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Comment

Bankruptcy and Divorce: The Courts Send a Message to Congress

"[W]hen a debtor uses the Code to steal from his former wife, we should not likely conclude that the Code, properly read, commands such a result."¹

I. Introduction

The rights of both are as American as apple pie, but when it comes to debtors in bankruptcy and families in divorce, whose rights supersede when there is only one piece of pie?²

This Comment will discuss the ways in which a debtor in bankruptcy, by claiming an exemption under the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"),³ is often able to either retain for himself, or convey to commercial creditors, property that was awarded to his ex-spouse⁴ pursuant to either a

1. *In re Sanderfoot*, 899 F.2d 598, 607 (7th Cir. 1990) (Posner, J., dissenting), *rev'd*, 111 S. Ct. 1825 (1991).

2. "The support and maintenance of the family, even though separated through divorce, should continue to be a principle consideration in the distribution of property." Letter from Rep. Henry J. Hyde, R. Ill., to Members of Congress (June 28, 1991) (accompanying H.R. 1242, 102d Cong., 1st Sess. (1991) (Property Settlement Integrity Act)) (hereinafter "Dear Colleague Letter"); see *infra* notes 519-24 and accompanying text.

3. 11 U.S.C. §§ 101-151326 (1988) (§§ 1501-151326 *repealed by* Pub. L. No. 99-554, Title II, 100 Stat. 3088, 3103 (1986)).

4. Although in a few of the cases the debtor who attempts to retain property that has been granted to the ex-spouse is the wife, in most cases it is the husband. While this Comment does not suggest that it is any less unfair when the non-debtor spouse who is deprived of his property is the husband, the problem is generally more acute when the non-debtor spouse is the wife, because it is usually the wife, and not the husband, who is in need of ongoing support. For ease of reference, and because this discussion principally addresses the problem of the ex-wife who, having been awarded a property settlement rather than alimony and/or child support, is at risk of losing her property if her former

court ordered settlement agreement or a negotiated settlement agreement in divorce.⁵ The Supreme Court, in the 1991 case of *Farrey v. Sanderfoot*,⁶ reversed the Seventh Circuit⁷ and held that a debtor could not avoid his ex-wife's lien on the marital home.⁸ Sanderfoot, the husband, had been awarded the home pursuant to a divorce separation agreement in exchange for a commitment to reimburse his wife Farrey, over time, for the value of her equity in the home.⁹ Shortly thereafter, Sanderfoot filed for voluntary bankruptcy¹⁰ and claimed that he was entitled, under his homestead exemption in bankruptcy,¹¹ to avoid Farrey's lien on the home.¹²

Although it may appear to do so at first blush, the decision in *Sanderfoot* does not create a rule of law that all obligations springing from a familial relationship cannot be avoided by fil-

husband declares bankruptcy, the parties in the cases will be referred to as "the debtor" and "the non-debtor spouse," regardless of whether, in the actual case being discussed, the debtor is the husband or the wife. The cases will be set forth to chronicle the directions that statutory construction of the Bankruptcy Code have taken. Additionally, when the discussion calls for a personal pronoun, the masculine "he," "him," or "his," will be used to denote the debtor, and the feminine "she," or "her" will be used to denote the non-debtor spouse. This nomenclature will be used when discussing all cases except *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991). Finally, since Mrs. Sanderfoot resumed her maiden name of "Farrey" after the divorce, the cases generally refer to her as "Farrey" or "Ms. Farrey;" occasionally the cases refer to the couple as "the Sanderfoots."

5. An informal survey of both lawyers who do not specialize in either bankruptcy or divorce law, and of lay people, suggests that this phenomenon is virtually unknown. A feature article concerning the search for somewhat sensational "sound bites" for television programs such as "Good Morning America" and the "Today Show," reports:

Let's peek backstage at the "Today" show. It is 10:30 a.m. on a recent Tuesday, and producers in Washington, New York and London are having a conference call about the next day's guests . . . [A Washington producer] pitches two Washington stories from her . . . office . . . There are no takers. . . [A New York producer] mentions a Supreme Court case involving a man who filed for bankruptcy to avoid making divorce payments. "We might be able to get the wife who filed the suit," she says.

Howard Kurtz, *How to Succeed in Washington by Going on Television*, WASH. POST, May 19, 1991, at W14.

6. *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991).

7. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), *rev'd*, 111 S. Ct. 1825 (1991).

8. *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991) (where the ex-wife's interest pre-exists the fixing of the lien); *see also infra* notes 222-24 and accompanying text.

9. *Farrey*, 111 S. Ct. at 1827.

10. *Id.*

11. *Id.*

12. *Id.* at 1827-28.

ing for bankruptcy.¹³ A study of similar cases,¹⁴ together with a reading of the plain language of the Bankruptcy Code,¹⁵ demonstrates that, in many situations, a number of legal theories enable a debtor to avoid financial obligations to his ex-spouse by filing for bankruptcy.¹⁶

Many bankruptcy, district court, and circuit court judges, have expressed the opinion that to allow a debtor to retain property which in effect belongs to his ex-spouse, is unjust.¹⁷ These judges have clearly felt prompted to comment regardless of whether they have held, based on the facts and applicable law, that a debtor is exempted or not exempted from conveying property to his or her ex-spouse.¹⁸ For example, Judge Posner, in disagreeing with the majority in the Seventh Circuit decision in *In re Sanderfoot*,¹⁹ (which affirmed the district court and held that Mr. Sanderfoot could avoid his former wife's lien on marital property) commented:

The fact that a judicial decision offends the moral sense of laymen does not prove the decision was wrong. Institutional or systemic considerations, themselves morally significant, but invisible to the laity, may outweigh the tug of simple justice. But they do not do so here . . . [W]hen a debtor uses the Code to steal from his former wife, we should not lightly conclude that the Code, properly read, commands such a result.²⁰

Additionally, most of the courts that have held that a debtor is excused from a financial obligation to his non-debtor ex-spouse have stated that it would be appropriate for Congress, rather than the courts, to change the laws in such a way that a just result could virtually always be achieved.²¹

For purposes of this discussion, it is interesting to bear in mind four policies that were ingrained in United States society

13. See discussion *infra* part II.C.

14. See discussion *infra* part II.C.

15. 11 U.S.C. §§ 101-151326.

16. See discussion *infra* part II.C.

17. See discussion *infra* part II.C.

18. See discussion *infra* part II.C.

19. *Sanderfoot*, 899 F.2d at 598 (Posner, J., dissenting); see *infra* notes 393-98 and accompanying text.

20. *Sanderfoot*, 899 F.2d at 606-07 (emphasis added).

21. See *infra* part II.A.

from its earliest days. First, married women could not own property.²² Second, husbands had a duty to support their wives, and this principle extended even beyond the marriage.²³ Third, divorce was based on fault: if a husband was at fault he was obliged to pay alimony; if a wife was at fault she was not eligible for alimony.²⁴ Finally, while the notion of debtors' prisons and otherwise intolerant treatment of debtors was generally considered repugnant, the prospect of a bankruptcy law that would be available to individual debtors on a voluntary basis was largely considered to be unconstitutional.²⁵

Although these policies have changed over the years in an enlightened attempt to achieve fairness, it is not always clear whose rights have fared well and whose rights have fared less well. For example, married women can now own property, both individually and jointly with their spouses.²⁶ However, if they divorce, they are often at risk of losing their share in the property that they owned jointly with their spouses if their ex-husbands declare bankruptcy.²⁷ This property could conceivably be property that the woman owned individually prior to, and even at some point during, the marriage.²⁸ Today, during the course of a marriage, "each spouse has a legal duty to support the other."²⁹ This mutuality is extended to support obligations when a marriage is terminated; men are as eligible as women to receive alimony.³⁰ At present, legal grounds for divorce are rarely fault related³¹ and, correspondingly, support and property awards in

22. See *infra* notes 89-93 and accompanying text.

23. Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, or False Start?*, 69 N.C. L. REV. 577, 582 n.23 (1991) (citing HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 250-51 (2d ed. 1988)).

24. See *infra* notes 108-19 and accompanying text.

25. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 25 (1935); see *infra* note 63 and accompanying text.

26. See discussion *infra* text accompanying notes 94-96.

27. See discussion *infra* text accompanying notes 99-163.

28. See *infra* part II.C.

29. Scheible, *supra* note 23, at 582 n.23 (citing HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 251 (2d ed. 1988) ("[D]uty of support must rest equally on both spouses to be constitutional.")). "Largely as a result of the women's movement and equal protection claims based on gender discrimination, today the obligation is mutual." "Today each spouse has a legal duty to support the other." *Id.* at 582.

30. See *infra* note 105 and accompanying text.

31. See discussion *infra* text accompanying notes 99-163.

divorce are now rarely based on fault.³² Women generally receive lower awards of support than they did under fault-based guidelines.³³ Individual debtors can declare bankruptcy³⁴ and they can do so voluntarily.³⁵ Moreover, they can legally engage in prepetition planning by transferring assets into the type of property that qualifies for an exemption from the bankruptcy estate.³⁶

This Comment discusses the ongoing conflict between the right to a fresh start for a debtor through bankruptcy and the rights of his family to the fulfillment of his financial obligation to them.³⁷ Part II addresses the development of bankruptcy laws in the United States which led to the present Bankruptcy Code.³⁸ It emphasizes the specific provisions that enable a debtor to retain property that has been granted to his or her ex-spouse as part of a settlement agreement, and gives a capsule overview of the provisions of the Bankruptcy Code that are relevant to the discussion. When pertinent to the subject of alimony and property division as they affect ex-spouses in bankruptcy, Part II also traces the steps and philosophies leading to today's married women's property ownership rights and today's divorce laws. Part II also briefly explores the conflicts that exist between state and federal courts, and state and federal laws in cases where marital and divorce issues are collateral to bankruptcy. Part II continues with a discussion of the types of cases that typically arise in the context of bankruptcy and divorce: support awards as opposed to property awards, financial obligations to

32. See discussion *infra* text accompanying notes 99-163.

33. See discussion *infra* text accompanying notes 108-144.

34. 11 U.S.C. § 101(35) (1988).

35. 11 U.S.C. § 301 provides:

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

11 U.S.C. § 301 (1988).

"Section 109 defines the entities that may be debtors in the various types of bankruptcy proceedings." DAVID L. BUCHBINDER, *FUNDAMENTALS OF BANKRUPTCY: A LAWYER'S GUIDE*, §5.6 (1991) (citing 11 U.S.C. § 109(a)).

36. See *infra* note 73 and accompanying text.

37. "Bankruptcy law has long struggled to find a balance between affording a debtor a fresh start on the one hand, and protecting the debtor's family members on the other." Scheible, *supra* note 23, at 579.

38. 11 U.S.C. §§ 101-151326.

third parties or agreements to hold harmless, and pensions. Part II then tracks some of the major cases which preceded *Sanderfoot* and which, like *Sanderfoot*, addressed the issue of liens of non-debtor spouses against property awarded to debtor spouses, examines the *Sanderfoot* decision in depth, and surveys the cases with like issues that have been decided after *Sanderfoot*. Part II then reviews some of the extraordinary and extensive commentary contained in the cases regarding the unfairness of allowing debtors to either retain for themselves or otherwise deprive non-debtor spouses of the non-debtor spouses' property. Part II concludes by setting forth the Property Settlement Integrity Act of 1990.³⁹

Part III recapitulates a cross section of the opinions and dissents that forcefully express the need for Congress to amend the Bankruptcy Code with respect to property rights in divorce, points out that Congress has enacted a number of statutes designed to protect non-debtor spouses' interests in debtors' pensions, and argues that this point is persuasive evidence of Congress' motivation to ensure fair outcomes for non-debtor spouses. Part III then reviews some of the many cases that have strained to find theories upon which to base a fair outcome. The courts are split on the interpretation of the bankruptcy laws in some of these factual situations. Thus, the reasoning of the different courts in arriving at different holdings even though presented with virtually identical fact patterns, is set forth. The question of whether courts will be as free, after *Sanderfoot*, to arrive at creative holdings in order to achieve fairness, or whether only those cases whose facts fit squarely within the *Sanderfoot* pattern will be entitled to the same holding, is addressed. Part III notes that at least one court has managed to find a rationale that bars the debtor from avoiding the non-debtor's lien on marital property, notwithstanding the holding in *Sanderfoot*.⁴⁰ Finally, Part III urges the adoption of the Property Settlement Integrity Act of 1990.⁴¹

Part IV briefly addresses the extent to which bankruptcy

39. H.R. 1242, 102d Cong., 1st Sess. (1991).

40. *Klemme v. Schoneman*, 477 N.W.2d 77 (Wis. Ct. App. 1991); see *infra* notes 550-55 and accompanying text.

41. H.R. 1242, 102d Cong., 1st Sess. (1991).

and divorce laws, which were adopted to further our social policies, have accomplished their goals.

II. Background

A. Policy and Legislation: Historical Development

1. A "Fresh Start": Bankruptcy Law

a. Historical Background

In 1934, the Supreme Court, in *Local Loan Co. v. Hunt*,⁴² stated that the purpose of bankruptcy law:

has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.⁴³

The United States Constitution states that "Congress shall have the power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."⁴⁴ In pre-colonial days, debtors were often incarcerated in debtors' prisons.⁴⁵ The framers of the United States Constitution expressly granted the power to make bankruptcy laws to Congress in order to establish a compassionate and methodical system of relief for debtors and an equitable system of relief for creditors.⁴⁶ The framers' intent was to avoid the experience of debtors in common law England and western Europe.⁴⁷ Notwithstanding the Framers' vision, the road to the present Bankruptcy Code⁴⁸ has been anything but smooth.⁴⁹ No fewer than five national bankruptcy acts preceded it,⁵⁰ each of which was the subject of much heated debate.⁵¹ In

42. 292 U.S. 234 (1934).

43. *Id.* at 244.

44. U.S. CONST. art. I, § 8, cl. 4.

45. GRADY L. PETTIGREW, JR., *THE BUREAU OF NATIONAL AFFAIRS, FEDERAL BANKRUPTCY CODE THEORY INTO PRACTICE* 2 (1982).

46. *Id.*

47. *Id.*

48. 11 U.S.C. §§ 101-151326.

49. See generally WARREN, *supra* note 25.

50. The first Bankrupt Act was passed by Congress in 1800. *Id.* at 19. By its terms, it was to operate only five years, but it was repealed by Congress after only three years.

1935, one author noted that "desire for bankruptcy legislation and depression have always been coupled in our history . . ."⁵² Thus, it is against that backdrop that warring interests and philosophies were expressed with respect to every bankruptcy act as far back as that of 1898.

The first issue for debate with each of these five acts, that is to say every national bankruptcy act except the present Bankruptcy Code, was whether or not to permit bankruptcy at all.⁵³ For example, when the Bankrupt Act of August 19, 1841, was passed, John Quincy Adams wrote in his diary:

I believe no bankrupt law can, in this country, be of much benefit to the class of creditors. The bankrupt law of 1800 operated as a receipt in full for some hundreds of men who had large debts and nothing to pay. This bill will pass some thousands through the same process.⁵⁴

Another issue was that of identifying which classes of people would receive bankruptcy protection. Some wanted to limit

Id. The Bankrupt Act of Aug. 19, 1841, 5 Stat. 1440, was repealed in 1843. BUCHBINDER, *supra* note 35, § 1.4. The Bankrupt Act of 1867 was repealed in 1873. WARREN, *supra* note 25, at 115-16; the Bankrupt Act of 1874 was repealed in 1878. *Id.* at 122. The Bankrupt Act of 1898 (hereinafter The Act) was replaced by the present Bankruptcy Code of 1978. BUCHBINDER, *supra* note 35, § 1.4.

51. For example, Thomas Jefferson, in a letter to James Pleasants dated December 26, 1821, stated:

I find you are to be harassed again with a bankrupt law. Could you not compromise between agriculture and commerce, by passing such a law which like the bylaws of incorporate towns should be binding on the inhabitants of such towns only, being the residence of commerce, leaving the agriculturalists, inhabitants of the country, in undisturbed possession of the rights and modes of proceedings to which their habits, their interests and their partialities attach them? This would be as *uniform* as other laws of local obligation.

12 WRITINGS OF THOMAS JEFFERSON (Paul L. Ford ed., 1905), *quoted in* WARREN, *supra* note 25, at 172 n.51 (emphasis in original). In addition, Justice Story commented that:

One of the most pressing grievances bearing upon commercial, manufacturing, and agricultural interests at the present moment is the total want of a general system of bankruptcy. It is well known that the power has lain dormant except for a short period ever since the Constitution was adopted; and the excellent system they put into operation [speaking of the Act of 1800] was repealed before it had any fair trial. . . .

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1830). *quoted in* WARREN, *supra* note 25, at 168 n.26.

52. WARREN, *supra* note 25, at 21-22.

53. See generally WARREN, *supra* note 25.

54. *Id.* at 79.

eligibility for bankruptcy to merchants only,⁵⁵ while others wanted to include other classes.⁵⁶

The issue that was probably the most hotly contested was whether bankruptcy should be voluntary, involuntary, or both.⁵⁷ Technically, a bankruptcy proceeding under the 1800 Act "could only be initiated by creditors and was a compulsory process."⁵⁸ However, bankruptcy proceedings were actually "utilized by debtors themselves through some friendly creditor."⁵⁹ The Bankrupt Act of 1847, originally introduced in Congress in 1820, represented the first legislation in the history of the world to be "proposed to benefit debtors at large, instead of merely to enable creditors to reach the property of merchants and traders."⁶⁰ This proposal urged "that any person imprisoned for debt might voluntarily file a petition to be adjudged a bankrupt."⁶¹ In February 1827, a bill containing a section authorizing voluntary bankruptcy was defeated.⁶² By the time the Act of 1867 was being debated, both lawyers and the courts "had so thoroughly accepted the principle of voluntary bankruptcy as being within the Constitutional power of Congress, that the question was not even raised."⁶³ However, among the points of disagreement in the debates leading up to the passage of the Bankrupt Law of

55. *Id.* at 7. For example, in 1788 the New York Constitutional Convention "urged an amendment to the Federal Constitution so as to provide 'that the power of Congress to pass uniform laws concerning bankruptcy shall only extend to merchants and other traders . . .'" *Id.* at 7-8.

56. *Id.* at 8.

Whether the framers of the Constitution used the word "bankruptcies" as a compulsory form of procedure confined to traders as in the English bankruptcy legislation existing in 1788, or whether they contemplated that it might apply to all classes of persons and all forms of insolvency as in some of the American states of that day, are matters which for eighty years there was much discussion.

Id. at 6.

57. *Id.*

58. *Id.* at 20.

59. *Id.* (footnote omitted).

60. *Id.* at 27.

61. *Id.* Thomas H. Benton, among others, "opposed the voluntary bill as unconstitutional" and termed it "a mere insolvent law at the will of the debtor." *Id.* at 62 (quoting Thomas H. Benton). Henry Hubbard of New Hampshire said the voluntary feature was "admirably calculated in favor of dishonest debtors and rogues." *Id.* (quoting Henry Hubbard).

62. *Id.* at 45. At that time the preponderance of legal opinion held that a provision which allowed voluntary bankruptcy in any federal law was unconstitutional. *Id.*

63. See generally WARREN, *supra* note 25, at 87.

1898, the issue of voluntariness was once again in the forefront.⁶⁴

In spite of the constitutional grant of power to Congress to "establish . . . uniform laws on the subject of bankruptcies throughout the United States,"⁶⁵ there were many who opposed the concept of uniform bankruptcy laws. Opponents of the bill (circa 1820) argued that it was undesirable "that any bankruptcy law should be uniform throughout the country."⁶⁶ For example, James Pendall of Virginia argued that state legislatures were more familiar than the federal government with the desires of their own constituents.⁶⁷ Thus, another issue was whether the federal government or the states would define a debtor's exemptions.

64. *Id.* at 135. According to Warren, some congressmen: favored a purely voluntary bill for relief of debtors. William A. Stone of Pennsylvania said that "involuntary bankruptcy only brought about forced sales, and depreciated market values, injuring the whole country." . . . Such a bill should never be enacted when a business depression exists. The only argument for it is to afford greater facility to creditors in the collection of debts . . . [M]y judgment is that the States are right. Indulgence to the debtor gives time and a breathing spell until more prosperous times arrive. . . . Constantine B. Kilgore of Texas said that the bill was "vile and bad, subserving the interests of only a limited class of selfish people — the great wholesale merchants." [Charles A.] Culbertson of Texas said that farmers' debts to retail merchants would be "dragged into the Bankruptcy Courts and their mortgages foreclosed with merciless promptness."

Id.

