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THE DISCHARGEABILITY OF DIVORCE OBLIGATIONS UNDER THE BANKRUPTCY CODE: FIVE FAULTY PREMISES IN THE APPLICATION OF SECTION 523(a)(5)

James H. Gold*

Section 523(a) of the Bankruptcy Code sets out certain exceptions to the Code's general policy of allowing a debtor to discharge obligations which arose prior to the filing of the debtor's bankruptcy petition. Among the exceptions to discharge found in this part of the Code is section 523(a)(5) which provides that alimony, maintenance, or support obligations owed to a spouse, former spouse, or child of the debtor cannot be discharged in the bankruptcy proceeding. This Article challenges the validity of a number of principles frequently relied on by courts in determining whether a particular divorce obligation qualifies for the section 523(a)(5) exception to discharge. The author suggests an approach which analyzes the divorce obligation in relation to the needs and incomes of both the debtor and the nondebtor spouse as they exist at the time of the section 523(a)(5) trial.

ONE OF THE PRIMARY purposes of the Bankruptcy Code is to give honest debtors a fresh economic start. To facilitate that goal, most obligations which arose prior to the filing of a debtor's bankruptcy petition are discharged in the bankruptcy.

* Law Clerk to the Honorable A. Thomas Small, United States Bankruptcy Court for the Eastern District of North Carolina; B.A., Grinnell College (1972); J.D., Wayne State University (1979).

1. The Bankruptcy Code is contained in title 11 of the United States Code. References to statutory sections in this Article will be to sections of the Bankruptcy Code unless otherwise indicated.

2. See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Forsdick v. Turgeon, 812 F.2d 801, 802 (2d Cir. 1987); In re Campbell, 74 Bankr. 805, 808 (Bankr. M.D. Fla. 1987).

However, section 523(a) of the Bankruptcy Code furthers a number of other policy goals by excepting some debts from discharge. One of the most significant exceptions is found in section 523(a)(5) which provides that debts to a spouse, former spouse, or child of the debtor, for alimony, maintenance, or support, are not dischargeable in bankruptcy.

Section 523(a)(5) is a commonly invoked provision of the Bankruptcy Code, no doubt because the number of divorces and bankruptcies have increased in recent years and because marital conflict and economic woes tend to go hand in hand. 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). Courts are most frequently called upon to determine whether a particular divorce obligation qualifies for the section 523(a)(5) exception in three paradigmatic situations: 1) when the obligation in the divorce decree or separation agreement requires the debtor to hold the nondebtor spouse harmless on joint marital obligations; 2) when the obligation is to pay a sum of money, either in a lump sum or in installments, within a specified time period which is unrelated to or unaffected by the remarriage or death of the nondebtor spouse; and 3) when there has been a significant change in either the financial needs or the incomes of the debtor and the nondebtor spouse.

Bankruptcy Code. In a chapter 7 bankruptcy, the debtor's nonexempt assets are liquidated and distributed pro rata to creditors in full satisfaction of debts qualifying for discharge. Under chapter 13, the debtor typically makes monthly payments to a trustee for a period of up to five years, which the trustee then distributes to creditors. The chapter 13 debtor's debts which arose prior to the filing of the bankruptcy petition will be discharged when the payments are completed even though creditors have not been paid in full. A chapter 13 debtor is required to pay creditors at least as much as they would receive under chapter 7.

4. These exceptions include: § 523(a)(1) (debts for specified taxes), § 523(a)(2) & (4) (debts incurred through fraud or larceny), § 523(a)(3) (debts not listed in the debtor's bankruptcy petition unless the creditor had knowledge of the debtor's bankruptcy), § 523(a)(6) (debts for willful and malicious injuries), § 523(a)(7) (debts for governmental fines), § 523(a)(8) (debts for educational loans), § 523(a)(9) (debts arising from the debtor's drunk driving), and § 523(a)(10) (debts involved in a prior bankruptcy case of the debtor).

5. Although all the exceptions to discharge found in § 523(a) are applicable in a chapter 7 "liquidation" bankruptcy, the only exception to discharge under § 523(a) applicable in a nonhardship chapter 13 "wage-earner" bankruptcy is for alimony, maintenance, and support listed under § 523(a)(5). See 11 U.S.C. § 1328(a) (1986).


one or both of the parties subsequent to the divorce.

The public policy rationale for section 523(a)(5) is that a debtor should be required to fulfill support obligations to his former spouse and children arising out of the broken marriage. However, this policy is not absolute. The fresh start policy must still be considered. The legislative history of section 523(a)(5) makes clear that Congress did not intend for all obligations of a bankruptcy debtor arising out of a prior divorce decree to be nondischargeable. Section 523(a)(5) represents an attempt by Congress to balance the competing policy considerations of providing the debtor with a fresh start and of not allowing a debtor to neglect his divorce obligations to his former spouse and children.

It is the contention of this Article that many courts are taking an overly formalistic approach to section 523(a)(5) issues when a more flexible, equitable approach is needed. These courts rely on criteria which have little relevance to the question of whether a divorce obligation is "in the nature of alimony, maintenance, or support" or refuse to consider other factors which are pertinent to the analysis. As a result, in far too many cases courts are not striking a proper balance between the competing policy concerns addressed by section 523(a)(5). The rather striking results in two recent federal court decisions demonstrate that an overly rigid application of section 523(a)(5) may create harsh consequences for either the debtor or his former spouse.

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. This Article will therefore use masculine pronouns to describe the debtor spouse and feminine pronouns to describe the nondebtor spouse. The principles discussed in this Article are, of course, equally applicable in the more unusual situation in which the nondebtor spouse is male. See, e.g., In re White, 55 Bankr. 878 (Bankr. E.D. Tenn. 1985).

9. In Shaver v. Shaver, 736 F.2d 1314, 1316 n.3 (9th Cir. 1984), the Ninth Circuit stated that the rationale for § 523(a)(5) is threefold: "the protection of the spouse who may lack job skills or who may be incapable of working, the protection of minor children who may be neglected if the custodial spouse entered the job market, and the protection of society from an increased welfare burden that may result if debtors could avoid their familial responsibilities by filing for bankruptcy."

Other courts have read § 523(a)(5) more broadly so as to prevent the discharge of divorce obligations that were intended to allow the debtor's former spouse and children to maintain the standard of living to which they had become accustomed during the marriage. See In re Goin, 808 F.2d 1391, 1393 (10th Cir. 1987); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984).

10. See infra notes 31-33, 45-47 and accompanying text.


In *In re Gebhardt*, a 1981 divorce decree incorporated a separation and property settlement agreement which required the husband to pay $450 each month in maintenance and child support. The agreement also required the husband to pay his former spouse $20,000 immediately and a total of $80,000 in annual installments over six years. When the husband filed his chapter 7 bankruptcy petition approximately one year after the divorce decree, he attempted to discharge the $80,000 promissory note. The bankruptcy court held in an unpublished opinion that the debtor’s obligation on the $80,000 promissory note was in the nature of support and therefore nondischargeable because the obligation on the note was intended to help the wife meet her monthly living expenses. The court took into account the fact that, at the time of the divorce, the debtor’s wife was unemployed and suffering from multiple sclerosis.

The district court reversed the bankruptcy court’s decision. The district court held that the evidence was clear that the parties intended the $80,000 promissory note to be “part of the property division and, therefore, . . . dischargeable.” In reaching this conclusion, the court noted that the separation agreement had required the wife to quitclaim to the husband her interest in a farm with a net value of approximately $200,000, which was twice the value of the cash settlement not labeled support. It also emphasized the fact that there were other provisions for maintenance in the divorce decree, and that the husband’s obligation on the promissory note did not terminate upon the death or remarriage of his wife. The district court in *Gebhardt* held that the bankruptcy court had erred in relying on the wife’s poor physical health and her need for present and future support in reaching its decision when the language of the separation agreement showed that the note represented a property division. The district court’s opinion did not discuss the debtor’s ability to fulfill his obligation on the $80,000 promissory note given as part of the separation agreement. Thus, despite the debtor’s former wife’s unemployment and multiple sclerosis, the debtor’s obligation on the $80,000 note was discharged, leaving only the $450 monthly maintenance and child support obligation.

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13. 53 Bankr. 113 (W.D. Mo. 1985).
14. *Id.* at 115.
15. *Id.* at 115-16. There is no indication in the *Gebhardt* opinion as to how much the debtor’s former spouse would receive from the liquidation of the debtor’s estate in satisfac-
In *In re Stone*, a separation agreement entered into in 1983 after twenty-eight years of marriage required, among other things, that the husband pay his wife $7,000 per month. The husband’s obligation to make these monthly payments would terminate upon the remarriage of his wife or the death of either party. Both children of the marriage were over eighteen years of age at the time of the separation. Some time after the separation agreement was executed, the debtor suffered what the bankruptcy court characterized as “a severe financial setback.” The value of some 34,000 shares of stock held by the debtor in his employer corporation fell from twelve dollars to twenty-two cents a share. The debtor's option to purchase 120,000 shares of stock in his employer was rendered worthless and his employment was terminated.

The debtor went into bankruptcy in 1986 and his former wife instituted an adversary proceeding seeking a ruling that both past and future payments due from the debtor’s monthly obligations under the separation agreement were nondischargeable pursuant to section 523(a)(5). The bankruptcy court found, based primarily on the debtor’s net worth and income at the time of the separation agreement and the former wife's lack of work experience during the long marriage, that the parties had mutually intended the monthly payments required by the separation agreement to be for the wife's support. In holding that the debtor’s monthly payment obligations were nondischargeable, the bankruptcy court ruled that changes in the financial circumstances of the parties subsequent to the entry of the separation agreement were irrelevant to the resolution of the section 523(a)(5) issue. Therefore, the court rejected the debtor’s argument that, in view of his financial setback, his obligation to make the monthly payments should be discharged to the extent that the payments exceeded his former wife’s present actual needs. The court in *Stone* was uninfluenced by the fact that, prior to filing for bankruptcy, the debtor had been denied a reduction of his monthly support obligations in state court due to a provision in the separation agreement which prohibited modification in state court. Thus, despite the debtor’s financial setback, he remained obligated to pay his former wife in excess of $84,000 per year unless she remarried or until one of the

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17. Id. at 634.
parties died.

In reaching their respective holdings, the Gebhardt and Stone courts relied on legal principles which have frequently been cited in other recent decisions addressing section 523(a)(5). These holdings, which in this writer's opinion are both harsh and unwarranted, suggest that many of the legal principles used by courts to resolve questions arising under section 523(a)(5) are poorly reasoned or in need of refinement.

After briefly reviewing the history of the exception to discharge for alimony, maintenance, and support obligations, this Article will critique the following legal principles commonly employed by courts in determining section 523(a)(5) issues: 1) divorce obligations representing divisions of marital property do not qualify for the section 523(a)(5) exception to discharge; 2) the crucial issue under section 523(a)(5) is whether the parties to a divorce settlement or the court issuing the divorce decree intended to create a support obligation; 3) a divorce obligation which does not terminate upon the death or remarriage of the recipient spouse is generally dischargeable in bankruptcy; 4) a debtor's assumption of an obligation of the nondebtor spouse will not qualify for the section 523(a)(5) exception if the underlying obligation was not incurred to provide necessities for the nondebtor spouse; and 5) changes in the financial circumstances of the parties after the divorce decree was entered are not relevant under section 523(a)(5).

It is contended that all of these principles frustrate, rather than further, the underlying purposes of section 523(a)(5) and that none of them is mandated by the statutory language of that section. Because any divorce obligation, if fulfilled, both contributes to the welfare of the debtor's former spouse and hinders the debtor's fresh start, the form that a particular divorce obligation takes (which is often the result of capricious factors) should not be determinative of its dischargeability. This Article proposes an approach which determines the dischargeability of divorce obligations under section 523(a)(5) by focusing directly on the needs, income levels, and earning potentials of the debtor and the nondebtor spouse as they exist at the time of the section 523(a)(5) trial. Although this proposed weighing of the parties’ needs and incomes provides no “bright line” test for determining the dis-

18. Although Gebhardt and Stone are extreme examples, there are many other decisions under § 523(a)(5) cited within this Article which do not appear to strike an equitable balance between the competing policy concerns behind that section.
chargeability of divorce obligations, it better facilitates the striking of a proper balance between the competing policy considerations underlying section 523(a)(5) than does an approach which relies on the more formalistic and narrow criteria critiqued in this Article.

