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# AT THE INTERSECTION OF BANKRUPTCY AND DIVORCE: PROPERTY DIVISION DEBTS UNDER THE BANKRUPTCY REFORM ACT OF 1994

*Meredith Johnson*

*Bankruptcy has long had unique implications for divorce settlements and debts between ex-spouses. Historically, some marital debts owed from one ex-spouse to another were excepted from the traditional policy of "discharge." Bankruptcy law distinguished between debts in the nature of alimony, maintenance, and support, which were protected from discharge, and property division debts, which were not. This distinction often had harsh consequences for creditor ex-spouses. Recently, Congress enacted the Bankruptcy Reform Act of 1994, in part to ameliorate this problem. The amended Bankruptcy Code provides better protection for some property division debts. In this Note, Ms. Johnson argues that the new amendments, while certainly a conscientious enhancement of the Bankruptcy Code's previously inadequate protection for marital debts, are in need of clarification. She locates several problems in these new amendments, and recommends specific guidelines to the National Bankruptcy Review Commission.*

*Ms. Johnson canvasses legal commentary on the new legislation and surveys contemporary case law to demonstrate that myriad difficulties exist in the application of the new section 523(a)(15)(B) "balancing test" created by the Reform Act. She argues that the test encourages excessive flexibility and subjectivity. The "balancing" function is performed with varying degrees of success, and some courts have tended to uphold discharge notwithstanding the possibility of bankruptcy for the creditor ex-spouse. Also, numerous splits of authority have emerged. Ms. Johnson recommends specific guidelines to clarify section 523(a)(15)(B). These standards would remedy current problems of opacity, lack of uniformity, and subjectivity. Implementation of these guidelines would give bankruptcy judges better direction in applying the balancing test, while more effectively realizing Congress's goal: greater protection for marital debts.*

Imagine that you are working late one night on a complicated divorce case. The phone rings, and on the other end of the line you hear your client's voice, strained almost to the point of tears. "What's the matter?" you ask. "I got this notice that my ex-husband filed for bankruptcy," the client says, "I called him and he laughed at me and said, 'beating me into the ground financially won't work. I'm filing bankruptcy so that I don't have to pay child support or those debts listed in the divorce decree.'"<sup>1</sup>

A practitioner with incomplete knowledge of the Bankruptcy Reform Act of 1994<sup>2</sup> might find little cause for alarm. In contrast to provisions in

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1. Dale Ellis, *Divorce Cases After the Bankruptcy Reform Act of 1994 (With Forms)*, Prac. Law., July 1995, at 79, 79-80.

2. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.) [hereinafter Reform Act].

the 1978 Bankruptcy Code,<sup>3</sup> which often had harsh consequences for the ex-spouses and children of bankruptcy filers,<sup>4</sup> supporters have touted the Reform Act as reflecting "the public interest in providing support for a child, spouse or former spouse."<sup>5</sup> Whereas the 1978 Bankruptcy Code protected family support obligations from discharge<sup>6</sup> only if they were in the nature of alimony, maintenance, or support,<sup>7</sup> the Reform Act protects some property division debts<sup>8</sup> through application of the new section 523(a)(15) of the Bankruptcy Code.<sup>9</sup>

The practitioner who further investigates bankruptcy case law and the scholarly literature since the passage of the Reform Act may find greater cause for concern in her client's late night call. Though the Reform Act protects some property division debts from discharge, cases and commentary reveal that current law regarding the discharge of these debts is in a state of confusion, and offers few useful standards to guide the bankruptcy bench in interpreting the new statute. It is thus too soon to conclude with confidence that previous problems with the Bankruptcy Code have been eliminated, and that spouses, ex-spouses, and children of debtors are now adequately protected from the potential burdens of property division debts.

While acknowledging the progressive nature of the Reform Act, this Note suggests that considerable difficulties remain. The Note locates several problems in the new amendments and recommends to the newly-created National Bankruptcy Review Commission<sup>10</sup> specific, universal

3. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1994)) [hereinafter Bankruptcy Code].

4. See Ellis, *supra* note 1, at 80; *infra* Part I.A.

5. Meg Lawless, *The Bankruptcy Reform Act of 1994 and Its Effect on Family Law*, *The Advocate*, July 1995, at 9, 9.

6. In bankruptcy, a discharge amounts to [t]he release of a debtor from all of his debts which are provable in bankruptcy, except such as are excepted by the Bankruptcy Code. The discharge of the debtor is the step which regularly follows the filing of a petition in bankruptcy and the administration of his estate. By it the debtor is released from the obligation of all his debts which were or might be proved in the proceedings, so that they are no longer a charge upon him, and so that he may thereafter engage in business and acquire property without its being liable for the satisfaction of other such former debts.

*Black's Law Dictionary* 463 (6th ed. 1990); see also 11 U.S.C. § 524 (1994) (describing effects of discharge).

7. See Candace C. Carlyon, *Daddy Don't You Walk So Fast: Bankruptcy Court No Longer Safe Haven for Support Debtors*, *Nev. Law.*, Oct. 1995, at 16, 17.

8. "An obligation that is not a support debt is, by process of elimination, a property division debt." Margaret Dee McGarity, *Family Law Provisions in the Bankruptcy Reform Act of 1994*, 27 *Bankr. Ct. Dec. (LRP)* (May 16, 1995), available in Westlaw, TP-ALL Database. For example, mortgages and credit card debts are property division debts. See, e.g., *Hill v. Hill (In re Hill)*, 184 B.R. 750 (Bankr. N.D. Ill. 1995) (analyzing mortgages and credit card debts as property division debts).

9. See 11 U.S.C. § 523(a)(15) (1994).

10. As part of the Reform Act, Congress created the National Bankruptcy Review Commission to investigate and study issues relating to the amendments. See 11 U.S.C. ch.

guidelines for implementing section 523(a)(15)(B) of the Bankruptcy Reform Act of 1994. Coherent and uniform rules of application are necessary to effect the congressional goal of providing "greater protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of a debtor in bankruptcy."<sup>11</sup> If Congress were to adopt these recommendations and clarify the new legislation, the practice of both bankruptcy judges and lawyers would be simplified and congressional intent would be maximized. The ultimate goal of this Note is therefore to urge clarification of the new amendment, and to recommend interpretations of the statute that will more effectively realize Congress's goal: greater protection for marital debts in appropriate cases.

Part I will explore the context in which the Reform Act was passed. It will explain the state of the law regarding discharge of marital obligations prior to the Reform Act, subsequent developments providing the impetus for change in this area, and the text of the Reform Act, along with its legislative history. Part I will also examine the larger social and legal contexts in which current bankruptcy jurisprudence is situated. Part II will map out the present state of the law in this area. First, Part II will explain how discharge proceedings under the new amendments operate. Then, by analyzing professional commentary, a sample of recently decided cases, and by offering a critique of current implementation, Part II will demonstrate the need for guidelines for implementing the new statutory provision. Finally, Part III will propose a set of guidelines to clarify the legislation and assist judges in the application of the new section.

### I. HISTORICAL, LEGAL, AND SOCIAL CONTEXT OF THE BANKRUPTCY REFORM ACT OF 1994

A primary purpose of bankruptcy law historically has been to provide the "honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt"—a fresh start.<sup>12</sup> Additionally, although United States bankruptcy laws "reflect a variety of separate and discreet policies," one clear purpose is to "provide a collective forum for sorting out the rights of the various claimants against the assets of a debtor where there are not enough assets to go around."<sup>13</sup> Although bankruptcy has existed since biblical times, the practice as it is known today became a permanent component of United States law in 1898, after several unsuccessful at-

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1 note (1994) (National Bankruptcy Review Commission). For more information on the Commission and its function, see *infra* notes 209–215 and accompanying text.

11. H.R. Rep. No. 103-835, at 54. (1994), reprinted in 1994 U.S.C.A.N. 3340, 3363.

12. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

13. 1 David G. Epstein et al., *Bankruptcy* § 1-2 (1992).

tempts at establishing a uniform system of bankruptcy.<sup>14</sup> The original statute did not undergo modernization until eighty years later with the enactment of the Bankruptcy Reform Act of 1978.<sup>15</sup>

Generally, there are two types of bankruptcy: liquidation (Chapter 7) and rehabilitation (Chapters 11, 12, and 13).<sup>16</sup> Usually, eighty or ninety percent of debtors are non-business debtors, and between seventy and eighty percent of bankruptcy filings are under Chapter 7.<sup>17</sup> When a debtor declares bankruptcy under Chapter 7, a trustee collects the debtor's nonexempt property, converts it to cash, and then distributes it among the creditors.<sup>18</sup> Chapter 7 treats similarly situated creditors alike by providing for pro rata distribution to holders of unsecured claims.<sup>19</sup> The debtor forfeits his<sup>20</sup> nonexempt property and hopes that his debts will be discharged:<sup>21</sup> "a release of the debtor from any further personal liability for his or her pre-bankruptcy debts."<sup>22</sup> Under Chapter 11, 12, and 13 rehabilitation cases, creditors expect to recover future earnings of the debtor rather than property owned at the time of bankruptcy.<sup>23</sup> The debtor usually keeps his assets and pays creditors as provided by a court-approved plan.<sup>24</sup> Discharge is available under these chapters as well.<sup>25</sup>

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14. See Gloria Jean Liddell, *The New and Improved Bankruptcy Act of 1994*, Nat'l B. Ass'n Mag., Jan.-Feb. 1995, at 8, 8.

15. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1994)).

16. See 1 Epstein et al., *supra* note 13, § 1-5. Bankruptcy proceedings begin with the filing of a petition, usually by the debtor. Creditors, however, have a limited right to commence "involuntary" bankruptcy proceedings against debtors under Chapters 7 and 11. The Bankruptcy Code establishes eligibility requirements for debtors under each chapter. See David G. Epstein, *Bankruptcy and Other Debtor-Creditor Laws in a Nutshell* 143 (1995).

17. See 1 Epstein et al., *supra* note 13, § 1-6.

18. See 1 *id.* § 1-5.

19. See 1 *id.* § 1-7(d). There are three exceptions to the policy of pro rata distribution: creditors with secured claims enjoy more favorable treatment; certain unsecured claims enjoy priority over other unsecured claims; and dividends must only be paid on allowed claims. See *id.*

20. This Note uses masculine pronouns when referring to debtors because men seek discharge of marital debts in bankruptcy more often than women. See *infra* notes 74-79 and accompanying text.

21. See 1 Epstein et al., *supra* note 13, § 1-5.

22. See 1 *id.* § 1-7(e); see also *supra* note 6 (defining discharge). When a debt is discharged, the creditor of the discharged debts receives only its pro rata distribution. See 1 Epstein et al., *supra* note 13, § 1-7(e).

23. See 1 *id.* § 1-5.

24. See *id.*

25. See 1 *id.* §§ 1-8 to 1-10. There are some differences among the various chapters regarding applicability of discharge. Under Chapter 11, the discharge occurs when the payment plan is confirmed, see 1 *id.* § 1-9(a)-(b), whereas under Chapters 12 and 13, discharge does not occur until the debtor has performed under the plan. See 1 *id.* §§ 1-9(b), 1-10. There are fewer exceptions to discharge under Chapter 13 than under Chapter 7. See 1 *id.* § 1-8. In fact, protection from discharge under the new section 523(a)(15) may not even be available under Chapter 13. See *infra* note 103.

To prevent the discharge of a specific debt, a creditor must initiate an "adversary proceeding."<sup>26</sup> This adversary proceeding remains "within the main case to which it relates, and is usually heard by the bankruptcy court in much the same way as any lawsuit would be."<sup>27</sup> The challenge is known as a complaint "to determine the dischargeability of a debt."<sup>28</sup>

Just as bankruptcy has long figured on the legal landscape, family law historically has intersected with bankruptcy law in cases where debtors owe spouses or ex-spouses debts or support. The mechanics of divorce and separation agreements directly impact bankruptcy proceedings regarding marital debts. Divorce may be achieved through litigation or settlement, but as is the case with most other lawsuits, divorce usually is resolved by a settlement (or separation) agreement.<sup>29</sup> Courts commonly incorporate separation agreements into the divorce decree.<sup>30</sup> Negotiating these agreements under the "traditional bargaining process" involves "manipulating labels [i.e., property division, child support, and alimony] to obtain an overall package that appeals to both parties."<sup>31</sup> Although the various components of the package are largely fungible, emotional attitudes can affect the proceeding significantly, and certain tradeoffs, such as those between money and child custody, can be hard to quantify and assess.<sup>32</sup> Generally, property division awards are not modifiable, although maintenance and child support awards may be modified when there has been a substantial change in circumstances.<sup>33</sup> Although both spouses are often liable to third parties for debts acquired during marriage, usually one party will accept responsibility for the debts upon divorce.<sup>34</sup> This assumption of responsibility does not relieve the other

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26. Fed. R. Bankr. P. 7001.

27. Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women As Creditors in Bankruptcy*, 43 *Cath. U. L. Rev.* 351, 357 (1994).

28. Fed. R. Bankr. P. 7001(6).

29. See Ira Mark Ellman et al., *Family Law* 688 (2d ed. 1991). Separation agreements are favored by law, "thus allowing a husband and wife, with the help of their respective attorneys, to contractually agree on a division of marital property and other assets, spousal and other child support, child custody matters, pension and retirement plans, insurance coverage, tax planning, and the like prior to divorce." Peter N. Swisher et al., *Family Law: Cases, Materials, and Problems* 917 (1990). In fact, approximately 90% of all divorces are achieved through settlement rather than litigation. See Carl E. Schneider & Margaret F. Brinig, *An Invitation to Family Law* 256 (1996).

30. See Harry D. Krause, *Family Law* 176 (Black Letter Series, 2d ed. 1996).

31. Ellman et al., *supra* note 29, at 690. Note that there are alternatives to this traditional process, such as mediation. See *id.* at 692-93.

32. See *id.* at 690-91.

33. See *id.* at 451-52. State court decrees regarding alimony and child support are routinely changed and adjusted accompanying a change in the circumstances of the parties. For example, one party's ability to pay may increase or decrease, and the needs of the recipients may change and evolve. In such cases, courts commonly modify prior decrees. See 2 Epstein et al., *supra* note 13, § 7-29(a).