65. U.S. CONST. art. I, § 8, cl. 4.

66. WARREN, *supra* note 25, at 36.

The violent opposition by John Randolph and most of the Virginia representatives was largely due to the fact that a National bankruptcy law would enable creditors to reach all real estate of their debtor, whereas under the Virginia State law real estate in fee could not be taken by a creditor on execution.

Id. at 32 (endnote omitted). "The debtor class itself found that while the statute (the 1841 Act) had preserved all State liens, it had not preserved the various State exemptions of property from execution and other protective provisions furnished by the States to debtors." *Id.* at 82 (endnote omitted). In 1863, when bills that had been introduced in the Senate and the House were being debated, James R. Doolittle of Wisconsin:

moved that all debtors' property so exempted by the States should be free from the demands of creditors under the National bankruptcy law. To this, objection was strongly made that, as these exemptions were very different in the several States, their allowance would render the law non-uniform and that Congress had no power so to discriminate in favor of more property in one State than in another, and thus to benefit debtors in one State more than in another.

Id. at 100.

67. *Id.* (quoting James Pindall of Virginia).

b. *The Bankruptcy Reform Act of 1978: An Overview*

The Bankruptcy Reform Act of 1978 (Bankruptcy Code), which replaced the Bankruptcy Act of 1898 (Bankruptcy Act), provides two types of relief to debtors. One form of relief is by means of liquidation of the debtor's estate (Chapter 7), and the other is by means of reorganization of the debtor's financial obligations (Chapters 11 and 13).

Once a debtor declares bankruptcy, all of his assets are brought into what is called an estate.⁶⁸ The estate is then divided, as provided in the Code, to equitably satisfy the debtor's creditors.⁶⁹ However, before this division is made, the debtor is entitled to exempt — in other words to remove from the estate and keep — certain property interests.⁷⁰ This is one of the ways

68. 11 U.S.C. § 541(a) (1988).

69. Section 541 was explained as follows:

This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case . . . Paragraph (1) . . . includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate.

S. REP. No. 598, 95th Cong., 2d Sess. (hereinafter S. REP. No. 598), *reprinted in* 1978 U.S.C.C.A.N. 5868, 5868.

70. 11 U.S.C. § 522 provides:

(b). . . [A]n individual debtor may exempt from property of the estate

. . . .

(d)(1)The debtor's aggregate interest, not to exceed \$7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2)The debtor's interest, not to exceed \$1,200 in value, in one motor vehicle.

(3)The debtor's interest, not to exceed \$200 in value in any particular item or \$4,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4)The debtor's aggregate interest in any property, not to exceed \$500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5)The debtor's aggregate interest, not to exceed in value \$400 plus up to \$3,750 of any unused amount of the exemption provided under paragraph (1) of

that the Bankruptcy Code provides the debtor with a fresh

this subsection.

(6) The debtor's aggregate interest, not to exceed \$750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmaturing life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value \$4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmaturing life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive—

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 [footnote omitted] of the Internal Revenue Code of 1986 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

(11) The debtor's right to receive, or property that is traceable to—

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed \$7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

11 U.S.C. § 522 (1988).

start.⁷¹ Unsecured creditors cannot reach this exempted property by pre-petition attachment.⁷² The exemption is intended to thwart creditors who, sensing an impending bankruptcy, rush to secure a debt, thereby preventing the debtor from obtaining a fresh start. Pre-petition planning that enables a debtor to convert property into the type of property that will be exempt once it becomes part of his bankruptcy estate is generally allowed.⁷³ However, "otherwise exempt property" is subject to "properly secured liens or properly filed tax liens."⁷⁴

The Bankruptcy Act of 1898 had provided that the law of the debtor's domicile would determine what property could be exempted in bankruptcy.⁷⁵ This resulted in a lack of uniformity⁷⁶ and the "Commission on the Bankruptcy Laws of the United States proposed a uniform federal bankruptcy exemption

71. The legislative history in this regard is repeated continuously in the cases. "Subsection (e) protects, the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the lien could have been exempted in the absence of the lien" S. REP. NO. 989, 95th Cong., 2d Sess., at 86. "11 U.S.C. § 522(f)(1) allows the debtor to undo the actions of creditors that bring legal actions against the debtor shortly before bankruptcy. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions." H.R. REP. NO. 595, 95th Cong., 1st Sess. 126 (1977) (hereinafter H.R. REP. NO. 595).

72. 11 U.S.C. § 522 exemptions provide in pertinent part:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien . . .

11 U.S.C. § 522(f)(1) (1988).

73. S. REP. NO. 598 explains the exemptions:

Subsection (b) tracks current law. It permits a debtor the exemption to which he is entitled under other Federal law and the law of the State of his domicile.

....

As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.

S. REP. NO. 598, *supra* note 69, at 75-76, reprinted in 1978 U.S.C.C.A.N. 5861, 5862 § 522 (emphasis added); see also Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615 (1978).

74. BUCHBINDER, *supra* note 35, § 9.4.

75. GEORGE M. TREISTER, FUNDAMENTALS OF BANKRUPTCY LAW § 7.02 (1986).

76. *Id.*

system,"⁷⁷ when making recommendations with respect to what was to become the current Bankruptcy Code.⁷⁸ However, political exigencies allowed only for compromise.⁷⁹ Thus, the Bankruptcy Code allows a debtor to choose between a federal list of exemptions or his state's list of exemptions, unless the state elects to opt out of the federal list.⁸⁰ In 1983, one commentator reported that almost three-fourths of the states had "enacted opt-out legislation, so that the federal exemption alternative [was] . . . available in . . . relatively few states."⁸¹

A *discharge* operates to legally relieve the debtor of all dischargeable obligations.⁸² In general, a discharge "voids any judgment" and permanently enjoins the collection of any debt subject to discharge.⁸³ Debts that are incurred before the date of the bankruptcy petition are dischargeable with some exceptions.⁸⁴

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*; see, e.g., N.Y. CIV. PRAC. L. & R. 5206(a) (McKinney Supp. 1993), which provides in relevant part:

Property of one of the following types, not exceeding ten thousand dollars in value above liens and encumbrances, owned and occupied as a principal residence, is EXEMPT from application to the satisfaction of a money judgment, unless the judgment was recovered wholly for the purchase price thereof:

1. a lot of land with a dwelling thereon,
2. shares of stock in a cooperative apartment corporation,
3. units of a condominium apartment, or
4. a mobile home.

Id.; see also WIS. STAT. ANN. § 815.20(1) (West Supp. 1992), which provides in relevant part:

An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of \$40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. The exemption shall not be impaired by temporary removal with the intention to reoccupy the premises as a homestead nor by the sale of the homestead, but shall extend to the proceeds derived from the sale to an amount not exceeding \$40,000, while held, with the intention to procure another homestead with the proceeds, for 2 years.

Id.

81. TREISTER, *supra* note 75, § 7.02, at 283.

82. 11 U.S.C. § 524 (1988).

83. 11 U.S.C. § 524(a) (1988).

84. 11 U.S.C. § 727(b) (1988) provides in relevant part: "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter" See *infra* part II.B.

Additionally, "[e]xemptions do not protect a debtor's otherwise exempt property from non-dischargeable taxes or non-dischargeable maintenance, alimony, or support."⁸⁵

From these beginnings, law has evolved whereby a debtor can keep his or her ex-spouse's property under the guise of a "fresh start" in bankruptcy. The development of laws which give married women the right to own property, recapitulated in the next section, is another of the factors that have often contributed to depriving ex-wives of the property interests awarded to them through a divorce decree when their ex-husbands declare bankruptcy.⁸⁶

2. Married Women's Property Ownership Rights

The development of family property law in the United States has been "characterized by the decline of the autocratic power of the husband-father."⁸⁷ The changes have been subtle and there has been little attendant public controversy.⁸⁸

Until the mid 1800's, married women were not permitted to control property that they had acquired before marriage, that was given to them at marriage, or that they had acquired during marriage.⁸⁹ This was true even if they had earned the property.⁹⁰ The law, which had medieval origins — the "religious concept of the merger of the wife into the legal person of her husband,"⁹¹ and the feudal function of ensuring "that all property was held by a male who could provide military service to his

85. 11 U.S.C. § 523(a)(5) (1988).

86. See discussion *infra* text accompanying notes 87-98.

87. HERBERT JACOB, SILENT REVOLUTION 106 (1988).

88. *Id.*

89. *Id.*; see also CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 753 (2d ed. 1976). An unmarried adult woman, on the other hand, "was a fully competent person who could sue, be sued, and hold property." *Id.* at 751.

90. JACOB, *supra* note 87, at 106.

91. *Id.* at 107. In 1870, Sir William Blackstone wrote:

By marriage, the husband and wife are one person in law: [t]hat is, the being of the legal existence of the woman is suspended during the marriage or at least incorporated and consolidated into that of the husband under whose wing, protection and cover, she performs every thing [sic], and is therefore called in our law-[f]rench a *feme-covert*; . . . and her condition during her marriage is called her *coverture*.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1870) (emphasis in original).

lord"⁹² — had been transported "to the United States from England together with most other common law."⁹³

Beginning in the mid-1800's, most American jurisdictions had enacted legislation that had "drastically transformed the legal status of married women."⁹⁴ These statutes, known as Married Women's Property Acts ("MWPAs") were largely concerned with correcting specific disabilities of married women at common law."⁹⁵ Typically under the MWPAs, property which the wife brought into the marriage, and property which she acquired during the marriage, "[was] regarded as her separate estate subject to her separate control and power of disposition."⁹⁶ For purposes of this discussion, one of the important consequences of the MWPAs was that, whereas in the years preceding their enactment women who divorced were only granted support awards,⁹⁷ now they were entitled to retain their individual property, as well as in some cases, a share of the marital property.⁹⁸

3. *Divorce Law: The Shift From Awards of Support to Property Settlements*

Traditionally in the United States, grounds for divorce and standards for the disposition of a divorcing couple's property were based on fault,⁹⁹ and wives were generally awarded permanent alimony,¹⁰⁰ now usually termed "maintenance or spousal support,"¹⁰¹ although "many statutes held that when alimony was insufficient to support the innocent wife, some of the property of the husband could be transferred to the wife."¹⁰² In the 1970's, states started to enact no-fault divorce laws and, with these laws, came "a dramatic shift in property awards."¹⁰³ Property division began to replace "alimony as a device for adjusting

92. JACOB, *supra* note 87, at 107.

93. *Id.*

94. FOOTE, *supra* note 89, at 754.

95. *Id.*

96. *Id.* at 756.

97. *Id.*

98. *Id.*

99. *See infra* notes 113-14 and accompanying text.

100. *See infra* notes 116-19 and accompanying text.

101. JACOB, *supra* note 87, at 3.

102. *Id.* at 112.

103. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 30 (1985).

the financial relationships of the spouses”¹⁰⁴ Today, alimony is gender-neutral¹⁰⁵ and is generally awarded only in situations where the court deems that property division is inadequate to meet the financial needs of the spouse who requires ongoing support.¹⁰⁶ Moreover, even in cases where alimony is awarded, it is usually a temporary and transitional payment rather than a permanent one.¹⁰⁷

a. *From Fault to No-Fault*

The English common law provided the roots for our divorce laws.¹⁰⁸ This common law, as it pertained to divorce, was premised on the concept of marriage as “a permanent and cherished union which the Church — and then the state — had to protect and preserve.”¹⁰⁹ This concept lasted into the twentieth century.¹¹⁰ Restricting access to divorce was assumed to be the best way to “protect the bond of matrimony.”¹¹¹ Since the law’s goal was to “preserve marriage as a lifetime union,”¹¹² divorce was only permitted when one of the parties had a “legal basis or *ground* for the divorce”¹¹³ springing from “a serious marital offense such as adultery, cruelty, or desertion.”¹¹⁴

By the beginning of the 1900’s “most states had adopted . . . four major elements of traditional divorce laws: fault-based grounds, one party’s guilt, the continuation of gender-based marital responsibilities after divorce, and the linkage of financial

104. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.1 (2d ed. 1987). Lenore Weitzman, in her ten-year study of the effects of the no-fault law in California, suggests that in an increasing number of cases “the property award [is] explicitly linked to spousal support, indicating that the wife or husband received more of one in exchange for less of the other.” WEITZMAN, *supra* note 103, at 75-76.

105. See *Orr v. Orr*, 440 U.S. 268, 282-83 (1978) (holding that to impose alimony obligations on husbands and not on wives constitutes gender-based discrimination, violative of the equal protection clause of the United States Constitution).

106. WEITZMAN, *supra* note 103, at 52-109.

107. See *infra* note 161 and accompanying text.

108. WEITZMAN, *supra* note 103, at 6.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 7.

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

114. *Id.*

awards to findings of fault.”¹¹⁵ In this way divorce law helped to perpetuate “the spouses’ conventional roles and responsibilities in marriage — by both punishment and reward.”¹¹⁶ “[T]he sex-based division of roles and responsibilities enshrined in traditional legal marriage [consisted of] the wife’s domestic responsibilities and the husband’s obligation to provide support.”¹¹⁷ Up to 1970, fault-based grounds for divorce were required by every state.¹¹⁸ Alimony, and sometimes property and child custody as well, were denied to a wife found guilty of adultery, desertion, or cruelty; husbands who were at fault were punished through awards of alimony, property, and child support to their ex-wives.¹¹⁹ Although the MWPA’s¹²⁰ “were not part of the law of divorce,”¹²¹ their adoption influenced divorce law.¹²² The disposition of property in the event of a divorce was effectuated by “[t]wo somewhat different devices . . . : alimony and property division.”¹²³ The laws of some states provided for both.¹²⁴ In other states, “only alimony existed although it served the purpose of property division as well.”¹²⁵ Since financial awards were directly related to the degree of fault, “the law created strong financial incentives for parties to exaggerate the transgressions of their spouses.”¹²⁶

115. *Id.*

116. *Id.* at 14.

117. *Id.* at 11; see also *Audubon v. Schufeldt*, 181 U.S. 575, 577 (1901) (“Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife.”).

118. WEITZMAN, *supra* note 103, at 14.

119. *Id.* at 14. See also JACOB, *supra* note 87, at 113 (“In both common-law title states and in community property states, fault was an important element in the disposition of property at divorce. The spouse at fault was often penalized.”).

120. See *supra* notes 87-98 and accompanying text.

121. JACOB, *supra* note 87, at 111.

122. *Id.*

123. *Id.* at 112.

124. *Id.*

125. *Id.*

126. WEITZMAN, *supra* note 103, at 12. It is not within the scope of this Comment to trace the disposition of cases in which property awards were dictated by the fault of a spouse, and then bankruptcy was subsequently declared under the pre-1978 Bankruptcy Act, and in which § 17(a)(7) was successfully invoked by the “guilty” debtor, resulting in his discharge from the property debt. However, it is a virtual certainty that a number of those property awards, some of them based on actual fault, were discharged because they were not in the nature of alimony pursuant to § 17(a)(7) of the Bankruptcy Act.

Complaints with respect to fault-based divorce "had three common themes . . . doctoring of evidence to fit the narrow provisions of existing divorce law [,] . . . forc[ing] family disputes into the adversarial mode of court actions[,] . . . and [the fact that] the nation's divorce laws were a patchwork of provisions that differed for each state."¹²⁷ Law professors, lawyers, and judges were the first to espouse no-fault reform.¹²⁸ They focused primarily "on the legal grounds for divorce; their primary purposes were to reduce expense, acrimony, and fraud in resolving matters envisioned as essentially private concerns."¹²⁹ In 1969, California enacted the first legislation¹³⁰ "in the Western world to abolish completely any requirement of fault as the basis for marital dissolution."¹³¹ The new law eliminated fault "not only from the grounds for divorce but also from the standards for dividing property and awarding alimony."¹³²

In 1974, the National Conference of Commissioners on Uniform State Laws ("NCCUSL")¹³³ and the American Bar Association ("ABA") promulgated the Uniform Marriage and Divorce Act ("UMDA").¹³⁴ Like the California Family Law Act,¹³⁵ the UMDA contains express language that eliminates fault from consideration in awarding alimony.¹³⁶ Although very few states adopted the property provisions of the UMDA in toto,¹³⁷ by 1974 many states had eliminated fault as both grounds for di-

127. JACOB, *supra* note 87, at 67-68.

128. Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 195 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

129. *Id.*

130. California Family Law Act ch. 1608, 1969 Cal. Stat. 3312, 3314-51 (codified as amended at CAL. CIV. CODE §§ 4000-5138 (West 1983 and Supp. 1989)).

131. WEITZMAN, *supra* note 103, at 15.

132. *Id.* at 19.

133. JACOB, *supra* note 87, at 62. The NCCUSL was formed in 1892 to develop, "among other reforms, a uniform marriage and divorce act for the states." *Id.* at 62-63.

134. *Id.* at 80. The NCCUSL's early attempts to develop such an act were unsuccessful. In 1974, the NCCUSL again addressed its attention to the formulation of a uniform marriage and divorce act for the United States which culminated in the Uniform Marriage and Divorce Act.

135. See *supra* notes 130-32 and accompanying text.

136. UMDA § 308(b) provides, in pertinent part, "The maintenance order shall be . . . without regard to marital misconduct" UNIF. MARRIAGE AND DIVORCE ACT § 308(b), 9A U.L.A. 348 (1987).

137. JACOB, *supra* note 87, at 121.

vorced and as a basis for property division.¹³⁸ By 1985, all the states had either eliminated fault as a ground for divorce or had added alternative no-fault grounds.¹³⁹ Correspondingly, "a 'guilty' spouse was not necessarily punished and an 'innocent' spouse was not necessarily rewarded in the distribution of the family's property or in the award of alimony."¹⁴⁰

Whereas under fault law "the spousal obligations of the traditional marriage contract were reinforced upon divorce,"¹⁴¹ these obligations were eliminated by no-fault law.¹⁴² Now that most states no longer have fault based divorce, a wife of many years, who is divorced for whatever reason (even if her husband decides unilaterally to divorce her),¹⁴³ is generally awarded lower maintenance and support than she would have been under fault-based divorce guidelines.¹⁴⁴

b. *Economic Partnership*

In the 1960s, when legal reformers began to contemplate no-fault divorce, they also encountered great confusion with respect to the division of a divorcing couple's property stemming from a "multitude of provisions existed in state law[s] about how the assets of a divorcing couple should be handled."¹⁴⁵ Traditionally, all states other than community property¹⁴⁶ states adhered to

138. *Id.* at 125. Private as well as public groups are instrumental in making policy. *Id.* at 62. There are two such groups in the United States. *Id.* "One is the American Law Institute [ALI] which periodically issues 'Restatements of the Law . . . ' . . . that become influential accounts of black letter law in the United States. . . . The second is the National Conference of Commissioners on Uniform State Laws (NCCUSL), which issues uniform state laws to guide state legislatures." *Id.* An example of the influence of these groups is the Uniform Commercial Code, which the ALI and the NCCUSL drafted together. *Id.*

139. *Id.* at 80.

140. *Id.*

141. WEITZMAN, *supra* note 103, at 25.

142. *Id.*

143. In many states, "[e]ither party can end a marriage simply by asserting that the marriage has broken down." Lawrence M. Friedman, *Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664 (1984).

144. WEITZMAN, *supra* note 103, at 32-33.

145. JACOB, *supra* note 87, at 116-17.

146. The community property system was "brought to the western and southwestern regions of what is now the United States by the Spanish Colonists." FOOTE, *supra* note 89, at 756. This system, *bienes gananciales*, derived from the Spanish Codes, *id.* (footnote omitted), and provided that "property acquired . . . during the marriage by

the rule that, when a marriage ended, "[t]he person who held title to the property owned it, although an innocent wife might be granted her dower's portion."¹⁴⁷

In 1963, the President's Commission on the Status of Women made the following recommendation:

Marriage is a partnership to which each spouse makes a different but equally important contribution. . . . Accordingly . . . [we] conclude [] that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death.¹⁴⁸

Robert Levy, in the 1968 monograph that he prepared for the NCCUSL to help them address the "widespread dissatisfaction with divorce procedures,"¹⁴⁹ made a number of recommendations, among which was that "a new category of property which would encompass the couple's joint holdings be established for common-law states."¹⁵⁰ When referring to this new category, Levy used the term "marital property."¹⁵¹ The NCCUSL first suggested the concept of marital property in 1970 and it has clearly gathered momentum since then.¹⁵² Today, most states consider that marital property includes everything acquired during the marriage except gifts and inheritances¹⁵³

labor or for other valuable consideration, was owned jointly by the husband and wife. Property owned by either spouse before the marriage, or acquired during the marriage by gift or bequest, remained separate property of that spouse." *Id.* Should a marriage be terminated, the community was considered dissolved and "each spouse was entitled to his or her separate property plus his or her one-half share in the community property." *Id.*

147. JACOB, *supra* note 87, at 2.

148. FOOTE, *supra* note 89, at 749 (citation omitted).

149. JACOB, *supra* note 87, at 67 (footnote omitted).

150. *Id.* at 118.

