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CONSUMER BANKRUPTCY

Ten Bankruptcy Fundamentals the Matrimonial Attorney Should Know

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Just as most bankruptcy attorneys find matrimonial issues confusing, most matrimonial attorneys find bankruptcy issues confusing. Nevertheless, in order for the matrimonial attorney to be able to effectively represent his or her client, certain bankruptcy fundamentals should be recognized, especially considering that divorce is one of the major factors which drives consumers into bankruptcy. Although bankruptcy-matrimonial matters can easily fill a treatise, I will concisely point out the top ten issues that you should be aware of.

1. The Basic Premise Still Exists: Maintenance and Support Are Not Dischargeable. The Bankruptcy Code excepts from discharge, maintenance or support payments owed to a spouse, former spouse or child of the debtor, in connection with a separation agreement, divorce decree, court order, administrative determination, or property settlement. Section 523(a)(5).

2. The Other Basic Premise, that Equitable Distribution is Not Dischargeable, Has Changed. Prior to October 1994, when the Bankruptcy Code received a major overhaul, it was easy for attorneys to advise clients: Maintenance and support were dischargeable; equitable distribution was not. However, the 1994 Bankruptcy Amendment Act changed that with the introduction of a new provision, section 523(a)(15), which makes equitable distribution "potentially" non-dischargeable.

This new section enables an aggrieved spouse to make equitable distribution non-dischargeable if the aggrieved spouse can prove a two-prong test: a) the debtor has the ability to pay the debt; and b) the detrimental consequences to the aggrieved spouse outweigh the benefits to the debtor spouse in discharging the debt.

If you ask attorneys who primarily represent wives, they would say that this section was added to protect innocent spouses, who, during the marriage, relied on their husbands for their economic well being. However, if you ask counsel who often represent husbands, they would argue that the new law was passed to ensure that bankruptcy lawyers are fully employed and that bitter wives be given one last whack at their husbands, in the court of last resort.

3. Objecting to the Dischargeability of Equitable Distribution Requires Quick Action. The bankruptcy court has exclusive jurisdiction of dischargeability determinations under the section 523(a)(15) two-prong test. The aggrieved spouse must file an adversary proceeding complaint with the bankruptcy court within 60 days of the date of the meeting of creditors, objecting to the dischargeability of the equitable distribution. This date is known as the "bar date."

4. The Bankruptcy Court Shares Concurrent Jurisdiction. Although the bankruptcy court has exclusive jurisdiction of the two-prong test of section 523(a)(15), it shares concurrent jurisdiction with the state court on section 523(a)(5) issues concerning whether a debt is non-dischargeable because it is support or maintenance.

5. Bankruptcy Judges Hate Matrimonial Law Issues, and Supreme Court Judges Hate Bankruptcy Law Issues. Two courts are often needed. State court judges tend to have limited familiarity with bankruptcy law issues and do not seem to be eager to get involved with interpreting bankruptcy law. On the other hand, whether a bankruptcy judge has exclusive or concurrent jurisdiction over matrimonial debt issues, the bankruptcy judge will often kick the sticky divorce issues back to the matrimonial court for a determination there, which the bankruptcy court will then adopt.

6. Bankruptcy Judges and State Court Judges Have Different Objectives. You should also be aware that bankruptcy judges theoretically may favor the debtor since the policy of bankruptcy is to offer a debtor the opportunity for a fresh new financial start. Meanwhile, matrimonial judges may be more likely to favor the aggrieved spouse as the state has a public policy of protecting innocent spouses.

7. The Burden of Proof is on the Aggrieved Spouse. A general rule of law about objecting to discharge is that the aggrieved spouse creditor carries the burden of proof that the debt is non-dischargeable.

8. Settlement Agreements and Divorce Decrees Are Not Always Binding. Settlement agreements and divorce decrees usually designate debts as either support and maintenance, or equitable distribution. However, such designations are not binding and the bankruptcy court can look beyond such language to determine the true nature of the debt. There is a large body of case law that explores those factors that the court should consider.

The main factors that the court will look at to determine whether the debt is in the nature of a support payment or equitable distribution are: a) whether the payments terminate upon death or remarriage of the spouse receiving them; b) whether payments are contingent on future earning abilities; c) whether payments are to be periodic over a long period of time; and d) whether the payments are designated as being for the purposes of medical care, mortgage, or other needs of the spouse receiving them.

9. Attorneys' Fees Are Usually Non-dischargeable. Income-providing husbands are often ordered to pay the attorneys' fees of their spouses. However, when a husband files for bankruptcy, such attorney's fees are usually found to be in the nature of support, and thus, non-dischargeable (unless a successful adversary proceeding is brought regarding the two-prong test under section 523(a)(15)).

10. Know When To Consult With Bankruptcy Counsel. There are many bankruptcy traps for the unwary matrimonial attorney. Consider conferring with a bankruptcy attorney experienced in bankruptcy-matrimonial issues.

Editor's Note (revised 2008):
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