d 281, 265 P.2d 642 (1952) is followed. This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement. *See Hearings*, pt. 3, at 1287-90.

H.R. REP. NO. 595, 95th Cong., 1st Sess. 364 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6320.

212. *See* Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1106-07 (6th Cir. 1983); Williams v. Williams (*In re* Williams), 703 F.2d 1055, 1057 (8th Cir. 1983); Pauley v. Spong (*In re* Spong), 661 F.2d 6, 11 (2d Cir. 1981); Petoske v. Petoske (*In re* Petoske), 16 Bankr. 412, 413 (Bankr. E.D.N.Y. 1982).

213. Commentators have remarked that flexible rules of statutory construction permit "the judiciary to construct a congressional intent that comports with any judge's view on an issue" and have questioned "whether Congress forms any intent at all when it enacts a piece of legislation." Klee & Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 2, 3 (1988).

214. *Harrell*, 754 F.2d at 907.

215. *Id.* at 907 n.8.

216. *Id.* at 907.

217. *Id.*

actually in the nature of support.[218] Upon determining that a payment possesses that essential nature, the role of the bankruptcy court ends.[219] *Harrell*'s policy argument is its strongest rationale for its rejection of the present circumstances test.

Although the factual contexts of *Calhoun* and *Harrell* are clearly distinguishable, *Harrell* is firm in its holding that present circumstances should be deemed irrelevant, in any form and under any conditions, in classifying a debt for bankruptcy purposes.[220] Other federal circuits have agreed.[221]

In rejecting a present circumstances test in 1984, the Court of Appeals for the Eighth Circuit simply concluded that "the bankruptcy court does not examine the present situation of the parties."[222] Several lower courts within the Eighth Circuit questioned their own jurisdiction to modify state court awards,[223] and in 1986, in *Draper v. Draper*,[224] the Court of Appeals for the Eighth Circuit reaffirmed its rejection of a present circumstances test.[225] With-

218. *Id.*

219. *Id.*

220. Within the Eleventh Circuit, see also Graves v. Hart (*In re* Graves), 69 Bankr. 626, 628 (Bankr. S.D. Fla. 1987) (following *Harrell*); Myers v. Myers (*In re* Myers), 61 Bankr. 891, 896 (Bankr. N.D. Ga. 1986) (same); Delaine v. Delaine (*In re* Delaine), 56 Bankr. 460, 464-66 (Bankr. N.D. Ala. 1985) (same).

221. Gianakas v. Gianakas (*In re* Gianakas), No. 90-3258 (3d Cir. Oct. 19, 1990) (LEXIS, Genfed Library, USAPP file); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801, 803-04 (2d Cir. 1987); Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984).

222. *Boyle*, 724 F.2d at 683.

223. *See* Booth v. Booth (*In re* Booth), 44 Bankr. 674 (Bankr. W.D. Mo. 1984) (no reference to *Boyle*, decided earlier that year). The court in *Booth* first questioned whether the bankruptcy court had jurisdiction to reform a state court decree that the debtor alleged was based on fraud or mistake. *Id.* at 675-76. Declining to interpret the decree contrary to its express provisions, the court refused to modify the amount of the obligation, holding that the bankruptcy court lacked jurisdiction. *Id.* at 677 (relying on Marathon Pipeline Constr. Co. v. Northern Pipe Line Co., 458 U.S. 50 (1982)). The Bankruptcy Amendments and Federal Judgeship Act of 1984 amended the Bankruptcy Code to provide that bankruptcy courts have jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 title I sec. 101(a), 98 Stat. 333 (codified as amended at 28 U.S.C. § 157(b)(1) (1988)). A dischargeability determination is defined as a "core proceeding" under § 157(b)(2)(I). 28 U.S.C. § 157(b)(2)(I) (1988). *See generally* Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1 (1985) (criticizing the 1984 amendments); Ferriell, *Core Proceedings in Bankruptcy Court*, 56 UMKC L. REV. 47 (1987) (discussing the constitutionality of bankruptcy jurisdiction granted by the 1984 amendments); Schwartzberg, *The Retreat from Pervasive Jurisdiction in Bankruptcy Court*, 7 BANKR. DEVS. J. 1 (1990) (advocating the conferral of article III status on bankruptcy courts to ensure the reestablishment of pervasive jurisdiction). A federal district court and several bankruptcy courts in the Eighth Circuit followed *Booth*'s reasoning. *See* Mathes v. Mathes (*In re* Mathes), 58 Bankr. 4, 6 (Bankr. W.D. Mo. 1985); Holcer v. Earl (*In re* Earl), 55 Bankr. 12, 15 (Bankr. W.D. Mo. 1985); Gebhardt v. Gebhardt (*In re* Gebhardt), 53 Bankr. 113, 115 (W.D. Mo. 1985); *see also* Schultz v. Mitchell-Huron Prod. Credit Ass'n (*In re* Schultz), 69 Bankr. 629 (D.S.D.) (only question is whether debt constituted support), *appeal dismissed*, 837 F.2d 481 (8th Cir.1987); Hague v. Hague (*In re* Hague), 57 Bankr. 511, 512 (Bankr. W.D. Mo. 1986) (state court should make dischargeability determination, applying federal standards).

224. 790 F.2d 52 (8th Cir. 1986) (per curiam).

225. *Id.* at 54; *cf. Gebhardt*, 53 Bankr. at 115 (bankruptcy court must look to circumstances at creation of debts and may not reform instrument). *But cf.* Winders v. Winders (*In re* Winders), 60 Bankr. 746, 748 (Bankr. N.D. Iowa 1986) (only a portion of payments due to wife "recharacterized" as support).

out further analysis, the *Draper* court decided to follow *Harrell*. It denied any relevancy of the parties' present circumstances, and rejected the debtor's argument that a "needs" test should be applied to determine the nature of terms of a settlement agreement in which he had contracted to pay certain of his children's educational, medical, and dental expenses.[226]

In the Second Circuit, several bankruptcy courts initially indicated that present circumstances could be a relevant factor in determining the nature of a debt.[227] However, in the 1987 case of *Forsdick v. Turgeon*,[228] the Second Circuit also decided to follow *Harrell*. The *Forsdick* court, while acknowledging the strong bankruptcy policy of affording a debtor a fresh start, agreed that Congress already had considered the competing interests of the debtor and his dependents and decided in favor of the latter—a choice that the federal courts have no option but to accept.[229] The *Forsdick* court enjoined disruption of state family law mechanisms absent "an unmistakable mandate from Congress to do so in order to achieve a valid federal objective."[230]

The *Forsdick* court also contrasted section 523(a)(5) with section 523(a)(8),[231] which categorizes certain student loans as nondischargeable *unless* "excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents."[232] Although another court has noted that

226. *Draper*, 790 F.2d at 54. The Arkansas state court had previously held that those terms were contractual and therefore not modifiable under state law. *See id.* at 53. Because the debtor had remarried and his financial situation had changed, he then sought a reduction in his payments, which the bankruptcy court had concluded were child support. *Id.* at 53-54.

227. *See* Lewis v. Lewis (*In re* Lewis), 39 Bankr. 842, 845 (Bankr. W.D.N.Y. 1984) ("a promise to indemnify on joint third party debt, which debt is unrelated to past or present health, shelter or related support needs, would not survive"); Migliarese v Migliarese (*In re* Migliarese), 38 Bankr. 978, 980 (Bankr. E.D.N.Y. 1984) (portion of support award not yet due at time of wife's remarriage dischargeable). *But see* Aurre v. Kalaigan (*In re* Aurre), 60 Bankr. 621, 628 (Bankr. S.D.N.Y. 1986) (action to declare arrearages dischargeable barred by res judicata).

228. 812 F.2d 801 (2d Cir. 1987).

229. *Id.* at 804.

230. *Id.* (Application of a present circumstances test "would turn this legislative intent on its head by having the bankruptcy court entertain arguments about, and deciding issues of dischargeability on the basis of, a continuing need for support instead of protecting the award previously found by the state courts to be appropriate.")

231. *Id.* (citing Benz v. Nelson (*In re* Nelson), 20 Bankr. 1008, 1011 n.3 (M.D. Tenn. 1982)); *see supra* text accompanying notes 139-40; *see also* Stone v. Stone (*In re* Stone), 79 Bankr. 633, 639 (Bankr. D. Md. 1987) ("[I]t is abundantly clear when considering the language of §§ 523(a)(5)(B) and 523(a)(8)(B) side by side that Congress did not intend anything other than an absolute discharge in § 523(a)(5).").

232. 11 U.S.C. § 523(a)(8) (1988). Section 523(a)(8) excepts from discharge debts "for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution." *Id.* In addition to the "hardship" proviso in subsection (B), subsection (A) permits discharge of loans that "first became due before five years . . . before the date of the filing of the petition." *Id.* § 523(a)(8)(B). The Code itself neither defines "undue hardship" nor provides a test for its determination. The courts have developed several standards, however. Many courts apply a strict standard, requiring the debtor to prove unique or extraordinary hardship. *See, e.g.*, Cahill v. Norstar Bank of Upstate New York (*In re* Cahill), 93 Bankr. 8, 13 (Bankr. N.D.N.Y. 1988); Georgia Higher Educ. Assistance Corp. v. Bowen (*In re* Bowen), 37 Bankr. 171, 172 (Bankr. M.D. Fla. 1984); Love v. United States (*In re* Love), 33 Bankr. 753, 754-55 (Bankr. E.D. Va. 1983); Abrams v. University of Nebraska at Lincoln (*In re* Abrams), 19 Bankr. 64, 66 (Bankr. D. Neb. 1982). Other courts have been more lenient. *See, e.g.*, Yarber v. Department of Health Educ. & Welfare, 19 Bankr. 18, 20 (Bankr. S.D. Ohio 1982); *In re* Fonzo, 1 Bankr. 722, 724 (Bankr. S.D.N.Y. 1979). Several courts have adopted a "mechanical

the "reasonableness" inquiry of the present circumstances test is not equivalent to "undue hardship" in the student loan exception,[233] the *Forsdick* court interpreted the absence of such a qualification in section 523(a)(5) as an "absolute exception" to discharge.[234] Significantly, the *Forsdick* court further refused to create an exception for cases in which modification is unavailable in the state court.[235] Instead, the court found the nonmodifiability of certain support awards in state courts representative of a state policy decision—a domestic relations area upon which it refused to encroach.[236] The Second Circuit concluded that the nature of the award at the time of its creation conclusively establishes its nature for bankruptcy.[237]

The Tenth Circuit joined the growing majority of courts rejecting the present circumstances test in 1989 in *Sylvester v. Sylvester*.[238] After concluding that the debts owed to the wife met the relevant criteria for classification as support,[239] the Tenth Circuit rejected the debtor's *Calhoun* arguments as a minority approach that it declined to follow.[240] The *Sylvester* court found no basis for a

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test," ascertaining the debtor's sources and likely sources of income during the life of the educational debts and the extent to which the debtor and his dependents will be able to maintain a minimum standard of living if repayment of the debt is required. *See, e.g.*, Erickson v. North Dakota State Univ. (*In re* Erickson), 52 Bankr. 154, 157 (Bankr. D.N.D. 1985); Cossette v. Higher Educ. Assistance Found. (*In re* Cossette), 41 Bankr. 689, 691 (Bankr. D. Minn. 1984). The debtor's good faith may play a critical role. *See, e.g.*, Pennsylvania Higher Educ. Assistance Agency v. Birden (*In re* Birden), 17 Bankr. 891, 894 (Bankr. E.D. Pa. 1982); Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 Bankr. 128, 130-31 (Bankr. S.D.N.Y. 1981). Under any test, the Commission on the Bankruptcy Laws of the United States suggested that the primary consideration should be the debtor's financial condition. H. REP. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1, at 174, 177 (1973). The courts generally consider the debtor's unearned income or accumulated assets, his prospects for obtaining or retaining steady employment, the income expected from such employment, the debtor's necessary family expenses at a minimal standard of living, and any excess available for payment on the educational debt. *See* Annotation, *Bankruptcy Discharge of Student Loan on Ground of Undue Hardship Under § 523(a)(8)(B) of Bankruptcy Code of 1978 (11 USCS § 523(a)(8)(B)*, 63 A.L.R. FED. 570, 574 (1983). The previous version of the statute also contained an "undue hardship" exception. *See* 20 U.S.C. § 1087-3(a) (1976). Therefore, cases decided under that statute apply as precedent to controversies under current § 523(a)(8).