151. *Id.*

152. *Id.* at 12. This evaluation is also based on a reading of the relevant statutes for each of the fifty states. For an overview of the relevant statutes for each of the fifty states, see generally Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 24 FAM. L.Q. 309 (1991).

153. Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 128, at 6, 12.

and which belongs to both the wife and the husband regardless of who holds title.¹⁵⁴ Moreover, monetary contribution toward the acquisition of marital property is no longer a factor in its disposition.¹⁵⁵ Indeed, many state statutes "explicitly mandate that a homemaker's non-monetary contributions be counted the same as the wage earner's salary or income."¹⁵⁶

c. *The Feminist Movement*

Although the feminist movement did not concentrate its energies into reforming family law, its rhetoric greatly impacted "the ways in which many Americans conceptualized the ideal family structure."¹⁵⁷ At the onset of the feminist movement, "some feminists thought alimony was a sexist concept that had no place in a society in which men and women were to be treated as equals."¹⁵⁸ Feminists believed that women should consider themselves "responsible for their own economic well-being,"¹⁵⁹ and were vehemently opposed to the concept of ex-wives being treated, by the laws, "as incompetents who could not care for themselves."¹⁶⁰ Accordingly, "[m]ost feminists in the 1960's and 1970's did not perceive any problem with transforming alimony . . . into a temporary and transitional maintenance payment, designed to allow a woman to take up the responsibility of caring for herself independently."¹⁶¹

Property division as a substitute for alimony was intended to give women a sense of control and independence by freeing them from the stress of waiting for regular checks which may or may not arrive,¹⁶² and by giving them the opportunity to have working capital that they can invest in order to provide for their own support.¹⁶³

154. JACOB, *supra* note 87, at 2.

155. *Id.*

156. *Id.*

157. *Id.* at 23.

158. WEITZMAN, *supra* note 103, at 359.

159. JACOB, *supra* note 87, at 23.

160. *Id.* at 23-24.

161. *Id.* at 24.

162. Dear Colleague Letter, *supra* note 2.

163. Telephone Interview with Owen Doss, Esq., former President of American Academy of Matrimonial Lawyers (Oct. 18, 1991). This innovation has not worked in most cases. In reality, the property owned by most couples consists, at best, of a house

B. *Bankruptcy and Divorce: Jurisdiction and Applicable Law*

It is well settled that domestic relations, as creatures of state law, are "virtually [the] exclusive province of the states,"¹⁶⁴ and that the related establishment and modification of support obligations have "traditionally been regarded as an exclusive function of the state courts."¹⁶⁵ Under the judicially created "domestic relations exception" adhered to by federal courts¹⁶⁶ even in diversity cases, jurisdiction for divorce judgments, disposition of marital property, and awards of support, rests exclusively with the state courts, each administering its respective state laws.¹⁶⁷ Exclusive jurisdiction for bankruptcy cases rests with the federal courts.¹⁶⁸ However, in the course of bankruptcy proceedings, as with virtually every case in which there is federal jurisdiction, federal courts are empowered, and indeed must decide certain state law issues.¹⁶⁹ Moreover, in particular areas, federal bankruptcy law preempts the state rule of decision and a federal court will decide these "state law" issues *de novo* as a matter of federal law.¹⁷⁰ Thus, when a debtor seeks to be dis-

and an automobile. These assets do not provide a woman with the liquid capital needed to invest in order to provide for her support. *Id.* Considering that "less than half of divorcing couples have significant assets to divide, and since conventional approaches to property division generally penalize [women], this represents a rather skewed concept of fairness." Rhode & Minow, *supra* note 128, at 202.

164. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

165. Scheible, *supra* note 23, at 581.

166. *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858). The Court stated, in dictum, "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one of bed and board." *Id.* This became the "domestic relations exception" to subject matter jurisdiction in federal diversity cases under which, even though there is diversity of citizenship and the requisite jurisdictional amount is in controversy, federal courts refuse to hear divorce cases. *See, e.g., Anastasi v. Anastasi*, 544 F. Supp. 866 (D.N.J. 1982).

167. Scheible, *supra* note 23, at 581 ("Both the creation and modification of support obligations . . . traditionally have been regarded as exclusively a function of the state courts.").

168. 28 U.S.C. § 1334 (1988) provides: "(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11." *Id.*

169. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 761 (1824).

170. 28 U.S.C. § 1334(2) provides, in pertinent part: "Except as provided in subsection (b) of this section, the distinct court shall have original and exclusive jurisdiction of all cases under title 11." S. REP. NO. 989 and H.R. REP. NO. 595 interpreted 11 U.S.C. § 523(a)(5) as follows: "What constitutes alimony, maintenance, or support will be deter-

charged from a debt to a non-debtor spouse, the characterization of the debt, originally fashioned by a state court applying state law, rests with a federal court applying federal law. Even though a federal bankruptcy court will generally give some deference to a state court's characterization of a given award as being either in the nature of support or in the nature of a property settlement,¹⁷¹ the federal bankruptcy court is not required to do so.¹⁷²

Alimony, maintenance, support, and child support, are not dischargeable in bankruptcy.¹⁷³ This concept was recognized by

mined under the bankruptcy law, . . . not state law" S. REP. NO. 989, 95th Cong., 2d Sess. 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865. For an in-depth discussion of federal courts interpreting state courts' judgments, see generally Scheible, *supra* note 23. Professor Scheible argues that "[a] preferable procedure would be for the bankruptcy courts to defer to the state courts whenever uncertainty about the nature of a marital debt arises." *Id.* at 635. Professor Scheible points out that 28 U.S.C. § 1334(c)(1) provides for permissive abstention: "'Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11.'" *Id.* at 631 (quoting 28 U.S.C. § 1334(c)(1) (1988)).

171. *In re Barac*, 62 B.R. 713, 716 (Bankr. E.D. Mo. 1985).

172. *Brown v. Felsen*, 442 U.S. 127, 138-39 (1979) (stating that the bankruptcy court is not bound by a state court's prior determination). "The bankruptcy court is not confined to a review of the judgement and record in the prior state-court proceedings when considering the dischargeability of respondent's debt." *Id.*; see also *In re Williams*, 703 F.2d 1055, 1057 (8th Cir. 1983) (stating that federal bankruptcy courts are to make the determination of whether payments pursuant to a divorce decree are in the nature of support, maintenance, or alimony as opposed to property because it is a federal question.); *In re Ramey*, 59 B.R. 527, 529 (Bankr. E.D. Ark. 1986); *In re Tosti*, 62 B.R. 131, 131 (Bankr. D.N.J. 1986) (citing *In re Bedingfield*, 42 B.R. 641 (S.D. Ga. 1983) ("The law unquestionably places the burden of the determination on the bankruptcy court.")); see also H.R. REP. NO. 595, *supra* note 71, at 364, *reprinted in* 1978 U.S.C.C.A.N. at 6320; S. REP. NO. 989, 95th Cong. 2d Sess. 79, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865.

173. 11 U.S.C. § 523 provides in pertinent part:

(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) 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—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) 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 (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

courts even before the Bankruptcy Act of 1898.¹⁷⁴ The original policy for alimony not being dischargeable is that it "is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife."¹⁷⁵ The District Court of the United States for the Southern District of New York, under the Bankruptcy Act of 1867, held "that a claim for alimony . . . was not a provable debt nor barred by a discharge."¹⁷⁶ The Court, in *Audubon v. Schufeldt*, stated that the *In re Lachemeyer* decision was believed to be the only one on that issue under the 1867 Act.¹⁷⁷ The court also noted that "[l]ike decisions [had] been made . . . in the same court under the present bankrupt act."¹⁷⁸ At that time, "the present bankrupt act" had been in existence for only two years. However, property settlements are treated differently from alimony: any asset owed to an ex-spouse pursuant to a property agreement is dischargeable.¹⁷⁹

In cases of bankruptcy and divorce, there are four basic fact patterns in which the debtor may raise (often successfully) the issue of whether he will be able to avoid the terms of a settlement agreement. In each of these cases, the debtor's contention is that the underlying financial obligation is dischargeable because it is in the nature of a property settlement and not in the

11 U.S.C. § 523 (1988) (footnote omitted).

174. See *infra* notes 175-78 and accompanying text.

175. *Audubon v. Schufeldt*, 181 U.S. 575, 577 (1900) (reversing an order granting a discharge for arrears of alimony).

176. *Id.* The court also stated: "Under the Bankruptcy Act of 1867, it was held by the District Court of the United States for the Southern District of New York . . . that a claim for alimony, whether accrued before or after the commencement of . . . bankruptcy [proceedings], was not a provable debt nor barred by discharge." *Id.* at 578.

177. 18 Natl. Bankr. Reg. 270 (1878).

178. *Id.*

179. 11 U.S.C. § 523(a)(5) (1988). The Code does not explicitly state that an individual debtor is discharged from a debt to a spouse, former spouse, or child, that arises from a property settlement. However, property settlements are not included in the debts to a spouse, former spouse, or child, for which a debtor is not discharged. See *supra* note 173 (setting forth text of 11 U.S.C. § 523(a)(5)); see, e.g., *In re Singer*, 787 F.2d 1033 (6th Cir. 1986); *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983), superseded by *In re Lewis*, 39 B.R. 842 (Bankr. W.D.N.Y. 1984); *In re Arosema*, 63 B.R. 55 (Bankr. D. Mont. 1986); *Tosti v. Tosti*, 62 B.R. 131 (Bankr. D.N.J. 1986); *In re Smith*, 61 B.R. 742 (Bankr. D. Mont. 1986); *In re Ramey*, 59 B.R. 527 (Bankr. E.D. Ark. 1986); *In re Kagan*, 42 B.R. 563 (Bankr. N.D. Ill. 1984); see *supra* notes 82-85 and accompanying text (regarding dischargeability).

nature of support. They are: 1) cases where a debtor claims that a debt owed directly to an ex-spouse is in the nature of a property settlement and not in the nature of support;¹⁸⁰ 2) cases where there is a property settlement agreement pursuant to which the debtor agrees to make payments to third parties or to hold the non-debtor harmless with respect to financial obligations to third parties;¹⁸¹ 3) cases where there is a settlement agreement that provides for the payment of a given percentage or amount of the debtor's pension to the non-debtor;¹⁸² and 4) cases where the non-debtor has been granted a lien on property that was awarded to the debtor to secure the debtor's promise to pay the non-debtor the amount of money that represents the non-debtor's equity in the property.¹⁸³

C. *The "Nature" of Awards in Divorce*

1. *Property Settlement vs. Alimony*

When a woman receives an award pursuant to a divorce decree that is in the nature of a property settlement rather than in the nature of support, and her former husband subsequently declares bankruptcy, she must file suit just like any other creditor, even if the property was meant to provide her with support. As plaintiff, she has the burden of proof of establishing that the award is in the nature of alimony and not in the nature of a property settlement.¹⁸⁴ A woman in this situation is often with-

180. See 11 U.S.C. § 523(a)(5)(B) (1988); see, e.g., *In re Ramey*, 59 B.R. 527 (Bankr. E.D. Ark. 1986); *In re Coffman*, 52 B.R. 667 (Bankr. D. Md. 1985); see also *infra* part II.C.

181. See, e.g., *In re Gianakas*, 917 F.2d 759 (3rd Cir. 1990); *Sylvester v. Sylvester*, 865 F.2d 1164 (10th Cir. 1989); *In re Yeates*, 807 F.2d 874 (10th Cir. 1986); see *infra* part II.C.

182. See, e.g., *McCarty v. McCarty*, 453 U.S. 210 (1981); *Bush v. Taylor*, 893 F.2d 962, *rev'd*, 912 F.2d 989 (8th Cir. 1990); *In re Chandler*, 805 F.2d 555 (5th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987), *reh'g denied*, 493 U.S. 987 (1989); see *infra* part II.C.

183. See, e.g., *In re Pederson*, 875 F.2d 781 (9th Cir. 1989); *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984); see *infra* part II.C.

184. "At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection." Bankr. R. 4005; see also *In re Calhoun*, 715 F.2d 1103, 1111 (6th Cir. 1983) ("[P]lacing the burden of persuasion on the debtor [is] legal [error] . . ."):

[I]t should be made clear that the burden of proof is on the party asserting that a debt is non-dischargeable. This is as it should be, since every debt which a debtor must continue to bear impedes his ability to make good on the fresh start which

out the means to press suit.¹⁸⁵

Whether payments pursuant to a divorce decree are in the nature of a property settlement as opposed to support, maintenance, alimony, or child support is a federal question to be determined by the federal bankruptcy court.¹⁸⁶ Courts use different tests to ascertain if money owed to an ex-spouse by a debtor in bankruptcy is in reality part of a property settlement or is part of a support award. The most common test is intent;¹⁸⁷ some courts rely on the words of the agreement, regardless of how obvious it is or is not that the "property" to be conveyed is actually intended to provide support.¹⁸⁸ Some courts, however, disregard the labels given to awards in divorce decrees and look to a variety of factors in determining whether the award in question is, in fact, in the nature of a property settlement or in the nature of support.¹⁸⁹

the Bankruptcy Code provides him.

In re Barac, 62 B.R. 713, 716 (Bankr. E.D. Mo. 1985) (citing *In re Lineberry*, 9 B.R. 700 (Bankr. W.D. Mo. 1981)).

185. Telephone Interview with Owen Doss, Esq., *supra* note 163.

186. See *supra* note 168-72 and accompanying text.

187. See *infra* notes 188-89 and accompanying text.

188. Scheible, *supra* note 23, at 594 n.92.

The bankruptcy courts now concur that they should apply some version of the 'intent' test to determine the nature of a marital debt. Although the precise formulation of the intent test is not yet uniform, essentially that analysis requires the bankruptcy court to discern whether the debt was intended by the divorce court or the parties themselves to constitute support.

Id. (citations omitted).

189. For example, the court in *In re Ramey*, 59 B.R. 527, 531 (Bankr. E.D. Ark. 1986), reasoned as follows:

In this case the property settlement agreement does label these obligations as alimony, but other factors militate against this characterization. There are other provisions in the agreement which designate support and alimony There was only a slight disparity in the parties [sic] income There was no evidence that the parties intended the obligation to terminate upon the death or remarriage of [one or the other] Nothing in the facts or in the decree suggests that the debtor's obligation in this regard was intended to be in the nature of support.

Id.

In *In re Coffman*, 52 B.R. 667, 674-675 (Bankr. D. Md. 1985), Judge Mannes, after having reviewed over thirty decisions, compiled a list of eighteen factors that could be of help to courts in their determinations as to the parties' and/or the courts' actual intent with respect to the divorce settlement at the time it was made. This list, which has been widely referenced by federal courts, reads as follows:

1. Whether there was an alimony award entered by the state court.
2. Whether there was a need for support at the time of the decree; whether the

Another of the tests that has been used to determine the

support award would have been inadequate absent the obligation in question.

3. The intention of the court to provide support.
4. Whether debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances.
5. The age, health, work skills, and educational levels of the parties.
6. Whether the payments are made periodically over an extended period or in a lump sum.
7. The existence of a legal or moral "obligation" to pay alimony or support.
8. The express terms of the debt characterization under state law.
9. Whether the obligation is enforceable by contempt.
10. The duration of the marriage.
11. The financial resources of each spouse, including income from employment or elsewhere.
12. Whether the payment was fashioned in order to balance disparate incomes of the parties.
13. Whether the creditor spouse relinquished rights of support in payment of the obligation in question.
14. Whether there were minor children in the care of the creditor spouse.
15. The standard of living of the parties during their marriage.
16. The circumstances contributing to the estrangement of the parties.
17. Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties.
18. Tax treatment of the payment by the debtor spouse.

Id.

Many of these factors stemmed from § 308 of the UMDA, which recommended maintenance criteria as follows:

(a) In a proceeding for dissolution of marriage, legal separation, or maintenance following a decree of dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property to provide for his reasonable needs; and

(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his

dischargeability of marital debts is the so-called present circumstances test. The case best known for articulating the present circumstances test is *In re Calhoun*.¹⁹⁰ The *Calhoun* court examined the question in the context of an assumption of joint debts on the part of the debtor; however, the principles involved for determining the nature of the award are the same as if the payments were to be remitted directly to the non-debtor spouse.¹⁹¹ The court stated that it "believe[d] that the initial inquiry must be to ascertain whether the state court or the parties to the divorce intended to create an obligation to provide support."¹⁹² However, the court maintained that a "finding of intent does not . . . control the ultimate issue of whether the assumption of joint debts was actually in the nature of support for purposes of federal bankruptcy."¹⁹³ The next inquiry, according to the court, was "whether such assumption has the effect of providing the support necessary to ensure that the daily needs of

needs while meeting those of the spouse seeking maintenance.

UNIFORM MARRIAGE AND DIVORCE ACT § 308, reprinted in DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT (Family Law Reporter ed. 1982); see *supra* notes 134-36 and accompanying text.

190. *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983); see also *In re Warner*, 5 B.R. 434, 442 (Bankr. D. Utah 1980) (holding that "[e]ven if the debt was originally imposed on the basis of the need of the spouse or children, the debt cannot be held nondischargeable unless at the time of filing there exists a present need by the spouse or children that the debt be paid").

191. *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983).

Paragraph (6) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (42 U.S.C. 656(b)) by section 326 of the bill, will apply to make non-dischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law. . . . The proviso, however, makes dischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under the bankruptcy law considerations as to whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.

S. REP. NO. 989, 95th Cong., 2d Sess. 79 (1978) [To accompany H.R. REP. NO. 8200], reprinted in 1978 U.S.C.C.A.N. 5787, 5865; see, e.g., *In re Spong*, 661 F.2d 6, 9 (2d Cir. 1981) (holding that under 11 U.S.C. § 523 (a)(5)(A), a debt to a former spouse that has been assigned to another entity is dischargeable if it was intended for alimony, maintenance or support).

192. *Calhoun*, 715 F.2d at 1109.

193. *Id.*

the former spouse . . . are satisfied.”¹⁹⁴ Should the daily needs of the former spouse be capable of being satisfied without the assumption of the obligation on the part of the debtor, then the inquiry ends, and the debtor is discharged.¹⁹⁵ If, on the other hand, the obligation “has the effect of providing necessary support,”¹⁹⁶ then it must still be considered not “manifestly unreasonable in view of the earning power and financial status of the debtor spouse”¹⁹⁷ to be held to be in the nature of support.

Presently, the federal courts are split as to whether present circumstances are to be taken into account when determining dischargeability of marital debts.¹⁹⁸ The majority of federal appellate courts that have addressed the issue have concluded that if a debt had the necessary features of support at its inception, then the obligation retains that character for bankruptcy purposes and may not be discharged.¹⁹⁹ Conversely, a minority position, advanced primarily by the Sixth Circuit, adopts the view that at least a limited inquiry into the parties’ circumstances at the time of bankruptcy is necessary to accurately categorize certain types of marital debts.²⁰⁰

2. *Payments to Third Parties or Agreements to Hold Harmless*

Another issue that arises frequently in the bankruptcy and divorce setting is that of the dischargeability of agreements to

194. *Id.*

195. *Id.*

196. *Id.* at 1110.

197. *Id.*

198. Scheible, *supra* note 23, at 606.

199. *In re Gianakas*, 917 F.2d 759, 763 (3d Cir. 1990) (holding that the award was in the nature of alimony, maintenance, or support, and therefore non-dischargeable). In the court’s words: “We believe that whether an obligation is in the nature of alimony, maintenance or support, as distinguished from a property settlement, depends on a finding as to the intent of the parties at the time of the settlement agreement.” *Id.* at 762 (citing *In re Yeates*, 807 F.2d 874, 878 (10th Cir. 1986)); *Sylvester v. Sylvester*, 865 F.2d 1164, 1166 (10th Cir. 1989); *Forsdick v. Turgeon*, 812 F.2d 801 (2d Cir. 1987) (court refusing to follow *Calhoun* and holding that award was in the nature of alimony and therefore non-dischargeable); *Draper v. Draper*, 790 F.2d 52 (8th Cir. 1986) (holding that the needs test was irrelevant and that the award was in the nature of support and thus dischargeable); *In re Harrell*, 754 F.2d 902, 906-07 (11th Cir. 1985); see also *In re Miller*, 34 B.R. 289, 292 (Bankr. E.D. Pa. 1983)).