34. See Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, False Start, or Head Start?*, 69 *N.C. L. Rev.* 577, 588 (1991).

party of liability to the creditor, but courts usually order the "assuming spouse to hold harmless and indemnify the other spouse."<sup>35</sup>

"It has not been uncommon for a party who is left in financial distress as a result of a divorce or property settlement order or who in his view received inequitable treatment in the family courts, to seek relief from the consequences of such orders by seeking to discharge debts in a bankruptcy."<sup>36</sup> In 1901, the Supreme Court determined that alimony, maintenance, and support obligations were nondischargeable in bankruptcy; in *Audubon v. Shufeldt*, the Court held that although the debtor would be excused from paying certain debts acquired before bankruptcy, he remained liable for alimony, which constituted an obligation to his family, rather than a dischargeable debt.<sup>37</sup> Thus, the strain between protecting the debtor's discharge in order to provide him with a fresh start,<sup>38</sup> and the need of former spouses and children of bankruptcy debtors to enforce financial obligations under various family law agreements, has been a "frequent and well-developed source of litigation."<sup>39</sup>

#### A. *Discharge of Family Support Obligations Prior to the Bankruptcy Reform Act of 1994*

Prior to passage of the Reform Act, the Bankruptcy Code provided only limited safeguards for marital debt creditors—former spouses and children.<sup>40</sup> Under the Bankruptcy Code, a debtor's obligations to former spouses and children are divided into support debts (alimony, maintenance and support) and property division debts. Until the Reform Act added section 523(a)(15), this distinction determined whether a debt owed to a former spouse was dischargeable: while support debts were not dischargeable, property division debts were.<sup>41</sup>

35. *Id.* at 588–89.

36. *Campbell v. Campbell (In re Campbell)*, 198 B.R. 467, 470 (Bankr. D.S.C. 1996).

37. See *Audubon v. Shufeldt*, 181 U.S. 575, 580 (1901).

38. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

39. McGarity, *supra* note 8. Societal preferences for private, individual support rather than support from the state may cause or exacerbate this tension. Cf. Martha Albertson Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* 212 (1995) (paternal responsibility relieves state of burden for children). Society may be reluctant to relieve the debtor of his obligations to his family and former spouse if the state would become responsible for their care.

40. The Bankruptcy Code "reflected a philosophy that third party creditors be paid prior to the debtor and debtor's family and former spouse." Carlyon, *supra* note 7, at 16.

41. The pertinent part of the statute, which was part of the 1978 Bankruptcy Code and which remains in force, reads as follows:

§ 523. Exceptions to Discharge

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

....

(5) 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,

The legislative history accompanying this provision specified that section 523(a)(5) was designed to

make 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 bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.<sup>42</sup>

Thus, it was determined that "hold harmless provisions"—those provisions in which the debtor assumes marital debt as part of the divorce decree, often in exchange for lower alimony or maintenance awards—must "actually be in the nature of alimony, maintenance or support to be excepted from discharge."<sup>43</sup>

A typical case under the old Bankruptcy Code proceeded as follows. Husband and wife dissolve their marriage. As part of the terms of their Dissolution of Marriage, husband is ordered to assume certain joint debts and hold wife harmless for them. Both parties waive maintenance. Husband subsequently files for bankruptcy and claims that the assumed joint debts are dischargeable, because they are not in the nature of alimony, maintenance, or support. The court finds that the parties intended that the balance of the dissolution agreement serve as a property settlement. Without consideration of any bargaining that might have been conducted between the former couple, or that the assumption of debt might have been meant as a supplement to child support, the court holds that the pledge to hold the wife harmless on certain debts is "in the nature of a property settlement and [the debts] are dischargeable in bankruptcy," leaving her responsible for such debts.<sup>44</sup>

As this example suggests, the difference between property and support can be critical. Because of divorce reform that began in the 1970s, traditional alimony is largely in decline.<sup>45</sup> As a result, property division often substitutes for alimony and provides support for ex-spouses.<sup>46</sup> Thus, even though "[d]ivorcing couples are generally concerned with the

determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement . . .

11 U.S.C. § 523(a)(5) (1994); see also McGarity, *supra* note 8 ("Until the [1994] Act added 11 U.S.C. Section 523(a)(15), this classification meant that a support debt was excepted from discharge, and a property division debt was not."). Note that "[e]ven though this dichotomy is often meaningless in the family law context, each decree or settlement agreement being an interrelated and mutually dependent bundle of rights, it is necessary to classify each isolated obligation as a support debt or property division debt when the obligated party files a bankruptcy case." *Id.*

42. H.R. Rep. No. 95-595, at 364 (1977), reprinted in 1978 U.S.C.A.N. 5963, 6320.

43. E.g., *Mallin v. Mallin* (In re *Mallin*), 137 B.R. 673, 677 (Bankr. N.D. Ohio 1992).

44. *Fitzsimmons v. Fitzsimmons* (In re *Fitzsimmons*), 110 B.R. 912, 915 (Bankr. E.D. Mo. 1990).

45. See Scheible, *supra* note 34, at 587.

46. See *id.* at 588. Professor Scheible explains further:



economic consequences of divorce, rather than the labels that attach to the arrangement's components,<sup>47</sup> the consequences of the support/property dichotomy have been severe. Often, divorcing spouses have agreed to pay marital debts, holding the other spouse harmless from them, in exchange for lower alimony payments; in other instances, spouses have bargained for a larger property settlement rather than marital debt assumption.<sup>48</sup> Under the old Bankruptcy Code, if the obligated spouse filed for bankruptcy, these property settlement obligations often were not considered in the nature of alimony, support, or maintenance, and were discharged. The statute forced courts to take an overly formalistic view, often requiring them to focus myopically on the label attached to a particular marital debt, or manipulate the label in order to achieve an equitable outcome. This discharge had the effect of undoing a carefully-wrought settlement to the detriment of the creditor who bargained away other opportunities or privileges. As a result, the nondebtor spouse often was "saddled with substantial debt and little or no alimony or support."<sup>49</sup>

Many commentators and judges criticized the anomalous and unjust results of this dichotomy, urging reform "because of the injustice caused by the support/property division and to spare bankruptcy judges from the sophistry of reconciling the irreconcilable."<sup>50</sup> In fact, many bankruptcy, district court, and circuit court judges expressed their distaste for discharging marital debts that, in all fairness, should have been borne by the debtor.<sup>51</sup> For example, Judge Posner, in his dissenting opinion in *In*

Although the theory of property division is based on an allocation of assets acquired during marriage, equitable division principles frequently take into account factors traditionally considered in awarding alimony. Moreover, if division of marital assets in kind is impractical, courts may direct a spouse who receives a greater amount of property to repay the other in cash, often by means of a series of periodic payments. Although such payments resemble alimony, they represent ownership interests rather than support and are ordered as a definite, liquidated sum, and, thus, are nonmodifiable.

Id. (footnotes omitted).

47. *Dressler v. Dressler* (In re Dressler), 194 B.R. 290, 300 (Bankr. D.R.I. 1996) (citing *Collins v. Hesson* (In re Hesson), 190 B.R. 229, 233 (Bankr. D. Md. 1995)).

48. See H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363.

49. H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363.

50. *Hesson*, 190 B.R. at 235. For examples of such commentary, see, e.g., Alexander, supra note 27, at 392-93 (urging that jurisdiction of marital debts remain with family courts); Scheible, supra note 34, at 631-35 (advocating that bankruptcy courts abstain from determining nature of marital debts and defer to state courts); Otilie Bello, Comment, Bankruptcy and Divorce: The Courts Send a Message to Congress, 13 Pace L. Rev. 643, 712 (1993) (maintaining that certain bankruptcy court decisions were "genuine outcries for legislation"); Renee Heotis, Comment, Bankruptcy and Divorce: The Countervailing Policy Concerns, 13 Whittier L. Rev. 723, 745-53 (1992) (reviewing history of problem and noting lack of uniformity and judicial economy). See generally Sandra D. Freeburger & Claude Bowles, What Divorce Court Giveth, Bankruptcy Court Taketh Away: A Review of the Dischargeability of Marital Support Obligations, 24 J. Fam. L. 587 (1986) (review of state law and divorce practitioner's guide to approaching Bankruptcy Code).

51. See Bello, supra note 50, at 705-10.

*re Sanderfoot* remarked, “[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.”<sup>52</sup>

These complaints did not fall on completely deaf ears. The amendments of the Reform Act of 1994 stemmed largely from legislative pressure to make *all* marital obligations (including property division debts) nondischargeable, rather than only those expressly characterized as alimony, maintenance, or support.<sup>53</sup>

### B. *The Amendment As Adopted*

The final version of the amendment accomplished a change less radical than preventing the discharge of all property division debts, but still spoke to concerns of critics of the old Bankruptcy Code.<sup>54</sup> Congress’s goal was to protect alimony, support, and maintenance obligations more effectively:<sup>55</sup> those proposing the amendments believed that “a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations.”<sup>56</sup> The final version of “the most sweeping change in bankruptcy law, as it relates to domestic relations, since the passage of the Bankruptcy Act of 1898 and the deci-

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52. *Farrey v. Sanderfoot* (In *re Sanderfoot*), 899 F.2d 598, 607 (7th Cir. 1990) (Posner, J., dissenting), *rev’d*, 500 U.S. 291 (1991).

53. See Mary D. Scott & Kimberley F. Woodyard, *Bankruptcy Reform Act of 1994 Sections Affecting Secured Lenders*, May 4, 1994, at \*301, \*338–40 (A.L.I.-A.B.A. Resource Materials, Banking and Commercial Lending Law), available in Westlaw, TP-ALL Database, C995ALI-ABA301.

Representative Henry J. Hyde first proposed an amendment to make all property settlement obligations nondischargeable in 1984, and continued to resubmit the bill. See Bello, *supra* note 50, at 710–11 & nn.521–23 (citing Telephone Interview with George M. Fishman, Legislative Aide to Rep. Henry J. Hyde (Oct. 16, 1991)).

54. The new exception to discharge created by the Reform Act originated in H.R. 4711, 103d Cong. (1994), introduced by Representative Slaughter. This bill proposed that property settlement debts “assumed or incurred” be nondischargeable, see *id.*, and that the debt would not be discharged unless paying the debt would be an undue hardship *and* the benefit of the discharge outweighed the detriment to the creditor. See Scott & Woodyard, *supra* note 53, at \*338. The “undue hardship” standard was developed in the context of student loans, and “could provide a measure of predictability in the outcome of a particular case” because a substantial body of law had developed around the test in the bankruptcy context. McGarity, *supra* note 8. The original proposal was eventually rejected, and “the final product created a more limited exception.” Scott & Woodyard, *supra* note 53, at \*339.

55. See H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363. Note that reform in this area of bankruptcy law corresponds with rising concerns regarding “deadbeat dads.” See, e.g., Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994). One commentator noted: “The plight of vast numbers of American children entitled to but not receiving adequate support by noncustodial parents has not failed to attract the attention of Congress. The economic disadvantage experienced by some former spouses of bankruptcy debtors has likewise created an impetus for change.” McGarity, *supra* note 8.

56. H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363.

sion of *Audubon v. Shufeldt*<sup>57</sup> provides that property debts to an ex-spouse will be discharged only if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and his dependents, or if the benefit to the debtor from discharge outweighs the harm to the nondebtor ex-spouse.<sup>58</sup> This two-pronged inquiry allows discharge if either of the two requirements are met.

In the legislative history, the Committee on the Judiciary expressed its belief that "payment of support needs must take precedence over property settlement debts," but also cautioned that "[t]he benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start."<sup>59</sup> Thus, although concerned with the plight of the disadvantaged creditor spouse, the Committee remained concerned for the debtor, and did not wish for debts to remain nondischargeable where the nondebtor spouse could easily pay them. The resulting test allows discharge of some, but not all, property settlement debts.

### C. *Beyond Bankruptcy Law*

Social realities beyond the world of bankruptcy jurisprudence oblige bankruptcy courts to respect and insure the integrity of family court judgments whenever possible. In considering the context of the amendment, it is important to recognize that women are uniquely situated: they are creditors in these discharge proceedings in much higher numbers than men, and are more harmed by discharge.<sup>60</sup> Consideration of how women are affected by divorce and bankruptcy, along with their economic status in general, is therefore essential.<sup>61</sup>

57. Claude R. Bowles, *Matrimonial Implications of the Bankruptcy Reform Act of 1994*, 15 *FairShare* 3, 3 (1995).

58. The amendment, as codified in the Bankruptcy Code, reads:

§ 523. Exceptions to Discharge

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

....

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—  
(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such a business; or  
(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor . . .

11 U.S.C. § 523(a)(15) (1994).

59. H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363.

60. See *infra* Part I.C.2.

61. For further commentary on the impact of divorce and bankruptcy on women, written before the amendments, see Alexander, *supra* note 27, at 363-69.

The special circumstances of women in the wake of divorce and in the workforce require federal bankruptcy courts to respect, rather than defeat, settlements imposed by family courts. "Women often must face the double-barreled emotional and financial impact of a divorce followed by the filing of a bankruptcy petition by their ex-husband."<sup>62</sup> The harsh financial effects of divorce substantially result from a combination of three factors: women are likely to suffer a decrease in standard of living after divorce; women generally earn less and are subject to more obstacles in the workforce; and men more often seek discharge in bankruptcy proceedings.

1. *Divorce and Economic Viability.* — Women are often jeopardized economically following divorce. Unlike men, women and children usually experience a marked decrease in their standard of living after divorce.<sup>63</sup> This quick drop in standard of living leaves women accustomed to a middle class lifestyle struggling at the poverty level.<sup>64</sup> Those who did not work outside the home prior to divorce must cope with an additional burden: the search for a job and adjustment to professional work environments after many years at home.<sup>65</sup> Further complicating the situation, divorces involving young children usually end with women assuming custody.<sup>66</sup>

Other realities compound these problems. First, men and women do not experience the "tradeoffs and tensions" of work and family life in the same ways.<sup>67</sup> Because the sex-role revolution has yet to reach home-making and childcare responsibilities, women remain at a distinct disadvantage.<sup>68</sup> Second, years of gender discrimination in the workforce have made it difficult, if not impossible, for women to become primary

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62. *Id.* at 363 (citations omitted); see also *id.* at 363 n.60 (noting that bankruptcy frequently follows divorce). Other authors and scholars have also noted this phenomenon. See, e.g., Heotis, *supra* note 50, at 723.

63. See Judith Areen, *Cases and Materials on Family Law* 711 (3d ed. 1992) (describing study finding wives and children twelve times more likely than men to be on welfare after divorce or separation, while husbands experienced increase in spendable income).

64. See Alexander, *supra* note 27, at 364-65.

65. "[F]ulltime homemakers run the risk that divorce will leave them with inadequate skills for earning a living at a paid job." Victor R. Fuchs, *Women's Quest for Economic Equality* 74 (1988).

66. See Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 787 (2d ed. 1988).

67. See Fuchs, *supra* note 65, at 58-74.

68. See *id.* Women bear the burdens of both work and childcare, effectively working a "second shift" when they arrive home for the day. See Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* 3 (1989) (over year women work extra month of twenty-four hour days). Consequently, "[w]omen's homemaking responsibilities reduce their earnings, and, in a feedback loop, the lower earnings induce behavior that further depresses women's labor market opportunities." Fuchs, *supra* note 65, at 64.

wage-earners.<sup>69</sup> Employers discriminate against working women through the imposition of gender-specific work requirements<sup>70</sup> and the invocation of women's "differences" as justification for their absence from traditionally male jobs.<sup>71</sup> Women may also confront sexual harassment at work, frustrating their efforts at mobility and even causing them to leave their jobs.<sup>72</sup>

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69. Economic reality dictates that "so long as men earn a great deal more than women, it is income-maximizing for the couple to place greater weight on the husband's career." Fuchs, *supra* note 65, at 64.

70. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1994), employers have been allowed to impose neutral job requirements on a sex-specific basis, which has the effect of mitigating liability for actions based solely on sex. These requirements often hinder women's mobility and promotion. See, e.g., *Craft v. Metromedia, Inc.*, 572 F. Supp. 868 (W.D. Mo. 1983) (holding that Title VII does not prohibit employer from imposing reasonable, but different, standards of appearance for men and women), *aff'd in part, rev'd in part*, 766 F.2d 1205 (8th Cir. 1985). Courts have held that different appearance standards for men and women are not invalid if both sexes are screened with respect to a neutral fact. See, e.g., *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (different hair length requirements for men and women valid because both were being screened with respect to community grooming standards). This does not preclude such standards from having a negative, disparate impact on women: women may still be discharged from their jobs based upon such differing standards.

Furthermore, Title VII permits gender-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1994). Thus, in certain instances where sex is considered a BFOQ for the normal operation of a job or enterprise, sex-based discrimination is permitted in hiring. Unfortunately, male qualities are sometimes considered "proxies" for certain job requirements, such as height and weight, and effectuate the permissible exclusion of women from jobs. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (despite disparate impact on women applicants, height and weight requirements held to be reasonable BFOQs for employment as prison guard). In other cases, BFOQs serve to perpetuate stereotypes and the sexual objectification of women. See, e.g., *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (defendant argued unsuccessfully that it could discriminate against males because "attractive female flight attendants and ticket agents" personified airline's "sexy image" and fulfilled its public promise to "take passengers skyward with " 'love' "). Both practices hinder women's true equality in the workforce.

71. Women are often poorly represented in the higher paying, traditionally male positions. Employers have successfully argued that women are significantly absent from certain traditionally male jobs by choice. See, e.g., *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (women not in field of commission sales because they were not interested). However, employers—wittingly or not—form gender-biased work structures and processes that prevent women from aspiring to nontraditional jobs. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *Harv. L. Rev.* 1749, 1840 (1990) (arguing that law has capacity to change employer practices and therefore, women's occupational preferences through Title VII, but fails to realize its potential). The net effect is to relegate women to lower paying jobs, thus reducing their potential for self-support.

72. A woman may be denied actual material benefits if she refuses to participate in sexual activities with an employer. This happens in the context of "quid pro quo" sexual harassment, where concrete employment benefits are conditioned on sexual favors. See,

Women's efforts to achieve economic independence are thwarted by the combination of divorce, work, and family life—problems further aggravated by pervasive discriminatory employment practices. This can make financial survival impossible without additional economic support, of which divorce settlements constitute an important component. Upheaval of the court-mandated economic order via subsequent bankruptcy action can have drastic financial and emotional consequences.<sup>73</sup> It is therefore especially harsh to deprive women of support through discharge in bankruptcy. Subsequent courts should be loathe to disturb the delicate balance that the state court has established.

2. *Women and Bankruptcy.* — In the context of marital debt discharge proceedings, women interact with the bankruptcy system in different capacities and numbers than men, and the system treats them differently.

Recently, Professor Peter Alexander conducted empirical research focusing on the gender of parties in section 523(a)(5) (marital debt) disputes.<sup>74</sup> His research concluded that men seek discharge of marital debts in bankruptcy more often than women.<sup>75</sup> Professor Alexander gathered statistics from United States bankruptcy courts in the Central District of Illinois and the Middle District of Pennsylvania to determine the number of section 523(a)(5) adversary complaints filed in 1992 and the gender of the debtors and plaintiffs.<sup>76</sup> In the Central District of Illinois, twenty-eight adversary complaints were filed under section 523(a)(5). Of the twenty-eight complaints, men were the debtors seeking discharge of debts in twenty-six cases and women were the debtors in only two.<sup>77</sup> Similarly, in the Middle District of Pennsylvania, of the eight complaints filed pursuant to section 523(a)(5), men were debtors in six cases while women were debtors in only two.<sup>78</sup> At the appellate level, cases almost always involve a husband who has filed for bankruptcy and is appealing a finding that his family obligations are not dischargeable.<sup>79</sup>

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e.g., *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Alternatively, a woman's job performance may be impaired by the presence of severe and pervasive harassment on the job that does not directly affect economic benefits. This is "hostile environment" discrimination. See *id.*

73. Cf. Alexander, *supra* note 27, at 363–65 (urging consideration of the traumatic impact of divorce on women when assessing the fairness of discharge).

74. See *id.* at 368.

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.* While this empirical research is not conclusive, it is highly suggestive. Professor Alexander also reviewed the annotations listed after 11 U.S.C.A. § 523 (West 1993) and found that out of the 92 decisions reported, the man was the debtor in 84 cases, the woman was the debtor in five cases, and the remaining three cases were joint filings. See *id.* at 368 n.88.

79. See 2 Epstein et al., *supra* note 13, § 7-29.

Cases in this area illustrate that a woman's involvement in discharge proceedings can be tremendously burdensome.<sup>80</sup> Male debtors who file for bankruptcy after divorce often know that their wives will not have the financial means to challenge discharge, and may use this knowledge to leverage desirable settlements.<sup>81</sup> Thus, "[t]he ambiguity . . . , the uncertainty and unpredictability of court decisions, and the weak financial position of many ex-wives following a divorce are all factors which seem to entice the debtor to seek the discharge."<sup>82</sup> Furthermore, women can still "lose" in the bankruptcy context even when debts are eventually ruled nondischargeable. Because the domestic relations exceptions to discharge promote litigation, women who have already suffered financially following divorce must exhaust time and money just to maintain that which the divorce court decided was rightfully theirs.<sup>83</sup> Those women who are not successful in protecting their awards from discharge—and many who are—will have expended resources only to be left impoverished.<sup>84</sup>

Courts and other observers have begun to recognize that there is a true empirical difference in the treatment of men and women in bankruptcy proceedings. The Ninth Circuit's Gender Bias Task Force reports:

The Advisory Committee on Bankruptcy asked whether there were any distinctive characteristics of bankruptcy law and practice that implicated gender. The Committee concluded that women and men may indeed be differently affected.

Despite common perception, that bankruptcy is about commerce, and that commercial activity is predominantly the activity of men, the Advisory Committee learned that, as an empirical matter, a large proportion of the litigants in bankruptcy are women, appearing as creditors and debtors. Despite the numbers of women who are litigants, the Advisory Committee reported that bankruptcy practice remains predominantly male. Further, bankruptcy law brings federal courts into areas of law not often associated with federal law; because of conflicts between obligations of support, imposed under state law, and federal bankruptcy protections accorded debtors, bankruptcy judges must now consider how state efforts to enable collection of obligations owed to former spouses are affected by federal bankruptcy interpretations of dischargeable debts. The failure of spouses to obtain such family support from former spouses may, in turn, trigger the filing of bankruptcy. Moreover, the bankruptcy law's reliance on "family" as the relevant unit may have a negative ef-

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80. See Alexander, *supra* note 27, at 387–88 (describing *In re Davidson*, 133 B.R. 795 (N.D. Tex. 1990), *rev'd* on other grounds, 947 F.2d 1294 (5th Cir. 1991), where battle over discharge began with divorce in 1983, and ensued until debt was ultimately found nondischargeable in 1991).

81. See *id.* at 387.

82. *Id.*

83. See *id.* at 388.

84. See *id.*

fect on the spouse who has not incurred the debts and may wish to stay out of bankruptcy.<sup>85</sup>

Thus, even when the bankruptcy laws are not facially discriminatory, they have a disproportionately negative impact on women.<sup>86</sup>

#### D. *Family Law in Federal Courts?*

Federal courts weighing the dischargeability of marital debts find themselves at a peculiar junction: the familiar terrain of bankruptcy and the generally eschewed territory of family law. Although Congress has given bankruptcy courts the power to consider whether a separation agreement qualifies as support or property (and now mandates that bankruptcy courts determine whether property debts are to be discharged), federal courts traditionally have been reluctant to involve themselves in family law matters. In *Ankenbrandt v. Richards*, the Supreme Court reaffirmed the "domestic relations exception," noting the long-standing practice of the Supreme Court and other federal courts to refrain from hearing such matters.<sup>87</sup> This traditional reluctance to get involved, coupled with real problems that the bankruptcy bench has encountered in applying provisions of the Bankruptcy Code relating to domestic relations, has provoked commentators to recommend that bankruptcy courts abstain from hearing such matters<sup>88</sup> or that the Bankruptcy Code be amended so as not to require that bankruptcy judges deliberate on them at all.<sup>89</sup>

There are several reasons to be concerned with federal courts determining the dischargeability of marital debts. First, hearings by bankruptcy courts may be reduced to relitigation of divorce issues with which one of the parties is unhappy.<sup>90</sup> Though bankruptcy courts frequently

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85. The Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force* 135-36 (1993).

86. See Sheila Driscoll, *Consumer Bankruptcy and Gender*, 83 *Geo. L.J.* 525, 557 (1994). Driscoll notes:

Although the bankruptcy laws are not facially discriminatory toward female debtors, the unique circumstances of women in society—particularly the phenomenon of the feminization of poverty—may allow the bankruptcy laws to have a disparate impact on women in and out of bankruptcy. The various barriers to access to the bankruptcy system may particularly affect women because women in general are poorer than men and because women may not have equal access to information about bankruptcy protection.

*Id.*

87. See *Ankenbrandt v. Richards*, 504 U.S. 689, 693-94 (1992). The case involved child abuse and, although not applying it in the specific case, established that there is a domestic relations exception to federal diversity jurisdiction. For a critical examination of the domestic relations exception, see generally Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 *Iowa L. Rev.* 1073 (1994) (arguing that "double stranded federalism explains [federal courts'] unwillingness to decide family law cases," and advocating federal court jurisdiction).

88. See Alexander, *supra* note 27, at 397; Scheible, *supra* note 34, at 577.

89. See Bello, *supra* note 50, at 715-18.

90. See, e.g., *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 302 (Bankr. E.D. Ark. 1996) ("[T]his bankruptcy is merely an extension of the divorce proceedings. . . . [T]he



deal with discharge, the relationship of a debtor to an arm's length creditor stands in stark contrast to the relationship between the debtor and creditor in domestic bankruptcy proceedings. In this domestic context, a court may explore the lifestyles and personal histories of the parties, as well as witness emotional tensions between them. Although bankruptcy judges may argue that they are independently reviewing the facts to address issues particular to their courts, they often review the same questions as the divorce judges preceding them. Indeed, they frequently consider many of the same factors in making their determinations of whether to characterize a debt as property or support, such as the length of the marriage, the parties' intent or understanding, the health of the parties, and their earning potential.<sup>91</sup>

Second, bankruptcy courts may lack the procedural and substantive tools to determine whether marital debts should be discharged. Unlike family court judges, bankruptcy judges have not been privy to the parties' testimony at the time of divorce and may not know with certainty how the parties intended to characterize their obligations.<sup>92</sup> Even if evidence is admitted from the state court proceeding, the judges cannot witness the testimony first-hand. They are unable to observe other nonverbal messages and dynamics of the couple's relationship at the time of divorce.<sup>93</sup> To the extent that they must consider the circumstances under which the marital settlement was negotiated, these factors leave the bankruptcy courts considerably disadvantaged in determining the dischargeability of a debt. Perhaps because of this lack of experience and expertise, bankruptcy court judges<sup>94</sup> have expressed discomfort with their involvement in domestic relations. The bankruptcy courts "do not want

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debtor] did not like the outcome of the divorce proceedings and wishes to continue that contest. Unfortunately, Congress has unwittingly provided him with an opportunity to do so in the federal courts."); see also Alexander, *supra* note 27, at 373 ("Is the federal bankruptcy court violating the basic civil procedure principles of *res judicata* and collateral estoppel in addressing what appears to be the same issues and/or claims that the state divorce court already addressed in distributing marital assets and obligations?").

91. See Alexander, *supra* note 27, at 374 & n.114. Professor Alexander notes the similarities between factors listed in *Daulton v. Daulton* (In re *Daulton*), 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992), and the factors listed by Martha Fineman as affecting property division upon divorce. See Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 40-41* (1991).

92. See Alexander, *supra* note 27, at 379. Professor Sheryl Scheible suggests that state courts are the preferable arena for a variety of reasons: they show a greater interest in protecting former spouses and children from a loss of support; they have more experience and expertise in evaluating the competing interests of the parties; they are more familiar with local economics in relation to the parties' needs and often employ specially trained personnel; they are in a better position to analyze the competing policy interests in modifying a support award; they are accustomed to weighing economic and noneconomic factors in such proceedings; and they have the power to increase as well as decrease the amount of marital support awarded. See Scheible, *supra* note 34, at 636.

93. See Alexander, *supra* note 27, at 379.

94. See *id.* at 369 & n.92 (citing interviews with several bankruptcy judges who commented that bankruptcy issues are being taken over by nonbankruptcy issues, such as

to crowd their dockets with matters that seem only tangentially related to bankruptcy law . . . ."<sup>95</sup> They do not want to sit as " 'super-divorce' courts,"<sup>96</sup> and anecdotal evidence suggests that some bankruptcy judges would prefer that jurisdiction over marital debts remain with divorce courts.<sup>97</sup> Bankruptcy courts are not situated to consider adequately noneconomic factors, and so should avoid such considerations.

Although bankruptcy courts may not be expert in the nuances of domestic relations, they do have substantial experience in bankruptcy law, which should remain the focus of discharge litigation. The concerns articulated above suggest that bankruptcy judges should strive to limit their determinations as much as possible to the relative economic positions of the two parties, and accept prior family court determinations regarding the intent and actions of the parties during and after marriage.

## II. CURRENT ENFORCEMENT OF THE REFORM ACT

The new amendments are a conscientious and necessary augmentation of the Bankruptcy Code's previously inadequate protection of marital debts. While problems remain, the amendments have successfully shielded more marital debts from discharge.<sup>98</sup> Notwithstanding Congress's efforts, however, difficulties in evaluating the support/property dichotomy remain. Reviews of the statute from the bankruptcy bar and bench have been mixed. Likewise, a survey of the case law to date reveals a judiciary perplexed by the amendments and unable to find tenable standards to apply.

### A. *Continuing Difficulties in Discharge Analysis*

Congress's laudable intentions in passing reform have been frustrated by the absence of substantial legislative history or explicit standards to guide enforcement. Bankruptcy judges are left with little direction on procedural and interpretive issues. Under the Reform Act, determining the dischargeability of marital debts involves sections 523(a)(5) and

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domestic relations matters, and that this phenomenon contributes to increasing workload).

95. *Id.* at 392.

96. *Long v. Calhoun* (In re Calhoun), 715 F.2d 1103, 1110 n.12 (6th Cir. 1983).

