ARTICLE

DIVORCE OBLIGATIONS AND
BANKRUPTCY DISCHARGE: RETHINKING
THE SUPPORT/PROPERTY DISTINCTION

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The Bankruptcy Code currently divides divorce-related obligations into
two categories: awards or agreements in the nature of support are non-
dischargeable; obligations arising from property divisions can be dis-
charged in the same manner as ordinary commercial debts. Because recent
developments in family law have undermined the support/property distinc-
tion and because privately negotiated divorce agreements often fail to
distinguish between payments intended to serve as support and those
intended to distribute property, the Code’s reliance on this classification
often leads to confusion and hardship for divorce obligees. In addition,
because of the rise of equitable distribution as the dominant method of
allocating marital gains and losses, the policy of refusing to protect di-
voice-related property divisions is unfair to divorcing couples who struc-
ture their financial arrangements according to modern notions of marital
partnership.

Tracing the history of the marital support exemption and examining
recent trends in family law, Professor Singer argues that the goals of
bankruptcy law and divorce law could be better served by amending the
Bankruptcy Code to exclude from discharge all divorce-related obliga-
tions. Such a rule would recognize the particular nature of financial com-
mitments arising out of marriage, and allow the Code to conform with our
modern understanding of the marriage relationship.

Both divorce and bankruptcy law attempt to balance an in-
dividual’s interest in a fresh financial start with the obligation
to honor family commitments. Modern divorce law does this by
allowing easy exit from marriage, but requiring divorcing
spouses to support their children and to apportion equitably
between themselves the economic gains and losses attributable
to their marriage.¹ Federal bankruptcy law currently strikes this
balance by allowing debtors to discharge divorce-related finan-
cial obligations unless a court determines that a particular ob-

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¹ See Joan M. Krauskopf, Theories of Property Division/Spousal Support: Searching
ligation is "in the nature of alimony, maintenance or support."\textsuperscript{2} Divorce awards or agreements that constitute or reflect property division, rather than support obligations, are dischargeable under the current Bankruptcy Code; bankruptcy thus extinguishes these obligations and renders them unenforceable through the divorce decree or by other means.\textsuperscript{3}

The potential conflict between these two ways of balancing individual and family interests is made concrete when divorce and bankruptcy intersect. In particular, when bankruptcy follows on the heels of a divorce—an increasingly common chain of events—bankruptcy law can significantly reorder the balance that state divorce law establishes between an individual’s interest in a fresh financial start and his obligation to honor financial commitments arising out of marriage.

Although a certain tension has always existed between the goals of divorce and bankruptcy law, the Bankruptcy Code’s purported distinction between nondischargeable marital support obligations and dischargeable property debts arguably represented an acceptable compromise as long as two critical assumptions held true. First, that obligations described as property divisions differed substantively from those described as support. Second, that awards of spousal support—rather than

\textsuperscript{2} Section 523(a)(5) of the Bankruptcy Code provides an exception to discharge for debts:

- to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination in accord with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that: (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.


distributions of marital property—represented the primary means of alleviating financial need and achieving economic equity at the time of divorce.

Recent developments in family law have vitiated both of these assumptions. The widespread adoption of equitable distribution as a means of allocating property interests at the time of divorce has eliminated whatever conceptual distinctions once existed between support awards and property divisions. The advent of equitable distribution has also resulted in property division replacing support as the preferred means of allocating marital gains and losses. The expansion of the definition of marital property to include such intangible assets as pensions and professional goodwill has further blurred both the formal and the functional distinctions between property division and spousal support.

These changes in marital property law have been paralleled by a fundamental rethinking of the nature and functions of alimony, more commonly referred to today as maintenance or spousal support. This rethinking has deemphasized the role of alimony as a status-based obligation designed to alleviate future need and has emphasized instead its compensatory and retributionary functions—functions that have traditionally been associated not with alimony, but with the division of marital property.

As a result of these developments, the Bankruptcy Code's distinction between nondischargeable support awards and dischargeable property distributions has become untenable. Moreover, because property division has replaced support as the preferred means of adjusting the spouses' financial relationship, a bankruptcy debtor's ability to discharge divorce-related property debts undermines central policy goals associated with modern divorce reform. In particular, permitting discharge of divorce-related property obligations compromises the certainty and finality of divorce settlements and undermines the partnership notions that lie at the heart of equitable distribution schemes. Additionally, because men make up the overwhelming majority of debtors who seek to discharge divorce obligations,

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4 See, e.g., Unif. Marriage & Divorce Act § 308, 9A U.L.A. 147 (1987) (referring to "maintenance"). This Article will use the terms alimony, maintenance, and spousal support interchangeably. This interchangeability is consistent with the language of § 523(a) of the Bankruptcy Code. See supra note 2.
the current dischargeability rules contribute to the already disparate economic effect of divorce on women.\(^5\)

The Article will therefore argue that the Bankruptcy Code should abandon its attempt to distinguish between nondischargeable spousal support awards and dischargeable property divisions and that Congress should amend the Code to exempt from discharge in bankruptcy all financial obligations to or for the benefit of a debtor's ex-spouse or children, assumed or imposed in connection with a divorce or marital separation.\(^6\)

The Article will proceed as follows. Part I will trace the history of the Bankruptcy Code's marital support exemption. Part I.A will argue that the Supreme Court's initial recognition of the nondischargeability of marital debts was broad enough to encompass divorce-related property obligations as well as spousal support awards. Parts I.B and I.C will contend that Congress erred in the late 1970s by rejecting the recommendation of the National Commission on Bankruptcy that all divorce-related property settlements be made nondischargeable in bankruptcy. Part I.D will highlight the doctrinal confusion engendered by Congress's insistence on preserving the support/property distinction.

\(^5\) See Gold, supra note 2, at 457 n.8 ("In the overwhelming majority of cases arising under § 523(a)(5), the bankruptcy debtor is a male who is seeking to discharge divorce obligations to his former wife."); William Reppy, Discharge in Bankruptcy of Awards of Money or Property at Divorce: Analyzing the Risk and Some Steps to Avoid It, 15 COMMUNITY PROP. J. 1, 1 & n.1 (1988) (husband was debtor in all but two cases read by author while researching article). A plethora of recent empirical studies establish the disparate economic effects of divorce on women and the children in their custody. See, e.g., Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985); Roslyn B. Bell, Alimony and the Financially Dependent Spouse in Montgomery County, Maryland, 22 Fam. L.Q. 225, 284 (1988); Robert E. McGraw et al., A Case Study in Divorce Law Reform and Its Aftermath, 20 J. Fam. L. 443 (1981-1982); James B. McLindon, Separate but Unequal: The Economic Disaster of Divorce for Women and Children, 21 Fam. L.Q. 351 (1987); Barbara R. Rowe & Jean M. Lowen, The Economics of Divorce and Remarriage: The Rural Utah Families, 16 J. CONTEMP. L. 301 (1990); Barbara R. Rowe & Alice Mills Morrow, The Economic Consequences of Divorce in Oregon After 10 or More Years of Marriage, 24 Willamette L. Rev. 463 (1989); Charles E. Welch & Sharon Price-Bonham, A Decade of No-fault Revisited: California, Georgia, and Washington, 45 J. MARRIAGE & FAM. 411 (1983); Heather R. Wishik, Economics of Divorce: An Exploratory Study, 20 Fam. L.Q. 79 (1986). While critics have questioned the methodology of some of these studies, their overall conclusion—that divorce has a disproportionately negative economic effect on women—remains undisputed. See, e.g., Stephen D. Sugarman, Dividing Financial Interests on Divorce, in DIVORCE REFORM AT THE CROSSROADS 130 (Stephen Sugarman & Herma Hill Kay eds., 1990).

\(^6\) See infra part IV. The proposed amendment would also preserve the nondischargeability of all court-ordered child support obligations. At least one commentator has recently suggested in passing that Congress should eliminate the support/property distinction from the Bankruptcy Code. See Scheible, Fresh Start, supra note 3, at 637.
Part II of the Article will focus on the family law developments that contravene the Bankruptcy Code's support/property distinction. It will show how recent changes in the law and theory governing financial allocations at the time of divorce have enhanced the importance of property obligations and have eliminated both the conceptual and the practical distinctions between spousal support and property division.

Part III will discuss the practical difficulties caused by the support/property division. Parts III.A and III.B will focus on the procedural obstacles facing a divorce obligee during and after an obligor's bankruptcy proceedings. Part III.C will argue that the specter of future bankruptcy often taints divorce negotiations and that the Bankruptcy Code wrongfully allows federal bankruptcy courts to supplant state courts as the ultimate arbiter of the financial arrangement that should follow the dissolution of a marriage.

Finally, Part IV of the Article will articulate and defend a proposed amendment to the Bankruptcy Code that would eliminate the support/property distinction and would preclude a debtor from discharging in bankruptcy any obligations to, or for the benefit of, a former spouse or child incurred in connection with divorce. This Part will demonstrate that such an amendment is necessary to effect important family law goals and is consistent with the "fresh start" policy of bankruptcy law.

I. THE HISTORY OF THE MARITAL SUPPORT EXEMPTION

A. The Supreme Court's Early Recognition of the Nondischargeability of Marital Obligations

The nondischargeability in bankruptcy of marital support obligations is judicial, rather than statutory, in origin. In the 1901 case of 

Audubon v. Shufeldt,

the Supreme Court considered whether a debtor in bankruptcy could discharge alimony arrearages of $800 owed to his former wife. The Bankruptcy Act in effect at the time

provided for the discharge of "all . . . debts which are provable in bankruptcy, except such as are excepted

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7 181 U.S. 575 (1901).
by this Act."9 Included among such provable debts were fixed liabilities evidenced by a judgment or an instrument in writing and debts "founded upon a contract, expressed or implied."10 The Act contained no exceptions for alimony or other financial obligations arising out of marriage or divorce.

Despite the lack of such a statutory exception, the Supreme Court ruled that the alimony arrearages were not dischargeable. The Court based its ruling on the distinction between contractually-assumed commercial obligations and legal obligations arising out of the marriage relationship. Specifically, the Court reasoned that

[a]limony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction.11

Thus, the Court’s ruling on nondischargeability rested not on any purported distinction between “alimony” and other divorce-related obligations, but rather on factors that distinguish both alimony and divorce-related property awards from obligations arising out of ordinary commercial transactions.

The Supreme Court underscored this reasoning three years later in Wetmore v. Markoe.12 At issue in Wetmore was the dischargeability in bankruptcy of a divorced husband’s non-modifiable obligation to pay his ex-wife the sum of $3,000 per year.13 The Court held that while the absolute nature of this husband’s obligation distinguished it from the modifiable alimony awards held nondischargeable in Audubon and similar cases, “this fact does not change the essential character of the liability nor determine whether a claim for alimony is in its nature contractual so as to make it a debt.”14 In each instance, the Court reasoned, the obligation “is not a debt that has been put in the form of a judgment, but is rather a legal means of

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9 Audubon, 181 U.S. at 577 (discussing Bankruptcy Act of 1898).
10 Id.
11 Id.
12 196 U.S. 68 (1904).
13 Although the husband’s obligation was imposed “as alimony,” it was to continue even if the wife remarried. Id. at 70. The divorce decree also obligated the husband to pay the wife an additional $1,000 annually for the education and maintenance of each of the couple’s three minor children. Id. at 68.
14 Id. at 74.
enforcing the obligation of the husband and father to support and maintain his wife and children.”

And in each instance, the debtor owes this duty, “not because of any contractual obligation, but because of the policy of the law which imposes the obligation.”

In other words, according to the Court, what distinguishes divorce-related financial obligations from ordinary commercial liabilities—and what makes divorce obligations nondischargeable in bankruptcy even in the absence of an explicit statutory directive—is that these obligations are legally-imposed incidents of the marriage relationship. They arise not out of voluntary contractual exchanges, but rather by operation of law, as a result of an ongoing personal relationship.

Although the Supreme Court’s reasoning in Audubon and Wetmore could apply with equal force to all financial obligations arising out of marriage, it is undeniable that the Court spoke specifically in terms of alimony and support. This is not surprising, however, given the law governing the economic consequences of marriage and divorce at the time. In particular, at the time the Supreme Court recognized the nondischargeability of marital support obligations, the terms “alimony” and “spousal maintenance” were understood in a much broader sense than we understand them today. Most significantly, those terms were understood to encompass much of what we today associate with the equitable distribution of marital property. To understand why this was so, it is necessary to review briefly the economic position of married women prior to the twentieth century.

In the eighteenth and nineteenth centuries, “when the law of alimony was largely shaped and fixed, [a wife] had no property apart from her husband” and little chance of securing a portion of his property if they separated. At common law, ownership of a woman’s personal property vested in her husband by virtue

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15 Id.
16 Id.
17 See also Dunbar v. Dunbar, 190 U.S. 340 (1903) (holding that contract obligating divorced husband to make monthly payments for the support of his ex-wife and children could not be discharged in bankruptcy).
18 Robert W. Kelso, The Changing Social Setting of Alimony Law, 6 LAW & CONTEMP. PROBS. 186, 192–93 (1939); see also Chester G. Vernier & John B. Hurlbut, The Historical Background of Alimony Law and Its Present Statutory Structure, 6 LAW & CONTEMP. PROBS. 197, 198 (1939) (“The discriminatory common law scheme of marital property rights was in full bloom.”).
of the marriage. The personalty that came into her possession during marriage similarly became her husband’s property. Upon divorce, her husband’s title, being absolute, continued undisturbed. The rules governing a married woman’s real property were somewhat more complex, but no more protective of her interests, either during marriage or in the event of divorce. Nor was even a wage-earning wife likely to acquire assets during marriage since, by law, her husband was entitled to all of her earnings.

Viewed against this background, a wife’s entitlement to alimony in the event of a divorce represented more than mere judicial enforcement of the husband’s legal duty of support. Alimony also functioned as a means of reallocating property interests—a way of restoring to a virtuous wife at least some of the access to material wealth that she had lost by virtue of her marriage. The Supreme Court in Audubon explicitly recognized this “property division” aspect of alimony when it stated—in support of the nondischargeability of alimony obligations—that “[p]ermanent alimony is regarded rather as a portion of the husband’s estate to which the wife is equitably entitled, than as strictly a debt.”

Turn-of-the-century state domestic relations law also recognized the “property division” function of alimony awards.

21 Vernier, supra note 19, § 91. This was also the rule in regard to her choses in action which the husband had reduced to possession. Clark, supra note 19, at 287.
22 Clark, supra note 19, at 287; Johnston, supra note 20, at 1085.
23 Johnston, supra note 20, at 1046. Married women were also disabled from entering into enforceable contracts, which further inhibited their ability to acquire property. Id.; see also Norma Basch, In the Eyes of the Law 111–12 (1982) (“Because of the law, the entrepreneurial wives who ran urban boardinghouses, managed farms, and headed businesses functioned as their husbands’ agents . . . . For them, the chief business remained marriage, a partnership that entailed the surrender of their legal personalities.”).
24 See Vernier & Hurlbut, supra note 18, at 199.
25 See Timothy B. Walker, Spousal Support (Alimony, Maintenance): General Considerations, in Barry H. Frank et al., Alimony, Child Support and Counsel Fees, Award, Modification & Enforcement 4-1, 4-4 to 4-5 (1990) (“Alimony awards at common law were primarily based on the wife’s disabilities as a result of coverture and the lack of meaningful opportunities for women. . . . The wife’s need for support was not of primary importance.”).
26 Audubon v. Shufeldt, 181 U.S. 575, 578 (1901); cf. Ort v. Orr, 440 U.S. 268, 279 n.9 (1979) (discussing argument that husband’s duty of support was designed to compensate wives for the discrimination they suffered at the hands of the common law).
27 See Wilson v. Hinman, 75 N.E. 236, 237 (N.Y. 1905) (noting that some states
vorce statutes in a number of states explicitly provided that a court could award a wife, as alimony, a portion of her husband’s real or personal property. Courts and commentators also noted that while a divorcing husband could not be forced to disgorge assets acquired from his wife by virtue of marriage, the value of such assets should be taken into account in fixing the amount of alimony to which the wife was entitled. The common practice of capping alimony awards at one-third of the husband’s estate also reflected property principles; this one-third figure corresponded to the interest that a widow could claim in her husband’s lands by virtue of her dower rights.

The passage in the mid- to late 1800s of the married women’s property acts ameliorated somewhat the “property-less” status of married women. These statutes, however, did little to alter the relative legal and economic positions of husbands and wives in the event of a divorce. As an initial matter, many of the early statutes left undisturbed a husband’s right to his wife’s earnings. Other statutes appeared more expansive but were interpreted restrictively by the courts. More fundamentally, even

characterize alimony awarded upon divorce “as a decree settling the property rights of the parties and as a distribution of the assets of the quasipartnership hitherto existing between them”). This view of alimony persisted in a few jurisdictions as late as the mid-1970s. See, e.g., Shula v. Shula, 132 N.E.2d 612, 614 (Ind. 1956) (“Alimony is awarded in Indiana for the purpose of making a present and complete settlement of the property rights of the parties... The primary factor in fixing the alimony is the existing property of the parties.”); Wellington v. Wellington, 304 N.E.2d 347, 353 (Ind. App. 1973) (“Alimony serves a dual purpose—a method to aid in the equitable distribution of property and a method to provide continued maintenance or support if deemed appropriate.”); Martin A. Rosen, Note, Indiana’s Alimony Confusion, 45 Ind. L.J. 595, 601–03 (1970).

28 Vernier, supra note 19, § 99 at 237, § 104 at 261, § 107 at 285–90 (discussing statutes); see also Annotation, Propriety of Direction that Specific Property of Husband Be Transferred to Wife as Alimony, or in Lieu of, or in Addition to, Alimony, 133 A.L.R. 860 (1941).

29 See, e.g., Smith v. Smith, 161 Eng. Rep. 1130 (1814); Cooke v. Cooke, 161 Eng. Rep. 1072 (1812); Vernier & Hurbut, supra note 18, at 199. By the early 20th century, statutes in a number of jurisdictions allowed courts, in certain circumstances, to grant a divorcing wife some interest in her husband’s real or personal property. See Vernier, supra note 19, §§ 99–100.

30 See Vernier, supra note 19, § 99 (discussing statutes).

31 See Basch, supra note 23, at 158–59 (discussing 1948 New York statute); Johnston, supra note 20, at 1067–86 (discussing early Connecticut statutes). In at least one state (Georgia), a husband retained control over his wife’s earnings until 1943. See id. at 1070 n.156.

the most expansive married women’s legislation did not abolish a husband’s common law right to his wife’s unpaid domestic services, nor a wife’s obligation to provide those services. Nor did the married women’s property acts increase women’s access to employment outside the home. Thus, while statutory developments in the nineteenth century removed some of the formal bars to married women’s ownership of property, they did not change the legal or social incidents of marriage that kept most wives from acquiring material wealth.

Moreover, and perhaps ironically, passage of the married women’s property acts coincided with the rise of the “cult of domesticity” and the accompanying ideology of separate spheres, which posited that a woman’s proper place was in the home, performing unpaid domestic labor, rather than in the workplace accumulating material wealth. The influence of this ideology on the structure of middle- and upper-class marriages further reduced the effect of the married women’s property acts on the relative legal and economic positions of divorcing men and women. Women, by virtue of their marriage, continued to sacrifice their ability to hold and accumulate property in return for the right to their husband’s financial support.

20, at 1069–70 (“It is clear that a characteristic pattern of restrictive judicial interpretations of this legislation complicated the process and retarded the rate of change.”).

33 Cf. 3 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 173, at 195 (1935); Johnston, supra note 20, at 1066, 1071–72. Johnston quotes a turn-of-the-century judicial interpretation of married women’s property acts. The court concluded that the married women’s property acts did not deprive the husband of his common-law right to avail himself of a profit or benefit from his wife’s services. The law has never recognized the wife’s right to compensation from her husband on account of the peculiar nature of her services for him whether done in or outside the household. While he may not, as a matter of right, require her services outside of the household, yet such services as she does render him, whether within or without the strict line of her duty, belong to him.

