



January 1987

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Recommended Citation

Blake L. Berryman, Comment, *Bankruptcy Discharge of Texas Marital Property Awards under Section 523(a)(5) of the Bankruptcy Code: Rethinking In Re Nunnally*, 41 Sw L.J. 869 (1987)
<https://scholar.smu.edu/smulr/vol41/iss3/3>

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COMMENTS

BANKRUPTCY DISCHARGE OF TEXAS MARITAL PROPERTY AWARDS UNDER SECTION 523(a)(5) OF THE BANKRUPTCY CODE: RETHINKING *IN RE NUNNALLY*

by Blake L. Berryman

SECTION 523(a)(5) of the Bankruptcy Code¹ states that a debtor's² discharge in bankruptcy will not affect the debtor's liability on debts for alimony, maintenance, or support of a former spouse.³ In this way Congress has sought to balance the competing policies of ensuring that the debtor's family, often completely dependent upon the debtor for its support, is not left destitute by the debtor's bankruptcy, and of seeing that the debtor receives a financial fresh start on life.⁴ This Comment discusses how courts

1. 11 U.S.C.A. § 523(a)(5) (West 1979 & Pam. Supp. 1987).

2. In this Comment, "debtor" refers to a person who has filed a petition in bankruptcy. See 11 U.S.C. § 101(12) (1982).

3. Section 523(a) provides:

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 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

11 U.S.C.A. § 523(a) (West 1979 & Pam. Supp. 1987).

4. Long v. Calhoun (*In re Calhoun*), 715 F.2d 1103, 1106 (6th Cir. 1983); Brock v. Barlow (*In re Brock*), 58 Bankr. 797, 806 (Bankr. S.D. Ohio 1986); B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 3.09[5], at 3-45 (rev. ed. 1986); *Recent Developments—Section 523(a)(5): The Exception From Discharge of Alimony, Maintenance and Support Obligations*, 4 BANKR. DEV. J. 109,109 (1987). The notion of the fresh start has long provided the guiding theme of bankruptcy law. The goal is often stated as "giv[ing] to the

decide whether or not a given property award is dischargeable in bankruptcy under section 523(a)(5), and how they should decide. Primary attention falls on the decisions of the Fifth Circuit and of the bankruptcy courts within it, as they apply section 523(a)(5) to the divisions and obligations that Texas matrimonial property law allows divorce courts to order. This Comment first briefly summarizes the marital property law of Texas. Focusing on the leading Fifth Circuit case on the subject, *In re Nunnally*,⁵ the Comment examines the history and current status of the alimony exception to discharge in bankruptcy. The Comment then investigates the Sixth Circuit's innovative approach to the problem in *In re Calhoun*.⁶ Finally, the Comment concludes by urging the Fifth Circuit to replace *Nunnally* with a modified *Calhoun*-type approach that one bankruptcy court in Texas has already endorsed.⁷

I. TEXAS MARITAL PROPERTY AWARDS ON DIVORCE

Texas law divides all property that either or both spouses own into three categories: the husband's separate property, the wife's separate property, and the spouses' community property.⁸ A spouse's separate property includes any property that the spouse owned before marriage, any property acquired during marriage by gift or inheritance, and any recovery for personal injury to the spouse during marriage except recovery that represents the spouse's diminished earning power during marriage.⁹ Community property consists of all other property that either spouse acquires during marriage.¹⁰

The Texas Family Code authorizes a court in a divorce proceeding to make an equitable division of the spouses' property.¹¹ The Code does not

honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); see Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985).

The question arises, however, as to what role the bankruptcy courts are to play in the balancing of policies. See *infra* notes 197-199 and accompanying text.

5. 506 F.2d 1024 (5th Cir. 1975).

6. 715 F.2d 1103 (6th Cir. 1983).

7. See *Holland v. Holland (In re Holland)*, 48 Bankr. 874, 876-77 (Bankr. N.D. Tex. 1984).

8. TEX. CONST. art. XVI, § 15.

9. *Id.*; TEX. FAM. CODE ANN. § 5.01(a) (Vernon 1975). In addition, separate property includes property that is traceable to previously held separate property. See *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Love v. Robertson*, 7 Tex. 6, 10-11 (1851); *Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.—Dallas 1981, no writ). For a fuller discussion of the tracing principle, see J. MCKNIGHT & W. REPPY, TEXAS MATRIMONIAL PROPERTY LAW 38-47 (1983).

10. TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975).

11. *Id.* § 3.63 (Vernon Supp. 1987) provides:

(a) In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

(b) In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that

require that a court divide the property equally between the spouses.¹² In dividing the marital property between the spouses, the court is to weigh the equities of the parties, including fault in the breakup of the marriage and each spouse's probable ability to meet future needs.¹³ Without a showing of some abuse of discretion an appellate court will not disturb a divorce court's division of property.¹⁴ Texas divorce courts possess a broad range of options in allocating property between the spouses. The court need not actually divide each form of property into two parts; it can award one kind of property to one spouse and another kind to the other.¹⁵ The court can order property sold and the proceeds divided.¹⁶ It can award an indivisible type of property to one spouse and a money judgment to the other, securing payment of the judgment with a lien on the property given to one spouse.¹⁷ One important limitation on the court's power to divide marital property, however, is that only community property is subject to division; each spouse keeps his or her own separate property.¹⁸

Texas is the only state in the Union that does not allow permanent, court-ordered alimony.¹⁹ The two adjectives modifying "alimony" in the preceding sentence are important: Texas law permits a court to order temporary support payments to either spouse,²⁰ and will enforce a contractual obligation to pay alimony.²¹ The Texas Supreme Court has declared that ordering

the court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or

(2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

12. *Price v. Price*, 591 S.W.2d 601, 604 (Tex. Civ. App.—Tyler 1979, no writ); *Horlock v. Horlock*, 533 S.W.2d 52, 60 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.).

13. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981). The court noted:

[T]he trial court may consider such factors as the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property.

Id.; see also McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 433-34 (1976) (lists additional factors for consideration).

14. *Murff*, 615 S.W.2d at 698; McKnight, *supra* note 13, at 435.

15. *J. MCKNIGHT & W. REPPY*, *supra* note 9, at 272.

16. *Id.*

17. *Id.*

18. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139-40 (Tex. 1977) (holding that separate realty is not subject to division); *Cameron v. Cameron*, 641 S.W.2d 210, 219-20 (Tex. 1982) (extending *Eggemeyer* to include separate personalty).

19. *Cameron v. Cameron*, 641 S.W.2d 210, 218 n.7 (Tex. 1982); McKnight, *supra* note 13, at 422.

20. TEX. FAM. CODE ANN. § 3.59 (Vernon Supp. 1987). These payments must end, however, upon rendition of the final divorce decree. *Id.*

21. McKnight, *supra* note 13, at 422. The contractual support obligation becomes part of the divorce decree by virtue of § 3.631 of the Family Code, provided the court finds the agreement to be "just and right." TEX. FAM. CODE ANN. § 3.631(b) (Vernon Supp. 1987). The Texas Supreme Court has defined the term "alimony," for purposes of the proscription against

post-divorce alimony is contrary to the statutes and public policy of the State of Texas.²² On the other hand, a mere money judgment in favor of one former spouse is not necessarily void as an award of alimony. Such a judgment is valid if it is traceable to property that the obligor spouse holds at the end of the marriage.²³

II. THE ALIMONY EXCEPTION TO DISCHARGE IN BANKRUPTCY

A. Historically

At common law and in the bankruptcy statutes the debtor's obligation to provide financial support for a spouse and children has always escaped the effect of discharge in bankruptcy.²⁴ As one commentator has indicated, the courts have viewed family support less as a debt and more of a moral duty that should survive beyond the debtor's discharge.²⁵ The Bankruptcy Act of 1898²⁶ in its original form made no express reference to spouse and child support as excepted from discharge. In 1901, however, the United States Supreme Court held in *Audubon v. Shufeldt*²⁷ that debts for alimony were not dischargeable in bankruptcy.²⁸ Two years later, Congress amended the Bankruptcy Act to exclude alimony and child support from the effect of discharge.²⁹

it, as "an allowance for support and sustenance of the wife, periodic or in gross, which a court orders a husband to pay . . ." *Francis v. Francis*, 412 S.W.2d 29, 32 (Tex. 1967) (emphasis in original).

22. *Francis*, 412 S.W.2d at 32.

23. *Price v. Price*, 591 S.W.2d 601, 603 (Tex. Civ. App.—Tyler 1979, no writ). The court declared:

[T]he trial court may require one party to make monetary payments to the other after a divorce, so long as a division was referable to the rights and equities of the parties in and to the properties at the time of the dissolution of the marriage. In such a case, the courts have held that the division is not an allowance of permanent alimony in violation of the established public policy.

Id.; see *Francis*, 412 S.W.2d at 32-33.

24. *In re Bell*, 61 Bankr. 171, 174 (Bankr. S.D. Tex. 1986); 11 U.S.C.A. § 523(a) (West 1979 & Pam. Supp. 1987); *Ravin & Rosen, The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations*, 60 AM. BANKR. L.J. 1, 1 (1986).

25. Comment, *The Bankruptcy Reform Act of 1978: Dischargeability of Obligations Incurred Under Property Settlements, Separation Agreements, and Divorce Decrees*, 12 U. BALT. L. REV. 520, 520 (1983).

26. Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544.

27. 181 U.S. 575 (1901).

28. *Id.* at 578. The Court reasoned that alimony was not a debt in the ordinary sense of the word:

Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. . . . Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt

Id. at 577-78.

29. Act of February 5, 1903, ch. 487, 32 Stat. 797, 798. Section 17(a) of the amended act provided: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are . . . for alimony due or to become due, or for maintenance or support of wife or child . . ." *Id.*

B. Under the Bankruptcy Code

Congress completely revamped the bankruptcy laws with the Bankruptcy Reform Act of 1978.³⁰ This alteration occurred largely to accommodate changes in the commercial environment, including the widespread adoption of the Uniform Commercial Code and the explosion of consumer credit.³¹ Congress retained the alimony exception to discharge in section 523(a)(5) of the Bankruptcy Code.³² Section 523(a)(5) did differ, however, from section 17(a)(7) of the Bankruptcy Act of 1898 in several respects. First, Congress changed the word "wife" in section 17(a)(7) to "spouse" to remove lingering doubts as to the old provision's constitutionality.³³ Second, Congress added language referring to former spouses, to make it clear that section 523(a)(5) excepted from discharge obligations extending beyond dissolution of the marriage.³⁴ One bankruptcy court has identified a third difference between section 17(a)(7) of the old Bankruptcy Act and section 523(a)(5) of the Bankruptcy Code.³⁵ The court noted that under section 17(a)(7) obligations imposed in a divorce decree were nondischargeable if considerations of support played any significant role in the determination of the award.³⁶ Section 523(a)(5), by contrast, requires that the award be "actually in the nature of" alimony or support to be excepted from discharge, or essentially for the purpose of supporting the obligee former spouse.³⁷