I. HISTORY OF THE EXCEPTION TO DISCHARGE FOR ALIMONY, MAINTENANCE, AND SUPPORT

Courts have been excepting from discharge a debtor’s support obligations to his former wife and his children since before the turn of the century. Although the Bankruptcy Act of 1898 did not explicitly set forth an exception to discharge for support obligations, the United States Supreme Court held in a series of decisions that such an exception was implied because payment of support obligations constituted a duty not subject to discharge, rather than a dischargeable debt. The Supreme Court decisions holding that support obligations were not dischargeable in bankruptcy represented the prevailing view at that time. The Court cited the same policy considerations which are still relied upon today in support of an exception to discharge for support obligations: “The bankruptcy law should not deprive [a] 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.”

Congress followed the Supreme Court’s lead and amended section 17(a) of the Bankruptcy Act in 1903 to explicitly provide for an exception to discharge for “alimony due or to become due,

21. Wetmore v. Markoe, 196 U.S. 68 (1904); Dunbar v. Dunbar, 190 U.S. 340 (1903); Audubon v. Shufeldt, 181 U.S. 575 (1901). The duty/debt distinction drawn by the Supreme Court in these cases is no longer relevant under the current Bankruptcy Code which provides that all claims which arose prior to the filing of a bankruptcy petition are subject to discharge unless specifically excepted. See Note, The Bankruptcy Reform Act of 1978: Dischargeability of Obligations Incurred Under Property Settlements, Separation Agreements, and Divorce Decrees, 12 U. Balt. L. Rev. 520, 526 n.56 (1983). A “claim” is broadly defined in the Bankruptcy Code as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(4) (1986).
22. See Shine v. Shine, 802 F.2d 583, 586 (1st Cir. 1986)(citing 1A Collier on Bankruptcy 1668-69 (14th ed. 1978)).
23. Wetmore, 196 U.S. at 77.
or for maintenance or support of wife or child . . . ."24 Thereaf-
fer, the courts were increasingly called upon to determine whether
a particular obligation arising out of a divorce constituted ali-
mony, maintenance, or support within the meaning of the Bank-
ruptcy Act.26 The Act, itself, did not provide a definition of these
terms. The courts attempted to define them by drawing a distinc-
tion between a husband's ongoing duty to support his former wife
and children and obligations which arose out of a division of mar-
tal property, with only the latter considered dischargeable in
bankruptcy.28 In determining whether an obligation constituted
nondischargeable alimony or a dischargeable property settlement,
some courts found the state law definition of alimony in the state
where the divorce decree was entered to be controlling, while
other courts focused on the substance of the obligation.27

Congress effected a major overhaul of the bankruptcy laws

25. Shine, 802 F.2d at 586.
26. Id. The rationale for the rule that divisions of marital property are subject to
discharge is based upon the distinction between a dischargeable debt and a nondischarge-
able duty enunciated by the Supreme Court in its decisions around the turn of the century
which established the discharge exception for support obligations. Obligations based upon
divisions of marital property were considered to be debts determined according to the law
of contract and therefore not covered by the statutory exception to discharge. In re Alcorn,
(9th Cir. 1963)(bracketed citation contained in opinion):
   It is well settled that "[a]limony does not arise from any business transaction,
but from the relation of marriage. It is not founded on contract, express or im-
plied, but on the natural and legal duty of the husband to support the wife,"
(1901)] and it is the obligation based on this duty which is saved from discharge
in bankruptcy by Section 17, sub. a(2) of the Act. Wetmore v. Markoe, 196

27. Note, supra note 21, at 524-26. It should be noted that prior to 1970 the dis-
chargeability of divorce obligations was usually determined in state court in a post-bank-
ruptcy action to enforce the obligation. See Swann, Dischargeability of Domestic Obliga-
tions in Bankruptcy, 43 TENN. L. REV. 231, 234 (1976). In 1970 the Bankruptcy Act was
amended to permit bankruptcy courts to determine the dischargeability of a debt before an
L. No. 91-467, 84 Stat. 990. Since that amendment, the dischargeability of divorce obliga-
tions has been determined more frequently in the bankruptcy courts. See Note, Discharge
of Post-Marital Support Obligations Under the New Bankruptcy Code, 4 HARV. WOMEN'S

Currently, bankruptcy courts and state courts have concurrent jurisdiction to deter-
mine dischargeability under § 523(a)(5). See In re Brock, 58 Bankr. 797, 799 (Bankr. S.D.
Ohio 1986). Yet, there are many more recently reported federal court decisions addressing
§ 523(a)(5) than there are state court decisions.
when it enacted the Bankruptcy Reform Act of 1978, which replaced the Bankruptcy Act of 1898. In attempting to modernize the bankruptcy law, Congress considered implementing some dramatic changes with respect to the dischargeability of support obligations; however, it ultimately elected to make only relatively minor changes in the statutory language excepting support obligations from discharge.

Among the reforms which Congress considered, but failed to adopt, was a proposal by the Commission on the Bankruptcy Laws of the United States to eliminate the distinction that courts had been drawing between alimony and property divisions by making all obligations in connection with a separation agreement or divorce decree nondischargeable. The Commission took the view that obligations arising from property divisions should not be dischargeable because an obligation in the nature of family support may frequently take the form of a division of marital property.

The National Conference of Bankruptcy Judges also drafted a proposed exception to discharge for support obligations which was introduced in Congress. However, this draft narrowed, rather than expanded, the existing exception. The Judges' bill preserved the support/property settlement distinction by limiting its proposed exception to alimony, maintenance, or support, but it added the following proviso with respect to "hold harmless" clauses: "Provided, however, That a debt shall not be excepted from discharge hereunder merely to hold the spouse harmless on

30. The exception to discharge under the Bankruptcy Code is a "substantial reenactment" of the statutory exception to discharge for alimony, maintenance, and support under the Bankruptcy Act. In re Bell, 61 Bankr. 171, 173 n.1 (Bankr. S.D. Tex. 1986). One reform that was implemented by the Bankruptcy Code was to make the exception available to both male and female nondebtor spouses. Under the Bankruptcy Act of 1898, only support obligations for the debtor's wife or child were excepted from discharge.
33. Id. at 139.
her obligation in any manner to pay the debt . . . ." One of the members of the Conference explained that this language remedied what the Conference perceived to be an abuse of the exception to discharge by allowing the debtor to discharge debts shared with his former spouse "where the beneficiary of the payments on such obligations is not the wife but rather an unsecured creditor whose debt would otherwise be dischargeable in bankruptcy."

Congress adopted neither of the significant reforms proposed in the Commission's and the Judges' bills when it passed the new Bankruptcy Code. The adopted exception to discharge is found in section 523(a)(5) of the Code and currently reads as follows:

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

. . . .

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that —

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

35. Judges' Bill, supra note 34, § 4-506(a)(6).

Section 523(a)(5) was also amended in 1981 and 1984 to add the parenthetical language in § 523(a)(5)(A) which prevents the discharge of support obligations assigned to a governmental unit. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2334(b), 95 Stat. 357, 868; The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(b), 98 Stat. 333, 376. These are the only changes which have been made to § 523(a)(5) since it was enacted.
State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

Some of the most significant language with respect to the dischargeability of support obligations is found not in the text of section 523(a)(5), but rather in statements contained in the legislative history of the 1978 Act. These statements have been used to establish principles which are not readily apparent from the text of section 523(a)(5).

The reports prepared by the House and Senate Judiciary Committees to assist the members of Congress in their consideration of the final version of the 1978 Act state that "[w]hat constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law." Based on this legislative history, courts have held that an obligation could be in the nature of support so as to be excepted from discharge under section 523(a)(5) even though the initial creation of the obligation had not been required under state support law. While courts are now virtually unanimous in accepting the principle that the determination of dischargeability under section 523(a)(5) is ultimately a matter of federal law, it is frequently stated that principles of state law with respect to alimony, maintenance and support may be looked to for guidance in resolving issues arising under section 523(a)(5).

The Congressional reports also addressed the question raised by the Judges' bill of whether a debtor's obligation to assume joint marital debts and to hold his former spouse harmless on those debts may be nondischargeable under section 523(a)(5). Although the House and Senate reports contain the statement that section 523(a)(5) will only except from discharge support obligations

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39. E.g., In re Yeates, 807 F.2d 874, 878 (10th Cir. 1986); In re Harrell, 754 F.2d 902, 905 (11th Cir. 1985) (debtor's obligation under a separation agreement to pay his son's college expenses held to be nondischargeable support under § 523(a)(5) even though the debtor was not required under state law to support his son past the age of majority); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984); In re Brown, 74 Bankr. 968, 972-73 (Bankr. D. Conn. 1987); In re Grijalva, 72 Bankr. 334, 338 (S.D. W. Va. 1987).
40. E.g., In re Yeates, 807 F.2d 874 (10th Cir. 1986); In re Calhoun, 715 F.2d 1103 (6th Cir. 1983); In re Spong, 661 F.2d 6 (2d Cir. 1981); In re Snider, 62 Bankr. 382 (Bankr. S.D. Tex. 1986).
"owed directly to a spouse or dependent," the remainder of the House and Senate reports make it clear that section 523(a)(5) does apply to a debtor's obligations to hold a former spouse harmless on joint debts:

This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.

The prevailing view, based on this language, is that a debtor's obligation to pay his former spouse's debts to third parties can be excepted from discharge under section 523(a)(5). Section 523(a)(5)(A), which states that a support obligation is not excepted from discharge if it has been "assigned to another entity," has been narrowly interpreted by courts to mean that there is no assignment within the meaning of section 523(a)(5)(A) if the nondebtor spouse is receiving a support benefit from the payment or assumption of the debt.

Beyond the clarifications contained in the House and Senate reports, neither the text nor the legislative history of section 523(a)(5) provides much guidance for courts attempting to determine whether a particular debt constitutes alimony, maintenance, or support so as to be nondischargeable. No definition of these terms is provided by the text or legislative history of the Act. Perhaps the most significant message which can be gleaned from the legislative history is that Congress intended for courts to at-

41. HOUSE REPORT, supra note 29, at 364 (emphasis added); SENATE REPORT, supra note 38, at 79 (emphasis added).
42. HOUSE REPORT, supra note 29, at 364; SENATE REPORT, supra note 38, at 79. The quoted language is taken from the House Report. The Senate Report contains virtually identical language, but there are slight variations which do not affect the meaning of the passage.
43. Two of the more detailed discussions of this issue are found in In re Calhoun, 715 F.2d 1103 (6th Cir. 1983) and In re Spong, 661 F.2d 6 (2d Cir. 1981). See infra notes 121-22.
45. In re Yeates, 807 F.2d 874, 877 (10th Cir. 1986); In re Harke, 24 Bankr. 645, 647 (Bankr. E.D. Mo. 1982).
tempt to balance the competing policies of providing a bankruptcy debtor with a fresh start and insuring that familial support obligations are fulfilled. This conclusion is drawn from the fact that Congress rejected both the proposal from the Commission on the Bankruptcy Laws of the United States which would have eliminated consideration of the "fresh start" policy as well as the proposal of the National Conference of Bankruptcy Judges which would have substantially narrowed the types of support obligations qualifying for the exception to discharge.\textsuperscript{46} Congress apparently was unwilling to completely embrace one policy at the expense of the other. Unfortunately, because section 523(a)(5) is silent as to how the balance between these competing policies is to be struck, the confusion and inconsistency which existed under the Bankruptcy Act of 1898 has persisted under the Bankruptcy Code.\textsuperscript{47}

