ARTICLES
EMINENT DOMAIN AND THE "PUBLIC USE": MICHIGAN SUPREME COURT LEGISLATES AN UNPRECEDENTED OVERRULING OF POLETOWN IN COUNTY OF WAYNE v. HATHCOCK
John E. Mogk

FOR DEBTOR OR WORSE: DISCHARGE OF MARITAL DEBT OBLIGATIONS UNDER THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005
Daniel A. Austin

PROTECTING FEDERALISM INTERESTS AFTER THE CLASS ACTION FAIRNESS ACT OF 2005: A RESPONSE TO PROFESSOR VAIRO
Heather Serbiner

SYMPOSIUM
REMEDIATION TECHNIQUES FOR RACIAL HOUSING DISCRIMINATION—AN INTRODUCTION TO THE SYMPOSIUM
Professor Otto J. Hetzel

ADVERTISING DISCRIMINATION IN HOUSING FAIR HOUSING CENTER OF METROPOLITAN DETROIT v. HENRY FORD VILLAGE: A MODEL FOR EFFECTIVE, AFFIRMATIVE RELIEF UNDER THE FEDERAL FAIR HOUSING STATUTE
John A. Obev

AN ASSESSMENT OF HOW LOCAL, PRIVATE, NON-PROFIT, FAIR HOUSING ORGANIZATIONS AND PRIVATE ATTORNEYS CAN SUCCESSFULLY COOPERATE FOR THE ENFORCEMENT OF FAIR HOUSING LAWS
Clifford C. Schryver & Michael Olshan

CHANGING THE FACE OF PUBLIC HOUSING IN FORT WORTH: TEXAS: HANDLING REPLACEMENT HOUSING FOR DISPLACED RIPLEY ARNOLD RESIDENTS
Ramón Gómez

COMMENT
REPRESENTATIVE PAYMENT UNDER THE SOCIAL SECURITY PROTECTION ACT OF 2004
Samuel Siks

NOTES
HIDE AND SEEK: THE FMLA GAME OF PERSONAL LIABILITY FOR PUBLIC SECTOR SUPERVISORS

EVIDENCE AND FIRST NATIONAL MAINTENANCE: DETAILED ANALYSIS OR CURSORY EXPLANATION?

STATE AND LOCAL TAX EXEMPTION OF REACQUIRED INDIAN LANDS: CITY OF SHERRILL v. ONEIDA INDIAN NATION
FOR DEBTOR OR WORSE: DISCHARGE OF MARITAL DEBT OBLIGATIONS UNDER THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

DANIEL A. AUSTIN

Table of Contents

I. INTRODUCTION ................................................................. 1370
II. BANKRUPTCY AND DIVORCE IN AMERICA: STATISTICAL AND PROCEDURAL OVERVIEW ................................................................. 1372
    A. The Scope and Statistics of Bankruptcy and Divorce ........... 1372
    B. Overview of the Consumer Bankruptcy Process .................. 1375
    C. What Are Domestic Support Obligations and How Do They Arise? ................................................................. 1382
III. COMPARISON OF BANKRUPTCY CODE SECTIONS ON DISCHARGE OF MARITAL DEBT BEFORE AND AFTER THE BAPCPA .................. 1384
    A. Discharge of Marital Debt under the Pre-BAPCPA §§ 523(a)(5) and (15) ................................................................. 1385
    B. BAPCPA Amendments to §§ 523(a)(5) and (15) .................... 1390
IV. DISORDER IN THE COURTS: MARITAL DEBT DISCHARGE LITIGATION PRE-BAPCPA ................................................................. 1393
    A. In re Gianakas and Long v. Calhoun: A Tale of Two Circuits ................................................................. 1393
       1. Third Circuit in In re Gianakas: An Expansive View of What Constitutes Alimony ................................................................. 1394
       2. Sixth Circuit and In re Calhoun: What A Difference Today Makes ................................................................. 1397
          a. Calhoun Refined: In re Fitzgerald .............................. 1400
          b. Calhoun Even More Refined: In re Sorah ................. 1401
    B. Marital Debt Discharge In The Other Circuits .................. 1402
       1. First, Second, and Tenth Circuits: Friends of In re Gianakas ................................................................. 1402
       2. Fourth, Fifth, and D.C. Circuits: The Writing Between the Parties and Quasi Estoppel ................................................................. 1403


The author would like to thank Wendy Warren Austin for her assistance with this article. Research assistance provided by Emily Fibbs.

1369
I. INTRODUCTION

In April 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)1 was signed into law. Effective as of October 17, 2005, the BAPCPA brought sweeping changes to the 1978 Bankruptcy Code.2 Nowhere were these changes more significant than in the provisions of the Code dealing with consumer bankruptcy. The BAPCPA revised the Code to make it more difficult to file for bankruptcy, requiring more debtors to pay back at least a portion of their unsecured debt over time.3 Among the Code provisions altered by the BAPCPA are the sections relating to the discharge of obligations incurred in connection with a separation or divorce.4 Previously, § 523(a)(5) excepted from discharge any obligation incurred in connection with divorce or separation, "designated as alimony, maintenance or support" and that was "actually in the nature of alimony, maintenance or support."5 Drawing a distinction between "support" type obligations and other types of marital debt, such as property division, pre-BAPCPA § 523(a)(15) allowed a court to grant partial or complete discharge of property division debts if the debtor could not afford to pay the debt or the detriment to the debtor outweighed the benefit to the creditor spouse.6

6. Id.
7. (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor, and, if the debtor is engaged in business, for the payment of expenditure necessary for the continuation, preservation, and operation of such business; or
(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.
8. See SECTION III.A., infra.
9. See SECTION III.A.2., infra.
either 523(a)(5) or (15) and therefore it falls into the category of "nonpriority" or general unsecured debt, which is not excepted from discharge. Thus, this new BAPCPA language actually liberalizes the discharge potential of third-party obligations and ensures that at least some discharge litigation is going to continue.

The second reason that marital debt discharge litigation is not going to go away anytime soon is due to a special rule in the Sixth Circuit. The Sixth Circuit permits bankruptcy courts to discharge a portion of a nondischargeable support obligation to the extent that it exceeds the debtor's ability to pay. This rule, while distinct in the minority, gives courts a measure of flexibility to fashion outcomes based upon the reality of the facts in a case. Given that most support obligations are enforced by state-court criminal contempt orders, and a possible jail sentence, the issue is more than just a financial one for many debtors.

This article will proceed as follows: Part I examines the intersection between divorce and bankruptcy in contemporary American society, providing an overview of divorce demographics and an introduction to the bankruptcy process. Part II offers a pre- and post-BAPCPA comparison of the Bankruptcy Code sections governing divorce obligations and discharge under the Bankruptcy Code. Part III reviews how courts in the past have approached § 523(a)(5) in order to surmise how courts in the future are likely to do so under the BAPCPA revisions. Part IV joins together existing rules and approaches to the new BAPCPA language to determine how courts will apply the BAPCPA marital discharge provisions to future cases. Part V concludes with an analysis of the strengths and weaknesses of the divergent rules, problems that are likely occur in the future under BAPCPA provisions, and comments on how courts can best deal with these hurdles.

II. BANKRUPTCY AND DIVORCE IN AMERICA: STATISTICAL AND PROCEDURAL OVERVIEW

A. The Scope and Statistics of Bankruptcy and Divorce

Bankruptcy and divorce are now as American as mom and apple pie. The two have joined death and taxes as the proverbial avoidables in contemporary U.S. society. From January 1, 1994 through December 31, 2004, there were 13,153,991 non-business bankruptcy filings in the United States. Filings rose from 874,842 in calendar year 1994-95 to a peak of 1,625,208 in 2003. There were 1,563,145 non-business filings in 2004, and during the first quarter of 2005, there were 401,149 filings. Of these, approximately 71% were chapter 7 petitions, while 28% were filed under chapter 13. These numbers do not keep track of petitions that are jointly filed by husband and wife, which are estimated to be approximately 32% of nonbusiness filings. Thus, there would have been approximately 2,063,351 persons who filed a joint or individual non-bankruptcy petition in 2004 and 2,145,274 in 2003. Multiplying the total number of filings by .32 over the ten-year period adds an additional 4,209,277 individual debtors who would not have been counted based solely on the number of filings. Therefore the number of Americans who filed for bankruptcy during the ten-year period 1994-2004 may be as high as 17,363,268. During this same period, United States population grew from 263,436,000 to 294,451,000, for an average 278,943,000 for the ten-year period. The number of households, including single person households, rose from 98,990,000 to 111,300,000 for an average of approximately 103,917,000 households. From these numbers, the following calculations can be made: between 1994 and 2004, 6.2% of Americans filed a personal bankruptcy, while the number of households filing for bankruptcy was 12.6%. Clearly, bankruptcy is a ubiquitous feature of American life.

Divorce is also a common occurrence in American life, although divorce rates have been falling steadily over the past decade. While the raw numbers of total divorces in the United States are not maintained on a consistent basis, the National Center for Health Statistics (NCHS) publishes...

15. Bankruptcy Statistics, Administrative Office of the U.S. Courts, available at...
partial data on divorce numbers and rates. Online data from NCHS data shows, for example, that divorce rates have dropped from 4.3 per thousand in 1997 to 3.7 per thousand in 2004. Some experts believe that the percentage of marriages that end in divorce has leveled off in recent years to approximately 41%. Others suggest the number is closer to 50%, and rates vary significantly from state to state and region to region. Yet, even if the lower estimate of 41% is correct, based upon available data, there would have been at least 892,980 divorces filed in 2004, and 896,670 in 2003. Information from NCHS also shows that there were 957,200 divorces filed in 2000, approximately 1,100,000 filed in 1998, and 1,103,000 filed in 1997. Given that each divorce represents a minimum of two people directly affected thereby, the number of people divorcing in 2004 was 1,785,960 and for 2003 the number was 1,793,340. The divorce figures are somewhat less than the number of people filing for bankruptcy, but the figures do show that both divorce and bankruptcy are prominent features of contemporary American society.