97. See *Collins v. Hesson* (In re Hesson), 190 B.R. 229, 236 (Bankr. D. Md. 1995) (citing Alexander, *supra* note 27, and noting that Professor Alexander advises "[m]uch to the prayers of some bankruptcy judges that jurisdiction over marital debts should remain in the divorce court with the bankruptcy court serving as an adjunct to enforce the state court orders"); cf. *Schmitt v. Eubanks* (In re Schmitt), 197 B.R. 312, 317 (Bankr. W.D. Ark. 1996) (stating that section 523(a)(15)(B) was "an issue Congress foolishly placed exclusively before the federal courts rather than state domestic and family courts which are clearly the courts with the expertise to assess need of the former spouses and their families" and arguing that state courts should have concurrent jurisdiction).

98. See *infra* note 126.

523(a)(15).<sup>99</sup> The court first decides under section 523(a)(5) whether the debt incurred as part of the divorce decree to a spouse, former spouse, or child of the debtor is "for alimony to, maintenance for, or support of such spouse or child," or is more appropriately characterized as a property division debt.<sup>100</sup> In classifying marital debts, bankruptcy courts have considered as many as twenty factors.<sup>101</sup> If the court determines that the debt is in the nature of alimony, maintenance, or support, the debt cannot be discharged and the inquiry ends.<sup>102</sup>

If the court instead finds the marital debt to be a property division debt, it is no longer automatically dischargeable. Such a finding triggers the two-pronged inquiry of the new section 523(a)(15).<sup>103</sup> Under the new section, the property debt may not be discharged unless the debtor does not have the ability to pay the debt, or unless the benefit of the discharge to the debtor outweighs any detrimental consequences of such

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99. For proceedings under section 523(a)(15), the Reform Act applies prospectively to bankruptcies filed after October 22, 1994. See 11 U.S.C. § 101 note (1994) (Effective Date of 1994 Amendment). Unlike cases under section 523(a)(5), which may be tried in state or federal court, cases under section 523(a)(15) are under exclusive jurisdiction of the federal courts. See 11 U.S.C. § 523(c)(1). This distinction from section 523(a)(5) actions is important because it creates what some have termed a "procedural trap . . . for the unwary creditor spouse." See Michaela M. White, *Divorce After the Bankruptcy Reform Act of 1994: Can You Stay Warm After You Split the Blanket?*, 29 *Creighton L. Rev.* 617, 626 (1996). The creditor spouse must file an adversary proceeding within sixty days of the first meeting of the creditors, or the debt will be discharged. See *Fed. R. Bankr. P.* 4007(c)(1994). The creditor could still argue in state or federal court that the debt is in the nature of alimony, maintenance, or support under section 523(a)(5), and therefore not dischargeable. However, if the court determines that it is a property settlement debt, the debt could be considered discharged because of failure to raise the property settlement claim in federal court in a timely manner. See White, *supra*, at 627.

100. 11 U.S.C. § 523(a)(5).

101. Some of the factors are quite similar to those used in section 523(a)(15) determinations. See Alexander, *supra* note 27, at 361 n.54 (citing *Daulton v. Daulton*, 139 B.R. 708 (Bankr. C.D. Ill. 1992)). Since such factors are "weighted differently . . . across the country," commentators have criticized their use. *Id.* at 361-62.

Among such factors, considerable attention has been devoted to determining the intent of the parties at the time of the dissolution of the marriage. See Scheible, *supra* note 34, at 594-96.

Note also that the "bankruptcy court makes an assessment and characterization of evidence independent from the divorce court's previous findings." Alexander, *supra* note 27, at 360 (footnote omitted).

102. See 11 U.S.C. § 523(a)(5).

103. See 11 U.S.C. § 523(a)(15). It should be noted that debts that are not discharged under Chapter 7 and Chapter 11 of the Bankruptcy Code may still be dischargeable under Chapter 13, which allows fewer exceptions to discharge. See Bowles, *supra* note 57, at 5; McGarity, *supra* note 8. But see *In re Auld*, 187 B.R. 351, 352 (Bankr. D. Kan. 1995) (holding section 523(a)(15) exception was not dischargeable under section 1328(a), but incorporating new test into section 1328(b) "hardship discharge" determination). For a general sketch of the differences among these chapters, see *supra* notes 16-25 and accompanying text.

discharge to the spouse, former spouse, or child.<sup>104</sup> Although a creditor seeking a judgment of nondischargeability normally bears the burden of proof beyond a preponderance of the evidence,<sup>105</sup> in property division cases the debtor will most likely bear the burden.<sup>106</sup>

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104. See 11 U.S.C. § 523(a)(15). Several approaches have emerged regarding the appropriate date for measuring ability to pay and impact of discharge. Some early cases determined that the correct time for assessing the relative conditions of the parties is at the time of bankruptcy filing. See, e.g., *Anthony v. Anthony* (In re Anthony), 190 B.R. 433, 438 (Bankr. N.D. Ala. 1995); *Carroll v. Carroll* (In re Carroll), 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995); *Becker v. Becker* (In re Becker), 185 B.R. 567, 570 (Bankr. W.D. Mo. 1995). Other courts measure at the time of trial. See, e.g., *Dressler v. Dressler* (In re Dressler), 194 B.R. 290, 300 (Bankr. D.R.I. 1996); *Bodily v. Morris* (In re Morris), 193 B.R. 949, 952 (Bankr. S.D. Cal. 1996); *Gantz v. Gantz* (In re Gantz), 192 B.R. 932, 934 (Bankr. N.D. Ill. 1996); *Beicher v. Owens* (In re Owens), 191 B.R. 669, 674 (Bankr. E.D. Ky. 1996); *Collins v. Hesson* (In re Hesson), 190 B.R. 229, 238 (Bankr. D. Md. 1995). Finally, some courts expand the inquiry into present and *future* circumstances. See, e.g., *Schmitt v. Eubanks* (In re Schmitt), 197 B.R. 312, 316 (Bankr. W.D. Ark. 1996); *McGinnis v. McGinnis* (In re McGinnis), 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996); *In re Smither*, 194 B.R. 102, 107 (Bankr. W.D. Ky. 1996); *Scott v. Scott* (In re Scott), 194 B.R. 375, 380 (Bankr. D.S.C. 1995).

105. See *Garner v. Garner*, 498 U.S. 279, 287 (1991). In certain circumstances, however, such as when a debtor seeks to discharge a student loan, the debtor is required to show circumstances meriting the dischargeability of a debt. See *Bachner v. Illinois ex rel. Ill. Student Assistance Comm'n* (In re Bachner), 165 B.R. 875, 880–81 (Bankr. N.D. Ill. 1994).

106. The new amendment is silent on the issue of burden of proof, see 11 U.S.C. § 523(a)(15), and a split of authority on this issue has already emerged. See *White*, supra note 99, at 628–30. For extensive discussion of this split, see *Stone v. Stone* (In re Stone), 199 B.R. 753, 758–85 (Bankr. N.D. Ala. 1996).

The majority of courts, in construing the new amendment, have held that the burden of proof is on the debtor. See, e.g., *Anthony*, 190 B.R. at 436; *Phillips v. Phillips* (In re Phillips), 187 B.R. 363, 368 (Bankr. M.D. Fla. 1995); *Carroll*, 187 B.R. at 200; *Becker*, 185 B.R. at 569; *Hill v. Hill* (In re Hill), 184 B.R. 750, 753 (Bankr. N.D. Ill. 1995).

Bankruptcy Judge Richard DeGunther explained the policy that necessitates this result:

Section (A) of 523(a)(15) requires a showing that the Debtor does not have ability to pay. If the burden is placed on the Plaintiff to show the Debtor does not have the ability to pay, the Plaintiff would want to fail to meet the burden. Similarly, section (B) requires a showing that discharging the debt would result in a greater benefit to the Debtor. Again, if the burden is on the Plaintiff, the Plaintiff would want to fail to meet the burden. Thus, by the very nature of Section 523(a)(15), the burden of the exceptions must shift to the Debtor.

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The burden shift amplifies the policy that even though the debtor ordinarily is entitled to a discharge of debts in bankruptcy, the debtor must at times show he or she is deserving of the dischargeability of a particular debt.

*Hill*, 184 B.R. at 753–54; see also *McGarity*, supra note 8 (“[I]t appears that once an action has been filed the burden of production of evidence shifts to the debtor to show inability to pay or to show that the benefit of the discharge to the debtor outweighs the detriment to the creditor.”).

In contrast, some courts place the burden squarely on the objecting creditor. See, e.g., *Wiley v. Wiley* (In re Wiley), 198 B.R. 1007, 1013 (Bankr. S.D. Fla. 1996); *Adie v. Adie* (In re Adie), 197 B.R. 8, 9 n.1 (Bankr. D.N.H. 1996); *Dressler*, 194 B.R. at 304; *Kessler v. Butler* (In re Butler), 186 B.R. 371, 373 (Bankr. D. Vt. 1995); see also *Woodworth v.*

The first prong of the new test—ability to pay—is relatively straightforward and objective.<sup>107</sup> If the debtor is unable to pay without jeopardizing support of himself, his business, or his dependents, the debt is discharged without further inquiry.<sup>108</sup> The more difficult task comes in applying section 523(a)(15)(B)—the balancing test that weighs the benefit of discharge to the debtor against the detriment to the creditor.<sup>109</sup> One bankruptcy judge characterized the inquiry this way:

Section 523(a)(15)(B) requires this Court to exercise its pure equitable powers. To apply this section as Congress intended, this Court must in essence evaluate the lifestyles of the parties and measure the benefit of former husband's discharge against the degree of harm suffered by former wife. The legislative history of this section essentially requires this Court to make a value judgment in deciding which party suffers the most.<sup>110</sup>

It is in this area that courts have had the most difficulty discerning standards for guidance. With little direction from Congress<sup>111</sup> and no analogous provision elsewhere in the Bankruptcy Code,<sup>112</sup> a variety of standards, often collectively articulated as a "totality of the circumstances

Woodworth (In re Woodworth), 187 B.R. 174, 177 (Bankr. N.D. Ohio 1995) (relying on case decided before section 523(a)(15) was passed).

Finally, a few courts use a bifurcated burden of proof, holding that the debtor has the burden to prove inability to pay under section 523(a)(15)(A), then the burden shifts to the creditor to show that the detrimental consequences to the creditor outweigh the benefits to the debtor under section 523(a)(15)(B). See, e.g., In re Patterson, 199 B.R. 21, 22 (Bankr. W.D. Ky. 1996); Morris v. Morris (In re Morris), 197 B.R. 236, 243 (Bankr. N.D. W. Va. 1996); *Hesson*, 190 B.R. at 239.

A full analysis of this question is beyond the scope of this Note. It should be noted, however, that the new amendments would benefit from a uniform standard in this area.

107. A number of courts have noted that the phrase "ability to pay" essentially mimics the language of section 1325(b)(2), which is known as the "disposable income test." See, e.g., *Hill*, 184 B.R. at 755. This test "focuses on whether the debtor's budgeted expenses are reasonably necessary." *Id.* Most courts have used the disposable income test in their analysis of section 523(a)(15)(A). See *Morris*, 197 B.R. at 243 ("[M]ost courts have seen fit to apply [the] test to the facts presented in [the section 523(a)(15)(A)] context."). But cf. *Humiston v. Huddelston* (In re Huddelston), 194 B.R. 681, 687-88 (Bankr. N.D. Ga. 1996) (arguing that although disposable income analysis should figure into section 523(a)(15)(A), "such a single faceted inquiry cannot encompass the totality of a court's consideration in applying section 523(a)(15)."). Because courts have an analogous Bankruptcy Code section for guidance in the section 523(a)(15)(A) context, it seems to have caused less controversy, and will not be analyzed in this Note.

108. See 11 U.S.C. § 523(a)(15); *Hesson*, 190 B.R. at 239; *Carroll*, 187 B.R. at 200.

109. See 11 U.S.C. § 523(a)(15)(B).

110. *Phillips*, 187 B.R. at 369. The court goes on to assure the reader that it is not "shy to fulfill its role in deciding what is 'fair'." *Id.*

111. See *Becker*, 185 B.R. at 569 ("[T]here is no legislative history to guide the Court, thus, I am left with the plain language of the Code section.").

112. See *Hill*, 184 B.R. at 756 ("The lack of an analogous Code provision compels the Court to search for its own guidelines for balancing the equities."); see also McGarity, *supra* note 8 ("The 'benefit' balancing test does not have an analogous statutory provision . . .").

test,"<sup>113</sup> have emerged to determine dischargeability, leaving judges adrift and practitioners puzzled about which standards prevail.

### B. *Response to the New Amendments*

Practitioners and judges recognize that the new amendments to section 523 are groundbreaking; one commentator even claims that they represent part of "the most sweeping change in bankruptcy law" relating to domestic relations in almost 100 years.<sup>114</sup> It seems certain that at a minimum, the Reform Act "codifies a new social policy."<sup>115</sup> Certainly, the new amendments reflect Congress's awareness of the inadequacy in protecting only support debts from discharge. Enactment of the amendments affirmed congressional commitment to the policy that "a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations."<sup>116</sup>

Although commentators applaud the goals and purposes of the new legislation, most believe that Congress's strategy for interpretation and implementation of the statute by bankruptcy courts is, at best, opaque.<sup>117</sup> Several judges and other commentators, noting that there is not even an analogous statutory provision to furnish guidance, have attempted to formulate their own guidelines. Not surprisingly, these efforts have yielded a variety of standards.<sup>118</sup> Other judges have relied exclusively on the lan-

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113. See, e.g., *Beasley v. Adams* (In re Adams), 200 B.R. 630, 635 (Bankr. N.D. Ill. 1996); *Sterna v. Paneras* (In re Paneras), 195 B.R. 395, 404 (Bankr. N.D. Ill. 1996); *Humiston v. Huddelston* (In re Huddelston), 194 B.R. 681, 689 (Bankr. N.D. Ga. 1996); *Gantz v. Gantz* (In re Gantz), 192 B.R. 932, 936 (Bankr. N.D. Ill. 1996); *Taylor v. Taylor* (In re Taylor), 191 B.R. 760, 766 (Bankr. N.D. Ill. 1996); *Florio v. Florio* (In re Florio), 187 B.R. 654, 658 (Bankr. W.D. Mo. 1995).

114. Bowles, supra note 57, at 3.

115. Ellis, supra note 1, at 81 ("Under the new Act, bankruptcy courts must now affirmatively protect the interests of the debtor's spouse, former spouse, and children.")

116. H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.A.N. 3340, 3363.

117. See, e.g., Bowles, supra note 57, at 4 ("Congress' intent was not clearly stated in the resulting legislation."). Bowles lists a set of questions that seem to remain unanswered by the amendment: "Who has the burden of proof? . . . Who has standing to bring these actions? . . . What is dischargeable or nondischargeable under this section? . . . What does the term 'in the course of a divorce or separation' mean? . . . How will the 'reasonably necessary income and property' test be applied?" *Id.* at 4-5; see also Arthur B. Federman, *The Bankruptcy Reform Act of 1994*, 51 J. Mo. B. 105, 105 (1995) ("By its nature the maintenance versus property settlement issue has always been murky. Well, it just got murkier."). But see *Anthony v. Anthony* (In re Anthony), 190 B.R. 433, 435-36 (Bankr. N.D. Ala. 1995) ("The legislative history of the section is uncharacteristically clear and is helpful in deciding this matter.").

