

2.A: CAN I EVEN HEAR THIS??

Wayne Morrison

Question 2.A.: Can the Superior Court Judge proceed with a **divorce action Temporary Hearing** when a Bankruptcy action is also pending?

Facts:

Wanda and Dilbert have had a difficult marriage, but fortunately there are no children. Wanda has been threatening for months that she will file a divorce and will “take Dilbert for everything he’s got.” She also threatens to “stick him” with all of the enormous credit cards they have run up. Wanda carries through and files for divorce and schedules a temporary hearing in which she seeks in part exclusive temporary use of the double wide trailer, fully furnished, and requests that Dilbert pay the first and second mortgages on the double wide as well as temporary alimony. Before the hearing date, in a panic, Dilbert files a Chapter 7 bankruptcy. The parties and their lawyers go to the temporary hearing and Dilbert pulls out his bankruptcy paper filing and maintains that the Court cannot proceed with **the temporary hearing**. Can the Court even proceed with the hearing?

ANSWER: Yes.

The Payments will likely be considered domestic support related obligations under BAPCPA §101(14A). As a support debt the payments will likely be excepted from his bankruptcy case pursuant to §523(a)(5) and §362(b)(2).

SUPPORT:

The filing of a bankruptcy petition automatically invokes a stay prohibiting almost all actions against the debtor and his or her property; this includes divorce proceedings. However, actions to collect alimony, maintenance, or support from non-separate property may proceed, as may actions to establish alimony, maintenance, or support. No actions should be taken that have any potential to violate the automatic stay without first securing the bankruptcy court's approval.

BAPCPA defines support related obligations under §101(14A):

The term domestic support obligation encompasses what was historically referred to as "support," "alimony," "child support," and "maintenance." Domestic support obligation means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable bankruptcy 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, on, or after the date of the order for relief in a case 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 non-bankruptcy 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 of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting debt.

A support obligation is any such obligation that exists at the time of filing, that comes into being after filing, or that could come into existence.

There is an automatic exception of support debts from all bankruptcy cases. §523(a)(5). Further, §523(a)(15) provides additional automatic exception to discharge for non-support, divorce related debts from Chapter 7, 11 and 12 cases. BAPCPA §362(b)(2) greatly expanded the exceptions applicable to domestic support obligation creditors. Filing a bankruptcy petition does not stay:

- (a) the commencement or continuation of a civil action or proceeding to establish or modify a domestic support obligation;
- (b) collecting of a domestic support obligation from property that is not property of the estate;
- (c) A pre-petition Income Deduction Order may continue post-petition: “with respect to withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or statute.”

However, any action that affects property of the estate (except for the collection of a domestic support obligation pursuant to a remedy allowed pursuant to §362(b)(2)) is subject to the stay and should not proceed without permission from the bankruptcy court. Permission may be sought through a motion to lift the automatic stay or through a request by declaratory judgment that the stay does not apply. If an action is brought by a non-party debtor in reliance on an exception without relief from the automatic stay obtained from the bankruptcy court, the debtor may move for an order to prohibit continuation of the state action. The debtor may also seek an award of sanction against the other party.

Question 2.B.: Can the Superior Court proceed with a **contempt action** in a pending divorce when a bankruptcy action is filed AFTER the Temporary Order?

Facts:

Assume Dilbert did not file the bankruptcy prior to the temporary hearing and the hearing proceeded, and the Court Ordered Dilbert to pay the first and second mortgages, totaling \$1,000.00 per month and in addition to pay \$1,000.00 per month as temporary alimony until further Order of the Court. Dilbert is outraged and simply refuses to make the payments required. Wanda files a contempt action and then Dilbert files his bankruptcy. Can he successfully evade his obligations this way?

ANSWER: No

SUPPORT:

A recipient spouse may proceed with efforts to collect support in the divorce case even when a bankruptcy is subsequently filed, assuming the temporary alimony award to Wanda and the requirement that Dilbert pay the mortgages are both Domestic Support Obligations (DSOs as defined above) from Dilbert's current income. The bankruptcy code recognizes that a valid DSO may be in place even if the payments are made to third-party creditors, such as the mortgage company.

Question 3: IT'S JUST TEMPORARY

Anne Jarrett

Does it matter if Dilbert's bankruptcy filing in either of these scenarios is a Chapter 7 or a Chapter 13?

ANSWER:

“No...”

SUPPORT:

If Dilbert has filed a Chapter 7 bankruptcy, all of these temporary support obligations continue to be due and payable, and subject to collection efforts. If however Dilbert has filed a Chapter 13 bankruptcy, some of his post-petition earnings and property may be property of the bankruptcy estate and not immediately available for support obligations. However, ultimately these post-petition earnings would be available to be included in a Chapter 13 reorganization plan or available for payment of a DSO claim. (Also, in a Chapter 13, the bankruptcy Court will not approve the reorganization plan or confirm the plan if the debtor has not paid all DSOs accrued prior to the bankruptcy filing or subsequent to it. However, as the parties proceed with the divorce action, temporary support obligations may become intertwined with the issue of property of the estate in a Chapter 13 proceeding and how this would be handled on a final basis, as property of the estate in a Chapter 13 proceeding, such as Dilbert’s possible interest in the double-wide trailer, could be part of the reorganization of the debts in a Chapter 13 proceeding.)

Section 362 Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -...

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) –

(A) of the commencement or continuation of a civil action or proceeding –

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or (v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or (G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

Section 523 Exceptions to discharge

(a) 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 governmental unit; ...