200. Scheible, *supra* note 23, at 604.

hold harmless and obligations to make payments to third parties. Essentially, the question again turns on whether the obligation is in the nature of a division of marital property or in the nature of support.²⁰¹ Courts use the same tests for determining dischargeability of debts owed to third parties and debts included in agreements to hold harmless, as they use when evaluating the indicia of an award that is to be paid by the debtor directly to the ex-spouse.²⁰² Accordingly, if a court determines, for example, that payment on a loan or on a bill for an attorney's fee, is in actuality a property award, then the debt will be dischargeable and the non-debtor spouse will be liable for that debt.²⁰³ If, on the other hand, the court determines that the debt is in lieu of support, then the debt will be non-dischargeable and the debtor will be liable for the debt.

For example, the court in *In re Barac*,²⁰⁴ noting that "[a] promise to pay a joint debt can create a non-dischargeable obligation provided its function is support,"²⁰⁵ nevertheless held that the debtor's assumption of debt was part of the "division of property and, hence, is dischargeable."²⁰⁶ The court based its

201. S. REP. No. 989, 95th Cong., 2d Sess., pt 95-598 at 365, (1978); H.R. REP. No. 595 (construing 11 U.S.C. § 523(a)(5)):

What constitutes alimony, maintenance or support will be determined under the bankruptcy law, not state law. . . . This provision, however, makes nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse as determined under the bankruptcy law considerations as to whether a particular agreement of payment to a spouse is actually alimony or a property settlement.

In re Coil, 680 F.2d 1170, 1171 (7th Cir. 1982) (hold-harmless clause "was intended as an integral and inseparable part of the necessary maintenance and support . . ."); *In re Anderson*, 62 B.R. 448 (Bankr. D. Minn. 1986); *In re Erler*, 60 B.R. 220 (Bankr. W.D. Ky. 1986); *In re Petoske*, 16 B.R. 412 (Bankr. D. N.Y. 1982).

[The debtor] is not legally obligated to pay creditors by virtue of his promise to [the non-debtor spouse] in the divorce decree. [The debtor] may, however, be legally obligated to hold [the non-debtor spouse] harmless on these debts, presumably by paying the creditors, if payment of the debts constitutes "alimony, maintenance, or support."

Warner v. Warner, 5 B.R. 434, 438 (Bankr. D. Utah 1980).

202. See *supra* note 186-97 and accompanying text.

203. See *supra* note 186-97 and accompanying text.

204. 62 B.R. 713 (Bankr. E.D. Mo. 1985).

205. *Id.* at 717.

206. *Id.*

holding on the fact that the maintenance award was sufficient,²⁰⁷ and that the non-debtor spouse "failed to carry her burden of proof as to what necessities the . . . obligation related."²⁰⁸

3. Pensions

The question of whether non-debtor spouses are entitled to retain their interests in debtors' pensions and retirement benefits has also been the basis of extensive litigation within the framework of bankruptcy and divorce. Here too, some courts have based their inquiry, into whether a debtor could be discharged from remitting to his ex-spouse that ex-spouse's interest in the debtor's pension, on whether the award represented an obligation "in the nature of property"²⁰⁹ or "in the nature of support."²¹⁰ Thus, each of these courts analyzed each case according to the standard for determining the nature of the award that the court had adopted.²¹¹

Some courts have held that the non-debtor spouse was entitled to the share of the pension that represented her ex-spouse's interest in the pension payments based on a theory that these payments were in reality post-petition debts.²¹² Other courts have based their conclusions that a debtor is not discharged from remitting an interest in pension payments to an ex-spouse on the theory that "an ex-spouse holds pension payments in trust for the spouse to whom a share of such benefits has been awarded."²¹³ Other courts arrive at the same conclusion on the

207. *Id.*

208. *Id.*

209. See *supra* notes 184-200 and accompanying text.

210. See *supra* notes 184-200 and accompanying text.

211. See, e.g., *In re Neely*, 59 B.R. 189, 193-94 (Bankr. D. S.D. 1986) (holding that "the military pension payments are not in the nature of support but property settlement and, therefore, . . . not precluded from discharge under § 523(a)(5)."); *In re Anderson*, 21 B.R. 335, 339 (Bankr. D. Cal. 1982) (in holding pension award was alimony, not property: "[I]t is clear that the award of 43% of debtor's military retirement benefits, was intended to provide [the ex-spouse] with . . . means of support.").

212. See, e.g., *In re Chandler*, 805 F.2d, 555, 557 (5th Cir. 1986), cert. denied *Chandler v. Chandler*, 481 U.S. 1049 (1987), sub nom., *In re Teichman*, 774 F.2d 1395 (9th Cir. 1985) (holding that the debt arose only at the time payment was due from the debtor to the ex-spouse since no payment was due to ex-spouse until after the debtor was paid by the Air Force); *In re McNierney*, 97 B.R. 648, 651 (Bankr. S.D. Fla. 1989).

213. See, e.g., *Teichman*, 774 F.2d at 1400 (ex-husband invested with control over benefits belonging to wife was responsible for transferring them to ex-wife under divorce

premise that the debtor is merely a "conduit" for the payments to the ex-spouse.²¹⁴ Still other courts maintain that it is not the debtor, but the party who pays the pension, who is liable for the debt; therefore, the debtor is not eligible for such a discharge.²¹⁵

In *Bush v. Taylor*,²¹⁶ the Eighth Circuit disagreed with the theory that the debtor's obligation to remit one-half of his pension benefits to his ex-spouse constituted a constructive trust,²¹⁷ reversed the courts below, and discharged the debtor from the obligation.²¹⁸ The court defined this obligation "to remit a percentage of pension payments to a former spouse as part of a property settlement [as] a debt."²¹⁹ The court continued, "The Code makes such debts dischargeable. . . . This result, however unpalatable, may not be avoided by resort to a new definition of debt or strained application of equitable devices."²²⁰ However, on rehearing en banc,²²¹ the Eighth Circuit reversed its panel decision and affirmed the court below, holding that the pension payments were not dischargeable both on the constructive trust theory²²² and on the theory that the non-debtor spouse's interest in the debt was a post-petition debt and, therefore, not a debt dischargeable under the Bankruptcy Code.²²³

decree, so that a trust was created) (cited in *Bush v. Taylor*, 912 F.2d 989, 993 (8th Cir. 1992) *rev'g* 893 F.2d 962 (Fletcher, J., dissenting)); *cf. In re Dahlin*, 94 B.R. 79, 81 (Bankr. E.D. Va. 1988) (holding that "where divorce decree created express trust in favor of wife, debtor-husband bound to remit payments").

214. *See, e.g., In re Mace*, 82 B.R. 864, 868 (Bankr. S.D. Ohio 1987) ("ex-husband was merely 'conduit' for payments to former wife from share of pension fund that belonged to her) (cited in *Bush*, 898 F.2d at 965); *In re Thomas*, 47 B.R. 27, 33 (Bankr. S.D. Cal. 1984) ("court had no power to modify ex-wife's interest in her separate property.").

215. *See, e.g., In re Manners*, 62 B.R. 656, 657 (Bankr. D. Mont. 1986) (holding wife's "interest in the pension rests with the United States, not the debtor."); *In re Hall*, 51 B.R. 1002, 1003 (S.D. Ga. 1985) (holding wife "became a federal pensioner in her own right when she received an equitable share of her husband's pension").

216. 893 F.2d 962 (8th Cir.), *rev'd en banc*, 912 F.2d 989 (1990).

217. *Id.* at 966.

218. *Id.* at 963.

219. *Id.* at 967.

220. *Id.*

221. *Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990), *rev'g* 893 F.2d 962 (1990).

222. *Id.* at 993. "[The non-debtor spouse's] share of the pension was her sole and separate property and [the debtor] received it . . . as a constructive trustee for her benefit." *Id.*

223. *Id.*

In *McCarty v. McCarty*,²²⁴ a 1981 United States Supreme Court case, the Court held that federal law preempts state community property law and that, consequently, a state court was precluded by the Supremacy Clause of the United States Constitution from dividing military nondisability retirement pay pursuant to a state's community property laws.²²⁵ The Court examined the relevant statute, 10 U.S.C. § 3929, which provides: "A member of the Army retired under this chapter is entitled to retired pay."²²⁶ Moreover, the Court continued, "the military retirement system does not embody even a limited 'community property concept.'"²²⁷ The Court noted that "Congress ha[d] explicitly stated: 'Historically, military retired pay has been a *personal entitlement* payable to the retired member himself as long as he lives.'"²²⁸

The Court also observed that, in contrast to its treatment of military benefits, Congress had "enacted legislation that requires that Civil Service benefits be paid to an ex-spouse to the extent provided for in 'the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.'"²²⁹ It also noted that there was legislation pursuant to which "an ex-spouse is entitled to a pro rata share of Foreign Service retirement benefits."²³⁰ Thus, the Court continued, "the Civil Service amendments require the United States to recognize the community property division of Civil Service retirement benefits by a state court, while the Foreign Service amendments establish a limited federal community property concept."²³¹ However, the Court said, "in striking contrast,"²³² comparable "legislation affecting military retired pay was introduced in the 96th Congress, [and] none of

224. *McCarty v. McCarty*, 453 U.S. 210 (1981).

225. *Id.* at 223.

226. *Id.* at 223, 224 (quoting 10 U.S.C. § 3929 (1976)).

227. *Id.* at 223.

228. *Id.* at 224 (quoting S. REP. NO. 1480, 90th Cong., 2d Sess. 6 (1968) (emphasis added)).

229. *Id.* at 230 (quoting Pub. L. No. 95-366 § 1(a), 92 Stat. 600, 5 U.S.C. § 8345(j)(1) (Supp. IV 1976)).

230. *Id.* at 230, 231.

231. *Id.*

232. *Id.* at 231.

those bills was reported out of committee."²³³

A year after the *McCarty* decision, Congress enacted the Uniformed Services Former Spouses' Protection Act of 1982 ("USFSPA").²³⁴ Section 1408(d)(1) of the USFSPA provides, in relevant part:

After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or a former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order, and with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order.²³⁵

Congress is generally considered to have enacted the USFSPA as a direct response to the *McCarty* decision, in order to preclude an outcome analogous to that in *McCarty*.²³⁶

Another federal statute that protects non-debtor spouses' interests in debtors' pensions is section 1056 of the Employee Retirement Income Security Act ("ERISA").²³⁷ ERISA, which governs private pension plans, generally prohibits the alienation of benefits under such plans;²³⁸ however, a 1984 amendment to ERISA ensures that a non-debtor spouse is not deprived of the non-debtor spouse's share of a pension.²³⁹ The amendment pro-

233. *Id.*

234. Pub. L. No. 98-525, Subsec. 634(c)(1) (codified as 10 U.S.C. § 1408 (1988)).

235. *Id.* (codified at 10 U.S.C. § 1408(d)(1) (1988)).

236. Mary A Throne, *Pension Awards in Divorce & Bankruptcy*, 88 COLUM. L. REV. 194, 208-11 (1988); see also Stephanie K. Cardoes et al., *The Uniformed Services Spouses Protection Act*, 33 FED. B. NEWS & J. Jan. 1986, at 33; Carol Manashil, *The Uniformed Services Former Spouses' Protection Act of 1982: Problems Resulting from its Application*, 20 U.S.F. L. REV. 83 (1985).

237. See 29 U.S.C. § 1056(d)(1) (1988).

238. See 29 U.S.C. § 1056 (1988).

239. 29 U.S.C. § 1056(d)(3) (1988). "Congress enacted this 1984 exception to the anti-alienation law 'to guarantee that the Nation's private retirement income-system provided fair treatment for women.'" *Bush v. Taylor*, 912 F.2d 989, 993 (8th Cir. 1990) (quoting *Mackey v. Lanier Collections*, 486 U.S. 825, 838 (1988)). "We doubt that Congress ever intended that a former wife's judicially decreed sole and separate property

vides that a state court, pursuant to a qualified domestic relations order ("QDRO") may assign rights in a pension plan to a former spouse.²⁴⁰ These rights would not be subject to the debtor's bankruptcy proceeding.²⁴¹

4. *Liens*

a. *The Statutes*

A "lien," as defined by the Bankruptcy Code, is a "charge against or interest in property to secure payment of a debt or performance of an obligation."²⁴² The Bankruptcy Code makes reference to three types of liens:

1) security interests, which are: lien[s] created by an agreement;²⁴³ 2) statutory liens, which are "lien[s] arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but [do] not include security interest[s] or judicial lien[s], whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;²⁴⁴ and 3) judicial liens, which are "[l]iens obtained by judgement, levy, sequestration, or other legal or equitable process or proceeding."²⁴⁵

Section 522, the exemptions section of the Bankruptcy Code, allows a debtor to exempt certain property from the bankruptcy estate. Section 522 provides in pertinent part:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . (1) a judicial lien.²⁴⁶

interest in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving a debtor a fresh start." *Id.* at 994.

240. *Bush*, 912 F.2d at 993.

241. *Id.* at 994.

242. 11 U.S.C. § 101(37) (1988).

243. 11 U.S.C. § 101(45) (1988).

244. 11 U.S.C. § 101(47) (1988).

245. 11 U.S.C. § 101(32) (1988).

246. "11 U.S.C. 522(f)(1) allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the

Section 522 provides that an individual debtor may exempt from property of the estate "[t]he debtor's aggregate interest, not to exceed \$7,500 in value, in real property or personal property that the debtor . . . uses as a residence."²⁴⁷ This is the so-called homestead property exemption.

Property that has been included in a debtor's estate,²⁴⁸ and then properly exempted by him,²⁴⁹ can nevertheless be subject to a valid lien if the creditor has a pre-existing interest in the property.²⁵⁰ A lien cannot be avoided under 11 U.S.C. § 522(f) unless three factors are satisfied: 1) the lien must attach to an interest of the debtor in property;²⁵¹ 2) the lien must impair an exemption to which the debtor would otherwise be entitled;²⁵² and 3) the lien must be a judicial lien.²⁵³ Otherwise exempt homestead property is included in the category of exempt property that is subject to valid liens.²⁵⁴ This principle was generally preserved by Congress in its revision of the Code.²⁵⁵ "[D]ischarge in bankruptcy will not prevent the enforcement of valid liens — even on exempt property."²⁵⁶

debtor is nevertheless entitled to his exemptions." H.R. REP. NO. 595, *supra* note 71, at 126. "Subsection (e) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien. . . . " S.R. NO. 989, at 6 *reprinted in* U.S.C.C.A.N. 5862. "Section 522(f)(1) thus allows the debtor to avoid a lien if it is 1) a judicial lien [; and] 2) on an interest of the debtor in property." *Maus v. Maus*, 837 F.2d 935, 938 (10th Cir. 1988).

247. 11 U.S.C. § 522(d)(1) (1988).

248. *See* 11 U.S.C. § 541 (1988).

249. *See* 11 U.S.C. § 522 (1988).

250. COLLIER ON BANKRUPTCY § 522.04 (15th ed. 1992); *In re Sanderfoot*, 899 F.2d 598, 606 (7th Cir. 1990) ("It is settled in the nonfamily context that a debtor cannot avoid a lien on an interest acquired after the lien attached.") (citing *In re McCormick*, 18 B.R. 911 (Bankr. W.D. Pa. 1982)); *In re Stephens*, 15 B.R. 485 (Bankr. W.D.N.C. 1981)).

251. 11 U.S.C. § 522(f)(1) (1988).

252. U.S.C. § 523(a)(5) (1988). *See supra* note 247 and accompanying text.

253. 11 U.S.C. § 522(f)(1) (1988); *Maus v. Maus*, 837 F.2d 935, 938 (10th Cir. 1988) ("Section 522(f)(1) thus allows the debtor to avoid a lien if it is 1) a judicial lien, 2) on an interest of the debtor in property.").

254. *Long v. Bullard*, 117 U.S. 617, 620-21 (1886); S. REP. NO. 598 *supra* note 69, *reprinted in* 1978 U.S.C.C.A.N. at 5862 explains section 522 exemptions: "Subsection (c). . . The rule of *Long v. Bullard*, 117 U.S. 617 (1886) (citation omitted) is accepted with respect to the enforcement of valid liens on nonexempt property as well as on exempt property." *Cf. Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 583 (1935)."

255. *Sanderfoot*, 111 S. Ct. at 1829 (construing the Bankruptcy Code).

256. COLLIER ON BANKRUPTCY § 522.04, at 522-17 (15th ed. 1992); *see also Long*, 117

b. *Pre-Sanderfoot*

In all but one²⁵⁷ of the cases discussed below, which were decided prior to the Supreme Court's decision in *Sanderfoot v. Farrey*,²⁵⁸ there is a common set of underlying facts. Husband and wife divorce and, pursuant to either a consensual agreement or a court ordered settlement, one of the spouses is awarded the marital homestead property and in exchange is obligated to pay the other spouse her equity in the homestead property. The recipient of the homestead property subsequently files for bankruptcy, exempts the homestead property from his bankruptcy estate to the extent permitted by applicable law, and seeks to avoid paying his wife her equity in the property by claiming that he is entitled to discharge the obligation.

There was disagreement among the Circuit Courts with respect to the factors that warrant lien avoidance. The Eighth Circuit held that such liens could not be avoided because the non-debtor spouse has a pre-existing interest in the property at issue.²⁵⁹ The Ninth Circuit held that such liens could be avoided because Congress intended that "'property settlements should be treated the same as other debts in bankruptcy.'"²⁶⁰ The Tenth Circuit held that the issue turned on whether or not the instrument that awarded the property to the debtor specified "free and clear."²⁶¹

In *Boyd v. Robinson*,²⁶² the Eighth Circuit, articulated a new theory, that of a pre-existing property interest,²⁶³ and held that the debtor could not avoid the non-debtor spouse's lien under 11 U.S.C. § 522(f)(1).²⁶⁴ The court stated that, for present purposes, 11 U.S.C. § 522(f)(1) "establishes two requirements for avoiding a lien: (1) the lien must attach to an interest of the

U.S. at 620-21.

257. *In re Seablom*, 348 N.W.2d 920 (N.D. 1984); see *infra* notes 293-98 and accompanying text.

258. 111 S. Ct. 1825 (1991).

259. *Boyd v. Robinson*, 741 F.2d 1112, 1115 (8th Cir. 1984).

260. *In re Pederson*, 875 F.2d 781, 784 (9th Cir. 1989) (quoting *Boyd v. Robinson*, 741 F.2d 1112, 1116 (Ross, J., dissenting)).

261. See *infra* notes 275-92 and accompanying text.

262. 741 F.2d 1112 (8th Cir. 1984).

263. *Id.* at 1114.

264. See *supra* note 72 and accompanying text.

debtor in exempt property; [and] (2) the lien must be a judicial lien."²⁶⁵ In applying the first prong of this test, the *Boyd* court held "that the lien imposed by the state court does not attach to an interest of [the debtor], but rather protects a *pre-existing interest* of [the non-debtor] in the homestead that was created under Minnesota law prior to the marriage dissolution."²⁶⁶ The non-debtor spouse's pre-existing interest arose by virtue of her right, during the marriage, to approve or reject conveyance of the homestead, her contribution of non-marital funds toward improving the property, and her having made part of the mortgage payments.²⁶⁷

In a strong dissent, Judge Ross disagreed with the reasoning of both the majority and the court below.²⁶⁸ The order of the state court that dissolved the marriage and distributed the property, he said, dissolved the non-debtor spouse's interest in the house and replaced it with the debt which was to be enforced by a lien on the house.²⁶⁹ Accordingly, he maintained, "[w]hat had been a property interest became simply collateral for a debt."²⁷⁰

The Ninth Circuit, in *In re Pederson*,²⁷¹ disagreed with the Eighth Circuit's analysis in *Boyd* and held that the lien was avoidable to the extent that it impaired the debtor's homestead exemption.²⁷² The court found that the money award "was not in the nature of alimony, maintenance or support [and thus] would have been dischargeable in bankruptcy under 11 U.S.C. § 523 (a)(5)."²⁷³ The court reasoned that permitting the husband "to avoid a lien securing such a dischargeable property settlement [was] consistent with Congress's provision 'that property settlements should be treated the same as other debts in bankruptcy.'"²⁷⁴

265. *Boyd*, 741 F.2d at 1113.

266. *Id.* at 1114 (emphasis added).

267. *Id.*

268. *Id.* at 1115 (Ross, J., dissenting).

269. *Id.* Judge Ross agreed that the non-debtor had originally had a pre-existing interest in the house, but said that interest was held prior to the order which "gave the house outright to [the debtor], subject to [the non-debtor spouse's] lien." *Id.*

270. *Id.*

271. 875 F.2d 781 (9th Cir. 1989).

272. *Id.* at 783.

273. *Pederson*, 875 F.2d at 784.

274. *Id.* (quoting *Boyd*, 741 F.2d at 1116 (Ross, J., dissenting)).