In deciding issues under section 523(a)(5), the courts recite a litany of principles, many of which, if not particularly helpful or always heeded, are at least fundamentally sound. These principles include the following: "An obligation to a former spouse for alimony, maintenance, or support for the spouse or child, in connection with a separation agreement or divorce decree is not dischargeable in a bankruptcy proceeding if the debt is actually in the nature of alimony, maintenance or support."\textsuperscript{48} "Whether a debt is dischargeable [under section 523(a)(5)] is determined by federal bankruptcy law, not by state law."\textsuperscript{49} "The Bankruptcy Code requires the bankruptcy court . . . to determine the true na-

\begin{itemize}
\item \textsuperscript{46} See supra notes 31-36 and accompanying text.
\item \textsuperscript{47} See In re MacDonald, 69 Bankr. 259, 270-71 (Bankr. D.N.J. 1986); Note, supra note 21, at 526, 531.
\item \textsuperscript{48} In re Smith, 61 Bankr. 742, 745 (Bankr. D. Mont. 1986). Accord Forsdick v. Turgeon, 812 F.2d 801, 802 (2d Cir. 1987); In re Yeates, 807 F.2d 874, 878 (10th Cir. 1986); Tilley v. Jesse, 789 F.2d 1074, 1077 (4th Cir. 1986); In re Harrell, 754 F.2d 902, 904 (11th Cir. 1985); Shaver v. Shaver, 736 F.2d 1314, 1314 (9th Cir. 1984); In re Calhoun, 715 F.2d 1103, 1107 (6th Cir. 1983); In re Nowac, 78 Bankr. 638, 638 (Bankr. D.N.H. 1987); Moore v. Moore, 78 Bankr. 304, 304 (Bankr. N.D. Fla. 1987); In re Freyer, 71 Bankr. 912, 916 (Bankr. S.D.N.Y. 1987); In re Soval, 71 Bankr. 690, 692 (Bankr. E.D. Mo. 1987); In re Pitzen, 73 Bankr. 10, 11 (Bankr. N.D. Ohio 1986).
\item \textsuperscript{49} In re Phillips, 80 Bankr. 484, 486 (Bankr. W.D. Mo. 1987). Accord In re Yeates, 807 F.2d 874, 877 (10th Cir. 1986); In re Long, 794 F.2d 928, 930 (4th Cir. 1986); In re Harrell, 754 F.2d 902, 905 (11th Cir. 1985); Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); In re Calhoun, 715 F.2d 1103, 1107 (6th Cir. 1983); In re Williams, 703 F.2d 1055, 1056 (8th Cir. 1983); In re Hoivik, 79 Bankr. 401, 402 (Bankr. W.D. Wis. 1987); In re Brown, 74 Bankr. 968, 971 (Bankr. D. Conn. 1987); In re Campbell, 74 Bankr. 805, 809 (Bankr. M.D. Fla. 1987); In re Young, 72 Bankr. 450, 452 (Bankr. D.R.I. 1987); In re Freyer, 71 Bankr. 912, 916 (Bankr. S.D.N.Y. 1987); In re Soval, 71 Bankr. 690, 692 (Bankr. E.D. Mo. 1987); In re MacDonald, 69 Bankr. 259, 267 (Bankr. D.N.J. 1986).\end{itemize}
ture of the debt, regardless of the characterization placed on it by the parties' agreement or the state court proceeding.\textsuperscript{50} "Dischargeability must be determined by the substance of the liability rather than its form."\textsuperscript{51} "[T]he burden of proof is on the party asserting that a debt is non-dischargeable. This is as it should be, since every debt which a debtor must continue to bear impedes his ability to make good on the fresh start which the Bankruptcy Code provides him."\textsuperscript{52}

A number of other frequently cited principles are either faulty in premise or, at the least, unduly susceptible to misinterpretation and misapplication. A critique of these faulty premises follows.

II. FAULTY PREMISES

A. Faulty Premise #1: "[O]bligations created by property settlements are divisions of property and are dischargeable in bankruptcy."\textsuperscript{53}

Courts applying section 523(a)(5) have repeatedly stated, without offering elaboration or justification, that divorce obligations based on divisions of marital property are dischargeable in bankruptcy, while support obligations are not dischargeable.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{50} In re Benich, 811 F.2d 943, 945 (5th Cir. 1987). Accord In re Goin, 808 F.2d 1391, 1392 (10th Cir. 1987); Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); In re Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Roberts v. Poole, 80 Bankr. 81, 85 (N.D. Tex. 1987); Moore v. Moore, 78 Bankr. 304, 305 (Bankr. N.D. Fla. 1987); In re Campbell, 74 Bankr. 805, 809 (Bankr. M.D. Fla. 1987); In re Cockhill, 72 Bankr. 339, 341 (Bankr. N.D. Ill. 1987); In re Young, 72 Bankr. 450, 452 (Bankr. D.R.I. 1987); In re Mizen, 72 Bankr. 251, 253 (Bankr. N.D. Ohio 1987); In re Soval, 71 Bankr. 690, 692 (Bankr. E.D. Mo. 1987).
\item \textsuperscript{52} In re Barac, 62 Bankr. 713, 717 (Bankr. E.D. Mo. 1985). Accord In re Benich, 811 F.2d 943, 945 (5th Cir. 1987); In re Long, 794 F.2d 928, 930 (4th Cir. 1986); In re Calhoun, 715 F.2d 1103, 1111 (6th Cir. 1983); Roberts v. Poole, 80 Bankr. 81, 85 (N.D. Tex. 1981); In re Hoivik, 79 Bankr. 401, 402 (Bankr. W.D. Wis. 1987); In re Campbell, 74 Bankr. 805, 808 (Bankr. M.D. Fla. 1987); In re Freyer, 71 Bankr. 912, 916 (Bankr. S.D.N.Y. 1987); In re Pitzen, 73 Bankr. 10, 12 (Bankr. N.D. Ohio 1986).
\item \textsuperscript{53} In re Bell, 61 Bankr. 171, 174 (Bankr. S.D. Tex. 1986).
\item \textsuperscript{54} E.g., In re Long, 794 F.2d 928, 931 (4th Cir. 1986); In re Coil, 680 F.2d 1170, 1171 (7th Cir. 1982); In re Grijalva, 72 Bankr. 334, 336 (S.D. W. Va. 1987); In re Freyer, 71 Bankr. 912, 916 (Bankr. S.D.N.Y. 1987); In re MacDonald, 69 Bankr. 259, 268
\end{itemize}
courts have erroneously viewed these two types of divorce obligations as mutually exclusive, resulting in a number of decisions which frustrate the policy of requiring debtors to fulfill obligations in the nature of support.

The theoretical distinction between a support obligation and a property settlement can be easily stated. Alimony, maintenance, and support are based upon a spouse's continuing legal duty to provide for the needs of his former spouse and children after a divorce, while the purpose of a property division is to unscramble the ownership of marital property in an equitable fashion. Despite this theoretical distinction, however, the purposes and functions of property divisions and support obligations tend to overlap. Although the laws of each state vary, support obligations are generally determined by considering the length of the marriage, the needs and income levels and potentials of each spouse, and the standard of living enjoyed during the marriage. Courts will attempt to divide marital property in a manner which is just or equitable by considering the source of the property in question and the contributions of each spouse to the marriage. In dividing marital property, many courts will also consider the same factors which are traditionally relied upon in establishing support obligations. More significantly, it is apparent that, in both di-
Divorce settlements and court imposed decrees, the division of marital assets and obligations will often result in the reduction or elimination of a support obligation which would otherwise be required.61

For example, one divorcing couple might have few significant marital assets, but needs and earning capacities which would warrant a support obligation to the wife of $12,000 per year. Another couple might have identical needs and earning capacities, but also own a family business which the husband wishes to retain. The husband in the second hypothetical might agree or be required to issue a promissory note for $150,000, payable over ten years, as compensation for the wife’s share of the business, but, in view of that property settlement, be relieved of any obligation to pay alimony. The $15,000 annual payments on the note in the second hypothetical and the $12,000 yearly support payments in the first hypothetical, where there was no property division, would serve the same function — meeting the support needs of the spouse.

Similarly, a divorce settlement or decree may require one spouse to pay $24,000 per year alimony while the recipient spouse is required to assume $25,000 of joint marital debts. The same parties might instead agree or be required to set the alimony level at $19,000 for the first five years (before being increased to $24,000), but with the spouse paying the alimony also being required to assume and hold the other spouse harmless on the joint marital debts. Without an intervening bankruptcy, the needs of the recipient spouse would be equally satisfied under either

arrangement.

At the time alimony is established and property divided, the parties will often be less concerned with differentiating between the two types of obligations than with the "bottom line" question of the total each spouse is to receive or give up. 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 or of the court issuing the divorce decree. The form of a divorce obligation will often bear no relationship to whether that obligation is actually serving a support function.

There is nothing inherently wrong with divorce settlements and decrees blurring the distinction between support obligations and property divisions. In fact, the two appear to be unavoidably interrelated. The problem arises when courts applying section 523(a)(5) fail to recognize the connection. A number of courts have held that a debtor's unfulfilled obligation to his former spouse was dischargeable because it constituted a "property settlement," without discussing the parties' financial needs and earning capacities or by disregarding such evidence. This can result in

62. See infra note 89 and accompanying text.

63. Sometimes the form of a divorce obligation will have been influenced by income tax considerations. Alimony payments have traditionally been deductible by the spouse making the payments and taxable to the recipient spouse, while payments representing a division of marital assets did not receive such treatment. 2 H. CLARK, supra note 55, § 16.1, at 180. Some courts have been influenced by the manner in which the parties had treated a divorce obligation for tax purposes prior to bankruptcy in determining whether that obligation is dischargeable or nondischargeable. E.g., Beiler v. Beiler, 80 Bankr. 63, 64 (E.D. Va. 1987); In re Bell, 61 Bankr. 171, 175 (Bankr. S.D. Tex. 1986). However, because "parties sometimes treat payments under a divorce settlement as one thing for tax purposes, while the true purpose is something else," In re Goodman, 55 Bankr. 32, 36 (Bankr. D.S.C. 1985), the better view is for courts deciding § 523(a)(5) issues to attach little significance to the tax treatment given to the obligation by the parties. See Roberts v. Poole, 80 Bankr. 81 (N.D. Tex. 1987); In re Singer, 18 Bankr. 782 (Bankr. S.D. Ohio 1982), aff'd, 787 F.2d 1033 (6th Cir. 1986).

Divorce settlements entered into after 1984 are less likely to be influenced by tax considerations because of changes in the federal income tax laws enacted that year. See 2 H. CLARK, supra note 55, § 17.9, at 321-45.

64. E.g., Roberts v. Poole, 80 Bankr. 81, 84 (N.D. Tex. 1987)(debtor's obligation to pay his former wife $3,000 a month for a period of ten years held to constitute a dischargeable division of marital property; needs of the parties not considered in making this determination): In re Brown, 74 Bankr. 968, 972-73 (Bankr. D. Conn. 1987)(debtor's obligation under separation agreement to pay $50,000 over six years "as part of the division of property" held to be dischargeable property settlement despite evidence that at the time of the divorce the debtor's income was between $40,000 and $50,000 while the nondebtor spouse's
the arbitrary discharge of obligations needed for support, in con-
travention of the underlying purposes of section 523(a)(5).

Some courts adhere so strongly to the property settlement/
alimony distinction that they have held that an obligation taking
the form of a property division is dischargeable even when the
divorce settlement indicates that the property division is being
made in lieu of alimony or in consideration of the wife's waiver of
her right to alimony. Such language clearly suggests that the
property division is a substitute for traditional alimony payments,
and the financial condition of the parties will often support the

income was approximately $16,000); In re Mallisk, 64 Bankr. 39, 42 (Bankr. N.D. Ohio
1986)(debtor's obligation to pay his former spouse approximately $20,000 over a ten year
period held to be dischargeable property settlement because the payments were intended to
compensate the nondebtor spouse for the release of her interest in the marital property; no
discussion of the needs of the parties); In re Jackson, 59 Bankr. 77, 78 (Bankr. S.D. Fla.
1986) ($20,000 awarded to wife to compensate her for her interest in the marital property
held to be a dischargeable property settlement without discussion of the needs of the par-
ties); In re Delaine, 56 Bankr. 460, 469-70 (Bankr. N.D. Ala. 1985)(debtor's obligation to
pay indebtedness secured by residence awarded to nondebtor spouse held to be a discharge-
able property settlement despite evidence that the nondebtor spouse was working for mini-
mum wage and that payment of the indebtedness was necessary for her support); In re
Gebhardt, 53 Bankr. 113, 115 (W.D. Mo. 1985)(discussed supra notes 13-15 and accom-
panying text). See also cases cited infra notes 65, 92 & 101.