Id. at 1066 (quoting Porter v. Dunn, 131 N.Y. 314 (1892), quoted in WILLIAM BULLOCK, A TREATISE ON THE LAW OF HUSBAND AND WIFE IN THE STATE OF NEW YORK, INCLUDING CHAPTERS ON DIVORCE AND DOWER § 146 (1897)).

34 Indeed, a number of those who advocated passage of the married women’s property acts—including some female reformers—sought only to improve women’s subordinate status within the domestic sphere, not to enhance women’s opportunities in the more public arenas of work or politics. See BASCH, supra note 23, at 163–64, 228. Similarly, many supporters of married women’s property rights were opposed to women’s suffrage. Id. at 189, 196–97.

35 Historical evidence indicates that throughout the 19th century, 95% of white women did not work outside their homes during marriage. See id. at 164–65 (quoting Daniel S. Smith, Family Limitation, Sexual Control and Domestic Feminism in Victorian America, in CLIO’S CONSCIOUSNESS RAISED 120 (Mary S. Hartman & Lois Banner eds., 1974)). While the percentage of black women who worked during marriage was higher, these women were excluded from most factory and office jobs and were segregated into
Thus, the Supreme Court's 1901 pronouncement that marital support obligations were not dischargeable in bankruptcy took place against a legal and economic landscape that perpetuated, to a significant extent, the "property-less" status of married women.\textsuperscript{36} In particular, the legal and economic incidents of marriage continued to deprive divorcing women of access to material wealth. The concept of alimony continued to be understood expansively, encompassing the reallocation of property interests between husbands and wives as well as the enforcement of husbands' common law duty of support.

B. Codification and Early Interpretation of the Nondischargeability of Marital Debts

Congress codified the nondischargeability of marital support obligations in 1903 when it amended section 17(a) of the Bankruptcy Act to bar the discharge of debts that "are liabilities . . . for alimony due or to become due, or for maintenance or support of wife or child."\textsuperscript{37} This section of the Act remained essentially unchanged for seventy-five years.

Prior to 1970, only a small number of reported cases addressed the dischargeability of particular divorce obligations under section 17(a) of the Bankruptcy Act.\textsuperscript{38} In part, this paucity of case poorly paid domestic employment. See Nancy Dowd, \textit{Work and Family: Restructuring the Workplace}, 32 ARIZ. L. REV. 432, 435–36 (1990).

\textsuperscript{36} See BASCH, supra note 23, at 229–30 ("With equity as a model, the rights granted to nineteenth-century wives were a far cry from the rights that underpinned the United States Constitution. The married women's property acts did not grant wives the same right to property and its protection that had been synonymous with individual liberty in the eighteenth century."); Richard W. Bartke & Lori A. Zavalec, \textit{The Low, Middle and High Road to Marital Property Reform in Common Law Jurisdictions}, 7 COMMUNITY PROP. J. 200, 201–03 (1980) ("Since in those times most women were only working in the home or on the family farm, receiving no compensation, and having few expectations of gifts or inheritances, the reforms did nothing for them and still left them propertyless.").


\textsuperscript{38} The author's search of relevant case digests, secondary sources, and computer databases found 36 cases decided between 1917 and 1969 that discussed whether a particular divorce obligation constituted a nondischargeable support obligation or a dischargeable property debt under § 17(a) of the Bankruptcy Act. A handful of other cases addressed the related issues of the dischargeability of a husband's liability for his ex-wife's divorce expenses, see, e.g., Smith v. Smith, 7 F. Supp. 490 (W.D.N.Y. 1934), and the dischargeability of alimony obligations that had been assigned to third parties. See Blackstock v. Blackstock, 265 F. 249 (8th Cir. 1920). For secondary sources discussing these cases, see G. Stanley Joslin, \textit{Bankruptcy from a Family Perspective}, 9 VAND. L. REV. 789, 797–800 (1955); Pierre R. Loiseau, \textit{Domestic Obligations in Bankruptcy}, 41 N.C. L. REV. 27, 31–38 (1962); Note, \textit{California Divorce Agreements—
law was a function of the relative infrequency of divorce. It also reflected the relative unimportance of property division (as opposed to alimony or spousal maintenance) as a means of adjusting the financial rights and responsibilities of divorcing spouses. Moreover, even where property division played a significant role in a divorce, the division tended to be accomplished in-kind or by an immediate transfer of funds, rather than by the creation of an ongoing financial obligation that an obligor might later seek to discharge in bankruptcy.

During the 1970s, the divorce rate increased substantially across the country, and the allocation of property interests acquired during marriage became a far more important aspect of many divorce decrees and settlements. At the same time, state law definitions of marital property expanded to include intangible assets such as pensions and other forms of deferred compensation. These changes were paralleled in the bankruptcy context by an increasing amount of litigation over the dischargeability of particular divorce obligations under section 17(a) of the Bankruptcy Act. In particular, courts were increasingly asked to determine whether a particular financial obligation arising out of a divorce constituted a dischargeable spousal support award or a nondischargeable property debt.

Alimony or Property Settlement, 2 Stan. L. Rev. 731 (1950); W. R. Habeck, Annotation, Obligation Under Property Settlement Agreement Between Spouses as Dischargeable in Bankruptcy, 74 A.L.R.2d 758 (1960); Annotation, Construction and Application of Provision of Bankruptcy Acts Excluding Debts for Maintenance or Support of Wife or Child from Discharge, 103 A.L.R. 722 (1936).

39 Property division upon divorce played a more important role in the eight community property jurisdictions than in the substantial majority of American states that followed common law property principles. See generally Joan M. Krauskopf, Cases on Property Division at Marriage Dissolution 1–13 (1984). It is not surprising, therefore, that more than a third of the pre-1970 cases discussing the dischargeability of support versus property obligations arose in community property jurisdictions.

40 See infra notes 68–101 and accompanying text (illustrating distinctions between support and property obligations).

41 Between 1970 and 1981, the divorce rate in the United States increased from 3.5 per 1000 total population to 5.3 per 1000 total population. U.S. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the U.S. 86 tbl. 128 (111th ed. 1991). During that same time period, the divorce rate for married women age 15 or older increased from approximately 14.9 per 1000 to approximately 22.6 per 1000. See U.S. Dep't of Health & Human Serv., Monthly Vital Statistics Rep., Sept. 25, 1986, at 1–2, 5 fig.1.

42 See infra notes 137–148 and accompanying text (discussing the expanded definition of marital property).

The resulting decisions were confusing and chaotic. As one scholar has explained, "[c]ourts developed a confused and often contradictory body of case law partly because of their failure to agree as to the underlying source of applicable law." Some courts focused exclusively on the law of the state in which the divorce obligation arose, while others attempted to rely on support principles in general—rather than the law of a particular state—to determine the underlying nature (and hence, the dischargeability) of the disputed obligation. Courts adopting the latter approach still reached inconsistent results because they could not agree on the essential attributes of a support obligation.

C. The Bankruptcy Act of 1978: An Opportunity Missed

In 1978, Congress enacted a completely revised Bankruptcy Code. As a prelude to that enactment, Congress in 1970 appointed the Commission on the Bankruptcy Laws of the United States (the "Commission") to conduct a comprehensive review of federal bankruptcy law. The Commission recommended, among other things, that the exemption from discharge for marital support obligations be expanded to include "any liability to a spouse or child for maintenance or support, for alimony due or to become due, or under a property settlement in connection with marriage"  

\[\text{\textsuperscript{44} Scheible, Defining Support, supra note 3, at 26.}\]

\[\text{\textsuperscript{45} See id. at 26–27. Compare, e.g., Nitz v. Nitz, 568 F.2d 148 (10th Cir. 1977) (applying Utah law to determine that ex-husband’s divorce decree obligations are in the nature of a property settlement, as opposed to alimony or support, and are therefore dischargeable in bankruptcy); Jones v. Tyson (In re Jones), 518 F.2d 678 (9th Cir. 1975) (holding that California law determines whether ex-husband’s obligation to pay divorced wife’s legal fees was in the nature of support); and Waller v. Waller (In re Waller), 494 F.2d 447, 448 (6th Cir. 1974) ("The law of Ohio must be resorted to in order to determine what constitutes alimony, maintenance or support.") with Nunnally v. Nunnally (In re Nunnally), 506 F.2d 1024, 1027 (5th Cir. 1975) (stating that bankruptcy court, in determining dischargeability, is not bound by state law characterization of husband’s divorce obligation); Shacter v. Shacter (In re Shacter), 467 F. Supp. 64, 66 (D. Md.) (”In determining whether [divorce] obligations are liabilities for support, a court should look to the substance of the obligation and not the labels imposed by state law.”), aff’d, 610 F.2d 813 (4th Cir. 1979); and Usher v. Usher (In re Usher), 442 F. Supp. 866 (N.D. Ga. 1977) (holding that characterization of payments as alimony in divorce decree is not determinative of whether obligation is nondischargeable alimony or property settlement).}\]

\[\text{\textsuperscript{46} Scheible, Defining Support, supra note 3, at 27.}\]

with a separation agreement or divorce decree." The Commission explained that the proposed expansion recognized that "obligations to provide for family dependents in the future may take the form of either a duty to make periodic payments based on need or an obligation to pay a settlement based on the debtor's present or anticipated wealth. The choice of form frequently turned on tax considerations or other factors not directly related to the duty to provide support." Congressional hearings on the Commission's proposal also suggested that the proposed expansion would benefit divorced spouses and children by making it unnecessary to relitigate in a bankruptcy proceeding a previously settled divorce award.

The National Conference of Bankruptcy Judges opposed the Commission's recommendation. In testimony before Congress, Judge Joe Lee, a representative of the Conference, argued that the Commission's proposal would have a "disastrous effect" on divorcing husbands and would impede the objective of rehabilitating debtors. Judge Lee also claimed that precluding husbands from discharging divorce-related property obligations would be "counterproductive," since it would inhibit their ability to comply with court-ordered alimony and child support.

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49 COMM'N REPORT, supra note 48, at 139.


51 The National Conference of Bankruptcy Judges disagreed with major aspects of the draft legislation submitted to Congress by the Commission. The bankruptcy judges therefore drafted and submitted an alternative proposal. Both proposals were introduced in the 93d and 94th Congresses, and joint hearings were held on the two draft bills between May 1975 and May 1976. See House Comm. on the Judiciary, Bankruptcy Law Revision, H.R. Rep. No. 595, 95th Cong., 1st Sess. 2 (1977), reprinted in 1978 U.S.C.C.A.N. 5964.


53 1977 Hearings at 686 (oral and prepared statement of Judge Lee); 1976 Hearings,
The bankruptcy judges were particularly concerned that husbands be permitted to discharge obligations, assumed upon divorce, to pay joint marital debts or to hold their wives harmless on marital obligations. In a supplemental submission to the House Judiciary Committee, Judge Lee argued that husbands are often unrepresented in divorce proceedings and may agree to assume joint marital debts without fully understanding the legal consequences of such an agreement.\[54\] While conceding that allowing a husband to discharge his divorce-related assumption of joint marital debts might result in the wife becoming solely liable for the debts, he suggested that the “best solution” to this problem would be for the wife to declare bankruptcy as well, rather than requiring her ex-husband to honor his obligations arising out of the divorce decree.\[55\] Judge Lee also proffered another possible solution: the revised Bankruptcy Code could include a definition of “alimony” which excluded property settlements, thereby limiting nondiscordable marital debts and assuring bankrupt husbands a fresh start.\[56\]

The Bankruptcy Code eventually passed by Congress adopted in large part the position of the bankruptcy judges. It rejected the Commission on the Bankruptcy Laws’ proposal to expand the marital discharge exemption to encompass divorce-related property settlements. Consistent with Judge Lee’s suggestions, Congress also made clear that a state court’s designation of a divorce-related obligation as “alimony” or “maintenance” would not be sufficient to establish its nondischargeability in bankruptcy. Rather, the bankruptcy court would be required to determine whether the particular obligation was “actually in the nature of alimony, maintenance, or support.”\[57\] And, in making that determination, federal bankruptcy law, not state domestic relations law, was to govern.\[58\]

\[\text{supra} \text{ note 50, at 1308 (supplemental statement of Judge Lee). For an extended discussion of this testimony, see J. Joseph Cohen, Note, Congressional Intent in Excepting Alimony, Maintenance, and Support from Discharge in Bankruptcy, 21 J. Fam. L. 525, 534–36, 539 n.103 (1983).}\]

\[\text{\[54\] 1976 Hearings, supra note 50, at 1308 (supplemental statement of Judge Lee); see also 1977 Hearings, supra note 52, at 688 (statement of Judge Lee) ("The language of the Senate Bill will make it possible for lawyers to subvert the alimony exception to discharge simply by providing in the property settlement agreement that certain debts shall be paid by the husband. In most instances the husband will not be able to make alimony or child maintenance payments and also pay all the debts of the parties.").}\]

\[\text{\[55\] 1976 Hearings, supra note 50, at 1288 (oral statement of Judge Lee).}\]

\[\text{\[56\] Id. at 1310 (supplemental statement of Judge Lee).}\]


\[\text{\[58\] Senate Comm. on the Judiciary, Bankruptcy Reform Act of 1978, S. Rep.}\]
The arguments successfully propounded by the National Conference of Bankruptcy Judges at best reflect a profound misjudgment about the economic realities of divorce. Today, as in the 1970s, only a small minority of divorcing husbands are required to pay alimony or spousal support. Even fewer divorcing husbands are ordered both to support their former wives and children and to assume substantial marital debt—the scenario upon which Judge Lee’s counter-productivity argument depends. To the contrary, in an increasing number of divorces, the property obligations that a divorcing husband seeks to discharge in bankruptcy represent his ex-wife’s only significant financial entitlement arising out of the divorce.

Moreover, a plethora of empirical studies establish that it is divorcing wives, and not their husbands, who incur the greatest economic hardship as a result of marital dissolution. Lenore Weitzman’s pioneering study of divorcing couples in California revealed that, within a year after divorce, women on average experience a seventy-three percent decline in their per capita standard of living while men experience a forty-two percent improvement. Similar studies conducted in states across the country confirm Weitzman’s basic conclusions. Judge Lee’s claim that divorcing husbands, deprived of competent legal advice, routinely incur financial obligations that they can neither understand nor afford is not supported by the available empirical evidence.

Recent studies also reveal that many female heads of household are precariously close to bankruptcy themselves. For example, a recent comprehensive study of consumer bankruptcy found that single women who file for bankruptcy are much more

No. 989, 95th Cong., 2d Sess. 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787. This report states: “What constitutes alimony, maintenance or support will be determined under the bankruptcy law, not State law.” Id. at 5865. This language was intended to overrule cases such as Waller v. Waller (In re Waller), 494 F.2d 447 (6th Cir. 1974), in which the court held that a husband’s divorce-incorporated agreement to pay and indemnify and hold his wife harmless from all existing marital debts constituted alimony under state law and was therefore not dischargeable in bankruptcy. Id.

59 As of spring 1986, less than 15% of ever-divorced or currently separated women in the United States were awarded (or had an agreement to receive) alimony. Only 12.4% of women divorced between 1980 and 1985 were awarded alimony. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SERIES P-23, NO. 154, CHILD SUPPORT AND ALIMONY: 1983 16 tbl. K (1989). In 1977, approximately 16.5% of divorcing women in California were awarded alimony. WEITZMAN, supra note 5, at 169. Moreover, most alimony and spousal support awards today terminate within a few years after divorce. See notes 151–157 and accompanying text.

60 WEITZMAN, supra note 5, at 338–39.

61 See supra note 5 (studies cited).
similar economically to their counterparts in the general population than are men who file for bankruptcy, either alone or with their wives. In particular, while men who file for bankruptcy have substantially lower earnings and income than men in the general population, the earnings of women heads of household in or out of bankruptcy were statistically indistinguishable. Women in the general population had higher total incomes than women in bankruptcy, but only because the former group received approximately thirty percent of their total income from non-wage sources, including alimony and other divorce awards. The authors conclude that, for many women, the receipt of such supplemental income may well represent the difference between staying out of bankruptcy and being forced into it.

In light of these economic realities, the bankruptcy judges’ overriding concern with mitigating the alleged financial burdens faced by divorcing husbands seems misplaced, to say the least. Divorce is likely to be financially difficult for all family members, but allowing a debtor husband to avoid his divorce-related obligations at the expense of his ex-wife and children only exacerbates an already disparate economic situation. Equally disturbing is Judge Lee’s suggestion that the “preferred solution” for any unfairness to women created by the dischargeability of particular divorce-related obligations is for them to declare bankruptcy as well, and for both ex-spouses to reap the benefits of a fresh financial start. While the precarious financial circumstances faced by many divorced women indicates that Judge Lee’s “dual bankruptcy” scenario is a realistic one, advocating this as a “preferred solution” ignores entirely the disparities in income and earning power that the former husband and wife are likely to face after bankruptcy has wiped their respective slates clean.

More generally, both the position of the bankruptcy judges and congressional endorsement of that position evince a disturbing disregard for the needs and interests of divorced women. Indeed, after Representative Robert F. Drinan (D-Mass.) pressed Judge Lee on the potential unfairness to wives of allowing husbands to discharge their divorce-related property obli-

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62 Theresa A. Sullivan et al., As We Forgive Our Debtors 151–56 (1989).
63 Id. at 154.
64 Id.
65 Id.
66 Id.
gations, another representative interrupted the proceedings by asking Judge Lee to forgive Father Drinan for being “really . . . stuck on his divorce.” General laughter followed this remark.

D. The Support/Property Distinction in Practice: Doctrinal Confusion and Federal Encroachment

Congress’s 1978 decision to preserve the statutory distinction between nondischargeable support awards and dischargeable divisions of marital property exacerbated the confusion in an already discordant body of case law. Although Congress made clear that federal law, rather than state law, was to govern the dischargeability determination, neither Congress nor the federal courts have developed clear or uniform standards for determining when a particular divorce obligation qualifies as “alimony, maintenance, or support.” Instead, “confusion, disagreement, and controversy over the appropriate method of determining the nature of a divorce-related debt, and thereby its status for the purpose of discharge, has continued.” Courts and commentators disagree, for example, on the continued relevance of state domestic relations law to the dischargeability inquiry. They also differ on the significance of the characterization of the

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66 1976 Hearings, note 50, at 1290.
67 Id.
68 See Sandra D. Freeburger & Claude Bowles, What the Divorce Court Giveth, Bankruptcy Court Taketh Away: Review of the Dischargeability of Marital Support Obligations, 24 J. Fam. L. 587, 600 (1985–86) (“Despite this long history of judicial interpretation [of § 523(a)], no single uniform federal standard has yet emerged from the case law to define alimony, maintenance or support.”); Gold, supra note 2, at 456 (“Section 523(a)(5) is also a frequently litigated provision because neither Congress nor the courts have provided clear guidance as to what constitutes alimony, maintenance, or support for purposes of section 523(a)(5).”); Scheible, Defining Support, supra note 3, at 3 (“A tremendous volume of litigation has been generated under section 523(a)(5) largely because of the courts’ failure to develop a clear federal standard for determining the nature of these debts.”); Comment, Striking the Mean Between the Goals of Bankruptcy and Divorce, 7 Bank. Dev. J. 565, 574 (1990) (“The problem is that the current statute has completely failed to effect the development of a clear and uniform standard for determining the nature of domestic obligations in the context of the bankruptcy of one of the spouses.”).
69 Scheible, Defining Support, supra note 3, at 29.
70 Compare, e.g., Pauley v. Spong (In re Spong), 661 F.2d 6 (2d Cir. 1981) (relying heavily on state domestic relations law to conclude that counsel fees awarded in connection with divorce fell within the bankruptcy definition of alimony, maintenance, or support) with Boyle v. Donovan, 724 F.2d 681 (8th Cir. 1984) (rejecting argument that divorce-created obligation to pay children’s post-majority education expenses must be nondischargeable because state law did not create duty of post-majority support).
obligation in the divorce decree or settlement agreement, and on the propriety of examining the parties' post-divorce financial circumstances in determining whether a disputed award is "in the nature . . . of support." Indeed, one recent law review article identifies five separate approaches that bankruptcy courts currently use to determine whether a disputed divorce obligation is a nondischargeable support award or a dischargeable property debt.