Under the Bankruptcy Code either the debtor or the obligee former spouse can file a complaint to determine whether an obligation created upon divorce is dischargeable.³⁸ The obligee former spouse need not assert nondischargeability in the bankruptcy case. Unlike the discharge exceptions contained in paragraphs (2), (4), and (6) of section 523(a), which the creditor waives if he fails to assert them in the bankruptcy court, a former spouse can assert an exception to discharge under section 523(a)(5) at any time.³⁹ The burden of persuasion rests with the party asserting nondischargeability.⁴⁰

30. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-151326 (1982)).

31. S. REP. NO. 989, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5788.

32. See *supra* note 3. Chapter 5 of the Bankruptcy Code, of which § 523(a)(5) is a part, applies to all bankruptcy cases that parties bring under chapter 7, 11, or 13 of the Code. 11 U.S.C. § 103(a) (1982); H.R. REP. NO. 596, 9th Cong., 2d Sess. 6, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5967.

33. See *In re Crist*, 632 F.2d 1226, 1234 (5th Cir. 1980) (section 17(a) as written denies husbands equal protection of the laws), cert. denied, 451 U.S. 986 (1981).

34. *In re Bell*, 61 Bankr. 171, 174 (Bankr. S.D. Tex. 1986).

35. *Carlile v. Fox (In re Fox)*, 5 Bankr. 317, 320 (Bankr. N.D. Tex. 1980).

36. *Id.*

37. See *supra* note 3; *Fox*, 5 Bankr. at 320. The *Fox* court concluded that this change should make it more difficult for an obligee former spouse to prove the alimony exception under § 523(a)(5) than under section 17(a). *Fox*, 5 Bankr. at 320. In *In re Teter*, 14 Bankr. 434, 436 (Bankr. N.D. Tex. 1981), the court, although citing *Fox* favorably, required only that support considerations "play a part" in the creation of the obligation for a court to except it from discharge under § 523(a)(5).

38. See BANKR. R. 4007(a).

39. 11 U.S.C. § 523(c) (1982); BANKR. R. 4007(b); 3 COLLIER ON BANKRUPTCY ¶ 523.15[6] (15th ed. 1986); Ravin & Rosen, *supra* note 24, at 4.

40. *In re Benich*, 811 F.2d 943, 945 (5th Cir. 1987); *Long v. West (In re Long)*, 794 F.2d

In deciding whether a certain award of property arising from a divorce constitutes alimony, maintenance, or support within the meaning of section 523(a)(5), the courts observe two fundamental principles of law. The first is that the substance of the award, not its form, will determine dischargeability.⁴¹ The courts generally begin their analysis by trying to discern the underlying purpose of the obligation in question, and whether the parties considered the support needs of the recipient spouse in creating the debt.⁴² Consequently, the divorce court's designation of the award in the divorce decree will not control the bankruptcy court's decision regarding dischargeability.⁴³

The second general principle, related to the first, declares that federal, not state, law will decide whether a property award is alimony, maintenance, or support and, therefore, nondischargeable under section 523(a)(5).⁴⁴ Under the old Bankruptcy Act the opposite was true as state law often controlled.⁴⁵ The policy of letting state law govern issues of bankruptcy, however, led to the establishment of different standards for alimony, maintenance, and support in different states and impaired Congress's ability to provide uniform bankruptcy laws.⁴⁶ Still, most bankruptcy courts do not ignore state domestic-relations law entirely, but look to it for guidance in deciding whether the divorce court intended the award to be for the support of the recipient former spouse.⁴⁷ The bankruptcy court examines state-law criteria for award-

928, 930 (4th Cir. 1986); *In re Tosti*, 62 Bankr. 131, 133 (Bankr. D.N.J. 1986); *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317, 320 (Bankr. N.D. Tex. 1980). The burden of persuasion is the same if the obligee ex-spouse sues in state court to collect on the obligation, even though discharge in bankruptcy stands as an affirmative defense in Texas. See *Harbour v. Harbour*, 590 S.W.2d 828, 830 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), cert. denied, 449 U.S. 834 (1980); TEX. R. CIV. P. 94.

41. *Ravin & Rosen*, *supra* note 24, at 7.

