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# Nevada Famruptcy 101: What the Family Lawyer Can't Afford Not to Know

*By Brian E. Blackham and Laura A. Deeter*

The casualties of the "Great Recession" are everywhere. Throughout Southern Nevada, abandoned homes lie in disrepair and vacant storefronts line our major streets. From our televisions, the phrase "Now handling bankruptcies" abounds. If you are fortunate enough to have a job, you certainly know people who are not so lucky. With unemployment rising and consumer debts mounting, a staggering number of Southern Nevadans are seeking relief through bankruptcy. According to the United States Bankruptcy Court, District of Nevada Web site, 22,604 bankruptcies were filed in Southern Nevada from last year through November. This is a 43 percent increase from 2008. Given this unprecedented surge in bankruptcy filings, it is crucial for the family law practitioner to be aware of the impact that debt resolution and bankruptcy may have on divorce proceedings.



## Federal law vs. State law

As bankruptcy is entirely a creature of federal law, it generally preempts state law under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2; *Nanopierce Techs., Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 168 P.3d 73, 79 (2007) (acknowledging federal preemption). However, "the whole subject of domestic relations . . . belong to the States . . .and not to the United States." *Popvici v. Alger*, 280 U.S. 379, 383 (1930). Thus, the tension between state and federal law in domestic matters is likely to increase as consumer bankruptcies continue to rise.

## Chapter 7 vs. Chapter 13

The two most common types of consumer bankruptcies a family lawyer is likely to encounter are Chapter 7 liquidation and Chapter 13 reorganization. A Chapter 7 is a short and fast liquidation process that typically lasts about 90 days, after which a debtor's obligations are discharged, or completely eliminated. Some debts cannot be discharged in a Chapter 7, such as domestic support obligations, property settlement obligations (see discussion below), and, almost always, federally-backed student loans. In contrast, a Chapter 13 bankruptcy proceeding typically places the debtor in a repayment plan for a period of three to five years, in which all or a portion of the debtor's debts are repaid. At the end of the repayment period, the debtor's remaining obligations are fully discharged. Once a debtor receives a discharge, attempts by creditors to enforce or collect on discharged debts are barred by the discharge injunction. 11 U.S.C. §524(a).

## Domestic support obligations vs. Property settlement obligations

The basic rule of thumb is that child support and alimony cannot be discharged. Both of these obligations will survive any bankruptcy proceeding. Prior to the sweeping overhaul of the Bankruptcy Code in 2005 (BAPCPA), property settlement obligations resulting from a divorce could be fully discharged in a Chapter 7. However, BAPCPA eliminated the ability for debtors to discharge property settlement

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debts in a Chapter 7, although they may still be discharged in a Chapter 13. Specifically, 11 U.S.C. §523(a)(5) provides that domestic support obligations are not dischargeable. A domestic support obligation is defined in 11 U.S.C. §101, and although the statutory definition is comprehensive and contains some nuances, the term typically refers to child support or alimony (including arrears on either).

The dischargeability of property settlement debts is addressed in 11 U.S.C. §523(a)(15), which provides that a debt to a "spouse, former spouse, or child of the debtor [other than domestic support obligations] incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of the court of record . . ." is not dischargeable in a Chapter 7.

In contrast, property settlement debts may be included in a Chapter 13 plan. This is clear from the negative implication in 11 U.S.C. §1328(a), which specifically excludes domestic support obligations and certain other debts from a Chapter 13 discharge, but conspicuously does not identify property settlement obligations as being among the nondischargeable debts.

To illustrate, suppose that pursuant to a divorce decree, Spouse A is ordered to (1) pay Spouse B the sum of $20,000.00 as an equalization of assets; and (2) pay Spouse B $500.00 per month in child support. After the divorce, Spouse A files for Chapter 13 bankruptcy relief, makes all of his plan payments for five years, and receives a discharge. Spouse A is no longer obligated to pay Spouse B the $20,000.00, although Spouse B may have received pro rata payments on the debt (as would other creditors) as part of the Chapter 13 plan. However, in order to receive her pro rata share, Spouse B must timely file a proof of claim and participate as necessary in the bankruptcy case. Failure to do so will likely result in a full discharge of Spouse A's property settlement obligation without Spouse B receiving a dime. On the other hand, if Spouse A had filed for Chapter 7 relief, he would still be obligated to pay the $20,000.00. No matter what type of bankruptcy relief Spouse A seeks, the current child support obligation and any arrears cannot be discharged.

## Treatment of community debts and timing

In divorces, community debts are treated similarly to community property, in that they are usually divided equally, or close to equally. *Wolf v. Wolf*, 112 Nev. 1355, 1361, 929 P.2d 916, 920 (1996). In reaching its decision, the *Wolf* Court cited to NRS 125.150(1)(b), which directs the Court to make, to the extent practicable, an equal division of community property, unless there are compelling reasons for an

unequal division. Thus, the *Wolf* Court appears to direct the district courts to treat community debts in the same manner as community property. That is, the courts must either divide community debts equally, or set forth written findings showing compelling reasons for an unequal division.

Nevertheless, a bankruptcy may complicate the division of community debts, if the timing happens to be right. In *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992), the Supreme Court held that a former husband's *post-divorce* Chapter 7 discharge of his $1,300,000 property settlement debt to his former wife constituted changed circumstances to justify an upward modification of the former husband's alimony obligation. *Id.* at 996, 843 P.2d at 813. *Siragusa* is often cited as a blanket preclusion of a spouse from ever discharging his or her community obligations as to the other spouse. But is it? In fact, the *Siragusa* decision was handed down 13 years before BAPCPA. Today, the facts in *Siragusa* could not occur, as the husband would not be able to discharge his property settlement obligation to his wife in a Chapter 7. The argument could therefore be made that the BAPCPA amendments rendered the primary holding in *Siragusa* moot.

Perhaps more importantly, neither *Siragusa*, nor the Bankruptcy Code expressly precludes the discharge of one spouse's share of the community debts *prior* to the entry of a divorce decree or property settlement agreement. It is usually preferable for spouses contemplating divorce to file bankruptcy jointly to discharge all community debts before dissolving their marriage. However, if one of the spouses refuses to file, there appears to be no reason why the other spouse could not file bankruptcy alone—even in the middle of a divorce action—obtain a discharge of his or her share of the community debt, and consequently stick the non-filing spouse with all of the community debts. While the family court may attempt to equalize such a case by imposing alimony on the debtor spouse or unequally dividing the community assets, such actions are not permitted by the narrow *Siragusa* holding, and may be considered a violation of the discharge injunction.

Obviously, the areas of overlap between bankruptcy and family law are far more extensive and complex than the space here would allow. If you have a client with significant debts or an opposing party who is considering bankruptcy, you may want to consult bankruptcy counsel to ensure that your client's property interests are protected.

***Brian E. Blackham is an associate attorney with Goldsmith & Guymon, P.C., practicing primarily in domestic relations law.***

***Laura A. Deeter is an associate attorney with Goldsmith & Guymon, P.C., practicing in the areas of bankruptcy, guardianship, family law, estate planning and probate.***