Other bankruptcy commentators contend that most federal courts have adopted some version of an intent test for distinguishing support from property obligations. Under this approach, the relevant inquiry is whether the divorcing parties or the court intended the disputed obligation to provide support for a financially dependent spouse. If so, then the obligation is nondischargeable. Even these commentators concede, however, that bankruptcy courts differ on the propriety and relative significance of a wide range of factors in discerning judicial or party intent. For example, some bankruptcy courts place great weight on the language and structure of the divorce decree or settlement agreement while other courts hold that such factors

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71 See Gold, supra note 2, at 468–76; Scheible, Defining Support, supra note 3, at 30–35.
72 See Gold, supra note 2, at 486–92; Scheible, Fresh Start, supra note 3, at 596–617.
74 See, e.g., John F. Murphy, The Dischargeability in Bankruptcy of Debts for Alimony and Property Settlements Arising from Divorce, 14 PEPP. L. REV. 69, 74 (1986); Scheible, Fresh Start, supra note 3, at 594; Zeisler, supra note 73, § 44.05[4]b] ("Bankruptcy courts most often cast the issue of characterization of family support [obligations] in terms of the intent of the parties or divorce court."); Note, Bankruptcy and Divorce in Kansas, 29 WASHBURN L.J. 551, 560 (1990) ("While courts must rely on various tests to resolve the differences between an obligation for support and a property settlement, the most common test is the intent test.").
75 See, e.g., Yeates v. Yeates (In re Yeates), 807 F.2d 874, 878 (10th Cir. 1986); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984) (explaining that the critical question in the dischargeability determination is the function that the parties intended the agreement to serve at the time they entered into it); In re Coil, 680 F.2d 1170, 1171 (7th Cir. 1982). The relevant intent depends upon the origin of the obligation. Where a divorce obligation is the product of an agreement between the parties, the intent of the parties governs. See Freeburger & Bowles, supra note 68, at 606–07 n.84. Where the obligation arises from a court decree entered after an adjudicated divorce, the bankruptcy court must determine the intent of the court that imposed the obligation. Id.; see also Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1109 n.10 (6th Cir. 1983); Helm v. Helm (In re Helm), 48 B.R. 215, 221 (W.D. Ky. 1985).
76 See Scheible, Defining Support, supra note 3, at 29–35.
are not dispositive on the question of intent.\textsuperscript{77} Discerning the intent of a disputed divorce obligation is likely to be particularly difficult in the overwhelming number of cases in which the obligation is the product of a negotiated settlement, rather than a contested adjudication. During divorce negotiations, parties (and their attorneys) are likely to be far less interested in the precise legal characterization of their obligations than in the bottom line question of the total financial package for each spouse.\textsuperscript{78} "Whether a particular obligation takes the form of a property division or alimony will often be the result of capricious factors such as the amount of marital assets and obligations to be divided and the drafting style of the lawyer preparing the settlement agreement . . . ."\textsuperscript{79} Tax considerations, as well, have traditionally played a significant role in determining the legal label attached to a particular divorce obligation.\textsuperscript{80} Bankruptcy courts have repeatedly emphasized these difficulties in attempting to discern relevant intent.\textsuperscript{81}

\textsuperscript{77} Compare, e.g., Yeates, 807 F.2d at 878 (clear, unambiguous language generally controls); Clark v. Clark (In re Clark), 113 B.R. 797, 801 (S.D. Ga. 1990) (no further investigation necessary when intent is clear from face of agreement; wife's waiver of alimony precludes classifying as nondischargeable husband's agreement to pay home mortgage); and Hoivik-Olson v. Hoivik (In re Hoivik), 79 B.R. 401 (Bankr. W.D. Wis. 1987) (ex-husband's obligation to make mortgage payments on marital residence dischargeable because it appeared in a sentence that included the words "complete and final property division") with Calhoun, 715 F.2d at 1111 (reversing lower court's holding that clear language of separation agreement controlled dischargeability inquiry); Williams v. Williams (In re Williams), 703 F.2d 1055 (8th Cir. 1983) (stating that disputed obligations were within the bankruptcy definition of support even though the original divorce agreement characterized them as a "property settlement" in order to insulate the nondebtor spouse from tax liability); Jenkins v. Jenkins (In re Jenkins), 94 B.R. 355, 360 (Bankr. E.D. Pa. 1988); and Myers v. Myers (In re Myers), 61 B.R. 891, 894 (Bankr. N.D. Ga. 1986).

\textsuperscript{78} See Graham v. Jenkins (In re Jenkins), 32 B.R. 978, 982 (Bankr. S.D. Ohio 1983) ("Few are the cases where either party knows or cares whether [the debt] is alimony, support or [a] division of property. Each is interested only in what each will get or have to pay."); Freeburger & Bowles, supra note 68, at 608; Gold, supra note 2, at 471; Murphy, supra note 74, at 74.

\textsuperscript{79} Gold, supra note 2, at 471.

\textsuperscript{80} Id. at 471 n.63. Recent amendments to the Internal Revenue Code have significantly reduced the importance of the property versus alimony label attached to a divorce obligation. See infra note 148.

\textsuperscript{81} See, e.g., Mencer v. Mencer (In re Mencer), 50 B.R. 80 (E.D. Ark. 1985); Helm v. Helm (In re Helm), 48 B.R. 215, 221 (W.D. Ky. 1985); Rankin v. Alloway (In re Alloway), 37 B.R. 420, 425 (E.D. Pa. 1984) ("Very often the parties have no intent to differentiate between an alimony debt and a property settlement debt and will view both as merely financial obligations arising from the separation or divorce."); Jenkins, 32 B.R. at 982 (noting that parties gave no thought to possibility of bankruptcy); Schroeder v. Schroeder (In re Schroeder), 25 B.R. 190, 191 (Bankr. N.D. Ill. 1982) ("Unfortunately, attorneys drafting divorce property settlements and judgments do not usually anticipate . . . a subsequent bankruptcy by one of the parties. As a result, questions such as [these] arise time and again in the bankruptcy courts.").
Because of the difficulties of determining intent, many bankruptcy courts have recently shifted their focus to the effect or function of a disputed divorce obligation.\textsuperscript{82} Thus, bankruptcy courts now commonly examine the family circumstances at the time of divorce to determine whether the disputed liability was essential to the nondebtor spouse's basic well-being and was reasonable in light of the debtor's ability to pay.\textsuperscript{83} If the court finds that the disputed obligation has the effect of providing necessary and reasonable support, then the court is likely to conclude that the award was intended as support and that it therefore survives bankruptcy.\textsuperscript{84} If, by contrast, the bankruptcy court finds that the nondebtor spouse can meet her basic needs without relying on the disputed obligation, then the court is likely to conclude that the obligation was not intended to provide support, and that it should therefore be discharged.\textsuperscript{85}

As a result of this emphasis on the effect or function of a disputed divorce award, the federal courts’ dischargeability inquiry has increasingly come to resemble the examination that state divorce courts typically undertake in order to resolve financial issues at the time a marriage is dissolved. In both contexts, the court is centrally concerned with the obligee-spouse’s financial needs and the potential obligor’s economic circumstances. In characterizing disputed divorce obligations, bankruptcy courts currently consider both parties’ “mental, physical, and emotional health; age; work skills; educational background and opportunities to enhance earning potentials; and the extent of individual assets.”\textsuperscript{86} To improve the quality of their determinations, Professor Scheible urges bankruptcy courts to consider as well “[t]he length of the parties’ marriage” and “the presence of minor children, their unique needs, and the custodial and visitational arrangements made regarding them.”\textsuperscript{87}

\textsuperscript{82} See Scheible, Fresh Start, supra note 3, at 595; Scheible, Defining Support, supra note 3, at 32.

\textsuperscript{83} Scheible, Fresh Start, supra note 3, at 595.

\textsuperscript{84} Id.

\textsuperscript{85} See, e.g., Tsanos v. Bell (\textit{In re Bell}), 47 B.R. 284, 287 (Bankr. E.D.N.Y. 1985) (holding that since divorced wife was employed and capable of self-support, debtor’s contractual obligation to pay her rent was not in the nature of support and was therefore dischargeable); Altavilla v. Altavilla, 40 B.R. 938, 941 (Bankr. D. Mass. 1984); Bedingfield v. Bedingfield (\textit{In re Bedingfield}), 42 B.R. 641, 649 (Bankr. S.D. Ga. 1983) (holding that debtor’s assumption of ex-wife’s automobile loan and agreement to pay her law school expenses were insufficiently related to wife’s basic needs to avoid discharge).

\textsuperscript{86} Scheible, Defining Support, supra note 3, at 58; see also Note, supra note 74, at 563–64.

\textsuperscript{87} Scheible, Defining Support, supra note 3, at 58.
This exhaustive list of factors bears an uncanny resemblance to the factors that state courts typically weigh in determining how to allocate financial interests equitably at the time a marriage is dissolved. There, too, the court considers the parties’ individual and jointly-accumulated assets, their respective contributions to those assets, and their future needs and economic capabilities.\(^8\) In essence, then, the Bankruptcy Code’s current dischargeability inquiry supplants the divorce court’s earlier financial determinations and affords the debtor-spouse a second chance to contest the very issues of economic equity and financial need that he either conceded or lost at the time of the divorce.

Bankruptcy law’s increased focus on the effect of disputed divorce awards has also persuaded some bankruptcy courts to consider evidence of any changes in the parties’ relative economic positions occurring between the divorce and the bankruptcy filing.\(^9\) This allows a debtor to argue that even if a particular divorce obligation originally functioned as support, events occurring since the divorce have deprived the award of its “support” characteristics and therefore rendered it totally or partially dischargeable in bankruptcy.\(^0\)

Such a “changed circumstances” argument is likely to be particularly effective in the bankruptcy context. As one commentator has noted, “[w]hen the debtor’s present circumstances are taken into account the scales tip heavily in his favor because

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\(^8\) See infra part II.

\(^9\) Although most bankruptcy courts limit their examination of the parties’ relative economic positions to circumstances existing at the time of the divorce, a minority of courts consider as well any changes in the parties’ financial positions occurring between the divorce and the bankruptcy filing. See, e.g., Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1109, 1110 & n.11 (6th Cir. 1983); Helm v. Helm (In re Helm), 48 B.R. 215, 225 (Bankr. W.D. Ky. 1985); Altavilla, 40 B.R. at 941. See generally Scheible, Fresh Start, supra note 3, at 596–617; Zeisler, supra note 73, § 44.05[5], at 44-29 to -31.

\(^0\) See, e.g., Forsdick v. Turgeon, 812 F.2d 801, 803 (2d Cir. 1987) (presenting debtor’s appeal to changed circumstances). Focusing on the parties’ present circumstances could also lead a court to find that an award that was not originally intended to provide support has, because of changed financial circumstances, taken on a support function and is therefore nondischargeable. In practice, however, the structure of the “present circumstances” inquiry precludes this result. Under Calhoun, a bankruptcy court must first find that the relevant legal actors intended the disputed debt to create a support obligation. If they did not, the debt is dischargeable regardless of the parties’ present needs and financial circumstances. See Calhoun, 715 F.2d at 1109; cf. Tilley v. Jesse, 789 F.2d 1074, 1076–78 (4th Cir. 1986) (holding that despite wife’s demonstrated need for support, she failed to show that both she and her husband intended husband’s agreement to pay a lump sum in installments to constitute a support obligation). Only if the parties or the state divorce court intended to create an obligation to provide support should the bankruptcy court go on to consider whether the award has the present effect of providing for an ex-spouse’s daily needs. Calhoun, 715 F.2d at 1109.
his bankruptcy action itself is persuasive evidence that his financial situation has deteriorated.\footnote{\textit{Scheible, Fresh Start}, supra note 3, at 598; see also \textit{Chedrick v. Chedrick (In re Chedrick)}, 98 B.R. 731, 734 (W.D. Pa. 1989).} Focusing on the parties’ present financial positions also penalizes an obligee-spouse who has improved her economic position through employment or remarriage.\footnote{\textit{See Gianakas v. Gianakas (In re Gianakas)}, 917 F.2d 759, 763 (3d Cir. 1990) (rejecting changed circumstances analysis and noting that examination of a former spouse’s continued need would “serve essentially as a penalty for a former spouse who may have struggled to gain self-sufficiency”); \textit{Sharp v. Hysock (In re Hysock)}, 75 B.R. 113 (Bankr. D. Del. 1987) (citing ex-wife’s better-paying post-divorce employment in support of finding that husband’s assumption of second mortgage no longer functioned as nondischargeable spousal support); \textit{Yeates v. Yeates (In re Yeates)}, 44 B.R. 575, 580–81 (Bankr. D. Utah 1984) (noting that a material improvement in a recipient spouse’s financial condition, such as securing a higher-paying job, might render a support award “superfluous, and dischargeable”).} Moreover, it does so in a way not contemplated by the divorce decree, and without resort to established state procedures for the modification of divorce obligations.

\textit{Johnson v. Seta}\footnote{\textit{Id.} at 9.} illustrates the effect of allowing a bankruptcy court to consider post-divorce circumstances in determining the dischargeability of a divorce obligation.\footnote{\textit{Id.}} In \textit{Seta}, the parties divorced after a thirteen-year marriage that left the husband with substantially more earning power than the wife.\footnote{\textit{Id.} at 8–9. The divorce decree ordered the husband to assume and hold the plaintiff harmless on both a first and a second mortgage on the marital residence. This obligation was to be secured by a third mortgage from the husband to the wife. The residence was sold after the husband filed for bankruptcy. The purchase price was sufficient to pay off the first mortgage, but not the second. \textit{Id.} at 9.} Although the wife received custody of the couple’s two children, the divorce decree awarded the marital residence to the husband.\footnote{\textit{Id.}} In lieu of alimony, the decree ordered the husband to assume a $6,000 second mortgage on the marital residence and to pay the wife an additional $6,000 as her share of the equity in the house.\footnote{\textit{Id.} at 8.} In the husband’s subsequent bankruptcy proceeding, filed shortly after the divorce, the bankruptcy court found that neither obligation was in the nature of support, despite the disparity in the spouses’ respective earning potential and the absence of an explicit alimony award. The bankruptcy court based its finding on the wife’s subsequent remarriage and on its conclusion that the wife’s present needs were being “more than adequately” met out of her second husband’s income.\footnote{\textit{Id.}}
A majority of federal appellate courts have refused to consider the parties’ post-divorce circumstances in determining the dischargeability of divorce obligations. They reason that a bankruptcy court’s consideration of such “changed circumstances” would amount to an improper usurpation of the states’ traditional role in modifying domestic relations decrees. As the Second Circuit recently explained: “An inquiry [into alleged changed circumstances] would put federal courts in the position of modifying the matrimonial decrees of state courts, thus interfering with the delicate state systems for dealing with the dissolution of marriages and the difficult and complex results that flow therefrom.”

But precisely the same “usurpation” charge applies to virtually all dischargeability determinations under the current Bankruptcy Code. That is, a bankruptcy court’s application of what one appellate opinion candidly terms “[t]he federal bankruptcy common law of domestic relations” to determine the dischargeability of obligations previously imposed in a state divorce decree necessarily interferes with “the delicate state systems” for handling divorce. This is true regardless of whether the bankruptcy court considers the parties’ post-divorce circumstances. The shift from a strict intent test to an inquiry that focuses explicitly on the effect or function of the disputed award highlights the extent of this federal interference: in ascertaining whether a disputed obligation functions as sup-

99 See Gianakas v. Gianakas (In re Gianakas), 917 F.2d 759 (3d Cir. 1990); Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989) (per curiam); Forsdick v. Turgeon, 812 F.2d 801 (2d Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986) (per curiam); Harrell v. Sharp (In re Harrell), 754 F.2d 902 (11th Cir. 1985).

100 Forsdick, 812 F.2d at 803–04. Commentators are divided on the propriety of such a changed circumstances inquiry. Compare Schible, Fresh Start, supra note 3, at 635–38 (arguing that bankruptcy courts’ application of present circumstances test constitutes improper usurpation of state courts’ traditional power to create and modify support obligations; bankruptcy courts should therefore abstain from determining the nature of disputed marital debts and defer to the more appropriate state court forum) with Gold, supra note 2, at 489–90 (endorsing bankruptcy courts’ consideration of parties’ present financial circumstances in determining dischargeability of divorce obligations) and Michaela M. White, Strange Bedfellows: The Uneasy Alliance Between Bankruptcy and Family Law, 17 N.M. L. Rev. 1, 34 (1987).

101 See Gold, supra note 2, at 489. Indeed, it is arguable that the language of § 523 implicitly supports consideration of the parties’ present financial circumstances. Section 523 excepts from discharge a marital obligation only where “such liability is actually in the nature of alimony, maintenance, or support.” 11 U.S.C. § 523(a)(5)(B) (emphasis added). As one commentator has noted, “[t]he use of the present tense is supports Calhoun’s implicit conclusion that the statute directs discharge of support-related debts unless they are currently in the nature of support at the time ... the bankruptcy petition is filed.” Schible, Fresh Start, supra note 3, at 610.
port, bankruptcy courts essentially reweigh precisely the same economic and equitable factors that a state court previously considered in determining whether to impose or approve the obligation.

Thus, it is not the inquiry into "changed circumstances" that creates the specter of federal usurpation of the states' traditional domestic relations role—although the debtor's ability to plead "changed circumstances" may increase the likelihood that a particular divorce obligation will be discharged. The problem of federal usurpation stems from the structure of the current Bankruptcy Code. It inheres in the Code's attempt to distinguish—as a matter of federal common law—between divorce obligations that survive bankruptcy because they are "in the nature of . . . support" and divorce obligations that can be extinguished because a federal court determines that they lack the essential characteristics of support, and therefore constitute dischargeable property debts.

E. Summary

The foregoing analysis establishes that the Supreme Court's original rationale for exempting marital support obligations from discharge in bankruptcy was broad enough to encompass divorce-related property divisions as well as alimony and support awards. Although Congress's 1903 codification of the exemption referred explicitly to "alimony . . . maintenance or support," this language reflected the "property-less" status of married women and the relative unimportance of property division as a means of adjusting financial interests and obligations at the time of divorce.

As both divorce and property division became more common, bankruptcy courts were called upon with increasing frequency to distinguish between nondischargeable spousal support awards and dischargeable divisions of marital property. These efforts produced a confusing and inconsistent body of case law. Congress in the mid-1970s could have remedied this confusion by expanding the marital discharge exemption to encompass divorce-related property obligations, as well as spousal support awards—a course of action recommended by its own expert commission. Congress rejected the Commission's recommen-
dation because of a serious misjudgment about the economic realities of divorce.

Congress's insistence on preserving the support/property distinction has exacerbated an already confused body of case law. Despite a growing number of cases, the federal courts have failed to develop clear or consistent guidelines for distinguishing nondischargeable support awards from dischargeable property obligations arising out of divorce. Moreover, Congress's directive that divorce obligations be characterized according to federal law, rather than state law, has resulted in increasing federal interference with state domestic relations schemes. These judicial failures are understandable: they reflect the fact that meaningful distinctions no longer exist between support awards and property divisions.

II. FAMILY LAW DEVELOPMENTS

The shortcomings of the Bankruptcy Code's current approach to divorce obligations are not limited to doctrinal confusion and federal encroachment. The Code's support/property distinction is also fundamentally inconsistent with recent trends in family law. Family law developments over the past fifteen years have eliminated most of the formal distinctions between support and property obligations and have undermined whatever theoretical differences once existed between them.