65. E.g., Beiler v. Beiler, 80 Bankr. 63 (E.D. Va. 1987)(debtor's obligation in separa-
tion agreement to pay his former spouse $5,000 over two years held to be dischargeable
based on evidence that there had been a waiver of alimony; no discussion of needs of par-
ties); In re Wadleigh, 68 Bankr. 499 (Bankr. D. Vt. 1986)(debtor's obligation to pay his
former spouse's legal fees arising from the divorce held to be dischargeable because the
former spouse agreed to waive alimony in exchange for a better property settlement); In re
McVay, 57 Bankr. 432 (Bankr. N.D. Miss. 1985)(provision in separation agreement re-
quiring husband to assume second mortgage on home awarded to wife held to be discharge-
able without discussion of wife's needs based on language in agreement that no alimony
would be paid); In re Hudgens, 57 Bankr. 184 (Bankr. M.D. La. 1986)(debtor's obligation
to assume a second mortgage of $8,000 was dischargeable when the obligation was as-
sumed in exchange for the nondebtor spouse's agreement not to seek alimony despite evi-
dence that the nondebtor spouse was earning $924 a month and supporting four children at
the time of the separation); In re Talley, 57 Bankr. 75 (Bankr. W.D. Mo. 1985)(debtor's
obligation to pay his former wife $10,000 within nine months of the divorce decree held
dischargeable based on waiver of maintenance contained in decree despite evidence that the
wife had been unemployed for many years at the time of the divorce, was unable to support
herself, and needed the $10,000 for her support); see also In re Brown, 74 Bankr. 968
(discussed supra note 64)(court relies on fact that separation agreement states that "wife
makes no demand or claim for alimony" in holding obligation contained in agreement to be
dischargeable despite large disparity of income between the parties).

Other courts have found that a divorce obligation created in lieu of alimony was in the
nature of support so as to be nondischargeable under § 523(a)(5). E.g., In re Yeates, 807
F.2d 874 (10th Cir. 1986); In re Lightner, 77 Bankr. 274 (Bankr. D. Mont. 1987); In re
Young, 72 Bankr. 450 (Bankr. D.R.I. 1987); In re Horton, 69 Bankr. 42 (Bankr. E.D. Mo.
1986).
conclusion that the obligation arising from the property division is needed to provide for the support of the nondebtor spouse.66

A court decision that a property division obligation given in exchange for a waiver of alimony is dischargeable may have particularly harsh consequences because the nondebtor spouse may be precluded by the waiver language of the settlement agreement from later seeking an upward modification of the divorce obligation in state court. The property division provisions of a divorce decree are generally not subject to alteration under state law, but, absent a waiver, all states will permit a divorced spouse to petition for modification of traditional support obligations based upon changed circumstances.67 Many states, however, will not allow an upward modification of alimony if the agreement expressly limits or precludes modification.68 Thus, a spouse who negotiates or litigates a division of marital assets (or debts) based on a careful assessment of her budget can potentially be permanently deprived by a bankruptcy filing of the benefits needed for her support if she agreed to waive support in exchange for the property division. Even if the nondebtor spouse is able to obtain a state court grant or increase of support following the bankruptcy discharge of a “property settlement” obligation despite waiver language in the separation agreement, the time and expense of this additional litigation is a substantial detriment to the nondebtor spouse.69

Some courts, while citing with approval the principle that section 523(a)(5) does not except property settlements from discharge, have implicitly recognized the injustice of discharging an obligation needed for support merely because the obligation represents a division of marital assets or debts. These courts will disregard the form of an obligation and determine its dischargeability under section 523(a)(5) based on an assessment of the needs of the parties.70 While such an approach usually leads to a just result

66. See supra note 65.
67. 2 H. CLARK, supra note 55, § 16.1, at 179 (alimony awards are generally modifiable while division of property is not).
69. In discharging a divorce obligation because it constitutes a property settlement, many bankruptcy courts will console the nondebtor spouse by suggesting that she return to state court to seek an increase in alimony. E.g., In re Nowac, 78 Bankr. 638 (Bankr. D.N.H. 1987); In re Winders, 60 Bankr. 746 (Bankr. N.D. Iowa 1986).
70. In re Benich, 811 F.2d 943 (5th Cir. 1987); In re Yeates, 807 F.2d 874 (10th
in the case in which it is employed, it does not adequately challenge the holdings of those courts which have taken a more rigid view of the rule that obligations arising from property settlements are dischargeable in bankruptcy.

Direct repudiation of this misguided principle should lead to a reduction in the number of decisions in which an obligation serving a support function is arbitrarily discharged merely because it can be categorized as a property division. One of the strongest criticisms of the traditional rule is found within a recent Sixth Circuit decision — \textit{In re Singer}.\footnote{71} Unfortunately, this criticism only appears in a concurring opinion. Judge Guy, concurring with a finding of nondischargeability, quoted with approval the following language from a prior bankruptcy court decision:

\begin{quote}
"While the parties have cast the argument before us, and it is common in these controversies to do so, as whether certain property . . . was awarded as alimony or as property settlement, such a characterization is not particularly constructive . . . . The two terms are not . . . mutually exclusive. Under the law of Ohio the parties may, upon a divorce, agree to how they will divide up their property, and such an award of property to a spouse may be regarded as alimony."\footnote{72}
\end{quote}

The majority opinion in \textit{Singer} is not as straightforward in criticizing the support/property division dichotomy as the concurring opinion. The majority stated that an obligation which is "strictly" a property settlement is dischargeable, but that a "property settlement in connection with alimony, maintenance, or support" is not.\footnote{73} The majority went on to state, citing a Ninth Circuit opinion,\footnote{74} that if a settlement agreement fails to explicitly provide for support, a "so-called property settlement" will be presumed to be intended for support and excepted from discharge when circumstances indicate that the nondebtor spouse is in need of support.\footnote{75} Although this statement is valid as far as it goes, it fails to take

\begin{thebibliography}{1}
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\item 71. 787 F.2d 1033, 1035 (6th Cir. 1986).
\item 72. \textit{Id.} at 1037 (concurring opinion)(quoting \textit{In re Hill}, 26 Bankr. 156, 159 (Bankr. S.D. Ohio 1983)).
\item 73. \textit{Singer}, 787 F.2d at 1034.
\item 74. \textit{Shaver v. Shaver}, 736 F.2d 1314 (9th Cir. 1984).
\item 75. \textit{Singer}, 787 F.2d at 1035.
\end{thebibliography}
into account the situation in which a traditional support obligation had been set at a reduced amount (but not eliminated) in the expectation that a related property division obligation would be satisfied and would contribute to the support needs of the nondebtor spouse.\textsuperscript{66} While Singer represents a step in the right direction, it apparently has not led many other courts to reexamine their thinking since neither the majority nor concurring opinion has been frequently cited for its analysis of the support/property settlement distinction.\textsuperscript{77}

As noted previously, the legislative history of section 523(a)(5) demonstrates that Congress did not intend that all obligations arising from a division of marital assets and debts be non-dischargeable.\textsuperscript{78} In a number of cases, the discharge of such obligations would appear to be appropriate.\textsuperscript{79} It is also clear, however, that Congress' desire to provide protection for a debtor's former spouse and children is poorly served by completely excluding from the coverage of section 523(a)(5) any obligation arising from a division of marital property. There is nothing in the language of the statute which mandates such an arbitrary approach.\textsuperscript{80} Any debt arising from a divorce, regardless of whether it is based upon a division of marital assets or a traditional support obligation,

\textsuperscript{76} See, e.g., Tilley v. Jessee, 789 F.2d 1074 (4th Cir. 1986)(discussed infra note 104).

\textsuperscript{77} Only two bankruptcy courts have cited the Singer majority opinion with respect to the dischargeability of property settlements. In re Leupp, 73 Bankr. 33, 35 (Bankr. N.D. Ohio 1987); In re Markizer, 66 Bankr. 1014, 1018 (Bankr. S.D. Fla. 1986). Neither the concurring opinion in Singer nor the lower court opinion in Hill which it quoted has been cited by any other court for their discussion on this point.

\textsuperscript{78} See supra notes 31-33, 45-47 and accompanying text.

\textsuperscript{79} E.g., In re Ammirato, 74 Bankr. 605, 607 (Bankr. D. Conn. 1987)(debtor's obligation pursuant to separation agreement to hold his former spouse harmless on joint marital debts held to be dischargeable where nondebtor spouse had a significantly larger salary than the debtor and the nondebtor spouse acknowledged that she did not know where the debtor would get the money to pay off the joint debts); In re Markizer, 66 Bankr. 1014, 1019 (Bankr. S.D. Fla. 1986)(debtor's obligation to pay his former spouse $600 per week for approximately nine years for her share of the family business held to be dischargeable when the nondebtor spouse had already received over $370,000 in other cash and property pursuant to the divorce agreement, the family business could not be sold for the anticipated sales price of $600,000, and the debtor had offered to give the entire business to his former spouse prior to filing for bankruptcy).

\textsuperscript{80} The House and Senate Reports on § 523(a)(5) are confusing since they seem to draw a distinction between alimony and property settlements while simultaneously clarifying that "hold harmless" obligations (which constitute a type of property settlement since they involve a division of marital liabilities) can be nondischargeable. See supra note 42 and accompanying text. The underlying purposes of § 523(a)(5), however, argue in favor of applying that section to property divisions which serve a support function.
should be excepted from discharge if it is in the nature of alimony, maintenance, or support. The purposes underlying section 523(a)(5) would be furthered if courts would explicitly recognize this principle and renounce the premise that property settlements do not qualify for the section 523(a)(5) exception and are therefore dischargeable in bankruptcy.

B. Faulty Premise #2: "The crucial issue [under section 523(a)(5)] is the function the award was intended to serve." Many courts, in addition to or instead of articulating a support/property division distinction, will state that a decisive issue under section 523(a)(5) is whether the obligation was intended by the parties or by the court issuing the divorce decree to serve a support function. This approach can lead to sound results when courts attempt to determine "constructive intent" by analyzing the obligation in relation to the needs and incomes of the parties. Because this approach allows for the possibility that an obligation based on a division of marital assets and debts could have been created with the intent that it serve a support function, it is markedly superior to the view that divisions of marital property and support obligations are mutually exclusive.

An intent test, however, is also subject to misapplication.

81. Setting forth an appropriate and effective test for determining whether a debt is in the nature of alimony, maintenance, or support is not an easy task, but will be attempted later in this Article.

82. In re Snider, 62 Bankr. 382, 384 (Bankr. S.D. Tex. 1986)(citing In re Williams, 703 F.2d 1055, 1057 (8th Cir. 1983)).

83. E.g., In re Yeates, 807 F.2d 874, 878 (10th Cir. 1986); In re Long, 794 F.2d 928, 931 (4th Cir. 1986); Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984); In re Calhoun, 715 F.2d 1103, 1109 (6th Cir. 1983); Roberts v. Poole, 80 Bankr. 81, 85-86 (N.D. Tex. 1987); In re Cockhill, 72 Bankr. 339, 341 (Bankr. N.D. Ill. 1987); In re Young, 72 Bankr. 450, 452-53 (Bankr. D.R.I. 1987); In re Freyer, 71 Bankr. 912, 919 (Bankr. S.D.N.Y. 1987); In re MacDonald, 69 Bankr. 259, 268 (Bankr. D.N.J. 1986). See also cases cited infra notes 85, 92 & 101.


86. It should be noted that a test governed solely by the intent of the parties or the divorce court at the time of the divorce precludes a consideration of changes in the financial circumstances of the parties subsequent to the divorce. Whether such changes should be considered in resolving § 523(a)(5) issues is discussed infra at notes 133-56 and accompanying text.
Some courts have taken a narrow view of intent by requiring subjective evidence of a mutual intent to create a support obligation or by refusing to examine extrinsic evidence of the parties' needs and incomes when the obligation in question was labelled a "property division" in the divorce settlement or decree. Requiring explicit evidence of intent makes little sense in view of the arbitrary manner in which the form of most divorce obligations is determined. Rather than attempting to ascertain the subjective intent of the parties, courts applying section 523(a)(5) should make an independent determination of whether the obligation at issue is, in fact, serving a support function.