While there are no precise statistics that directly compare bankruptcy and divorce, the correlation between financial stress and divorce is undeniable. Financial stress has long been recognized as a significant cause of divorce. Post-divorce expenses also contribute to financial stress. One study determined that a single divorce costs individuals as well as state and federal governments about $30,000. Another researcher puts the number at $50,000 and notes that $175 billion is spent annually on divorce costs and litigation. Causes of post-divorce financial stress may include the cost of divorce, additional costs of two households, the fact that one party is less skilled or able to earn an income, the fact that one party’s remarriage requires greater expenditure to help support an additional spouse or new children, or other reasons.

Bankruptcy and divorce collide when one party files for bankruptcy and the person’s debts include obligations owed to a spouse or former spouse arising from a divorce or separation agreement, or court decree. Seeking a “fresh start,” the debtor may want to have the support obligation discharged along with his or her other dischargeable debts. Conversely, the creditor spouse may be just as determined to retain his or her right to payment of the obligation. This intersection between divorce and bankruptcy spawned a great deal of litigation and led to widely different approaches between the circuits. The BAPCPA amendments were clearly an effort to deal with this problem.

B. Overview of the Consumer Bankruptcy Process

The Bankruptcy Code serves as a safety valve for individuals and families to be relieved of many debts that they cannot feasibly repay. Most unsecured debts can be completely or partially discharged in chapter 7, or paid in full or in part over time under a chapter 13 plan of reorganization. This reflects the underlying purpose of the Bankruptcy Code to provide

In some parts of the country as many as half of all marriages end in divorce, often due, at least in part, to financial difficulties. Even when the divorce was not caused by money problems, the financial consequences to the former spouses now living as two households are often dire. henry j. sommer et al., COLLIER FAMILY LAW AND THE BANKRUPTCY CODE, § 6.05(5), at xiii (2005). In the aftermath of divorce, many families are forced to rely on welfare to make ends meet. In Utah, which has a divorce rate slightly higher than the national average, seventy-five to eighty percent of people on welfare are divorced. Social and Economic Costs of Divorce, available at http://www.divorceform.org/soc.html (last visited Jan. 29, 2006). Barbara Defoe Whitehead and David Popene, The State of Our Unions, available at http://marriage.rutgers.edu/Publications/SOOU/TEXTS/SOOU2005.htm (last visited Jan. 29, 2005). 33. Pranay Gupta, It’s Personal for a Top NYC Divorce Lawyer, N. Y. SUN, May 17, 2005, at 10A.
34. See SECTION III, infra.
qualified debtors with a “fresh start.” The following is an overview of the bankruptcy process under current law.

A consumer chapter 7 or chapter 13 case commences with the filing of a bankruptcy petition in the federal bankruptcy court for that jurisdiction. The commencement of a voluntary case constitutes an “order for relief,” and invokes the “automatic stay” prohibiting most creditors from pursuing enforcement outside of the bankruptcy process. The debtor must file schedules of assets and liabilities, monthly income and sources of income, expenses, and provide a variety of additional personal financial information. The BAPCPA adds some new filing requirements. A debtor must obtain an individual or group briefing from an approved nonprofit budget and credit-counseling agency within 180 days after filing, and complete a personal financial management course before receiving a discharge. The debtor must document his or her income received within the sixty days immediately before filing, and file a statement of any increases in income or expenditures that the debtor reasonably expects within the next twelve months.

Perhaps the most significant component of the BAPCPA for individual consumers is the “means test” set forth in § 707(b)(2)(A), the purpose of which is to determine whether the debtor can afford to repay a minimum amount or percentage to unsecured creditors. A debtor must first determine if he or she is subject to the “means test.” In this calculation, the joint monthly income for the debtor and the debtor’s spouse are combined even if only one files. If this sum is above the median income established for the state of the debtor’s residence, using median income numbers taken

36. Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1109 (6th Cir. 1983).
40. 11 U.S.C.S. § 521(a)(1)(2006); Fed. R. Bankr. P. 1007. The information required is intended to provide a comprehensive picture of the debtor’s current financial circumstances in order to determine whether the debtor has resources to pay any part of his or her unsecured debt.
41. 11 U.S.C.S. § 109(h) (2006). In most circumstances, the debtor must file a certificate from the agency describing the credit counseling services rendered, and if a debt repayment plan was offered to creditors, the debtor must file a copy of the plan. 11 U.S.C. § 521(b) and Bankruptcy Rule 1007(b)(3).

from U.S. Census Bureau tables, then the debtor is subject to the means test. If the joint current monthly income of the debtor and spouse falls below the median income standard, then the means test does not apply.

Under the means test, only the debtor’s income is used if the debtor did not file jointly with a spouse. If the debtor’s current monthly income, reduced for “necessary expenses” and then multiplied by sixty, is sufficient to allow the debtor to repay the greater of $6,000 or 25% of nonpriority unsecured debt, then the presumption of abuse arises and the case will be dismissed unless the debtor consents to conversion of the case to chapter 13 or can document special circumstances or expenses.

The calculation of allowable “necessary expenses” is based upon national standards set by the IRS and Bureau of Labor Statistics, such as for housing, food, apparel and personal care, and local standards for housing, utilities, transportation, medical, and other necessities. “Necessary expenses” also include payment of domestic support obligations. An exhaustive discussion of the means test is beyond the scope of this article, and the subject has been treated in detail elsewhere.

The theory of a chapter 7 is that the debtor must turn over all of his or her unencumbered assets to a chapter 7 bankruptcy trustee and the trustee then uses those assets to satisfy the claims of unsecured creditors. However, the Code allows debtors to claim “exemptions” up to a certain value in real and personal property before the property may be taken by the trustee to pay creditors. For most debtors, the unencumbered value of their
real and personal property will be lower than the maximum allowed for exemptions. In order to retain property secured by a lien, such as a house or automobile, the Code requires that the debtor file a “statement of intention” stating whether he or she intends to pay the secured obligation and retain the property. As long as the debtor remains current in his or her payments on secured loans, such as a mortgage or automobile, the debtor may keep the property under a chapter 7, and may catch up on arrears over time and retain the property in a chapter 13. The result is that most debtors who qualify for bankruptcy relief even under the BAPCPA will be able to keep all of their property in chapter 7 or 13.

A chapter 7 case in which there are no assets left to pay unsecured creditors, after encumbrances and exemptions, is called a "no asset" case. To the extent that there are assets available in the debtor’s estate, the Code sets forth a schedule of priorities in which unsecured debts are to be paid in full. Priority expenses include, in descending order, trustee’s fees, domestic support obligations and similar debts described in §§ 523(a)(5) and (15), attorneys and administrative fees, wages, rental deposits, etc., and finally, non-priority or "general unsecured debts." For most individual debtors and households, "general unsecured debts" including credit card bills, unpaid medical or professional bills, money owed to relatives, etc., constitute the majority of personal debt and are usually the type of debts that can be discharged or modified in a chapter 7 or chapter 13.

Once a debtor has filed his or her petition, the “automatic stay” goes into effect under § 362, requiring most creditors to stop collection efforts outside of the bankruptcy process. Generally, the scope of the stay is broad, but not all actions are stayed. For example, the automatic stay does not apply to actions concerning domestic relations claims.

No fewer than twenty days nor more than forty days after the bankruptcy petition is filed, the chapter 7 trustee convenes a meeting of creditors, referred to as a “341 meeting,” at which the debtor, being both spouses if filing jointly, appears so that the trustee and the creditors may examine the debtor to determine whether the debtor qualifies for a bankruptcy discharge, and whether there are any assets that may be used by the trustee to pay unsecured creditors. Assuming that there are no assets for payment to creditors or the debtor has turned over any non-exempt assets and has otherwise met the stricter requirements of the BAPCPA, and there are no objections filed by creditors, then after sixty days from the conclusion of the meeting of creditors the debtor will receive notice of discharge, and the case is closed. For most creditors, objections to discharge of a debt must be filed before the expiration of sixty days after the meeting of creditors or the objection to discharge is permanently waived.

The statutory scheme for discharge of debt is found in § 727 of the Code, which provides in relevant part:

The court shall grant the debtor a discharge unless—

[lists 12 different situations that require that the discharge not be granted, including fraud or misconduct by the debtor, or if the debtor has received a chapter 7 discharge within the last eight years]

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all


66. FED. R. BANKR. P. 2003(a). The meeting is often called a "341 meeting" because of § 341, which provides for the meeting. 11 U.S.C.S. § 341 (2006).


68. FED. R. BANKR. P. 4004(a).


debts that arose before the date of the order for relief under this chapter. . . .

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section. 71

Under § 727, all debts must be discharged unless there is a successful objection that the debtor has engaged in specifically proscribed misconduct, 72 or if the debt is one of the types of debt enumerated in § 523. Pre-BAPCPA law required exceptions to discharge to be strictly construed against the creditor and liberally in favor of the debtor so as to provide the debtor with a “fresh start.” 73 This policy can now be questioned at least to some degree due to provisions such as the § 707(b)(2) “presumption of abuse” and the general creditor-friendly nature of the BAPCPA. It is too early to tell whether courts will move away from the liberal “fresh start” presumption that prevailed before the BAPCPA.

Section 523, “Exceptions to Discharge,” sets forth nineteen categories and numerous subcategories of debt that are excepted from discharge under § 727. Such debts include, inter alia, customs duties and taxes, 74 most debts incurred by the debtor through fraud or malfeasance, 75 student loans, 76 debt incurred for “luxury” goods in excess of $500 within ninety days before filing bankruptcy and consumer credit cash advances aggregating more than $750 within seventy days of filing, 77 and any debt for a domestic support obligation. 78 For most debts, the debt is discharged when the bankruptcy court signs the discharge order. 79 Failure by the creditor to object within that time means that the claim is forever waived. However, as provided in

80. Fed. R. Bankr. P. 4007, Determination of Dischargeability of a Debt, provides in pertinent part:

(a) Persons Entitled to File a Complaint. A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.
(b) Time for Commencing Proceeding Other Than Under § 523(c) of the Code. 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.
(c) Time for Filing Complaint Under § 523(c) in a Chapter 7 Liquidation . . . A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors.
81. Debts for which an objection must be filed within sixty days: 11 U.S.C.S. § 523(a)(2)(A) (2006) (debts incurred by fraud), (B) (2006) (fraud or material misrepresentation), (C) (2006) (fraud, larceny or embezzlement while in a fiduciary capacity), (D) (willful or malicious injury to a person or property), (E) (death or injury while substance impaired).
83. 11 U.S.C.S. § 1322(d)(1)-(2) (2006). The length of the required chapter 13 plan is based upon an income and expenses formula for the debtor, spouse, and household.
of reorganization.