A. Traditional Distinctions

Although alimony and property awards have always been intertwined, it seemed possible, until recently, to draw some coherent distinctions between the two, both conceptually and practically. In concept, alimony was expressly forward-looking: its purpose was to provide for a dependent spouse's future needs, not to compensate a spouse for contributions made during marriage.\footnote{See Clark, supra note 19, at 593, 641-42 (identifying the purposes and functions of alimony as the maintenance and support of the spouse and, indirectly, the children of the marriage); Gold, supra note 2, at 469 (describing alimony as based on spouse's continuing legal duty to provide for the needs of his former spouse and children after a divorce); Suzanne Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 Fordham L. Rev. 827, 831-32 (1988) (explaining that the dominant justification for alimony in both separate and community property states was to accommodate economic need).} Property awards, by contrast, were oriented
toward the past: their purpose was to unscramble the respective ownership interests of each spouse in property acquired during marriage.\textsuperscript{103} Alleviating post-divorce need was not among the acknowledged functions of divorce-related property division.\textsuperscript{104}

Until the 1970s, moreover, unscrambling the spouses' respective ownership interests in marital assets was a relatively straightforward task. In the small number of community property states, each spouse was considered an equal co-owner of all assets acquired during marriage as a result of either spouse's efforts.\textsuperscript{105} In the much larger number of separate property states, ownership of property acquired during marriage generally followed title principles. In the absence of unusual circumstances surrounding the acquisition of a titled asset, divorce courts awarded the asset to the spouse who held formal title.\textsuperscript{106} For non-titled assets, courts generally presumed that the spouse who had provided the income used to acquire the asset was its rightful owner.\textsuperscript{107} Since husbands generally provided all or most of

\textsuperscript{103} See Clark, supra note 19, at 593 (explaining that the traditional purpose and function of property division was to give to each spouse that property which he or she equitably owned); Gold, supra note 2, at 469 (describing the purpose of property division as "unscrambling the ownership of marital property in an equitable fashion").

\textsuperscript{104} Reynolds, supra note 102, at 831 (arguing that historically the alleviation of post-divorce need was not a central function of property division); cf. W. S. McClaughan, Community Property Law in the United States § 12:3, at 526 (1982) (justifying existence of alimony in community property states on grounds that the division of the marital property could not satisfy economic need).

\textsuperscript{105} Clark, supra note 19, at 296; William Q. DeFuniak & Michael J. Vaughn, Principles of Community Property 2-3 (2d ed. 1971).

\textsuperscript{106} Lawrence J. Golden, Equitable Distribution of Property 4-5 (1983) (under the common law (title) approach, "property rights are determined on the basis of title"); Henry H. Foster, Jr. & Doris J. Freed, Marital Property Reform in New York: Partnership of Co-Equals?, 8 Fam. L.Q. 169, 171 (1974) (under traditional common law system, "unless equitable title can be traced, or a constructive trust is imposed, only jointly held property is distributed or made subject to partition if there is a divorce"); Mary A. Glenn, Is There a Future for Separate Property?, 8 Fam. L.Q. 315, 316 (1974) ("Upon divorce, the strict application of separate title theory in many states means that if the family assets have been acquired by and held in the name of the husband, he takes them when the household is dismantled."); For examples of judicial application of strict title theory, see, e.g., Norris v. Norris, 307 N.E.2d 181 (Ill. App. Ct. 1974) (applying principle that "ordinary services" performed by wife cannot be taken into consideration in determining property rights, ruling that wife who had worked for twenty-two years both inside and outside the home was not entitled to any property interests in substantial assets acquired during marriage and titled in husband's name); Fischer v. Wirth, 326 N.Y.S.2d 308 (N.Y. App. Div. 1971) (holding that wife was not entitled to any share of investments titled in husband's name even though wife had paid bulk of family expenses and couple had pooled their earnings during most of their forty-year marriage).

\textsuperscript{107} See Manheim v. Manheim, 302 N.Y.S.2d 473 (N.Y. Sup. Ct. 1969) (holding that husband's purchase of personal property creates inference of ownership which is not defeated by couple's joint use of property during marriage); Smith v. Smith, 120 S.E.2d
the income in households that accumulated substantial assets, application of common law title principles generally resulted in the husband being awarded a lion’s share of the property in most divorces.\textsuperscript{108}

This conceptual distinction between property division as a means of allocating established ownership interests and alimony as a vehicle for addressing future need was always somewhat blurred in practice. For example, the statutes of most community property states have long empowered their courts to consider future need in dividing community property.\textsuperscript{109} Similarly, a number of separate property jurisdictions historically authorized the division of property to effectuate an alimony award.\textsuperscript{110} In addition, many separate property states used equitable doctrines such as constructive trust and special equity to ameliorate the harsh effects on divorcing wives of dividing property according to title principles.\textsuperscript{111} Despite these equitable intrusions, however, alimony and property division remained conceptually distinct, particularly in separate property states.

Significant practical differences also distinguished alimony awards from property divisions prior to the mid-1970s. In the small number of cases in which alimony was awarded, the award generally took the form of a series of periodic payments from the husband to the wife.\textsuperscript{112} Because alimony was linked to a husband’s ongoing duty of support, the standard of living estab-


\textsuperscript{109} Reynolds, supra note 102, at 832–33.

\textsuperscript{110} \textit{Id.} at 832.

\textsuperscript{111} See \textbf{Golden}, supra note 106, at 7–8; Reynolds, supra note 102, at 832 & n.23. As of 1970, approximately half of the common law jurisdictions had statutes authorizing divorce courts, in certain circumstances, to divide a couple’s property regardless of which spouse had title. Judith T. Younger, \textit{Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform}, 67 \textit{Cornell L. Rev.} 5, 72 (1981). However, “[m]ost courts gave limited scope to these statutes, interpreting them merely to protect the interests of a spouse who provided the capital to acquire a particular asset and using them to ‘unscreamb’ ownership by giving the asset back.” \textit{Id.}

\textsuperscript{112} \textbf{Clark}, supra note 19, at 653. Although the Supreme Court ruled in \textbf{Orr v. Orr}, 440 U.S. 268 (1979), that alimony must be available to husbands as well as wives, if it is available at all, “[t]he effect of \textbf{Orr} has been more symbolic than practical,” and very few husbands are awarded alimony. \textbf{Clark}, supra note 19, at 622.
lished during the marriage was often used as the measure of the wife’s entitlement.\[^{113}\] Consistent with the ongoing nature of the husband’s support duty, alimony awards were typically permanent or, more accurately, of indefinite duration.\[^{114}\] However, since both a wife’s needs and a husband’s ability to provide for those needs could change over time, alimony awards were generally subject to court modification upon a showing of changed circumstances.\[^{115}\] In addition, alimony generally terminated upon the death of either the recipient or the obligor, since these events extinguished, respectively, the wife’s need for and the husband’s ability to provide support.\[^{116}\] Similarly, if an alimony recipient remarried, her entitlement to alimony automatically ceased, since by virtue of her remarriage she had become the support responsibility of another man.\[^{117}\]

The division of marital property, by contrast, typically took the form of a one-time transfer or transaction, rather than a series of periodic payments.\[^{118}\] Thus, property division, unlike alimony, generally did not result in a continuing financial relationship between the parties. Moreover, because property awards represented the allocation of vested ownership interests, they were considered final and could not be modified upon a showing of changed circumstances; nor were such awards affected by the death or remarriage of either spouse.\[^{119}\] Enforcement of property awards also differed from enforcement of alimony or support orders. Unlike alimony and child support, property awards generally could not be enforced via the con-
tempt power of the court. The tax treatment of alimony and property awards also differed significantly.

These conceptual and practical differences between alimony and property awards played significant roles in bankruptcy cases decided prior to the adoption of the 1978 Bankruptcy Code. In particular, bankruptcy courts frequently relied on one or more of these distinctions to determine whether a particular obligation arising out of a debtor’s divorce was a dischargeable division of marital property or a nondischargeable support award. Commentators, too, referred to these distinguishing features as bases for differentiating support awards from property divisions in the bankruptcy context.

B. Recent Developments

Over the past fifteen years, a series of related family law developments has undermined both the conceptual and the for-

120 See Scheible, Defining Support, supra note 3, at 17. In justifying this rule, which applied only to monetary (as opposed to act) decrees, a number of courts reasoned that enforcement of a property award by contempt would violate the constitutional prohibition on imprisonment for debt. See, e.g., Proffit v. Proffit, 462 P.2d 391 (Ariz. 1969); Plumer v. Superior Court, 328 P.2d 193 (Cal. 1958). Other courts argued that the severe sanction of contempt should not be applied to a decree which is not modifiable. See, e.g., McAlear v. McAlear, 469 A.2d 1256 (Md. 1984). For a critique of these justifications, see CLARK, supra note 19, at 674. A growing number of courts are now willing to enforce divisions of property by contempt. Id.

121 Under federal income tax law prior to 1984, alimony payments were deductible by the payor and taxable to the payee, while payments in compliance with an award of property were neither taxed to the payee nor deductible by the payor. I.R.C. § 71 (1983); Wright v. Commissioner, 543 F.2d 593 (7th Cir. 1976). The Domestic Relations Tax Reform Act of 1984 eliminated this distinction for all divorce decrees and separation agreements executed after 1984. For a discussion of the Act’s provisions, see CLARK, supra note 19, at 693–98.

122 Scheible, Defining Support, supra note 3, at 24. For example, in In re Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958), the court held that a husband’s contractual obligation to pay his ex-wife $50 per month as long as she remained “single and unmarried” constituted nondischargeable support. The court distinguished an earlier decision on the ground that the payments in the earlier case were to continue regardless of the wife’s subsequent remarriage or the husband’s death. Id. at 210–11 (distinguishing Edmondson v. Edmondson, 242 S.W.2d 730, 735 (Mo. 1951)). By contrast, in Abrams v. Burg, 327 N.E.2d 745 (Mass. 1975), the Massachusetts Supreme Judicial Court held nondischargeable a husband’s divorce-created obligation to make annual payments to his ex-wife for eight years. In characterizing the obligation as a dischargeable property debt, the court emphasized that the obligation was to continue even if the wife died or remarried, that the husband could substitute a lump-sum payment to his wife, and that the decree specified that the payments were not to be considered taxable income to the wife. Id. at 747.

123 See, e.g., John G. Branca, Dischargeability of Financial Obligations in Divorce: The Support Obligation and the Division of Marital Property, 9 Fam. L.Q. 405 (1975) (discussing factors used by bankruptcy courts to distinguish property from alimony awards); Loiseaux, supra note 38; Note, Fresh Start Forgotten, supra note 43; Habeeb, supra note 38, at 758 (discussing cases).
mal distinctions between spousal support and property division. These developments have hindered the Bankruptcy Code’s attempt to distinguish between nondischargeable support awards and dischargeable divisions of marital property.

First, the widespread adoption of equitable distribution principles has effectively merged the functions of property division and spousal support. Indeed, in many jurisdictions, the equitable distribution of marital property has replaced spousal support as the preferred means of providing for the future needs of divorcing spouses. Second, the expansion of the definition of marital property to include such intangible assets as pensions and other forms of deferred compensation, as well as business and professional goodwill, has both changed the structure of many property awards and enhanced the potential of property division to provide for a spouse’s post-divorce needs.

Changes in the law and theory regarding alimony have also blurred the distinction between property and support awards. The uncoupling of alimony from the husband’s duty of support has reduced the availability of “permanent” alimony and has led to support awards that look and function like extended divisions of marital property. The demise of the husband’s support obligation has also spurred a reconceptualization of alimony that emphasizes its compensatory and restitutionary functions, rather than its traditional needs-based justification. This emphasis on alimony as compensation for economic contributions made and losses incurred during marriage has also resulted in the development of hybrid divorce remedies that combine the traditional characteristics of property and support awards. Finally, the increased ability of spouses to determine via contracts the financial consequences of their divorce has led to economic settlements that defy categorization under the traditional support/property dichotomy.

1. The Rise of Equitable Distribution

One of the most important aspects of American divorce reform over the past twenty years has been the widespread adoption of equitable distribution as the basis for allocating property interests at the time of divorce.\textsuperscript{124} This nearly universal endorse-

\textsuperscript{124} All common law property jurisdictions currently allocate property at divorce by equitable distribution, rather than by title. Doris J. Freed & Timothy B. Walker, \textit{Family
ment of equitable distribution principles has largely vitiated the conceptual distinction between alimony and property division. This is because the purpose of dividing marital property, under most equitable division schemes, involves more than sorting out the spouses’ pre-existing ownership interests in marital assets; rather, it is to allocate those assets between the spouses in a fashion that is just, reasonable, or equitable. Moreover, in determining which distribution of property will satisfy these criteria, courts are typically directed to consider not only historical factors such as the spouses’ economic and noneconomic contributions to the marriage, but also such forward-looking criteria as the spouses’ post-divorce incomes, employment prospects, and financial needs. Indeed, many equitable distribution statutes focus more on the parties’ post-divorce circumstances than on factors relating to the acquisition of assets. These statutes justify the inference that the purpose of equitable distribution “is as much to provide for the financial needs of the spouses after the divorce as to award to each what he or she equitably owns.”

Law in the Fifty States: An Overview, 23 Fam. L.Q. 495, 523–24 tbl. 4 (1990). In addition, all but three of the eight community property states authorize equitable, rather than strictly equal, division of property in at least some circumstances. Id. Twenty years ago, many common law jurisdictions either failed to authorize the transfer of one spouse’s property to the other upon divorce or prohibited or restricted such transfers. See Herma Hill Kay, Beyond No-Fault: New Directions in Divorce Reform, in Divorce Reform at the Crossroads, supra note 5, at 6, 12.

The vast majority of equitable distribution statutes make no attempt to distinguish the purposes of property division from the purposes of an alimony award. CLARK, supra note 19, at 592. But see Neb. Rev. Stat. § 42-365 (1988) (stating that the purpose of property division is to distribute marital assets equitably between the parties, while the purpose of alimony is to provide maintenance or support where appropriate).


CLARK, supra note 102, at 841 (“Of the forty equitable distribution statutes in separate property states and the District of Columbia, twenty-eight include factors that take into account not only the acquisition of the property but also the needs of the spouses.”).

See Reynolds, supra note 102, at 842 & n.84.

CLARK, supra note 19, at 594; see also Reynolds, supra note 102, at 268 (1983) (describing the accommodation of future needs as a primary goal of many equitable distribution statutes); Krawskopf, supra note 39, at 226 (“A major purpose of equitable distribution in many states is to provide for future support needs.”); Reynolds, supra note 102, at 843 (observing that state equitable distribution schemes “suggest widespread...
The widespread adoption of equitable distribution has done more than blur the conceptual distinctions between property division and spousal support. It has also resulted, to a significant extent, in property division replacing alimony as the preferred means of adjusting the economic relationship of divorcing spouses.\textsuperscript{130} The Uniform Marriage and Divorce Act, for example, seeks to promote finality whenever practical by "encourag[ing] the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance."\textsuperscript{131} Indeed, the Act explicitly precludes a court from awarding maintenance unless it finds that the requesting spouse "lacks sufficient property to provide for his reasonable needs."\textsuperscript{132}

Consistent with this emphasis on looking first to property division, rather than to alimony, to meet the spouses' post-divorce needs, many state divorce schemes require that property division precede the determination of eligibility for support and that a spouse's need for support be evaluated in light of any property distributed.\textsuperscript{133} If an in-kind division of marital assets is impractical, a court may still use property division to accommodate need by directing a spouse who receives a greater share of tangible assets to repay the other in cash, often by a series of periodic payments.\textsuperscript{134} Even in states that have not addressed statutorily the interplay between property and support awards, concurrence in the notion that property division should support needy spouses and that property division is preferable to alimony in performing this function"; Scheible, \textit{Fresh Start}, supra note 3, at 587–88 ("Increasingly, since the widespread adoption of equitable distribution of property schemes, property division is employed as a substitute for alimony and provides a dependent spouse a means of self-support."); CLARKE, supra note 19, at 589; Scheible, \textit{Fresh Start}, supra note 3, at 587–88; Mary J. Connell, \textit{Note, Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion}, 50 FORDHAM L. REV. 415, 415 (1981) ("The emphasis in modern divorce statutes has shifted from the awarding of alimony to the division of property between the spouses.").

\textsuperscript{130} \textsc{Unif. Marriage & Divorce Act} § 308 cmt., 9A U.L.A. 147, 348 (1987); see also \textit{id. at prefatory note}, 9A U.L.A. at 149 (describing the division of property "as the primary means of providing for the future financial needs of the spouses").

\textsuperscript{132} \textit{Id.} § 308(a)(1), 9A U.L.A. at 348.


\textsuperscript{134} See Hellwig v. Hellwig, 426 N.E.2d 1087, 1092 (Ill. App. Ct. 1981) (holding that where in-kind division of marital property would be impractical or inequitable, court may award property to one spouse, subject to repayment to non-acquiring spouse); Ashraf v. Ashraf, 397 N.W.2d 128, 131 (Wis. 1986) (awarding all major assets to husband and requiring husband to pay wife half the value of those assets); Scheible, \textit{Fresh Start}, \textit{supra} note 3, at 387. Although these payments resemble alimony, they are generally understood to represent nonmodifiable ownership interests. See \textit{id. at 388.
case law often recognizes that economic equity is to be achieved primarily, if possible, through the distribution of property.\textsuperscript{135}

One commentator has summed up these developments as follows:

The message of reform could not have been clearer: property division should perform a support function and is superior to alimony for this task. Property should take over the function of alimony when sufficient property exists. The future needs of an economically dependent spouse should figure foremost in decisions about the division of property, not only in decisions about alimony.\textsuperscript{136}

2. Expansion of Definition of Marital Property

The primacy of property division over alimony as a means of allocating marital gains and losses has been reinforced by the expansion of the definition of marital property to include such intangible assets as pensions and business or professional goodwill. While divorce-related property divisions in the past typically involved the allocation of interests in land and other tangible forms of wealth, property obligations today more commonly involve the distribution of pension and other work-related benefits accumulated during marriage.\textsuperscript{137} Indeed, many courts assume that the equitable distribution of pension and other retirement benefits performs precisely the same “support” function traditionally associated with long-term alimony. This assumed equivalency is evidenced by cases holding that if a wage-earner’s pension has been treated as property for equitable distribution purposes, it cannot also constitute income for purposes of imposing or modifying an alimony award.\textsuperscript{138} Several

\textsuperscript{135} See O’Brien v. O’Brien, 489 N.E.2d 712, 716 (N.Y. 1985) (stating that purpose of equitable distribution is to eliminate economic dependence); Reynolds, supra note 102, at 842–43.

\textsuperscript{136} Reynolds, supra note 102, at 841.


courts have also held that if a non-employee spouse receives a pension share as part of a division of marital property, a reduced alimony or maintenance award to that spouse may be appropriate.\textsuperscript{139}

Thus, fifteen or twenty years ago—before pensions were considered divisible marital assets in most common law property states—a homemaker who divorced after a long-term marriage might be awarded indefinite alimony based, in part, on her husband’s expected pension income.\textsuperscript{140} Today, that woman is likely to receive, as a full or partial alimony substitute, a percentage share of the pension benefits accumulated as a result of her husband’s employment during the marriage.\textsuperscript{141}

The increased importance of pensions and other intangible marital assets has also blurred many of the formal distinctions between property and alimony awards. In many divorces, pension benefits earned during marriage constitute by far the most valuable marital asset.\textsuperscript{142} Unless a spouse is already retired, however, this asset consists of the right to receive payments in the future.\textsuperscript{143} Dividing a pension at the time of divorce, therefore, essentially involves assigning rights to future income, as does a traditional alimony award.\textsuperscript{144}

Moreover, because the value of the pension often exceeds the value of all other marital assets, it may be difficult or impossible for divorcing couples to complete the process of property division immediately upon divorce. Rather, to effectuate an equitable division of marital assets, a court must often adopt one of

\textsuperscript{139} See, e.g., Cotter v. Cotter, 473 A.2d 970 (Md. 1984).

\textsuperscript{140} See, e.g., In re Marriage of Ellis, 538 P.2d 1347 (Colo. Ct. App. 1975) (considering husband’s right to retirement pay for purposes of setting alimony); Howard v. Howard, 242 N.W.2d 884 (Neb. 1976) (considering military retirement pay in setting alimony but not regarding military retirement pay as marital property); In re Roth, 569 P.2d 693 (Or. 1977) (refusing to classify husband’s pension as divisible property but using it as a basis for awarding alimony to wife).

\textsuperscript{141} See, e.g., Diffenderfer v. Diffenderfer, 491 So. 2d 265, 268 (Fla. 1986) (“It is preferable to deal with pension rights as a marital asset rather than as a source of support obligations.”); Keen v. Keen, 407 N.W.2d 643 (Mich. Ct. App. 1987) (disfavoring distribution of pension benefits through alimony); In re Marriage of Kernan, 776 P.2d 41 (Or. Ct. App. 1989) (holding that trial court erred in awarding wife spousal support in lieu of a share of husband’s retirement benefits).