118. See, e.g., *Anthony*, 190 B.R. at 437 ("Factors . . . include: changes in circumstances from the time of the divorce or separation to the filing of the bankruptcy petition; the relative income and worth of the parties; employment or potential for employment; the nondebtor's responsibility for other debts; a comparison of the debtor's and nondebtor's post-bankruptcy obligations; the present financial conditions of the parties; and, effect on children, if there are any."); *Carroll v. Carroll* (In re Carroll), 187 B.R. 197, 201 (Bankr. S.D. Ohio 1995) ("In light of the lack of an analogous Bankruptcy Code provision, . . . the Court must examine factors such as the income and expenses of

guage of the statute without articulating any guiding considerations.<sup>119</sup> Observers have also expressed concern that the new provision will perpetuate battles fought in divorce court into subsequent bankruptcy proceedings.<sup>120</sup>

Imperfect congressional efforts to resolve the problem of property division debts have left considerable confusion and frustration in their wake. A few judges have even registered their complaints in recent opinions, rejecting the balancing test as too flexible to provide meaningful guidance. Judge DeGunther explains:

Bankruptcy Judges are often called upon to apply a totality of the circumstances analysis to the interpretation of subjective terms. And we do it with a conscientious vigor. But have we ever been called upon to decide a more illusive statutory standard than the benefit of a discharge to Party A versus the detrimental consequences to Party B?<sup>121</sup>

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both parties, the nature of the debts, and the non-Debtor spouse's ability to pay relevant debts. The Court must therefore review the totality of the circumstances . . ."); *Hill v. Hill* (In re Hill), 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995) ("The lack of an analogous Code provision compels the Court to search for its own guidelines for balancing the equities. Factors to examine include, but are not limited to the following: the income and expenses of both parties; whether the nondebtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the nondebtor spouse's ability to pay."); see also McGarity, *supra* note 8 ("Factors to be considered in balancing the benefit of the debtor's discharge against the detriment to the creditor might include the amount of the debtor's exempt property, the income of both parties, the number of dependents of each, and whether the non-debtor former spouse is also liable to creditors assigned to the debtor in divorce.").

119. See, e.g., *Collins v. Hesson* (In re Hesson), 190 B.R. 229, 232 (Bankr. D. Md. 1995); *Phillips v. Phillips* (In re Phillips), 187 B.R. 363, 368 (Bankr. M.D. Fla. 1995); *Kessler v. Butler* (In re Butler), 186 B.R. 371, 373 (Bankr. D. Vt. 1995); *Becker v. Becker* (In re Becker), 185 B.R. 567, 569 (Bankr. W.D. Mo. 1995).

120. For analysis of this problem in greater depth, see *supra* text accompanying notes 90-91; *infra* note 231.

121. *Hill*, 184 B.R. at 756. Judge Conrad was concerned with the nature of the new amendment:

It has been said that one should never watch laws or sausage being made, and section 523(a)(15) of the Bankruptcy Code is no exception to that caution. Section (a)(15) is a pernicious creature. Using it is equivalent to applying acupuncture without a license because it does not heal the emotional wounds from a divorce. Indeed, section (a)(15) is an intrusive invasion into the private lives of a former couple who had agreed in their divorce to separate forever. Section (a)(15) can be described as an impediment to the emotional fresh start in life that divorce may bring. It also can impede the fresh start of bankruptcy.

*Butler*, 186 B.R. at 372; see also *Schmitt v. Eubanks* (In re Schmitt), 197 B.R. 312, 317 (Bankr. W.D. Ark. 1996) ("The terms of this statute require a Court weigh [sic] the benefit against the detriment—an odd balancing and an impossibly amorphous standard."); *Gantz v. Gantz* (In re Gantz), 192 B.R. 932, 937 (Bankr. N.D. Ill. 1996) ("In the year and a half since its effective date, Section 523(a)(15) has provided a formidable challenge to the interpretive skills of bankruptcy practitioners and judges.").

These comments, along with a review of recent cases, suggest that while the new section 523(a)(15)(B) is an important step toward better protection of marital debts, it is in need of further clarification.

### C. Sampling of Current Decisions

Some have warned that “[t]he small stream of domestic relations cases which have been flowing through the Federal Courts under 11 U.S.C. § 523(a)(5) now threatens to become a mighty river under 11 U.S.C. § 523(a)(15).”<sup>122</sup> A considerable body of case law has certainly accumulated since Congress enacted the amendments. This Part analyzes how bankruptcy courts have applied the new amendment to section 523 through a review of *Dressler v. Dressler* (*In re Dressler*),<sup>123</sup> *Bodily v. Morris* (*In re Morris*),<sup>124</sup> and *In re Smither*.<sup>125</sup>

The purpose of exploring these cases is to discover how section 523(a)(15)(B) is being implemented in practice. It is impossible to flesh out, in the span of three cases, all of the nuances and wrinkles involved in application of the amendment. The goal of this discussion, instead, is to illustrate the range of judicial interpretation and application of the statute. All of these decisions hinged on application of the balancing test, as opposed to the first prong of the new amendment. The first two cases reached results that are inconsistent with the goals of the statute; the last case arrived at a result that better meets those goals. Not all decisions resulting from the new statute are “bad” or unjust. To the contrary, many decisions arrive at the “right” result.<sup>126</sup> The larger point here is that courts have no definite instructions on *how* to apply the statute, resulting in a variety of approaches and leaving the case law in disarray. These varied approaches sometimes dictate results that do not fully realize Congress’s purposes.

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122. *In re Smither*, 194 B.R. 102, 112 (Bankr. W.D. Ky. 1996).

123. 194 B.R. 290 (Bankr. D.R.I. 1996).

124. 193 B.R. 949 (Bankr. S.D. Cal. 1996).

125. 194 B.R. 102 (Bankr. W.D. Ky. 1996).

126. In the first cases decided under the Reform Act, debtors apparently were more successful than creditors. See *Debtors Are Early Winners in New Discharge Battle*, *Consumer Bankr. News* (BCD), Sept. 28, 1995, at 1, 4. However, among the growing number of cases decided since the effective date of the amendment, more debts have been protected rather than discharged.

In some cases, the equitable outcome will be to discharge the debt. For an example of a case justifiably reaching this result, see, e.g., *Taylor v. Taylor* (*In re Taylor*), 191 B.R. 760 (Bankr. N.D. Ill. 1996). In *Taylor*, the creditor ex-wife’s financial status was far superior to the debtor’s, and her deposition testimony included “her candid admission that the detrimental consequence to her if [the debtor did] not have to repay her the subject debt ‘[would] be psychological more than anything else.’” *Id.* at 763.

Because Congress’s intent was to better protect marital debts from discharge, this Note focuses on cases where discharged debts arguably should have been protected—decisions that are too pro-debtor. It must also be recognized, however, that some cases have at least arguably been too pro-creditor. See *Smither*, 194 B.R. at 110; see also *infra* note 148 (describing critique made by *Smither* court).



1. *Dressler v. Dressler*. — Fredda and Michael Dressler dissolved their marriage of approximately twenty years on November 19, 1993.<sup>127</sup> The settlement agreement provided that Michael would pay child support and alimony to Fredda, who had not worked outside the home for most of the marriage.<sup>128</sup> The agreement also awarded Fredda the family residence, for which she eventually was to assume primary financial responsibility.<sup>129</sup> Michael received other properties (the "Providence properties"), and was responsible for their associated debt; he also agreed to indemnify Fredda for any losses sustained because of her liability on the mortgage obligations of those properties.<sup>130</sup>

When the settlement agreement was finalized, a loan secured by the Providence properties was in default.<sup>131</sup> Although Michael was negotiating with the bank to release Fredda from personal liability on the obligation, no agreement was reached, and after the divorce the bank foreclosed on the Providence properties and obtained a deficiency judgment against Fredda, also seeking to collect the deficiency against Michael.<sup>132</sup> Fredda eventually settled with the Trust, owing her father \$52,500 plus interest for money loaned to her to satisfy the settlement.<sup>133</sup> At the time of the discharge litigation, Fredda had sold the family residence, had approximately \$150,000 in the bank, and was working as a real estate broker, with a salary of approximately \$40,000.<sup>134</sup> Michael had a 1994 income of \$130,170 and a 1995 salary of approximately \$100,000.<sup>135</sup> Both parties had remarried, and Fredda's husband had substantial assets and income.<sup>136</sup> At some point during this time, Michael filed for Chapter 7 bankruptcy.

Michael's assumption of the Providence properties debt and maintenance of insurance relating to the Providence properties were the source of the court's section 523(a)(15) analysis. After finding that the hold harmless/debt assumption obligation was not excepted from discharge under section 523(a)(5),<sup>137</sup> the court proceeded to examine dischargeability under section 523(a)(15).<sup>138</sup> Judge Haines found that Michael had sufficient income to pay his hold harmless obligation to

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127. See *Dressler*, 194 B.R. at 293.

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.* at 294.

132. See *id.*

133. See *id.*

134. See *id.* at 293.

135. See *id.*

136. See *id.* The court did not consider Fredda's husband's assets because "her personal resources and earning capacity [made] it unnecessary to do so." *Id.* at 305 n.36.

137. In other words, the court found that the debt was neither alimony nor support. See *id.* at 297.

138. The court found little guidance to interpret the statute:

Here, we leave the beaten path. Section 523(a)(15) is relatively new and is not yet the subject of authoritative case law in the First Circuit or this district. Moreover,

Fredda, satisfying section 523(a)(15)(A).<sup>139</sup> He then continued with application of the section 523(a)(15)(B) balancing test. With no explicit articulation of the factors considered in making this determination, the court held that Michael's debt to her would be discharged "[b]ecause Fredda [had] the present ability to pay the obligation without any other demonstrated detrimental consequence . . . ."<sup>140</sup> Fredda had "cash in hand" from which she could repay the money that she had borrowed from her father, and was capable of earning at least \$40,000 a year.<sup>141</sup> Given these realities, she did not demonstrate "the character of detriment that Congress had in mind when it added § 523(a)(15) to the Code."<sup>142</sup> According to the court she could "easily pay."<sup>143</sup>

This result distorted the amendment's goals of better protecting post-divorce debt obligations. Though the court found (as provided by the amendments) that Michael's ability to pay the debt alone did not protect Fredda from discharge, Fredda's ability to pay that debt, without regard to other factors, was sufficient to protect Michael. There was no "balancing" involved in the court's determination: the court paid scant attention to the detrimental consequences resulting from Fredda's payment of the debt, and did not discuss at all Michael's "benefit" from the discharge.<sup>144</sup> A brief look at the relative financial situations of Fredda and Michael at the time of trial reveals that from a strictly economic standpoint, the benefit of discharge would likely not outweigh the detriment to Fredda.<sup>145</sup> Judge Haines himself noted that "Fredda could shoulder debt even less easily than Michael" when analyzing the debt under section 523(a)(5).<sup>146</sup> Furthermore, Michael filed for Chapter 7 bankruptcy, and presumably was obtaining the financial relief that bank-

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the statute is awkwardly drawn, leading the courts that have considered it to disparate notions of how it is to be applied.

Id. at 299.

139. See id. at 304.

140. Id. at 305.

141. See id.

142. Id.

143. Id.

144. See id. The court sought to justify its result by characterizing the debt as one that Fredda could "easily pay," situating her in one of the few examples provided by the legislative history. See H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.A.N. 3340, 3363 ("[I]f a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged."). To the contrary, this was not a debt Fredda could easily pay. Such an assumption is not supported, given the relative financial realities of the two parties, along with the motivations and rationales of the settlement agreement.

145. See supra text accompanying notes 134-136. "Michael maintains a six-figure income with valuable perquisites. He lives with his new wife and their young child in an expensive home and drives a new car. He enjoys membership in a country club and a health club. His lifestyle is, to say the least, comfortable." *Dressler*, 194 B.R. at 304.

146. Id. at 298.

ruptcy affords.<sup>147</sup> Finally, given that both parties had the wherewithal to pay the debt in question (although Michael was arguably better situated in this regard),<sup>148</sup> the court did not consider the underlying rationale of the settlement agreement: from what can be gleaned of the couple's history, Fredda was not employed for most of the couple's twenty-year marriage, and began to work full-time just before the divorce.<sup>149</sup> The settlement provisions were most likely intended to reflect these realities, including her earning potential.<sup>150</sup> Had the court applied a thoughtful and nuanced balancing of the detriments and benefits as demanded by the statute, it seems unlikely that the debt in question would have been discharged.<sup>151</sup>

2. *Bodily v. Morris*. — Elizabeth and James Morris dissolved their marriage on November 16, 1994.<sup>152</sup> In the dissolution judgment, no spousal support was ordered because Elizabeth's income was slightly

147. See *infra* text accompanying note 219.

148. The parties in *Anthony v. Anthony* (*In re Anthony*), were in a financial position similar to the Dresslers: there was an "equality of circumstances" in that both parties had the ability to pay the debt in question. 190 B.R. 433, 440 (Bankr. N.D. Ala. 1995). In that case, the court held that the debtor (Michael), who made \$500 more on a monthly basis than his former spouse, failed to meet his burden of proof concerning dischargeability of the property division debt under section 523(a)(15)(B). See *id.* This case has been criticized, however, because the court made this finding notwithstanding the fact that his former spouse had inherited \$71,000 since the divorce, and the debtor did not own a car and was living with his mother at the time of trial. See *In re Smither*, 194 B.R. 102, 110 (Bankr. W.D. Ky. 1996) ("The language in *Anthony* and *Florio* ignores the value of the Debtor's discharge and simply blends [section 523(a)(15)(B)] into an inseparable mass with [section 523(a)(15)(A)] by making the existence of 'excess income' the determinative test of 523(a)(15)(B).").

149. See *Dressler*, 194 B.R. at 293.

150. See *supra* text accompanying notes 63–73 (describing how women in Fredda's position are often harmed by divorce and bankruptcy more than their ex-spouses).

151. For another example of less-than-rigorous application of the balancing test that arguably achieved an unjust result, albeit in dicta, see, e.g., *Woodworth v. Woodworth* (*In re Woodworth*), 187 B.R. 174 (Bankr. N.D. Ohio 1995). In *Woodworth*, the court found that the debtor was unable to pay under the first prong of section 523(a)(15). See *id.* at 177. Because the case was one of first impression, the court proceeded to analyze discharge under section 523(a)(15)(B). See *id.* Placing the burden of proof on the creditor, the court found that the benefit to the debtor outweighed the detriment to the creditor. See *id.* Judge Baxter made this finding notwithstanding several troubling facts. The debtor, although temporarily employed after losing his job, was living at home and appeared to have substantial job skills. He also spent a lump sum award from his 401-K settlement plan on buying a car for his girlfriend and other expenses, rather than paying off some of his scheduled debt. See *id.* at 176. The debtor's ex-wife also had to leave her previous jobs. Unlike the debtor, however, she was diagnosed as permanently and partially disabled with carpal tunnel syndrome, leaving her unable to capitalize on previously acquired job skills. See *id.* Also unlike the debtor, she lived alone, was self-employed, and her ability to make a profit was speculative at the time of trial. See *id.* Without articulating which factors it had considered, the court found that they did not weigh clearly in favor of either party, and that therefore the balancing test would have favored dischargeability. See *id.* at 178.