233. Hopkins v. Hopkins, 109 N.M. 233, 240, 784 P.2d 420, 427 (1989).

234. Forsdick v. Turgeon, 812 F.2d 801, 804 (2d Cir. 1987).

235. Although *Forsdick* questioned *Harrell*'s comments regarding the availability of a state court remedy, none of the earlier cases had been determined exclusively on that basis. *Id.* It should be noted, in contrast to § 523(a)(8), that alternate remedies are available to the debtor who has incurred student loans. Federal regulations allow deferral of both principal and interest under specified circumstances, 34 C.F.R. §§ 674.34 to .37, 682.210 (1990) (deferment for specified times for, *inter alia*, military or foreign or domestic service programs, disability, or service as medical or similar internship); forbearance in others, 34 C.F.R. § 682.211 (1990) (temporary cessation of payments, time extensions, or reduction of scheduled payments for poor health, other personal problems); and cancellation of all or portions of the loan in still others, 34 C.F.R. § 674.51 to .58 (1990) (cancellation for, *e.g.*, public school teaching, military service, disability, or death). No alternative federal remedy exists for relief from a support debt, nor, in many instances, will the debtor be able to obtain state court relief from nondischarged obligations. *See infra* notes 270-83 and accompanying text.

236. *Forsdick*, 812 F.2d at 804.

237. *Id.*

238. 865 F.2d 1164 (10th Cir. 1989) (per curiam).

239. *Id.* at 1166 (relying on Goin v. Rives (*In re* Goin), 808 F.2d 1391 (10th Cir. 1987) and Yeates v. Yeates (*In re* Yeates), 807 F.2d 874 (10th Cir 1986)).

240. In *Sylvester* the debtor had agreed in 1969 to make certain payments to and for the benefit of his former wife and their child in recognition of the wife's contributions to the husband's medical education and training. *Id.* at 1165. The wife sought to enforce those commitments through a state court contempt proceeding when the husband filed a Chapter 11 bankruptcy action in 1984. *Id.* On

present circumstances test in either the language or the history of the exception from discharge, observing that "such an inquiry would put federal courts in the position of modifying state matrimonial decrees."[241] It refused "to make such an intrusion into the area of domestic relations absent a clearer congressional mandate to do so."[242]

Most recently, the Third Circuit also expressly rejected *Calhoun*'s present circumstances test in *Gianakas v. Gianakas* (*In re Gianakas*), noting that examination of a former spouse's continued need would "serve essentially as a penalty for a former spouse who may have struggled to gain self-sufficiency."[243] Although bankruptcy courts in that circuit had been divided,[244] a federal district court in 1989 described the majority position as being "clearly superior" and observed:

> To allow a bankruptcy court to take into consideration the parties' changed financial circumstances in determining whether an obligation constitutes [support] would be to rule that such agreements are dischargeable in nearly every case. In most cases, by the time the debtor has filed for bankruptcy, the economic condition of his or her ex-spouse will be at least on par with, if not more favorable than, that of the debtor, who, after all, has been driven to bankruptcy by his debts. The debtor's proper remedy in this case is not to avoid this debt through bankruptcy, but to petition to the court with jurisdiction over his or her divorce decree for a modification of any such agreement in light of changed circumstances.[245]

The viability of the present circumstances test is uncertain in the remaining federal circuits. Although the bankruptcy cases within the First,[246] Fourth,[247]

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the husband's complaint to the bankruptcy court, that court found the obligations to be nondischargeable. *Id.* When the federal district court affirmed the bankruptcy court's decision, the husband appealed to the Tenth Circuit Court of Appeals. *Id.*

241. *Id.* at 1166.

242. *Id.*

243. No. 90-3258 (3d Cir. Oct. 19, 1990) (LEXIS, Genfed Library, USAPP file).

244. *Compare* MacDonald v. MacDonald (*In re* MacDonald), 69 Bankr. 259, 277-78 (Bankr. D.N.J. 1986) (approved present circumstances test but found it inapplicable to the facts of the case) *with* Jenkins v. Jenkins (*In re* Jenkins), 94 Bankr. 355 (Bankr. E.D. Pa. 1988) (rejecting present circumstances test). The *Jenkins* court noted that while a specific debt may be part support and part property division, determination of actual amounts is a task for the state courts:

> [S]uch a limited approach might, on occasion, result in the nondischargeability of a debt beyond what an objective bankruptcy observer would conclude was sufficient to meet the needs of the non-debtor spouse. Yet a more expansive role exceeds congressional intent (to the extent discernable from the legislative history), differs from the longstanding approach under the former Act, undermines comity considerations and threatens to convert this bankruptcy forum into a federal domestic relations court. If the original state court award was excessive, it may be addressed by a state court appeal. If the circumstances of the parties change warranting an adjustment of the obligation, state law allows a party to request a modification.

Id. at 360-61 (citations omitted).

245. Chedrick v. Chedrick (*In re* Chedrick), 98 Bankr. 731, 734 (W.D. Pa. 1989).

246. *Compare* Altavilla v. Altavilla (*In re* Altavilla), 40 Bankr. 938, 941 (Bankr. D. Mass. 1984) (adopting *Calhoun* intent test and noting that relevant factors in determining intent include "relative earning powers of the parties, both at the time of the divorce *and thereafter*" (emphasis added)) *with* Rosell v. Gibson (*In re* Gibson), 61 Bankr. 997, 999 (Bankr. D.N.H. 1986) ("[i]t is important to note

Fifth,[248] and Seventh[249] Circuits have conflicted, the more recent decisions indicate a trend toward its rejection. A primary rationale for rejecting the test is the concept that modification of a debt by a bankruptcy court would undermine state interests and authority.[250] One court concluded that not only is the bankruptcy court ill-equipped to determine a reasonable amount of support, but such a determination would demand that the matter remain open for reconsideration upon future changes in circumstances.[251] Another court has observed that the split of authority results from a difference in perspective: the Sixth Circuit approach concentrates on the debtor, emphasizing the federal policy of providing a fresh start, while the majority position focuses on the debtor's dependents and "the expressed federal policy of a [sic] favoring the continuing enforceability of familial obligations."[252]

Because neither the statutory language nor the legislative history is conclusive in resolving the controversy over the present circumstances test,[253] the answer to the dilemma must be based on policy. If the federal courts are to defer

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. . . that subsequent transactions or changes in conditions effecting the parties have *no bearing* upon the decision") (emphasis altered)).

247. *See* Stone v. Stone (*In re* Stone), 79 Bankr. 633 (Bankr. D. Md. 1987), *aff'd*, 98 Bankr. 243 (1988); *see also* West v. West (*In re* West), 95 Bankr. 395, 400 (Bankr. E.D. Va. 1989) (where state divorce court's clarification of marital obligation indicates intent, no need to consider additional factors; not the role of bankruptcy court to rewrite decree). *But see* Boyd-Leopard v. Douglass (*In re* Boyd-Leopard), 40 Bankr. 651, 656 (Bankr. D.S.C. 1984) (obligation to pay second mortgage on residence no longer constitutes support when former spouse no longer resides in home).

248. *See* Smith v. Smith (*In re* Smith), 114 Bankr. 457, 464 (Bankr. S.D. Miss. 1990) (rejects "minority" *Calhoun* approach); Jackson v. Jackson (*In re* Jackson), 102 Bankr. 524, 531-32 (Bankr. M.D. La. 1989) (stating court not bound to *any* test or factors); *In re* Smith, 97 Bankr. 326, 330 (Bankr. N.D. Tex. 1989) (bankruptcy court not proper forum to reexamine divorce arrangements); Levy v. Levy (*In re* Levy), 63 Bankr. 449 (Bankr. W.D. La. 1986); Bell v. Bell (*In re* Bell), 61 Bankr. 171 (Bankr. S.D. Tex. 1986). *Contra* Sullivan v. Sullivan (*In re* Sullivan), 62 Bankr. 465, 472-74 (Bankr. N.D. Miss. 1986) (portion of child support award is manifestly unreasonable in light of present circumstances and therefore partially dischargeable); Holland v. Holland (*In re* Holland), 48 Bankr. 874, 876-77 (Bankr. N.D. Tex. 1984) (adopts *Calhoun* test but finds no change in circumstances since divorce decree). *See generally* Comment, *Alimony and Child Support*, *supra* note 8 (providing an overview of the dischargeability of family support obligations in the Fifth Circuit, including a review of the conflicting policies in bankruptcy and domestic relations law).

249. *See* Fryman v. Wendt (*In re* Fryman), 67 Bankr. 112, 113-14 (Bankr. E.D. Wis. 1986) (arrearages on child support not dischargeable despite wife's remarriage and children's attaining age of majority); *see also* Penn v. Penn, No. 88 C 10704 (Bankr. N.D. Ill. May 26, 1989) (WESTLAW, FBKR-CS 91748) (although court cited *Calhoun* favorably with respect to factors indicating intent, *Calhoun* not followed to extent "inconsistent with Seventh Circuit law"). *But see* Chambers v. Chambers (*In re* Chambers), 36 Bankr. 42, 44-45 (Bankr. W.D. Wis. 1984) (need for support determined at time bankruptcy petition filed, although court need not balance present financial circumstances of parties in determining nature of debt owed to third party).

250. *See Fryman*, 67 Bankr. at 113; *Levy*, 63 Bankr. at 451; Booth v. Booth (*In re* Booth), 44 Bankr. 674, 679 (Bankr. W.D. Mo. 1984).

251. *Levy*, 63 Bankr. at 451. The *Levy* court believed that a present circumstances evaluation is inappropriate for reasons of both comity and practicality, despite the likelihood that the debtor would have no state court recourse because of the nonmodifiability of his contractual obligation. *Id.*

252. Jackson v. Jackson (*In re* Jackson), 102 Bankr. 524, 532 n.13 (Bankr. M.D. La. 1989). In an extensive footnote, the *Jackson* court criticized the *Calhoun* approach, suggesting that an inquiry into present circumstances requires the bankruptcy court "in fact to sit as a surrogate state family court to monitor the substantive propriety of state court awards," in what would amount to a "full-blown state court alimony trial." *Id.*

253. *See supra* notes 207-13 and accompanying text.

to the state courts on issues relating to the modification of support, it is instructive to examine the impact of bankruptcy on state court modification actions.

IV. THE IMPACT OF BANKRUPTCY ON STATE COURT MODIFICATION ACTIONS

A. Upsetting the Balance of Need and Ability

When bankruptcy has disrupted the financial balance between former spouses, one of them is likely to bring a state court modification action shortly thereafter.[254] A bankruptcy that occurred prior to divorce is not relevant, because modification requires evidence of a change of circumstances since the previous support hearing.[255] Similarly, courts have refused to hear a motion for modification until bankruptcy proceedings are completed.[256] However, a bankruptcy discharge granted subsequent to divorce frequently is a factor in determining whether modification is appropriate. The mere fact that bankruptcy has occurred does not in itself compel modification, although it may be a significant factor,[257] and, as in all modification actions, a trial judge is afforded considerable discretion in determining whether a modification of support should be authorized in light of bankruptcy.[258]

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254. Bankruptcy may also be a consideration in a contempt action. The typical situation occurs when the nonbankrupt spouse alleges that the debtor should be held in contempt of court for failure to pay spousal or child support and the debtor defends by arguing that his obligation was discharged in the bankruptcy case. *See* Hopkins v. Hopkins, 109 N.M. 233, 784 P.2d 420 (1989). Alternatively, because inability to comply with a court order is a defense to a contempt action, the debtor may allege that his bankruptcy is evidence that he was unable to pay the debt at the time it was due. *Compare* Patterson v. Gartman, 439 So. 2d 171, 173 (Ala. Civ. App. 1983) (obligor may be held in contempt for willful refusal to pay support, despite decrease in income and bankruptcy) *with Hopkins*, 109 N.M. 233, 784 P.2d 420; Brown v. Brown, 670 S.W. 2d 167, 171 (Mo. App. 1984) (bankruptcy is factor in avoiding contempt charges).

255. *See* McCarthy v. McCarthy, 225 Ga. 326, 327, 168 S.E.2d 164, 165-66 (1969); *cf.* Neier v. Neier (*In re* Neier), 45 Bankr. 740, 743 (Bankr. N.D. Ohio 1985) (marital debt arising from post-bankruptcy divorce decree not discharged). *See generally* Fibich & Floyd, *supra* note 8, at 643-46 (discussing the pursuit of divorce after bankruptcy filed); Robbins, *The Advantages of a Timely Bankruptcy*, 5 FAM. ADVOC., Winter 1983, at 14 (instructing attorneys on how best to coordinate divorce litigation with a bankruptcy under the Bankruptcy Reform Act of 1978).