The inappropriateness of a narrowly construed intent test is illustrated rather ironically in In re Helm, where the court was called upon to determine the dischargeability of a debtor's divorce obligation to pay his former spouse $1,000 a month for approximately twelve years unless she died or remarried first. The court initially made the following observation:

[The parties to a divorce are rarely interested in the legal characterizations given to obligations created by a divorce settlement or decree. In the words of a sister Bankruptcy Court: "Few are the cases where either party knows or cares whether it [the debt] is alimony, support or [a] division of property. Each is interested only in what each will get or have to pay." In the very next paragraph, the court held that the $1,000 monthly payments could not be excepted from discharge under section 523(a)(5) because:

[The nondebtor spouse] has failed to prove that she and [the debtor] intended the "periodic maintenance" payments to be alimony or support. The evidence showed that while she may have regarded the payments as alimony, he saw the payments as nothing more than a method of transferring property which carried with it substantial tax and economic advantages.

The Helm court thus held that the failure to show a mutual intent to create a support obligation was dispositive, and that it was not necessary to consider whether the obligation actually had the ef-

87. See infra notes 88-92, 97-101 and accompanying text.
90. Helm, 48 Bankr. at 221 (emphasis in original).
fect of meeting the nondebtor spouse's support needs.91 Other courts have followed this reasoning.92

If the parties to a divorce are, as acknowledged by the Helm court, often indifferent and ignorant with respect to the legal characterizations given to obligations arising from a divorce, then their intent regarding those characterizations often will not be a reliable indicator of whether an obligation is actually in the nature of support. Therefore, intent should not be the dispositive factor in determining whether an obligation to a former spouse is dischargeable in bankruptcy. The purposes of section 523(a)(5) are better served by examining the obligation in relation to the needs and incomes of the former spouses. The Fifth Circuit adopted this approach in In re Benich93 when it held that a debtor's obligation under a "property settlement agreement"94 to pay his former wife $400 per month until her death or remarriage was in the nature of support under section 523(a)(5). The court of appeals focused on evidence that the wife had not worked during the eighteen year marriage and had no occupational training. The court rejected the debtor's argument that his uncontradicted testimony95 that he had never intended to agree to pay support was controlling: "While the intention of the parties is the ultimate question, even the uncontradicted testimony of one of the spouses is not decisive."96

However, neither Benich nor any other recently published opinion has directly criticized Helm or the other cases which have decided section 523(a)(5) issues based on a failure to show mutual intent.

The intent quagmire is particularly acute when the obligation in question appears under a "property division" heading in the divorce settlement or decree. Courts then are especially unwilling to

91. Id. at 221, 224. In holding that it was unnecessary to consider whether the obligation was actually serving a support function, the Helm court relied on the Sixth Circuit's opinion in In re Calhoun, 715 F.2d 1103 (6th Cir. 1983), which holds that no further inquiry is required if there was no intent to create a support obligation. See infra note 162. The Calhoun intent test is criticized in Scheible, supra note 68, at 51.

92. Tilley v. Jessee, 789 F.2d 1074 (4th Cir. 1986)(although nondebtor spouse's intention that a support obligation be created was demonstrated, the failure to show a "shared intent of both parties" to create a support obligation rendered the debt dischargeable despite evidence of the nondebtor spouse's poor health; the parties' financial circumstances at the time of the divorce held to be irrelevant); Beiler v. Beiler, 80 Bankr. 63 (E.D. Va. 1987)(follows Tilley in holding that the lack of a demonstrated mutual intent to create a support obligation was dispositive without considering the needs of the parties).

93. 811 F.2d 943 (5th Cir. 1987).

94. Id. at 944.

95. The debtor's former spouse did not testify.

96. Benich, 811 F.2d at 945.
consider the actual needs and incomes of the parties. For instance, the Tenth Circuit in the recent decision of *In re Yeates* stated:

A written agreement between the parties is persuasive evidence of intent. Thus, if the agreement between the parties clearly shows that the parties intended the debt to reflect either support or a property settlement, then that characterization will normally control. On the other hand, if the agreement is ambiguous, then the court must determine the parties’ intentions by looking to extrinsic evidence.  

The Tenth Circuit held that the agreement in question was ambiguous because it did not clearly segregate alimony and property settlement provisions. The court therefore considered evidence of the nondebtor spouse’s financial needs in affirming the district court’s holding that the debtor’s agreement to assume a joint marital debt of $6,000 was in the nature of support so as to be nondischargeable.

Although the Tenth Circuit in *Yeates* characterized the nondebtor spouse’s need for support as “a very important factor in determining the intent of the parties,” the opinion clearly suggests that evidence of such need will be given little or no consideration if the obligation in question appears under a “property division” heading. This narrow intent test, which other courts have appeared to follow in determining whether divorce obligations are dischargeable, is nothing more than an application of the rigid

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97. *In re Yeates*, 807 F.2d 874, 878 (10th Cir. 1986)(citations omitted).
98. *Id.* at 878-79.
99. *Id.* at 879.
100. *Id.* at 878.
101. *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986)(separate headings in separation agreement for alimony and property settlement held to constitute substantial evidence that the obligation under the property settlement heading was not intended for support); *Beiler v. Beiler*, 80 Bankr. 63 (E.D. Va. 1987); *In re Gebhardt*, 53 Bankr. 113 (W.D. Mo. 1985); *In re Hoivik*, 79 Bankr. 401 (Bankr. W.D. Wis. 1987); *In re Nowac*, 78 Bankr. 638 (Bankr. D.N.H. 1987); *In re Brown*, 74 Bankr. 968 (Bankr. D. Conn. 1987); *In re Freyer*, 71 Bankr. 912 (Bankr. S.D.N.Y. 1987); *In re Lineberry*, 55 Bankr. 510, 514 (Bankr. W.D. Ky. 1985)("It has been the experience of this court in addressing issues under Section 523(a)(5), that the outcome is totally dependent on the definition given the state court provisions purporting to award certain property or monetary sums.").

Other courts have been willing to look past a property settlement label to hold that the parties intended to create a support obligation based on evidence of the needs and incomes of the respective parties. E.g., *In re Williams*, 703 F.2d 1055, 1057 (8th Cir. 1983); *In re Coil*, 680 F.2d 1170, 1171-72 (7th Cir. 1982); *In re MacDonald*, 69 Bankr. 259, 261-62, 277 (Bankr. D.N.J. 1986).

Courts have also been required to determine the dischargeability of divorce obligations clearly designated as support. Some have attached great significance to the support label.
rule that divisions of marital property and obligations in the nature of support are mutually exclusive in any case in which the obligation was labelled a property division in the divorce decree or settlement.

As discussed previously, a divorce obligation which represents a division of marital property may also have been intended to serve a support function. The fact that the parties to a divorce settlement or the court which issued a divorce decree specifically employed a property settlement label does not demonstrate that the obligation was not intended for support. This is so even when there are separate property settlement and support headings in the agreement or decree since the support function of the property division may have been considered in determining the amount of traditional support which would be provided.

E.g., *In re Long*, 794 F.2d 928 (4th Cir. 1986); *In re Graves*, 69 Bankr. 626 (Bankr. S.D. Fla. 1987). Others have looked at additional evidence to determine that the debt was not actually in the nature of support and was therefore dischargeable. E.g., Robert v. Poole, 80 Bankr. 81 (N.D. Tex. 1987); *In re Phillips*, 80 Bankr. 484 (Bankr. W.D. Mo. 1987).

This author believes that all divorce obligations should be examined in relation to the needs and incomes of the parties to determine if they are actually in the nature of support under § 523(a)(5), even those clearly labeled support. See infra notes 164-67 and accompanying text.

102. See supra notes 60-62 and accompanying text.

103. Some courts have indicated a greater reluctance to disregard support and property division labels when they have been judicially created by the trier of fact after a contested hearing than when the labels were the product of a settlement agreement between the parties. "In cases where it is clear that the state court has clearly and carefully considered the question of support in the context of a contested case . . . then it is extremely unlikely that a bankruptcy court would make a contrary finding as to the true nature of the support obligation." *In re Lineberry*, 55 Bankr. 510, 516 (Bankr. W.D. Ky. 1985)(quoting *In re Helm*, 48 Bankr. 215, 220 n.13 (Bankr. W.D. Ky. 1985))(emphasis in *Helm.*). See also *In re Long*, 794 F.2d 928 (4th Cir. 1986); *In re Nowac*, 78 Bankr. 638 (Bankr. D.N.H. 1987). However, in view of the effect that a property division might have on the amount of support awarded in a contested proceeding, see supra notes 61-62 and accompanying text, there should be no greater weight attached to judicially created labels, at least when the obligation in issue appears under a property division heading. A divorce obligation labeled as support by a state court in a contested proceeding should also be subject to scrutiny under the federal standard of § 523(a)(5). See infra notes 164-67 and accompanying text. "Code section 523(a)(5) makes no distinction between an obligation which arises from an agreement of the parties and one which is ordered in the first instance by a court." *In re Brown*, 74 Bankr. 968, 971-72 (Bankr. D. Conn. 1987).

A provision in a divorce decree entered prior to bankruptcy specifically stating that a particular obligation is or is not to be dischargeable in bankruptcy should be given no res judicata or collateral estoppel effect because the determination of the federal issue is not essential to the state court divorce action. *In re Aurre*, 60 Bankr. 621, 624 (Bankr. S.D.N.Y. 1986). See also *In re Helm*, 48 Bankr. 215, 219-20 (Bankr. W.D. Ky. 1985).

104. But see Tilley v. Jessee, 789 F.2d 1074 (4th Cir. 1986), in which the nondebtor spouse testified that a $1,000 per month support obligation was insufficient to meet her
Section 523(a)(5) provides an exception to discharge for debts for alimony, maintenance, or support; it does not limit the exception to debts which the parties or the divorce court intended to be for alimony, maintenance, or support. Courts called upon to determine the dischargeability of an obligation under section 523(a)(5) should focus directly on the function of the obligation by examining evidence of the needs and incomes of the parties involved. They should not endeavor to indirectly determine the nature of a divorce obligation by attempting to divine the intent of the parties or the divorce court. This is especially important since, at the time of the divorce, the focus of the parties and the divorce court is likely to be on state law, rather than on the separate federal bankruptcy law which controls on the question of the dischargeability of an obligation arising from a divorce.

C. Faulty Premise #3: "In order to constitute a nondischargeable debt [under section 523(a)(5)], a key test is whether or not the obligation terminates on the death or remarriage of a spouse."\(^{105}\)

Courts addressing issues arising under section 523(a)(5) frequently state that the fact that a divorce obligation does not terminate upon the death or remarriage of the recipient spouse indicates that the obligation is not in the nature of support and is therefore subject to discharge.\(^{106}\) Consideration of this factor is partly based on the assumption that because a spouse's need for support ends upon her death, and presumably upon her remarriage, an obligation which does not cease upon the occurrence of these events was not created to serve a support function.\(^{107}\)

support needs in view of her poor health and that the fulfillment of the debtor's obligation to make installment payments on a $125,000 note, as required under the property division section of the separation agreement, was also necessary for her support. The Fourth Circuit held the obligation on the promissory note to be dischargeable, based in large part on the fact that that obligation appeared under the property division section of the separation agreement, rather than the alimony section.

107. See, e.g., In re Campbell, 74 Bankr. 805, 810 (Bankr. M.D. Fla. 1987); In re
dition, courts which adhere to a rigid distinction between support obligations and divisions of marital property will often rely on this factor to identify dischargeable property settlements\textsuperscript{108} since traditional monthly support obligations terminate upon the recipient spouse's death or remarriage, while obligations arising from divisions of marital property do not.\textsuperscript{109} Courts which have held divorce obligations to be dischargeable without discussing the needs of the parties or by disregarding such evidence have justified their holdings by pointing to the noncontingent nature of the obligation.\textsuperscript{110}

A provision in a divorce decree or settlement specifying that an obligation is to terminate upon the death or remarriage of the recipient spouse strongly suggests that the obligation was intended for support and there are almost no recent holdings that such contingent obligations are dischargeable.\textsuperscript{111} Unfortunately, courts have too often failed to recognize that the converse is not true. The fact that an obligation is to continue even if the recipient spouse dies or remarries has little bearing on the question of whether that obligation is serving a support function. As noted previously, a noncontingent obligation based upon a division of marital property may be created with the expectation that the obligation will provide for the needs of the spouses and thereby supplement or replace the traditional support obligation.\textsuperscript{112} Therefore, an obligation may be based upon the nondebtor spouse's noncon-

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108. Roberts v. Poole, 80 Bankr. 81, 84 (N.D. Tex. 1987); In re Phillips, 80 Bankr. 484, 486 (Bankr. W.D. Mo. 1987); In re Brown, 74 Bankr. 968, 972 (Bankr. D. Conn. 1987); In re Campbell, 74 Bankr. 805, 810 (Bankr. M.D. Fla. 1987).