42. *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317, 320 (Bankr. N.D. Tex. 1980); *Harris v. Harris*, 605 S.W.2d 684, 687 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

43. *Hack v. Laney* (*In re Laney*), 53 Bankr. 231, 235 (Bankr. N.D. Tex. 1985); *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980); *Hoffman & Murray, Obligations That Cannot Be Erased*, FAM. ADVOC., Winter 1983, at 19. Although the divorce court's characterization of the debt is not res judicata, *Fox*, 5 Bankr. at 319-20, the divorce court's determination of the existence and amount of the debt becomes binding on the parties through the doctrine of collateral estoppel. *Heiser v. Woodruff*, 327 U.S. 726, 733-34 (1946); *In re Comer*, 27 Bankr. 1018, 1021-22 (Bankr. 9th Cir. 1983), *aff'd*, 723 F.2d 737 (9th Cir. 1984). On the other hand, bankruptcy courts often consider the label attached to the award as a clue to the parties' intent. See *Long v. West* (*In re Long*), 794 F.2d 928, 931 (4th Cir. 1986); *In re Anderson*, 62 Bankr. 448, 454 (Bankr. D. Minn. 1986); Comment, *supra* note 25, at 521.

44. *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982) (per curiam); *Holland v. Holland* (*In re Holland*), 48 Bankr. 874, 876 (Bankr. N.D. Tex. 1984); 3 COLLIER ON BANKRUPTCY ¶ 523.15[1] (15th ed. 1986). The legislative history on this point is clear: "What constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law." S. REP. NO. 989, 95th Cong., 2d Sess. 79, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320.

45. See *In re Waller*, 494 F.2d 447, 448-49 (6th Cir. 1974); B. WEINTRAUB & A. RESNICK, *supra* note 4, ¶ 3.09[5]; Note, *Bankruptcy: Dischargeability of Divorce-Related Expenses Under 11 U.S.C. § 523(a)(5)*, 35 OKLA. L. REV. 799, 800, 806 (1982).

46. *In re Yeates*, 44 Bankr. 575, 578 (D. Utah 1984), *aff'd*, 807 F.2d 874 (10th Cir. 1986); see U.S. CONST. art. I, § 8, cl. 4 (Congress's power to establish uniform bankruptcy laws); *Id.* art. VI, cl. 2 (supremacy clause).

47. *In re Yeates*, 807 F.2d 874, 877-78 (10th Cir. 1986); *Long v. Calhoun* (*In re Calhoun*),

ing alimony or support. If these criteria were present at the time the divorce court rendered its decree, the bankruptcy court is more likely to find the obligation in question to be alimony, maintenance, or support, and therefore nondischargeable.⁴⁸ Reference to state law appears appropriate, since the underlying obligation is a product of state law.⁴⁹

1. *The Intent/Factor Approach*

The determining question in a proceeding based on section 523(a)(5) of the Bankruptcy Code asks whether the obligation in dispute is "actually in the nature of" alimony or support.⁵⁰ If the award is not one of support, but merely a division of property, section 523(a)(5) does not apply, and a discharge will relieve the debtor of personal liability on the debt.⁵¹ The bankruptcy courts have resorted to several methods to determine which obligations between former spouses are nondischargeable under section 523(a)(5). The majority of courts today use the intent/factor approach.⁵² Under this view, the intent of the divorce court, or of the spouses in the case of a property settlement, becomes crucial. The bankruptcy court will find the award in question nondischargeable only if it finds that the parties to the decree intended the award to serve as support for the recipient former spouse.⁵³ The courts discern the parties' intent by applying a variety of factors, many of which constitute the same factors that state courts use in awarding alimony or dividing community property.⁵⁴ Different bankruptcy courts enunciate different factors, but no one factor is dispositive.⁵⁵

One factor is the language that the divorce decree or property settlement uses. The bankruptcy court is likely to find an award that a decree or settle-

715 F.2d 1103, 1107-08 (6th Cir. 1983); *Holland v. Holland (In re Holland)*, 48 Bankr. 874, 876 (Bankr. N.D. Tex. 1984).

48. *Holland v. Holland (In re Holland)*, 48 Bankr. 874, 876 (Bankr. N.D. Tex. 1984).

49. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1108 (6th Cir. 1983); *Ravin & Rosen, supra* note 24, at 12. Furthermore, state law can provide clues to the parties' intent in concluding a particular agreement, since presumably the parties knew and intended the legal consequences of their dealings. *In re Delaine*, 56 Bankr. 460, 466 (Bankr. N.D. Ala. 1985).

50. 11 U.S.C. § 523(a)(5)(B) (1982).

51. *In re Coffman*, 52 Bankr. 667, 674 (Bankr. D. Md. 1985); *In re Bedingfield*, 42 Bankr. 641, 645 (S.D. Ga. 1983); *Harbour v. Harbour*, 590 S.W.2d 828, 830 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), *cert. denied*, 449 U.S. 834 (1980); *Ravin & Rosen, supra* note 24, at 2.

52. *Ravin & Rosen, supra* note 24, at 7-8; *Recent Developments, supra* note 4, at 121.

53. *In re Yeates*, 807 F.2d 874, 878 (10th Cir. 1986); *In re Tosti*, 62 Bankr. 131, 134 (Bankr. D.N.J. 1986); *Taylor v. Lineberry (In re Lineberry)*, 55 Bankr. 510, 515 (Bankr. W.D. Ky. 1985); *In re Helm*, 48 Bankr. 215, 221 (Bankr. W.D. Ky. 1985); *Hoffman & Murray, supra* note 43, at 19; *Ravin & Rosen, supra* note 24, at 8; *Comment, supra* note 23, at 529.