In *Maus v. Maus*,²⁷⁵ the Tenth Circuit also rejected *Boyd's* pre-existing interest theory, calling it a "convoluted theory"²⁷⁶ whose defect was that "the decree gives one party title outright and that is the interest to which the lien attaches."²⁷⁷ The court observed that "[m]any courts have struggled to find theories under which a lien to enforce a property settlement survives bankruptcy."²⁷⁸ The *Maus* court held that the debtor could avoid the non-debtor spouse's "claim either if it [was] merely a debt stemming from a property settlement rather than a lien, or if it [was] a judicial lien on [the debtor's] own property,"²⁷⁹ because the divorce decree had awarded the property to the debtor as "*sole and separate property, free and clear of any and all claims.*"²⁸⁰ The court added that it was unnecessary to decide if, under Kansas law, "a money judgment in a divorce decree can give rise to a lien on homestead property . . . when the decree does not specifically create a lien,"²⁸¹ because "[e]ven if such a lien were created . . . it would be a judicial lien as defined in 11 U.S.C. §101(27)."²⁸²

In *In re Donahue*,²⁸³ the Tenth Circuit held that the non-debtor's interest represented an equitable lien against the property which secured the debt.²⁸⁴ The debtor had been awarded a "piece of property . . . 'subject to' a monetary judgment awarded to" the non-debtor spouse.²⁸⁵ The court distinguished *Donahue* from its earlier decision in *Maus*. Whereas in *Maus* the divorce decree "explicitly awarded the property to the debtor spouse '*free and clear of any claims of the non-debtor spouse,*'" the court noted in *Donahue* that "the divorce decree itself clearly contemplated the creation of a lien or security interest of some kind in favor of [the non-debtor spouse] and against the

275. 837 F.2d 935 (10th Cir. 1988).

276. *Id.* at 939 (citing *In re Boyd*, 741 F.2d 1112 (8th Cir. 1984)).

277. *Id.*

278. *Id.*

279. *Id.* at 938.

280. *Id.* at 937 (quoting Divorce Decree of Nikki and Jesse Maus, Jul. 31, 1981) (emphasis modified).

281. *Id.* at 938.

282. *Id.*

283. 862 F.2d 259 (10th Cir. 1988).

284. *Id.* at 266.

285. *Id.* at 260.

Property."²⁸⁶

The Tenth Circuit also decided *In re Borman*,²⁸⁷ wherein the non-debtor spouse conceded that she had a judicial lien, but claimed the debt was "not dischargeable in that the judicial lien was designed to secure the payment of court decreed alimony."²⁸⁸ The court held that the lien was unavoidable for another reason and distinguished its decision from its holding in *Maus*. The *Borman* court reasoned that in *Maus* the non-debtor spouse had received a money judgment and the debtor had received the homestead property free and clear of any and all claims of the non-debtor spouse. The court further noted that the issue in *Maus* was "limited to . . . whether a money judgment awarded in a divorce decree can give rise to a lien on homestead property when the divorce decree itself does not specifically create a lien."²⁸⁹ The court said that the facts of *Borman* were more similar to those in *Donahue*, where the non-debtor spouse received a money judgement against the debtor, payable upon the debtor's remarriage, sale, or encumbrance of the homestead property.²⁹⁰ When the debtor filed for bankruptcy and claimed the property as exempt homestead property, the *Donahue* court held that the non-debtor spouse "had an equitable lien against the property. . . ."²⁹¹ The critical difference between *Maus* and *Donahue* was "that the decree in *Maus* awarded the property to the debtor spouse *free and clear* of any

286. *Id.* at 265 (emphasis added). See *supra* notes 275-82 and accompanying text. The court further observed:

[a] number of courts have recognized that an equitable lien against property may arise in a situation such as the one before us today. "An equitable lien is a creature of equity, is based on the equitable doctrine of unjust enrichment, and is the right to have a fund or specific property applied to the payment of a particular debt."

Donahue, 862 F.2d at 265 (quoting *Caldwell v. Armstrong*, 342 F.2d 485, 490 (10th Cir. 1965)). The court also noted that "[in] some cases equitable liens have been imposed by bankruptcy courts when ex-spouses filed bankruptcy primarily to avoid compliance with the property division provisions of their divorce decrees." *Id.* (quoting *In re Sanderfoot*, 83 B.R. 564, 569 (Bankr. E.D. Wis. 1988)).

287. 866 F.2d 273 (10th Cir. 1989).

288. *Id.* at 274.

289. *Borman*, 886 F.2d at 274.

290. *Id.* at 274 (citing *In re Donahue*, 862 F.2d at 259 (10th Cir. 1988)).

291. *Id.*

claims of the non-debtor spouse."²⁹²

*In re Seablom*²⁹³ and *In re Rittenhouse*,²⁹⁴ both federal bankruptcy court cases, followed *Boyd*'s pre-existing interest theory. *Seablom* followed *Boyd* in a somewhat roundabout way. In *Seablom*, the property involved was income property, held by the parties as joint tenants during their marriage, whose conveyance by the non-debtor to the debtor was conditioned upon payment by him of a money settlement.²⁹⁵ Since the property was not homestead property, and not claimed by the debtor as an exemption to the bankruptcy estate, the issue became whether the property was to go into the debtor's general estate from which all his creditors' claims would be satisfied, or whether the non-debtor spouse had a lien upon the property that would entitle the non-debtor to her interest in the property.²⁹⁶ Although the divorce decree had not specifically granted the non-debtor a lien on the property, the bankruptcy court determined that from "the testimony . . . and the totality of the decree itself . . . this was the intent of the parties as well as the state court."²⁹⁷ The court then held that, "[a]ccordingly, the lien created by the divorce decree to protect [the non-debtor's] right to payment did not attach to an interest of the estate but only protected a pre-existing property interest."²⁹⁸

The *In re Rittenhouse* court²⁹⁹ noted the attempts by many courts to "find theories under which a lien to enforce a property settlement survives bankruptcy."³⁰⁰ "[T]hree of the 'survival' theories,"³⁰¹ said the court, are "equitable lien, consensual lien, and a lien which does not attach to debtor's existing property interest."³⁰² The *Rittenhouse* court then looked to the decisions in the Tenth Circuit to determine if there was any binding pre-

292. *Id.* (emphasis added).

293. 45 B.R. 445 (Bankr. D.N.D. 1984).

294. 103 B.R. 250 (Bankr. D. Kan. 1989).

295. *Seablom*, 45 B.R. at 450.

296. *Id.*

297. *Id.* at 451.

298. *Id.* "The lien is not avoidable under section 522(f)(1) because it did not attach to any interests of the Debtors in the property." *Id.*

299. 103 B.R. 250 (Bankr. D. Kan. 1989).

300. *Id.* at 252 (quoting *Maus*, 837 F.2d at 939).

301. *Id.*

302. *Id.*

cedent that would have to be followed in reaching its holding. Given that the Tenth Circuit in *Donahue*³⁰³ had not resolved the issue of avoidability under 11 U.S.C. § 522(f)(1),³⁰⁴ the court opined that "the state of the law on the three theories [was] somewhat uncertain."³⁰⁵ However, the court continued, it "is clear . . . that the Tenth Circuit has not foreclosed the availability of any of the three theories and has made each factually dependent upon primarily the terms of the divorce decree."³⁰⁶ The court went on to determine that, under Kansas law, "once a petition for divorce is filed 'each spouse becomes the owner of a vested, but undetermined, interest in all the property individually or jointly held.'"³⁰⁷ In *Rittenhouse*, said the court, "[t]he divorce decree both creates a lien in favor of one spouse and conveys some interest to the other spouse."³⁰⁸ Accordingly, the court held, the lien could not be avoided because "[t]he interest transferred to the debtor/spouse is already subject to the lien, thereby making § 522(f)(1) unavailable."³⁰⁹

Some courts, in the absence of an applicable statute, hold that in order to avoid unjust enrichment, a finding of the existence of an "equitable lien"³¹⁰ is warranted.³¹¹ The federal bankruptcy court in *In re Hart*³¹² held that the non-debtor spouse had a valid lien against the debtor's property which could not be avoided under 11 U.S.C. § 522(f)(1),³¹³ basing its conclusion on

303. *In re Donahue*, 862 F.2d 259 (10th Cir. 1988).

304. *Rittenhouse*, 103 B.R. at 253 (construing 11 U.S.C. § 522(f)(1) (1988)).

305. *Id.* at 254.

306. *Id.*

307. *Id.* at 255 (quoting *Cady v. Cady*, 581 P.2d 358, 362-63 (Kan. 1978)).

308. *Id.* at 255-56.

309. *Id.* at 256 (construing 11 U.S.C. § 522(f)(1) (1988)).

310. An "equitable lien" is "[t]he right not recognized at law, to have a fund or specific property, or its proceeds, applied to the payment of a debt." *In re Hart*, 50 B.R. 956, 959-60 (Bankr. D. Nev. 1985) (quoting 6 DEBTOR-CREDITOR LAW ¶ 26.02(C)(2) (Matthew Bender 1982)). "Equitable liens may arise either by express contract showing intent to secure an obligation by a charge to particular property, or by implication from the conduct and dealings of the parties." *Id.* at 960 (citing 6 DEBTOR-CREDITOR LAW ¶ 26.02(C)(2) (Matthew Bender 1982)).

311. See, e.g., *In re Hart*, 50 B.R. 956, 960 ("An equitable lien may also be created by judicial decree. Substance must prevail over form. Therefore, 'if a transaction resolves itself into a security, whatever its form or the name given to it, it is in equity a lien.'") (quoting 6 DEBTOR-CREDITOR LAW ¶ 26.02(C)(2)).

312. 50 B.R. 956 (Bankr. D. Nev. 1985).

313. *Id.* at 963.

the intent of the parties. The court noted that "the apparent intent of the parties was to create a lien in specific property of the debtor . . . representing the [non-debtor's] equity therein."³¹⁴ Thus, "the lien [arose] either by virtue of an express agreement or, at least, the imposition of an equitable lien to carry out the parties' intent."³¹⁵ As such, the lien "qualified" as a security interest rather than a judicial lien.³¹⁶ Moreover, "the fact that the lien was perfected and embodied in a judgment shortly before the petition will not subject the lien to the debtor's avoiding powers . . . since the source of the lien was the voluntary agreement of the debtor."³¹⁷ An equitable lien, added the *Hart* court, "may also be created by a judicial decree. Substance must prevail over form."³¹⁸

In two noteworthy Wisconsin cases, the federal bankruptcy courts based their decisions as to whether the liens in question were avoidable upon a determination of whether or not the liens were mortgages. In *Wozniak v. Wozniak*,³¹⁹ the trial court had awarded the debtor an interest in a parcel of real estate which was subject to a lien of the non-debtor spouse. The purpose of the lien was to secure payment of an interest-bearing debt, and it specified the date when payment on the debt was due and allowable expenses of foreclosure.³²⁰ The court stated that "[w]hile a mortgage serves as a security for a particular piece of property, a judgment lien ordinarily is not a lien on any specific real estate of the judgment debtor but is a general lien on all of the debtor's real property."³²¹ The court gave deference to the

314. *Id.* at 961.

315. *Id.*

316. *Id.* at 961-62.

317. *Id.* at 962 (construing 11 U.S.C. § 522(g)(1)(A) (1988)).

318. *Id.* at 960 (citing 6 DEBTOR-CREDITOR LAW ¶ 26.02 (c)(2) (Matthew Bender 1982)). "Therefore, 'if a transaction resolves itself into a security, whatever its form or the name given to it by the parties, it is in equity a lien.'" *Id.* (quoting 6 DEBTOR-CREDITOR LAW ¶ 26.02 (c)(2) (Matthew Bender 1982)).

319. 359 N.W.2d 147 (Wis. 1984).

320. *Id.* at 148.

321. *Id.* at 149 (citing 49 C.J.S. *Judgments* § 455 (1947)). Whereas a mortgage is "a pledge or security of particular property for the payment of a debt or the performance of some other obligation, whatever form the transaction may take." BLACK'S LAW DICTIONARY 1010 (6th ed. 1990). A judgement lien is "[a] lien binding the real estate of a judgment debtor, in favor of the holder of the judgment, and giving the latter a right to levy on the property for the satisfaction of his judgment to the exclusion of other adverse

decision of the trial court that had divided the marital property, as to whether the lien in question was a judgment lien or a mortgage.³²² The court also found that the fact that the trial court had considered "the enforcement of the secured interest by means of a foreclosure action is persuasive evidence that the trial court awarded a mortgage interest in the property,"³²³ since a judgment lien is enforced by execution on the debtor's property.³²⁴ Finally, the court outlined the characteristics that it had compiled to define a mortgage lien. A mortgage lien is "on a specific parcel of real estate as security for the payment of a sum of money, bearing interest at a specific rate, and due at a specific date,"³²⁵ as well as a judgment that mentions "the possibility of [the non-debtor] bringing a foreclosure action to secure payment."³²⁶

In *In re Duncan*,³²⁷ the property in question consisted of a farm which had been the homestead of the debtor prior to and during the marriage.³²⁸ The Circuit Court for Jackson County, Wisconsin issued a Memorandum Decision pursuant to which the non-debtor spouse was to receive a sum of money "[a]s a full, final and complete settlement." ³²⁹ The settlement was subject to being payable on a specified date and was "[a] lien upon the entire farm of [the debtor]." ³³⁰ In event of default, the prop-

interests subsequent to the judgment." *Id.* at 845.

322. *Wozniak*, 359 N.W.2d at 150. "In determining what type of lien was created by the divorce judgment, we note that the trial court has broad powers to divide property in divorce actions." *Id.* at 149.

The mere form of an instrument cuts but very little figure in respect to whether it is enforceable as a mortgage or not upon its character being called in question in a legal or equitable action, as those terms are used under our system. *The purpose of the instrument is the controlling feature under all circumstances.* If that is security and the facts of the matter are established in any action involving the subject, the instrument is treated as a mortgage and nothing else.

Id. at 150 (quoting *Smith v. Pfluger*, 105 N.W. 476 (Wis. 1905) (emphasis added)).

323. *Id.* at 150.

324. *Id.*

325. *Id.*

326. *Id.* The court added that "[t]o avoid the problem created by the judgment in this case, trial courts should specify in the divorce judgment the type of lien awarded." *Id.*

327. 85 B.R. 80 (W.D. Wis. 1988).

328. *Id.*

329. *Id.* at 81.

330. *Id.*

erty was to be transferred to a trustee and sold to the highest bidder.³³¹ The Memorandum Decision further specified that, in the event that the amount received for the property was insufficient to satisfy the sum awarded to the non-debtor, the debtor would be responsible for paying the difference to the non-debtor, over time, with twelve percent interest.³³²

The district court framed the issue as “whether a lien on exempt property granted under a divorce judgment to secure payment of a property settlement may be avoided under § 522(f)(1) of the Bankruptcy Code.”³³³ Concurring with the reasoning of the dissent in *Boyd*, the district court vacated the bankruptcy court’s decision and remanded, noting that subsequent to the bankruptcy court’s decision in *Duncan*, the reasoning of the *Boyd* dissent had also been embraced by both the Tenth Circuit in deciding *Maus*, and the Bankruptcy Appeals Panel for the Ninth Circuit in deciding *Pederson*.³³⁴ First, the court said, the non-debtor’s spouse’s lien did attach to an interest of the debtor because “whatever interest [the non-debtor spouse] had was extinguished by the divorce decree and . . . the debtor obtained sole ownership of the property, subject only to the [non-debtor spouse’s] lien.”³³⁵ Second, the court said, the lien granted to the non-debtor was a “judicial lien”³³⁶ and not an equitable mortgage or security interest.³³⁷ It was irrelevant to the court “that the Wisconsin state court [had] held that such a lien [was] to be foreclosed under the mortgage statutes”³³⁸ “If state law were allowed to vary what would otherwise be a judicial lien by merely calling the interest an ‘equitable mortgage,’ havoc would result.”³³⁹

331. *Id.*

332. *Id.* (citations omitted).

333. *Id.* at 82.

334. *Id.*

335. *Id.*

336. “The federal definition of ‘judicial lien’ is unambiguous and must control in this instance.” *Id.* at 83 (referencing *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945)).

337. *Id.* “Section 101(45) states that ‘security interest’ means ‘lien created by an agreement.’ Here, it is absolutely undisputed that the lien was not created by agreement but was created in a disputed divorce trial.” *Id.*

338. *Id.*

339. *Id.* (quoting *Boyd*, 741 F.2d at 1115 (Ross, J., dissenting)).

The court also deemed the fact that the "lien attached only to one piece of the debtor's property" plainly irrelevant to the issue of whether it was a judicial lien under the Bankruptcy Code.³⁴⁰ It found that since § 523(a)(5) provides "that only maintenance and support obligations are nondischargeable, there is little justification to hold that a lien enforcing a dischargeable property division debt should be unavoidable."³⁴¹ The court concluded by declaring that it "decline[d] to join the herd of prior courts who have trampled the Bankruptcy Code in a rush to achieve their own perception of justice in the divorce setting."³⁴²

D. Sanderfoot

1. *The Divorce Judgment*

On September 12, 1986, Jeanne and Gerald Sanderfoot were divorced after 20 years of marriage.³⁴³ Within four months of the entry of the decree of divorce, Gerald Sanderfoot filed for bankruptcy.³⁴⁴ The Divorce Judgment provided, in relevant part:

IX. PROPERTY DIVISION

Real Estate—House. The Court awards the real estate—house to the Respondent herein [Gerald Sanderfoot] for \$104,000.

XI. PROPERTY BALANCE PAYOUT FROM RESPONDENT TO PETITIONER AND PROPERTY BALANCE SHEET

The Court hereby orders the respondent to pay to the Petitioner the amount of \$29,208.44, all as follows:

1. \$14,604.22 shall be paid from the Respondent to the Petitioner on or before January 10, 1987
2. \$14,604.22 shall be paid from the Respondent to the Petitioner on or before April 10, 1987

The Petitioner herein shall have a lien against the real estate property of the Respondent for the total amount of money due her pursuant to this Order of the Court, i.e. \$29,208.44, and the

340. *Id.*

341. *Id.* (citation omitted).

342. *Id.*

343. Brief for the Petitioner at 5, *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991) (No. 90-350).

344. *In re Sanderfoot*, 83 B.R. 564, 566 (Bankr. E.D. Wis. 1988).

lien shall remain attached to the real estate property of the Respondent until the total amount of money is paid in full. Specifically, the lien shall attach to the house/real estate of the Respondent . . .

The Oral Decision of the Court, as set forth above, is considered a full, final, complete and equitable property division in recognition of a species of community ownership of the marital estate resembling a division of the property between co-owners vested at the time of the commencement of this action.

*21. Divesting of Property Rights: Mutual Releases. Each party shall be divested of and waives, renounces and gives up, any and all right, titles and interest in and to the property awarded to the other. All property and money received or retained by the parties shall be the separate property of the respective parties, free and clear of any right, title, interest or claim of the other party, and each party shall have the right to deal with, and dispose of his or her separate property as fully and effectively as if the parties had never been married, except as expressly provided for in this agreement, and each party accepts the property herein in full satisfaction of all property rights and all obligations arising out of the marital relationship of the parties.*³⁴⁵

A trial was held on the issues of maintenance, child support, and division of property, since there was no agreement between the parties regarding these matters.³⁴⁶

2. The Bankruptcy Petition

In May 4, 1987, "[f]our months after entry of the decree of divorce,³⁴⁷ Gerald Sanderfoot filed a voluntary petition for bankruptcy under title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Wisconsin.³⁴⁸ Attached to Sanderfoot's petition for bankruptcy, was Schedule B-1, Statement of All Property of Debtor.³⁴⁹ Statement B-1, which set forth the requirement that it "must include all property of the debtor as of the date of the filing of the petition

345. Divorce Judgment at 51a, 56a-58a (*In re Sanderfoot*, No. 84-FA-657 (Outagamie County Ct. Wis. 1986) (emphases added).

346. *In re Sanderfoot*, 83 B.R. 564, 565 (Bankr. E.D. Wis. 1988).

347. *Id.* at 566.