\textsuperscript{142} See, e.g., Brown v. Brown (In re Marriage of Brown), 544 P.2d 561, 566, 568 (Cal. 1976); GOLDEN, supra note 106, at 167. This assumes that neither a professional degree, nor a spouse’s enhanced earning power, counts as a marital asset.

\textsuperscript{143} See generally GOLDEN, supra note 106, at 167–77 (discussing various types of pension interests). Even where a spouse is already retired, pension benefits are still generally received as periodic payments.

\textsuperscript{144} In the case of a pension, however, the future income actually represents compensation for services performed in the past.
two forms of deferred distribution: it can either order the spouse who retains the pension to reimburse the other spouse for her share of the asset via a series of periodic payments, or it can award each spouse a specified share of each pension payment “if, as and when” that payment is received.\(^{145}\) Both of these methods of distribution differ from traditional forms of property division—and resemble traditional alimony awards—in that they involve a series of payments over time, rather than a one-time transfer or transaction. Moreover, both of these methods of distribution involve some degree of continued financial connection between the divorcing spouses, a feature characteristic of traditional support arrangements, but not of traditional property divisions.

Dividing business or professional goodwill often entails a similar process of deferred distribution. Unless the business or professional practice is to be sold at the time of divorce, or unless there are other assets that can be used to offset the value of the goodwill, the equitable division of marital assets is likely to involve a series of payments from one spouse to the other. Like the extended or deferred distribution of a pension, these payments resemble traditional support awards in that they entail a continuing financial relationship between the divorcing parties.\(^{146}\)

The blurring of the formal and functional distinctions between property division and spousal support has been accompanied by a reduction in the non-bankruptcy consequences of characterizing a divorce obligation as property rather than support. A growing number of jurisdictions, for example, now hold that courts may use their contempt power to enforce divorce-related property obligations, as well as awards of spousal or child support.\(^{147}\) Similarly, Congress has recently recognized that the


\(^{146}\) They differ from traditional support awards, however, in that they are generally considered final and not subject to modification. If the statutory proposal advocated in this Article were adopted, it might make sense to create an exception to the ban on post-divorce modification of extended property awards where unanticipated changes in the obligor’s financial condition render enforcement of such an extended award unconscionable. Cf. O’Brien v. O’Brien, 489 N.E.2d 712, 720–21 (N.Y. 1985) (Meyer, J., concurring) (suggesting that property divisions based on one spouse’s professional license should be modifiable).

\(^{147}\) See, e.g., In re Marriage of Ramos, 466 N.E.2d 1016 (Ill. App. Ct. 1984) (holding that both property settlement and maintenance provision of dissolution decree were
income tax treatment of payments made pursuant to a divorce settlement or decree should not depend upon whether the payments fit more neatly into the pigeonhole labeled property or the pigeonhole labeled support.\textsuperscript{148}

3. Reconceptualization of Alimony

Changes in the law and theory of alimony have also contributed to the conceptual merger of spousal support and property division. Traditionally, alimony represented the judicially mandated continuation of a husband's duty to support his wife.\textsuperscript{149} Since the duty of support was the husband's alone, only wives were entitled to alimony. The right to marital support, however, was conditioned on dutiful behavior during marriage; a wife who was the guilty party in a divorce generally forfeited her right to alimony.\textsuperscript{150}

The demise of the gender-based marriage contract, in conjunction with no-fault divorce reform, undermined these traditional rationales for awarding alimony. It also left the law of alimony in somewhat of a theoretical vacuum.\textsuperscript{151} A number of courts and legislatures initially reacted to this vacuum by reconceptualizing alimony as a short-term transition payment designed to enable formerly dependent spouses to become eco-

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\item \textsuperscript{148} enforceable through contempt proceedings); \textit{In re} Marriage of Lenger, 336 N.W.2d 191 (Iowa 1983) (rejecting argument that use of contempt power to enforce property division embodied in divorce decree violated state constitutional ban on imprisonment for debt); Haley v. Haley, 648 S.W.2d 890 (Mo. Ct. App. 1982); Robinson v. McDanel, 795 P.2d 513 (Okla. 1990) (holding that property rights embodied in a divorce decree are enforceable via contempt); McCravy v. McCravy, 723 P.2d 268 (Okla. 1986) (applying statute that superseded prior contrary authority and provided that contempt power could be used to enforce any order for the payment of money as part of a division of spousal property pursuant to a divorce or separate maintenance action); Hanks v. Hanks, 334 N.W.2d 856 (S.D. 1983) (holding that contempt may be used to enforce property settlement aspects of divorce); see also CLARK, supra note 19, at 674; Christopher Hall, Annotation, \textit{Divorce: Propriety of Using Contempt Proceeding to Enforce Property Settlement Award or Order,} 72 A.L.R.4th 298 (1991).
\item \textsuperscript{150} CLARK, supra note 19, at 619–20; Ira M. Ellman, \textit{The Theory of Alimony,} 77 Cal. L. Rev. 1, 5–6 (1989).
\item \textsuperscript{151} See Singer, supra note 114, at 1110.
\item \textsuperscript{151} See Ellman, supra note 149, at 6.
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nomically self-sufficient as soon as possible.\textsuperscript{152} To this end, trial
courts in a number of jurisdictions largely replaced so-called
permanent alimony with short-term "rehabilitative" awards.\textsuperscript{153}

Recent appellate and legislative developments have attempted
to curb the inappropriate use of short-term alimony, particularly
in marriages of long duration.\textsuperscript{154} Many jurisdictions, however,
continue to prefer short-term rehabilitative or transitional
awards over permanent alimony wherever feasible.\textsuperscript{155} These re-
habilitative awards differ from traditional alimony—and resemble
the division of marital property—in that they generally con-
sist of a definite and limited number of payments, paid out over
a specific time period. Moreover, unlike traditional alimony ob-
ligations, these limited-term awards are often considered non-
modifiable or modifiable only in extreme circumstances.\textsuperscript{156} In
addition, one of the express purposes of rehabilitative alimony

\textsuperscript{152} See, e.g., Reback v. Reback, 296 So. 2d 541 (Fla. Dist. Ct. App. 1974); Sansone
1978); Henry H. Foster & Doris J. Freed, \textit{Spousal Rights in Retirement and Pension
"has come to be regarded as an interim stipend which is available for a relatively short
time while a former spouse in need prepares for the labor market"). Several states also
adopted statutes limiting the duration of alimony awards. \textit{E.g.}, \textit{Del. Code Ann. tit. 13
§ 1512(a)(3) (1981) (limiting alimony to two years if the marriage lasted less than 20
are no children). For a discussion and critique of these developments, see Linda B.

\textsuperscript{153} See Joan M. Krauskopf, \textit{Rehabilitative Alimony: Uses and Abuses of Limited
Duration Alimony}, in \textit{American Bar Association, Section of Family Law, Al-
mony: New Strategies for Pursuit and Defense 65, 70–71 (1988) (discussing and
criticizing cases); Marshall, supra note 152.

\textsuperscript{154} See, e.g., \textit{Minn. Stat. § 518.552, subdiv. 3, amended by 1985 Minn. Laws 266
("[N]othing in this section shall be construed to favor a temporary award of maintenance
over a permanent award, where the factors . . . justify a permanent award."); Morrison
v. Morrison (\textit{In re} Marriage of Morrison), 573 P.2d 41 (Cal. 1978) (reversing limited
duration award to 54-year-old wife with minimal work experience after a 28 year
marriage); Walter v. Walter, 464 So. 2d 538 (Fla. 1985) (reversing lower court's disap-
proval of permanent alimony and expressly disapproving court's statement that per-
manent alimony should be awarded only as a last resort and only upon a showing of
lack of capacity for self-support); Lewis v. Lewis, 739 P.2d 974 (N.M. 1987) (holding
that a 62-year-old homemaker whose husband was well able to afford permanent alimony
had no obligation to "rehabilitate" herself by seeking full-time employment outside the
home); Toler v. Toler, 356 S.E.2d 429 (S.C. Ct. App. 1987) (concluding that record
failed to demonstrate requisite likelihood of self-sufficiency to justify rehabilitative
alimony where the claimant was a 42-year-old homemaker with limited education and
job experience); see also Kay, \textit{supra} note 124, at 16. \textit{See generally} Krauskopf, \textit{supra}
note 153, at 70–74 (discussing recent appellate trend away from over-reliance on short-
term alimony awards).

\textsuperscript{155} See Scheible, \textit{Fresh Start}, \textit{supra} note 3, at 589.

\textsuperscript{156} Id. at 589 & n.67 (citing cases).
is to minimize the possibility of an ongoing financial relationship between the parties.

Growing concern about the disparate economic effects of divorce on women (and children) has highlighted the inadequacy of treating alimony as simply a short-term transition payment, designed to facilitate economic self-sufficiency. These concerns have led both scholars and policy-makers to rethink the nature and functions of alimony. A consensus is emerging among family law scholars that alimony and property division share a single, fundamental purpose: to apportion fairly the economic gains and losses that result from participation in a marriage.\(^\text{157}\) In particular, a number of family law scholars have recently argued that alimony (or a similar form of post-divorce income sharing) is both appropriate and necessary to prevent the unjust enrichment of an economically dominant spouse who has benefitted financially as a result of marriage, and/or to compensate an economically dependent spouse for the loss of earning capacity associated with her assumption during marriage of primary childcare and household duties.\(^\text{158}\)

It is significant, for purposes of bankruptcy law, that both of these emerging justifications for alimony focus primarily on the spouses’ gains and losses during marriage, rather than on their post-divorce needs. Alimony, under these theories, is still forward-looking in that it deals with the allocation of the spouses’ future income. But the justifications for that allocation are increasingly grounded in the past: they focus centrally on the parties’ contributions and sacrifices during marriage, and on the continuing effects of those marital activities on the parties’ respective post-divorce earnings.\(^\text{159}\)

\(^{157}\) Krauskopf, supra note 1, at 256.


\(^{159}\) Cf. Carl Schneider, Rethinking Alimony: Marital Decisions and Moral Discourse, 1991 B.Y.U. L. Rev. 197, 257 (endorsing what author describes as the “traditional justification for alimony . . . that people who marry take on special responsibilities for each other because of the commitment that defines marriage and because of the commitments that grow out of a shared life”).
Recent legislative and judicial developments also emphasize these compensatory justifications for alimony. A number of state statutes now explicitly require courts, in awarding alimony, to consider any contributions that one spouse has made to the other’s professional education, training, or career. Similarly, several states have recently amended their list of required alimony considerations to include “the extent to which the spouse seeking maintenance has reduced his or her income or career opportunities for the benefit of the other spouse.” Recent case law in a number of jurisdictions also stresses the importance of alimony as a means of compensating financially dependent spouses for contributions made or economic losses incurred over the course of a marriage.

4. The Creation of Hybrid Divorce Remedies

This increased emphasis on the compensatory and restitutionary functions of alimony has also led to the creation of hybrid divorce awards that defy categorization under the traditional support versus property framework. Perhaps the most common occasion for such hybrid awards is a divorce that occurs shortly after one spouse has supported the other through graduate or professional school. Because the divorce occurs soon after the supported spouse obtains his degree, the other spouse is unable to share in the increased standard of living that both spouses had expected the degree to provide. Moreover, because the couple has invested most of its resources in achieving the

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160 See, e.g., CAL. CIV. CODE § 4801(g) (West Supp. 1992); FLA. STAT. § 61.08 (1985); IND. CODE § 31-1-11.5-11(e) (1979); IOWA CODE § 598.21 (1981); N.Y. DOM. REL. LAW § 236(B) (McKinney 1990); OHIO REV. CODE ANN. § 3105.18 (Baldwin 1989); OR. REV. STAT. § 107.105(d) (1991); TENN. CODE. ANN. § 36-5-101(d) (1991); WIS. STAT. § 767 (1981).

161 ARIZ. REV. STAT. § 25-319(B)(7) (1987); see also N.Y. DOM. REL. LAW § 236(B)(6)(a)(5); OR. REV. STAT. § 107.105(d)(F).


163 In the vast majority of reported cases, the husband earns the professional degree, while the wife provides financial and family support. For a general discussion of this problem, and the legal responses to it, see, e.g., IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 321–51 (2d ed. 1991); Deborah A. Batts, Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorce, 63 N.Y.U. L. REV. 751 (1988); Joan M. Krauskopf, Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in Human Capital, 28 KAN. L. REV. 397 (1980).
degree, few—if any—traditional assets are available for equitable distribution.

The majority of states that have addressed this situation have not considered a graduate or professional degree to be marital property subject to division.\textsuperscript{164} These same states have held, however, that a spouse who contributes in this manner to her partner’s graduate or professional training has a strong claim for financial compensation, even if she would not otherwise qualify for spousal support under the prevailing state law standards.\textsuperscript{165} To provide this compensation, a number of jurisdictions have endorsed the concept of “reimbursement” or “restitutional” alimony.\textsuperscript{166}

Awards of “reimbursement” or “restitutional” alimony generally take the form of a sum certain payable in installments.\textsuperscript{167} Unlike traditional periodic alimony, these hybrid divorce awards generally are not modifiable and do not terminate upon a recipient’s remarriage.\textsuperscript{168} Thus, although such awards carry the label “alimony,” they are both formally and functionally akin to the equitable division of marital property.\textsuperscript{169}


\textsuperscript{166} See, e.g., CALIF. CIVIL CODE § 4800.3 (Supp. 1992) (requiring “reimbursement” upon divorce to the marital community “for community contributions to education or training of a party that substantially enhances the earning capacity of the party”); In re Marriage of Francis, 442 N.W.2d 59 (Iowa 1989); Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982); Bold v. Bold, 574 A.2d 552 (Pa. 1990); Petersen v. Petersen, 737 P.2d 237, 243 n.5 (Utah Ct. App. 1987); Hoak v. Hoak, 370 S.E.2d 473 (W. Va. 1988). A number of prominent family law commentators have endorsed the concept of reimbursement alimony. Professor Joan Krauskopf, for example, has proposed the use of a non-modifiable monetary award, which she sees as akin to maintenance in gross, as “the most justifiable way in which to recompense a spouse who has contributed to the other spouse’s increased earning capacity.” Krauskopf, supra note 163, at 401. Similarly, Professor Herma Hill Kay has called for the adoption of a hybrid divorce award “that can combine the flexibility of a support order with the permanence of a property award.” Kay, supra note 124, at 23. But cf. Ellman, supra note 149, at 24–28 (criticizing restitution as a conceptual basis for alimony).

\textsuperscript{167} See Mahoney, 453 A.2d at 535–36; Scheible, Fresh Start, supra note 3, at 590.

\textsuperscript{168} See Francis, 442 N.W.2d at 60 (“Reimbursement alimony . . . which is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other, should not be subject to modification or termination until full compensation is achieved.”); Smith v. Smith, 540 A.2d 1348, 1349 (N.J. Super. Ct. Ch. Div. 1988) (describing the purpose of reimbursement alimony as compensation rather than support); Zullo v. Zullo, 576 A.2d 1070, 1073 (Pa. Super. Ct. 1990) (holding that reimbursement alimony is not subject to termination on remarriage); Scheible, Fresh Start, supra note 3, at 590.

\textsuperscript{169} See Francis, 442 N.W.2d at 64 (“Similar to a property award, but based on future
Other courts have eschewed the alimony label and have utilized principles of equity and contract law to fashion hybrid divorce remedies that combine the traditional attributes of support and property awards. For example, in *Pyatte v. Pyatte*, the Arizona Court of Appeals held that a divorcing wife was entitled to quasi-contractual relief where she had made substantial financial contributions to her husband’s education, pursuant to an oral understanding that was too indefinite to qualify as a contract. Similarly, in *DeLa Rosa v. DeLa Rosa*, the Minnesota Supreme Court invoked restitution theory to award a divorcing wife sums she had expended for her student husband’s education and living costs, even though she did not qualify for spousal maintenance under the governing statute.

More recently, the Michigan Court of Appeals combined support and property principles to rule that where one spouse’s advanced degree is the product of a “concerted family effort involving mutual sacrifice, effort, and contribution,” it creates a “marital asset” as to which the non-student spouse has an “equitable claim” for compensation. The court explicitly rejected prior decisions that had characterized an advanced degree earned during marriage as a factor to be considered in awarding alimony, rather than a marital asset subject to distribution. However, the court also rejected a pure property analysis that would have given the non-student spouse an interest in the degree itself, and therefore entitled her to a percentage share of the present value of the degree. Instead, the court held that the nonstudent spouse’s compensatory claim should be valued by first examining “her sacrifices, efforts and contributions toward the attainment of the degree” and then determining, in light of those sacrifices, “what remedy or means of compensation would most equitably compensate the nonstudent spouse earning capacity rather than a division of tangible assets, [reimbursement alimony] should be fixed at the time of the decree.”; *Smith*, 540 A.2d at 1349.

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171 309 N.W.2d 755 (Minn. 1981).
172 Id. at 758.
174 Id. at 913–17.
175 Id. at 920–21. In support of this conclusion, the court quoted with approval the reasoning of an earlier panel decision that had rejected the view that an advanced degree constituted divisible marital property and had instead adopted an alimony approach. Id. (quoting Krause v. Krause, 441 N.W.2d 66, 72–73 (Mich. Ct. App. 1989)).
under the facts of the case."\textsuperscript{177} The court recognized that such compensation could be effectuated in different ways. It gave two examples: an award which requires the degree-earning spouse to finance an equivalent education or training opportunity for the nonstudent spouse, and an award reimbursing the nonstudent spouse for the amount of financial assistance she contributed toward the degree, taking into account her nonpecuniary sacrifices and efforts.\textsuperscript{178} The court also noted that either of these awards could be made payable in monthly installments, with interest, over a fixed period of time.\textsuperscript{179}

The creation and justification of the hybrid divorce awards discussed above represent a frontal assault on the traditional dichotomy between property division and spousal support. Divorce remedies such as equitable compensation, and "reimbursement" or "restitutional" alimony not only defy categorization under a support versus property framework, they also show the increasing convergence of both the theoretical justifications for, and the practical functions of, property division and spousal support.

5. The Increased Role of Private Contracting

A final family law development that has undermined the support/property distinction is the increased ability of spouses to determine by private contract the financial consequences of divorce. Although couples and their attorneys have long used out-of-court settlements to resolve economic issues related to divorce, states traditionally imposed significant limitations on the scope and content of these agreements.\textsuperscript{180} Prior to the late 1970s, for example, most states largely precluded couples from contracting before or during an intact marriage about the financial consequences of divorce.\textsuperscript{181}

States also imposed significant constraints on contracts negotiated at the time of divorce. Because the husband's support

\textsuperscript{177} Id. at 923.
\textsuperscript{178} Id. at 926.
\textsuperscript{179} Id. at 927.
\textsuperscript{181} Clark, supra note 19, at 6–7, 10. Such contracts between spouses or prospective spouses were thought to violate public policy by unduly encouraging divorce and by altering the essential incidents of marriage, particularly the husband's duty of support. Id.; see also Sally Burnett Sharp, Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom, 132 U. Pa. L. Rev. 1399–1400 (1984).
obligation was imposed by law, courts traditionally held that it could not be contracted completely away.\textsuperscript{182} In theory at least, judges were expected to scrutinize separation and divorce agreements to ensure that their support provisions were "'fair, just and reasonable in view of all the circumstances.'"\textsuperscript{183} Although such judicial scrutiny was often perfunctory, it was not uncommon for courts to assert the right to reject a divorce agreement on the sole ground that its alimony and/or property provisions differed from the provisions that the court would have imposed.\textsuperscript{184} Most states also subjected divorce-related financial agreements to rigorous procedural scrutiny, relying on a presumed confidential relationship between the spouses that persisted well into the divorce process.\textsuperscript{185}

Divorcing couples today have considerably more freedom than in the past to determine privately the financial consequences of divorce.\textsuperscript{186} Indeed, courts and commentators today generally favor private resolution of financial issues as a means of encouraging amicable dissolution, fostering certainty and finality, and promoting judicial economy.\textsuperscript{187} Although some courts still purport to scrutinize divorce agreements for both procedural and substantive fairness, a growing number of jurisdictions defer to privately negotiated divorce agreements in much the same way as they do to other types of private contracts.\textsuperscript{188}

\textsuperscript{182} Sharp, supra note 180, at 830–31.