152. See *Bodily v. Morris* (*In re Morris*), 193 B.R. 949, 951 (Bankr. S.D. Cal. 1996).

greater than James's, but James was required to pay child support and to assume responsibility for one-half of two unsecured debts.<sup>153</sup> The court ordered James to make an equalization payment to Elizabeth of \$8542.68.<sup>154</sup>

James filed for Chapter 7 bankruptcy on January 13, 1995.<sup>155</sup> At that time he claimed a combined net monthly income of \$2612.26 and total monthly expenses of \$3028.<sup>156</sup> At the bankruptcy proceeding to determine dischargeability, Elizabeth testified that she owed over \$37,000 in credit card debt and \$41,000 in student loan debts that matured in October and November of 1995.<sup>157</sup> Elizabeth "steadfastly assert[ed] that she [would] not be filing Chapter 7 bankruptcy herself," but the court found that her net monthly income of \$3600 did not "realistically appear to be sufficient to pay debts of this magnitude."<sup>158</sup>

James's responsibility for the equalization payment was the subject of the discharge dispute. When the trial concluded, the court found that although James was able to pay seventy-five dollars each month in fulfillment of the equalization debt under section 523(a)(15)(A), the detriment to him outweighed the benefit to Elizabeth, "who would still be hopelessly in debt."<sup>159</sup> Applying a "totality of the circumstances" test, the court considered the income and expenses of both parties, whether the nondebtor spouse was jointly liable on the debts, the number of dependents, the nature of the debts, and the nondebtor's ability to pay.<sup>160</sup> Two especially significant factors in the court's balancing determination were James's "tight budget" and the possibility that the seventy-five dollar payment each month might jeopardize or harm the relationship he had with his children.<sup>161</sup> These factors, coupled with Elizabeth's own debt, counseled in favor of discharge.<sup>162</sup> The court opined that "[p]articularly, where the nondebtor spouse is hopelessly in debt, the best solution is for both spouses to file bankruptcy."<sup>163</sup> Elizabeth admitted at trial that she had a monthly deficit of \$461.29, not including certain necessities and the matured student loan debts; she could not, according to the court,

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153. See *id.*

154. See *id.* The equalization payment was intended to equalize allocation of responsibility for the payment of debts and the division of property between Elizabeth and James. See *id.* at 950.

155. See *id.* at 951.

156. See *id.* James later admitted that some expense items listed had been overstated, but that other expenses (income taxes, rent, and child support arrearages to the mothers of his two other minor children) had not been disclosed. See *id.*

157. See *id.*

158. *Id.*

159. *Id.*

160. See *id.* at 954 n.8 (citation omitted).

161. See *id.* at 954.

162. See *id.*

163. *Id.* (citing *Woodworth v. Woodworth* (In re *Woodworth*), 187 B.R. 174, 176-78 (Bankr. N.D. Ohio 1995); *Hill v. Hill* (In re *Hill*), 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995)).

pay her debts even when receiving the monthly equalization payment.<sup>164</sup> Thus, the court suggested that Elizabeth was "better off filing bankruptcy to deal with her debts."<sup>165</sup>

This decision is part of an alarming trend in some bankruptcy courts to discharge marital debts even when that result may increase the likelihood that the creditor will file for bankruptcy herself.<sup>166</sup> While the *Morris* court did grasp the statutory imperative to effect a balancing test, its execution of that test was perfunctory. Neither the benefit to the debtor nor the detriment to the creditor was explored in much detail. The apparent benefits to James were the alleviation, to some degree, of his "tight budget" and enabling him to spend more time and money with his other two children.<sup>167</sup> On the other side of the balance was possible bankruptcy for Elizabeth. The court carefully pointed out the extent to which discharge would not really *help* her, since she (in the court's opinion) could not pay her debts. However, the court underestimated the extent to which discharge would work to Elizabeth's *detriment*, suggesting dismissively that she file for bankruptcy herself.<sup>168</sup> The court did not appear to consider the effects that loss of the equalization payment might have on *her* relationship with her child, nor did it consider the psychological and other costs associated with bankruptcy filing.

164. See *id.* at 954.

165. *Id.* Although filing for bankruptcy could have placed Elizabeth in a position where the creditors could not collect the debt, see *supra* note 144, the statute and legislative history should not be construed as advocating bankruptcy filing for creditor ex-spouses. See *infra* notes 166–172, 236–237, and accompanying text.

166. *Willey v. Willey* (In re *Willey*), 198 B.R. 1007, 1016 (Bankr. S.D. Fla. 1996); *Hill*, 184 B.R. at 756; and *Woodworth*, 187 B.R. at 176, are three other cases where the courts would have discharged marital debts although such action meant that the creditor would likely have to file for bankruptcy herself. However, in those three cases, the debtors were unable to pay the debts under section 523(a)(15)(A). *Morris* is even more egregious: not only would Elizabeth most likely have to file for bankruptcy, but James was capable of paying the debt at issue. Moreover, here the court purposefully and paternalistically attempted to impose bankruptcy upon the creditor against that creditor's better judgment and express intentions. See *supra* text accompanying note 158; see also *Craig v. Craig* (In re *Craig*), 196 B.R. 305, 309 (Bankr. E.D. Va. 1996) ("Though the court is sympathetic to the fact that plaintiff was forced into bankruptcy by debtor's failure to live up to his obligations, several courts have suggested that, under the circumstances, bankruptcy is the best remedy available to the nondebtor spouse."); In re *Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996) (creditor's eligibility for bankruptcy considered a factor); *Collins v. Hesson* (In re *Hesson*), 190 B.R. 229, 240 (Bankr. D. Md. 1995) (court noted that nondebtor could file for bankruptcy relief as partial basis for decision); *Silvers v. Silvers* (In re *Silvers*), 187 B.R. 648, 650 (Bankr. W.D. Mo. 1995) ("[T]he only redeeming factor here is that now . . . the former spouse can discharge these obligations the same way the debtor did.").

For the opposite conclusion, see *Schmitt v. Eubanks* (In re *Schmitt*), 197 B.R. 312, 317 (Bankr. W.D. Ark. 1996) (rejecting "any notion that the nondebtor should resolve his situation by filing bankruptcy himself").

167. See *Morris*, 193 B.R. at 954.

168. See *id.*

Finally, the court disregarded Elizabeth's stated intention not to file Chapter 7 bankruptcy herself.<sup>169</sup> Judge Adler's ruling encouraged bankruptcy filing both overtly, by suggesting that Elizabeth was "better off" filing for bankruptcy,<sup>170</sup> and covertly, as discharging James's debt to Elizabeth deprived her of one source of income that could have helped her avoid bankruptcy. Furthermore, Judge Adler's determination that Elizabeth should file was no guarantee that she *would*, especially given her explicit testimony. If Elizabeth had filed for bankruptcy prior to the discharge proceeding, such filing might have suggested little economic detriment in discharge. Absent such filing, however, discharge of marital debt should not be permitted to hasten bankruptcy for the creditor. In the event that Elizabeth did not file, the detriment could be vast, as she would struggle to keep afloat, cutting both discretionary and non-discretionary spending, and falling further into debt. Possible bankruptcy should be considered "substantial detriment" to the nondebtor outweighing the debtor's need for a fresh start,<sup>171</sup> especially when the debtor has the ability to pay the debt in question, and the nondebtor does not.<sup>172</sup>

3. *In re Smither*. — Joan and Victor Smither divorced in 1993 after a twenty-year marriage.<sup>173</sup> During the marriage, Joan stayed at home to care for their children, and later decided to forego employment opportunities in order to further Victor's career.<sup>174</sup> The divorce judgment awarded Joan custody of the children and the marital residence, equally divided the marital estate, and divided other property, debts, and assets between the two parties.<sup>175</sup> The court ordered Victor to pay Joan \$2994 "in order to equalize the amount of assets awarded to each party," and to pay her attorneys' fees.<sup>176</sup>

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169. See supra text accompanying note 158.

170. See supra text accompanying note 165.

171. See *Schmitt*, 197 B.R. at 317 (implication that nondebtor would have to file for bankruptcy militates in nondebtor's favor).

172. For a case where the court considered possible bankruptcy filing by the creditor to mitigate in her favor, see *Slover v. Slover* (In re Slover), 191 B.R. 886 (Bankr. E.D. Okla. 1996). In *Slover*, the court found that the debtor would have the ability to pay the debt. Turning to the balancing test, the court stated:

Should harsh collection efforts be made . . . to collect [the debt], [the creditor] will in all probability be a prime candidate for Bankruptcy Code relief. She has been saddled with most of the debts of the marriage. When considering all the circumstances and fairness to the parties, the Court finds that, by a preponderance of the evidence, the detriment to the nondebtor spouse in this case outweighs the benefit of discharging the debt. Thus, this Court finds that the debt to [the creditor] is nondischargeable.

*Id.* at 893.

173. See *In re Smither*, 194 B.R. 102, 112 (Bankr. W.D. Ky. 1996).

174. See *id.* at 113. By making such sacrifices, Joan forfeited both career development and other financial opportunities that likely would have been beneficial following divorce.

175. See *id.* at 118.

176. *Id.*

Soon after their "bitter and hotly contested divorce," Victor filed for bankruptcy in December 1994.<sup>177</sup> At the time of the filing, the parties' circumstances had changed considerably. Both had remarried. Victor was earning \$71,175.92 annually, along with a manager incentive bonus of \$12,060. His net monthly pay was \$3400.<sup>178</sup> In his bankruptcy petition schedule, Victor listed expenses of \$4289.70 each month, including mortgage payments on a house owned by his new wife and alimony he was no longer required to pay, but not including \$1500 each month for Joan's state court attorneys' fees.<sup>179</sup> After the divorce, Joan left her job, where she earned approximately \$23,000 annually, and returned to college.<sup>180</sup> She and her new husband reported a combined income of between \$40,000 and \$50,000, excluding the child support she was receiving from Victor.<sup>181</sup> Their monthly expenses were \$3939.48, not including tithing to her church and additional charitable contributions.<sup>182</sup>

After consideration of the genesis and purposes of the Reform Act,<sup>183</sup> along with unresolved issues and differences in interpretation,<sup>184</sup> the court proceeded to analyze the dischargeability of the \$2994 equalization payment under sections 523(a)(15)(A) and (B). The court interpreted the language of the statute as clearly mandating that

a court . . . compare the standard of living of the debtor against the standard(s) of living of his or her spouse, former spouse, and/or children to determine whether the debtor will "suffer more" by not receiving a discharge of the debts in question than his or her spouse would suffer if the obligations were discharged.<sup>185</sup>

After reviewing vastly different interpretations of the balancing test, some of which seemed too biased in favor of either debtors or creditors, the court offered its own formulation of the best way to apply the balancing test:

[The court must] review the financial status of the debtor and the creditor and compare their relative standards of living to determine the true benefit of the debtor's possible discharge against any hardship the spouse, former spouse and/or children would suffer as a result of the debtor's discharge. If, after making this analysis, the debtor's standard of living will be greater than or approximately equal to the creditor's if the debt is not

177. *Id.* at 104.

178. See *id.* at 104–05. Victor and his new wife had a combined income of \$122,692, but her income was not introduced at trial. See *id.*

179. See *id.* at 105.

180. See *id.*

181. See *id.*

182. See *id.*

183. See *id.* The court also described the new statute as "a paving stone on the road to the region of Hades reserved for litigation nightmares." *Id.* at 106.

184. For discussion of unresolved issues and splits of authority in this area, see *infra* notes 204–208 and accompanying text.

185. *Smither*, 194 B.R. at 110.

discharged, then the debt should be nondischargeable under the 523(a)(15)(B) test. However, if the debtor's standard of living will fall materially below the creditor's standard of living if the debt is not discharged, then the debt should be discharged

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... .  
Judge Dickenson then articulated eleven factors that courts should consider (as a minimum) when applying the balancing test.<sup>187</sup> Considering the factors, the court concluded that both Joan and Victor had adequate resources to absorb the debt. Victor would not be driven to a significantly lower standard of living if the debt were not discharged; but neither would Joan especially suffer if the debt were discharged.<sup>188</sup> Finding that the two parties' standards of living were approximately equal regardless of discharge, the court held that Victor had failed to show that his benefit from discharge outweighed the detriment to Joan that would have accompanied discharge.<sup>189</sup>

Situated between extreme interpretations unduly favoring either debtors or creditors, Judge Dickenson's standard of living approach established a tenable middle ground, although ideally the factors considered would be more narrow in scope. By cabining the myriad factors constituting a "totality of the circumstances" in terms of the parties' relative standards of living, Judge Dickenson made the test manageable. Standards of living are substantially quantifiable and are accurate barometers for evaluating the benefits and detriments of discharge. Furthermore, his considerations include implicit presumptions that favor creditor ex-spouses in two areas, thus according proper deference to divorce settlements and respect for the congressional goal of better protecting marital obligations. First, the debt would not be discharged if the debtor's standard of living is greater than or equal to the creditor's; however, the debt would be dischargeable *only* if the debtor's standard of living falls *materially below* the creditor's. Second, the court considered as one of its factors the good faith of both parties. This is especially impor-

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186. *Id.* at 111.

187. *See id.* The factors discussed were: (1) the amount of debt involved; (2) the current income of the debtor, creditor, and their respective spouses; (3) their current expenses; (4) current assets; (5) current liabilities; (6) their health, job skills, training, age and education; (7) dependents, along with ages and any special needs; (8) any changes in financial conditions; (9) the amount of other debt which has or will be discharged in the debtor's bankruptcy; (10) whether the objecting creditor is eligible for relief under the Bankruptcy Code; and (11) whether the parties have acted in good faith in the filing of bankruptcy and the litigation. *See id.* The court also felt that it was important to consider a voluntary reduction of income by the debtor or creditor, for example, sacrifice of income in order to pursue education and career goals. *See id.*

188. *See id.* at 111.