C. What Are Domestic Support Obligations and How Do They Arise?

Support obligations come in many forms and arise under a broad set of circumstances and assumptions. The most common are direct-pay obligations, where the debtor is under obligation to pay state-mandated spousal support or child support directly to the ex-spouse in a specific amount each month. Such obligations typically end upon the emancipation of a minor, in the case of child support, or upon death or remarriage of the payee spouse or for a fixed period of years, in the case of spousal support. These types of payments are usually, but not always, made in incremental installments, such as monthly installments, although lump sum payments can also constitute support. Support obligations can also include the obligation to pay the mortgage for the ex-spouse’s residence or to make car payments. These types of debts are payments by the payee to third parties for on-going essential needs of the former spouse. Still another type of obligation is the allocation of debt incurred during the marriage. This means that one spouse has agreed or has been ordered to be liable for payment of the parties’ marital debt, and to make those payments directly to the third-party creditor. Credit card debt often comes under this category, and usually takes the form of an assumption of debt or a “hold harmless” agreement. This type of debt differs from direct payments for a mortgage or car payments, in that the debt being paid has already been incurred, and therefore arguably offers no direct support benefit to the other spouse. Other types of indirect payments include payments to the attorney of an escrow for fees incurred in connection with nondischargeable debt.

In contrast to support obligations, other types of marital obligations are generally termed as equitable distribution of property or property division by parties to the divorce agreement and in domestic relations courts.

88. Silansky v. Brodsky, Greenblatt & Renehan (In re Silansky), 897 F.2d 743 (4th Cir. 1989) (ordering husband to pay spouse’s attorney fees pursuant to divorce decree).
89. See, e.g., In re Chang, 163 F. 3d 1138, 1140 (9th Cir. 1998) (holding that federal law determines “whether a particular debt constitutes nondischargeable spousal support or a division of property”); Paneras v. Paneras (In re Paneras), 195 B.R. 395, 405-06 (Bankr.

typically include payments in one or more lump sums, often with interest, that are not terminable upon death or remarriage of the payee spouse. These payments are sometimes, but not always, tied to the sale or division of specific marital property, such as a house or business.

Domestic support obligations may be characterized as alimony or property distribution for tax reasons. Alimony is deductible for the payor and taxable for the payee, whereas property distribution is not a taxable event. In addition, in most states, alimony is modifiable in state court, but property division is not.

While divorce courts have the right to allocate the responsibility to pay jointly-incurred marital debt to one party or another, the allocation does not, as a matter of law, affect the rights of a creditor. A creditor’s right to proceed against one or both parties is not extinguished simply because a divorce agreement requires one party to pay the debt. If the party responsible does not pay the debt, the creditor may proceed against the other party, notwithstanding the divorce agreement. This has important implications.

N.D. Ill. 1996) (stating the court must find that debts are either support or property settlement).
90. Horner v. Horner (In re Horner), 222 B.R. 918 (Bankr. S.D. Ga. 1998) (finding that where payments are lump sum and not terminable at death of payee spouse, bankruptcy court should have ruled the payments are property division and not alimony payments).
92. Massachusetts: MASS. GEN. LAWS ch.208, §37 (2006) (concerning revision of alimony); Drapek v. Drapek, 503 N.E.2d 946, 949 (Mass. 1987) (holding that property division cannot be revised). Pennsylvania: If alimony is a result of an agreement, as opposed to a court-imposed decree, the agreement is treated as a contract and, with very few exceptions, is not modifiable even in the event of changed circumstances. 23 Pa. Cons. Stat. § 3105(c) (2006); Peck v. Peck, 707 A.2d 1163 (Pa. Super. 1998) (holding that the trial court had no authority to modify the terms of a voluntary support agreement).
93. See, for example, Arizona, which requires the following language to be provided to both parties to a divorce settlement agreement:

In your property settlement agreement or decree . . . the court may assign responsibility for certain community debts to one spouse or the other. Please be aware that a court order that does this is binding on the spouses only and does not necessarily relive either of you from your responsibility for these community debts. These debts are matters of contract between you and your creditors . . .

In your property settlement agreement or decree the court may assign responsibility for certain community debts to one spouse or the other. Please be aware that a court order that does this is binding on the spouses only and does not necessarily relieve either of you from your responsibility for these community debts. These debts are matters of contract between you and your creditors . . .

In your property settlement agreement or decree the court may assign responsibility for certain community debts to one spouse or the other. Please be aware that a court order that does this is binding on the spouses only and does not necessarily relieve either of you from your responsibility for these community debts. These debts are matters of contract between you and your creditors . . .

In your property settlement agreement or decree the court may assign responsibility for certain community debts to one spouse or the other. Please be aware that a court order that does this is binding on the spouses only and does not necessarily relieve either of you from your responsibility for these community debts. These debts are matters of contract between you and your creditors . . .
implications for parties to a divorce agreement. Divorce settlements are often structured to provide for one party to pay a joint debt. When the payer spouse repudiates the debt and seeks to have it discharged in bankruptcy, then the creditor may look to the other party to pay the debt. The parties may have already considered this when they created the settlement agreement and specifically labeled the obligation as a form of support. Or, if discharge litigation arises, the payee spouse may seek to prove that the obligation of one spouse to pay a joint debt directly to a creditor should be deemed support, even if it is not actually labeled as such.

III. COMPARISON OF BANKRUPTCY CODE SECTIONS ON DISCHARGE OF MARITAL DEBT BEFORE AND AFTER THE BAPCPA

Bankruptcy courts have long recognized marital and child support obligations as a unique type of debt to be treated differently from other forms of secured debt due to the vulnerability of former spouses and dependents. The alimony exception to discharge was first established in the 19th century by Supreme Court in [Audubon v. Shufeldt](https://www.presidentialmansionmuseums.org/history/shelbyville-shelby-county-ohio/audubon-v-shufeldt-1830). Two years later, in [Dunbar v. Dunbar](https://www.presidentialmansionmuseums.org/history/shelbyville-shelby-county-ohio/dunbar-v-dunbar-1832), the Court established an exception for child support. These exceptions were enacted into law by Congress in 1903, and ultimately codified in the 1978 Bankruptcy Code §§ 523(a)(5) and (15).

Prior to the BAPCPA, marital debt litigation concerned one of two issues: (1) under § 523(a)(5), whether a particular debt should be deemed "in the nature of" a support or alimony and hence, nondischargeable, or (2) under § 523(a)(15), if the debt was property division or a type of debt other than support, whether the debtor could afford to pay it or whether the benefit of discharge for the debtor outweighed the hardship to the creditor spouse. In addition, the Sixth Circuit developed rules to allow for discharge of a nondischargeable § 523(a)(5) debt to the extent it exceeded the debtor's ability to pay.


Prior to the BAPCPA, the Bankruptcy Code provided as follows:

§523 Exceptions to discharge
A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

***

(5) 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—such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or such debt includes a liability designated as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance, or support;

***

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit; unless—

the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Thus, § 523(a) divided marital obligations into two categories, alimony/support/maintenance, and property distribution. Section 523(a)(5) dealt with debts “in the nature of alimony, maintenance, or support.” Under § 523(a)(5)(A), debts which had been “assigned” to another party (other than to a government entity) were not subject to the discharge exception. "The test for whether the debt has been assigned under §523(a)(5)(A) is whether or not the nonpaying spouse will receive any present benefit from the payment of the debt."100 There were relatively few cases dealing with assignment under (a)(5)(A). Child support payments that were assigned as a payment to obtaining Aid to Families with Dependent Children (AFDC) welfare assistance were always held to be nondischargeable because the assignment is to a government entity.101 However, one court held that backowed child support had been assigned and was outside the discharge exception when the trustee in the debtor’s case sought to obtain the back support for the benefit of the debtor’s creditors.102

Under § 523(a)(5)(B), a marital obligation was presumed discharged unless the creditor spouse objected to discharge and could show that the debt was “designated as alimony, maintenance, or support” and that the debt was “actually in the nature of alimony, maintenance, or support.” Most pre-BAPCPA domestic support discharge litigation dealt with whether a particular debt should be considered “actually in the nature of alimony, maintenance, or support.”

It should be noted that not a single court ever applied § 523(a)(5)(B) exactly as it was written. Under a literal reading of the statute, the debt at issue first had to be “designated as alimony, maintenance or support” before a court could consider whether the debt was “actually in the nature of alimony, maintenance or support.”103 No decisions dealing with this statute ever required that a debt first be “designated” as support before considering the actual nature of the debt. Every decision that ruled on this statute looked only to the “actual” nature of the debt, without consideration of whether the debt was actually designated as alimony, maintenance, or support.104 Recognizing this drafting defect, the authors of the BAPCPA pointedly eliminated the designation requirement.105

Pre-BAPCPA, marital debts that were not “in the nature of alimony, maintenance or support” fell into the broad category of property distribution and were treated under § 523(a)(15).106 Section 523(a)(15)(A) allowed for discharge of a property distribution obligation if the debtor could not afford to pay the debt, in light of his or her reasonable needs and those of any dependents.107 Section 523(a)(15)(B) was essentially a balancing test, permitting discharge of a property distribution debt if, in light of the parties current financial circumstances, the relief provided to the debtor outweighed the detriment to the creditor spouse.108 The bankruptcy court could only consider discharge under § 523(a)(15) if it first determined that the obligation at issue, although incurred in connection with a divorce or separation settlement, was not intended to function as alimony, support, or maintenance.