348. Petition for a Writ of Certiorari at 44a, *Farrey v. Sanderfoot*, 111 S. Ct. 507 (1990) (No. 90-350).

349. *Id.* at 48a.

by or against him,"³⁵⁰ listed the "Residence located at 540 Island Road, Route 2, Hortonville, WI 54944"³⁵¹ under the heading:

Description and location of all real property in which debtor has an interest (including . . . rights and powers exercisable for his own benefit).³⁵²

Statement B-1 set forth the figure, \$72,000.00, under the heading:

Market value of debtor's interest with deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4.³⁵³

In other words,

Mr. Sanderfoot listed the marital home on the schedule of assets submitted with his bankruptcy petition, identifying it as exempt homestead property and Ms. Farrey's lien as "[d]isputed[,] "[and] listed marital home on the schedule of assets filed with the bankruptcy petition . . . designating the family's home as exempt homestead property under Wisconsin law. Mr. Sanderfoot next filed a motion under § 522(f)(1) in which he asked the bankruptcy court for permission "to avoid Ms. Farrey's lien against the property, claiming it was a judicial lien that impaired his homestead exemption."³⁵⁴

3. *The Bankruptcy Court*

The bankruptcy court denied Sanderfoot's motion.³⁵⁵ Although the court found that Farrey's³⁵⁶ lien was a judicial lien,³⁵⁷ the court applied the test for lien avoidance under 11 U.S.C. § 522(f)(1) and held that Farrey's lien could not be avoided because it protected her pre-existing interest in the marital property.³⁵⁸ The court noted that, from the record, it was not clear whether the parties had owned the homestead as joint tenants or

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. Brief for Petitioner at 8, *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), *petition for cert. filed*, 111 S. Ct. 507 (1990).

355. *In re Sanderfoot*, 83 B.R. 564 (Bankr. E.D. Wis. 1988).

356. *See supra* note 345.

357. *Sanderfoot*, 83 B.R. at 566 (citing 11 U.S.C. § 101(32)).

358. *Id.* (construing 11 U.S.C. § 522(f)(1)).

tenants in common.³⁵⁹ If Mrs. Sanderfoot was a co-owner, the court said, "and the divorce judgment conveyed her interest to the debtor, Mr. Sanderfoot took the property subject to her lien [in which case] the lien did not attach to the interest of the debtor, and [was] not avoidable under 11 U.S.C. § 522(f)(1)."³⁶⁰ However, the court continued, the issue of whether Mrs. Sanderfoot held title prior to the divorce was not dispositive here.³⁶¹ The court, noting that Wisconsin law provides for "equitable property division at divorce,"³⁶² applied the reasoning of *Boyd* and stated:

In a divorce proceeding, the document which conveys one spouse's interest in the homestead to the other spouse simultaneously creates a lien in favor of the spouse who will no longer be allowed to live in the residence. In effect, the property is conveyed to the debtor subject to a lien to secure payment of the nonresident spouse's share of the property settlement.³⁶³

The court also observed that the "legislative history makes clear that the policy behind 11 U.S.C. § 522(f) was not to circumvent a divorce court's decision by allowing one spouse to acquire substantially all of the predivorce assets to the exclusion of the other."³⁶⁴ And, in the court's words, "Mr. Sanderfoot is attempting to manipulate bankruptcy law for this very purpose, and to permit such a result would be inequitable and contrary to public policy."³⁶⁵

Accordingly, the court held that, "regardless of how title was previously held, the debtor acquired his interest by virtue of the divorce judgement and subject to the lien. The lien did not attach to the debtor's interest, and [thus, was] not avoidable."³⁶⁶

359. *Id.* at 568.

360. *Id.*

361. *Id.*

362. *Id.* (citations omitted).

363. *Id.* at 567 (citing *In re Thomas*, 32 B.R. at 12).

364. *Id.* at 566. The court noted that "[s]ection 522(f) permits avoidance of the 'fixing of a lien on an interest of the debtor.'" *Id.* at 567 (emphasis in original). The court reasoned that this language and the House Report implied the intent by Congress that liens could not be avoided if they became fixed before "the debtor's acquisition of interest in the property." *Id.* (citing *In re Williams*, 38 B.R. 224, 226-27 (Bankr. N.D. Okl. 1984)).

365. *Id.* at 566.

366. *Id.* at 568.

4. *The United States District Court*

Mr. Sanderfoot then appealed to the United States District Court of the Eastern District of Wisconsin, which reversed the order that had denied Sanderfoot's motion under §522(f).³⁶⁷ The court noted that there was no dispute that the lien that impaired Mr. Sanderfoot's homestead exemption was a judicial lien.³⁶⁸ The court agreed with the reasoning in *Maus v. Maus*³⁶⁹ and pronounced itself unable to accept the theory, followed by the bankruptcy court and articulated in *Boyd*,³⁷⁰ that the debtor acquired the property subject to a lien attached to the "pre-existing property interest of the non-debtor spouse."³⁷¹ The court quoted the Tenth Circuit in *Maus*, which had called this a "convoluted theory" in that, as the dissent in *Boyd* pointed out, "the decree gives one party title outright and that is the interest to which the lien attaches."³⁷²

Thus, the court determined that the divorce decree had extinguished the parties' pre-existing interests in the property and simultaneously created new interests, and that Mr. Sanderfoot could "avoid Mrs. Sanderfoot's lien pursuant to § 522(f)(1) because he ha[d] met all of the statutory requirements of that section."³⁷³

The district court noted that the issue had not yet been addressed by the Seventh Circuit. However, the court also observed that in *In re Duncan*,³⁷⁴ the only other district court in Wisconsin to address "the identical issue" had, unlike the bankruptcy court in *Sanderfoot*, rejected the reasoning of *Boyd*.³⁷⁵ Accordingly, the court decided that Mr. Sanderfoot had "met all of the statutory requirements" of § 522(f)(1).³⁷⁶

367. *In re Sanderfoot*, 92 B.R. 802 (E.D. Wis. 1988).

368. *Id.* at 803.

369. 837 F.2d 935 (10th Cir. 1988). *See supra* notes 275-82 and accompanying text.

370. *Boyd*, 741 F.2d at 1112. *See supra* notes 262-267 and accompanying text.

371. *Sanderfoot*, 92 B.R. at 803.

372. *Id.* (quoting *Maus*, 837 F.2d at 939 (citing *Boyd*, 741 F.2d at 1112) (sic)).

373. *Id.*

374. 85 B.R. 80 (W.D. Wis. 1988).

375. *Sanderfoot*, 92 B.R. at 803.

376. *Id.*

5. *The Seventh Circuit*

Ms. Farrey then appealed the district court's decision to the Court of Appeals of the Seventh Circuit.³⁷⁷ A divided panel of the Seventh Circuit affirmed, holding that the divorce proceeding had extinguished any pre-existing interest that Farrey had in the homestead. Her new interest, the court said, which had been "created in the dissolution order and evidenced by her lien, attached to Mr. Sanderfoot's interest in the property."³⁷⁸ The circuit court noted that the bankruptcy court had "conceded that the lien is 'without question a type of judicial lien,' "³⁷⁹ and that the district court had concluded that the lien was a judicial lien and could not be avoided.³⁸⁰ The Seventh Circuit observed that Ms. Farrey's lien, which had been granted by the Wisconsin Circuit Court for Outagamie County, had therefore been "obtained by 'legal proceedings.' "³⁸¹ This, the Seventh Circuit said, was a *transaction that fits squarely within the Code's definition of a judicial lien "as a lien obtained by judgement, levy, sequestration, or other legal process or proceeding."*³⁸² Consequently, the circuit court concluded, since "it is clear from the face of the statute that Ms. Farrey has a judicial lien that impairs Mr. Sanderfoot's homestead exemption, we conclude that the lien is avoidable under section 522(f)(1)."³⁸³

The court made note of the Tenth Circuit's observation in *Maus v. Maus*³⁸⁴ "that '[m]any courts have struggled to find theories under which a lien to enforce a property settlement survives bankruptcy.' "³⁸⁵ The Seventh Circuit went on to discuss the split among the circuit courts on the issue, and also observed that the district court in *In re Duncan* had held that whatever interest the non-debtor spouse had in the property at issue "was

377. *In re Sanderfoot*, 899 F.2d 598, 600 (7th Cir. 1990).

378. *Id.* at 602.

379. *Id.* at 603 (quoting *Sanderfoot*, 83 B.R. at 566).

380. *Id.* (citing *Sanderfoot*, 83 B.R. at 566).

381. *Id.*

382. *Id.* (citing 11 U.S.C. § 101(32)) (emphasis added).

383. *Id.* at 605.

384. 837 F.2d 935, 959 (10th Cir. 1988).

385. *Sanderfoot*, 899 F.2d at 603 (quoting *Maus*, 837 F.2d at 939) (alteration in original).

extinguished by the divorce decree”³⁸⁶ In *Duncan*, the district court said, “[a]s in the instant case, the lien was created in and by the divorce decree”³⁸⁷ and the court agreed with the Duncan court that to uphold the lien would directly conflict “with ‘the unambiguous language’ of section 522”³⁸⁸

The Seventh Circuit in *Sanderfoot* further agreed with the Duncan court’s reasoning that “[t]he ‘plain intent’ of the divorce decree, which granted a lien upon the entire farm, was to declare the debtor the sole owner of the property, subject to the non-debtor’s lien.”³⁸⁹ Whatever interest the non-debtor had in the farm was dissolved by the divorce decree, and the non-debtor’s “preexisting interest in the farm was thus ‘simply irrelevant.’”³⁹⁰ Accordingly, the Seventh Circuit in *Sanderfoot* determined that the divorce proceeding had extinguished whatever interest Ms. Farrey had in the homestead, and that “[h]er new interest, created in the dissolution order and evidenced by her lien, attached to Mr. Sanderfoot’s interest in the property.”³⁹¹ Therefore, the circuit court concluded, as the Western District of Wisconsin had, that whether Ms. Farrey “had prior rights in the residence under Wisconsin law is . . . ‘simply irrelevant.’”³⁹²

In his dissenting opinion, Circuit Judge Posner maintained that the statute does not state that a judicial lien is avoidable to the extent that it impairs an exemption.³⁹³ The statute, opined Judge Posner, “says that the bankrupt may avoid ‘the fixing of’ such lien ‘on an interest of the debtor in property’ [and] [t]he debtor must have the interest at the time the court places the lien on it.”³⁹⁴ In the present case, Judge Posner continued, that condition was not satisfied.³⁹⁵ The Sanderfoots had owned their home jointly prior to the divorce. Pursuant to Wisconsin state law, Mr. Sanderfoot could not have sold the home without Ms. Farrey’s consent, “whether or not her name appeared on the ti-

386. *Id.* at 602 (quoting *In re Duncan*, 85 B.R. 80, 82 (W.D. Wis. 1988)).

387. *Id.* (citing *Duncan*, 85 B.R. at 81).

388. *Id.* (citing and quoting *Duncan*, 85 B.R. at 82).

389. *Id.* (citing *Duncan*, 85 B.R. at 82).

390. *Id.* (citing and quoting *Duncan*, 85 B.R. at 82).

391. *Id.*

392. *Id.* (quoting *Duncan*, 85 B.R. at 82).

393. *Id.* at 606 (Posner, J., dissenting).

394. *Id.*

395. *Id.*

tle papers.”³⁹⁶ Accordingly, Mr. Sanderfoot “did not own it free and clear of his wife’s interest, which was equal to his own.”³⁹⁷ The divorce court, said Judge Posner, “did not extinguish her interest, but instead transformed it from that of a co-owner to that of a mortgagee.”³⁹⁸

6. *Farrey’s Petition for Certiorari*

Ms. Farrey then petitioned for a writ of certiorari to the United States Supreme Court. In her petition, Farrey presented the following question for review: “Does the federal bankruptcy code give an individual awarded his spouse’s interest in the family’s exempt homestead in a contested divorce case, the absolute right to avoid the homestead lien simultaneously awarded the debtor’s spouse in the same divorce judgement?”³⁹⁹

Farrey made two arguments in support of her petition. First, she argued, the Seventh Circuit’s decision to allow an ex-spouse to avoid a homestead lien “awarded to the other spouse in a divorce decree” was at odds with decisions in two other circuits.⁴⁰⁰ Farrey conceded that although the Seventh and Ninth Circuits had found judicial liens to be avoidable,⁴⁰¹ the Eighth and Tenth Circuits had found that they were not.⁴⁰² Farrey asserted that in 1978 Congress “specifically preserved a concept that has been integral to the law of bankruptcy for at least 100 years: ‘[t]he setting apart of the homestead to the bankrupt [debtor] . . . did not relieve the property from the operation of liens created by contract before the bankruptcy.’”⁴⁰³

The court of appeals, said Farrey, “misapplied the language of the Bankruptcy Code in § 522(f).”⁴⁰⁴ “Under Wisconsin’s

396. *Id.* (citation omitted).

397. *Id.*

398. *Id.* (citing *Wozniak v. Wozniak*, 359 N.W.2d 147 (Wis. 1984)).

399. Petition for a Writ of Certiorari at i, *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990) (No. 90-350), *cert. granted*, 111 S. Ct. 507 (1990) (hereinafter *Petition for a Writ of Certiorari*).

400. *Id.* at 9.

401. *Id.* at 9 & n.3 (citing *In re Pederson*, 875 F.2d 781 (9th Cir. 1989)).

402. *Id.* (citing *In re Borman*, 886 F.2d 273 (10th Cir. 1989); *In re Donahue*, 862 F.2d 259 (10th Cir. 1988); *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984)).

403. Brief for the Petitioner, *supra* note 354, at 12-13 (quoting *Long v. Bullard*, 117 U.S. 617, 621 (1886) (alterations in original)).

404. Petition for a Writ of Certiorari, *supra* note 399, at 20-21.

marital property law . . . each party had a 'present undivided one-half interest in each item of marital property.'"⁴⁰⁵ "After their divorce, only Mr. Sanderfoot owned the home and the land, encumbered by a lien imposed simultaneously with the transfer of title by the state court to compensate Ms. Farrey for her property interests in the marriage."⁴⁰⁶ Had the lien on his title been "awarded either one day *before* the divorce on Mr. Sanderfoot's undivided half interest or one day *after* the divorce . . . the lien might be subject to the avoidance statute."⁴⁰⁷ Farrey argued that "three critical events — divorce, the transfer of Ms. Farrey's entire interest to Mr. Sanderfoot, and the court's imposition of the lien to compensate Ms. Farrey — occurred simultaneously in the same bench decision and in the same divorce judgment."⁴⁰⁸ The Seventh Circuit, Farrey contended, "misread the statute when it focused on the 'fixing of a [judicial] lien' without regard for the complementary phrase 'on an interest of the debtor.'"⁴⁰⁹ The lien, argued Farrey, "came with the property interest he received in the divorce judgment, and a debtor can never avoid a lien on an interest the debtor acquired subject to the lien."⁴¹⁰ Second, Farrey advanced her plea for certiorari by discussing the significant impact that the inconsistent application of the bankruptcy law has on state and federal courts and innumerable litigants.⁴¹¹

7. *The United States Supreme Court*

The Supreme Court granted certiorari to resolve the split of authority among the circuits.⁴¹² Justice White wrote the Court's opinion.⁴¹³ He articulated the question presented for review as whether § 522(f)(1):

405. Brief for the Petitioner, *supra* note 354, at 19 (citation omitted).

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 20-21.

411. *Id.* at 36.

412. *Farrey v. Sanderfoot*, 111 S. Ct. 1825, 1828 (1990) (citation omitted).

413. *Id.* at 1826. Chief Justice Rehnquist and Justices Marshall, Blackmun, Stevens, O'Connor, Kennedy and Souter joined in all but the penultimate paragraph of Part III. *Id.* at 1826-27. Justice Kennedy filed a concurring opinion in which Justice Souter joined. *Id.* at 1831.

permits a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the non-debtor spouse's former interest.⁴¹⁴

The Court went on to identify the phrase, "the debtor may avoid the fixing of a lien on an interest in . . . property,"⁴¹⁵ as being "[t]he key portion of § 522(f)"⁴¹⁶ The Court agreed with Judge Posner's and Farrey's construction of "the text as permitting the avoidance of a lien only where the lien attached to the debtor's interest at some point after the debtor obtained the interest."⁴¹⁷

The Court, in discussing the concept that certain valid liens which are obtained before bankruptcy can be enforced on exempt property,⁴¹⁸ noted that this principal was generally preserved by Congress in the 1978 Code.⁴¹⁹ However, the Court pointed out that in the 1978 Code, "Congress also revised the law to avoid the fixing of some liens."⁴²⁰ Section 522 (f)(1), the Court continued, "extends this protection to cases involving the fixing of judicial liens onto exempt property."⁴²¹ The House Report, the Court added, provided "specific legislative history . . . [and] suggests that a principal reason Congress singled out judicial liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts."⁴²² To underscore its conclusion, the Court quoted from the House Report as follows: "the first right [§ 522(f)(1)] allows the debtor [is] to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions."⁴²³

414. *Id.* at 1827.

415. *Id.* at 1828 (quoting 11 U.S.C. § 522(f) (1988)).

416. *Id.* (construing 11 U.S.C. § 522(f) (1988)).

417. *Id.* at 1828-29.

418. *Id.* at 1829.

419. *Id.*

420. *Id.* (citing 11 U.S.C. § 545).

421. *Id.*

422. *Id.*

423. *Id.* (quoting H.R. REP. No., *supra* note 71, at 595, reprinted in U.S.C.C.A.N. at

The Court then turned to the question of whether Sanderfoot had "ever possessed an interest to which the lien fixed, before it fixed" ⁴²⁴ That determination, wrote the Court, is a matter of state law. The Court continued, Farrey "contends that prior to the divorce judgment, she and her husband held title to the real estate in joint tenancy, each possessing an undivided one-half interest." ⁴²⁵ Farrey further asserted that the divorce decree simultaneously "extinguished these interests . . . and . . . created new interests in place of the old Both in his briefs and at oral argument, Sanderfoot agreed on each point." ⁴²⁶ Under the view of both parties, wrote the Court, and assuming that they "characterize[d] Wisconsin law correctly, . . . Sanderfoot took the interest and the lien together, as if he had purchased an already encumbered estate from a third party." ⁴²⁷ Accordingly, the Court stated, "[s]ince Sanderfoot never possessed his new fee simple interest before the lien 'fixed,' § 522(f)(1) is not available to void the lien." ⁴²⁸

8. *Post-Sanderfoot*

In *In re Montgomery*, ⁴²⁹ the federal bankruptcy court addressed the same issue as that in *Sanderfoot*. ⁴³⁰ Under the decree in *Montgomery*, the debtor retained the marital home and agreed to pay the non-debtor spouse's share of the equity in the

6087-88).

424. *Id.* at 1830.

425. *Id.*

426. *Id.* (citing Brief for Respondent at 7-8; Transcript of Oral Argument at 39) (emphasis added)).

427. *Id.* at 1830-31.

428. *Id.* at 1831. The Court also observed that even if, under Wisconsin law, the divorce decree had simply "reordered" the Sanderfoots' pre-existing interests, rather than extinguishing those pre-existing interests, the same result would follow. *Id.* In that case, in the Court's view, Sanderfoot would have retained his pre-existing interest, "augmented by Farrey's prior interest." *Id.* And, the Court continued, since the state court had protected Farrey's interest with a lien, Sanderfoot would still be barred from avoiding the lien "since it [would have] fastened only to what had been Farrey's pre-existing interest, and this interest Sanderfoot would never have possessed without the lien having already fixed." *Id.*

429. *In re Montgomery*, 128 B.R. 780 (Bankr. W.D. Mo. 1991).

430. *Id.* at 781. The *Montgomery* court also addressed the issue of whether an obligation under a hold harmless agreement contained in the marital settlement and separation decree was in the nature of a property settlement and, as such, dischargeable. *Id.*

house to the non-debtor spouse by a given date.⁴³¹ The court said the issue with respect to the claim for the non-debtor spouse's share of the equity was whether it was a post-petition obligation or a maintenance award, both of which are non-dischargeable in bankruptcy, or a property settlement obligation, which is dischargeable in bankruptcy.⁴³² "Finally," the court asked, "if such obligation is not a post-petition obligation, and is not maintenance, can the Court impose an equitable lien on the debtor's homestead by virtue of a judgment having been entered in favor of the [non-debtor spouse] prior to the filing of the bankruptcy petition?"⁴³³ The court opined that, "[d]espite the number of questions raised in the first issue, it [was] essentially resolved by *Farrey v. Sanderfoot* . . . and *Bush v. Taylor*"⁴³⁴ In the instant case, as in *Sanderfoot*, the court continued, the non-debtor spouse was given a money award "as a property settlement for her half of the equity on the house, and judgment was entered on this amount"⁴³⁵ Since this judgment represents a lien on the debtor's real estate, the court said, "the *Sanderfoot* decision requires a finding that does not permit an avoidance of the lien."⁴³⁶

In *In re Finch*,⁴³⁷ a Texas case, a divorce decree awarded the debtor community real estate holdings and granted the non-debtor spouse a lien against the land to secure the judgment.⁴³⁸ The debtor subsequently filed for bankruptcy and moved to avoid the wife's lien, claiming that it was avoidable as a judicial lien which impaired his Texas homestead exemption on the property.⁴³⁹ The bankruptcy court denied the husband's motion and the district court affirmed, stating that "[t]he cornerstone issue on appeal [was] whether [the debtor] could seek avoidance of the judicial lien as a matter of law."⁴⁴⁰ The court cited the

431. *Id.*

432. *Id.*

433. *Id.* at 781-82.