\textsuperscript{183} Id. at 832 (quoting 1 ALEXANDER LINDEY, LINDEY ON SEPARATION AGREEMENTS AND ANTENUPITAL CONTRACTS § 15, at 15-91 (rev. ed. 1978)). It is questionable, however, whether such a fairness requirement existed in practice. See id. at 832–33.

\textsuperscript{184} See CLARK, supra note 19, at 773, 773 n.15 (citing cases from states across the country in which courts assert discretionary power to modify or invalidate agreements); Note, supra note 38, at 732.

\textsuperscript{185} See Sharp, supra note 181, at 1415–23; Sharp, supra note 180, at 834–38.


\textsuperscript{187} See, e.g., UNIF. MARRIAGE & DIVORCE ACT prefatory note, 9A U.L.A. 147, 149 (1987) (explaining that the Act attempts to "reduce the adversary trappings of marital litigation" by encouraging parties "to make amicable settlements of their financial affairs"); CLARK, supra note 19, at 756–57, 774–75 (referring to the "obvious need for and advantages of separation agreements as devices for compromising marital disputes and for avoiding the expense, delay, and stress of litigation"); Scheible, Fresh Start, supra note 3, at 591 ("Permitting divorcing couples to determine contractually their post-marital financial relationship reflects a state family law policy of encouraging amicable dissolution and fostering certainty."); Sally Burnett Sharp, Semantics as Jurisprudence: The Elevation of Form over Substance in the Treatment of Separation Agreements in North Carolina, 69 N.C. L. REV. 319, 319–29 (1991) (maintaining that private agreements reduce psychological and economic costs of divorce, foster post-divorce cooperation, decrease the negative impact of divorce on children, and promote judicial economy).

\textsuperscript{188} See, e.g., Brighton v. Brighton, 517 So. 2d 53 (Fla. Dist. Ct. App. 1987) (holding that where there is no fraud or overreaching and the parties have full knowledge, an
This increased reliance on privately negotiated divorce arrangements undermines the doctrinal division between support awards and property divisions in a number of ways. First, many divorce agreements do not indicate whether a particular financial obligation represents a support award, a division of property, or a combination of the two.\textsuperscript{189} This lack of precise identification makes it more difficult later to characterize the award for purposes of a subsequent discharge in bankruptcy.

Moreover, privately negotiated divorce agreements often contain little, if any, information about the parties' respective financial needs and circumstances. Nor do such agreements generally recite in any detail the reasons for the financial arrangements that the parties have entered into. To the extent that a bankruptcy court's characterization of a divorce obligation now depends upon an assessment of the relative economic positions of the spouses at the time of divorce, privately negotiated divorce arrangements are likely to provide little relevant historical information.

Divorcing spouses also can agree privately to financial obligations that differ from or go beyond the obligations that a court could impose on its own. For example, the parties may agree to extend the scope or the duration of a "support" award beyond what state law would authorize a court to order.\textsuperscript{190} Similarly, a

\textsuperscript{189} Scheible, \textit{Fresh Start}, supra note 3, at 590–91; see also Sharp, \textit{supra} note 180, at 826–27.

\textsuperscript{190} See, e.g., Cutshaw v. Cutshaw, 261 S.E.2d 52 (Va. 1979) (holding that parents may contract to extend their legal obligation to support and maintain a child after majority); Beard v. Worrell, 212 S.E.2d 598, 607 (W. Va. 1974) (upholding contractual alimony
couple may agree to make final and non-modifiable an obligation that state law ordinarily would treat as subject to modification or as terminable upon the recipient’s remarriage.\textsuperscript{191} Conversely, divorcing spouses can agree to an arrangement that resembles (or is labeled) a division of property yet permits modification if certain contingencies occur. Thus, the parties’ ability to transcend the constraints and categories of state domestic relations law diminishes the relevance of the support/property dichotomy and complicates the later characterization of the obligation as either a nondischargeable support award or a dischargeable property division.

C. Summary

As a result of these interconnected family law developments, neither form nor function continues to provide a reliable basis for differentiating support awards from property divisions. A non-modifiable monetary award, paid out in a single lump sum or over a limited time period, can represent either an equitable division of marital property or an award of “rehabilitative” or “reimbursement” alimony. Similarly, a divorce judgment (or agreement) that entitles one spouse to a specified share or amount of the other spouse’s future income can represent either the deferred distribution of a pension or an award of indefinite alimony. Thus, neither the finality of a divorce award nor its duration or payment structure provides a reliable guide for distinguishing dischargeable property obligations from nondischargeable support awards.

\textsuperscript{191} See, e.g., \textit{CAL. CIV. CODE} § 4811(b) (West 1983 & Supp. 1992) (permitting modification of alimony except where the parties’ agreement expressly provides otherwise); \textit{In re Marriage of Lee}, 781 P.2d 102 (Colo. Ct. App. 1989) (deciding that only where parties agree to preclude modification of maintenance awards is maintenance incapable of modification under Colorado law); \textit{UNIF. MARRIAGE & DIVORCE ACT} §§ 306(f), 316(a)–(b), 9A U.L.A. 147, 217, 489–90 (1987) (separation agreement may preclude or limit modification of maintenance); \textit{1 LINDEY & PARLEY, supra} note 188, § 15A.04, at 15A-105, -111 (payor spouse may lawfully agree to continue support payments after his death and/or after the recipient spouse remarries); \textit{Scheible, Fresh Start, supra} note 3, at 591 & n.76 (citing cases that hold contractual terms to be unmodifiable, as well as contrary cases that permit modification, particularly by mandatory statute, despite conflicting contractual language). Divorce agreements may also limit future modifiability by specifying the circumstances that will govern modification. \textit{See} \textit{1 LINDEY & PARLEY, supra} note 188, § 15A.04, at 15A-103 to -123.
Nor is it possible, in light of these family law developments, to distinguish support from property division on a functional or conceptual basis. With the advent of equitable distribution, property awards now constitute an acknowledged—and in many cases preferred—means of providing for the future needs of economically dependent spouses. Conversely, support awards, as well as property divisions, can function legitimately as compensation for contributions made or economic opportunities foregone during marriage. Moreover, a single divorce obligation may serve several of these functions simultaneously. In sum, as a noted family law scholar has observed in a different context, the Bankruptcy Code’s attempt to distinguish between nondischargeable support awards and dischargeable property divisions “is based on the fiction that there is some perceptible difference between awards of alimony and of property. There is no such difference.”

III. PRACTICAL EFFECTS OF THE SUPPORT/PROPERTY DISTINCTION

The preceding discussion establishes that the Bankruptcy Code’s current treatment of divorce obligations rests on an increasingly untenable legal fiction. The Code’s support/property distinction also generates a number of practical difficulties for divorcing spouses. In particular, the distinction creates unnecessary hardship for divorce obligees and inappropriately skews the process of divorce negotiations.

A. Procedural Hurdles for the Divorce Obligee

When a debtor with divorce obligations declares bankruptcy, the debtor’s ex-spouse must relitigate in the bankruptcy context many of the same financial issues that she previously litigated (or negotiated) in connection with the divorce. She must do so, moreover, in a forum that gives first priority to the debtor’s interests. While the spouses stand on an equal footing in state divorce proceedings, federal bankruptcy court “is a debtor’s

192 Clark, supra note 19, at 658. Even federal income tax law has abandoned its attempt to distinguish between alimony and property division, in part because of the tremendous amount of litigation the purported distinction produced. See id. at 691–94.

193 See Throne, supra note 137 at 204–06.
court where the system promotes discharge of the debtor’s obligations.”

Exceptions to discharge are strictly construed in favor of the debtor, and the objecting spouse bears the burden of proving that a particular divorce obligation is nondischargeable. The fact that the divorce decree or settlement agreement characterizes the obligation as alimony, maintenance, or support does not shift this burden of proof.

Moreover, after obtaining a right at the state level where both spouses have the same status, the divorce obligee appears in bankruptcy court as an ordinary creditor. Unlike the ordinary creditor, however, she has not entered into an arm’s-length relationship with the debtor. Instead, her claims grow out of an intimate, personal relationship, often one that has endured for a substantial period of time. Moreover, unlike most commercial creditors, the divorce obligee could not have diversified and insured against her risks. It is also highly unlikely that the nondebtor spouse would have analyzed the risk of divorce and subsequent bankruptcy when she began her relationship with the debtor or contributed to his economic well-being.

The unique procedures applicable to bankruptcy cases create additional hurdles for the divorce obligee. The moment a debtor files for bankruptcy, section 362 of the Bankruptcy Code imposes an automatic stay on virtually all collection efforts against the debtor. The Code excepts from this automatic stay actions for “the collection of alimony, maintenance, or support from

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194 Id. at 205.
195 See supra note 68, at 596–97; Throne, supra note 137, at 204–06.
196 Freeburger & Bowles, supra note 68, at 597; see also Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1111 (6th Cir. 1983). Moreover, a number of courts have applied a test based on intent which requires the nondebtor spouse to prove that both she and the debtor intended to create a support obligation—an impossible task in many cases. See, e.g., Tilley v. Jessee, 789 F.2d 1074, 1078 (4th Cir. 1986) (holding that even though husband conceded that wife used disputed payments for her support, wife failed to carry her burden of proving mutual intent to create support award); Helm v. Helm (In re Helm), 48 B.R. 215, 221 (Bankr. W.D. Ky. 1985) (concluding that while wife may have regarded payments as alimony, she failed to prove that her husband shared that intent).
197 Id. at 205.
198 11 U.S.C. § 362(a); see also Janet L. Chubb et al., Divorce and Bankruptcy: A Dangerous Liaison, 4 Am. J. Fam. L. 339, 347 (1990). The purposes of the automatic stay are to provide a breathing spell for the financially troubled debtor and to preserve the bankrupt debtor’s estate. See id. at 347; White, supra note 106, at 10. One authority has summarized the effects of the automatic stay as follows: “In short, upon the filing of the petition the creditor may continue to eat, sleep and breathe; perhaps he can smile at the debtor, but he may do little else.” JAMES J. WHITE, BANKRUPTCY AND CREDITORS’ RIGHTS 97 (1985).
property that is not the property of the estate."

However, because federal law, rather than state law, determines whether a particular divorce obligation constitutes "alimony, maintenance, or support" for purposes of this exception, a divorce obligee acts at her peril in attempting to enforce any divorce obligation after her ex-spouse files for bankruptcy. If a bankruptcy court later rules that the disputed obligation is not "actually in the nature of . . . support," her collection efforts may violate the automatic stay and result in contempt proceedings or other sanctions. Even unintentional violations of the automatic stay provisions may result in damage awards, including costs and attorneys' fees.

In light of these potential pitfalls, bankruptcy commentators generally caution that if there is any uncertainty about the dischargeability of a divorce obligation, the nondebtor spouse should obtain a ruling from the bankruptcy court regarding the applicability of the automatic stay before attempting to enforce

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200 11 U.S.C. § 362(b)(2). This exception has been interpreted to apply only to actions and proceedings to enforce support obligations evidenced by an order or judgment entered before the bankruptcy case is filed. White, supra note 100, at 13–14. The Code stays all other family law actions, including dissolution proceedings, actions for support, alimony, or maintenance awards, and actions for a division of property. Id. at 14. Moreover, the property from which support, alimony, and maintenance may be collected is limited to property that is not the property of the estate. 11 U.S.C. § 362(b)(2); White, supra note 100, at 13–14. In Chapter 7 bankruptcies, wages earned by a debtor for services performed after the commencement of the case are not property of the estate. 11 U.S.C. § 541(a)(6). Thus, a Chapter 7 debtor's post-petition wages and any property acquired from those wages may be garnished or attached to satisfy court-ordered alimony, maintenance, or support obligations without violating the automatic stay. See White, supra note 100, at 14–15.

201 Chubb et al., supra note 199, at 351; White, supra note 100, at 17–18.

202 Pody v. Pody (In re Pody), 42 B.R. 570, 573–74 (Bankr. N.D. Ala. 1984) (holding that ex-spouse violated automatic stay by not releasing garnishment on debtor's wages in an effort to collect a debt determined to be a nondischargeable property settlement obligation); Stamper v. Stamper (In re Stamper), 17 B.R. 216, 221 (Bankr. S.D. Ohio 1983) (holding ex-spouse in contempt of bankruptcy court for violating automatic stay by initiating state court contempt action against debtor before obtaining a determination of the dischargeability of family obligation); Brock v. Barlow (In re Brock), 58 B.R. 797 (Bankr. S.D. Ohio 1981) (ordering ex-wife who obtained contempt order against debtor husband to pay damages of $8,892.50 for willful violation of automatic stay); see also Chubb et al., supra note 199, at 351–52; White, supra note 100, at 21–23 ("Orders or judgments obtained in violation of the stay are frequently held to be nullities and attorneys as well as clients are regularly found in contempt of the bankruptcy court, fined, and ordered to pay damages for willful violations of the stay."). See generally Lewis J. Heilsman, Annotation, Violation of Automatic Stay Provisions of 1978 Bankruptcy Code (11 U.S.C. § 362) as Contempt of Court, 57 A.L.R. Fed. 927 (1982).

203 In re McDonald, 98 B.R. 1015 (Bankr. S.D. Fla. 1989); In re Ducich, 385 F. Supp. 1287 (C.D. Cal. 1974) (finding a violation but no contempt); see also Chubb et al., supra note 199, at 352. Such penalties can be assessed against an attorney even though the attorney may be unfamiliar with the Bankruptcy Code and its automatic stay provisions. See id.
the obligation. Under the current Bankruptcy Code, such uncertainty is likely to exist in most cases.

Obtaining a ruling from the bankruptcy court and generally participating in bankruptcy proceedings are likely to require the services of an attorney. This, in turn, generally requires access to money—something that many divorced obligees lack, particularly if their ex-husbands have ceased complying with court-ordered divorce obligations. Even if money is not a problem, the non-debtor spouse who seeks to protect her interests must still locate an attorney with expertise in bankruptcy law since the attorney who handled her divorce most likely will not be qualified to represent her in the bankruptcy context.

Thus, even if a particular divorce obligation is eventually found to be nondischargeable spousal support, the confusion and uncertainty created by the Bankruptcy Code's support/property distinction is expensive and disruptive to divorce obligees. The Code's current treatment of divorce obligations adds further to the complexity and expense associated with divorce by requiring family law attorneys to master the intricacies of

\footnote{See Chubb et al., supra note 199, at 351; White, supra note 100, at 17–18, 22 ("Caution being the better part of valor, the wise family law lawyer will seek leave of the bankruptcy court before proceeding with any action that arguably violates the automatic stay."); Zeisler, supra note 73, § 44.04[4][a], at 44-9 to -11 ("[T]he practitioner should not take the risk of proceeding in a state court when the automatic stay is in effect. Determination of the dischargeability issue in the Bankruptcy Court [sic] is the only certain way of avoiding possible sanctions."). The nondebtor spouse may also litigate the dischargeability issue in state court, if the debtor does not object to this forum. See Scheible, Fresh Start, supra note 3, at 625–26.}

\footnote{See Zeisler, supra note 73, § 44.04[4], at 44-10 to -11 ("Caution is dictated, however, if the practitioner plans to proceed when the automatic stay is in effect. Since one is rarely certain as to what is considered alimony or child support . . . an improper evaluation subjects the non-debtor spouse to serious sanctions."); text accompanying notes 68–101. Indeed, if the bankruptcy court follows the Calhoun "present circumstances" approach in determining the dischargeability of divorce obligations, such uncertainty will exist in virtually all cases.

A divorce obligee may elect not to participate in bankruptcy proceedings and instead file a petition in state court to determine the dischargeability of a marital debt. While § 523(c) of the Bankruptcy Code requires that the dischargeability of certain specified debts be determined by the bankruptcy court, marital obligations are not included in that provision. 11 U.S.C. § 523(c); see also Scheible, Fresh Start, supra note 3, at 625. Thus, the dischargeability of marital debts may be determined by state courts, unless the debtor first files a complaint to determine dischargeability in the bankruptcy court. See Freeburger & Bowles, supra note 68, at 617–18 (suggesting that it would be advantageous to the obligee spouse to seek a determination on dischargeability from the state court that entered the divorce decree); Scheible, Fresh Start, supra note 3, at 625–26 & n.311. In addressing the dischargeability issue, the state court must apply federal bankruptcy law. See In re Marriage of Salisbury, 779 P.2d 878, 881 (Kan. Ct. App. 1989); State ex rel. Rough, 710 P.2d 47, 49 (Mont. 1985). Once the state court has made its dischargeability determination, the issue may not be relitigated in federal court. Scheible, Fresh Start, supra note 3, at 626.}
bankruptcy law and to concern themselves with the potential bankruptcy implications of the settlements they negotiate and the judgments they seek. The necessity for such expertise likely increases the costs of adequate divorce representation, and such higher costs further disadvantage financially weaker divorcing spouses.

B. The Divorce Obligee’s Options After Discharge

A debtor’s ability to discharge divorce-related property obligations has serious and often permanent repercussions for the divorce obligee. The discharge of a debt in bankruptcy extinguishes the debtor’s liability and forbids creditors from taking any action “to collect, recover or offset any such debt.” As a result, once a bankruptcy court has determined that a divorce obligation is dischargeable, a state court is precluded from amending or modifying the divorce decree to reinstate the discharged obligation. Nor may divorcing parties agree in advance, as part of their divorce settlement or decree, to the reinstatement of obligations discharged in bankruptcy.

When a bankruptcy court discharges a disputed divorce award, it often consoles the obligee spouse by suggesting that she return to state court to seek an increase in spousal support. But this consolation is seldom realistic. First, obtaining an increase in spousal support is possible only if the original divorce decree either awarded alimony or expressly reserved

207 See White, supra note 100, at 51 (“The spectre of bankruptcy should haunt the prudent family law attorney when drafting, negotiating, and structuring a dissolution order or marital settlement agreement.”); Zeisler, supra note 73, § 44.11, at 44-50 (“The matrimonial attorney should consider the impact of a bankruptcy on each decree in order to prevent the loss of assets or the discharge of an obligation.”).

208 11 U.S.C. § 524(a)(2); see also Scheible, Fresh Start, supra note 3, at 619.


211 See, e.g., Murphy v. Nowac (In re Nowac), 78 B.R. 638, 640 (Bankr. D. N.H. 1987); Winders v. Winders (In re Winders), 60 B.R. 746, 748 (Bankr. N.D. Iowa 1986); see also Zeisler, supra note 73, § 44.06[4], at 44-36 (discussing post-bankruptcy modification of support obligations).
jurisdiction to do so. In the absence of such reserved jurisdiction, a state court is generally precluded from granting post-bankruptcy support even where the “property” obligation discharged in bankruptcy was clearly incurred in lieu of alimony. Thus, an economically disadvantaged spouse who agrees to waive alimony in return for a favorable division of marital assets (or liabilities) risks being permanently deprived of the means necessary for her support by a successful bankruptcy filing. Similarly, a spouse who agrees as part of an overall settlement to a non-modifiable support award may be precluded from later seeking an increase in support to offset the elimination in bankruptcy of her partner’s other divorce obligations.

Even where a state divorce court retains the authority to modify support in response to an obligor’s discharge in bankruptcy, an obligee spouse by no means is assured of obtaining an increase. In most jurisdictions, a party seeking to modify support must demonstrate a substantial and continuing change in circumstances that “[w]as not contemplated or provided for in the original [divorce] decree.” Obtaining an increase in support is even more difficult in states that have adopted the Uniform Marriage and Divorce Act; in these states, a nondebtor spouse must show “changed circumstances so substantial and continuing as to make the [original support award] unconscionable.” Moreover, questions regarding the modification of support are generally committed to the sound discretion of the trial judge, and are reversed only for an abuse of discretion.