Enforcement of support payments provided a limited exception to the automatic stay under pre-BAPCPA law. The stay did not apply to the commencement or continuation of an action to establish, modify, or collect alimony, maintenance, or support “from property that is not property of the estate.” 110 In this context, “property that is not property of the estate” consists of the future income of the debtor. 111 Thus, the debtor’s bankruptcy filing did not operate as a stay of actions to collect for marital obligations that become due and payable after the bankruptcy filing and which are to be paid by the future income of the debtor. 112 But, the stay did stop civil contempt actions to collect on support judgments that were due and payable before the bankruptcy filing date. 113

In order to except a debt from discharge under § 523(a)(5), the spouse opposing discharge was required to demonstrate that the debt fell outside the definition of the section. “The analysis of dischargeability under section 523 must begin with the assumption that dischargeability is favored under the Code unless the complaining spouse, who has the burden of proof, demonstrates that the obligation at issue is ‘actually in the nature of alimony, maintenance, or support.’” 114 Pre-BAPCPA, §§ 523(a)(5) and (15) were generally interpreted to reflect a congressional preference for the rights of spouses to alimony, maintenance or support over the rights of debtors to a fresh start. 115 Thus, most bankruptcy courts construed the § 523(a)(5) exception liberally in favor of the creditor spouse. 116

111. Section 541(a) generally describes property of the estate as interests of the debtor “as of the commencement of the case.” 11 U.S.C. § 541(a) (2006).
112. In re Bezoza, 271 B.R. 46, 50-52 (Bankr. S.D.N.Y. 2002) (holding that the stay does not apply to an action to collect against non-estate property, which includes that the debtor earns and what he or she is capable of earning).
113. Most bankruptcy courts ruled that pre-BAPCPA bankruptcy provided a safe harbor against civil contempt actions filed to collect on a judgment for alimony or support. See, e.g., In re Leonard, 231 B.R. at 889 (holding that the district court held that bankruptcy court’s refusal to lift stay in order to allow creditor spouse to continue civil contempt proceedings was not an abuse of discretion, holding that “the automatic stay has generally been applied to civil contempt proceedings”). C.f. In re Lincoln, 264 B.R. 370, 372-73 (E.D. Pa. 2001) (holding that while the automatic stay generally applies to civil contempt proceedings, it does not apply to contempt proceedings whose purpose is to punish a contemptor and uphold the dignity of the bankruptcy court).
114. Tilly v. Jesse, 789 F.2d 1074, 1077 (4th Cir.1986). See also Hudson v. Raggio, Inc. (In re Hudson), 107 F.3d 355, 356 (5th Cir. 1997) (applying 11 U.S.C. § 523(a)(5), stating that it is a “basic principle of bankruptcy that exceptions to discharge must be strictly construed against a creditor and liberally construed in favor of a debtor so that the debtor may be afforded a fresh start”).
deference by bankruptcy courts was one of the points of divergence between the circuits.

B. BAPCPA Amendments to §§ 523(a)(5) and (15)

The BAPCPA amendments to §§ 523(a)(5) and (15) are at once simple and dramatic (the revised language is in italics):

§523 Exceptions to Discharge
A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

***

(5) for a domestic support obligation

***

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a government unit. 122

The BAPCPA pares down the pre-BAPCPA verbiage of §§ 523 (a)(5) and (15) from 311 words to 97, and at first glance appears to pretty much close off any debate over whether a divorce- or separation-related debt can ever be discharged. The BAPCPA also introduces a new term, “domestic support obligation,” in revised § 523(a)(5), and defines that term in new § 101(14A). That section contains a four-factor definition of “domestic support obligation,” as follows:

The term “domestic support obligation” means a debt that accrues before or after the entry of an order for relief under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or

(ii) a governmental unit;


(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before or after entry of an order for relief under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child, or parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt. 123

Obviously, new § 104(14A) mirrors the former § 523(a)(5), retaining the same “actually in the nature of” language that gave rise to so much litigation and divergence of judicial opinion under the pre-BAPCPA Code. It further qualifies the debt as one “owed to or recoverable by—” a “spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative.” 124 The term “domestic support obligation” is used throughout the revised Code and replaces the previous references to “alimony, maintenance, or support.”

Structurally, here is what the revised §§ 523(a)(5) and (15) accomplishes: first, the former § 523(a)(5) necessitated a two-step inquiry: it required debts to be (1) “designated as alimony, maintenance, and support,” and (2) the debts must be “actually in the nature of alimony, maintenance, and support.” Section 101(14A) retains the same “in the nature of alimony, maintenance, or support” language as former § 523(a)(5), but drops the requirement that the support obligation be so designated. Thus, the “in the nature of” inquiry that was previously the source of discharge litigation has been shunted to new § 101(14A).

The second major change is the elimination of any discharge of non-support-type debt under former § 523(a)(15). Section 523(a)(15)(A) allowed for potential discharge of non-support marital debt (generally this meant property division) if the debtor did not have the ability to pay the debt, or,

124. Id.
under (B) if the benefit to the debtor outweighed the detriment to the creditor spouse. In cases in which a debt was intended as property distribution, and the debtor believed he or she could satisfy the hardship or balancing of the equities criteria, debtors had incentive to seek distinguish between support and property division in order to discharge the debt under § 523(a)(15). That language is now gone. 125

At the same time that the BAPCPA closes off avenues for discharge of marital debt, it keeps one avenue pointedly open by distinguishing between two types of creditors. Section 101(14A) (which governs debts excepted from discharge in § 523(a)(5)), applies to a debt “owed to or recoverable by” the creditor spouse or child. 126 In contrast, § 523(a)(15) only applies to a debt “to a spouse, former spouse, or child of the debtor.” It must be assumed that the omission of the words “recoverable by” is intentional, drawing a clear distinction between (a)(5) creditors and (a)(15) creditors. Section 523(a)(5) is plainly a wider category than (a)(15).

What does the distinction mean? No cases have dealt with this issue, and so any answer here is speculative. Here is what the distinction appears to mean: debts that are “owed to” a spouse or child are debts so designated in an agreement or decree as payable to that person. Debts “recoverable by” a spouse or child are debts that, through state court legal process, the creditor spouse or child could enforce. This would include debts incurred in a divorce or separation that are designated as payable directly to a third party, such as a loan assumption agreement, or “hold harmless” agreement where the debtor has agreed to pay a debt owed by both parties. However, since § 523(a)(15) pointedly omits the “recoverable by” language, it can be presumed that the drafters of the BAPCPA intended to leave open the option of a debtor to discharge third-party debt if the debt is not “in the nature of alimony, support, or maintenance.” Again, this analysis is speculative, but in as much as the distinction between (a)(5) creditors and (a)(15) is clearly deliberate, this appears to be the intention of the revised

125. Other provisions of the BAPCPA will affect chapter 13 debtors. New § 1325(a)(8) requires a debtor to be current in all pre- and post-petition domestic support obligations in order to obtain confirmation of a chapter 13 plan. Revised § 1329(a) requires the debtor to have made all post-plan confirmation domestic support payments as a condition of receiving a chapter 13 discharge, and failure to pay any post-petition domestic support obligation may result in dismissal of the case. However, a debtor’s domestic support obligation payments are not considered part of the debtor’s disposable income, and a chapter 13 plan can provide for less than full payment of a domestic support obligation if all of the debtor’s disposable income is paid directly to the chapter 13 trustee for the full five years. 11 U.S.C.S. § 1325(a)(4); § 807(a)(1)(D) (2006).


IV. DISORDER IN THE COURTS: MARITAL DEBT DISCHARGE LITIGATION PRE-BAPCPA

This section analyzes the approaches taken by courts in different federal circuits in dealing with discharge of marital debt. The purpose of this section is to reveal the variety of rules and approaches used by courts in treating marital debt discharge litigation, and since some of the types of litigation will continue, this analysis will help show how courts are likely to apply the revised §§ 523(a)(5) and (15) to new cases filed under the BAPCPA. The variety of rules developed among the circuits suggests that interpretation of the revised sections is not likely to be uniform. The widest split is between the Third and Sixth Circuits and their respective precedents of In re Gianakas and Calhoun v. Calhoun (In re Calhoun).

A. In re Gianakas and Long v. Calhoun: A Tale of Two Circuits

Pre-BAPCPA, bankruptcy courts focused upon the intent of the parties in entering into a divorce agreement, 128 or the intent of a state order 129 in deciding whether a debt was nondischargable under § 523(a)(5). If a judgment purported to incorporate a written agreement, the intent of the judgment controlled if there was a discrepancy between the two. 130 And, some courts gave greater deference to contested divorce proceedings than to non-contested proceedings, and to court-written decrees over decrees that incorporated agreements between the parties. 131

128. See In re Brody, 3 F.3d 35, 38 (2d Cir. 2002) ("The intent of the parties at the time a separation agreement is executed determines whether a payment pursuant to the agreement is alimony, support, or maintenance within the meaning of § 523(a)(5)."").

129. See, e.g., Detels v. Nero (In re Nero), 323 B.R. 33, 38 (Bankr. D. Conn. 2005) ("In those cases where a state court issues a divorce decree after a contested hearing, the only relevant intention is that of the state court . . . .").

130. See, e.g., Van Aken v. Van Aken (In re Van Aken), 320 B.R. 620, 627 (B.A.P. 6th Cir. 2005) (rejecting debtor’s claim that the underlying separation agreement is the “key document” where the judgment restates and revises the relevant terms of the agreement).

131. See, e.g., Wooldar v. Axline (In re Wooldar), 269 B.R. 754, 758 (Bankr. S.D. Ohio 2001) (quoting In re Calhoun, 715 F.2d at 1109 n.10): "In a contested case the likelihood that the state court would have awarded support where it was unnecessary is sufficiently remote that such interference by the bankruptcy court will seldom be necessary. When, as in the present controversy, the decree is not the result of a contested case but merely incorporates the parties’ agreement, the concern for comity is of less importance. To allow the parties’
While almost all courts agreed that "intent" was the key determinant in deciding the "actual nature" of a § 523(a)(5) debt, courts in different circuits disagreed upon which factors were to be used to determine intent, and how much weight was to be placed on specific factors. Areas of divergence among the circuits included whether payments were made directly to a spouse or to a third party creditor, whether a party was estopped from treating marital debt differently for discharge purposes than for tax purposes, and whether, even if the debt were of a type that is nondischargeable, some of the debt could still be discharged in light of the debtor's actual ability to pay the debt. The Third Circuit case of In re Gianakas and the Sixth Circuit case of Long v. Calhoun (In re Calhoun) represent the widest divergence in approaches to discharge of marital debt under former § 523(a)(5).