189. *See id.* at 112. The court cited *Florio v. Florio (In re Florio)*, 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995) for the proposition that when "there is equal harm or lack of harm, a debt is nondischargeable" under the balancing test. *See Smither*, 194 B.R. at 112.



tant given the abuse of bankruptcy by ex-spouses, and congressional intent to eliminate such abuse through the new amendments.<sup>190</sup>

4. *Conclusions.* — Congress did not eradicate all problems when it amended the discharge provisions of the Bankruptcy Code by adding section 523(a)(15). Several problems remain. First, the flexibility of the balancing test, which has no guidelines or standards,<sup>191</sup> leads to a lack of uniformity and consistency<sup>192</sup> in application of the test that can translate into a high degree of subjectivity. Consequently, litigants and practitioners lack known boundaries when preparing their cases. One important justification for giving bankruptcy courts jurisdiction in domestic relations cases is promotion of uniform operation of law and a reduction in forum shopping and uncertainty for litigants.<sup>193</sup> Under the laconic command of section 523(a)(15)(B), however, courts determining the dischargeability of a marital debt have, unsurprisingly, developed a variety of approaches.<sup>194</sup> This lack of coherence thwarts uniform application of the law. Uniform application can be further frustrated by the methods courts employ in considering the relevant “factors.” The factors that courts enunciate may not be exhaustive of all factors they consider,<sup>195</sup> and as in the context of section 523(a)(5),<sup>196</sup> the courts have not evaluated the relative importance of the factors. As has also been the case with section 523(a)(5), the lack of unity in the factors informing the section 523(a)(15)(B) inquiry, along with the “wide discretion courts possess to create ad hoc hierarchies of importance, strongly contravenes the notion that the federal courts are applying the law uniformly or that there is one federal standard.”<sup>197</sup> This indeterminacy suggests that the test might be more manageable if couched in more quantifiable and less elusive terms.

A second problem is the *manner* in which some courts balance the competing interests of debtors and creditors. In the *Dressler* case,<sup>198</sup> the court did not appear to balance the competing interests at all; in

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190. See *supra* text accompanying notes 46–51, 55–56.

191. See *supra* notes 111–113 and accompanying text.

192. Inconsistent rulings among courts in this area were a problem even before the passage of the new amendments. See Alexander, *supra* note 27, at 374.

193. See *id.* at 382.

194. As the court in *Smither* noted, some courts seem to ignore any value of discharge to the debtor, and “blend[ ] [section 523(a)(15)(B)] into an inseparable mass with [section 523(a)(15)(A)] by making the existence of ‘excess income’ the determinative test of 523(a)(15)(B).” *Smither*, 194 B.R. at 110. But other courts are too pro-debtor when they disregard the balancing test “in favor of a narrow focus on the nature of the creditor’s detriment.” *Id.* at 111; see also *supra* note 144 and accompanying text.

195. See, e.g., *Hill v. Hill* (In re Hill), 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995) (factors to consider in application of section 523(a)(15)(B) “include, *but are not limited to*” a certain set (emphasis added)).

196. See *Bangert v. McCauley* (In re McCauley), 105 B.R. 315, 319 (E.D. Va. 1989) (assigning no specific weight to factors and holding that determination was in discretion of trier of fact).

197. Alexander, *supra* note 27, at 385.

198. See *supra* Part II.C.1.

*Morris*,<sup>199</sup> the court performed the balancing test only superficially. Without a true balancing of the competing equities, accurate and just determinations are simply not possible. It certainly is not difficult to find for the plaintiff or defendant in a given case when considering only one side of the equation.

Some recent cases also evince a failure to consider much of the underlying rationale behind property division settlements, which might have an effect on discharge, especially when the parties are similarly situated in their ability or inability to pay the debt in question. As noted above, divorce settlements can be critical support, and property settlements are often substituted for alimony as a means of financial survival for ex-spouses,<sup>200</sup> typically women. Furthermore, federal courts are altering economic arrangements of the more expert family courts, who have made careful determinations as to how property should be divided.<sup>201</sup> Subsequent to divorce, the allocation of property and financial resources has already been determined, either by the state court or the parties themselves.<sup>202</sup>

In addition, some decisions tend to uphold discharge notwithstanding a very real threat that the creditor will have to file for bankruptcy.<sup>203</sup> The courts in these cases disregard the considerable detriment that would result should the creditor ex-spouses be required to file for bankruptcy, and consider such a possibility as mitigating in favor of the debtor rather than the creditor. Though such a change in circumstances cannot always be averted, courts should avoid allowing discharge of marital debt to increase the likelihood of bankruptcy for the creditor.

Finally, a review of the cases to date reveals numerous splits of authority, including burden of proof issues,<sup>204</sup> the appropriate point in time to assess the parties' respective financial situations,<sup>205</sup> whether courts should consider the parties' new spouses' incomes in the

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199. See *supra* Part II.C.2.

200. See *supra* note 46 and accompanying text; see *supra* Part I.C.2.

201. Cf. *supra* text accompanying notes 92–97 (discussing bankruptcy courts' lesser capacity to effectively adjudicate domestic relations cases).

202. See *supra* notes 29–33 and accompanying text.

203. See *supra* note 166 and accompanying text.

204. See *supra* note 106.

205. See *supra* note 104.

calculus,<sup>206</sup> and whether debts may be partially discharged,<sup>207</sup> causing some judges to clamor for legislative remediation.<sup>208</sup> In light of the ensuing confusion and frustration caused by the new section, a finite set of specific considerations would simplify the courts' role, save time, and better implement congressional intent.

### III. PROPOSALS FOR APPLYING SECTION 523(A)(15)(B)

Although section 523(a)(15) provides creditor ex-spouses greater protection than the old Bankruptcy Code, practical judging problems continue to plague the bankruptcy bench. In creating the balancing test of section 523(a)(15)(B), Congress did not alleviate all of the problems that are both endemic to section 523(a)(5) determinations and surfacing

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206. Many cases impute current spouses' income in their determinations. See, e.g., *Beasley v. Adams* (In re Adams), 200 B.R. 630, 634 (Bankr. N.D. Ill. 1996) (following recent opinions that "courts cannot possibly determine exactly how much of a debtor's own income is truly 'necessary' for his and his dependent's [sic] support without inquiring whether or not, and how much, his new spouse is contributing to the family's maintenance"); *Cleveland v. Cleveland* (In re Cleveland), 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996) (considering income of new spouse or spousal equivalent in applying section 523(a)(15)(A)); *Celani v. Celani* (In re Celani), 194 B.R. 719, 721 (Bankr. D. Conn. 1996) ("Where the debtor and/or the debtor's former spouse have remarried, the financial circumstances of the new spouses logically and sensibly should be included in the balancing test . . ."); *Gantz v. Gantz* (In re Gantz), 192 B.R. 932, 936-37 (Bankr. N.D. Ill. 1996) (refusing to consider current spouse's income for section 523(a)(15)(A), but using it for section 523(a)(15)(B)); *In re Smither*, 194 B.R. 102, 108 (Bankr. W.D. Ky. 1996) ("[W]here a debtor has remarried prior to the trial . . . his or her spouse's income should be included in the calculation of the debtor's disposable income."); *Hill v. Hill* (In re Hill), 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995) (exploring impact of new spouse's income upon debtor's ability to pay); *Comisky v. Comisky* (In re Comisky), 183 B.R. 883, 883-84 (Bankr. N.D. Cal. 1995) (using new spouse's income in analysis).

Other courts do not consider such income. See, e.g., *Carter v. Carter* (In re Carter), 189 B.R. 521, 522 (Bankr. M.D. Fla. 1995) (refusing to impute income of new spouse, since "[t]he language of 523(a)(15)(A) restricts the determination of the ability to pay solely to the income of the debtor"); see also *Willey v. Willey* (In re Willey), 198 B.R. 1007, 1015 (Bankr. S.D. Fla. 1996) ("[N]o case law has ever imputed or considered the income of a debtor's *girlfriend*, and this Court will not consider same, as it could lead to a chilling effect on the courtship and re-marriage of divorced partners." (emphasis added)).

207. One of the early section 523(a)(15) cases allowed partial discharge. See, e.g., *Comisky*, 183 B.R. at 884. Some other courts have followed suit. See, e.g., *McGinnis v. McGinnis* (In re McGinnis), 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996); *Humiston v. Huddelston* (In re Huddelston), 194 B.R. 681, 689 (Bankr. N.D. Ga. 1996); *Smither*, 194 B.R. at 109. Other cases have held that the statute demands an all or nothing approach. See, e.g., *Taylor v. Taylor* (In re Taylor), 191 B.R. 760, 766 (Bankr. N.D. Ill. 1996); *Silvers v. Silvers* (In re Silvers), 187 B.R. 648, 649 (Bankr. W.D. Mo. 1995); *Hill*, 184 B.R. at 755 n.15 (refusing to resolve controversy but indicating assent to "all or nothing" approach).

208. See, e.g., *Gantz*, 192 B.R. at 937 ("The Court agrees with those cases urging Congress to enact legislative remediation."); *Taylor*, 191 B.R. at 766 ("The morass of § 523(a)(15) is difficult . . . to judicially navigate, and Congress needs to provide much needed legislative remediation."); *Collins v. Florez* (In re Florez), 191 B.R. 112, 116 (Bankr. N.D. Ill. 1995) ("Section 523(a)(15) should be the subject of critical review by the Bankruptcy Review Commission").

in section 523(a)(15)(B) deliberations, as discussed in Parts I and II above. These problems are inimical to fair and efficient bankruptcy adjudication.

The implementation of guidelines for the new statute is possible, and the ideal time for their proposal is at hand. When Congress passed the Reform Act, it created the National Bankruptcy Review Commission.<sup>209</sup> The duties of the Commission are to investigate and study issues and problems relating to the Bankruptcy Code, to evaluate the advisability of proposals and current arrangements, and to solicit divergent views of parties concerned with the bankruptcy system.<sup>210</sup> During its investigations, the Commission may hold hearings and meetings and collect official data.<sup>211</sup> The end result of the Commission's efforts will be a report<sup>212</sup> submitted to Congress, the Chief Justice, and the President by October 20, 1997.<sup>213</sup> This report will be non-binding, but will make recommendations aimed at legislative change.<sup>214</sup> The Commission's tenure will end thirty days after the report is submitted.<sup>215</sup>

This Note proposes a set of guidelines to clarify section 523(a)(15)(B). These guidelines should be concise and finite—something that judges can apply without unreasonable exertion and with maximum efficiency, determinacy, and accuracy. These standards would provide for uniform application of the law, thus curtailing the current problems of opacity, lack of uniformity, and subjectivity. Through uniform guidelines, judicial economy would be conserved, and practitioners and litigants would have a concrete guide for section 523(a)(15)(B) proceedings. The balancing test should not be applied with mathematical indifference, for the domestic relations context does not admit of such treatment.<sup>216</sup> What is important is to set out clear, easy to apply, uniform standards that allow judges to use limited discretion when necessary without exhausting too much time, expending scarce judicial resources, or depleting the litigants' funds.

At the outset, courts must be wary of any analysis of this section that is overly simplistic or pat. The balancing test demands *true* balancing of the interests of *both* parties. Anything less than the most conscientious

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209. See 11 U.S.C. ch. 1 note (1994) (National Bankruptcy Review Commission).

210. See 11 U.S.C. ch. 1 note. At least one court has urged that the Commission review section 523(a)(15). See *Florez*, 191 B.R. at 116 ("The Court concludes that Section 523(a)(15) should be the subject of critical review by the Bankruptcy Review Commission.").

211. See 11 U.S.C. ch. 1 note.

212. See 11 U.S.C. ch. 1 note.

213. Telephone Interview with Melissa Jacobi, Staff Attorney, National Bankruptcy Review Commission (Sept. 20, 1996).

214. *Id.*

215. See 11 U.S.C. ch. 1 note.

216. Proceedings between former husbands and wives presumably are more sensitive than those in the commercial context.

consideration of both sides of the balance likely will result in unjust outcomes.

A. *Appropriate Date for Measurement of Income and Positions of the Parties*

The circumstances at the time of the adversary proceeding rather than the time of filing or time of divorce are the proper context for measurement of the parties' relative positions.<sup>217</sup> Under the statute, the debt will be discharged if the benefit to the debtor of discharging it will outweigh the harm to the creditor.<sup>218</sup> This test does not look to the past, but to the present and the future. Considering the *most* present circumstances may prevent unwarranted discharges that might otherwise occur in the context of the initial filing of the complaint. The more time that has elapsed since the debtor filed and the complaint was made, the more likely it is that the debtor's financial situation will have improved as a result of the bankruptcy process. Discharge of other debts may reduce pressure on his income. His capacity to support his family, therefore, may be enhanced, lessening his need for discharge and strengthening the creditor ex-spouse's case for maintaining debts as nondischargeable.<sup>219</sup>

Additionally, courts should examine, to a limited degree, the *future* circumstances of the parties. This further enables courts to assess "the benefits of the 'fresh start' to the debtor," (and the discharge of other debts that may make discharge of marital obligations unnecessary) in the case of "any change in circumstances in employment, and other good or bad fortune which may have befallen the parties."<sup>220</sup> This approach is also preferable because a bankruptcy court "has no ability to revisit a debtor's financial circumstances after the conclusion of the trial on the [section] 523(a)(15) issues."<sup>221</sup> Thus, an inquiry into the circumstances of the parties must allow courts to consider prospective circumstances.<sup>222</sup> For example, it is important to contemplate potential as well as actual employment. Though the debtor may take time to recover from the circumstances that caused bankruptcy, courts should not assume that he will remain unemployed or even that a present job will necessarily be permanent. Attention to employment and potential employment will also aid women who have not worked outside the home and are entering the job market for the first time with little or no marketable skills.<sup>223</sup>

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217. Courts have disagreed about when to make this measurement. See *supra* note 104.

218. See 11 U.S.C. § 523(a)(15)(B) (1994).

219. See Scheible, *supra* note 34, at 619.

220. *Schmitt v. Eubanks* (In re Schmitt), 197 B.R. 312, 316 (Bankr. W.D. Ark. 1996).

221. In re *Smither*, 194 B.R. 102, 107-108 (Bankr. W.D. Ky. 1996).

222. Cf. *id.* at 107 ("[T]his inquiry must allow a court to consider the debtor's prospective earning ability.").

223. See *supra* note 65 and accompanying text. This examination must be carefully cabined, however, in order to contain discretion. Rather than speculate as to actual dollar amounts, courts should instead consider such factors as job skills, potential interviews, and other findings clearly established by the parties.

### B. Evidence of Bad Faith Filing

Another important factor in the application of the balancing test should be the parties' good faith.<sup>224</sup> The "Bankruptcy Code . . . authorizes bankruptcy courts to prevent the use of the bankruptcy process to achieve illicit objectives. The right of debtors to a fresh start depends upon the honest and forthright invocation of the Code's protections."<sup>225</sup> A threshold question in every proceeding under section 523(a)(15)(B), therefore, should be whether the debtor filed for bankruptcy in good faith, or was seeking refuge in bankruptcy from paying marital debts. Because Congress believed that debtors should not avoid legitimate marital obligations by using a bankruptcy filing as protection,<sup>226</sup> the balance should tip presumptively in favor of the creditor ex-spouse whenever bad faith is shown.<sup>227</sup>

A creditor should be able to offer evidence that the debtor in question filed for bankruptcy solely to avoid paying marital debts and not because of other legitimate financial hardship.<sup>228</sup> The evidence should be limited, however, to a determination of whether filing for bankruptcy was truly a necessity in the debtor's case, and other specific bad faith evidence related to that bankruptcy proceeding. This means limiting the inquiry to an accurate assessment of debts, and the economic necessity of bankruptcy: was the debtor truly insolvent? Allowing more extensive evidence, such as the propensity of the party to commit this kind of fraud, or more general bad faith evidence (e.g., the husband has a vindictive nature) would mire the court in personal battles reminiscent of "he-said-she-said" divorce proceedings.<sup>229</sup> As two commentators have noted, "[t]he net result of the section should be to prevent the use of bankruptcy simply to evade marital property settlement obligations when the debtor does not have bona fide financial problems."<sup>230</sup> The debtor

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224. For an example of a case that factored good faith into the balancing equation, see, e.g., *Smither*, 194 B.R. at 111 (good faith one of enumerated factors).