256. *See* Broussard v. Norris, 470 So. 2d 399, 401 (La. Ct. App. 1985) (modification case remanded for reconsideration after termination of bankruptcy action because outcome could effect change of circumstances); Schmidt v. Schmidt, 432 N.W.2d 860, 863 (N.D. 1988) (modification action dismissed until final Chapter 11 plan approved). *But see* Kruse v. Kruse, 464 N.E.2d 934, 938 (Ind. Ct. App. 1984) (modification of child support upheld despite father's filing bankruptcy petition). Although the automatic stay of 11 U.S.C. § 362 provides that collection of alimony, maintenance, or support is not barred, the provision prohibits placement of a lien on debtor's real estate as security for a property settlement. 11 U.S.C. § 362 (1988), *amended by* Act of June 25, 1990, Pub. L. No. 101-31, 104 Stat. 267; *see* Stolp v. Stolp, 383 N.W.2d 409, 410 (Minn. Ct. App. 1986); *see generally* White, *Spousal and Child Support*, *supra* note 8, at 373 (relationship of automatic stay to collection of support actions).

257. Murphy v. Murphy, 491 So. 2d 978, 980 (Ala. Civ. App. 1986) (existence of bankruptcy is considered in modification proceeding but does not mandate modification); Ribner v. Ribner, 6 Conn. App. 98, 104, 503 A.2d 612, 616 (1986) (bankruptcy a significant but not conclusive factor in request for modification as husband's condition actually improved after bankruptcy).

258. *See, e.g.*, *Patterson*, 439 So. 2d at 173 (modification of support decree based on changed circumstances is within sound discretion of trial court and should be reversed only for plain abuse of discretion); Wier v. Wier, 410 So. 2d 78, 81 (Ala. Civ. App. 1982) (same), *overruled in part on other grounds*, Bayliss v. Bayliss, 550 So. 2d 986, 994 (Ala. 1989).

The bankruptcy of the support obligor may justify either an upward or downward adjustment of the support obligation, depending on the totality of the circumstances. In some cases, the debtor's bankruptcy may be persuasive evidence of his decreased ability to pay the previously ordered amount of support, justifying a reduction of future payments.[259] Totally ignoring the debtor's bankruptcy may constitute error.[260] On occasion, bankruptcy may even be considered an appropriate factor in reducing arrearages as well as future support.[261] However, when an obligor pleads his bankruptcy as grounds for reducing a support order, state courts frequently will consider the obligor's earning potential, rather than his current financial status.[262] Furthermore, the fact that bankruptcy is a voluntary action may work against the debtor who seeks a reduction in support.[263]

The debtor's bankruptcy also may result in granting the former spouse's motion for an increase in support on a temporary or permanent basis. The recipient's need for support may have risen if that spouse suffered financial reversals because of the other's bankruptcy.[264] For example, the recipient spouse

259. *See* Deaton v. Deaton, 393 So. 2d 408, 409 (La. Ct. App. 1980) (husband's uncontroverted evidence of personal and corporate bankruptcy along with other factors warranted reduction, although court reserved plaintiff wife's right to petition for increase if husband's financial situation improved); Streitz v. Streitz, 363 N.W.2d 135, 138 (Minn. Ct. App. 1985) (bankruptcy is factor demonstrating material change in circumstances entitling debtor to reduction); Cook v. Cook, 364 N.W.2d 74, 78 (N.D. 1985) (although ability not necessarily permanently impaired because of bankruptcy, unlikely that debtor could have borrowed funds to make original payment); *cf.* McKeever v. McKeever, 486 So. 2d 1297, 1299 (Ala. Civ. App. 1986) (bankruptcy might have relieved husband of portion of support obligation had he not undertaken new obligations).

260. Siravo v. Siravo, 424 A.2d 1047, 1051 (R.I. 1981).

261. *See Streitz*, 363 N.W. at 138 (bankruptcy is one factor in determining father's nonwillful failure to pay child support and can lead to reduction of arrearages); *see also* Morovitz v. Morovitz, 743 S.W.2d 893, 896-97 (Mo. Ct. App. 1988) (trial court abused discretion in assessing arrearages for child support without consideration of bankruptcy stipulation between parties and trustee in bankruptcy), *cert. denied*, 110 S. Ct. 1822 (1990); *cf.* Bledsoe v. Bledsoe, 344 N.W.2d 892, 896 (Minn. Ct. App. 1984) (despite debtor's declaration of bankruptcy, trial court did not abuse its discretion by refusing to forgive debtor's child support arrearages).

262. *See* Davis v. Davis, 518 So. 2d 156, 159 (Ala. Civ. App. 1987); *Patterson*, 439 So. 2d at 173-74; Harris v. Harris, 91 N.C. App. 699, 704, 373 S.E.2d 312, 315 (1988); *see also* Murphy v. Murphy, 491 So. 2d 978, 980 (Ala. Civ. App. 1986) (lack of actual earnings or filing for bankruptcy do not necessarily warrant modification).

263. *See Harris*, 91 N.C. App. at 705, 373 S.E.2d at 316 (voluntary bankruptcy, under a Chapter 11 reorganization, may not be used to avoid child support nor to reduce the amount owed; debtor may be held in contempt).

264. *See* Kilby v. Kilby, 500 So. 2d 33, 35 (Ala. Civ. App. 1986) (temporary modification of alimony and permanent increase of child support authorized where husband's bankruptcy caused wife to suffer financial reversals and affected children's standard of living); Kruse v. Kruse, 464 N.E.2d 934, 937 (Ind. Ct. App. 1984) (husband's bankruptcy caused foreclosure procedure on wife's home, justifying increase of child support; husband's net pay and wife's expenses both increased); Foster v. Childers, 416 N.W.2d 781, 786 (Minn. Ct. App. 1987) (change in circumstances because of husband's bankruptcy may warrant modification of original decree); Siegel v. Siegel, 243 N.J. Super. 211, 214, 578 A.2d 1269, 1270-71 (N.J. Super. Ct. Ch. Div. 1990) (increase in alimony appropriate to compensate for loss of income from deferral of property settlement payment during husband's bankruptcy action); Eckert v. Eckert, 144 Wis. 2d 770, 773-74, 424 N.W.2d 759, 761 (Wis. Ct. App. 1988) (fixed term maintenance extended indefinitely because of substantial detrimental change in financial circumstances of the parties caused by husband's bankruptcy), *rev. denied*, 145 Wis. 2d 916, 430 N.W.2d 351 (Wis. 1988); *see also* Simpkins v. Simpkins, 435 So. 2d 753, 754 (Ala. Civ. App. 1983) (temporary increase in child support did not represent abuse of discretion where wife's financial condition was depressed after she incurred liability on loan discharged by husband's bankruptcy).

may be required to pay debts owed to third parties, which the debtor had agreed to pay before his discharge, and therefore may have less ability to support herself or the parties' children.[265] Furthermore, discharge of other debts in bankruptcy may reduce demands on the debtor's income. His ability to support his family may actually be enhanced, defeating his plea for a reduction of his support obligation,[266] or bolstering the recipient's motion for an increase in support.[267]

Bankruptcy by the recipient spouse similarly may upset the balance of need and ability, justifying a modification of support. The recipient's own bankruptcy may be a factor indicating increased need and warranting an elevation in support from a former spouse.[268] Conversely, the support recipient's own bankruptcy, which discharged her other debts, may improve her financial condition to the extent that her former husband is entitled to a reduction of support, especially if he became directly responsible for payment of those debts.[269] Thus, the effect of bankruptcy in a modification action depends upon its overall impact on the parties' financial situation.

B. No Reinstatement or Offset

Discharge of a debt in bankruptcy extinguishes the debtor's liability and forbids the creditor from taking any action "to collect, recover or offset any such debt."[270] Thus, once a bankruptcy court has determined that a marital debt is dischargeable, the supremacy clause and principles of comity preclude the state

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265. *See, e.g., Simpkins*, 435 So. 2d at 754 (child support increase permitted when mother required to pay debt that father had assumed, which was later discharged); *In re* Myers, 54 Wash. App. 233, 239-40, 773 P.2d 118, 122 (1989) (wife's needs increased because of liability on debts assumed by husband and discharged in his bankruptcy; increase in spousal support authorized).

266. Stolp v. Stolp, 383 N.W.2d 409, 413 (Minn. Ct. App. 1986); *see also* Roan v. Roan, 504 So. 2d 1220, 1221 (Ala. Civ. App. 1987) (elimination of personal indebtedness through bankruptcy weighed against reduction in child support); Gaines v. Gaines, 106 Ill. App. 2d 9, 13, 245 N.E.2d 574, 577 (1969) (discharge in bankruptcy does not diminish debtor's ability to make support payments because the discharge "relieves him of debts and thereby strengthens his financial position").

267. Coakley v. Coakley, 400 N.W.2d 436, 441 (Minn. Ct. App. 1987); Horcasitas v. House, 75 N.M. 317, 320, 404 P.2d 140, 142 (1965); Strauss v. Strauss, 619 S.W.2d 18, 19 (Tex. Ct. App. 1981).

268. *See In re* Loomis, 153 Ill. App. 3d 404, 405, 408, 505 N.E.2d 766, 767, 769 (1987) (wife's bankruptcy and loss of home constituted change of circumstances warranting increase in her support from husband). Similarly, the bankruptcy of a third party who owes the recipient spouse money may affect a recipient's need for support from a former spouse. *See* Gardner v. Gardner, 391 N.W.2d 865, 869 (Minn. Ct. App. 1986) (bankruptcy of party to contract assigned to recipient spouse as part of divorce settlement constitutes substantial detrimental change in financial circumstances and may justify increase in child support payments).

269. *See* Clements v. Clements, 134 Cal. App. 3d 737, 746, 184 Cal. Rptr. 756, 761 (1982) (husband entitled to decrease in spousal support requirements because wife's indebtedness was reduced and husband's obligation to creditor was increased by her discharge); Macy v. Macy, 714 P.2d 774, 781 (Wyo. 1986) (wife's discharge of debts, which she had assumed at divorce, may constitute a change of circumstances sufficient to reduce the husband's support obligation).

270. 11 U.S.C. § 524(a) provides:

> A discharge in a case under this title—
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> . . .
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, from property of the debtor, whether or not discharge of such debt is waived . . . .

11 U.S.C. § 524(a)(2) (1988).

court from reexamining the nature of that debt.[271] Nor may a state court amend or modify a divorce decree to reinstate a discharged debt. Thus, the nonbankrupt spouse may have no remedy in a subsequent state court action and may be compelled to absorb the financial loss.[272]

Even when the recipient spouse fails to litigate the nature of a marital debt in the bankruptcy action, some state courts construe the offset rule strictly, regarding themselves as powerless to modify a divorce decree to grant alimony.[273] Although, under state law, when any amount of alimony has been reserved initially, the trial court has continuing jurisdiction to alter and amend the award upon a showing of changed circumstances, if no alimony had been ordered in the original divorce decree, a final divorce decree cannot be modified to grant support.[274] The issue of alimony is res judicata and later modification is precluded, unless the movant is entitled to relief under appropriate rules of civil procedure.[275] The result of a modification proceeding following bankruptcy thus may hinge on the verbal formula employed in the original divorce decree.

Similarly, notwithstanding the fact that a property division clearly was granted *in lieu* of alimony, at least one court has found that it had no jurisdiction to amend the decree.[276] While noting that "[t]his unfortunate result may be

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271. *See* Cohen v. Cohen, 105 Cal. App. 3d 836, 843, 164 Cal. Rptr. 672, 676 (1980); Hopkins v. Hopkins, 487 A.2d 500, 504 (R.I. 1985); Fitzgerald v. Fitzgerald, 144 Vt. 549, 552, 491 A.2d 1044, 1046 (1984) (no collateral attack of bankruptcy court's determination of dischargeability).

272. *See, e.g.*, Williams v. Williams, 157 Cal. App. 3d 1215, 1227, 203 Cal. Rptr. 909, 917 (1984) (trial court exceeded its jurisdiction by ordering offset that had effect of modifying property settlement); *Cohen*, 105 Cal. App. 3d at 843, 164 Cal. Rptr. at 676 (federal remedy of discharge in bankruptcy is exclusive and thereby precludes any type of state action that would interfere with its outcome); Stolp v. Stolp, 383 N.W.2d 409, 413 (Minn. Ct. App. 1986) (where no maintenance previously was awarded, trial court had no jurisdiction currently to award maintenance for any purpose); Benavides v. Benavides, 99 N.M. 535, 538, 660 P.2d 1017, 1020 (1983) (final divorce decree that incorporates property settlement including outstanding debts may not be modified after expiration of statutory period for doing so).