109. 2 H. CLARK, supra note 55, § 16.1, at 179. See also Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); In re Myers, 61 Bankr. 891, 894-95 (Bankr. N.D. Ga. 1986).


111. But see In re Grijalva, 72 Bankr. 334 (S.D. W. Va. 1987), where the court held that the debtor's obligation to make monthly mortgage payments of $420 on the residence awarded to his former wife was a dischargeable property settlement despite the fact that the obligation would terminate upon the death or remarriage of the nondebtor spouse. The court relied on the fact that this obligation was not contained in the alimony and child support section of the separation agreement which provided $1,900 per month for the debtor's spouse and three children; the debtor in this case was a physician while his former wife spoke English poorly and had had no meaningful work experience since moving to the United States.

112. See supra notes 60-62 and accompanying text.
tingent right to her share of the marital estate and, at the same time, be needed to provide for her support.

Although it has been stated that a divorce obligation which is to be paid in a fixed amount over a fixed period of time is indicative of a debt which is not "support" for purposes of section 523(a)(5),113 there are a number of reasons why an obligation for support might be created for a limited period of time. The spouse might be awarded support for a specified period to enable her to complete her education,114 to obtain employment,115 to pay off a mortgage or other debts,116 or to remain in the marital home until the children are grown.117 The fact that the parties to a divorce settlement or the divorce court neglected to provide that an obligation which is already of limited duration is to terminate upon the death or remarriage of the recipient spouse should be given little weight in determining whether that obligation constitutes support so as to be nondischargeable under section 523(a)(5).

A number of courts have properly disregarded the noncontingent nature of a divorce obligation and excepted it from discharge under section 523(a)(5) by focusing on the needs and incomes of the parties.118 However, these decisions have rarely criticized the notion that a divorce obligation which does not terminate upon the death or remarriage of the recipient spouse will generally be dischargeable. In fact, some have instead cited this proposition with apparent approval.119 As long as the flawed premise remains essentially intact, the danger of future courts following it remains.

113. In re Goodman, 55 Bankr. 32, 35 (Bankr. D.S.C. 1985). See also In re Ramey, 59 Bankr. 527 (Bankr. E.D. Ark. 1987), in which the court, in holding that the debtor's obligation to a assume a debt payable in thirty-six monthly installments was dischargeable, emphasized the short term and noncontingent nature of the obligation.


118. E.g., Forsdick v. Turgeon, 812 F.2d 801 (2d Cir. 1987); In re Goin, 808 F.2d 1391 (10th Cir. 1987); In re Horton, 69 Bankr. 42 (Bankr. E.D. Mo. 1987); In re Myers, 61 Bankr. 891 (Bankr. N.D. Ga. 1986); In re Bell, 61 Bankr. 171 (Bankr. S.D. Tex. 1986).

119. E.g., In re Goin, 808 F.2d at 1393; In re Horton, 69 Bankr. at 44; In re Bell, 61 Bankr. at 175.
D. Faulty Premise #4: "Factors considered by bankruptcy courts in ascertaining the true nature of [a “hold harmless” obligation under section 523(a)(5)] include: (1) the nature of the obligation assumed (whether for necessaries or luxuries). . . ."120

The general rule is that an obligation to indemnify and hold a former spouse harmless on joint marital debts can be nondischargeable under section 523(a)(5).121 Most courts will determine the dischargeability of a debt assumption obligation by focusing on whether payment of the assumed debt is necessary for the nondebtor spouse’s support.122 Some courts, however, state that a significant factor in determining the dischargeability of a “hold harmless” obligation is whether the underlying debt was incurred in order to obtain goods or services necessary for the nondebtor spouse’s support.123 The absence of such a purpose in the underlying debt has been held by some courts to be “determinative”124 of the dischargeability of the debtor’s indemnification obligation without regard to the needs and incomes of the parties.125

The policy goals of section 523(a)(5) are not advanced by this emphasis on the nature of the assumed obligation. Even when the original debt was not incurred to provide necessities, it may still be essential for the debtor to fulfill his obligation to assume that debt in order for his former spouse’s support needs to be met. For instance, in In re Erler126 a divorce settlement required the husband to pay support of $300 per month. The husband testified

121. In re Calhoun, 715 F.2d 1103, 1107 (6th Cir. 1983); In re Coil, 680 F.2d 1170, 1171 (7th Cir. 1982); In re Spong, 661 F.2d 6, 11 (2d Cir. 1981); In re Galpin, 66 Bankr. 127, 130 n.1 (N.D. Ga. 1985); In re Young, 72 Bankr. 450, 452 (Bankr. D.R.I. 1987); In re Freyer, 71 Bankr. 912, 916 (Bankr. S.D.N.Y. 1987); In re Tosti, 62 Bankr. 131, 132-33 (Bankr. D.N.J. 1986); In re Anderson, 62 Bankr. 448, 456 (Bankr. D. Minn. 1986); see also cases cited infra note 122.
122. E.g., In re Yeates, 807 F.2d 874 (10th Cir. 1986); In re Williams, 703 F.2d 1055 (8th Cir. 1983); In re Lightner, 77 Bankr. 274 (Bankr. D. Mont. 1983); In re MacDonald, 69 Bankr. 259 (Bankr. D.N.J. 1986).
that he and his estranged wife had determined that this figure was sufficient to enable the wife to meet her living needs and those of their children. The agreement specified that this amount was predicated on, among other things, the husband's agreement to assume all debts arising during the marriage. One of the debts referred to in the "hold harmless" agreement was for 1981 taxes. The bankruptcy court held that the debtor's bankruptcy discharged his obligation to indemnify his wife for a contingent liability in an as yet unknown amount on the couple's joint 1981 tax return. In reaching this holding, the court focused "in particular" on the fact that a tax liability was not in the "nature" of "daily necessities." By discharging the debtor's assumption of the contingent tax liability, the court left the nondebtor spouse vulnerable to a potential tax judgment which could negate all or a substantial portion of the $300 monthly support payments which had been carefully calculated to provide for the nondebtor spouse's support needs.

Other courts have held that section 523(a)(5) does not except from discharge "hold harmless" obligations if the underlying joint debt assumed was for goods which were awarded to the debtor in the divorce or was for "personal" expenses incurred by the debtor and his "girl friend." Although goods which have been awarded to the debtor are likely to be subject to repossession, a deficiency debt may remain and the nondebtor spouse's ability to provide for herself will be impaired if she is required to use support payments to pay that deficiency. Furthermore, if the per-

127. Id. at 222. The Erler court also took the position that the assumption of the tax liability could not have been in the nature of support because, at the time of the divorce settlement, the amount of that liability was unknown. The court's reasoning is faulty because the parties apparently determined that the estranged wife's support needs would be met if she received $300 per month and if she would not be held responsible for any marital debts. Under these circumstances, the husband's assumption of all marital debts would be insuring that his wife's support needs would be met even if the exact amount of the assumed debt was uncertain.

129. In re Costell, 75 Bankr. at 356.
130. See In re Calhoun, 715 F.2d 1103, 1109 (6th Cir. 1983).
131. It has been suggested that hold harmless obligations should not be excepted from discharge because the nondebtor spouse has the option of seeking the discharge of the underlying debt by filing for bankruptcy herself. In re Delaine, 56 Bankr. 460, 464 (Bankr. N.D. Ala. 1985); Lee, Case Comment, 50 AM. BANKR. L.J. 175, 178 (1976). If the nondebtor spouse is left with no alternative but to file for bankruptcy, she is likely to face the loss of property (in chapter 7) or income (in chapter 13) which she had been counting on to meet her support needs. There may be circumstances in which a couple's finances
sonal expenses of the debtor and his girl friend were for goods or services not subject to repossession such as restaurant or hotel bills, the impact of the discharge of the debtor's "hold harmless" obligation will be even greater.

It is clear that hold harmless obligations can serve a support function even when the assumed debt had not been incurred to provide necessities for the nondebtor spouse. The dischargeability of any debt assumption obligation should be determined in the same manner as any other divorce obligation — by examining the obligation in relation to the needs and incomes of the parties. The results under section 523(a)(5) when a debtor had assumed joint marital debts should be no different than if the nondebtor spouse had assumed those debts with a correspondingly higher support award to cover the cost of the debt assumption.

Again, although a number of courts have applied section 523(a)(5) to except debt assumption obligations from discharge without regard to the nature of the underlying debt, they have done so without criticizing those courts which have improperly considered this factor.\footnote{E.g., In re Lightner, 77 Bankr. 274, 277 (Bankr. D. Mont. 1987). See In re MacDonald, 69 Bankr. 259, 266-67 (Bankr. D.N.J. 1986); In re Horton, 69 Bankr. 42, 44 (Bankr. E.D. Mo. 1986).}

E. Faulty Premise \#5: "Bankruptcy courts may only consider circumstances existing at the time of dissolution and 'not the present situation of the parties' [in resolving issues under section 523(a)(5)]."\footnote{In re Neely, 59 Bankr. 189, 193 (Bankr. D.S.D. 1986)(quoting Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984)). \footnote{715 F.2d 1103, 1109, 1111 n.11 (6th Cir. 1983). Although Calhoun only involved and specifically addressed the dischargeability of a debtor's obligation to assume joint marital debts, its analysis has been held to be applicable in all cases arising under \S 523(a)(5). See In re Singer, 787 F.2d 1033, 1038 n.2 (6th Cir. 1986) (concurring opinion); In re Helm, 48 Bankr. 215, 220 (Bankr. W.D. Ky. 1985); In re Wesley, 36 Bankr. 526, 529 (Bankr. S.D. Ohio 1983). Contra In re Deatherage, 55 Bankr. 268, 271 n.3 (Bankr. E.D. Tenn. 1985)(Calhoun analysis is not to be applied to obligations which are clearly in the nature of support such as standard child support payments and modifiable periodic...}
the financial situation of both the debtor and the nondebtor spouse occurring between the time of the divorce and the section 523(a)(5) trial may be taken into consideration in determining the dischargeability of divorce obligations. This approach is correct. Thus, courts in the Sixth Circuit and other courts following Calhoun will, in finding a divorce obligation to be dischargeable, take notice of changes in the nondebtor spouse's financial circumstances, such as remarriage or an increase in salary, which suggest that her support needs have decreased.\textsuperscript{135} These courts will also consider changes adversely affecting the debtor's ability to pay such as a financial setback, the debtor's poor health, or the fact that one of the children of the marriage has moved in with the debtor.\textsuperscript{136} Similarly, courts following Calhoun may justify excepting divorce obligations from discharge by considering such factors as the nondebtor spouse's current medical or financial problems, the debtor's continued or increased earning ability, and the fact that the debtor's bankruptcy will enable him to discharge substantial debts unrelated to the divorce.\textsuperscript{137}

Calhoun, however, represents the minority viewpoint.\textsuperscript{138} Most courts, to the extent that they consider need and income at all in resolving section 523(a)(5) issues, do not look beyond the financial circumstances of the parties as they existed at the time of the divorce.\textsuperscript{139} As a result, courts have applied section 523(a)(5) to except divorce obligations from discharge despite evidence suggesting a significant decrease in the nondebtor spouse's support needs or in the debtor's ability to pay.\textsuperscript{140} This Article contends

\textsuperscript{135} E.g., In re Hysock, 75 Bankr. 113, 115 (Bankr. D. Del. 1987); In re Sullivan, 62 Bankr. 465, 468-69, 474 (Bankr. N.D. Miss. 1986).

\textsuperscript{136} E.g., Hysock, 75 Bankr. at 115; Sullivan, 62 Bankr. at 468-69, 474; In re Erler, 60 Bankr. 220, 223 (Bankr. W.D. Ky. 1986).

\textsuperscript{137} E.g., In re Costell, 75 Bankr. 348, 356 (Bankr. N.D. Ohio 1987); In re Leupp, 73 Bankr. 33, 36-37 (Bankr. N.D. Ohio 1987); In re Pitzen, 73 Bankr. 10, 13 (Bankr. N.D. Ohio 1986); In re Young, 72 Bankr. 450, 453 (Bankr. D.R.I. 1987); In re MacDonald, 69 Bankr. 259, 278 (Bankr. D.N.J. 1986).