While a divorce obligee may argue that her ex-husband’s bankruptcy discharge justifies an increase in spousal support,

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212 See Scheible, Fresh Start, supra note 3, at 620. Since alimony is awarded in only a small percentage of divorces, most non-debtor spouses are likely to be precluded from pursuing this option.
213 See, e.g., Stolp v. Stolp, 383 N.W.2d 409, 412–13 (Minn. Ct. App. 1986) (holding that where no maintenance was awarded at the time of divorce, court had no jurisdiction later to award maintenance for any purpose); Benavides v. Benavides, 660 P.2d 1017, 1020 (N.M. 1983) (refusing, after husband’s successful discharge in bankruptcy, to modify divorce decree under which wife had waived alimony); Scheible, Fresh Start, supra note 3, at 620–21.
214 See Gold, supra note 2, at 473.
215 CLARK, supra note 19, at 660.
217 See Patterson v. Gartman, 439 So. 2d 171, 173 ( Ala. Civ. App. 1983) (stating that modification of support decree based on changed circumstances is within sound discretion of trial court and should be reversed only for plain abuse of discretion); CLARK, supra note 19, at 659.
the obligor spouse is likely to respond that his bankruptcy demonstrates a decline in financial circumstances that merits a reduction in support. Thus, a divorce obligee who follows the bankruptcy court’s advice to seek a support modification in response to her ex-husband’s discharge in bankruptcy may risk further eroding—rather than improving—her already precarious financial position.

The reluctance of many state courts to interfere with the “fresh start” objectives of bankruptcy law poses an additional obstacle to the divorce obligee who seeks a post-bankruptcy increase in spousal support. In Coakley v. Coakley, for example, the court refused the parties’ joint request to reopen a stipulated divorce judgment after the husband’s discharge in bankruptcy, finding that the requested relief would deny the husband the fresh start that bankruptcy granted him. Similarly, in Cohen v. Cohen, the court refused to include in a divorce decree provisions that would offset the effect of the husband’s pre-divorce discharge of his share of community debts. The court reasoned that including such provisions would “frustrate the intent and purpose of the Federal Bankruptcy Act and thus violate the supremacy clause of the U.S. Constitution.”

Even if a divorce obligee succeeds in obtaining an increase in spousal support following the discharge of her ex-spouse’s other divorce obligations, she will still have incurred the substantial expense and aggravation associated with post-divorce litigation. In addition, such a “successful” divorce obligee will face the often daunting task of enforcing her augmented support award. Ironically, it may well have been precisely these enforcement difficulties that persuaded the obligee spouse to rely

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218 See, e.g., Deaton v. Deaton, 393 So. 2d 408, 409 (La. Ct. App. 1980) (concluding that husband’s personal and corporate bankruptcy, along with other factors, warranted reduction in alimony); Streitz v. Streitz, 363 N.W.2d 135, 138 (Minn. Ct. App. 1985) (stating that bankruptcy is a factor demonstrating material change in circumstances entitling debtor to support reduction); Zeisler, supra note 73, § 44.06[4], at 44-36.
219 400 N.W.2d 436 (Minn. Ct. App. 1987).
220 Id.
221 164 Cal. Rptr. 672 (Cal. Ct. App. 1980).
222 Id.
223 Id. at 674 (quoting trial court).
224 For a discussion of some of the difficulties associated with enforcing support awards, see CANADIAN INSTITUTE OF LAW RESEARCH AND REFORM, MATRIMONIAL SUPPORT FAILURES: REASONS, PROFILES, AND PERCEPTIONS OF INDIVIDUALS INVOLVED (1981).
initially on property division, rather than alimony, as her primary divorce entitlement.

C. The Skewing of Divorce Negotiations

Even if an obligor spouse does not actually file for bankruptcy, the knowledge that some divorce obligations can be discharged is likely to cast a shadow of uncertainty over divorce negotiations. As one recent law review article concluded:

By careful analysis of [recent case law] the divorce practitioner may glean ideas which, if properly executed, may lead to the settlement agreement or divorce decree emerging from bankruptcy review unscathed. However, there is nothing the divorce practitioner can do in state court at the time the decree is entered to ensure his client that the decree will escape review by the estranged forum of the bankruptcy court.225

Indeed, because privately negotiated divorce agreements are particularly vulnerable to recharacterization in bankruptcy,226 permitting the discharge of any divorce-related debts is likely to undermine the family law objective of encouraging private consensual resolution of financial issues, rather than contested court proceedings.

Permitting the discharge of divorce-related property obligations is also inconsistent with the modern divorce law preference for using property division, rather than alimony, to accommodate the spouses’ future needs, wherever practicable. By undermining the certainty and finality of property obligations, bankruptcy law impairs one of their most important features. Indeed, concerns about the possibility of a discharge in bankruptcy may lead family law practitioners to recommend that a dependent spouse seek a support award rather than a property settlement, despite the well-known enforcement difficulties associated with awards of spousal support.227

226 Id. at 614; see also Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1105 (6th Cir. 1983); Helm v. Helm (In re Helm), 48 B.R. 215, 225 (Bankr. W.D. Ky. 1983).
227 See Zeisler, supra note 73, § 44.09(1), at 44-46 (suggesting that the nondebtor spouse negotiate greater periodic alimony payments in order to promote nondischargeability, rather than rely on a favorable allocation of joint marital debts). These difficulties include enforcement problems and the possibility of future modification or termination of awards.
Bankruptcy considerations may also discourage financially dependent spouses from seeking or negotiating non-modifiable support arrangements, despite the emerging consensus that compensatory awards for one spouse's contributions to the other's career should not be subject to modification.\textsuperscript{228} Since non-modifiability is perceived as a traditional characteristic of property settlements or awards, obligee spouses and their attorneys may fear that precluding modification may lead a bankruptcy court to conclude that the award is not "in the nature of support" or may preclude a state court from later reconsidering "what remains of a settlement agreement after a bankruptcy court has, perhaps, reviewed the agreement and emasculated it."\textsuperscript{229} The resulting availability of modification, however, conflicts with the desire for certainty in divorce arrangements and runs counter to the compensatory and restitutionary purposes that underlie many modern support awards.

This conundrum illustrates a more general problem. The Bankruptcy Code's current treatment of divorce obligations allows federal bankruptcy considerations to drive the resolution of state domestic relations disputes. This phenomenon reverses the appropriate relationship between state and federal legal systems in the area of marriage and divorce.\textsuperscript{230} State domestic relations law—not federal bankruptcy considerations—should determine how courts and divorcing spouses structure the financial allocations arising out of the dissolution of marriage.

A recent Texas case provides a particularly poignant example of a state court's unsuccessful effort to structure a divorce judgment so as to avoid the harsh effects of a bankruptcy filing. In \textit{Kahn v. Kahn},\textsuperscript{231} a husband moved from Texas to Florida in

\textsuperscript{228} See supra note 168 and accompanying text.

\textsuperscript{229} Freeburger & Bowles, supra note 68, at 616. The same logic would apply to judicially-imposed divorce awards.

\textsuperscript{230} Generally, federal law is unconcerned with the law of divorce. As the Supreme Court has stated: "[T]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the [s]tates, and not to the laws of the United States." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting \textit{In re Burrus}, 136 U.S. 586, 593-94 (1890)). Under the "domestic relations exception" to federal diversity jurisdiction, the federal courts do not have jurisdiction to grant divorces, award alimony, or determine the custody of children, even if the parties are citizens of different states and the required amount in controversy is present. Ankembrant v. Richards, 112 S. Ct. 2206 (1992) (affirming existence of "domestic relations exception" but finding it inapplicable to tort suit brought by divorced mother on behalf of her children against the children's father and his female companion); see also \textit{Clark}, supra note 19, at 414.

\textsuperscript{231} 813 S.W.2d 708 (Tex. Ct. App. 1991).
response to his wife’s filing for divorce. In violation of a temporary court order, the husband took with him $39,000 in cash, as well as property valued at $20,000. The husband also hid the couple’s personal papers and financial records, leaving his wife and two children with little cash, a $2000 monthly mortgage payment, and various marital debts. At the divorce hearing—at which the husband did not appear—the wife testified that her husband had threatened to file for bankruptcy after the completion of divorce proceedings because “he wanted to see her fail.” At the close of the hearing, the trial judge granted the wife’s request to structure $39,000 of her community property award as lump sum child support, so that the husband could not discharge the obligation in bankruptcy.

The Texas Court of Appeals reversed, finding that the lump sum award constituted an abuse of the trial court’s discretion. The appellate court acknowledged that the trial judge’s order represented “a sincere, thoughtful effort” to avoid the harsh consequences of a discharge in bankruptcy, but found that a spouse’s threat to declare bankruptcy did not meet the statutory “good cause” requirement for ordering lump sum child support. While one can certainly take issue with the Court of Appeals’ narrow interpretation of statutory “good cause,” one also must question the efficacy of the federal bankruptcy structure that both gave credence to the husband’s threat and necessitated the trial judge’s creative but misguided exercise of discretion. At the very least, a case like Kahn should lead federal policy-makers to consider whether the justifications for allowing the discharge of divorce-related property debts are strong enough to outweigh the potential harmful effects of discharge on the debtor’s former spouse and children.

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232 Id. at 708–09.
233 Id. at 709.
234 Id. Texas law precludes divorce courts from granting alimony, although it allows parties to contract for an alimony obligation. See Reppy, supra note 5, at 3.
235 Kahn, 813 S.W.2d at 708–09. The court concluded: “We are sympathetic to the plight of a former spouse who fears a major portion of her former spouse’s obligation to deliver property awarded to her will be discharged in bankruptcy. Unfortunately, we can find no authority for ordering lump sum child support to avoid this eventuality.” Id. at 709.
236 The Court of Appeals noted that an obligee’s misconduct could justify a lump sum child support award but refused to characterize the husband’s threat of bankruptcy as such misconduct. Id. at 710.
IV. PROPOSED BANKRUPTCY CODE AMENDMENT

A. The Rationale for Making All Divorce Obligations Nondischargeable

Establishing that support and property awards are functionally—and often formally—indistinguishable strongly suggests that they should be treated similarly for purposes of bankruptcy discharge. The question remains, however, whether both types of obligations should be exempted from discharge, as only support obligations are now, or whether both support and property awards should be discharged in the same manner as ordinary commercial debts.

The former solution is preferable. Strong family law considerations support extending the current marital support exemption to cover divorce-related property obligations. Moreover, such an extension would not unduly infringe on the “fresh start” policy that underlies modern bankruptcy law. Divorce-related obligations differ in important respects from virtually all other dischargeable liabilities. In addition, none of the reasons commonly given to support a general right to discharge applies to divorce-related obligations.

1. Family Law Considerations

The fundamental purpose of divorce-related financial adjustments—whether they are denominated property divisions or support awards—is to achieve an equitable sharing of the economic gains and losses attributable to a marriage.237 This means that where a divorce award is the result of a contested adjudication, a state court has determined that the obligation is appropriate and equitable, at least as between the divorcing parties. Even where a divorce obligation is the product of private negotiation, rather than adjudication, it is likely to represent both an equitable and a considered commitment. As family law scholars have emphasized, divorce agreements are negotiated “in the shadow of the law”; the law’s view of what constitutes an equitable sharing of benefits and burdens plays a central role.

237 See CLARK, supra note 19, at 594; Krauskopf, supra note 1, at 256.
in negotiating and structuring these agreements.\textsuperscript{238} Allowing a bankruptcy court to restructure the ex-spouses' financial relationship, by extinguishing any of a debtor's divorce obligations, thus directly undermines the family law objective of apportioning equitably the gains and losses associated with a marriage.

Allowing debtors to discharge divorce obligations also undermines a second important objective of modern domestic relations law: to resolve as definitely and as permanently as possible at the time of divorce the financial relationship of divorcing couples. This preference for certainty and finality is often expressed as the desire for a "clean break" between the spouses.\textsuperscript{239} But a complete termination of the couple's financial relationship is not necessary to achieve these goals. A divorce judgment that orders one spouse to pay the other a set amount of money over a definite period, or that mandates an equal sharing of the parties' post-divorce incomes for a set number of years after divorce, also provides the parties with a considerable degree of certainty about their future financial relationship. Allowing a bankruptcy court to redefine that relationship, by discharging all or part of one spouse's divorce obligations, significantly reduces the degree of certainty and security that divorce judgments and settlements can provide.

On a more theoretical level, the Bankruptcy Code's current treatment of divorce obligations conflicts with the modern conception of marriage as a "partnership between co-equals" rather than a support/dependency relationship.\textsuperscript{240} Both the widespread adoption of equitable distribution and the modern preference for property division over alimony reflect this change in the prevailing conception of marriage.\textsuperscript{241} By preserving only those


\textsuperscript{239} See, e.g., Herma Hill Kay, Appraisal of California's No-Fault Divorce Law, 75 CAL. L. REV. 291, 313 (1987) ("[N]o-fault philosophy . . . seeks to achieve a clean break between spouses to enable each to begin a new life."); Robert J. Levy, A Reminiscence About the Uniform Marriage and Divorce Act—and Some Reflections About Its Critics and Its Policies, 1991 B.Y.U. L. REV. 43, 72 (referring to "clean break policy" emphasized by Uniform Marriage and Divorce Act). As Mary Ann Glendon has pointed out, the idea of a clean financial break between divorcing spouses is "wholly unrealistic" in divorces involving minor children, which account for approximately three-fifths of all divorces in the United States. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 93 (1987).


\textsuperscript{241} See Throne, supra note 137, at 194–99.
divorce obligations that conform to traditional notions of dependency and support—and extinguishing those that rest on more modern partnership principles—federal bankruptcy law reflects and perpetuates an inaccurate and outdated view of marriage.

Rejecting the traditional view of marriage in favor of a more modern partnership vision does not entail endorsement of marriage as a business partnership. Unlike business partners, spouses and prospective spouses do not deal with each other for a limited, commercial purpose, nor do they seek to maximize profit.242 Indeed, one of the primary characteristics of family behavior is a willingness to sacrifice individual self-interest for the benefit of other family members.243 The modern law governing post-divorce financial obligations is designed, in part, to ensure that one spouse does not benefit unjustly from the other’s family-oriented sacrifices and contributions.244 Moreover, marriage is critical to self-identity in a way that most business relationships are not.245

Society, too, has a greater interest in imposing and enforcing financial commitments arising out of marriage than it does in enforcing purely commercial obligations. Spouses are both particularly dependent upon and particularly vulnerable to each other.246 Moreover, marriage remains a primary arena for the care and nurturing of children. Society thus has a heightened interest in creating and enforcing obligations that ensure equity between divorcing spouses and that protect children’s financial interests when a marital relationship dissolves.247

2. Bankruptcy Considerations in Support of Discharge

Because of these important differences between divorce-related obligations and ordinary commercial debts, refusing gen-

242 See Ellman, supra note 149, at 33–40 (criticizing application of partnership principles to marriage); Rutherford, supra note 158, at 555 (contrasting marriage with business partnerships).
244 See, e.g., Ellman, supra note 149, at 49–52; Krauskopf, supra note 1, at 256.
246 See Schneider, supra note 159, at 245.
erally to allow the discharge of divorce-related obligations would infringe only minimally on the legitimate goals of bankruptcy law. In particular, the essential economic and jurisprudential rationales offered to support a general right to discharge are not persuasive when applied to obligations assumed or imposed in connection with divorce.

In a seminal article entitled *The Fresh-Start Policy in Bankruptcy Law*, Professor Thomas H. Jackson offers several justifications for a non-waivable right of discharge. First, Jackson asserts that a non-waivable right of discharge protects individuals from their own impulsive decisions to overconsume credit, by encouraging creditors to monitor borrowing more closely. Jackson claims that this sort of legal rule, and the restrictions on contractual freedom that it entails, accord with the result that hypothetical individuals would reach behind a Rawlsian veil of ignorance: “If the members of society had gathered together before the fact and had anticipated the human tendency toward impulsive behavior, they would have devised a rule that denied them the opportunity to behave impulsively in the future.”

Jackson buttresses this argument by drawing on psychological evidence which suggests that, because of flaws in the way people process information, individuals consistently underestimate future risks, including the risks that their current consumption imposes on their future well-being. Because of the difficulties of compensating for these failures on an individual basis, a socially mandated non-waivable right of discharge may be desirable. Finally, Jackson argues that a non-waivable right of discharge may be justified because refusing to allow discharge might impose unacceptable costs on a wide range of third parties, starting with the debtor’s family.

None of these justifications supports the discharge of divorce-related obligations, however. Obligations owed to a former spouse are not incurred impulsively, but are accumulated gradually and progressively, over the course of a marriage. Moreover, these obligations generally result not from a one-time encounter or decision to consume, but from a series of interre-

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249 Id. at 1408–10.
250 Id. at 1410.
251 Id. at 1410–13.
252 Id. at 1414–15.
253 Id. at 1419.
lated and considered commitments. Even if one viewed divorce-related obligations as originating at the time of divorce, rather than as accumulating during marriage, the assumption of those obligations is not likely to result from impulsive behavior. Divorce obligations are either imposed by a court after careful consideration of both sides' positions or are the product of private negotiations in which the parties are represented by counsel.\footnote{254} Thus, divorce-related obligations are neither the result of impulsive decisions to overconsume, nor the product of accidental encounters between strangers.

Moreover, spouses and potential spouses are not likely to respond to a rule allowing the discharge of divorce obligations by becoming more wary about extending credit. Unlike most commercial creditors, spouses generally do not decide to "invest" in their partners based on economic factors.\footnote{255} Moreover, to the extent that allowing discharge of divorce obligations might affect marital behavior, it is likely to do so in ways that many would view as socially undesirable. Economically rational spouses who know that they cannot count on the security of financial obligations imposed at divorce may well decide to maximize their individual earning capacities rather than investing heavily in their families.\footnote{256} Such conduct would guard against financial vulnerability in the (not unlikely) event of divorce followed by an ex-spouse's bankruptcy.

Professor Jackson's final concern—the effects of a discharge rule on the debtor's family and other third parties—argues against the dischargeability of divorce obligations. The third parties most directly affected by the debtor's bankruptcy are likely to be his ex-spouse and children, and the effect on them of allowing discharge of divorce obligations is likely to be extremely injurious.\footnote{257} Thus, to the extent that discharge rules are

\footnote{254} Divorcing parties are particularly likely to be represented by counsel where there is substantial property to divide or where at least one spouse has substantial earning capacity.

\footnote{255} See generally Schneider, supra note 159.

\footnote{256} Cf. Ellman, supra note 149, at 46-53 (making a similar argument to justify the availability of alimony upon divorce).

\footnote{257} If the debtor has remarried, his new spouse (and any children born of the new marriage) would probably benefit from the discharge of the debtor's divorce-related obligations. Generally, however, the assumption of new family responsibilities does not adequately justify avoiding financial commitments to a former spouse or children. See, e.g., Williams v. Williams, 444 A.2d 977 (Me. 1982) (holding that ex-husband's remarriage did not justify reduction in alimony obligation); Christensen v. Christensen, 628 P.2d 1297 (Utah 1981). But see Berg v. Berg, 359 A.2d 354 (R.I. 1976) (stating that where obligor's adoption of second wife's children impaired his financial ability to
justified by their ability to minimize financial hardship to persons with a close relationship to the debtor, bankruptcy law should prohibit, rather than permit, the discharge of divorce-related obligations.

Several commentators have recently attempted to provide an alternative justification for discharge in bankruptcy, grounded in a natural law theory of morality. These theories also recognize a clear distinction between divorce-related financial obligations and ordinary consumer debts. In particular, these theorists acknowledge that the same values of human dignity, autonomy, and reciprocity that provide moral support for a general right of bankruptcy discharge also support an exception to that right for obligations arising out of family relationships.

Nor would exempting all divorce-related obligations from discharge unduly compromise the “fresh start” policy that lies at the heart of modern bankruptcy law. Bankruptcy law’s “fresh start” rationale is most compelling in the context of commercial and consumer transactions. For example, in the Supreme Court case that is often cited as the fount of the “fresh start” policy, the Court explained that a prime purpose of bankruptcy law is to “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.” This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for

provide for the needs of his former family, court should consider modification of alimony and child support obligations).