273. *Stolp*, 383 N.W.2d at 413; *Benavides*, 99 N.M. at 538, 660 P.2d at 1020.

274. *See supra* notes 46-47 and accompanying text (discussing scope of court's jurisdiction on matters of modification).

275. In the *Benavides* case, the couple had stipulated to a divorce settlement agreement that recited "Alimony: None." *Benavides*, 99 N.M. at 536, 660 P.2d at 1018. Neither the stipulation nor the divorce decree, which incorporated the agreement, mentioned a loan secured by a second mortgage on the family residence. *Id.* Within the same month as the divorce, the husband filed bankruptcy, listing the loan in the bankruptcy petition and separately listing the wife as a creditor because of their joint obligation on the loan. *Id.* In the bankruptcy action, the wife unsuccessfully attempted to compel payment by the husband, asserting that he fraudulently induced her to execute the mortgage; however, she did not contest discharge under § 523(a)(5). *Id.* at 537-38, 660 P.2d at 1019-20. Once the bankruptcy stay was lifted, allowing the wife to seek an increase in child support, she filed a motion to increase child support and the trial court granted a modification of the divorce decree, granting her an amount of support equal to the amount owed on the debt, on the basis that the decree was inequitable because the divorce court had not been informed of the loan's existence. *Id.* at 536-37, 660 P.2d at 1018-19. On the husband's appeal, the New Mexico Supreme Court reversed, holding that modification was precluded by res judicata when no alimony had been granted by the original divorce decree. *Id.* at 536-37, 660 P.2d at 1020. Neither New Mexico Rule of Civil Procedure 59, granting new trials, nor Rule 60, providing relief from judgments nor orders under designated conditions, was applicable, and, in this case, the trial court had not committed a mistake pursuant to Rule 60(b), but properly acted on the information before it at the time because the parties had knowingly concealed information about the debt. *Id.* at 539, 660 P.2d at 1020-21. The wife was not entitled to relief based on the mistake of the parties when she and her then-husband consciously chose the course of nondisclosure. *Id.* at 539, 660 P.2d at 1021.

276. Stolp v. Stolp, 383 N.W.2d 409 (Minn. Ct. App. 1986). In the *Stolp* case, the original

harsh, but [it is] the law,"[277] the court concluded that modifying the decree would circumvent the bankruptcy court's discharge.

Even when the divorce decree expressly retained jurisdiction over spousal support, one court, in *Cohen v. Cohen*,[278] held that modification was precluded after the debtor was discharged of his liability on marital debts. The *Cohen* court reasoned that "the federal remedy of discharge in bankruptcy is exclusive in the sense that the federal statutory scheme precludes any type of state action which would interfere with its objectives."[279] Thus, the state court is precluded from taking any action that would "either directly or indirectly, nullify the federal bankruptcy discharge of . . . part or all of the community indebtedness."[280] Attempts to draft provisions to avoid the consequences of bankruptcy also have been thwarted. In *Coakley v. Coakley*[281] the parties had foreseen the precise possibility of the husband's bankruptcy and had included a provision in their stipulated divorce decree that the court would retain jurisdiction to reopen the judgment in that event.[282] Nonetheless, the court later held that the stipulation was an invalid attempt to waive bankruptcy rights.[283]

If, however, the original divorce decree properly is structured to reflect *some* alimony, courts frequently have struggled to avoid the harsh results of bankruptcy discharge. Although the court in *Coakley* found the stipulation that purported to authorize modification of the property division provisions unenforceable, it achieved the desired result by permitting an increase in both spousal

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divorce decree specifically stated that the wife was "not granted any maintenance and instead [was] award[ed] a $10,500 property settlement to be paid in four installments over three years." *Id.* at 410. The husband filed bankruptcy within the same year as the divorce; the wife never brought an action in the bankruptcy court and the discharge of the debt to her was granted without objection. *Id.* In the wife's later action for contempt, based on allegations that the husband had failed to pay child support, the trial court granted her maintenance. *Id.* at 410-11. In reversing, the appellate court held that because a property division is final, the trial court had no jurisdiction to amend the property settlement, observing that if some maintenance originally had been awarded, or if the divorce court had reserved the issue for future determination rather than expressly waiving maintenance, modification might have been appropriate. *Id.* at 412.

277. *Id.*

278. 105 Cal. App. 3d 836, 843, 164 Cal. Rptr. 672, 676 (1980).

279. *Id.*

280. *Id.*

281. 400 N.W.2d 436 (Minn. Ct. App. 1987).

282. *Id.* at 438. In *Coakley* the husband had already filed a Chapter 13 bankruptcy action at the time of divorce. Foreseeing the possibility of his obtaining a discharge of his obligation to pay the wife installment payments of her share of his pension, the couple's stipulated divorce judgment provided that "if [the husband] were to amend his petition to one for Chapter 7 liquidation relief, the court would retain jurisdiction and either party could move for a reopening of the judgment on the issues of property distribution, maintenance, and support." Subsequently, the husband converted his bankruptcy action to Chapter 7 and, within two months of the divorce, was discharged of his obligation under the property settlement and of his liability on certain debts jointly owed to third parties. *Id.*

283. *Id.* at 440. When both parties attempted to reopen the judgment, the trial court refused to reopen the property provision, finding the stipulation an invalid attempt to waive bankruptcy rights. *Id.* at 439. The Minnesota Supreme Court agreed, noting that a waiver of bankruptcy rights is enforceable only with respect to obligations in the nature of support. *Id.* at 440 (citing Watrous v. George (*In re* George), 15 Bankr. 247, 249 (Bankr. N.D. Ohio 1981)). The court further concurred that the "imposition of a new property settlement . . . would deny him the relief granted him by the bankruptcy," and noted that both bankruptcy law and state law regard property settlements as final and prevent the nonbankrupt spouse from recovering the losses suffered. *Id.*

maintenance and child support because modification of support was authorized by statute, even in the absence of an express agreement.[284] If any support was awarded initially, that amount may be increased because of the change in circumstances associated with the bankruptcy action.[285]

Thus, although a discharged debt itself may not be offset or reinstated by a state court, the nonbankrupt spouse may be compensated indirectly if the original divorce decree was formulated appropriately. Despite potential frustration of the debtor's fresh start, bankruptcy discharge is recognized as a legitimate factor in state court modification proceedings.[286]

The Rhode Island Supreme Court went a step further in *Hopkins v. Hopkins*,[287] holding that the state court was not precluded from reevaluating the wife's express conditional waiver of alimony in the divorce decree. Although no formal order for alimony had appeared in the original divorce decree, the court reasoned that the then-effective Rhode Island statute[288] permitted the trial court to review and alter alimony awards and to make any related decree that could have been made in the original suit.[289] Thus, the *Hopkins* court concluded that the original order of a payment to be made to a third party could be construed as equivalent to an alimony award to the wife, and the husband's subsequent discharge of direct liability to the third party creditor was a sufficient change of circumstances to justify modification of the amount he owed the wife.[290]

Correspondingly, courts have reduced support obligations to offset indirectly a recipient's discharge of debts for which the support obligor becomes responsible.[291] For example, in *Clements v. Clements*,[292] the California Court of

284. *Id.* The court concluded that the results of the bankruptcy constituted a change of circumstances that would authorize the trial court, in its discretion, to increase maintenance and support. *Id.* The court further held that the trial court had not erred in directing the debtor to pay arrearages on mortgage and tax payments because there was no indication that the bankruptcy court was aware of the existence of the debts. *Id.* at 441-42.

285. *Id.* at 440. In Eckert v. Eckert, 144 Wis. 2d 770, 424 N.W.2d 759 (Wis. Ct. App. 1988), the court affirmed an extension of an eighteen-month maintenance award indefinitely when the husband's discharge prevented the wife from receiving her share of the marital estate and caused her to become directly liable for credit card debts assigned to the husband. *Id.* at 774-75, 424 N.W.2d at 761; *see also* Siegel v. Siegel, 243 N.J. Super. 211, 578 A.2d 1269 (1990) (increase in alimony granted during pendency of bankruptcy action). Even when no spousal support had been entered in the initial decree, courts have compensated a spouse indirectly by increasing child support. For example, in Kruse v. Kruse, 464 N.E.2d 934 (Ind. Ct. App. 1984), the court increased child support after the husband had been discharged of his obligation on a second mortgage on the family home and a lien on a van awarded to the wife in the divorce action. *Id.* at 937-38. The wife lost both the home and van to creditors after the husband's discharge. *Id.* at 937. Dismissing the husband's assertion that the increase in child support impermissibly converted the property settlement to alimony, the *Kruse* court concluded that the husband had not been ordered to pay discharged debts, nor had the trial court redetermined dischargeability. *Id.* Rather, the trial court had properly focused on the status of the parties at the time of the petition for modification. *Id.* at 938.

286. *See In re* Danley, 14 Bankr. 493, 495 (Bankr. D.N.M. 1981); *Eckert*, 144 Wis. 2d at 778-79, 424 N.W.2d at 762 (Wis. Ct. App. 1988).

287. 487 A.2d 500 (R.I. 1985).

288. R.I. GEN. LAWS § 15-5-16 (1981) (amended 1984).

289. *Hopkins*, 487 A.2d at 504.

290. *Id.*

291. *See* Clements v. Clements, 134 Cal. App. 3d 737, 746, 184 Cal. Rptr. 756, 761 (1982); Jones v. Jones, 300 Minn. 182, 188-89, 220 N.W.2d 287, 291 (1974) (child support increased after wife became liable for debt for which husband was discharged).

Appeals affirmed a modification order that reduced a husband's spousal support obligation after the wife was discharged of debts assigned to her in the divorce action.[293] The court recognized "two competing policy considerations": the bankruptcy fresh start doctrine and the family law court's "strong interest in requiring the bankrupt to fulfill obligations that are an indivisible part of the equal division of community property."[294] Thus, the court implicitly acknowledged the inextricable interrelationship between support and property division. It observed that although the wife's assumption of indebtedness could not have been construed to be "in the nature of alimony or support" because the husband was in a considerably better financial position,[295] reduction of the husband's support obligation was proper because the wife's need was reduced to the extent of her discharge, while the husband's obligations to third party creditors increased proportionately.[296]

Likewise, although a former husband is enjoined from directly and unilaterally offsetting the amount for which he became responsible because of the wife's discharge, the change in circumstances may justify modification of child support.[297] Even when no direct spousal support has been ordered, the custodial parent might benefit indirectly from the child support and that award may be modified when the resulting liability upsets the balance of the parties' financial situation.[298]

At the same time, when no express support is ordered in the initial decree, the payor spouse may have no remedy when the payments he owes the bankrupt spouse represent a property division. Although the bankrupt spouse has been

292. 134 Cal. App. 3d 737, 184 Cal. Rptr. 756 (1982).

293. *Id.* at 746, 184 Cal. Rptr. at 761. The facts of *Clements* were appealing: after the last community asset, which the wife had not listed in her bankruptcy action, was liquidated and the profits split between the former spouses, the wife immediately began to spend her share instead of paying the debts that had been assigned to her in the divorce decree. *Id.* at 741, 184 Cal. Rptr. at 758. The husband obtained a temporary restraining order from the state court to prevent her from spending the remaining funds, pending a hearing to determine whether her money from the liquidation of community property must be used to satisfy her discharged debts. *Id.* When the bankruptcy court in an *ex parte* order dissolved the restraining order, the wife spent $5237 of her remaining $6000 in less than two weeks. *Id.* at 742, 184 Cal. Rptr. at 758. The state court then automatically reinstated a previous order, which allowed the husband to offset spousal support payments to the extent that he became liable for the debt. *Id.* The wife appealed first to the bankruptcy court, which held that it was without jurisdiction to invalidate a state court modification action. *Id.* at 742 n.3, 184 Cal. Rptr. at 758 n.3. At the formal hearing on the wife's objection to the state court action, the bankruptcy court for the first time was apprised of the true nature and purpose of the debt, and stated that modification actions are the "exclusive province of the state family law court." *Id.*

294. *Id.* at 743-44, 184 Cal. Rptr. at 759.

295. *Id.* at 742, 184 Cal. Rptr. at 759.

296. *Id.* at 746, 184 Cal. Rptr. at 761. The court further implied that if the divorce court had originally specifically ordered that the debts be paid from the sale of community property, the entire problem might have been avoided. *Id.* at 744-45, 184 Cal. Rptr. at 760.

