Family Law and Bankruptcy Post BAPCPA

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Historically, there has always been a dynamic tension between state court divorce law and Federal Bankruptcy law. Congress has the exclusive right to make bankruptcy laws under the United States Constitution. The Bankruptcy Code has always affected how divorce laws are applied--particularly what is property of the estate and if family law obligations can be discharged in a bankruptcy.

The Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005 ("BAPCPA") made substantive changes in bankruptcy law which relate to family obligations. The law applies to bankruptcy cases filed on or after October 17, 2005.

The Bankruptcy Code has certain concepts regarding property which can affect a divorce case. When a debtor files bankruptcy, all of the debtor's property becomes "property of the estate", subject to the control of the debtor-in-possession or of a bankruptcy trustee. What constitutes property of the estate is generally defined in 11 U.S.C. § 541. Thus, the property of a party to a divorce becomes property of the estate upon that party's filing of a bankruptcy. It does not matter if the property is jointly owned or solely owned. In a Chapter 13 case, "property of the estate" also includes all of the debtor's post bankruptcy filing earnings. 11 U.S.C. §1307.

If a divorce or legal separation is pending when the bankruptcy petition is filed by one spouse, the state law will determine if each spouse has an equitable but contingent interest in property owned by the other, or if the non-owner spouse has no interest in the others' property until judgment. Unless state law provides for an inchoate or contingent interest, the non-debtor's interest in debtor's property is cut off by the filing of a bankruptcy petition.

Pre-Bankruptcy Division

The debtor's right to receive the other spouses' property pursuant to a property division is property of the debtor's estate. The property awarded to the debtor's former spouse pursuant to a pre-petition decree is not.

Support due to a debtor from a spouse may become property of the estate depending upon state law. In Florida, that should not normally be an issue as any support owed to a spouse would be exempt as alimony or child support. However, the right to receive property division could well become part of the bankruptcy estate.

Joint Tax Refund

Under Florida law, a joint tax refund is considered to be tenancy by the entirety property in most circumstances. *In re Kossow*, 325 B.R. 478 (Bankr. S.D. FL 2005.) Thus, if one party files bankruptcy and the other does not and there is a tax refund coming, it should be exempt as tenancy by the entirety, though there is case law in Florida that may go the other way. Compare *In re Marine*, 391 B.R. 480 (Bankr. M.D. FL 2008) (Held: A non-debtor spouse without earnings had no interest in a joint tax refund that had not been received and deposited in a tenancy by the entireties account) with *In re Freeman,* 387 B.R. 871 (Bankr. M.D. FL 2008) which says that the anticipated joint tax refund could be owned by the entireties.

Tenancy by the Entireties law is very strong in Florida and any property owned as such, either personal or real property is exempt if one of the parties goes into bankruptcy.

Property acquired within one hundred eighty days of filing under § 541, through the death of another person or by property settlement agreement with the debtor's spouse, or through interlocutory or final decree, is property of the estate. Thus, if a debtor is going to divorce and wants to retain the property that is exempt in the bankruptcy as tenancy by the entirety property, then the bankruptcy filing must be done more than 180 days after the entry of the final judgment of dissolution of marriage.

Sales of Interest in Property

A bankruptcy trustee of a debtor owning a fractional interest in an asset can only sell the entire asset under certain circumstances. For instance, when partition is impractical, sale of the fractional interest alone would realize less than the estate's interest in the proceeds and the benefit to the estate outweighs the detriment to the co-owner. 11 U.S.C. § 363(h).

This issue comes up in several circumstances. For instance, where a debtor has filed bankruptcy during the course of the dissolution of marriage proceedings, the bankruptcy trustee becomes the owner of the property instead of the debtor. Another example is where property was not divided in the property settlement agreement or by the final judgment of dissolution of marriage. If the divorce court does not have personal jurisdiction over one of the spouses to equitably divide the property, then just the dissolution of marriage may be granted and parties now own the property as tenants in common. If one