\textsuperscript{138} See Forsdick v. Turgeon, 812 F.2d 801, 803 (2d Cir. 1987); In re Bell, 61 Bankr. 171, 176 (Bankr. S.D. Tex. 1986).

\textsuperscript{139} E.g., Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984); In re Fryman, 67 Bankr. 112, 113-14 (Bankr. E.D. Wis. 1986); In re Gibson, 61 Bankr. 997, 999 (Bankr. D.N.H. 1986); and cases cited infra note 140.

\textsuperscript{140} Forsdick v. Turgeon, 812 F.2d 801, 803-04 (2d Cir. 1987)(evidence that nondebtor spouse no longer needed monthly support payments irrelevant); Draper v.
that section 523(a)(5) authorizes courts to consider the financial circumstances of the parties as they exist at the time of the section 523(a)(5) trial and that the underlying policy goals of section 523(a)(5) are better served by such a consideration.

Courts have given more detailed explanations for not considering changed circumstances than they have for their adherence to the other principles previously discussed in this Article. The primary justifications offered are that the language of section 523(a)(5) shows that Congress did not intend that there be an inquiry into the parties' changed financial circumstances,\(^{141}\) that such an inquiry would "embroil federal courts in domestic relations matters which should properly be reserved to the state courts,"\(^{142}\) and that such an inquiry is unnecessary because a modification of divorce obligations based on changed circumstances may be sought in state court under state law.\(^{143}\) These justifications will be addressed in sequence.

It has been argued that because Congress explicitly provided that debts for educational loans are to be excepted from discharge in section 523(a)(8) unless doing so "will impose an undue hardship on the debtor,"\(^{144}\) but failed to include similar language in section 523(a)(5), there was no intent that present circumstances be considered under section 523(a)(5).\(^{145}\) The omission from section 523(a)(5) of the language found in section 523(a)(8), however, may instead have been due to Congress' tacit perception that the question of whether a divorce obligation is in the nature of

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Draper, 790 F.2d 52, 54 (8th Cir. 1986)(debtor's post-divorce financial problems and his additional expenses resulting from his remarriage would not be considered in determining the dischargeability of his divorce obligations); In re Harrell, 754 F.2d 902, 906-07 (11th Cir. 1985)(evidence that nondebtor spouse no longer needed support at time of bankruptcy filing not relevant); In re Stone, 79 Bankr. 633, 639 (Bankr. D. Md. 1987)(see supra notes 16-17 and accompanying text); In re Graves, 69 Bankr. 626, 628-29 (Bankr. S.D. Fla. 1987); In re Levy, 63 Bankr. 449, 451 (Bankr. W.D. La. 1986)(debtor unemployed at time of § 523(a)(5) trial due to economic slump of maritime industry); In re Bell, 61 Bankr. 171, 176 (Bankr. S.D. Tex. 1986); In re Earl, 55 Bankr. 12, 14-15 (Bankr. W.D. Mo. 1985).

141. Forsdick v. Turgeon, 812 F.2d at 804; In re Harrell, 754 F.2d at 906; In re Stone, 79 Bankr. at 639.

142. Harrell, 754 F.2d at 907. See also Forsdick, 812 F.2d at 803-04; Stone, 79 Bankr. at 640.

143. Harrell, 754 F.2d at 907 n.8; In re Bell, 61 Bankr. 171, 176 (Bankr. S.D. Tex. 1986); In re Fryman, 67 Bankr. 112, 113-14 (Bankr. E.D. Wis. 1986); In re Earl, 55 Bankr. 12, 15 (Bankr. W.D. Mo. 1985).


145. Forsdick, 812 F.2d at 804; Stone, 79 Bankr. at 639.
support may be determined by examining the parties' circumstances at the time of the section 523(a)(5) trial, whereas no such flexibility exists under section 523(a)(8) in determining whether a debt is for an educational loan — that fact has been established long before the dischargeability hearing.

The verb tense employed in section 523(a)(5) suggests that Congress did contemplate that bankruptcy courts would consider the post-divorce circumstances of the parties. The statutory language first excepts from discharge any debt for alimony, maintenance, or support and then further provides that a liability designated as alimony, maintenance, or support is not to be excepted from discharge unless it "is actually in the nature of alimony, maintenance, or support." Had Congress intended the determination of the nature of a divorce obligation to be based solely on circumstances existing at the time the obligation was created, it likely would have stated that an obligation labelled as support is not to be excepted from discharge unless it actually was in the nature of support. Nothing in the language of section 523(a)(5) mandates that bankruptcy courts ignore evidence of the current circumstances of the parties in determining the dischargeability of divorce obligations.

The argument that consideration of changed circumstances would constitute an unwarranted intrusion by the federal courts into the domain of state courts over matters of domestic relations overlooks the fact that section 523(a)(5), if properly applied, requires such an intervention in every case even when changed circumstances are not at issue. Intrusion into the realm of domestic relations is unavoidable because the courts must balance the federal policy of providing debtors with a fresh start against the competing concern that familial support obligations be fulfilled. Bankruptcy courts must apply a federal standard to determine whether divorce obligations created pursuant to state law are in the nature of support so as to be nondischargeable. It has been


"While the intrusion of federal courts into the area of domestic relations law has been historically limited, the economic aspects of domestic relations clearly come into play in a bankruptcy case and call for the intervention of the bankruptcy court to pass upon the dischargeability of marital-related obligations." In re Singer, 18 Bankr. 782, 784 (Bankr. S.D. Ohio 1982)(citing Ridgway), aff'd 787 F.2d 1033 (6th Cir. 1986).
recognized that the resolution of a section 523(a)(5) issue necessitates an examination of many of the same factors that the state court relied upon in creating the original divorce obligation.\textsuperscript{148} However, the state court decree is not controlling, both because a separate federal standard must be applied under section 523(a)(5) and because the labels used in divorce decrees and settlements frequently do not accurately reflect whether a particular obligation actually serves a support function. In effect, section 523(a)(5) requires a \textit{de novo} review of previously created divorce obligations to determine whether they are in the nature of support.\textsuperscript{149} Such a review should take into account all evidence, including the present circumstances of the parties, which would assist the court in making a decision which would best serve the underlying policy goals of section 523(a)(5).

Some courts have justified their refusal to consider changed circumstances by noting that modification of support awards may be sought in state court.\textsuperscript{150} However, the issue of whether a divorce obligation is subject to discharge because it is not in the nature of alimony under federal bankruptcy law presents a legal question which is distinct from the issue of whether modification is appropriate under state law. The inadequacy of state law modification procedures as a substitute for a consideration of changed circumstances under section 523(a)(5) is illustrated by the fact that modification will sometimes be unavailable under state law regardless of any changes that may have occurred in the financial circumstances of the parties. For instance, in \textit{In re Stone},\textsuperscript{151} the

\textsuperscript{148} \textit{In re Yeates}, 807 F.2d 874, 878 (10th Cir. 1986); \textit{In re Calhoun}, 715 F.2d 1103, 1108-10 (6th Cir. 1983).

\textsuperscript{149} Contrary to the position taken by this Article, the Eleventh Circuit, while acknowledging that state law is not controlling on § 523(a)(5) issues, has held that § 523(a)(5) requires only a simple and imprecise examination of the parties' circumstances at the time of the divorce:

\begin{quote}
We conclude that Congress intended that bankruptcy courts make only a simple inquiry into whether or not the obligation at issue is in the \textit{nature} of support. This inquiry will usually take the form of deciding whether the obligation was in the nature of support as opposed to being in the nature of a property settlement. Thus, there will be no necessity for a precise investigation of the spouse's circumstances to determine the appropriate level of need or support. It will not be relevant that the circumstances of the parties may have changed . . . .
\end{quote}

\textit{In re Harrell}, 754 F.2d 902, 907 (11th Cir. 1985). Given the varied forms that support obligations may take, it is not clear how the question of whether an obligation is in the nature of support is to be simply determined without a precise investigation.

\textsuperscript{150} See supra note 143.

\textsuperscript{151} 79 Bankr. 633 (Bankr. D. Md. 1987) (discussed in detail supra notes 16-17 and
debtor, who had suffered a "severe financial setback" after his marital separation, was denied a reduction in state court of his obligation to pay his former wife $84,000 per year because of a nonmodification provision in the separation agreement. The bankruptcy court in *Stone* quoted with approval a recent Second Circuit holding that changed circumstances are irrelevant to the section 523(a)(5) analysis, despite the unavailability of state law relief for the debtor, "because the decision not to make modification available to the obligated spouse reflects a state-made policy decision in the area of domestic relations, an area into which we are loath to intrude." This undue deference to state law in the face of a competing federal interest sacrifices the federal policy of providing bankruptcy debtors with a fresh start.

An inquiry into changed circumstances under section 523(a)(5) is appropriate whether or not modification of the divorce obligation can be sought in state court. When a bank-

accompanying text). Other cases in which it appears that the debtor was precluded from obtaining a downward modification of some or all of his divorce obligations in state court no matter what changes had occurred in the parties' financial conditions include Draper v. Draper, 790 F.2d 52 (8th Cir. 1986) and *In re Patalano*, 68 Bankr. 30 (Bankr. D.R.I. 1986).

152. *Stone*, 79 Bankr. at 634.
153. *Id.* at 643 (quoting Forsdick v. Turgeon, 812 F.2d 801, 804 (2d Cir. 1987)).
154. This deference may be motivated in large part by a reluctance on the part of bankruptcy courts to act as a "super divorce" court, *Calhoun*, 715 F.2d 1103, 1110 n.12 (6th Cir. 1983), and thereby be forced to make the sorts of factual determinations typically involved in the establishment of an original divorce obligation. In *In re Stone*, 79 Bankr. at 643 n.2, the court expressed concern that a consideration of changed circumstances under § 523(a)(5) would require the court to exercise continuing jurisdiction to consider allegations of additional changed circumstances subsequent to the initial § 523(a)(5) trial. *See also In re Levy*, 63 Bankr. 449, 451 (Bankr. W.D. La. 1986). One response to this concern, which apparently has not proven to be a significant problem to those courts which do consider changed circumstances, would be for federal courts to abstain from hearing repeated § 523(a)(5) complaints based on changed circumstances and defer to the greater expertise of state courts in domestic affairs. *See infra* notes 169-70 and accompanying text.

155. It is well established that a pre-bankruptcy agreement to waive the fresh start benefits of a bankruptcy discharge is void against public policy. *In re Phillips*, 80 Bankr. 484, 486 (Bankr. W.D. Mo. 1987); *In re Markizer*, 66 Bankr. 1014, 1018 (Bankr. S.D. Fla. 1986). This principle has been cited by courts which have ignored provisions in divorce settlements stating that certain obligations would not be dischargeable in bankruptcy and have made independent determinations under § 523(a)(5) of whether the obligations in question were in the nature of support. *In re Phillips*, 80 Bankr. at 484; *In re Markizer*, 66 Bankr. at 1018. It can be argued that a bankruptcy court's refusal to consider changed circumstances in determining whether an obligation is actually serving a support function under § 523(a)(5), when coupled with the unavailability of modification of the obligation under state law because of a waiver of modification rights in a divorce settlement, has the practical consequence of giving effect to an indirect waiver of discharge.
Bankruptcy court discharges a divorce obligation based on evidence that the debtor no longer has the ability to pay that obligation or that the nondebtor spouse no longer needs that obligation to be fulfilled, it is merely exercising its customary authority to discharge debts in order to implement the federal "fresh start" policy. Conversely, when it considers an increase in the nondebtor spouse's needs or the debtor's ability to pay in holding a divorce obligation to be nondischargeable, it is merely leaving undisturbed an obligation which was either imposed upon or agreed to by the debtor in accordance with state law. Under either of these scenarios, the consideration of changed circumstances will facilitate the implementation of the policy goals behind section 523(a)(5).

III. A PROPOSED STANDARD

It is easier to criticize the principles currently relied upon by many courts in resolving section 523(a)(5) issues than it is to articulate a sound and precise test for resolving those issues. In attempting to set forth a clear and proper standard for determining whether a debt arising from a marital separation constitutes alimony, maintenance, or support under section 523(a)(5), one

156. In considering changed circumstances, courts should distinguish between divorce obligations which are past due and those which will be coming due in the future. A debtor should not be able to escape liability on unpaid past due obligations merely because his ability to pay or the nondebtor spouse's needs decreased after the arrearage was created. See In re Rowles, 66 Bankr. 628, 631 (Bankr. N.D. Ohio 1986). "The dischargeability of... unpaid past liabilities requires an analysis distinct from consideration of whether the continuing obligation... may be discharged." In re Calhoun, 715 F.2d at 1109 n.9. With respect to arrearages on divorce obligations, courts should focus on the financial circumstances of the parties as they existed at the time the obligation became due.