297. Macy v. Macy, 714 P.2d 774, 781 (Wyo. 1986). Although the court in *Macy* remanded without suggestion "that child support must be reduced or increased," it noted the extent of the debts for which the husband had become liable and questioned whether his financial ability was such that he could meet the increased child support decreed by the trial court. *Id.* A dissenting opinion criticized the court's decision to remand for hearing on the husband's oral motion for reduction of child support as permitting an offset to be accomplished indirectly when it was forbidden to be done directly. *Id.* at 782-83 (Rooney, J., dissenting).

298. *Id.* at 777, 780. The court observed, however, that, unlike withholding alimony, withholding child support deprives the children. *Id.* at 777.

discharged from obligations owed to third parties and the nonbankrupt spouse has become directly liable to those creditors, he will not be able to offset or modify his direct obligation to the bankrupt. *Williams v. Williams*,[299] a California case, is illustrative. In *Williams*, the husband had unilaterally ceased making property settlement payments when the wife failed to comply with her obligations under the parties' divorce decree.[300] The wife was then discharged in bankruptcy of her share of the community debts and her obligations to the husband.[301] The state court granted him an offset of the arrearages for which he was held liable by the creditors, but the appellate court reversed, concluding that no relief was available when no support order existed to be modified.[302]

Although the state has statutory provisions giving the court inherent power to enforce judgments, the *Williams* court interpreted those provisions to be limited by federal bankruptcy law's power to discharge property settlement debts.[303] The court declared, "[d]espite the obvious inequities of permitting one spouse who has assumed a share of the community property debts . . . to subsequently discharge those debts and leave the nonbankrupt spouse liable, in apparent derogation of the otherwise equal division of community property, the practice is well recognized and not one easily circumvented by the trial courts."[304] The debtor's recourse lies in the bankruptcy action, not later in the state court, despite the wife's failure to reveal certain assets and liabilities.[305]

More surprisingly, the *Williams* court also found that the state's statutory authorization to grant support for a spouse when the other spouse is discharged of a property settlement obligation was inapplicable.[306] Section 4812 of the California Civil Code provides:

> In the event obligations for property settlement to a spouse or support of a spouse are discharged in bankruptcy, the court may make all proper orders for the support of such spouse, as the court may deem just, having regard for the circumstances of the respective parties and the amount of any obligation under a property settlement agreement

299. 157 Cal. App. 3d 1215, 203 Cal. Rptr. 909 (1984).

300. *Id.* at 1218, 203 Cal. Rptr. at 910. The husband was to pay the wife $81.49 per month (a share of his retirement pay) for their joint lives. *Id.* To equalize their property division, the wife was ordered to deliver a promissory note, to be secured by a deed of trust on real property awarded her, and to deliver to him certain items of his separate personal property. *Id.* at 1218, 203 Cal. Rptr. at 910-11. After the wife failed to comply and the husband ceased making payments to her, the wife received a writ of execution and levied on the husband's savings account to recover the arrearages. *Id.* at 1218, 203 Cal. Rptr. at 910. When the husband moved to vacate the levy and sought to have the wife held in contempt for her failure to comply with the decree, the wife filed for bankruptcy. *Id.* at 1218, 203 Cal. Rptr. at 910-11.

301. *Id.* at 1219-20, 203 Cal. Rptr. at 912. The husband did not appear in the bankruptcy action to object or attempt to obtain an offset, although he turned over all the papers relating to that action to his attorney. *Id.* at 1220, 203 Cal. Rptr. at 912.

302. *Id.* at 1227, 203 Cal. Rptr. at 917. The trial court deferred on the contempt issue, finding that the wife had committed fraud in both the divorce and bankruptcy actions. *Id.* at 1218, 203 Cal. Rptr. at 911.

303. *Id.* at 1220, 203 Cal. Rptr. 912 (citing CAL. CIV. CODE § 4380; CAL. CIV. PROC. CODE § 128).

304. *Id.* at 1221, 203 Cal. Rptr. at 913.

305. *Id.* at 1223-24, 203 Cal. Rptr. at 914-15.

306. *Id.* at 1225-26, 203 Cal. Rptr. at 916.

which are discharged.[307]

Despite the legislature's intention to address this precise problem,[308] the *Williams* court interpreted the statute to be limited to modifying existing support orders, not final property settlements, notwithstanding the inequities that occur in cases of this nature. Because the periodic payment that the husband owed the wife was not support, no modification could be authorized.

The state courts have recognized the correlation between support and property division to a greater extent than the bankruptcy courts and have appreciated the unfairness that discharge in bankruptcy can impart on the nonbankrupt former spouse. The state courts frequently have demonstrated a willingness—even an eagerness—to remedy the inequity caused by one former spouse's discharge of marital debts, but have been constrained by state law. Those courts, however, possess greater power to prevent such inequity when the dischargeability determination is conducted in a state forum.

C. *Dischargeability Determinations in the State Courts*

Although dischargeability determinations under section 523(a)(5) are usually made in the bankruptcy courts, the jurisdiction of those courts is not exclusive.[309] While section 523(c) requires creditors of specified debts to request a hearing in the bankruptcy action to determine dischargeability,[310] debts under section 523(a)(5) are not included in that provision. Thus, the dischargeability determination for debts falling within section 523(a)(5) may be made by other courts, unless either the debtor or the creditor files a complaint in the bankruptcy court.[311] While the concurrent jurisdiction of the state courts is gener-

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307. CAL. CIV. CODE § 4812 (West 1983 & Supp. 1990).

308. *Williams*, 157 Cal. App. 3d at 1226, 203 Cal. Rptr. at 916. The court quoted the legislative report: "This provision is as close to reinstating debts owed to spouses as federal law will permit. Public policy should encourage payment of debts and support obligations . . . ." *Id.* at 1222, 203 Cal. Rptr. at 916-17 (quoting THE LEGISLATIVE COUNSEL'S DIGEST OF ASSEMBLY BILL NO. 1269 (1976-1978 Reg. Sess.)).

309. 3 L. KING, *supra* note 96, at § 523.15(6); *see also* State *ex rel.* Rough v. District Court of Eighth Judicial Dist., 710 P.2d 47 (Mont. 1985) (district court had jurisdiction to enforce obligation allegedly discharged by bankruptcy suit); Hopkins v. Hopkins, 109 N.M. 233, 238, 784 P.2d 420, 425 (N.M. Ct. App. 1989) ("the bankruptcy court and the state district court have concurrent jurisdiction to determine whether a debt arising out of a divorce agreement is dischargeable under Section 523(a)(5)"). Before the 1970 amendments to the previous Bankruptcy Act, Pub. L. No. 91-467, 84 Stat. 990 (1970), most dischargeability determinations were conducted by state courts. *See* Swann, *supra* note 8, at 234; *see also* Schwartzberg, *supra* note 223, at 6 (noting that until 1970, cases "concerning a creditor's objection to the dischargeability of a specific claim . . . were decided in nonbankruptcy courts by state and federal judges who did not specialize in bankruptcy problems").

310. Section 523(c) of title 11 provides:

> Except as provided in subsection (a)(3)(B) [pertaining to certain unlisted or unscheduled creditors without notice or actual knowledge of the case] of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2) [certain types of fraud], (4) [fraud or defalcation while acting as a fiduciary, embezzlement, or larceny], or (6) [willful and malicious injury] of subsection (a) of this section, unless, on request of the creditor to whom such debt is owned [sic], and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c) (1988).

311. 3 L. KING, *supra* note 96, at § 523.15. The Advisory Committee Note to Bankruptcy Rule 4007(b) states that jurisdiction over dischargeability determinations under § 523(a)(5), *inter alia*, "is

ally acknowledged,[312] those courts have been presented with the opportunity to exercise that jurisdiction on relatively rare occasions.[313] When a state court addresses the dischargeability issue, it must apply federal bankruptcy law.[314] Once the state court has made its dischargeability determination, the issue may not be relitigated in the federal courts.[315]

Typically, because determinations of debts excepted under section 523(a)(5) need not be timely made in the bankruptcy action,[316] the dischargeability issue reaches the state court after completion of a debtor's bankruptcy action in which the bankruptcy court never addressed the nature of a marital debt. Subsequently, when a former spouse attempts to enforce the obligation in state court, the debtor defends by asserting his general discharge.[317] To ascertain whether the debt survived the bankruptcy action, the state court will need to analyze the nature of that debt, employing the federal bankruptcy criteria.

The 1987 Minnesota case of *Long v. Long*[318] is illustrative. In *Long* the parties had acknowledged in a stipulated divorce judgment "that a portion of

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held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum." R. BANKR. P. 4007(b) (1990).

312. *See* Aldrich v. Imbrogno (*In re* Aldrich), 34 Bankr. 776, 780 (9th Cir. 1983); Erspan v. Badgett, 647 F.2d 550, 556 (5th Cir. 1981); Jordan v. Jordan (*In re* Jordan), 47 Bankr. 853, 855 n.4 (Bankr. E.D.N.Y. 1985); Davich v. State of Minnesota *ex rel.* Davich (*In re* Davich), 27 Bankr. 888, 890 (Bankr. D.S.D. 1983); *In re* Marriage of Sailsbury, 13 Kan. App. 2d 740, 742, 779 P.2d 878, 880 (1989); Hopkins v. Hopkins, 109 N.M. 233, 238, 784 P.2d 420, 425 (N.M. Ct. App. 1989); Hopkins v. Hopkins, 487 A.2d 500, 503 (R.I. 1985) (citing 3 L. KING, *supra* note 96, at § 523.15). *But cf.* Romeo v. Romeo (*In re* Romeo), 16 Bankr. 531, 534 (Bankr. D.N.J. 1981) (res judicata and collateral estoppel not applicable where state court merely concluded debts were nondischargeable and basis for conclusion indiscernible).

313. *See* Roberts v. Roberts, 261 Cal. App. 2d 424, 428, 68 Cal. Rptr. 59, 61 (1968); Foster v. Childers, 416 N.W.2d 781, 784 (Minn. Ct. App. 1987); Long v. Long, 413 N.W. 863, 866-67 (Minn. Ct. App. 1987); State *ex rel.* Rough v. District Court, 710 P.2d 47, 49 (Mont. 1985); Loyko v. Loyko, 200 N.J. Super. 152, 156, 490 A.2d 802, 804 (1985); *Hopkins*, 109 N.M. at 238, 784 P.2d at 425; Thompson v. Thompson, 501 N.E.2d 108, 109 (Ohio Ct. App. 1986); Buccino v. Buccino, __ Pa. Super. __, 580 A.2d 13, 14 (1990).

314. *See Sailsbury*, 13 Kan. App. 2d at 743, 779 P.2d at 881; *Rough*, 710 P.2d at 49; *Loyko*, 200 N.J. Super. at 156, 490 A.2d at 804; *Hopkins*, 109 N.M. at 238, 784 P.2d at 425.

315. *See* Goss v. Goss, 722 F.2d 599, 604 (10th Cir. 1983) (when identical dischargeability issue actually litigated in state court, collateral estoppel bars relitigation in federal court); Polley v. Spangler (*In re* Polley), 74 Bankr. 68, 71 (Bankr. S.D. Ohio 1987) (state court determination that debt is nondischargeable has collateral estoppel effect on bankruptcy court); Grimshaw v. Grimshaw (*In re* Grimshaw), 57 Bankr. 181, 183 (Bankr. N.D. Okla. 1986) (same); Kuzminski v. Peterman (*In re* Peterman), 5 Bankr. 687, 691-92 (Bankr. E.D. Pa. 1980) (relitigation of state court's determination that debt is dischargeable precluded by res judicata and collateral estoppel).

316. Bankruptcy Rule 4007(b) provides: "A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule." The Advisory Committee Note states that subdivision (b) "does not contain a time limit for filing a complaint to dischargeability of a type of debt listed as nondischargeable under § 523(a) . . . (5)." R. BANKR. P. 4007(b) advisory committee note; *see also* 3 L. KING, *supra* note 96, at § 523.15(6).

317. Failure to give sufficient notice to the creditor will cause a debt to be considered nondischargeable. 11 U.S.C. § 523(a)(3). Although § 523(a)(3)(A) permits discharge of debts not specified in §§ 523(a)(2), (4), or (6) when the creditor "had notice or *actual knowledge* of the case", 11 U.S.C. § 523(a)(3) (1988) (emphasis added), even if the debt was not listed or scheduled, the courts have interpreted the protection afforded support debts under § 523(a)(5) to override the notice provision. *See* Erspan v. Badgett, 647 F.2d 550, 555 (5th Cir. 1981); *In re* Rediker, 25 Bankr. 71, 75 (Bankr. M.D. Tenn. 1982); Warner v. Warner (*In re* Warner), 5 Bankr. 434, 443 (Bankr. D. Utah 1980); *Hopkins*, 109 N.M. at 239, 784 P.2d at 426.

