

BANKRUPTCY AND DIVORCE: BREAKING UP IS HARD TO DO

- Make Clients sign Acknowledgements
- Run Asset Reports; Credit Reports
- Actually pull the Divorce Decree; don't assume a client is Divorced!

THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT (BAPCA)

- 2005 Amendment to the Bankruptcy Code
- Changes directly effecting family obligations
- Distribution of Property

COMMON QUESTIONS IN THE INITIAL CONSULTATION PRIOR TO FILING

- Should you file bankruptcy first or finalize the divorce first? It Depends (typical lawyer answer) Scenario # 1
- Create Checklists
- Are the Debtors legally married in a way that is recognized in your jurisdiction?

Defense of Marriage Act (DOMA)

- Deemed Unconstitutional in June 2013
- Same Sex Married Couples Now Enjoy Federal Benefits
- Can same sex couples who were legally married in another jurisdiction file bankruptcy in Florida? US Trustees will have to make the decision to file objections to petitions

IT'S A NUMBERS GAME

- Median Household Income- Florida
- Determined by the Department of Justice
- Effective for Cases filed On and After April 1, 2013

Family Size – (1) \$41,915.00

(2) \$51,760.00

(3) \$54,934.00

(4) \$65,260.00

*Add \$7500 for each individual in excess of 4

WHAT IS PROPERTY OF THE (BANKRUPTCY) ESTATE AS IT RELATES TO DIVORCEE'S?

- Scenario # 2
- Tenancy by the entirety v. joint tenancy interests in property
- Is TBE property of the estate? Depends. *See Grant v. Himmelstein, 203 B.R. 1009 (M.D. Fla. 1996)*...
- Elements of TBE
 - Time, Title, Possession, Interest, Survivorship, Marriage

OBJECTIONS TO EXEMPTIONS

- More applicable in Chapter 7 cases
- Typically Made by the Trustee
- Must be made within 30 days of the conclusion of the meeting of creditors (Rule 4003(b)) or else the exemption is allowed

THE AUTOMATIC STAY

- Stays Some Divorce Proceedings; *See Williford v. Williford*, 294 Fed. Appx. 518 (11th Cir. 2008).
- In Chapter 13 cases, the stay continues to operate and prohibit the divorce proceeding for the length of the plan (unless stay relief is obtained)
- Property of the Bankruptcy Estate cannot be Divided or administered without Stay relief. *In re Willard*, 15 B.R. 898 (9th Cir. 2008)

THE AUTOMATIC STAY

- 11 U.S.C § 362 and its Effect on Most Creditors
- Exceptions(b)(2)(A)(B)(C)(E)(F)
- Paternity actions, Domestic Support Modifications, Withholding of Income for Domestic Support Obligations, Reporting of Overdue Support, Interception of Tax refund by IRS
- Incarcerating Debtor for failing to pay child support IS a violation of the stay
- Scenario #3

DISCHARGEABILITY FOR FAMILY OBLIGATIONS

- 11 U.S.C. 523(A)(15)
- Was the debt incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or court order?
- If so, it is nondischargeable in Chapter 7s
- *See Ginzl v. Ginzl*; 430 B.R. 702 (Bankr. M.D. Fla. 2010); *Fisher v. Santry*, 481 B.R. 824, 829 (Bankr. N.D. Ga. 2012); *Floody v. Kearney*, 433 B.R. 640, 646-47 (Bankr. S.D. Tex. 2010)
- What about attorneys' fees related to divorce proceedings?
- Scenario #4
- Can Family Judge Order former spouse to pay on debt discharged in bankruptcy? Violation of Discharge Injunction? No case law on issue but interesting hypothetical

DISCHARGEABILITY FOR FAMILY OBLIGATIONS....*CONTINUED*

- Property settlement obligations ARE dischargeable after Successful Completion of Chapter 13 plan
- Whether a Debt is a division of property or is in Nature of Support is a question for the Federal Court, not State Court
- How? Dischargeability is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

ROOKER-FELDMAN DOCTRINE

- *Other than U.S. Supreme Court, a federal court is without jurisdiction to act as an appeals court to a state court of competent jurisdiction. *See, e.g., Schmitt v. Schmitt*, 324 F.3d 484 (7th Cir. 2003);
- Split case law on whether or not doctrine applies where the federal court had exclusive jurisdiction to begin with

* Excerpt from American Bankruptcy Institute (Honorable Margarat Dee McGarity, Chief Bankruptcy Judge E.D. of Wisconsin)

DEBT LIMITS IN CHAPTER 13

- Effective April 1, 2013
- Per Debtor: *In re Scholz*, 2011 Bankr. Lexis 2971 (M.D. Fla. 2011)
- Unsecured debt = \$383,175.00
- Secured debt - \$1,149,525.00

CHAPTER 13 CONTINUED

- Scenario #5
- Mortgage Modification Mediation Program
- If Divorce Pending, according to HAMP guidelines – BOTH spouses have to apply for the Mod if Both are on the Note.
- If Divorce decree entered, Bank needs copy of divorce decree and a copy of the quitclaim deed
- In Florida, if the final judgment for divorce specifies that one spouse surrenders all interests of a property to other spouse, this is recognized the same as a quitclaim deed – Important if you do transferor (spouse) is not around or cooperative
- \$1500.00 no look fee (no fee application required)

Support Claims in Ch13

- DSO's are typically priority claims; must be paid in full over life of the plan; has priority over all other claims with the exception of the Trustee's fees and administrative expenses
- Proof of claim must be timely filed; can be filed by the Trustee
- Claims categorized as a property division do NOT receive priority treatment
- Support arrearages can be included in Ch. 13 plan

ETHICAL CONSIDERATIONS

- Divorce while bankruptcy is pending
- Do I continue to represent both? What if Debtor(s) cannot afford the Chapter 13 payments because of the separation?
- Can the case be bifurcated?
- Scenario #6