434. *Id.* at 782 (citations omitted).

435. *Id.*

436. *Id.*

437. 130 B.R. 753 (S.D. Tex. 1991).

438. *Id.* at 755.

439. *Id.*

440. *Id.*

Supreme Court's decision in *Sanderfoot*⁴⁴¹ as controlling.⁴⁴² In *Sanderfoot*, the court said, the Supreme Court held that under 11 U.S.C. § 522(f) a debtor cannot avoid "a judicial lien that attached to property at the same time that the debtor acquired his present interest in that property."⁴⁴³

The *Finch* court went on to say that the Supreme Court had applied this rule "in finding that a debtor in bankruptcy could not avoid a judicial lien awarded by a state court in a divorce decree to equalize the division of formerly community property."⁴⁴⁴ The debtor argued that Texas law calls for a different result than that arrived at in *Sanderfoot*, which had applied Wisconsin law.⁴⁴⁵ The *Finch* court agreed that the Supreme Court had "premised its [*Sanderfoot*] decision on the parties' undisputed contention that under Wisconsin law, a divorce decree creates new interests in place of the old in favor of the ex-spouses."⁴⁴⁶ However, the *Finch* court nonetheless found that "Texas law treats pre- and post-divorce interests in community property" in a similar fashion to that detailed in *Sanderfoot*.⁴⁴⁷ Under Wisconsin law, as applicable in *Sanderfoot*, "the divorce decree transformed the ex-spouses' one-half community interests in the property into a fee simple interest."⁴⁴⁸ Accordingly, the *Finch* court said, "[t]he lien awarded to the non-acquiring spouse in a divorce decree" attached "to the acquiring spouse's 'new' fee simple interest."⁴⁴⁹ Under Texas law, in "divorce proceedings, all community property becomes part of an estate, which the trial court must divide."⁴⁵⁰ Since the debtor's "one-half community interest as such did not survive the entry of the divorce decree he did not hold any preexisting interest at the time of the decree's entry to which the equitable lien could have

441. 111 S. Ct. 1825.

442. *Finch*, 130 B.R. at 755.

443. *Id.*

444. *Id.* (citing *Sanderfoot*, 111 S. Ct. at 1829).

445. *Id.*

446. *Id.*

447. *Id.* at 756.

448. *Id.* at 755.

449. *Id.* at 755-56.

450. *Id.* at 756 (citing *Cameron v. Cameron*, 641 S.W.2d 210, 215 (Tex. 1982); *Hailey v. Hailey*, 331 S.W.2d 299, 302-03 (1960)).

attached.”⁴⁵¹ Instead, the court continued, the lien attached at the same time that the debtor acquired the fee simple interest in the property, precisely as contemplated in *Sanderfoot*.⁴⁵²

In *In re Fischer*,⁴⁵³ “[t]he Final Judgment of Dissolution of Marriage provided that the Debtor was to receive the former marital home”⁴⁵⁴ in return for which “[the non-debtor spouse] was to execute a quit claim deed to the home.”⁴⁵⁵ The court awarded a lien on the former marital property to the non-debtor spouse because the non-debtor spouse had advanced money to prevent foreclosure on the property immediately before the entry of the Final Judgement of Dissolution of Marriage. The issue was whether the non-debtor’s lien was “a type of judicial lien which can be avoided pursuant to § 522(f)(1).”⁴⁵⁶ The court first noted that, since the non-debtor spouse’s lien was obtained by judicial order, it might initially appear to be a judicial lien.⁴⁵⁷ However, “a closer examination leads to the conclusion that [the non-debtor spouse] has merely an equitable lien which was *recognized* and imposed by the Final Judgment which dissolved the marriage of the parties.”⁴⁵⁸ In other words, the court said, the marriage judgment “did not impose [the non-debtor spouse’s] lien on the former marital home; rather, it simply recognized the non-debtor spouse’s equitable lien which already existed.”⁴⁵⁹ The *Fischer* court reasoned that this analysis squared with the Supreme Court’s comment in *Sanderfoot* to the effect that “the legislative history of § 522(f)(1) suggests that it was intended to thwart creditors who sensed an impending bankruptcy and rushed to Court to get a judgment with which they could defeat the debtor’s exemptions.”⁴⁶⁰

451. *Id.* at 757.

452. *Id.*

453. 129 B.R. 285 (Bankr. M.D. Fla. 1991).

454. *Id.* at 286.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.* (emphasis added).

459. *Id.* at 287 (citing *In re Boyd*, 31 B.R. 591 (D. Minn. 1983)). The *Fischer* court construed *Boyd* as follows: “lien not necessarily judicial lien as contemplated by § 522(f)(1) merely because it was imposed in judicial proceeding.” *Id.*

460. *Id.* at 286.

In *Klemme v. Schoneman*,⁴⁶¹ the non-debtor spouse instituted suit against the debtor to foreclose on a lien which the non-debtor spouse had obtained on jointly owned property pursuant to a divorce judgement. The Court of Appeals of Wisconsin affirmed the court below and held that the debtor could not avoid the lien by claiming a post-divorce discharge in bankruptcy because, the court said, the lien was a mortgage lien.⁴⁶² Moreover, the court opined, it is the purpose of a lien, which exists as the result of a divorce judgment, which "must ultimately control."⁴⁶³ The *Klemme* debtor invoked the Supreme Court's decision in *Sanderfoot* to support [his] argument that [the non-debtor spouse's] lien was avoidable.⁴⁶⁴ The Wisconsin court disagreed, noting that in *Sanderfoot* the Supreme Court had observed "that whether a debtor 'possessed an interest to which the lien fixed, before it fixed, is a question of state law.'"⁴⁶⁵

The Wisconsin court then reasoned that it would not be necessary to "answer the question left open under *Sanderfoot*" unless the lien in question was a judicial lien.⁴⁶⁶ If, as the wife argued, it was a mortgage lien instead, *Sanderfoot* would become irrelevant to this case.⁴⁶⁷ To make this determination, the *Klemme* court applied *Wozniak v. Wozniak*'s⁴⁶⁸ mortgage test to the *Klemme* facts.⁴⁶⁹ The court concluded that the non-debtor

461. 477 N.W.2d 77 (Wis. Ct. App. 1991).

462. *Id.* at 80.

463. *Id.* at 81.

464. *Id.* at 79.

465. *Id.* (quoting *Sanderfoot*, 111 S. Ct. at 1830). However, the *Klemme* court continued, the *Sanderfoot* Court:

was not required to delve into Wisconsin law on this point since *Sanderfoot* had conceded that the effect of the Wisconsin divorce judgment was to extinguish the parties' prior interests in the property and to create a new interest in *Sanderfoot*'s favor. From this concession the Supreme Court concluded that '*Sanderfoot* must lose' because Farrey's judicial lien encumbered *Sanderfoot*'s "wholly new fee simple interest" and, thus, *Sanderfoot* could not avoid the lien under sec. 522(f)(1).

Id.

466. *Id.* at 80.

467. *Id.*

468. 359 N.W.2d 147 (Wis. 1984).

469. The *Wozniak* court articulated the characteristics of a mortgage lien as follows: One such characteristic, according to the supreme court, is that a mortgage serves as security for a particular piece of property, while a judgment lien ordinarily is not a lien on any specific real estate of the judgment debtor but is a general lien

spouse's interest was a mortgage lien because, even though the term "mortgage" was not used in the divorce judgment, the non-debtor was awarded a lien on a specific parcel of real estate as security for the payment of a sum of money, bearing interest at a specific rate, and due on a specific date. The *Klemme* court went on to state that "[s]ince the [*Wozniak*] trial court contemplated the enforcement of [the non-debtor's] secured interest by means of a foreclosure action, the [Wisconsin] supreme court concluded that this represented 'persuasive evidence that the trial court awarded a mortgage interest in the property.'"⁴⁷⁰ The *Klemme* court stated that it did not deem "the absence of express 'foreclosure' language as fatal to [the non-debtor's] mortgage lien claim under *Wozniak*,"⁴⁷¹ and pointed out that the lien expressed in the divorce judgment contained "all the 'mortgage' ingredients present in *Wozniak*: (1) [non-debtor's] interest . . . expressed as a lien; (2) the lien attaches to a particular piece of property; (3) the lien is to guarantee payment of a sum of money; (4) the debt earns interest; and (5) the debt is due on a particular date."⁴⁷²

The court countered the debtor's argument that its interpretation of *Wozniak* was tantamount to declaring "every divorce judgment lien a mortgage lien."⁴⁷³ The debtor's reading of *Wozniak*, said the court, "is at once too broad and too narrow."⁴⁷⁴ The determination of whether a lien granted in a divorce decree is a judicial or mortgage lien, said the court, "will continue to require a case-by-case analysis"⁴⁷⁵ and "[w]hile it may in most cases result in a declaration of a mortgage lien,

on all of the debtor's real property. The court also observed that a transfer of property as security, regardless of the form thereof, denotes a mortgage. *Klemme*, 477 N.W.2d at 80 (citing *Wozniak*, 359 N.W.2d at 149-50).

470. *Id.* (citing *Wozniak*, 359 N.W.2d at 149-50).

471. *Id.*

472. *Id.*

473. *Id.* at 81.

474. *Id.* Moreover, the court asserted:

The central teaching of *Wozniak* is that a lien granted in the context of a judgment of divorce will be deemed a mortgage by operation of law, where the particular facts of the case indicate that the court intended that the lien attach to a specific parcel of real estate for the purpose of securing a debt whose satisfaction represents a division of the marital estate.

Id. (citing *Wozniak*, 359 N.W.2d at 150).

475. *Id.*

neither *Wozniak* nor this case create an ironclad rule."⁴⁷⁶ The court added:

[a]lthough *Sanderfoot* represents a statement of the United States Supreme Court and springs from a Wisconsin divorce, neither the parties nor the Supreme Court factored *Wozniak* into their discussions. In this case, *Wozniak* requires that we construe [the non-debtor's] lien as a mortgage lien, not a judicial lien. *Sanderfoot*, as a judicial lien case, thus does not control. The questions left open by *Sanderfoot* must await another day.⁴⁷⁷

The court concluded "by echoing the [Wisconsin] supreme court's caution in *Wozniak*: 'To avoid the problem created by the judgment in this case, trial courts should specify in the judgment of divorce the type of lien awarded.'"⁴⁷⁸ The court extended the "same caution to counsel who draft such judgments."⁴⁷⁹

E. Fairness Concerns

Many of the courts included some thoughts about fairness in their opinions. Among the cases surveyed, with the exception of those courts which followed the present circumstances test,⁴⁸⁰ no court opined that, despite its legal conclusions, it would be fair for the debtor to retain property, in any form, that had been awarded to the non-debtor pursuant to a divorce decree.

Even some of the courts that held that a debtor was discharged from a financial obligation to an ex-spouse were obviously motivated to voice their beliefs with respect to fairness and justice. For example, the *Maus* court wrote, "we recognize that our decision may produce questionable results in some circumstances."⁴⁸¹ The court in *In re Boggess*⁴⁸² interjected in its

476. *Id.*

477. *Id.* (emphasis added).

478. *Id.* (quoting *Wozniak*, 359 N.W.2d at 150).

479. *Id.*

480. The courts that followed the present circumstances test as expressed in *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983) believed that in some instances if, from the time of the award, the financial circumstances of the non-debtor had improved, or the financial circumstances of the debtor had deteriorated, then fairness would dictate that even obligations for support should be eliminated or reduced. See *supra* notes 190-97 and accompanying text.

481. 837 F.2d 935, 939-40 (10th Cir. 1988); see *supra* notes 275-82 and accompany-

opinion: "[R]egardless of its own perceptions of fairness, [this] Court must give effect to the policy decisions embodied in the express language of code provisions."⁴⁸³ Judge Ripple, writing for the Seventh Circuit in *Sanderfoot*,⁴⁸⁴ stated:

We recognize the policy arguments against avoidance, but emphasize that it is not for the courts to make policy While we might have struck a different balance than did Congress, we are not free to disregard the clear legislative judgment that debtors may avoid judicial liens of the type at issue.⁴⁸⁵

In *Bush v. Taylor*,⁴⁸⁶ the court was prompted to write:

*Whenever a debt arising from the division of marital property is discharged, the non-debtor spouse is thereby deprived of his or her sole and separate property. . . . As far as the Code is concerned, [the non-debtor spouse's] loss is not materially different from that of any creditor who may have extended goods, services, or funds to the debtor before bankruptcy, and subsequently is barred from collected the resulting just debt. There are sound policy arguments for treating property-settlement debts to former spouses differently, but the drafters of the Code declined to do so.*⁴⁸⁷

Judge Bowman, dissenting in *Bush*, wrote, "Short of outright thievery, it is hard to imagine a more compelling case of unjust enrichment."⁴⁸⁸ Judge Bowman continued, "If I truly thought that Congress had commanded such a bizarre and unjust result, I would join the Court's opinion."⁴⁸⁹ The Bankruptcy Code, he said, "is *not* intended to provide a way for a tricky

ing text.

482. 105 B.R. 470 (Bankr. S.D. Ill. 1989).

483. *Bogges*, 105 B.R. at 475.

484. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990).

485. *Id.* at 605.

486. 893 F.2d 962, *rev'd* 912 F.2d 989 (8th Cir. 1990) (holding debtor was entitled to a discharge of obligation to share a portion of debtor's pension with ex-spouse). The Eighth Circuit, sitting en banc, reversed and held that pension payments are not dischargeable either because they represented a constructive trust or, alternatively, were post-petition debts. *Bush*, 912 F.2d at 993. See *supra* notes 216-23 and accompanying text.

487. *Bush*, 893 F.2d at 966 (emphasis added).

488. *Id.* at 967 (Bowman, J., dissenting).

489. *Id.*

debtor to obtain clear title to the property of another.”⁴⁹⁰ Equally plainspoken and scathing was Judge Posner’s dissent to the Seventh’s Circuit’s decision in *Sanderfoot*.⁴⁹¹ Judge Posner wrote, “He seeks a fresh start with someone else’s property.”⁴⁹² Posner also said, “Today we place the crown of success on this vicious scheme[,]”⁴⁹³ and he asserted, “when a debtor uses the Code to steal from his former wife, we should not lightly conclude that the Code, properly read, commands such a result.”⁴⁹⁴

Judge Posner also pointed out that *Sanderfoot*’s lawyer had conceded that *Sanderfoot*’s successful attempt to avoid Farrey’s lien had undermined the objective of the divorce decree, but also contended that result to be of no consequence due to the inequity of bankruptcy.⁴⁹⁵ In Judge Posner’s words:

I am at a loss to understand why we should strain the language and ignore the purpose of the lien-avoidance statute in order to achieve a result that . . . denies simple justice. . . . I do not expect an argument about the characterization of our result, because *at oral argument the husband’s lawyer admitted that his client’s action had subverted the purpose of the divorce decree. The lawyer added, however, that this did not matter because, (in his words) “bankruptcy is inequitable.”* I had thought bankruptcy a branch rather than a rejection of equity.⁴⁹⁶

In his concurring opinion to the United States Supreme Court decision in *Sanderfoot*, Justice Kennedy, joined by Justice Souter, agreed with the “Court’s determination that *respondent conceded what we all now know to be the key point in the case.*”⁴⁹⁷ In his brief before the Court, wrote Justice Kennedy, “[i]n describing the effect of the Wisconsin Family Court’s decree on the real property in question,”⁴⁹⁸ the husband stated:

Prior to the judgment of divorce, the parties held title to the real estate in joint tenancy, each holding a pre-existing undivided one-

490. *Id.*

491. 899 F.2d 598 (7th Cir. 1990).

492. *Id.* at 608 (Posner, J., dissenting).

493. *Id.* at 606.

494. *Id.* at 607.

495. *Id.*

496. *Id.* (emphasis added)

497. 111 S. Ct. at 1831 (Kennedy, J., concurring) (emphasis added).

498. *Id.*

half interest. At the point that the divorce court issued its property division determination, those property rights were wholly extinguished and new rights were put into place.⁴⁹⁹

That concession, said Kennedy, was "fatal to the argument [Sanderfoot] must make to prevail here, which is that the judicial lien fixed upon his pre-existing interest in the property."⁵⁰⁰ Having determined that this is the standard by which the issue is to be decided, Kennedy cautioned:

the possibility arises that later cases, whether from Wisconsin or from some other jurisdiction, could yield a different result. This would depend upon the relevant state laws defining the estate owned by a spouse who had a pre-existing interest in marital property and upon state laws governing awards of property under a decree settling marital rights.⁵⁰¹

The applicable Wisconsin law, continued Justice Kennedy, "enacted when the State adopted substantial parts of the Uniform Marital Property Act, provides that '[a]ll property of spouses is presumed to be marital property,' and '[e]ach spouse has a present undivided one-half interest in each item of marital property.'"⁵⁰² Accordingly, wrote Justice Kennedy:

[a]bsent respondent's concession, it would seem that the state court did not divest him of his pre-existing interest. At no place in its "Finding of Fact, Conclusions of Law, and Judgment of Divorce" did the court declare that respondent's predecree interests were extinguished. Rather, the decree declared that upon its effective date sole title to the property vested in respondent."⁵⁰³

In line with this analysis, Kennedy expressed concern that the Bankruptcy Code might be used in some later case to allow a spouse to avoid an otherwise valid obligation under a divorce court decree.⁵⁰⁴ Although "adept drafting of property decrees or the use of court orders directing conveyances in a certain sequence might resolve the problem,"⁵⁰⁵ he wrote, "it appears that

499. *Id.* (quoting Brief for Respondent at 7-8).

500. *Id.* at 1831-32.

501. *Id.* at 1832.

502. *Id.* (citing WIS. STAT. § 766.31(2) (1989-90)).

503. *Id.* (citations omitted) (emphasis added).

504. *Id.*

505. *Id.* at 1832-33.

congressional action may be necessary to avoid in some future case the perhaps unjust result the Court today avoids having to consider only because of the fortuity of a litigant's concession."⁵⁰⁶

Courts that have held that the debtor cannot discharge his debt to the non-debtor spouse have expressed their satisfaction at having been able to arrive at a fair and just result.⁵⁰⁷ Moreover, in some of these cases, the dissenters, while unhappy with the reasoning of the majorities, were also satisfied with the fairness of the outcomes. The court in *In re Hart*⁵⁰⁸ provided an example when it wrote: "The Defendant now seeks to have the advantage of the agreement but to avoid its onerous results. A compelling and explicit statutory requirement to the contrary would be required to negative the parties' agreement and permit such an unfair result."⁵⁰⁹ In addition, the court in *In re Conway*⁵¹⁰ wrote: "[T]he debtor, having received the benefit in the form of the homestead conferred upon him by the divorce court, cannot now disaffirm the detriment as embodied in the lien. . . . To do so would be tantamount to giving the debtor a wind-fall."⁵¹¹ Similarly, the court in *In re Thomas*⁵¹² stated:

This result is not only supported by the legal considerations noted above, but also by compelling equitable considerations. *To rule otherwise . . . [i]n effect . . . would allow the debtor to keep property or its proceeds which belongs to another person.*⁵¹³

Justice Kennedy, concurring in *Sanderfoot*,⁵¹⁴ asserted, "The result the Court reaches consists with fairness and common sense."⁵¹⁵

506. *Id.* at 1833.

507. *See infra* notes 508-18 and accompanying text.

508. 50 B.R. 956 (Bankr. D. Nev. 1985) (holding lien was equitable, thus not avoidable, based on parties' intent to create lien on specific property of debtor).

509. *Id.* (quoting *In re Wicks*, 26 B.R. 769, 771 (Bankr. D. Minn.)).

510. 93 B.R. 731 (Bankr. N.D. Okla. 1988) (holding lien not avoidable).

511. *Id.* at 734.

512. 32 B.R. 11 (Bankr. D. Or. 1983) (holding lien not avoidable because it is not a judicial lien).

513. *Id.* at 12-13 (citing *In re Maness*, 17 B.R. 76, 77 (Bankr. W.D. Mo. 1981)) (emphasis added).

514. 111 S. Ct. 1825 (1991).

515. *Id.* at 1832 (Kennedy, J., concurring).