259 Flint, supra note 258, at 539 (“The moral responsibility of the debtor to provide economic support for his family is beyond question, and the exception [to discharge for family obligations] can be explained under the moral theory posited here as a response to the humanitarian needs of the family. The underlying ethical commitment to one's family was recognized by the courts even before the Act was amended in 1903 to specifically except such obligations from discharge.”); Gross, supra note 258, at 189 (recognizing that, despite constitutional and statutory prohibitions on peonage, “[p]arents can be required to support their children and spouses can be compelled to work to pay alimony”).
future effort, unhampered by the pressure and discouragement of preexisting debt.\(^{260}\)

This passage underscores the fact that the “fresh start” policy in bankruptcy law is designed primarily to relieve overburdened debtors from obligations incurred in their role as consumers and commercial beings.\(^{261}\) It is in this context that the “honest but unfortunate” debtor is entitled to a “new opportunity” and a “clear field for future effort.” Put more philosophically, the “fresh start” policy is primarily designed to allow a debtor to avoid the onerous financial consequences of his honest but unwise participation in the market by surrendering any remaining fruits of his market encounters and emerging with his personal core intact, free to resume his role as a productive economic actor.

As the Supreme Court’s early marital exemption cases demonstrate, this policy was never meant to release a debtor from obligations imposed or assumed as a result of his participation in a marriage.\(^{262}\) To the extent that a “fresh start” is warranted in the matrimonial context, state divorce law provides that opportunity.

**B. The Statutory Proposal**

The foregoing analysis suggests that Congress should amend section 523(a)(5) of the Bankruptcy Code to eliminate the statutory dichotomy between divorce-related support and property obligations and should exempt from discharge in bankruptcy all obligations to or for the benefit of a spouse, former spouse, or


\(^{262}\) See Wetmore v. Markoe, 196 U.S. 68, 77 (1904) (“The bankruptcy law should receive such an interpretation as will effectuate its beneficient purposes and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce.”). While important changes have occurred in both the precise content of marital obligations and their gender-based derivation, this ethical principle remains compelling.
child of the debtor incurred in connection with marriage, divorce, or separation. To accomplish this goal, Congress should amend section 523(a) of the Bankruptcy Code to read as follows:

. . . . (a) A discharge [in bankruptcy] does not discharge an individual debtor from any debt . . .

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

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

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

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

(iii) a property settlement agreement; or

(B) for any obligation assumed or imposed in connection with a separation agreement, divorce decree, or property settlement agreement;

except to the extent such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a state or any subdivision of a State). 263

This amendment would significantly reduce the tension between divorce and bankruptcy law and would eliminate the specter of federal bankruptcy proceedings reallocating the equitable apportionment of marital gains and losses mandated by a state court’s divorce judgment. Elimination of the support/property distinction would also ensure that bankruptcy considerations would not drive the negotiation and settlement of state domestic relations disputes. Finally, the amendment would discourage divorce obligors from using (or threatening to use) bankruptcy as a vehicle for extinguishing an ex-spouse’s divorce entitlements, while at the same time preserving bankruptcy’s tradi-

263 This proposed amendment is similar to the proposed “Property Settlement Integrity Act of 1990,” introduced by Representative Henry J. Hyde (R-Ill.) on March 5, 1991. H.R. 1242, 102d Cong., 1st Sess. (1991).
tional objective of giving the “honest but unfortunate debtor” a fresh financial start.

C. Application of the Amended Statute

1. In General

The proposed amendment would obviate the need for bankruptcy courts to determine whether a given divorce obligation is a support award or a property division. It would thus eliminate the need for bankruptcy courts to inquire into the “intent” of state divorce judges or divorcing spouses, or to probe ex-spouses’ past or current financial situations. Moreover, under the proposed amendment, divorce obligees would no longer be forced to relitigate—in an often unfriendly federal forum—the very issues of need and economic capacity previously determined in divorce proceedings. Instead, the only requirements for nondischargeability would be that the obligation was incurred in connection with a divorce or marital separation and that it was to or for the benefit of a spouse, ex-spouse or child of the debtor.264 The remainder of this section examines the effect of the proposed amendment on several recurring types of divorce obligations.

2. Attorneys’ Fees and Divorce Expenses

The amended exemption would prevent a debtor from discharging an agreement or decree-imposed obligation to pay an ex-spouse’s divorce-related attorneys’ fees or other litigation expenses. Unlike the situation under current law, there would be no need to determine whether the obligation to pay the attorneys’ fees or expenses was actually in the nature of support.265 Nor would the fact that payment was to be made directly to the attorney or another third party affect the dischargeability

264 The proposed amendment would preserve the nondischargeability of all court-ordered child support obligations, regardless of whether they were imposed in connection with divorce or marital separation.

265 Although most courts have held that a debtor’s obligation to pay an ex-spouse’s divorce-related attorneys’ fees is nondischargeable spousal support, they have often allowed discharge of liability for other divorce-related expenses. See, e.g., Eisen v. Linn (In re Linn), 38 B.R. 762, 763 (Bankr. 9th Cir. 1984) (holding that psychologist’s fees incurred in connection with custody hearing were dischargeable); Scheible, Defining Support, supra note 3, at 44–45 n.251.
inquiry, since the amended statute would exempt from discharge all divorce-related obligations to or for the benefit of a former spouse or child.

3. Payment of Future Expenses

The expanded exemption would also apply where a divorcing spouse has agreed or been ordered to make specified future payments to third parties for the benefit of his ex-spouse or children. Such divorce-related obligations often include medical, educational, and insurance expenses, as well as specified living expenses, such as rent or utility payments.266 Under the current Bankruptcy Code, the treatment of such prospective third party obligations is inconsistent. Read literally, the language of section 523(a) appears to require that, to be nondischargeable as a support obligation, a debt must be owed directly to a spouse, former spouse, or child of the debtor, rather than to a third party.267 Only a small minority of courts, however, has adopted this strict statutory interpretation.268 A majority of courts have reasoned instead that Congress intended support obligations to be nondischargeable regardless of whether they were payable directly to the spouse or child.269 These courts generally disregard the

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266 See Scheible, Defining Support, supra note 3, at 41.
267 Section 523(a)(5) of the Bankruptcy Code exempts from discharge any debt "to a spouse, former spouse or child of the debtor, for alimony to, maintenance for, or support of such spouse or child." 11 U.S.C. § 523(a)(5). In addition, the House Report accompanying the Bankruptcy Reform Act of 1978 provides:

Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language, in combination with the repeal of section 656(b) of the Social Security Act (43 U.S.C. § 656(b)) by section 327 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent.


268 See Fritz v. Daiker (In re Daiker), 5 B.R. 348 (Bankr. D. Minn. 1980) (holding that debts owed to Employees Credit Union, Master Charge, and a medical center were dischargeable because the payments were not made directly to former spouse); White, supra note 100, at 35-36. In addition, some courts have viewed such obligations as support debts that have been assigned to a third party (the creditor), thus rendering them dischargeable under 11 U.S.C. § 523(a)(5)(A). See, e.g., Dirks v. Dirks (In re Dirks), 15 B.R. 775, 779 (Bankr. D.N.M. 1981). Commentators have generally criticized these decisions. See, e.g., Freeburger & Bowles, supra note 68, at 591 n.16.

269 See Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1106-07 (6th Cir. 1983); Pauley v. Spong (In re Spong), 661 F.2d 6, 9-10 (2d Cir. 1981); White, supra note 100, at 39. The legislative history supports this interpretation. Commenting on the 1978 Bankruptcy Code shortly before its passage, Rep. Don Edwards (D-Cal.) stated that:

If the debtor has assumed an obligation of the debtor's spouse to a third party in connection with a separation agreement, property settlement agreement, or
fact that the actual recipient of the payment will be someone other than a spouse or child and proceed directly to the question of whether the underlying obligation is in the nature of alimony, maintenance, or support.\textsuperscript{270}

By prohibiting the discharge of all divorce-related obligations to or for the benefit of an ex-spouse or child, the amended statute would make clear that a divorce obligation is not dischargeable merely because someone other than an ex-spouse or child actually receives payment.\textsuperscript{271} Moreover, because the amendment would prohibit the discharge of property (as well as support) obligations, bankruptcy courts would no longer need to inquire whether a particular obligation to pay a family member’s future expenses was actually for the purpose of support.

4. Assumption of Joint Marital Debts

The amended statute would also alter the bankruptcy treatment of divorce obligations arising out of one spouse’s assumption of debts incurred jointly during marriage. As others have recognized, such an assumption of liability actually involves two separate obligations: the underlying obligation to the third-party creditor and the obligation to the former spouse, assumed in connection with divorce, to accept full responsibility for the

\begin{quote}
divorce proceeding, such debt is dischargeable to the extent that payment of the debt by the debtor is not actually in the nature of alimony, maintenance, or support of debtor’s spouse, former spouse, or child.
\end{quote}


\textsuperscript{271} As under current law, a divorce-related obligation would be dischargeable to the extent that it had actually been assigned (i.e., transferred) to another entity (other than a governmental entity). \textit{See} 11 U.S.C. § 523(a)(5). The test of whether a debt has been assigned under § 523(a)(5) is whether the former spouse or children of the debtor receive any benefit from the payment of the debt. Stranathan v. Stowell, 15 B.R. 223, 226 (Bankr. D. Neb. 1981); see also Freeburger & Bowles, \textit{supra} note 68, at 589 n.12; Scheible, \textit{Defining Support}, \textit{supra} note 3, at 40–41.
third-party debt.  This latter obligation is often formalized through the vehicle of a "hold harmless" agreement between the debtor and his former spouse.  

Current bankruptcy doctrine generally treats the third-party and spousal obligations as inseparable.  If the debtor’s "hold harmless" obligation to his former spouse is "in the nature of support," then both the "hold harmless" obligation and the underlying third-party debt are nondischargeable. If, by contrast, a debtor’s assumption of a joint marital debt lacks the essential characteristics of support, then both the underlying liability to the third-party creditor and the debtor’s obligation to his former spouse are discharged.

The proposed amendment would separate these two obligations for purposes of determining dischargeability. It would

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272 See Calhoun, 715 F.2d at 1106 n.4 ("There are two distinct obligations involved in an agreement to assume former joint marital debts—the underlying debt owed to the mutual creditor and the obligation owed directly to the former spouse to hold the spouse harmless on that underlying debt.").

273 See id. at 1105–06; Zeisler, supra note 73, § 44-45.

274 A few bankruptcy courts have analyzed these obligations separately under the current Bankruptcy Code. These courts have held that even where a debtor’s assumption of joint marital obligations is appropriately characterized as support, § 523(a) does not render nondischargeable the underlying obligation to the third-party creditor, but only the obligation to hold the former spouse harmless from the payment of the underlying debt. See Kircher v. Lord (In re Lord), 93 B.R. 678 (Bankr. E.D. Mo. 1988); Smith v. Smith (In re Smith), 42 B.R. 628 (Bankr. E.D. Mo. 1984). The court in Telgmann v. Maune (In re Maune), 133 B.R. 1010, 1014 (Bankr. E.D. Mo. 1991), disapproved of this analysis.

275 See, e.g., Maune, 133 B.R. at 1014. In determining the dischargeability of these obligations, most courts focus on whether payment of the assumed debt is necessary for the nondebtor spouse’s support. See, e.g., Yeates v. Yeates (In re Yeates), 807 F.2d 874 (10th Cir. 1986); Williams v. Williams (In re Williams), 703 F.2d 1055 (8th Cir. 1983); Lewis v. Lewis (In re Lewis), 39 B.R. 842 (Bankr. W.D.N.Y. 1984). Some courts, however, require that the original third-party debt be one for necessary goods and services. Under this analysis, if the underlying obligation was not for basic needs, then the debtor’s subsequent assumption of liability is dischargeable, regardless of the effect of discharge on the nondebtor spouse’s current support needs. See Erler v. Erler (In re Erler), 60 B.R. 220 (Bankr. W.D. Ky. 1986) (holding husband’s agreement to indemnify wife for contingent joint tax liability dischargeable because tax liability was not in the “nature” of “daily necessities”); Gold, supra note 2, at 484–86. Moreover, where the underlying obligation is secured by property which has been transferred to the debtor spouse, a court is likely to characterize the debtor’s assumption of liability as a dischargeable property settlement. See Malone v. Hackworth (In re Hackworth), 27 B.R. 638 (Bankr. S.D. Ohio 1982).

276 See, e.g., Stout v. Prussel, 691 F.2d 859, 861 (9th Cir. 1982) (holding that obligation of debtor to hold former wife harmless for a loan was dischargeable because the hold harmless clause was included in order to “equalize the division of community property”); Morgan v. Battaglia (In re Battaglia), 44 B.R. 420, 421 (Bankr. D. Del. 1984) (concluding that obligation to pay marital debts was dischargeable because the debtor assumed the obligation in return for the wife’s interest in the family home rather than to enable wife to support herself); Hackworth, 27 B.R. at 639 (holding that obligation arising from the assumption of liability for a loan, pursuant to a property settlement, was dischargeable even though discharge transferred liability to the ex-wife).
make nondischargeable all divorce-related "hold harmless" obligations, regardless of whether a federal court would characterize these obligations as support awards or property divisions. A debtor's obligation to indemnify his former spouse for debts incurred jointly during marriage would therefore survive bankruptcy in all cases. The same debtor, however, would be permitted to discharge his underlying obligation to the third-party creditor, assuming that discharge was not precluded by other parts of the Bankruptcy Code. Thus, the fact of divorce would no longer preclude a debtor from discharging ordinary commercial or consumer debts that he would have been able to extinguish had he remained married.

There are sound reasons for bankruptcy law to separate these two aspects of a spouse's assumption of joint marital debts. Unlike the debtor's "hold harmless" obligation to his former spouse, the underlying debt to the third-party creditor was incurred independently of the divorce and would have been dischargeable had the debtor remained married. In effect, refusing to permit discharge once divorce has intervened penalizes the debtor for dissolving his marriage. Moreover, exempting from discharge the underlying third-party commercial obligation gives the third-party creditor a privileged status not granted to other unsecured commercial creditors.277

Permitting a divorced debtor to discharge such third-party obligations also alleviates many of the concerns that led Congress in 1978 to reject the Bankruptcy Commission's proposal to make marital property obligations nondischargeable. Those who opposed the Commission's proposal were particularly concerned about the effect of an expanded marital exemption on a debtor's ability to discharge obligations to third-party creditors.278 Indeed, these opponents argued vigorously that preventing a divorced husband from discharging liability for debts

277 See J. Joseph Cohen, Note, Congressional Intent in Excepting Alimony, Maintenance, and Support from Discharge in Bankruptcy, 21 J. Fam. L. 525, 542 (1983); Joan Kingsly Gottesman, Note, Reconciling Bankruptcy's Fresh Start Policy with Marital Obligations, 49 Brook. L. Rev. 777, 784-87 (1983) (discussing Congress's desire, in making marital support obligations nondischargeable, to avoid creating unintended beneficiaries such as unsecured creditors).
278 See 1977 Hearings, supra note 52, at 688 (statement of Judge Lee) ("The language of the Senate Bill [excluding property settlements from discharge] will make it possible for lawyers to subvert the alimony exception to discharge simply by providing in the property settlement agreement that certain debts shall be paid by the husband."); Gottesman, supra note 277, at 784-87.
incurred jointly during marriage would hinder his ability to support a former spouse and children.279
The debtor’s divorce-created obligation to hold his former spouse harmless for debts incurred jointly during marriage stands on a very different footing: but for the couple’s divorce, this obligation would not exist in legal form. Therefore, under the amended statute, this intra-family aspect of a debtor’s assumption of joint marital debts would be nondischargeable in bankruptcy, regardless of whether a bankruptcy court would classify the obligation as in the nature of support.

Of course, the nondischargeability of the debtor’s “hold harmless” obligation to his former spouse would not stop the third-party creditor from proceeding against the former spouse, since she would still be liable on the underlying debt.280 The nondebtor spouse, however, could then proceed against the debtor on his undischarged “hold harmless” agreement. The debtor would be liable to his former spouse for the amount of the debt he had agreed to assume, as well as any additional costs the nondebtor spouse had incurred as a result of the creditor’s debt collection efforts.281 Even where the divorce decree or agreement lacked an express “hold harmless” provision, the former spouse could seek relief against the debtor for reneging on his contractual or decree-incorporated obligation to assume liability for the joint debts in question.282 Ensuring the survival of the debtor’s obli-

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279 See 1977 Hearings, supra note 52, at 686 (“In most instances the husband will not be able to make alimony or child maintenance payments and also pay all the debts of the parties.”); 1976 Hearings, supra note 50, at 1308 (letter from Judge Lee to Rep. Drinan). For a detailed discussion of this testimony, see supra notes 51–56 and accompanying text.

280 See Scheible, Defining Support, supra note 3, at 42. This would be true, however, even in the absence of a bankruptcy filing, since the third-party creditor would not be bound by a “hold harmless” agreement between the spouses and could therefore elect to proceed against either spouse, regardless of the existence of a such an agreement.

281 See id. at 43 n.239. This bifurcated approach may cause hardship in cases where the debtor’s continued payment of joint obligations is necessary to assure his former family an uninterrupted flow of support. Id. However, the same potential for hardship in these cases exists under the current Bankruptcy Code since, by filing for bankruptcy, a debtor automatically suspends all collection efforts by creditors. See supra notes 199–203 and accompanying text (discussing automatic stay provisions). Moreover, although proceeding separately against the debtor imposes costs on a divorce obligee, these costs may well be less than the costs associated with litigating the dischargeability issue under the current Bankruptcy Code. This is especially likely to be true in states that have relatively generous monetary limits for small claims filings.

gation to his former spouse, without regard to its characterization as support, would also act as a deterrent to a debtor who might be contemplating bankruptcy primarily as a way of thwarting an ex-spouse’s divorce entitlements.

Thus, in most cases involving the assumption of debts, preserving the debtor’s express or implied “hold harmless” obligation to his former spouse, while allowing discharge of the debtor’s underlying liability to third-party creditors, will adequately protect the non-debtor divorce obligee.283 Any additional benefit that could be obtained by precluding discharge of the underlying debt is outweighed by the potential unfairness of denying a debtor relief from ordinary commercial or consumer obligations incurred during marriage merely because of an intervening divorce.284

V. Conclusion

Recent developments in family law have rendered untenable and unjust the Bankruptcy Code’s attempt to distinguish between nondischargeable spousal support awards and dischargeable property obligations. Congress’s insistence on preserving the support/property distinction has created a confusing and incoherent body of case law and has inappropriately usurped the states’ traditional role in determining the financial consequences of divorce. An ex-spouse’s ability to discharge divorce-related property obligations undermines important family law goals; refusing generally to allow such discharge would not

283 Indeed, such a bifurcated analysis may, in some cases, benefit divorce obligees by ensuring that changes in the structure of the underlying third-party debt do not affect the debtor’s hold harmless obligation to his former spouse. See, e.g., Robinson v. Robinson (In re Robinson), 113 B.R. 687, 689 (D. Col.) (concluding that ex-wife’s refinancing of second deed of trust, which released husband from liability on original note, did not affect husband’s divorce-related “hold harmless” obligation), aff’d, 921 F.2d 252 (10th Cir. 1990); Keenan v. Keenan (In re Keenan), 112 B.R. 881 (Bankr. N.D. Ohio 1990) (holding that ex-wife’s reaffirmation in bankruptcy of debt upon which only ex-husband was formerly liable did not extinguish husband’s hold harmless obligation on debt); Swiczkowski v. Neagley (In re Swiczkowski), 84 B.R. 487 (Bankr. N.D. Ohio 1988) (holding that debtor’s obligation to pay indebtedness due on automobile awarded to ex-wife in divorce was not dischargeable even though the car had been repossessed).

284 See Scheible, Defining Support, supra note 3, at 43.
substantially interfere with the legitimate goals of bankruptcy law, including the “fresh start” policy that supports a general right to discharge in the commercial and consumer contexts. To ameliorate the shortcomings of the current bankruptcy scheme and restore the integrity of state equitable distribution regimes, Congress should amend the Bankruptcy Code to exempt from discharge all obligations to or for the benefit of a debtor’s former spouse or children, assumed in connection with a divorce or marital separation.