225. *Kestell v. Kestell* (In re *Kestell*), 99 F.3d 146, 149 (4th Cir. 1996).

226. See H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363.

227. This guideline finds support in the Bankruptcy Code:

Congress has made it clear within the Bankruptcy Code itself that misuse of the bankruptcy process should not be countenanced. Specific provisions throughout the code provide remedies for abuses in each of the types of bankruptcy proceedings. In some code provisions, enumerated circumstances of abuse are addressed. In others, general phrases such as "for cause" provide broad coverage for unenumerated instances of misuse.

*Kestell*, 99 F.3d at 148.

228. "In view of the Congressional mandate that property settlement obligations should not be discharged, a debtor should not be allowed to manipulate his/her financial condition to the detriment of a former spouse." *Gamble v. Gamble* (In re *Gamble*), 196 B.R. 54, 58 (Bankr. N.D. Tex. 1996) (citing *Florio v. Florio* (In re *Florio*), 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995)).

229. See *supra* text accompanying notes 90-91.

230. *Scott & Woodyard*, *supra* note 53, at \*340.

should not be allowed to discharge relevant debts if he has fraudulently filed for bankruptcy.<sup>231</sup>

### C. Economic Status

In order to reduce the extent to which bankruptcy courts must consider matters more properly left to divorce courts and lessen the need for relitigation of domestic relations issues, judicial inquiry into the circumstances of the parties should be limited, to the extent possible, to their economic circumstances. Limiting the inquiry to quantifiable economic issues whenever possible reduces the role of subjectivity and bias in judicial determinations of dischargeability.

Among the economic factors courts should consider to ascertain who is best able to shoulder the debt are the current income, expenses, assets and liabilities of the parties.<sup>232</sup> Courts should also consider the non-debtor's responsibility for other marital debts and whether the non-debtor spouse is jointly liable for any of the debts.<sup>233</sup> The debtor's reaffirmation of any debts<sup>234</sup> and the extent of the debtor's exempt property

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231. Bad faith may be difficult to prove, and may often go to issues similar to those in section 727 cases, which examine whether the debtor made false oaths or admissions related to his business transactions or discovery of his assets. When such fraud is shown, the Chapter 7 debtor is denied discharge. See 11 U.S.C. § 727 (1994); see, e.g., *Messing v. Urban* (In re Urban), 130 B.R. 340, 344-45 (Bankr. M.D. Fla. 1991); *Lister v. Gonzalez* (In re Gonzalez), 92 B.R. 960, 962 (Bankr. S.D. Fla. 1988). Evidence may be anecdotal, as in the case of the wife's testimony in *Chalkley v. Carroll* (In re Chalkley), No. 93-17198, 1995 WL 242314 (9th Cir. 1995). In *Chalkley*, the ex-wife testified that "[w]ell, I'd lived through his first bankruptcy and his first ex-wife, and he wanted—that was a good way to get rid of her through bankruptcy." An opportunity should be provided for creditor ex-spouses to make such showings.

232. Many of these factors are taken from various pronouncements of considerations suggested by courts listed at supra note 118. On contemplation of the debtor's financial circumstances, a voluntary reduction in income after divorce should be considered, along with the motivations for such reduction. See *In re Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996) ("[W]e hold that where either a Debtor or Creditor has voluntarily reduced their income, that voluntary reduction should . . . be considered by the Court in making the 523(a)(15)(B) determinations."). For example, a debtor should not be allowed to unnecessarily take a lower-paying job or quit and then use that fact as part of his justification for discharge.

233. Because the divorce agreement may assign various debts to both parties upon dissolution of the marriage, the court should heed the extent to which the nondebtor spouse is already burdened with marital debts that would inhibit her ability to assume additional debt.

234. That the debtor agreed to pay any obligations that would otherwise be discharged must be weighed when the debtor later seeks to discharge obligations to his spouse. *Hill* is an example of a case where the debtor reaffirmed certain non-marital debts and was still able to discharge marital debt obligations. There, the debtor reaffirmed debts of \$2325, a portion of which was used for a piece of band equipment. See *Hill v. Hill* (In re Hill), 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995). Furthermore, the relative importance of marital and other, reaffirmed debts should be compared. Given the important implications for discharge of marital debts, and Congress's concern for better protection of marital obligations, reaffirmed debts should be considered more important only in rare

are also important.<sup>235</sup> Finally, the number of dependents of both debtor and nondebtor should be considered, along with any undesirable effects of discharge (or failure to discharge) on children. One factor that emphatically should *not* be considered, at least to the extent that such consideration might weigh in favor of discharge, is possible (as opposed to unavoidable or present) bankruptcy of the creditor ex-spouse.<sup>236</sup> To the contrary, "the implication that a non-debtor would need to file bankruptcy because of another's debt militates in [her] favor because it is a detriment to [her] financial status and credit rating."<sup>237</sup>

In balancing economic interests, courts should consider the parties' relative standards of living, as the court did in *Smither*.<sup>238</sup> If the debtor's standard of living will be higher than or equal to the creditor's, the debt should not be discharged; if the debtor's standard of living falls materially below the creditor's, the debt—in most cases—should be discharged.<sup>239</sup> Courts should apply the most searching scrutiny to debtors' claims of income insufficient or barely sufficient to sustain their standard of living.<sup>240</sup> A recently divorced creditor should not be forced to subsidize her ex-spouse's upwardly mobile lifestyle through the assumption of debts that her ex-spouse was assigned under the divorce settlement.<sup>241</sup> This approach helps focus the nebulous "totality of the circumstances" test into manageable form by directing evaluation of economic factors towards ascertaining the parties' standards of living. Consideration of a finite set of economic factors, cabined in terms of standard of living, helps minimize the somewhat rampant flexibility, lack of uniformity, and broad discretion inherent in the language of the balancing test and its factors.<sup>242</sup>

#### D. "Equality of Circumstances"

The provisions above should suffice to guide courts in straightforward cases arising under section 523(a)(15)(B) where the parties stand in measurable economic disequilibrium. More difficult cases arise when the

cases. Consider *Hill*: It is extremely alarming that band equipment should take precedence over the obligations that the debtor assumed upon dissolution of the marriage. See also *Humiston v. Huddelston* (In re Huddelston), 194 B.R. 681, 684 n.5 (Bankr. N.D. Ga. 1996) ("Notwithstanding his lack of any cognizable source of income, however, the Debtor has seen fit to reaffirm the debt on a bass boat as part of his bankruptcy case.").

235. At the very least, courts must consider exempted property as an important aspect of the creditor's standard of living, especially when this exemption is substantial and not necessary for the support of the debtor and his dependents.

236. See supra notes 166–172 and accompanying text.

237. *Schmitt v. Eubanks* (In re Schmitt), 197 B.R. 312, 317 (Bankr. W.D. Ark. 1996).

238. See supra Part II.C.3.

239. See supra text accompanying note 186.

240. Recall that a woman is more likely to be the creditor and to experience a dramatic reduction in standard of living after divorce, while a man's standard of living generally rises. See supra note 63 and accompanying text.

241. Such a consideration may mitigate the extent to which women suffer disproportionate adverse affects in bankruptcy. See supra Part I.C.2.

242. See supra notes 191–197 and accompanying text.



parties involved exhibit an "equality of circumstances"—an equal ability or inability to pay the debt, or approximately equal standards of living. Congress has stated that marital debts should not be discharged unless "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor."<sup>243</sup> When the parties have achieved an equality of circumstances, however, the proper presumption is that the benefit to the debtor will never outweigh the detriment to the creditor ex-spouse.<sup>244</sup> When the parties are similarly situated, the sides of the balance are equally weighted. Thus, when competing equities are neutralized by the parties' circumstances, courts should maintain the status quo and not tinker unnecessarily with the previous court-mandated results of divorce. The marital debts as ordered or sanctioned by family courts should remain unaltered.

Important considerations of policy, judicial economy, and legislative intent necessitate this conclusion. The divorce court, or the parties themselves, divided the property and debts of the couple after reviewing their individual circumstances, as well as those of their marriage. Bankruptcy courts should respect, as a matter of comity, family court determinations and accept that there are substantial justifications for the division as ordered, which was specifically meant to equalize and compensate the relative positions of the parties. For example, the division may have been ordered to compensate one spouse for substantial work performed over the years in the home and with children, or in compensation for the subordination of personal and professional needs to those of family or spouse.<sup>245</sup>

Such a rule would address congressional concerns that bankruptcy filing should not be used to avoid legitimate marital and child support obligations,<sup>246</sup> as well as lessening the tendency currently evinced by some courts to discharge such debts inappropriately. It also would serve to better safeguard the interests of those Congress intended to protect

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243. 11 U.S.C. § 523(a)(15)(B) (1994).

244. See, e.g., *In re Smither*, 194 B.R. 102, 112 (Bankr. W.D. Ky. 1996) ("As this court finds that the parties' standards of living are approximately equal, regardless of whether this debt is discharged, this Court holds that the Debtor has failed to show that the benefit of a discharge of this debt outweighs the detriment to the Creditor which would arise if the discharge is granted, and that the obligation is therefore dischargeable."); see also *Anthony v. Anthony* (*In re Anthony*), 190 B.R. 433, 439 (Bankr. N.D. Ala. 1995) (explaining that "the facts demonstrate that the scales, if not in Ms. Anthony's favor, are equally balanced"). But see *Silvers v. Silvers* (*In re Silvers*), 187 B.R. 648, 649 (Bankr. W.D. Mo. 1995) (debt discharged although parties had "equal inability to pay"); *Woodworth v. Woodworth* (*In re Woodworth*), 187 B.R. 174, 176 (Bankr. N.D. Ohio 1995) (debt discharged although neither party had funds to pay debt in question).

245. See *supra* notes 45-47 and accompanying text.

246. See H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363-64.

and who often are hurt severely in bankruptcy proceedings—creditor ex-spouses.<sup>247</sup>

### E. *Partial Discharge*

When the debtor is unable to repay the entire debt at issue, the court should use its equitable powers to fashion a remedy of partial discharge. Though some believe that the statute does not contain language allowing partial discharge,<sup>248</sup> others have argued that it seems unlikely that Congress would require an “all or nothing” approach to this issue without a “specific legislative directive.”<sup>249</sup> One of the earliest reported cases applying section 523(a)(15) did allow partial discharge.<sup>250</sup> In *Comisky v. Comisky*, the court analogized to the student loan context, and noted that courts found discretion to declare only part of a debt dischargeable, or found a debt nondischargeable while limiting the enforcement of the judgment.<sup>251</sup> Since courts must already use their equitable powers in determining the discharge of marital debts,<sup>252</sup> they should not hesitate to do so here. An “all or nothing” approach is particularly harsh when considered in context of the issues mentioned above, and in light of Congress’s goal of better protecting the disadvantaged nondebtor spouse’s interests.

This approach, however, should be used with caution. Because partial discharge involves a more sophisticated calculus than does absolute discharge or nondischarge (i.e., the husband now bears less than the entire burden for a debt *and* the wife bears more), this type of determination may be more complicated than determining the dischargeability of a debt. Before sanctioning a complete discharge to the detriment of the creditor, however, courts should consider partial discharge as a more equitable middle ground.

### F. *Deference to State Courts*

Finally, to the extent that bankruptcy courts must go beyond the economic factors listed above in any given case, they should defer to state

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247. Those creditor ex-spouses are usually women. See *supra* Part I.C.2 It should be noted that women are not exclusively harmed in this context. For example, in *Becker v. Becker* (In re *Becker*), 185 B.R. 567 (Bankr. W.D. Mo. 1995), the husband was the creditor ex-spouse. The couple agreed during their marriage that he would care for children and manage property because she had the better education and earning potential. See *id.* at 570. Statistics suggest that in discharge cases, however, men are much more often debtors and women creditors. See *supra* Part I.C.2.

248. See *supra* note 207 (discussion of split of authority in this area).

249. Bowles, *supra* note 57, at 3.

250. See *Comisky v. Comisky* (In re *Comisky*), 183 B.R. 883 (Bankr. N.D. Cal. 1995).

251. See *id.* at 884 (citing *Gammoh v. Ohio Student Loan Comm’n* (In re *Gammoh*), 174 B.R. 707 (Bankr. N.D. Ohio 1994); *Sands v. United Student Aid Funds, Inc.* (In re *Sands*), 166 B.R. 299 (Bankr. W.D. Mich. 1994); *Cadle Co. v. Webb* (In re *Webb*), 132 B.R. 199 (Bankr. M.D. Fla. 1991)).

252. See *supra* note 110 and accompanying text.

court findings of fact regarding parties' intent, motivations, and actions during and after marriage. Such deference would address concerns of commentators and judges about federal court involvement in this area,<sup>253</sup> and would give precedence to the findings of courts that have expertise in this area and that actually hear testimony and concerns of the parties at the time of divorce.<sup>254</sup> State court divorce decrees are much more reliable sources of authority for noneconomic factors. Either through testimony and litigation, or through the incorporation of a separation agreement, divorce decrees are the end product of a process that painstakingly considers the relationship between the two parties, both parties' interests, and their collective and individual desires.<sup>255</sup> No relitigation of issues already tried in state court would be necessary. In essence, this deference would leave the consideration of such issues to the most appropriate and expert forum.

#### CONCLUSION

This Note has shown that although the new section 523(a)(15)(B) has improved protection for marital property settlement debts during bankruptcy, the broader remedial effect intended by Congress remains unrealized. Because Congress gave the bankruptcy bench little to work with in the way of legislative history and because there is no Bankruptcy Code provision with an analogous balancing test, bankruptcy judges have attempted to design their own standards with varying degrees of success and with a fair amount of frustration. This Note has proposed guidelines to help judges and practitioners navigate section 523(a)(15)(B). The implementation of the proposed guidelines would give bankruptcy judges greater direction in applying section 523(a)(15)(B), while better protecting the interests of those most often harmed in such proceedings and limiting the role of federal courts in the domestic relations area. These proposals would better realize congressional intent and simplify the task of bankruptcy judges.

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253. See *supra* notes 94-97 and accompanying text.

254. See *supra* notes 92-93 and accompanying text.

255. See *supra* notes 29-34 and accompanying text.