In states where the jury makes the actual property awards in a suit for divorce, the intent of the jury becomes the focus of attention under the intent/factor approach. *See Long v. West (In re Long)*, 794 F.2d 928, 931 (4th Cir. 1986). The jury in Texas divorce proceedings decides questions of facts relating to the allocation of community property (e.g., time of acquisition as deciding whether property is separate or community), but the trial judge performs the equitable division. *McKnight, supra* note 13, at 437.

54. *In re Coffman*, 52 Bankr. 667, 672 (Bankr. D. Md. 1985); *Carlile v. Fox (In re Fox)*, 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980); *see supra* note 13.

55. *Holland v. Holland (In re Holland)*, 48 Bankr. 874, 876 (Bankr. N.D. Tex. 1984); *Carlile v. Fox (In re Fox)*, 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980).

ment has labelled "alimony" to be nondischargeable under section 523(a)(5).⁵⁶ Conversely, designating an award as a property settlement militates in favor of finding the award outside the scope of section 523(a)(5).⁵⁷ The bankruptcy court may also pay heed to recitals in the divorce decree that a certain obligation is not dischargeable in bankruptcy.⁵⁸ In *In re Tosti*,⁵⁹ for example, the divorce court ordered the ex-husband to pay the ex-wife's attorney's fees. The court also ordered the ex-husband to assume the mortgage on the parties' house and to hold the ex-wife harmless thereon. The divorce decree recited that the award of attorney's fees was not dischargeable in bankruptcy; the decree was silent as to the dischargeability of the mortgage assumption. Reading the decree in its entirety, the bankruptcy court found an intent on the part of the divorce court that the mortgage assumption could be dischargeable.⁶⁰ Based on this finding of an intent to discharge, the bankruptcy court held that the mortgage assumption was not in the nature of alimony, maintenance, or support.⁶¹

Another factor that the courts apply is the debtor ex-spouse's treatment of the award on income tax returns. Section 215 of the Internal Revenue Code⁶² allows a taxpayer to deduct the amount of "alimony or separate maintenance payments" that the taxpayer has paid during the taxable year.⁶³ If a debtor in bankruptcy has deducted payments made pursuant to an obligation arising from divorce, the bankruptcy court may hold the balance of the obligation nondischargeable.⁶⁴ Section 71(a) of the Internal Revenue Code indicates that the obligee ex-spouse's gross income includes alimony received.⁶⁵ Logically, such treatment by the recipient under an obligation ought to weigh in favor of nondischargeability as well. No cases, however, have addressed the effect of the obligee ex-spouse's tax treatment of the award.

56. See *Long v. West (In re Long)*, 794 F.2d 928, 931 (4th Cir. 1986); *In re Anderson*, 62 Bankr. 448, 454 (Bankr. D. Minn. 1986).

57. *In re Sullivan*, 62 Bankr. 465, 471 (Bankr. N.D. Miss. 1986). In *Sullivan* the ex-wife expressly waived any right to alimony. The obligation described as a property settlement and found to be such arose when the ex-husband agreed to pay the ex-wife \$16,000 per year for five years for the construction of a house for the ex-wife and their children. *Id.*

58. One commentator strongly suggests that any settlement agreement or court order clearly state whether the parties intend § 523(a)(5) to prevent discharge of each particular obligation. Murphy, *The Dischargeability in Bankruptcy of Debts for Alimony and Property Settlements Arising From Divorce*, 14 PEPPERDINE L. REV. 69, 79 (1986).

59. 62 Bankr. 131 (Bankr. D.N.J. 1986).

60. *Id.* at 134.

61. *Id.*

62. I.R.C. § 215 (1986).

63. *Id.* § 215(a). The Internal Revenue Code defines "alimony or separate maintenance payment" as cash payments that (1) a spouse receives under a divorce or separation instrument (including a written separation agreement); (2) the creating instrument for which does not indicate the exclusion of such payments from the recipient spouse's gross income and the obligor spouse's deduction of such payments under § 215 of the Internal Revenue Code; (3) are not to occur while the obligor spouse and the obligee spouse are living together; and (4) are to terminate upon the death of the obligee spouse. *Id.* § 71(b)(1), (2)(B).

64. See *In re Bell*, 61 Bankr. 171, 175 (Bankr. S.D. Tex. 1986); *Harris v. Harris*, 605 S.W.2d 684, 687 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

65. I.R.C. § 71(a) (1986).

Bankruptcy courts often look to the relative earning powers of the spouses at the time the divorce court rendered its decree to decide whether the court or the spouses intended that an award provide support for the obligee former spouse.⁶⁶ The more the earning capacity of the obligor exceeds that of the obligee, the courts reason, the more likely it is that the divorce court created the awards in question for the purpose of meeting the support needs of the obligee ex-spouse.⁶⁷ This finding, in turn, tends to make the obligation non-dischargeable under section 523(a)(5).⁶⁸

Two additional factors involve an examination of the form of the award. First, courts often check whether the ex-spouse will pay the obligation in dispute in periodic installments or in one lump sum. An award contemplating periodic payments, all other factors being equal, probably will be considered "in the nature of" alimony or support,⁶⁹ conversely, a court is likely to determine that lump-sum arrangements create property divisions and thus, become dischargeable in bankruptcy.⁷⁰ Second, the bankruptcy courts consider whether the obligation terminates on the death or remarriage of the obligee former spouse.⁷¹ Termination on either event indicates an intent to provide support for the recipient until someone else is bound to support him or her or until he or she no longer needs support. The courts, therefore, are more likely to find that the obligation is not dischargeable under section 523(a)(5).⁷² The opposite inference arises when the obligation is to continue in full force regardless of the obligee ex-spouse's death or remarriage.⁷³