I. Third Circuit in In re Gianakas: An Expansive View of What Constitutes Alimony

Gianakas was widely cited in the Third Circuit and other circuits. The facts of Gianakas represent a typical divorce-meets-bankruptcy situation. Paul Gianakas and Karen Gianakas were divorced in 1983. The characterization of a loan assumption in such cases to control pro forma would permit the debtor to agree for forgo his rights under the bankruptcy law. But see In re Van Aken, 320 B.R. at 629:

The state courts are expected to fully express their intent with respect to spousal support awards in their written judgments and decrees, including rulings which incorporate agreements between the parties to a divorce or separation. The Panel thus disagrees with the suggestion of the bankruptcy court in Woolard that a distinction should be drawn between contested and uncontested divorce proceedings in terms of the deference to be given a state court decree.


3. See Section III.B.3., infra.

4. See Section III.A.2., infra.

5. See generally In re Gianakas, 917 F.2d 759 (3d Cir. 1990) (representing different approaches to the discharge of marital debt).

6. See generally In re Calhoun, 715 F.2d 1103 (representing different approaches to the discharge of marital debt).


9. In re Gianakas, 917 F.2d at 760.

10. Id.

11. Id.

12. Id.

13. Id.

14. Id.

15. Id.

16. Id.

17. Id. at 760-61

18. Id. at 761.

19. Id.

20. Id.

21. In re Gianakas, 917 F.2d at 761.

22. Id.
(citations omitted). As the court noted in *In re Yeates*, 807 F. 2d 874, 878 (10th Cir. 1986) "a debt could be 'in the nature of support' under section 523(a)(5) even though it would not legally qualify as alimony or support under state law."153

Distilling from other decisions, the *Gianakas* court identified three elements for the bankruptcy court to consider: (1) the language of the agreement;154 (2) the parties' financial circumstances at the time of the agreement or decree;155 and (3) the function served by the debt at the time of the agreement or decree.156 However, the writing between the parties cannot be considered a reliable indicia of intent because neither the parties nor the state court that incorporated the agreement in its decree were likely to have contemplated a future bankruptcy by one of the parties.157 The parties' financial circumstances at the time of the settlement are a more important indicator because:

The facts that one spouse had custody of minor children, was not employed, or was employed in a less remunerative position than the other spouse are aspects of the parties' financial circumstances at the time the obligation was fixed which shed light on the inquiry into the nature of the obligation as support.158

The final *Gianakas* factor is "the function served by the obligation at the time of the divorce or settlement."159 As the Third Circuit explained: "An obligation that serves to maintain daily necessities such as food, housing, and transportation is indicative of a debt intended to be in the nature of support."160 The *Gianakas* court was clear that the "function" inquiry was strictly limited to the time that the agreement or decree was established, and does not include the financial circumstances of the parties at any point later on.161

In *Gianakas*, Paul raised the issue of whether Karen still needed the payments.162 The Third Circuit would not even consider this point. "[T]he inquiry of the bankruptcy court should be limited to the nature of the obligation at the time it was undertaken."163 Finding that Karen needed Paul to pay the second mortgage at the time of the divorce in order for her to remain in the home with the children, the Third Circuit upheld the lower court rulings and found Paul's obligation to pay the second mortgage to be nondischargeable.164

2. Sixth Circuit and *In re Calhoun*: What A Difference Today Makes

Under the rule of the Sixth Circuit as first set forth in *In re Calhoun*, a bankruptcy court may take into account the debtor's current financial situation in deciding whether any portion of a nondischargeable debt may, in fact, be discharged. This rule distinguishes the Sixth Circuit from all other circuits,165 and nothing in the new § 523(a)(5) appears to mandate a different result.

In *Calhoun*, the husband and wife were divorced after a three-year marriage.166 Each had children by a previous marriage, but there were no children born of their marriage.167 At the time of the divorce, the husband was laid off and had income of $950 per month, of which $300 went towards support of the two children from his previous marriage.168 The wife had income of $500 per month.169 Under the divorce agreement, the husband agreed to a "hold harmless" obligation under which he assumed five jointly-owned credit card debts totaling $27,500 that were incurred during the marriage.170 His monthly payment amount towards the debts was

---

153. Id.
154. Id. at 762.
155. Id.
156. Id.
157. *In re Gianakas*, 917 F. 2d at 762. The court said that "[i]t is likely that 'neither the parties nor the divorce court contemplated the effect of a subsequent bankruptcy when the obligation arose.'" Id. This reason has also been cited by courts in the Eleventh Circuit. *See also* Cummings v. Cummings, 244 F.3d 1263, 1265 (11th Cir. 2001); Butler v. Butler (*In re Butler*), 277 B.R. 843, 850 (Bankr. M.D. Ga. 2002) (citing Cummings, 244 F.3d at 1265).
158. *In re Gianakas*, 917 F. 2d at 763.
159. Id.
160. Id.
161. Id.
162. Id.
163. *See also* Horner v. Overton (*In re Horner*), 125 B.R. 458, 462 (Bankr. W.D. Pa. 1991) ("Only the circumstances and intent of the parties at the time of the award may be considered, and not changes in circumstances which may have occurred prior to and during the bankruptcy.").
164. *In re Gianakas*, 917 F.2d at 763.
165. *One bankruptcy court in Pennsylvania, noting the difference between the Third and Sixth Circuits, made this unfulfilled wish: 'The fact that our Circuit disagrees with the Sixth Circuit will hopefully be reconciled in the near future.'* *In re Pollock*, 150 B.R. 584, 589 (Bankr. M.D. Pa. 1992) (evidencing that, thirteen years later, the Circuits have not reconciled).
166. In *re Calhoun*, 715 F.2d at 1105.
167. Id.
168. Id.
169. Id.
170. Id.
$707 per month.\textsuperscript{171}

The husband eventually filed for bankruptcy.\textsuperscript{172} The wife objected to discharge of the assumption obligation.\textsuperscript{173} At issue in the case is whether the hold-harmless obligation for the credit card debts constituted support or alimony within the meaning of § 523(a)(5).\textsuperscript{174} The lower courts ruled in favor of the wife, holding that the clear language of the parties controlled, unless to do so would work a “manifest injustice.”\textsuperscript{175}

Whereas for the Gianakas court, a finding of intent (using the three elements enumerated in the case) constituted the entire scope of a § 523(a)(5) inquiry, for the Calhoun court, it was only part of the inquiry. The Calhoun court added three more prongs to satisfy: (1) whether the debt has the actual effect of providing support, in light of the parties’ present financial circumstances;\textsuperscript{176} (2) whether the obligation is so excessive as to go beyond support;\textsuperscript{177} and (3) even if the debt is of the type that is nondischargeable, whether any portion of the debt may be discharged in light of what the debtor can actually afford to pay.\textsuperscript{178}

The “actual effect” factor considered the practical effect of continuing the support obligation.

If the bankruptcy court finds, as a threshold matter, that assumption of the debts was intended as support, it must next inquire whether such assumption has the effect of providing the support necessary to ensure that the daily needs of the former spouse and any children of the marriage are satisfied. The distribution or existence of other property, for example, may make the continuing [assumption of joint debts] unnecessary for support, as might drastic changes in the former spouse’s capabilities for self-support. Substance must prevail over form.\textsuperscript{179}

The Calhoun court made it clear that the inquiry was a rolling, fact-intensive one, and that a debt could be discharged regardless of the parties’ intent at the time of the agreement:

The bankruptcy court should also look to the practical effect of the discharge of each loan upon the dependent spouse’s ability to sustain daily needs . . . If without the [debt obligation] the spouse could not maintain the daily necessities . . . the effect of the loan assumption may be found “in the nature of support” for purposes of the Bankruptcy Act. If the loan assumption is not found necessary to provide such support, the inquiry ends and the debtor’s obligation . . . must be discharged.\textsuperscript{180}

Assuming the first two prongs are satisfied, a bankruptcy court must also consider whether the amount of support is “so excessive that it is manifestly unreasonable under traditional concepts of support.”\textsuperscript{181} An excessive allowance is “at odds with the fresh start concept underlying federal bankruptcy law.”\textsuperscript{182} In contrast to Calhoun, most bankruptcy courts in other circuits have stated that for a bankruptcy court to examine whether an award is excessive is to invade the family law jurisdiction of state courts.\textsuperscript{183} The Calhoun court expressed its concern that a rule that prohibited any modification of a support agreement would contradict the “mandate of Congress” that bankruptcy courts “fashion a common law of bankruptcy and the principle that one cannot contract away bankruptcy rights.”\textsuperscript{184}

Bankruptcy courts must, therefore, examine the ability of the debtor to pay, both at the time of the agreement, and in light of the debtor’s continuing ability to pay.\textsuperscript{185} The court noted that factors such as the debtor’s current ability to pay are also consistent with how state courts reach support determinations.\textsuperscript{186}

Even if the debt is found to be of the type that is nondischargeable, all or a portion of the debt may be discharged in light of the debtor’s current financial circumstances, and what the debtor can actually afford to pay.\textsuperscript{187}

In determining the amount by which a marital debt may be modified, the

\textsuperscript{171} Id. at 1105-06.
\textsuperscript{172} In re Calhoun, 715 F.2d at 1105-06
\textsuperscript{173} Id. at 1106.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 1110.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} In re Calhoun, 715 F.2d at 1110.
\textsuperscript{179} Id. (emphasis added).
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} See, e.g., In re Gianakas, 917 F.2d at 763. The Gianakas court noted that “this position has been rejected by most federal courts that have considered it . . . . An inquiry into present need ‘would put federal courts in the position of modifying matrimonial decrees of state courts, thus interfering with the delicate systems for dealing with the dissolution of marriages.'” Id. See also Luperno v. Evans (In re Evans), 278 B.R. 407, 412 (Bankr. D. Md. 2002) (holding that federal courts should refrain from modifying state court judgments).
\textsuperscript{184} In re Calhoun, 715 F.2d at 1110 n.11.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 1110.
\textsuperscript{187} Id.
bankruptcy court should utilize “such traditional state law factors” as relative earning power of the parties, their financial status, work experience and abilities, and other means of support “relevant to the substance of the result . . . in order to determine how much of the debt . . . can be fairly considered “in the nature of support” for purposes of federal bankruptcy.”

a. Calhoun Refined: In re Fitzgerald

After In re Calhoun was decided, bankruptcy courts in the Sixth Circuit applied the Calhoun “present circumstances” analysis to every instance of alimony and child support obligations. However, the ruling in Calhoun was refined by the Sixth Circuit opinion of Fitzgerald v. Fitzgerald (In re Fitzgerald).