The fact that a divorce obligation is excepted from discharge under § 523(a)(5) would not preclude the debtor from subsequently seeking a downward modification of that obligation in state court based upon state law. While the bankruptcy court is empowered to either discharge or except from discharge divorce obligations, it has no authority to establish those obligations or to require their continuance. However, to the extent that a bankruptcy court discharged a divorce obligation based upon changed circumstances, it would be in contravention of the bankruptcy court's authority to discharge debts for the state court to reinstate that obligation unless there was a showing of additional changed circumstances subsequent to the § 523(a)(5) trial.

157. Perhaps no apology is needed for an inability to propose an "easy" formula for resolving § 523(a)(5) issues since state courts acknowledge that "the rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined." Rezac v. Rezac, 221 Neb. 516, 517, 378 N.W.2d 196, 197 (1985). See also Gray v. Gray, 451 So. 2d 579, 586 (La. Ct. App. 1984).
should keep in mind Congress' intent in enacting that section. That intent was to strike a proper balance between the competing policies of giving a bankruptcy debtor a fresh start and requiring that the debtor's obligations to provide for his former spouse and children be fulfilled.

The first step in attempting to create a new standard for addressing these issues is to repudiate the five principles outlined in the previous section of this Article. The underlying purposes of section 523(a)(5) are not served by a standard which draws a line between traditional alimony obligations and divisions of marital assets and debts. All of a debtor's divorce obligations, if fulfilled, contribute to the welfare of the debtor's former spouse and children even if the obligations represent a division of the marital estate. In fact, it may be necessary that the division of the marital property be carried out in order for the most basic needs of the former spouse and children to be met. Conversely, any divorce obligation which a bankruptcy debtor is required to fulfill hinders his fresh start even if the obligation is in the form of traditional support. Therefore, the federal definition of alimony, maintenance, and support for purposes of section 523(a)(5) should not be tied to state law distinctions between marital property divisions and more traditional alimony or support obligations. The form that a particular divorce obligation takes should not be determinative of its dischargeability. Additionally, in order to facilitate the policy goals of section 523(a)(5), courts should focus on the function being served by the obligation in question, rather than on the intention of the parties or the divorce court in creating it. Finally, a willingness to consider the circumstances of the parties as they exist at the time of the section 523(a)(5) trial will advance the goal of striking a proper balance between the competing policy concerns of section 523(a)(5).

After the faulty premises addressed in this Article have been cast aside, the question remains as to the appropriate definition of alimony, maintenance, and support for purposes of section 523(a)(5). There are many possible meanings which can be given those terms, but little guidance is provided by the statute.

158. See In re Calhoun, 715 F.2d 1103, 1108 (6th Cir. 1983).
159. In view of this lack of guidance, it is not surprising that courts appear to differ on the standard of living which should be encompassed in the federal definition of support. In Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984), the debtor's obligation to pay the expenses for each of his children to obtain a "post-graduate professional degree" was held
Alimony, maintenance, and support under section 523(a)(5) could be defined narrowly as including only those obligations which must be fulfilled in order to insure that the minimum food, clothing, and shelter needs of the debtor's former spouse and children are met, no matter what standard of living was enjoyed during the marriage. Such an approach, however, would be giving too little weight to the interests of the debtor's former spouse and children. The bankruptcy laws should not be a tool which enables a debtor to force his former spouse and children into a spartan standard of living when the debtor could provide a higher standard without undue hardship.

On the other hand, section 523(a)(5) could be construed as automatically excepting from discharge all divorce obligations which are needed to maintain the nondebtor spouse and children at the standard of living to which they had become accustomed during the marriage, no matter how extravagant. The "fresh start" policy of the Bankruptcy Code would be slighted, however, if a debtor is not relieved of the obligation to maintain the

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160. The word "alimony" comes from Latin "alimonia," meaning sustenance.
161. In some bankruptcy cases, virtually all the debts which the debtor seeks to discharge arose from the divorce. E.g., In re Mallisk, 64 Bankr. 39 (Bankr. N.D. Ohio 1986) (the debtor agreed to pay his former spouse approximately $50,000 over ten years, and subsequently filed a chapter 7 petition in which he listed total debts of $37,172, of which $35,576 were for the debtor's divorce obligations).
nondebtor spouse's lavish lifestyle even if he is unable to do so without extreme hardship.

These rather extreme approaches define support based solely on what is needed to provide a minimum or accustomed level of support for the nondebtor spouse and children. However, the underlying policy goals of section 523(a)(5) would be better served if support were defined as being a function of needs, income level, and the future earning potential of both the debtor and the nondebtor spouse. Therefore, it is recommended that courts determine whether a divorce obligation constitutes nondischargeable support by weighing the interest of the debtor's former spouse and children in having the obligation fulfilled against the hardship that would result for the debtor if the obligation were not discharged.162 In other words, the greater the need of the nondebtor spouse for a divorce obligation to be fulfilled, the greater the hardship should be to the debtor as a result of a ruling of nondischargeability in order for that obligation to be discharged.163

162. The Sixth Circuit, in In re Calhoun, 715 F.2d 1103 (6th Cir. 1983), has set forth a test which is similar to this proposed standard. It provides that an obligation qualifies for the exception to discharge only if the obligation has the effect of providing necessary support and if the obligation is not manifestly unreasonable in view of the debtor's ability to pay. Id. at 1109-10. "Necessary" support has apparently been interpreted by courts applying Calhoun as being at least partially a function of the debtor's income. See, e.g., In re MacDonald, 69 Bankr. 259, 277-78 (Bankr. D.N.J. 1986); In re Brock, 58 Bankr. 797, 809 (Bankr. S.D. Ohio 1986). Therefore, Calhoun represents a balancing test of the sort urged here.

However, the Calhoun test also includes an ill-advised threshold requirement for nondischargeability that there have been an intent to create a support obligation by the parties or the court issuing the divorce decree. Calhoun, 715 F.2d at 1109. Although Calhoun suggests that intent may be determined by focusing on the needs and incomes of the parties, id. at 1108-09, an approach which will generally lead to sound results, see supra notes 84-85 and accompanying text, its intent test is also subject to misapplication and should be eliminated. See supra notes 87-104 and accompanying text.

Other courts appear to apply a balancing test of the sort proposed here without articulating it in as much detail as the Calhoun court. E.g., In re Patalano, 68 Bankr. 30 (Bankr. D.R.I. 1986); In re Anderson, 62 Bankr. 448 (Bankr. D. Minn. 1986).

163. An alternative standard would be to provide for an automatic exception from discharge for all divorce obligations needed by the nondebtor spouse and children for a sustenance level of support and then to apply a balancing test to determine the dischargeability of all obligations above that minimum level. It is questionable, however, whether even a bare minimum level of support should automatically be excepted from discharge. If, for instance, the parties had incurred substantial joint debts prior to the divorce, it may unduly sacrifice the debtor's fresh start to require him to fulfill an obligation to assume those debts even if the assumption is needed to provide a minimum level of support. Under such circumstances, the "hold harmless" obligation should be discharged and the nondebtor spouse left to file her own petition under the Bankruptcy Code.

Outside of this situation, the discharge of a divorce obligation which is needed for a
However, even a divorce obligation which would be needed by the nondebtor spouse for luxuries, rather than necessities, could be excepted from discharge if the debtor could fulfill the obligation with relatively little hardship.

All divorce obligations should be subject to this balancing test, even those which are in the form of "traditional" support obligations such as modifiable periodic payments which terminate upon the death or remarriage of the recipient spouse. Although some courts indicate that such obligations should always be excepted from discharge, it is contended here that such an approach is inconsistent with Congress' "intent that considerations particular to federal bankruptcy law shall be determinative of dischargeability issues." For example, in In re Sullivan, a debtor had agreed to a traditional monthly child support obligation which exceeded his monthly income. The bankruptcy court properly indicated its willingness to discharge that portion of the obligation which was unreasonable in view of the "fresh start" policy of the bankruptcy law. Although it is less likely in a contested case that a state court would create a traditional support obligation which was unreasonably excessive, even such a court imposed obligation should be scrutinized to determine if it is in the nature of support under the federal standard.

Courts applying the standard proposed in this Article to determine nondischargeability under section 523(a)(5) would focus on the relative needs and earning powers of the parties, much as...
state courts do in establishing or modifying the original divorce obligation.\textsuperscript{168} Although the original divorce decree cannot be determinative of section 523(a)(5) issues, federal bankruptcy and district courts should consider adopting a policy of abstaining from deciding section 523(a)(5) issues and allowing them to be heard in state court.\textsuperscript{169} The advantage of an abstention policy is that the assessment of the relative needs and earning powers of the parties would be performed by state courts which have much more expertise in undertaking this sort of analysis.

The danger of abstention is that the "fresh start" policy underlying the Bankruptcy Code might be given too little weight by state courts applying section 523(a)(5).\textsuperscript{170} This concern might be alleviated if the federal courts clearly articulated what factors should be considered in resolving section 523(a)(5) issues and, perhaps more importantly, what factors should not be considered. Because the proper resolution of section 523(a)(5) issues essentially boils down to an equitable determination based upon the

\textsuperscript{168} Courts assessing these factors under § 523(a)(5) will face many of the difficult questions encountered by state courts such as the effect of a debtor's decision to remarry, to go back to school, or to make a career change which will result in a reduction of income. Similar issues will arise with respect to the nondebtor spouse's post-divorce way of life. See, e.g., 2 H. CLARK, supra note 55, § 17.6, at 279-94 (explaining the factors used by courts when alimony is modified). In deciding what, if any, portion of a divorce obligation should be discharged, the court may consider whether the debtor has been making a good faith effort to fulfill the obligation. See, e.g., In re Sullivan, 65 Bankr. 465, 473-74 (Bankr. N.D. Miss. 1986).

\textsuperscript{169} 28 U.S.C. § 1334(c)(1) (1986) authorizes federal district courts to abstain from hearing a proceeding arising under the Bankruptcy Code in the interest of justice or in the interest of comity with state courts. Although a bankruptcy court does not have independent authority to abstain, it is authorized to recommend that the district court order abstention of a proceeding which is pending in the bankruptcy court. See Bankruptcy Rule 5011(b) (1987).

Abstention under 28 U.S.C. § 1334(e)(1) is most appropriate when another court traditionally decides the same issues as those before the abstaining court. This is especially true if the issue is one which requires a particular expertise which the bankruptcy court does not have. In re Heslar, 16 Bankr. 329, 332 (Bankr. W.D. Mich. 1981). Because state courts handle divorces on a daily basis, "In no other field does abstention better serve the interests of the parties and other interested persons than in that of domestic relations law." In re Smith, 81 Bankr. 888, 893 (Bankr. W.D. Mich. 1988) (quoting Heslar, 16 Bankr. at 333). Despite this language, only one recently published decision has been found in which a federal court abstained from hearing a § 523(a)(5) issue, and in that case a state court action to determine the dischargeability of the divorce obligation was already pending when the federal court abstained. In re Taylor, 49 Bankr. 416 (Bankr. N.D. Tex. 1985).

\textsuperscript{170} This danger is compounded by the fact that the only federal appellate review of state court judgments determining § 523(a)(5) issues would be by writ of certiorari to the United States Supreme Court. See 28 U.S.C. § 1257(3)(1986).
needs and incomes of the respective parties, state courts, which frequently make similar determinations in issuing divorce decrees, may very well be the most appropriate forum for litigating section 523(a)(5) issues.

CONCLUSION

Whether an obligation arising from a marital separation constitutes alimony, maintenance, or support so as to be nondischargeable should be determined by weighing the interest of the nondebtor spouse in having the obligation fulfilled against the hardship that would result to the debtor if the obligation were not discharged. In weighing these competing interests, courts should focus on the needs and earning power of both the debtor and the nondebtor spouse. Although this standard is obviously imprecise, it is markedly superior to an approach which relies on criteria which may be more definite, but which bear little relation to the underlying purposes of section 523(a)(5).