66. See *In re Bell*, 61 Bankr. 171, 175 (Bankr. S.D. Tex. 1986) (ex-husband was attorney, and ex-wife possessed no marketable skills); *In re Coffman*, 52 Bankr. 667, 674 (Bankr. D. Md. 1985) (listing respective earning power as factor in § 523(a)(5) determination); *In re Wesley*, 36 Bankr. 526, 529-30 (Bankr. S.D. Ohio 1983) (ex-husband's and ex-wife's earning capacities roughly equal; obligation held discharged); *Hoffman & Murray*, *supra* note 43, at 23 (noting court use of disparate earning capacity in § 523(a)(5) cases).

67. *In re Bell*, 61 Bankr. 171, 175 (Bankr. S.D. Tex. 1986); *In re Wesley*, 36 Bankr. 526, 530 (Bankr. S.D. Ohio 1983); *Hoffman & Murray*, *supra* note 43, at 23.

68. *In re Bell*, 61 Bankr. 171, 175 (Bankr. S.D. Tex. 1986); *In re Coffman*, 52 Bankr. 667, 672 (Bankr. D. Md. 1985); *In re Wesley*, 36 Bankr. 526, 530 (Bankr. S.D. Ohio 1983).

69. See, e.g., *In re Coffman*, 52 Bankr. 667, 672 (Bankr. D. Md. 1985); *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980); *Harris v. Harris*, 605 S.W.2d 684, 687 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

70. *In re Wesley*, 36 Bankr. 526, 530 (Bankr. S.D. Ohio 1983). *But see Long v. West* (*In re Long*), 794 F.2d 928, 931 (4th Cir. 1986) (lump-sum payment, but held nondischargeable).

71. *In re Anderson*, 62 Bankr. 448, 454 (Bankr. D. Minn. 1986); *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980); *Hoffman & Murray*, *supra* note 43, at 20.

72. *In re Anderson*, 62 Bankr. 448, 454-55 (Bankr. D. Minn. 1986); *In re Tosti*, 62 Bankr. 131, 143 (Bankr. D.N.J. 1986); *In re Coffman*, 52 Bankr. 667, 672 (Bankr. D. Md. 1985); *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980); *Hoffman & Murray*, *supra* note 43, at 20.

73. See *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982) (per curiam); *In re Wesley*, 36 Bankr. 526, 530 (Bankr. S.D. Ohio 1983).

At least one bankruptcy court has referred to the obligor spouse's bad faith as a factor in deciding dischargeability under section 523(a)(5). *Holland v. Holland* (*In re Holland*), 48 Bankr. 874, 877 (Bankr. N.D. Tex. 1984). In *Holland* the husband, in contemplation of divorce, agreed to assume and hold the wife harmless on a mortgage on which the spouses were jointly liable. One month after executing the agreement the husband filed a petition in bankruptcy. The bankruptcy court, in ruling on the dischargeability of the hold-harmless agreement, implied that agreeing to assume joint debts with the present intention of discharging them in bankruptcy weighs against their dischargeability under § 523(a)(5). *Id.* at 877. Other

In summary, under the intent/factor approach to the question of dischargeability under section 523(a)(5), the bankruptcy court will try to divine the intent of the appropriate party or parties⁷⁴ at the time the divorce court rendered its decree. If the original purpose behind the award in dispute was to establish a means of supporting the obligee ex-spouse, rather than as a simple allocation of joint property and liabilities, then the obligation survives the debtor's discharge. The factors discussed above merely represent examples of those that bankruptcy courts use in determining the parties' intent. Different courts apply different factors and weigh them in different ways.⁷⁵

2. *Approaches in the Fifth Circuit: Nunnally and Beyond*

The law in the Fifth Circuit on the alimony exception to discharge begins with *In re Nunnally*,⁷⁶ decided in 1975 under section 17(a)(7) of the old Bankruptcy Act.⁷⁷ In *Nunnally* the Texas divorce court awarded the wife \$41,779.41 as reimbursement for separate funds that the spouses used during the marriage to benefit their community estate.⁷⁸ The court also ordered the husband to pay the wife's attorney's fees of \$5,000. The former husband later filed for bankruptcy, without having paid the reimbursement or the attorney's fees. The question before the Fifth Circuit court was whether either or both of the awards in the divorce decree were excepted from discharge in bankruptcy. The court held that both were.⁷⁹

The court first analyzed the award for reimbursement. It pointed out that divorce courts in Texas, in dividing community property between spouses, may consider the parties' relative earning capacities, their future support needs, and the benefits that the innocent spouse would gain if the marriage were to continue.⁸⁰ From this observation the court expounded on the relationship between Texas family law and federal bankruptcy law in language

courts have dealt with the problem of the bad-faith assumption under § 523(a)(2)(A) of the Bankruptcy Code, which states that a court will not discharge a debt for money, services, or credit if the debt is a result of "false pretenses, a false representation, or actual fraud . . ." 11 U.S.C. § 523(a)(2)(A) (1982); see *In re Brasher*, 20 Bankr. 408, 409-10 (Bankr. W.D. Tenn. 1982); *In re Arterburn*, 15 Bankr. 189, 191-92 (Bankr. W.D. Okla. 1981).