In In re Fitzgerald, the Sixth Circuit addressed the “present needs” prong of In re Calhoun. Fitzgerald dealt with an alimony arrearage of $90,250 and an on-going alimony obligation of $1500 per month. The state court award designated the payments as alimony, and neither party questioned that it was the intended purpose of the debt. The Sixth Circuit held that the “present needs” prong of Calhoun was limited to cases in which the nature of the debt was not evident from the language of the agreement or decree: “Unlike Calhoun, where it was necessary to determine whether something not denominated as support in the divorce decree was really support, here the only question is whether something denominated as alimony is really alimony . . . .” Since there was no reasonable doubt that the debts at issue in In re Fitzgerald were intended by the parties as alimony, the Sixth Circuit held that it was not appropriate to apply the Calhoun “present needs” test as a way of determining the nature of the debt. To do so would be to invite undue interference by bankruptcy courts in state domestic relations courts.

b. Calhoun Even More Refined: In re Sorah

In Fitzgerald, there was no dispute that the debt in question was intended as alimony. However, in many cases, a debt may be labeled as alimony or support, but the debtor may nevertheless dispute the actual nature of the debt. This was the case in In re Sorah. In Sorah, the parties divorced after twenty years of marriage. The husband, who had a disproportionately greater income earning capacity than the wife, was ordered to pay $750 per month in support. He later filed bankruptcy and sought to have the debt discharged, while the wife objected pursuant to § 523(a)(5)(B). The bankruptcy court discharged the debt, finding that it was really intended to punish the husband for marital infidelity, and the wife appealed.

The Sixth Circuit held that if the nature of the debt is disputed, then the bankruptcy court must look beyond the label of the debt to determine whether it actually is “in the nature” of alimony. In doing so, the bankruptcy court should look to “traditional state law indicia” such as the label of the debt, whether the debt is payable directly to the spouse or to third parties, whether the payments are contingent upon events such as the death or remarriage of the payee spouse, and any other elements that the state court considers. And although a bankruptcy court may not sit as a “super-divorce court” to determine the most reasonable level of support, it may consider evidence that the obligation is unreasonable and discharge it to the extent that it exceeds what the debtor can reasonably be expected to pay.

Finding that the level of support was reasonable in light of the husband’s current resources, the Sixth Circuit court did not modify the award.

The “present needs” test of In re Calhoun and its progeny is alive in the
Sixth Circuit. The court in In re Woolard,206 citing Calhoun and Fitzgerald, considered the debtor’s “current ability to pay” in finding that an award of $1,000 per month in spousal support was not unreasonable. In In re McLaughlin, the court held that once the creditor spouse demonstrates that a debt is “in the nature of support,” the burden shifts to the debtor to show that the award is unreasonable in light of the debtor’s financial circumstances.207

B. Marital Debt Discharge In The Other Circuits

The history of marital debt discharge litigation in other circuits presents a mosaic of different approaches that seems surprising considering the cases are all interpreting the same statute. Many of the decisions from other circuits can be said to be shades of In re Gianakas, while other courts evolved wholly different criteria. All of the cases described below dealt with litigation over the nature of the debt: support or property division. Since, in some limited circumstances, litigation over the “actual nature” of a marital obligation will still take place, a review of cases is instructive both as to how former § 523(a) was applied, and how it will be applied in the future when a debtor seeks to discharge a non-support obligation that is payable to a third-party creditor.

1. First, Second, and Tenth Circuits: Friends of In re Gianakas

In the First Circuit, bankruptcy courts have used a four prong approach to determine the true character of a marital debt. The elements include: (1) if the agreement fails to provide explicitly for support, the court may presume that the property settlement is intended as support;208 (2) minor children and imbalance of income;209 (3) whether payments are made directly to the ex-spouse in installments over a substantial period of time;210 (4) an obligation that terminates upon death or remarriage is indicative of support.211 Courts in the First Circuit do not consider the present circumstances of the parties, holding that the key issue is the intended function of the debt at the time of the award.212 The parties’ current

2005] DISCHARGE OF MARITAL DEBT OBLIGATIONS 1403

financial circumstances play no role in a § 523(a)(5) analysis.213

Second Circuit courts developed similar criteria,214 also declining to consider the parties’ changed financial circumstances. As the court in Forsdick v. Turgeon,215 opined, “if Congress wished the bankruptcy court to consider the parties present circumstances, it could have easily so provided.”216 The court noted that § 523(a)(8) sets forth a “present needs” test to determine if education loans may be discharged in the event of undue hardship to the debtor or dependents.217 Since Congress expressly provided a hardship exception for education loans, and none for discharge of support obligations, it must mean that the marital obligation exception under § 523(a)(5) constitutes an “absolute exception” to discharge.218

Tenth Circuit courts seem perfectly slavish in their adherence to Gianakas-style rules and in rejecting of any consideration of the parties current circumstances. A typical case is Mullins v. Mullins (In re Mullins),219 in which the court described the factors to determine intent, such as the label and writing between the parties, pre-agreement negotiations between the parties, relative earning power, and whether the debt is payable in a lump sum and whether interest accrues on the unpaid balance. The “court must ascertain the intention of the parties at the time they entered in their stipulation agreement, and not the current circumstances of the parties.”220

2. Fourth, Fifth, and D.C. Circuits: The Writing Between the Parties and Quasi Estoppel

The Fourth, Fifth, and D.C. Circuits diverge from In re Gianakas and its kindred cases in several important ways. In the Fourth Circuit, bankruptcy litigants may be estopped from asserting a position in § 523(a)(5) litigation if the person has treated the debt differently for tax purposes.221 In Robb-Fulton v. Robb (In re Robb),222 a debtor who deducted payments as alimony for tax purposes was estopped from asserting that the

213. Id.
216. Id.
217. Id.
218. Id.
219. See In re Mullins, 312 B.R. at 405.
220. Id.
221. See, e.g., Robb-Fulton v. Robb (In re Robb), 23 F.3d 895, 899 (4th Cir. 1994).
222. Id.
payments were property distribution for bankruptcy purposes. Citing the Fifth Circuit ruling in *Davidson v. Davidson (In re Davidson)*, the court held that because the debtor had classified monthly payments to his ex-spouse as alimony for tax purposes, “quasi-estoppel precludes him from avoiding the corresponding obligations or effects of this classification under the Bankruptcy Code.”

The Fourth Circuit also places much greater weight upon the written language of an agreement. In *In re Catron*, the court held it “must take the parties at their word,” particularly where the parties were “represented by competent counsel and incorporated their agreement into a court order.” To do otherwise would invite profound mischief and encourage parties and their counsel to make agreements that do not reflect their true intent.

Courts in the Fifth Circuit also stress the importance of express intentions of the parties. In the case of *Milligan v. Evert (In re Evert)* a settlement agreement contained separate and distinct provisions for child support, nontrivial spousal support, and property distribution. The Fifth Circuit held that, generally, the writing between the parties will control:

Under bankruptcy law, the intent of the parties at the time the separation agreement is executed determines whether a payment pursuant to the agreement is alimony, support or maintenance within the meaning of section 523(a)(5). A written agreement between the parties is persuasive evidence of their intent.

The use of extrinsic evidence to determine intent is only proper if the agreement is ambiguous.

---

223. See *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1296 (5th Cir. 1991).
224. *In re Robb*, 23 F.3d at 899. See also *In re Kelly*, 216 B.R. 806, 810 (Bankr. E.D. Tenn. 1998) (estopping a debtor from claiming that the payments were alimony because of claims he made on his tax return).
226. *Id.*
228. *Id.* (emphasis added).
229. *Id.* at 371. As the court stated,
The approach we take minimizes the risk that what the parties and the divorce court unambiguously intended as a division of property may be recharacterized by the bankruptcy court as alimony merely because of its determination that in effect the parties and divorce court should have made or required provision for an amount of alimony greater than the nontrivial amount thereof specifically called for by the decree and the agreement of the parties.

---

230. See *In re Davidson*, 947 F.2d at 1297.
231. *Id.* at 1297.
232. *Id.*
233. *Id.* at 1297. In the language of the court:
To allow a spouse to set up an intricate and unambiguous divorce settlement, carefully distinguishing certain periodic payments, called alimony, from the division of marital property, and consistently taking advantage of this characterization for tax purposes, only then to declare that the payments truly represented a division of property, would be a legal affront to both the bankruptcy and tax codes. To uphold the discharge of these payments in bankruptcy would reward an admitted manipulation tantamount, at best, to deception.

234. *Id.*
235. *Cox v. Cox (In re Cox)*, 292 B.R. 141, 147 (Bankr. E.D. Tex. 2003) (estopping a chapter 7 debtor, who claimed payments were tax-deductible alimony, from asserting otherwise in response to former wife’s § 523(a)(5) objection to discharge); *Chance v. White (In re White)*, 265 B.R. 547, 555 (Bankr. N.D. Tex. 2001) (holding that where debtor deducted spousal support for income tax purposes, he "cannot escape the bankruptcy effects of his election to treat the payments as alimony").
237. *Id.* at 101.
238. *Id.*
239. *Id.* (citing United States v. ITT Continental Baking, 420 U.S. 223, 238 (1975)).
3. Quasi Estoppel in Other Circuits

Courts in the Sixth Circuit have ruled both ways on the issue of quasi estoppel. In In re Cunningham the debtor was estopped from denying that certain payments were maintenance after accepting the tax benefits, but in Kelly v. Kelly (In re Kelly) the bankruptcy court held that Bankruptcy Code § 523(a)(5) and the alimony deduction provisions of the IRS Code were sufficiently different that estoppel should not apply. The Seventh and Eighth Circuits accept quasi estoppel, and the Ninth Circuit is divided on the question. Most other circuits do not.