At least one court,⁵¹⁶ although it acknowledged that the award made to the non-debtor had the indicia of a property settlement, nevertheless refused to allow the debtor to avoid paying the debt.⁵¹⁷ The court stated flatly that "[a] discharge in bankruptcy . . . does not give the debtor the right to withhold specific property from its true owner."⁵¹⁸

G. *Proposed Legislation*

On March 5, 1991, Representative Henry J. Hyde of Illinois introduced the Property Settlement Integrity Act of 1991,⁵¹⁹ House Bill 1242, whose stated purpose was "[t]o amend title 11 of the United States Code to make nondischargeable debts for liabilities under the terms of a property settlement agreement entered into in connection with a separation agreement or divorce decree."⁵²⁰ The bill was referred to the Committee on the Judiciary. A copy of the bill, accompanied by a "Dear Colleague letter," was sent to each member of the House of Representatives.⁵²¹ The letter stated:

This legislation would prevent the discharge of any liability under the terms of a property settlement agreement. It is designed to protect spouses from having the assets upon which they depend stripped from them and distributed to other creditors The support and maintenance of the family, even

516. *In re Underwood*, 17 B.R. 417 (W.D. Mo. 1981).

517. *Id.*

518. *Id.* at 419 (citing *Royce v. Dunlap*, 15 B.R. 737 (Bankr. W.D. Mo. 1981)).

519. H.R. 1242, 102d Cong., 1st Sess. (1991).

520. "Sec. 2. AMENDMENT Paragraph (5) of section 523(a) of title 11, United States Code, is amended to read as follows:

(5) to a spouse, former spouse, or child of the debtor

(A) for alimony to, maintenance for, or support of such spouse or child in connection with -

(i) a separation agreement, divorce decree, or other order of a court of record;

(ii) a determination made in accordance with State or territorial law by a governmental unit; or

(iii) a property settlement agreement; or

(B) for any liability under the terms of a property settlement agreement entered into in connection with a separation agreement or divorce decree; . . ."

Id.

521. Telephone interview with George M. Fishman, Legislative Aide to Rep. Henry J. Hyde (October 16, 1991).

though separated through divorce, should continue to be a principle consideration in the distribution of property.⁵²²

Representative Hyde first proposed this amendment to the Bankruptcy Act in 1984,⁵²³ and has resubmitted the bill every year since then.⁵²⁴

III. Analysis

A. *The Courts Send a Message to Congress*

In most of the cases surveyed, where a court held that a debtor was discharged from a debt to a non-debtor spouse, there are expressions of the court's inability to change law, because that power rests with Congress. For example, the court in *In re Boggess*⁵²⁵ asserted, that "[R]egardless of its own perceptions of fairness, [this] Court must give effect to the policy decisions embodied in the express language of code provisions."⁵²⁶ In *Sanderfoot*,⁵²⁷ the Seventh Circuit held that Farrey's lien was avoidable, stating, "We recognize the policy arguments against avoidance, but emphasize that it is not for the courts to make policy. . . . Perhaps Congress should reexamine the statute, but until it is amended this court is constrained to apply the law as plainly written."⁵²⁸ Justice Kennedy's concurring opinion in the United States Supreme Court's *Sanderfoot* decision expressed concern that in similar cases a like result could not be reached and that "it appears that congressional action may be necessary to avoid in some future case the perhaps unjust result the Court today avoids having to consider."⁵²⁹ The Eighth Circuit in *Bush v. Taylor*⁵³⁰ declared that "Congress has chosen not to except property settlements from discharge, and we are not at liberty to

522. Dear Colleague Letter, *supra* note 2 (emphasis in original).

523. Fishman, *supra* note 521.

524. *Id.*

525. 105 B.R. 470 (Bankr. S.D. Ill. 1989); *see supra* notes 482-83 and accompanying text.

526. *Boggess*, 105 B.R. at 475; *see supra* notes 482-83 and accompanying text.

527. 899 F.2d 598 (7th Cir. 1990).

528. *Sanderfoot*, 899 F.2d at 605; *see supra* notes 377-92 and accompanying text.

529. *In re Sanderfoot*, 111 S. Ct. 1825, 1832 (Kennedy, J., concurring); *see supra* notes 497-506 and accompanying text.

530. 893 F.2d 962 (8th Cir. 1990); *see supra* 216-23 notes and accompanying text.

redefine 'debt' in order to accomplish that result."⁵³¹ The Tenth Circuit in *Maus v. Maus*⁵³² stated that "the policy considerations at issue ha[d] been weighed by Congress and embodied in the language of the Bankruptcy Act."⁵³³ The *Maus* court added, "It is the prerogative of Congress and not of the courts to adjust that balance."⁵³⁴

In many cases, a court's observations about its inability to rule in a fair way without a Congressional mandate may be offered to justify its conclusions rather than to bemoan them. However, this Comment maintains that the courts' assertions regarding Congressional mandates in the context of the bankruptcy/divorce cases are genuine outcries for legislation, not merely offers of justification. These assertions, when read with the vehement commentary of many of the courts regarding not only the injustice, but indeed the criminality, of allowing a debtor to retain property that belongs to his former spouse,⁵³⁵ present powerful evidence that the courts are urging Congress to remedy the situation.

In general, courts at every level have struggled to find theories upon which to hold that a debtor in bankruptcy will not be allowed to avoid paying to an ex-spouse an award granted to that ex-spouse pursuant to a divorce decree. Some of the pension cases are illustrative: the courts held that it was not the debtor at all who was liable, but rather the military or employer pension fund, and, therefore, the debtor could not be discharged of the debt.⁵³⁶ Another recurring rationale is exemplified by courts that have found that the debtor was merely a "conduit" of the non-debtor spouse's property from the employer to the non-debtor spouse.⁵³⁷

531. *Bush*, 893 F.2d at 966; see *supra* notes 216-23 and accompanying text.

532. 837 F.2d 935 (10th Cir. 1988); see *supra* notes 275-82 and accompanying text.

533. *Maus*, 837 F.2d at 940; see *supra* notes 275-82 and accompanying text.

534. *Maus*, 837 F.2d at 940.

535. See *supra* notes 480-518 and accompanying text. The court in *Duncan* "decline[d] to join the herd of prior courts who have trampled the Bankruptcy Code in a rush to achieve their own perception of justice in the divorce setting." *In re Duncan*, 85 B.R. 80, 83 (W.D. Wis. 1988) (emphasis added).

536. *In re Manners*, 62 B.R. 656, 658 (Bankr. D. Mont. 1986); *In re Hall*, 62 B.R. 1002, 1003 (Bankr. S.D. Ga. 1985); *In re Anderson*, 121 B.R. 355, (Bankr. D. Cal. 1982). See *supra* notes 212-41 and accompanying text.

537. See *supra* note 214.

Additionally, in some of the lien cases the courts have ventured a theory that asserts that the non-debtor spouse was granted an implicit lien because "the testimony and the totality of the decree itself"⁵³⁸ implied that the intent of the parties and the state court was to create a lien to protect a pre-existing property interest.⁵³⁹ The court in *Wozniak v. Wozniak*,⁵⁴⁰ with facts essentially identical to those in *Sanderfoot*, compiled a list of factors that satisfied the court that the lien in question was a mortgage lien and, therefore, not avoidable. The court in *In re Hart*⁵⁴¹ found that the parties' apparent intent to create a lien on specific property of the debtor was sufficient to hold that the non-debtor spouse's lien was an equitable lien, adding that "an equitable lien may also be created by judicial decree."⁵⁴² The court in *In re Rittenhouse*,⁵⁴³ in holding that the non-debtor spouse's lien was unavoidable, asserted that it had looked to Tenth Circuit decisions for binding precedent. The *Rittenhouse* court then listed the three "survival theories"⁵⁴⁴ for liens and inferred from the Tenth Circuit's decisions that it had not "foreclosed the availability of any of the three theories,"⁵⁴⁵ notwithstanding the Tenth Circuit's having termed *Boyd's* pre-existing interest theory a "convoluted theory".⁵⁴⁶ The *Rittenhouse* court went on with equanimity to hold that the lien could not be avoided because "[t]he interest transferred to the debtor [was] already subject to the lien"⁵⁴⁷ To date, the lien cases that have come after *Sanderfoot*⁵⁴⁸ have all been decided in favor of the non-debtor spouse. Thus, Justice Kennedy's misgivings that the Bankruptcy Code "may be used in some later case to allow a

538. *In re Seablom*, 45 B.R. 445, 451 (N.D. 1984); see *supra* notes 279-85 and accompanying text.

539. *Seablom*, 45 B.R. at 451.

540. 359 N.W.2d 147; see *supra* notes 319-26 and accompanying text.

541. 50 B.R. 956 (Bankr. D. Nev. 1985); see *supra* notes 312-18 and accompanying text.

542. *Hart*, 50 B.R. at 960; see *supra* notes 312-18 and accompanying text.

543. 103 B.R. 250 (Bankr. D. Kan. 1989); see *supra* notes 279-89 and accompanying text.

544. *Rittenhouse*, 103 B.R. at 251; see *supra* note 302 and accompanying text.

545. *Rittenhouse*, 103 B.R. at 254; see *supra* note 306 and accompanying text.

546. *Maus v. Maus*, 837 F.2d 935, 939 (10th Cir. 1988); see *supra* notes 275-82 and accompanying text.

547. *Rittenhouse*, 103 B.R. at 254; see *supra* notes 299-309 and accompanying text.

548. 111 S. Ct. 1825 (1991).

spouse to avoid otherwise valid obligations under a divorce court decree,"⁵⁴⁹ have not yet been realized.

Strikingly, even in *Klemme v. Schoneman*,⁵⁵⁰ the bankruptcy court did not concern itself with the debtor's failure to concede that both parties had held title to the real estate in joint tenancy and that the divorce decree had simultaneously extinguished those interests and created new interests — an interest in the property on the part of the debtor, and a lien on the non-debtor spouse's pre-existing interest on the part of the non-debtor. The court reasoned that if the lien in question were a mortgage lien, then "the question left open" by *Sanderfoot* would become irrelevant to this case.⁵⁵¹ Then the court applied the test for a mortgage that the *Wozniak*⁵⁵² court had articulated. The *Klemme* court held that since the lien in question was an "(1) . . . interest . . . expressed as a lien; (2) the lien attach[ed] to a particular piece of property; (3) the lien [was] to guarantee payment of a sum of money; (4) the debt [was to earn] interest; and (5) the debt [was] due on a particular date,"⁵⁵³ the test was satisfied. Accordingly, *Wozniak*, not *Sanderfoot*, controlled the *Klemme* case.⁵⁵⁴ The *Klemme* court prudently expressed that it was mindful of both the Supreme Court's statement in *Sanderfoot* and the fact that *Sanderfoot* also involved a Wisconsin divorce. However, opined the court, *Klemme* was distinguishable from *Sanderfoot* because "neither the parties nor the Supreme Court factored *Wozniak* into their discussions."⁵⁵⁵ To date, the decision in *Klemme* has not been appealed.

If it were to be appealed, it is possible that the Seventh Circuit would find that application of *Sanderfoot*⁵⁵⁶ compelled a different result. Unlike in *Sanderfoot*, the *Klemme* debtor did not concede that both his and the non-debtor spouse's pre-ex-

549. *Id.* at 1832 (Kennedy, J., concurring).

550. 477 N.W.2d 77 (Wis. Ct. App. 1991); see *supra* notes 461-79 and accompanying text.

551. *Klemme*, 477 N.W.2d at 80; see *supra* note 466 and accompanying text.

552. *Wozniak*, 359 N.W.2d at 148; see *supra* notes 319-26 and accompanying text.

553. *Klemme*, 477 N.W.2d at 80; see *supra* note 472 and accompanying text.

554. *Klemme*, 477 N.W.2d at 80; see *supra* note 477 and accompanying text.

555. *Klemme*, 477 N.W.2d at 81.

556. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990).

isting property interests were extinguished and simultaneously replaced by a property interest on the part of the debtor and a lien on the part of the non-debtor spouse.⁵⁵⁷ The Seventh Circuit might reach a different result on the state law issue of whether the lien was a mortgage lien or a judicial lien.

A balance has not always been struck between the needs of the debtor for a fresh start in bankruptcy and the needs of the family for continued support, even when the family is dissolved. Individual debtors have gained eligibility for relief when their financial obligations become insurmountable.⁵⁵⁸ Furthermore, they are entitled to apply for this relief on a voluntary basis.⁵⁵⁹ Married women have gained the right to own property that they either bring with them into a marriage or earn or otherwise acquire during a marriage.⁵⁶⁰ The NCCUSL, state legislatures, and the feminist movement have all attempted to mitigate the negative emotional and financial consequences of divorce by largely abolishing a system on which both grounds and standards for division of property were predicated on fault.⁵⁶¹ For the most part, this system has been replaced by the concept of marriage as an economic partnership.⁵⁶² Although the efforts behind these changes were well-intentioned,⁵⁶³ the shift from awarding women continuing support for themselves and their children in divorce to awarding them a larger share of the marital property has had devastating consequences for many women whose former husbands have declared bankruptcy and succeeded in being discharged from remitting to their former wives their share of the marital property.⁵⁶⁴

B. *Analysis of Proposed Legislation*

Section 17(a)(7) of the Bankruptcy Act of 1898 was the predecessor of § 523(a)(5) of the present Bankruptcy Code.⁵⁶⁵

557. *See supra* notes 424-27.

558. 11 U.S.C. § 101(33) (1988).

559. 11 U.S.C. § 109(a), (b) (1988).

560. *See discussion supra* notes 87-98 and accompanying text.

561. *See discussion supra* notes 108-61 and accompanying text.

562. *See discussion supra* notes 145-56 and accompanying text.

563. WEITZMAN, *supra* note 103, at 16-20.

564. *See supra* notes 184-342 and accompanying text.

565. The Bankruptcy Code, 11 U.S.C. § 523 (superseding The Bankruptcy Act of

Section 17(a)(7) was intended to protect women at a time when husbands were legally obligated to support their wives, and at a time when this obligation continued even after the termination of the marriage.⁵⁶⁶ At that time, for the most part, property was awarded to the wife only if alimony was insufficient to meet her needs for ongoing support.⁵⁶⁷ Section 17(a)(7) was designed to ensure that a woman whose former husband became a debtor in bankruptcy would not lose her (usually only) means of support.⁵⁶⁸ Today, the duty to support during marriage as well as the duty to support upon the dissolution of a marriage are mutual obligations of both spouses.⁵⁶⁹ More importantly, today, most state statutes direct that alimony be awarded only in instances where property division is not sufficient to provide for a spouse's needs for ongoing support. Accordingly, § 523(a)(5), the successor of § 17(a)(7) of the Bankruptcy Act, no longer ameliorates the problem it was designed to address.

The reasons for which Congress has not adopted the Property Settlement Integrity Act of 1991⁵⁷⁰ are not clear.⁵⁷¹ Nevertheless, enactment of House Bill 1242⁵⁷² would be a critical step toward effectuating a balance between the rights of the "honest, distressed debtor,"⁵⁷³ and the rights of women and families in divorce and, not inconsequently, countless lawsuits would be

1898, Ch. 541, 30 Stat. 544 (codified at 11 U.S.C. § 35)).

566. See *supra* notes 99-107 and accompanying text.

567. See *supra* note 102 and accompanying text.

568. See Scheible, *supra* note 23, at 542-96.

569. See *supra* notes 145-56 and accompanying text.

570. See *supra* notes 519-20 and accompanying text.

571. According to one matrimonial lawyer, each time the bill is scheduled to be heard by the Judiciary Committee of the House of Representatives, the Committee's attention is diverted by matters of more imminent importance, such as the stock market crash in 1987 and Operation Desert Storm in 1991. Telephone interview with Owen Doss, Esq., past President of the American Academy of Matrimonial Lawyers (Oct. 16, 1991). Robert Arenstein, the current President of the American Academy of Matrimonial Lawyers, stated that he believes H.R. 1242 is too all-encompassing, and that Congress will only be willing to ratify a compromise measure. Mr. Arenstein further asserted that another obstacle to Congressional action is that the Judiciary Committee of the House of Representatives regards the Supreme Court decision in *Sanderfoot* as having established a rule that both marital property and support awards are no longer subject to avoidance under the Bankruptcy Code. Telephone interview with Robert Arenstein, Esq., President of the American Academy of Matrimonial Lawyers (Oct. 16, 1991).

572. See *supra* note 519 and accompanying text.

573. See *supra* notes 42-67 and accompanying text.

avoided. The expense of lawsuits for women who stand to lose their portions of marital assets would be avoided. Continued and sometimes heightened hostilities between divorcing spouses, a phenomenon that the introduction and establishment of non-fault based divorce sought to alleviate, are doubtless reinforced rather than alleviated by the availability under the Bankruptcy Code of an avenue by which the debtor can circumvent the terms of a settlement agreement that are disadvantageous to him. The problematical need for a federal bankruptcy court to interpret the intentions of a state court and/or the parties involved with respect to whether a given award is in the nature of property or in the nature of support would no longer exist. Likewise, the need for a federal bankruptcy court to evaluate the needs of family members in order to determine if a support award should be modified, an area traditionally within the states' exclusive domain,⁵⁷⁴ would no longer exist. In this sense, there is the possibility that in some isolated cases a woman might have received support in lieu of a property settlement. Her former husband might have misused the property in one way or another, and then had an opportunity to prove and, in some cases prevail in his proof, that his commitment to provide support should be reduced or eliminated because his present circumstances rendered him unable to meet that commitment.

The enactment of various statutes guaranteeing payment of pensions to non-debtor spouses, among which are the amendment to the Employee Retirement Income Security Act ("ERISA")⁵⁷⁵ and the Uniformed Services Former Spouses Protection Act ("USFSPA"),⁵⁷⁶ is a powerful indication that Congress is troubled by the incidence of cases whereby debtors have been permitted, pursuant to the Bankruptcy Code, to retain "the sole property" of their ex-spouses. In *McCarty v. McCarty*,⁵⁷⁷ the Supreme Court made note of several statutes designed to protect non-debtor spouses' pension rights in order to underscore its conclusion that, had Congress wished to pro-

574. *McCarthy v. McCarthy*, 453 U.S. 210 (1981). See *supra* notes 224-36 and accompanying text.

575. 29 U.S.C. § 1056(d)(3) (1988). See *supra* note 239 and accompanying text.

576. 10 U.S.C. § 1408 (1988). See *supra* note 234 and accompanying text.

577. 453 U.S. 210 (1981). See *supra* notes 224-36 and accompanying text.

tect the interests of the former spouse of military personnel in the latter's pensions, then Congress would have passed a similar act to that effect.⁵⁷⁸ Less than a year later, Congress passed the USFSPA.⁵⁷⁹ Such a chain of events leads logically to an inference: if Congress hears the courts' message, it will provide recourse to the non-debtor ex-spouse in a bankruptcy and divorce dispute.

IV. Conclusion

The humanitarian objective of giving a debtor a fresh start, an equitable and orderly way to avail himself of a new beginning, is certainly representative of the ideology upon which the United States is founded. Laws designed to help women gain financial independence and, in particular, those laws designed to help divorcing women gain their own "fresh start" by shifting from continued financial support awards in divorce to property settlements in divorce, are also premised on humanitarian concerns — for both women and all family members. However, this change in women's divorce awards can have unanticipated consequences when the former husband declares bankruptcy.

Historically, our bankruptcy laws have not discharged the debtor from obligations for alimony, maintenance or support, but have discharged the debtor from obligations which arose from liens filed on their property before they filed for bankruptcy. The latter accommodation was created to protect the debtor from creditors who, sensing an impending bankruptcy, rush to obtain financial commitments from the prospective debtor. With the shift in women's divorce awards from support to property settlements, debtors are often able to use this protection, which was directed at shielding them from commercial creditors, to profit from awards made to them pursuant to divorce decrees while simultaneously being excused from honoring the financial obligation that was required of them pursuant to the same divorce decree.

The enactment of House Bill 1242, a simple amendment to the Bankruptcy Code providing that property settlements to ex-

578. *McCarty*, 453 U.S. at 231. See *supra* notes 224-36 and accompanying text.

579. See *supra* notes 234-36 and accompanying text.

spouses are not dischargeable, would afford a critical remedy in this regard. Such an amendment would offset a little known but troubling ramification of the trend toward elimination of support awards for divorcing women.

The recent Supreme Court decision in *Farrey v. Sanderfoot*⁵⁸⁰ has not resolved this problem. Indeed, *Sanderfoot* did not even conclusively settle the issue for all cases where a non-debtor spouse has a lien on marital property awarded to the debtor pursuant to a divorce decree. The courts continue to struggle to adhere to the strictures of the bankruptcy statutes and, at the same time, arrive at fair results.

Ottillie Bello

580. 111 S. Ct. 1825 (1991).