318. 413 N.W.2d 863 (Minn. Ct. App. 1987).

[their property settlement] is being used for the care and support of the minor children," and set out conditions for the reduction of the husband's twenty years of monthly payments to the wife.[319] Three months after the divorce, the husband filed bankruptcy and listed the wife as an unsecured creditor.[320] Although she had actual notice of the proceeding, the wife did not contest, and the property settlement debt was discharged.[321] Five years later, the wife sought a money judgment in state court for accrued child support under the original property settlement and petitioned for an increase in future child support; the trial court entered a judgment for $16,800 in rearages, but ordered no increase.[322]

On appeal the husband argued that because the wife had notice of the bankruptcy action, her failure to raise the dischargeability question in that court constituted a waiver and the bankruptcy discharge should be considered final.[323] Nevertheless, the court of appeals found that because the debtor had not segregated the portion of the debt attributable to child support from the rest of the debt owed his former spouse, the bankruptcy court never addressed that issue and res judicata did not bar the wife's state court action.[324] The court of appeals interpreted the language of the bankruptcy code as an absolute statement that a debtor is not discharged of his debts owed to a spouse for child support, holding that the rendition of a discharge does not prevent the state court from "looking into the proceedings" in determining the underlying nature of the liability.[325] The court noted:

> The approved practice at present . . . is to enter a general order of discharge and permit the bankrupt to plead his discharge as a defense in the state or other court where the creditor seeks to enforce his claim. The court having jurisdiction of the subject matter of the claim and of the parties is competent to determine whether the debt is affected by the discharge in bankruptcy or whether the claim is excluded under any of the provisions of [bankruptcy law].[326]

The *Long* court concluded that the trial court had correctly determined the portion of the debt that represented nondischargeable child support.[327]

Similarly, in *State ex rel. Rough v. District Court of Eighth Judicial Dis-*

319. *Id.* at 865. Pursuant to their agreement, the husband was to pay the wife $172,300 "for settlement of property rights" at $1896.60 per month for twenty years. They further agreed that the principal would be reduced by $27,300 if both children died before reaching age 18 or if custody were changed, the reduction decreasing by $3,600 per year after the date of the decree. *Id.*

320. The husband listed the debts as "Further Property Settlement for Divorce, Sept. 1981." *Id.*

321. *Id.*

322. *Id.* The wife requested, among other things, a money judgment of $300 per month, representing child support that had accrued since the husband had ceased payments under the property settlement. *Id.* at 866.

323. *Id.* at 867.

324. *Id.*

325. *Id.* (quoting Wetmore v. Markoe, 196 U.S. 68, 72 (1904)).

326. *Id.* (quoting Harrison v. Donnelly, 153 F.2d 588, 590 (8th Cir. 1946), *overruled by* Craycraft v. Adams, 9 Bankr. Ct. Dec. (CRR) 318 (N.D. Ohio June 29, 1982)).

327. The judgment ordered payment of $27,300, the amount of the property settlement that was to have been eliminated if the children no longer lived with their mother. *Id.* at 867-68.

trict, [328] the Supreme Court of Montana concluded that the state court had the authority to determine the nature of a husband's marital agreement to pay a debt owed to a credit union.[329] The husband had listed the credit union, but not his former wife, as a creditor in his bankruptcy petition.[330] After his general discharge, the credit union brought a collection suit against the wife, who then requested the state court to enforce the provision of the divorce decree.[331] The trial court held the husband in contempt for his failure to comply with the decree,[332] and the husband sought certiorari, arguing that the debt had been discharged. The supreme court, noting that "some debts flow through the bankruptcy unaffected even though the debtor is granted a general discharge,"[333] concluded that the state court had the power to determine the nature of the debt.[334] It held that the substance of the debt, not its label, controls its characterization for bankruptcy purposes and remanded the case for determination of the nature of the obligation consistent with bankruptcy law standards.[335]

The state courts consistently have proven that they are capable of applying federal law to ascertain the nature of a marital debt.[336] For example, one court noted that it is appropriate to "look behind the original judgment to ascertain the true nature of the claim or obligation imposed under a divorce decree," and determined that attorney fees awarded to a wife in an earlier divorce action had

328. 710 P.2d 47 (Mont. 1985).

329. *Id.* at 48-49. Five months prior to their divorce, the spouses co-signed a promissory note for $2,394.20 to the credit union. The wife also signed a separate guarantee agreement. *Id.* at 48.

330. *Id.*

331. The wife sought to enforce the terms of the divorce decree and to require the husband to make arrangements that would release her from her obligation to the credit union. *Id.*

332. *Id.* The trial court held that although the bankruptcy discharged the husband's direct obligation to the credit union, it did not discharge his obligation to the wife under the decree. *Id.* It held him in contempt for failing to pay the credit union debt, but stayed the judgment contingent on his making arrangements to pay the debt and the wife's attorney's fees. *Id.* Upon his failure to comply, the court ordered the husband to serve five days in jail and to execute an allotment to the wife to satisfy his obligation to her. *Id.*

333. *Id.*

334. *Id.* at 49.

335. *Id.* The court adopted the Ninth Circuit position that "the court must look beyond the language of the decree to the intent of the parties and to the substance of the obligation." *Id.* at 50 (quoting Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984)).

336. The same result was achieved under the previous Bankruptcy Act, 11 U.S.C. § 35(a)(2) (1976). *See* Roberts v. Roberts, 261 Cal. App. 2d 424, 68 Cal. Rptr. 59 (1968). In *Roberts* the California Court of Appeals decided that the husband's discharge in a bankruptcy action, in which he named his former wife as a creditor, was not res judicata with respect to the dischargeability of periodic payments due under a divorce decree. *Id.* at 426-27, 68 Cal. Rptr. at 61-62. The decree had incorporated the parties' property settlement, in which the husband had agreed, in clear, unambiguous terms, to make a series of periodic payments to the wife "for her support and maintenance . . . continuing until wife dies or remarries." *Id.* at 429, 68 Cal. Rptr. at 62. Although in an earlier state court action the trial court had determined that the debt was based on a property division and, as such, was not modifiable, the supreme court distinguished "pure" property settlements from those settlements that function as support. *Id.* at 427, 68 Cal. Rptr. at 61. It concluded that the debt in question was an "integrated" one, in which property division serves as support, and was not dischargeable under bankruptcy law. *Id.* at 427-28, 68 Cal. Rptr. at 61-62. *Roberts* clearly illustrates that the state courts are competent to apply different definitions of support and property division to distinguish between modification issues and federal dischargeability questions.

not been discharged in the husband's later bankruptcy.[337] That same court held that an award to the wife of the husband's pension benefits and a hold-harmless provision with respect to a bank loan were clearly part of a property division; thus, their discharge in bankruptcy could not be circumvented by denominating both provisions as awards of maintenance.[338] Another court held that the "clear economic realities" facing the parties at the time of their divorce led it to conclude that the husband's assumption of a debt had the effect of providing necessary support to the wife and children, despite the wife's waiver of alimony in the divorce action; therefore, the husband's bankruptcy had not discharged the debt.[339]

Although the state courts have demonstrated their competency in applying federal law to make dischargeability determinations, a remaining issue confronts those courts: What test should a state court apply in making such determinations? Specifically, should a state court modify a support award by employing a present circumstances test?

The Court of Appeals of New Mexico recently confronted that precise question. In *Hopkins v. Hopkins*[340] the court faced the characterization of the nature of a husband's obligation to make mortgage payments on the residence awarded to the wife in an earlier divorce decree after the husband had been granted a general discharge in a bankruptcy action that had not confronted the issue.[341] After analysis of the federal courts' application of the "intent test," the

337. Foster v. Childers, 416 N.W.2d 781, 784 (Minn. Ct. App. 1987) (citing Jones v. Jones, 300 Minn. 182, 186, 220 N.W.2d 287, 290 (1974)).

338. *Id.* at 785. The court failed to analyze the actual effect or function of these debts. It did, however, remand the case for consideration of a modification of maintenance based on the negative effect of the husband's bankruptcy on the wife's financial condition. *Id.* at 786.

339. Loyko v. Loyko, 200 N.J. Super. 152, 157, 490 A.2d 802, 804-05 (1985). During the pendency of the husband's bankruptcy action, the former wife filed an enforcement motion in the state court seeking a declaration that mortgage payment arrears and the husband's obligation to continue paying the mortgage were not dischargeable. *Id.* at 155, 490 A.2d at 803. Although the *Loyko* court relied on Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103 (6th Cir. 1983), it did not consider the relevance of present circumstances of the parties in its decision.

340. 109 N.M. 233, 784 P.2d 420 (1989).

341. In *Hopkins* the parties had obtained a stipulated divorce decree in 1984, under which the husband was to pay child support. *Id.* at 235, 784 P.2d at 422. The wife was awarded the family residence and assumed responsibility for the first mortgage. The husband agreed to assume other community debts, including two which were secured by second and third mortgages on the home. The following year, he filed for bankruptcy in another state, listing the third party creditors, but not his former wife, who had actual knowledge but no formal notification and no knowledge of the bankruptcy stay. After the husband's discharge, the creditors foreclosed on the family residence in 1986 and obtained a deficiency judgment against the wife. Neighbors purchased the home and verbally agreed to convey the second mortgage to her for their purchase price, allowing her to remain in the home. In 1987 the former wife filed a state court motion for contempt against the husband for child support arrearages and for his failure to pay the sums owed to the foreclosing creditors. He, in turn, sought a change of custody and reduction of child support. The trial court denied his motions and awarded the wife child support arrearages. *Id.* at 235-36, 784 P.2d at 422-23. More controversially, the court characterized his obligations on the mortgages as in the nature of child support, and ordered him to execute a note secured by a mortgage on his real property. *Id.* The husband moved for a reopening of the bankruptcy action, seeking an injunction to prevent enforcement of the state court order. *Id.* at 236, 784 P.2d at 423. The bankruptcy court reopened, and his state court appeal was stayed. The bankruptcy court then refused the injunction, finding that although the wife had actual knowledge of the bankruptcy action, she received no formal written notice of either the filing or the injunction against creditor action. *Id.* It concluded that it would be inappropriate to forbid her from bringing a state court action "or otherwise to interfere with state court jurisdiction in

court concluded that the trial court implicitly had found the requisite intent to create a support obligation because of the function of the debt, despite a provision in the divorce decree that no alimony would be awarded.[342]

The *Hopkins* court, however, further adopted the additional elements of *Calhoun*'s intent test, requiring inquiry into the reasonableness of the debt, both at the time of creation and at the time of bankruptcy.[343] Acknowledging that other federal circuits have rejected a reasonableness analysis,[344] the court pointed out that those courts have done so on the rationale that such an inquiry is more appropriate for the state courts; thus, application of a present circumstances test is entirely proper when a state court determines dischargeability.[345] Consequently, after application of a reasonableness test, a debt should be "modified" to the extent that it exceeds a debtor's ability to pay.[346] Because no reasonableness inquiry had been made, the court of appeals remanded the case to the trial court.

Significantly, the *Hopkins* court further noted that "in exceptional circumstances," the original decree could be modified to *include* a support obligation when justified.[347] Rule of Civil Procedure 60(b), recognized as "a reservoir of equitable power in order to accomplish justice,"[348] allows unspecified relief in appropriate circumstances, which the *Hopkins* court believed were present in this case because the husband's failure to make the mortgage payments had resulted in foreclosure upon the family home. Thus, *Hopkins* suggests that the state courts have a vehicle for upward modification of support as well as downward adjustment, in appropriate circumstances when bankruptcy renders the original decree unjust.[349]

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domestic relations matters." *Id.* The husband appealed to the state court, arguing that the debt was not in the nature of support and had been discharged. *Id.* at 234-35, 784 P.2d at 421-22.

342. *Id.* at 239-40, 784 P.2d at 426-27. The trial court found that the obligation was undertaken in lieu of alimony and to provide a home for the children, which the court of appeals viewed as "essential to its conclusion" that the obligation was for support. *Id.* at 239, 784 P.2d at 426. Relevant factors for determining intent include the language of the document, the placement of the provisions in the decree, and the family's need. *Id.*; *see also* Thompson v. Thompson, 27 Ohio App. 3d 296, 501 N.E.2d 108 (1986) (dischargeability determined by state court referee by application of *Calhoun* test; appellant's failure to file transcript prevents review of referee's factual conclusions).

343. *Hopkins*, 109 N.M. at 240, 784 P.2d at 427.