240. Id. at 103.
241. Id. at 91.
244. Id. at 811.
246. For the Eighth Circuit, see Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 (8th Cir. 1987) ("The doctrine estops a party who has full knowledge of the facts from accepting the benefit of a transaction, contract, or order and subsequently taking an inconsistent position to avoid corresponding obligations."). See also Portwood v. Young (In re Portwood), 305 B.R. 1, 3 (Bankr. W.D. Ark. 2003) (holding that a debtor's tax treatment of the obligation is relevant to determination of the nature of the obligation); Nowak v. Nowak (In re Nowak), 183 B.R. 568, 570 (Bankr. D. Neb. 1995) ("[b]y claiming past payments as alimony for income tax purposes, the debtor...is estopped from asserting that the claim is not alimony for purposes of § 523(a)(5)").
247. Compare In re Kretz, 190 B.R. 382, 388 (9th Cir. BAP 1995) (finding quasi estoppel does not apply) with In re Mullins, 205 WL 469060 (9th Cir. BAP Feb. 4, 2005) (holding tax treatment is one factor to consider).
248. For the First Circuit, see generally In re Schultz, 204 B.R. 275 (Bankr. D. Mass. 1996) (refusing to allow quasi estoppel where divorce attorney testified that property division label was solely for tax purposes). For the Ninth Circuit, see In re Kretz, 190 B.R. at 388 ("[q]uasi estoppel is inconsistent with the court's obligation to examine the substance, rather than the form, of the transaction"). But see In re Mullins, 205 WL 469060, at *5 (finding that the parties tax treatment of a debt is "evidence of intent but not dispositive"). For the Tenth Circuit, see generally Bailey v. Bailey (In re Bailey), 285 B.R. 13 (Bankr. N.D. Okla. 2002) and Lewis v. Trump (In re Trump), 309 B.R. 585 (Bankr. D. Kan. 2004).
250. Id.
251. Id.
252. Id.
253. Id.
254. Id.
256. Id. at 344. See also In re Cassidy, 892 F.2d 637, 641 (7th Cir. 1990), cert. denied, 498 U.S. 812 (1990) ("We think the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact."); McGuinn v. McGuinn (In re McGuinn), 284 B.R. 855, 869 (Bankr. N.D. III. 2002) (estopping a debtor from asserting in bankruptcy court that the payments were property distribution, when the debtor identified the payments as maintenance in state court proceedings); In re Townsley, No. 02-91476, 2003 Bankr. LEXIS 13, at *1 (Bankr. C.D. Ill. Jan. 6, 2003) (treating a marital obligation as property division for tax purposes and noting that the parties had expressly waived maintenance were two of the factors that the court used to determine that the obligation was not alimony). But see Sillins v. Sillins (In re Sillins), 264 B.R. 894, 898 (Bankr. N.D. III. 2001) (declining to impose quasi-estoppel to prevent husband from claiming that payments were a property settlement when he deducted the payments from his taxes because doing so would "place the nature of the transaction beyond the bankruptcy court's inquiry").
In the Seventh Circuit, if an obligation is nondischargeable under § 523(a)(5)(B), the bankruptcy court may not consider the debtor’s present circumstances to partially discharge the debt. In In re Skinner, the court refused to consider the debtor's evidence as to his inability to pay a marital obligation, holding that the “current circumstances of the parties has no bearing upon this determination . . . the debtor’s current inability to pay is irrelevant.” Instead, the debtor could seek a reduction of his obligation through the state court. 257

Although Seventh Circuit bankruptcy courts may not discharge any portion of a nondischargeable debt, the court in Wright v. Wright (In re Wright) 258 nevertheless took it upon itself to determine how much money the wife reasonably needed in ruling that at least part of an award was, in fact, property division and not alimony. In that case, the state court ordered the husband to pay $5,500 per month in support, to terminate upon the wife’s remarriage or death. 259 The court also awarded the sum of $135,000 to be paid within five years. 260 The state court stated that “a portion” of this amount would be needed by the wife to support herself and the children. 261 The husband subsequently filed a chapter 7 petition. 262 In determining whether any of the $135,000 award was property distribution, the bankruptcy court made a reasoned calculation as to how much of the award would be necessary to support the wife, and designated that portion as nondischargeable support. 263 The remaining portion was held to be property distribution and therefore potentially dischargeable. 264 Whereas courts in the Sixth Circuit refuse to sit as “super-divorce courts,” the court in Wright v. Wright openly endorsed that role. 265 Sixth Circuit courts will discharge part of an obligation based on what the debtor can reasonably afford. 266 In contrast, the Wright court considered what the creditor spouse reasonably required. 267 These are different approaches, but arguably leading to the same result. The Wright opinion has been noted with approval by the Eleventh Circuit. 268

5. Eighth Circuit: Hoggarth the Horrible

The case of Hoggarth v. Hoggarth (In re Hoggarth) 269 stands as the poster child for the absurdity that results when a statute such as § 523(a)(5) contains no mechanism for the exercise of judicial discretion in light of the facts of the case. Outcomes like this will be legion under the BAPCPA.

In the Eighth Circuit, courts must first look to the language of a separation agreement to determine the intent of the parties. 270 “If the function of an obligation is not obvious from the language of the separation agreement or divorce decree, then it is appropriate for the court to examine the circumstances surrounding the creation of the obligation.” 271 Factors to consider include the relative financial conditions of the parties at the time of the divorce, 272 the relative employment history and earning prospects of the parties, division of marital property, 273 whether payments are lump sum or periodic, and the needs of the parties and dependents. 274

In In re Hoggarth, the parties divorced in 1999 after twenty-seven years of marriage. 275 Throughout the marriage, the wife stayed home, kept house, and raised children while the husband engaged in family-owned grain company. 276 At the time of the divorce, the wife had health problems that limited her employment prospects. 277 For a while during the marriage, the family business was thriving and the couple was well-to-do. 278 In the divorce settlement, the husband agreed to pay the wife support in the amount of $1,000 per month for sixty months. 279 In addition, the husband was to pay the sum of $357,728.92 as division of the extended family assets that were accumulated during the marriage. 280 Of this amount, $100,000 was to be paid in a lump sum and the remaining $257,728 was to be paid in

259. Id. at 319.
260. Id.
261. Id.
262. Id.
263. Id.
264. In re Wright, 184 B.R. at 322.
265. Id.
266. Id.
267. Id.
268. See Cummings, 244 F.3d at 1263.
273. Id. at 55.
274. Id.
275. In re Hoggarth, 305 B.R. at 326.
276. Id.
277. Id.
278. Id.
279. Id.
280. Id.
installments of $3,260.11 over a ten-year period. Within a few years after the divorce, bad times hit the family business and an involuntary bankruptcy petition was filed against the grain company. In 2002, the husband filed for bankruptcy. At the time he filed, he was sixty-two years old and was working part-time as a farm laborer earning $300 per month, plus social security payments of $849 per month. He suffered from high blood pressure, shingles, and diabetes. In his bankruptcy petition, the husband sought to be discharged from the obligations and the wife objection pursuant to pre-BAPCPA § 523(a)(5)(B).

Focusing exclusively on the parties’ situation at the time of the divorce, the bankruptcy court found that the divorce obligations constituted alimony and were nondischargeable. The wife’s health problems, which started before the divorce, could be considered, but the husband’s health problems, which started after the divorce, could not. At the time of the divorce, the husband was a well-off shareholder in the family business and the wife had been a homemaker. “These facts... lead this Court to the conclusion that... the marital asset division was intended to provide maintenance and support to [the wife].”

The effective result of the Hoggart decision is this: A sixty-two-year-old diabetic with a monthly income of about $1200 (pre-tax) was required to pay $1000 per month in pre-petition spousal support for the next two and a half years, and $3260 per month for the next seven and a half years, for a total liability of $323,400 against expected pre-tax income of approximately $108,000 for the same period. The Hoggart decision, a clockwork exercise in the application of Eighth Circuit precedent, utterly failed to achieve a coherent result. The husband in Hoggart will never be able to pay the debt. The Eighth Circuit approach compares unfavorably with the Sixth Circuit rule of considering whether the debtor can actually pay the debt, and with the bankruptcy court’s thoughtful effort in In re Wright to determine what was reasonable based upon what the creditor spouse actually needed.

6. Ninth and Eleventh Circuits: Shades of Gianakas with a Twist

For the most part, courts in the Ninth Circuit consider the same type of factors as courts in other circuits when deciding whether a debt is in the nature of alimony or property distribution. These include, inter alia, the label given by the parties, the relative income and needs of the parties, whether the obligation terminates upon death or remarriage of the payee spouse, and whether the debt is lump sum or paid in installments. But Ninth Circuit courts may also consider the function served by the obligation. In Mullins v. Mullins (In re Mullins) the wife was liable to pay $500 per month to a credit card company for an account incurred during the marriage for which both parties were jointly liable. When the wife later filed a chapter 7 petition, the court held that the “hold harmless” obligation by the wife to pay the debt was dischargeable because it did not actually function as support. The Ninth Circuit “actual function” inquiry is in contrast to In re Gianakas and other cases in which the primary focus is the intent of the parties in entering into an agreement, irrespective of the actual function that the debt ultimately serves.

Eleventh Circuit courts look almost exclusively to the respective financial circumstances at the parties at the time the agreement is entered into. Evidence of changes to the parties financial circumstances since the agreement or decree are not considered. The case of Martin v. Wilbur (In re Wilbur) suggests why this strict rule is problematic. In In re Wilbur, the state court award consisted of obligations enumerated as “property distribution” and included a waiver of alimony. Since the evidence showed that at the time of the award, the wife could not have supported

281. In re Hoggart, 305 B.R. at 327.
282. Id.
283. Id.
284. Id.
285. Id.
286. Id.
287. In re Hoggart, 305 B.R. at 327.
288. Id. at 326-27.
290. Id. at 616.
292. Id. at *4.
293. See In re Catron, 186 B.R. 197, 204 (Bankr. E.D. Va. 1995) (rejecting debtor’s assertion that, in addition to intent, the court must find that the debt was actually in the nature of support. “[T]he Fourth Circuit has not held that a court must find more than that the parties intended the debt to be in the nature of support.”).
294. Indeed, the Eleventh Circuit has expressly rejected consideration of the parties’ present needs. See Harrell v. Sharp (In re Harrell), 754 F.2d 902, 906 (11th Cir. 1985) (conducting an extensive review of cases in this regard, the court concluded that § 523(a)(5) “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.”)
296. Id. at 528-29.
herself, the bankruptcy court held that the debt was in fact support. At the
time of the discharge litigation, however, the husband was in poor health
and unable to earn an income. The bankruptcy court refused to take the
debtor’s changed circumstances into account: “[A] post-divorce downturn
in the debtor’s finances does not impact the bankruptcy court’s analysis
pursuant to §523(a)(5). . . . Any modification of the support obligation . . .
is a matter for the state courts.” However, since the state court had
already labeled the debt as property distribution, which, unlike alimony, is
not modifiable, the debtor was locked into a debt that he could not pay and
for which he could be held in contempt by the state court. The decision
in In re Wilbur cannot be considered a reasonable outcome.