74. The spouses, if the obligation in question originated in their agreement; the divorce court, if the court imposed the obligation on the obligor spouse.

75. In *In re Coffman*, 52 Bankr. 667 (Bankr. D. Md. 1985), the court enumerated eighteen criteria that the various courts have considered in separating nondischargeable support obligations from dischargeable property divisions. *Id.* at 674-75.

76. 506 F.2d 1024 (5th Cir. 1975).

77. See *supra* note 29.

78. Texas marital property law permits reimbursement for monies belonging to one marital estate (the husband's separate estate, the wife's separate estate, or the couple's community estate) that a party or parties use to profit another marital estate. See *Trevino v. Trevino*, 555 S.W.2d 792, 798 (Tex. Civ. App.—Corpus Christi 1977, no writ) (reimbursed community estate for payments on separate debts); *Horlock v. Horlock*, 533 S.W.2d 52, 56-58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.) (reimbursed husband's separate estate for monies invested for benefit of community estate). See generally J. MCKNIGHT & W. REPPY, *supra* note 9, at 173-79 (discussing the doctrine of reimbursement and related issues). A right of reimbursement arises only upon dissolution of the marriage. *Burton v. Bell*, 380 S.W.2d 561, 565 (Tex. 1964).

79. *Nunnally*, 506 F.2d at 1027.

80. *Id.* at 1026.

that, considering the court's result, suggests that virtually all property awards from Texas divorce courts are not dischargeable.⁸¹

The ex-husband's counsel presented the *Nunnally* court with a dilemma that the court addressed in the sixth footnote of the opinion.⁸² As mentioned previously, Texas law does not approve of permanent, court-ordered alimony.⁸³ The ex-husband argued, in essence, that the reimbursement award in reality constituted either alimony, therefore void under Texas law, or a property division, therefore dischargeable in bankruptcy. Either way, the ex-husband would owe nothing.⁸⁴ The court noted that under Texas law an award that looks like alimony remains valid if the court can trace it to property that either spouse owns.⁸⁵ The divorce court had left the ex-husband with fifty-two percent of his Navy pension rights, out of which, the court presumed, he could pay the reimbursement award.⁸⁶ The Fifth Circuit observed that reimbursement is not alimony; reimbursement merely restores property advanced from one marital estate to another.⁸⁷ The court emphasized the nonalimony qualities of the reimbursement award: a fixed amount payable in one lump sum.⁸⁸ The award for reimbursement, therefore, was not void as court-ordered alimony.⁸⁹

The *Nunnally* court followed similar reasoning with regard to the award of attorney's fees. The court noted that divorce courts in Texas can award attorney's fees in divorce proceedings based on the same factors used to divide community property, including the respective abilities of the spouses to support themselves.⁹⁰ In *Nunnally* the award of attorney's fees appeared inseparable from the rest of the divorce decree; therefore, as with the award of reimbursement, the ex-husband's discharge in bankruptcy did not affect the award of counsel fees.⁹¹

The next Fifth Circuit case to address the subject of divorce-award excep-

81. *Id.* at 1027. The court stated:

Thus, it is clear support in the future can play a significant role in the divorce court's property division and that what may appear to be a mere division of assets may in fact, under a Texas decree, contain a substantial element of alimony-substitute, support or maintenance, however termed. The Texas Supreme Court has recognized that: "Support payments ordered to be made after divorce from the income of the husband's property, although considered alimony in many jurisdictions, is not considered alimony in this State." *Francis v. Francis*, 412 S.W.2d 29, 32-33 (Tex. 1967). So recognizing, we should not be bound by the label which the state places on a decree; we must look to its substance. Here the award of \$41,779.41 falls within the exception from discharge in Section 17.

Id.

82. *Id.* at 1027 n.6.

83. *See supra* notes 19-23 and accompanying text.

84. *Nunnally*, 506 F.2d at 1027 n.6.

85. *Id.*; *see Francis v. Francis*, 412 S.W.2d 29, 32-33 (Tex. 1967); *McBean v. McBean*, 371 S.W.2d 930, 932 (Tex. Civ. App.—Waco 1963, no writ).

86. *Nunnally*, 506 F.2d at 1027 n.6.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1027.