344. *Id.* (citing Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Harrell v. Sharp (*In re* Harrell), 754 F.2d 902 (11th Cir. 1985)).

345. Furthermore, the court found that application of this test is consistent with the congressional intent that "courts determine the essence of a debt which 'is' in the nature of support." *Id.*

346. In applying a reasonableness test, the trial court must determine whether the obligation exceeded the debtor's ability to pay; if it was " 'manifestly unreasonable under traditional concepts of support' " at either its inception or at bankruptcy, a reasonable limit must be imposed. *Id.* (quoting Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1110 (6th Cir. 1983)). The parties' implicit intention to create an obligation that functioned as support authorized the trial court to classify that debt as a nondischargeable support obligation, but only to the extent that the debt was not "manifestly unreasonable" at both relevant times. *Id.* The court should perform a complete evaluation of each party's total financial status, including their earning capacity, work history, and capability. *Id.* at 240-41, 784 P.2d at 427-28.

347. *Id.* at 241, 784 P.2d at 428.

348. Koppenhaver v. Koppenhaver, 101 N.M. 105, 108, 678 P.2d 1180, 1183 (N.M. Ct. App. 1984), *quoted in Hopkins*, 109 N.M. at 241, 784 P.2d at 428.

349. The *Hopkins* court distinguished the earlier *Benavides* case, *see supra* note 275, by noting

Although the state courts can, and have, effectively applied federal law to determine dischargeability, their opportunity to do so has been limited primarily to cases in which the support obligation has been overlooked in the bankruptcy action. When the bankrupt's former spouse has had proper notice and the opportunity to litigate the nature of the debt in the bankruptcy action,[350] res judicata will prevent reevaluation of the debt in state court. Where the nature of the debt has not been addressed squarely in the bankruptcy action, the dischargeability determination may take place many years later.[351] The result is that both spouses may live in uncertainty and the support recipients may be irreparably harmed.[352] Conversely, the nonbankrupt spouse may be allowed to ignore the bankruptcy proceeding and bring a state court action at a much later time, possibly after the debtor has detrimentally relied on his discharge. Failure to settle the dischargeability issue at the time of bankruptcy can result in continuing legal and practical problems; thus, although the state court may be a preferable forum for determining the nature of a marital debt, the issue should be conclusively resolved at the time of bankruptcy to avoid potential injury and protracted litigation.[353] The following discussion suggests an innovative option.

V. AN ALTERNATE APPROACH

Although bankruptcy courts have jurisdiction to determine dischargeability,[354] they also have statutory power to abstain from deciding certain issues in appropriate cases. 28 U.S.C. § 1334 (c)(1) provides for permissive abstention: "Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11."[355] If

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that the trial court in the instant case had found that the obligation to pay the mortgage constituted a support obligation existing in the original decree. *Hopkins*, 109 N.M. at 241, 784 P.2d at 428.

350. *See supra* note 275.

351. *See* Long v. Long, 413 N.W.2d 863 (Minn. Ct. App. 1987) (wife brought state court action five years after husband's bankruptcy).

352. *See* Hopkins v. Hopkins, 109 N.M. 233, 784 P.2d 420 (N.M. Ct. App. 1989) (family residence sold at foreclosure).

353. *But see* Note, *supra* note 102, at 587 (arguing that bankruptcy courts should be authorized to modify alimony in Chapter 13 cases).

354. 28 U.S.C. § 157(b) (1988); *see supra* note 223.

355. 28 U.S.C. § 1334(c)(1) (1988). The Bankruptcy Code extends this power to the bankruptcy courts:

> The court . . . may dismiss a case under this title or may suspend all proceedings in a case under this title, at any time if—
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
>
> (2)(A) there is pending a foreign proceeding; and (B) the factors specified in Section 304(c) of this title warrant such dismissal or suspension.

11 U.S.C. § 305. 28 U.S.C. § 1334(c)(2) provides for mandatory abstention:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise.

there is an ongoing proceeding in a state court, the bankruptcy court may abstain, at least until that proceeding is concluded.[356] However, a pending state court action is not a prerequisite for abstention.[357] In determining whether abstention is appropriate, the court should consider a number of factors, including the effect on the bankruptcy action, the extent of state law issues, the difficulty or uncertainty of state law principles, related proceedings in state courts, and the feasibility of severing state law claims.[358] Because of state interest in family law matters, the bankruptcy courts frequently have abstained with respect to issues involving domestic relations,[359] although the federal courts need not abstain in every case solely because a domestic relations question is involved.[360] One court has noted: "In no other field does abstention better serve the interests of the parties and other interested persons than in that of domestic relations law."[361] Abstention is particularly appropriate when the state court is more familiar than the bankruptcy court with the facts and circumstances of a case and, thus, is in a better position to determine dischargeability.[362] The bankruptcy courts should "avoid invasions into family law matters 'out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.' "[363]

On relatively rare occasions, bankruptcy courts have deferred to state

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The reference in Section 1334(c) to a "particular proceeding" in subsection (1) and a "proceeding" in subsection (2) probably limits its effect to issues encompassing less than the full scope of the bankruptcy case. D. COWAN, COWAN'S BANKRUPTCY LAW AND PRACTICE, § 1.4, 46 (1987 ed.).

356. *See* Ramus v. Ramus (*In re* Ramus), 32 Bankr. 67 (Bankr. N.D. Ga. 1983); Kaplan v. Kaplan (*In re* Kaplan), 18 Bankr. 1018 (Bankr. E.D.N.Y. 1982).

357. World Solar Corp. v. Steinbaum (*In re* World Solar Corp.), 81 Bankr. 603, 612 (Bankr. S.D. Cal. 1988) (mandatory abstention appropriate if action can be timely filed in state court with proper jurisdiction).

358. Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc. (*In re* Republic Reader's Serv., Inc.), 81 Bankr. 422, 429 (Bankr. S.D. Tex. 1987) (additional factors include jurisdictional basis, degree of relationship to the main bankruptcy case, substance of alleged "core" proceeding, burden on the bankruptcy court docket, likelihood of forum shopping, right to a jury trial, and presence of nondebtor parties); *see also* Minstar, Inc. v. Plastech Research, Inc. (*In re* Arctic Enterprises, Inc.), 68 Bankr. 71, 78 (D. Minn. 1986) (abstention appropriate when state court better suited or more convenient or where federal court claim not made in good faith).

359. *See* Kohn v. Hursa (*In re* Hursa), 87 Bankr. 313, 323 (Bankr. D.N.J. 1988) (abstention to allow state court to conclude equitable division of property in ongoing divorce proceeding); Baumgartner v. Baumgartner (*In re* Baumgartner), 57 Bankr. 517, 522 (Bankr. N.D. Ohio 1986) (abstention to allow state court to evaluate former wife's status as creditor of debts based on prenuptial agreement); Kaplan v. Kaplan (*In re* Kaplan), 18 Bankr. 1018, 1020 (Bankr. E.D.N.Y. 1982) (abstention in hearing dischargeability because divorce proceeding pending in state court and no award of alimony yet made); Chrystler v. Heslar (*In re* Heslar), 16 Bankr. 329 (Bankr. W.D. Mich. 1981) (determination of rights to equity in real estate during pending divorce); *In re* Evans, 8 Bankr. 568, 572 (Bankr. M.D. Fla. 1981) (wife put husband into involuntary bankruptcy out of animosity over prior divorce); *see also In re* Ericson, 26 Bankr. 973 (Bankr. C.D. Cal. 1983) (court abstained from determining rights of unmarried cohabitants).

360. Erspan v. Badgett, 647 F.2d 550, 553 n.1 (5th Cir. 1981) (court refused to abstain when wife brought federal court action to enforce award of military retirement benefits awarded in divorce decree after husband's bankruptcy action and his later initiation of contempt proceeding for violation of injunction based on discharge), *cert. denied*, 455 U.S. 945 (1982).

361. *Heslar*, 16 Bankr. at 333.

362. *In re* Reak, 92 Bankr. 804, 807 (Bankr. E.D. Wis. 1988).

363. White v. White (*In re* White), 851 F.2d 170, 173 (6th Cir. 1988) (quoting *In re* MacDonald, 755 F.2d 715, 717 (9th Cir. 1985) (quoting *In re* Graham, 14 Bankr. 246, 248 (Bankr. W.D. Ky 1981))).

courts for determination of the dischargeability of marital debts during the course of bankruptcy actions. In *Mathes v. Mathes (In re Mathes)*,[364] the United States Bankruptcy Court for the Western District of Missouri dismissed without prejudice the dischargeability issue to allow the parties to litigate the matter in state court. In *Mathes*, the former spouses had agreed after their divorce that the husband would make monthly payments on a residence occupied by the wife and children.[365] Although the agreement, which the parties never submitted to a court for approval, expressly stated that its provisions did not constitute alimony, the bankruptcy court found that uncontroverted evidence demonstrated that the purpose or function of the debt "was to put 'a roof over the heads' of the plaintiff and her children."[366] The *Mathes* court held that the state dissolution tribunal first should address the nature of the debt:

> It is fundamental that the bankruptcy court, in making the dischargeability determination, cannot modify the basic award made by the state dissolution court. It is not within the lawful powers of a bankruptcy court to redetermine the basic need of the plaintiff according to changed circumstances and thereby substitute its own award for the [sic] of the state dissolution court. Simply to supplement the state court award before the state court had an opportunity to determine whether it should be made at all would violate this cardinal principle.[367]

The *Mathes* court considered it the state court's duty to define the parties' relationship, a determination that must occur prior to any finding of dischargeability. Once the state court has resolved the relationship, the state court may determine dischargeability by applying federal law, or the action may be reinstated in the bankruptcy court.[368]

The same court again refused to hear a dischargeability claim in *Hague v. Hague (In re Hague)*,[369] holding that state court resolution would be more appropriate.[370] Because the payments did not provide alimony, support, or maintenance unambiguously, the bankruptcy court's first obligation would be to determine the type of debt the parties intended to create.[371] The court noted that no restrictions prohibited the state courts from adjudicating both the underlying liability question and the dischargeability issue, reasoning that, under the

364. 58 Bankr. 4 (Bankr. W.D. Mo. 1985).

365. The agreement provided that if a certain loan were granted the husband, he would pay the wife a specific sum. It further specified that the terms of the agreement "are contractual and not to be construed as maintenance and are not subject to modification under the dissolution of marriage law, and can only be modified or amended by written agreement of the parties hereto." *Id.* at 5 n.2.

366. *Id.* at 5-6.

367. *Id.* at 6 (citations omitted).

368. *Id.*

369. 57 Bankr. 511 (Bankr. W.D. Mo. 1986).

370. The court previously had granted the wife relief from the automatic stay in order to initiate state court dischargeability proceedings, partly because plaintiff did not allege that prepetition debt had accumulated at that time. The wife later moved for "partial reconsideration" of the judgment on the basis that past due maintenance payments in fact had accrued prior to the husband's bankruptcy petition. *Id.* at 512.

371. *Id.* (citing Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103, 1109 (6th Cir. 1983)).

circumstances, litigation in state court would be more convenient.[372]

The recent case of *Buccino v. Buccino*[373] illustrates this approach at the state court level. In *Buccino* the husband filed for bankruptcy six months after the couple's divorce; he listed the wife as creditor and sought discharge of all the marital debts ordered in the divorce decree.[374] The wife entered a motion for relief from the automatic stay in the bankruptcy court, requesting that the state divorce court determine the dischargeability issue. Recognizing that the state court's dischargeability decision would bind it, the bankruptcy court granted the wife's motion and abstained from determining the nature of the marital debts.[375] The state trial court found that all the debts were necessary for the support and maintenance of the wife and the couple's child and were not subject to discharge;[376] the husband appealed.

After a meticulous and exhaustive review of both bankruptcy law and state family law, the appellate court affirmed in an opinion that should serve as a model of analysis for bankruptcy and state courts alike.[377] The *Buccino* court focused on the policies underlying the support exception and concluded that former spouses and children should be "liberally protected" against discharge[378] because Congress intended their rights to have priority over the debtor's interest in a "fresh start."[379]

The *Buccino* court noted that the difficulty in performing dischargeability determinations results from two problems. First, a strict intent test is frequently impossible to perform because the parties often have not contemplated resulting legal consequences.[380]

> Second, and even more importantly, the evolution of domestic relations law has made it increasingly difficult to distinguish between alimony (or support) and property distribution. Frequently, courts will resolve all economic issues arising from a divorce simultaneously and

372. *Id.*

373. __ Pa. Super. __, 580 A.2d 13 (1990).