The Wilbur decision highlights a not-infrequent dilemma: what if a
bankruptcy court labels a debt as support, but the state court labels the same
debt as property division? A support obligation is not dischargeable in
bankruptcy, and a property division debt is generally not modifiable in state
courts. However, an alimony award is modifiable in most states and a
property division award, if payable to a third-party creditor, can be
discharged under the BAPCPA. A debtor without means to pay the debt
is denied any relief in either forum, based upon completely inconsistent
rulings.

Only one published decision has attempted to deal with this problem in
a systematic way. In Cummings v. Cummings, the state court ordered the
husband to pay the wife a large sum labeled only as equitable distribution
of property. The husband filed for bankruptcy and the entire debt was
discharged. Upon appeal, the Eleventh Circuit remanded with directions
to the bankruptcy court to allow the payee spouse time to move for relief
from the bankruptcy stay so that the state court could explain what if any
portion of the award was intended to serve as support. The support
portion would then be treated by the bankruptcy court as nondischargeable.
In explaining its holding, the Eleventh Circuit stated that: “it is appropriate
for bankruptcy courts to avoid incursions into family law matters out of consideration of court economy, judicial restraint, and
decision to our state court brethren and their established expertise in such

297. Id.
298. Id.
299. Id. at 529.
300. Id.
301. See SECTION II.B., supra.
302. See, e.g., Cummings, 244 F.3d at 1266.
303. Id.
304. Id.
305. Id. at 1266-67.

2005] DISCHARGE OF MARITAL DEBT OBLIGATIONS 1413

matters.” It remains to be seen whether, in the brave new BAPCPA
world, more courts will delay ruling on such discharge issues, giving state
courts the opportunity, in appropriate circumstances, to clarify the intended
nature of a debt. But this approach could solve some of the dilemmas
highlighted by cases such as In re Wilbur and Hoggarth v. Hoggarth, where
the ruling of the court bears no relationship to reality and the debtor has no
remotely possible means of paying the debt.

V. LITIGATION OVER MARITAL DEBT UNDER THE BAPCPA: THE SHAPE
OF (FEWER) THINGS TO COME

Here’s what we have learned from our review of past cases and the
dynamics of divorce and bankruptcy: Spouses will continue to file for
divorce. Debtors will continue to file for bankruptcy. Most debtors will
want to discharge or modify as much debt as possible, including, in many
instances, debts arising from a divorce or separation. And, for each such
debtor, there will almost always be an aggrieved ex-spouse equally
determined to see that the debt gets paid.

Debtors and their lawyers who would have seen fit to litigate over
marital debt discharge before the BAPCPA will have to consider the revised
BAPCPA §§ 523(a)(5) and (15), and act accordingly. This means that if the
debt is “owed to or recoverable by” a spouse, former spouse, or child (and,
for § 523(a)(5), a qualified relative or guardian), then the debtor can be
assured in advance that discharge of the obligation is almost certainly going
to be denied. But, for marital debt that is not “in the nature of alimony,
support, or maintenance” (as per the definition in § 101(14A)) and that is
“owed” to someone other than a spouse, former spouse, or child of the
debtor, discharge is still an option under § 523(a)(15) of the BAPCPA.

Since debt owed to a third party is fair game for discharge under §
523(a)(15), litigation is going to continue over whether such debts meet the
“in the nature of alimony, maintenance, or support” test of § 101(14A). If
it is, then the discharge exception applies pursuant to § 523(a)(5) and the
debt cannot be discharged. But if the debt is not support, then debt
payable to a third-party can be discharged because such debts are not
covered under § 523(a)(15), and the discharge presumption of § 727 will

306. Id. (citing Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992) (emphasis
added)).
307. See SECTION II.B., supra.
308. Id.
309. Id.
310. Id.
govern. So, in order to determine the nature of the debt that is to be paid to a third-party creditor, the same intent criteria, multi-factor tests, and other rules and precedents that have evolved among federal circuits will be applied, but in a more narrow range and probably fewer cases of. Of course, nothing in revised §§ 523(a)(5) and (15) speaks to the unique discharge rules of the Sixth Circuit, therefore nondischargeable debt is still subject to discharge in that jurisdiction, to the extent that the debt exceeds the debtor’s ability to pay.

Some courts have considered whether there is a difference between debts paid directly to a spouse or former spouse, and debts to be paid to a third-party. In the Sixth Circuit, the case of In re Calhoun concerned payments owed to a third-party creditor. But in In re Sorah, where the debt was payable directly to the spouse, the court applied the Calhoun discharge criteria irrespective of the payee. In In re Hammermeister, the bankruptcy court held that although an assumption obligation was an indicia that the debt was not alimony, it was only one of several factors to consider. However the court in Hanjora v. Hanjora (In re Hanjora), held that a debt assumption agreement, standing alone, did not create a support obligation. However, most decisions from the Sixth Circuit do not treat payments to a spouse differently from those to a creditor, and most courts in other circuits hold likewise.

Although the weight of authority is that there should not be a difference between debts paid directly to a spouse and those payable to a third-party creditor, all of the cases dealing with this subject were decided before the BAPCPA, and therefore were not interpreting the revised BAPCPA § 523(a)(15). Section 523(a)(15) now expressly distinguishes between a debt “owed to or recoverable by” a spouse, former spouse, or child, and a debt that is merely “to” a spouse, former spouse, or child. There is no case law that negates the clear distinction between BAPCPA § 523(a)(5) and § 523(a)(15) debts.

If I were a debtor and hoping to shed some marital debt, I would ideally like to be in the Sixth Circuit. Since my financial prospects since the divorce had changed, I might be able to get some of the debt discharged, to the extent it exceeds what I would really afford to pay. To improve my prospects even more, I would be like the debt to be specifically labeled in the divorce decree as directly payable to a creditor, such as a credit card company or an automobile lender. If I was not in the Sixth Circuit, then I would at least like to be in the Fourth, Fifth, or D.C. Circuits. Those circuits weigh strongly the written agreement as evidence of the intent of the parties. And, it would help a lot if I treated the debt as property division (not tax-deductible for me). Those circuits also apply the doctrine of quasi estoppel, so I would be consistent if I tried to prove the payments were property division. Otherwise, in the other circuits, particularly those that cite In re Gianakas with approval, I would face an in-depth review of extrinsic factors, particularly the financial circumstances and prospects of the parties at the time of the divorce, which is by far the most important determinant for most of the circuits. If, at the time of the divorce, I made a lot more money than my spouse, it is very likely that the debt would be found to be support, despite the label in the divorce agreement calling it property division. Of course, if the debt I want discharged is payable directly to my ex-spouse, then I have no hope for discharge under the BAPCPA, unless of course I am lucky enough to be in the Sixth Circuit.

What about the dicta from In re Gianakas that says the writing between the parties should not control because the parties were not thinking of the prospect of bankruptcy at the time they entered into the agreement? For parties represented by counsel, this is not a credible argument. Divorce lawyers (and their clients) are not, or should not be, so myopic that they are blind to the potential future consequences of a bankruptcy by one party or the other. Where parties to an agreement have gone to the trouble to create a signed writing that purports to express their agreement, it should be taken as prima facie evidence of their intent, and in absence of evidence that the writing was produced by duress or coercion, a bankruptcy court should not second-guess what the parties have written, or impose its opinion of what is fair and equitable in place of that of the parties themselves.

313. See In re McLaughlin, 320 B.R. at 666 (holding that “those attorney fees which may be viewed as inextricably intertwined with the litigation of nondischargeable support are said themselves to qualify for nondischargeability actions pursuant to § 523(a)(5)”). See also In re Hammermeister, 270 B.R. at 871 (noting that “[i]n [Calhoun], the Sixth Circuit provided an analytical framework for determining whether an obligation ‘is actually in the nature of alimony, maintenance or support,’ even though it is not so designated”); Courtney v. Traut (In re Traut), 282 B.R. 863, 868 (Bankr. N.D. Ohio 2002) (noting that “[i]n [Calhoun], the Sixth Circuit Court of Appeals held that four conditions must be met in order to establish that a debt is ‘actually in the nature of’ support…”).
315. See Section III.B., supra.
316. See supra note 157 and accompanying text.
VI. CONCLUSION

What will become of marital debt discharge under the BAPCPA? One answer is that there is certainly going to be less of it. Because § 523(a)(15) no longer allows for potential discharge of property distribution debts owed to a spouse, former spouse or child, an obligation that is payable directly to a spouse, former spouse, or child, will be nondischargeable. Whether it is for support or property division does not matter. This was a source of much of the pre-BAPCPA marital debt discharge litigation. However, if a debt is payable to a third-party creditor, and the debtor believes that the debt is not “in the nature of” support, then the distinction is germane because § 523(a)(15) omits third-party debt from the discharge exceptions. In such cases, litigation may follow, governed by the particular rules and precedents of the jurisdiction where the debtor filed.

As for the Sixth Circuit rule allowing for discharge of even nondischargeable debt, it may be that courts in that jurisdiction will read into the new BAPCPA a renewed Congressional intent that “nondischargeable” really means nondischargeable—to any degree—no matter what the debtor’s circumstances. But there is no reason yet to assume this will happen, and to date, the unique rule of the Sixth Circuit is alive. Even though the Sixth Circuit position is the minority one, one hopes it will endure. Despite the obvious semantic conflict between the Sixth Circuit rule and the actual wording of § 523(a)(5)—can a “nondischargeable” debt really be dischargeable, even in part?—the Sixth Circuit approach is more logical than some of the decisions resulting from a mechanical application of the statute, such as Hoggarth v. Hoggarth or In re Wilbur. What the BAPCPA accomplishes overall is to narrow the flexibility of courts to construct a feasible outcome matched to the reality of the parties. And little flexibility would be a good thing where the lives and livelihood of millions of future debtors, and their marital creditors, are at stake.