374. After their marriage in 1979, the wife supported the couple, contributing over $70,000 to the husband's education and career advancement, while the husband attended dental school and supplemented the family income during his early years of practice. The wife's parents made generous gifts and loans to the couple. During their separation, the wife moved to her parent's home in Massachusetts with the couple's child, and the husband moved to Indiana to obtain a graduate degree, taking the couple's mobile home with him. At the conclusion of their bitter divorce in 1986, the trial court, believing it could not directly reimburse the wife for her contributions, formulated an award to allow alimony beginning when the husband completed his residency. In recognition of his earning potential, the court further ordered the husband to pay the wife $3750, one-half the value of gifts from her parents; $9400, one-half the equity in the mobile home; and one-half the value of his IRA and retirement plan. The court's order did not segregate the provisions relating to custody, child support, alimony, or property division; rather, in narrative form, it "as a whole addressed each party's rights and obligations resulting from the dissolution of the marriage." *Id.* at __, 580 A.2d at 15.

375. *Id.* at __, 580 A.2d at 16.

376. *Id.*

377. Upon observing that federal bankruptcy law must be applied, the court remarked: "This principle is far easier to state than it is to apply." *Id.* at __, 580 A.2d at 17.

378. *Id.* at __, 580 A.2d at 18 (citing Schmiel v. Judge (*In re* Schmiel), 94 Bankr. 373, 377 (Bankr. E.D. Pa. 1988)).

379. *Id.*

380. *Id.* (citing Rankin v. Alloway (*In re* Alloway), 37 Bankr. 420, 425 (Bankr. E.D. Pa. 1984)).

> invariably will adjust alimony awards depending on the nature and amount of marital assets available for distribution.[381]

Although the *Buccino* court was unable to discern a "clear and consistent" federal test for dischargeability, it isolated common factors, focusing on the intentions of the parties and the court, and the effect and function of the obligation imposed.[382] The court further observed that not only will the appropriate factors vary from case to case, but the weight of their importance will differ.[383] Applying that analysis to the debts at issue, the court concluded that, despite the form and amounts of the awards, the divorce court had intended to provide support.[384] The court further noted that the duty of support may exceed minimal necessity.[385] Finally, the court rejected application of a present circumstances test in dischargeability determinations,[386] but added that state court relief occasionally may be appropriate in situations "wherein a nondischargeable support obligation far exceeds either the reasonable needs of the recipient or the ability of the debtor to pay."[387]

The *Buccino* court delved more deeply into the underlying nature of the debts than most bankruptcy courts, considering both the economic and noneconomic factors that had motivated the divorce court in constructing the award.[388] The court demonstrated sensitivity to the correlation between support and property division and managed to preserve innovative support debts, which had many of the earmarks of property division frequently relied upon by the bankruptcy courts. *Buccino* is a prime example of the state courts' superior qualifications over the bankruptcy courts for determining support related issues.

The state courts have demonstrated their willingness and ability to determine dischargeability, employing federal standards. A preferable procedure would be for the bankruptcy courts to defer to the state courts whenever uncertainty about the nature of a marital debt arises.

VI. CONCLUSION

The artificial distinction drawn between nondischargeable alimony, maintenance, and support debts on the one hand, and dischargeable property division debts on the other, continues to plague bankruptcy litigation whenever a debtor

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381. *Id.* at __, 580 A.2d at 18 (footnote omitted).

382. The court emphasized that labels should not control the characterization; rather, the court should focus on whether equitable distribution of property reasonably meets the needs of the recipient. "[I]ncome, employability, marital standard of living, needs and economic circumstances" all enter into a state court property division, and the award "may have a 'support' component." *Id.*

383. *Id.* at __, 580 A.2d at 20.

384. *Id.*

385. *Id.* at __, 580 A.2d at 23-24.

386. *Id.* at __, 580 A.2d at 24. It is important to note that, in rejecting a present circumstances test, the *Buccino* court was responding to the debtor husband's objection to the trial court's inquiry into his current financial status. Although the *Buccino* court rejected that test, it held that the determination was not altered by the inquiry.

387. *Id.*

388. *Id.* at __, 580 A.2d at 18 n.15 (observing that the Pennsylvania Divorce Code directs divorce courts to consider "overlapping economic and non-economic factors both in awarding alimony and in distributing marital assets").

has incurred debts pursuant to a divorce. Although federal bankruptcy law has made progress in developing an analytical framework for discerning the underlying nature of a marital debt, the result in a given case remains unpredictable.

State courts have struggled to compensate support recipients for financial losses incurred when marital debts are discharged in their former spouses' bankruptcy actions, but the courts' own modification laws have constrained them.[389] When state courts have been able to exercise their concurrent jurisdiction to determine dischargeability issues, their task has proved simpler. The cases confirm that not only are state courts capable of applying federal dischargeability law, they are, in fact, a preferable forum for such determinations. State courts have a greater interest in assuring former spouses and children adequate protection from loss of support. They possess more experience and expertise in evaluating the competing interests of the parties. They are more familiar with local economic conditions relative to the parties' needs and frequently employ specially trained personnel.[390] Furthermore, state courts are in a better position to analyze the strength of their own policy interests in awarding particular forms of support and to evaluate the prudence of modifying an award.[391] While the bankruptcy courts focus primarily on financial considerations, the state courts are accustomed to weighing both monetary and noneconomic factors in marital disputes.

Most significantly, state courts have the power to increase as well as to decrease the amount of marital obligations in appropriate circumstances, while modification by a bankruptcy court can only diminish the amount of support available to the nonbankrupt spouse. Because support is by its nature a flexible concept that can vary with the parties' fluctuating needs and abilities, present circumstances are critically relevant in determining the nature of a marital debt. Rather than adopting a present circumstances test, however, the bankruptcy courts should defer dischargeability determinations to state courts. Application of a federal bankruptcy test to dischargeability determinations in state courts would authorize those courts to modify debts that they ordinarily might be powerless to alter. Thus, reasonable debts that continue to function as support could

389. State divorce courts should consider reserving jurisdiction to award support in the limited circumstance of a spouse being discharged of marital debts in a later bankruptcy. Alternatively, legislatures could enact statutory provisions authorizing such awards, similar to California Civil Code § 4812, and specify that such statutes apply even in the absence of an existing support award in the original divorce decree. *See supra* note 307 and accompanying text.

390. *See* Chrystler v. Heslar (*In re* Heslar), 16 Bankr. 329, 333 (Bankr. W.D. Mich. 1981). The court stated:

> [State courts] handle divorces on a daily basis. The expertise of circuit judges in the family law field extends not only to legal problems but also to the disciplines of psychology and sociology. Specially trained personnel and the organization of the Court functions are geared to the protection of the rights of not only the parties themselves but also those of the children of the marriage and other family members.

Id.

391. The original divorce court may have heard evidence concerning a specific marital debt and may have firsthand knowledge of the parties' settlement, placing that court in a potentially superior position to determine the parties' intent. *In re* Marriage of Sailsbury, 13 Kan. App. 2d 740, 744, 779 P.2d 878, 881 (1989).

be protected from discharge, while those that have become entirely unreasonable because of changed circumstances could be reduced to a more moderate sum.

Because of the inextricable interrelationship between support and property division, the ideal solution is for Congress to eliminate the distinction from the Bankruptcy Code entirely.[392] Absent such a remedy, the bankruptcy courts should abstain from delving into the nature of disputed marital debts and defer to the more appropriate forum of the state courts. To avoid delay and continued uncertainty, the state court dischargeability determination should occur before the bankruptcy action is concluded.

Marital debts presumptively should be categorized as support; the fact that a debt to a former spouse arose from a divorce decree or settlement agreement should be prima facie evidence that the debt falls within the exception to discharge.[393] If a debtor was unable to persuade the court that the debt had become inequitable and unreasonable, the court would not discharge the debt in full or in part.[394] Thus, dischargeability determinations would need to be made only in extreme cases, and a debtor who failed to litigate the issue would be barred from raising the defense of discharge in a future enforcement action.

Furthermore, the federal courts must adopt a broader view of the exception from discharge. Section 523(a)(5) of the Bankruptcy Code excepts not only debts that function as "support," but also those in the nature of "alimony." Contemporary divorce law recognizes new forms of alimony intended to compensate spouses for tangible and intangible contributions to the education and career enhancement of the other spouse and, in some cases, for the contributing

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392. When it enacted the current Bankruptcy Code in 1978, Congress specifically rejected proposals to eliminate the distinction between support and property division. Senate Debate on Compromise Bill, 124 CONG. REC. 33,989-34,019 (1978); *id.* at 32,416-17; *id.* at 34,016-17. Rep. Henry Hyde (R-Ill.) recently has sponsored a bill to amend the Bankruptcy Code "to make nondischargeable debts for liabilities under the terms of a property settlement agreement entered into in connection with a separation agreement or divorce decree." H.R. 5203, 101st Cong., 1st Sess., 136 CONG. REC. (1990).

393. Bankruptcy Rule 4005 states that "[a]t the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection." The rule has been applied to exceptions from discharge under 11 U.S.C. § 523(a)(5) (1988). *See, e.g.*, Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103 (6th Cir. 1983); Davidson v. Davidson (*In re* Davidson), 104 Bankr. 788 (Bankr. N.D. Tex. 1989); Altavilla v. Altavilla (*In re* Altavilla), 40 Bankr. 938 (Bankr. D. Mass. 1984). However, the rule allows the courts to set their own standard of proof. Although in most bankruptcy proceedings the courts have adopted a clear and convincing standard, they have been more lenient in proceedings under § 523(a)(5). *See Davidson*, 104 Bankr. at 798 (preponderance of the evidence standard imposed); Wickman Machine Tools, Inc. v. Bradford (*In re* Bradford), 22 Bankr. 899, 901 (Bankr. W.D. Okla. 1982); Ravin & Rosen, *supra* note 8, at 29. Some courts have allowed the burden of proof to shift to the debtor upon presentation of a prima facie case. *See* Newkirk v. Thomas (*In re* Thomas), 21 Bankr. 571, 573 (Bankr. E.D. Pa. 1982); Daviau v. Daviau (*In re* Daviau), 16 Bankr. 421, 424 (Bankr. D. Mass. 1982). This procedure, however, has been criticized. *See* Melichar v. Ost, 7 Bankr. 951, 963 (D. Md. 1980); Ravin & Rosen, *supra* note 8, at 29. Nonetheless, the courts do have a certain amount of discretionary power to make the case easier for the objector, as indicated in the Advisory Committee Note for rule 4005:

> Subject to the allocation by the rule of the initial burden of producing evidence and the ultimate burden of persuasion, the rule leaves to the courts the formulation of rules governing the shift of the burden of going forward with the evidence in the light of considerations such as the difficulty of proving the nonexistence of a fact and of establishing a fact as to which the evidence is likely to be more accessible to the debtor than to the objector.

394. The presumption should be particularly strong when the bankruptcy occurs within a short time after the divorce.

spouse's own lost opportunity.[395] These awards, usually for a definite sum and not terminable upon contingencies such as death or remarriage, almost always resemble property division in form and, therefore, are commonly discharged in bankruptcy. When bankruptcy courts misinterpret substituted forms of alimony and support, the result frustrates policies behind state divorce law. Recognition of these unique awards as a form of alimony will preserve such debts and allow the recipient spouse to achieve the post-marital fresh start intended by state divorce courts.

In determining the nature of marital debts for bankruptcy purposes, state courts should be afforded the option of considering the parties' present circumstances. But those courts should do so with caution and restraint. Not uncommonly, financial awards to dependent and custodial spouses are woefully inadequate from the start.[396] Placing too much weight on the debtor's present financial circumstances can impoverish the former spouse and children, granting the debtor an unfair and unjustified head start. Conversely, when the former spouse prospers while the debtor's own position substantially declines, if unreasonable marital debts are not discharged, his bankruptcy action yields him nothing but an illusory false start. State courts should be permitted to determine both the significance of the parties' present circumstances and the strength of their own policies of affording certainty and stability to divorce decrees. Only by engaging the state courts in bankruptcy matters that extend into traditional family law issues will an appropriate balance be achieved.

395. *See supra* notes 65-70 and accompanying text.

396. The disastrous economic effect of divorce on women and children has been the subject of numerous studies for the past two decades. *See, e.g.*, L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICAN (1985); Espenshade, *The Economic Consequences of Divorce*, 41 J. MARRIAGE & FAM. COUNSELING 615 (1979); Hoffman, *Marital Instability and the Economic Status of Women*, 14 DEMOGRAPHY 67 (1977); Weitzman, *supra* note 20.