91. *Id.*

tions to discharge was *Erspar v. Badgett*.⁹² *Erspar* made it clear that *Nunnally* still controlled within the circuit.⁹³ The *Erspar* court used the same broad method of analysis as did the court in *Nunnally*. In *Erspar* the divorce court had ordered the ex-husband to pay the ex-wife one-half of all Army pension payments that he would receive in the future. The *Erspar* court took the opportunity to restate the exposition of law in *Nunnally*⁹⁴ and, without further discussion, likened the pension award to the awards in *Nunnally*. The court concluded that the ex-husband's obligation to pay was not dischargeable in bankruptcy.⁹⁵

In two recent cases the Fifth Circuit has shown a disinclination to follow the *Nunnally* analysis regarding the alimony exception to discharge in bankruptcy. The panel that decided *In re Chandler*⁹⁶ appears to have come up with a new way of determining whether divorce-related obligations are dischargeable in bankruptcy, a mode of analysis entirely independent of section 523(a)(5). In that case a Texas divorce court awarded the wife \$450 per month out of the husband's Army pension benefits "as [her] sole and separate property."⁹⁷ In deciding whether the ex-husband's subsequent bankruptcy relieved him of liability on the obligation, the Fifth Circuit held that the right to receive \$450 per month became the ex-wife's property as of the date of divorce, and as such did not constitute a debt that was dischargeable.⁹⁸ The court found it unnecessary to discuss section 523(a)(5) because the ex-wife did not seek to have pre-petition arrearages in the obligation

92. 647 F.2d 550 (5th Cir. Unit A June 1981), *cert. denied*, 455 U.S. 945 (1982).

93. 647 F.2d at 555.

94. *Id.* The court stated:

The essence of this Court's decision in *Nunnally* is that, regardless of how a state may choose to define "alimony," a federal court, for purposes of applying the federal bankruptcy laws, is not bound to the label that a state affixes to an award, and that, consistent with the objectives of federal bankruptcy policy, the substance of the award must govern.

Id.

95. *Id.*

96. 805 F.2d 555 (5th Cir. 1986).

97. *Id.* at 556.

98. *Id.* at 557. The divorce court had designated the ex-husband as trustee to receive the ex-wife's interest in the pension and turn it over to her. The Fifth Circuit's point may be that the monthly payments that the ex-wife was entitled to were not property of the bankruptcy estate, since the ex-husband held no cognizable interest in her share at the commencement of the bankruptcy case. See 11 U.S.C. § 541(a), (b)(1) (1982 & Supp. III 1985). The bankruptcy court in *In re Manners*, 62 Bankr. 656 (Bankr. D. Mont. 1986), seems to have used a similar approach, although the *Manners* court emphasized that the Coast Guard, not the ex-husband, had the duty to pay the ex-wife her share of the ex-husband's military pension following the divorce. *Id.* at 658; see 10 U.S.C. § 1408(c) (1982) (permitting state divorce courts to divide military pension rights between spouses); 32 C.F.R. § 63 (1986) (establishing procedure whereby recipient ex-spouse can receive his portion of military retirement benefits directly from United States). The *Manners* court found the obligation not to be a debt within the meaning of 11 U.S.C. § 101(11) (1982). *Manners*, 62 Bankr. at 658.

Alternatively, the Fifth Circuit in *Chandler* may have meant that the ex-wife's interest in the army pension no longer constituted a "personal liability of the debtor," so that a discharge in bankruptcy could not affect the ex-husband's duty to remit the \$450 each month. See 11 U.S.C. § 524(a)(1), (2) (1982 & Supp. III 1985). At any rate, the court could have employed clearer reasoning and more citations to the Bankruptcy Code.

declared nondischargeable.⁹⁹

In *In re Benich*,¹⁰⁰ decided three months after *Chandler*, the Fifth Circuit had to decide whether an ex-husband's agreement to make monthly payments to his ex-wife would survive the ex-husband's discharge in bankruptcy. The ex-husband's promise came in exchange for the ex-wife's waiving her community interest in the ex-husband's military pension. The court cited *In re Nunnally* three times,¹⁰¹ but expressed approval of a far more fact-based application of the alimony exception to discharge than the *Nunnally* opinion contained.¹⁰² The *Benich* panel discussed various characteristics of a support-type award and apparently embraced the intent/factor approach already discussed.¹⁰³ The court twice referred to the need to discern "the true nature of the debt" in determining dischargeability of divorce-related awards.¹⁰⁴ The circuit court affirmed the bankruptcy court's conclusion that the ex-husband's payments were for support and therefore nondischargeable under section 523(a)(5).¹⁰⁵

The bankruptcy courts within the Fifth Circuit, on the other hand, have long been willing to examine more closely the circumstances surrounding Texas divorce awards in deciding dischargeability under section 523(a)(5). In *In re Fox*¹⁰⁶ the divorce court had ordered the ex-husband to pay to his former wife \$250 per month, representing one-half of the ex-husband's military pension.¹⁰⁷ The divorce court also ordered the ex-husband to make child support payments of an unspecified amount. The ex-husband thereafter filed a petition in bankruptcy, whereupon the ex-wife objected to the discharge of the pension award. In response to *In re Nunnally*,¹⁰⁸ the bankruptcy court declined to follow the Fifth Circuit's decision for three reasons.¹⁰⁹ First, the Fifth Circuit court decided *Nunnally* under section 17(a)(7) of the old Bankruptcy Act, not under section 523(a)(5) of the Bank-

99. *Chandler*, 805 F.2d at 557.

100. 811 F.2d 943 (5th Cir. 1987).

101. *Id.* at 945 & nn.8, 9.

102. *Id.* at 945.

103. *Id.*

104. *Id.*

105. *Id.* In an interesting dictum the court seemed to dovetail *Benich* with the court's decision in *In re Chandler*, 805 F.2d 555 (5th Cir. 1986). According to the court, if the argument had been over the dischargeability of the ex-wife's interest in the pension benefits, rather than the agreed-upon payments in lieu thereof, *Benich* would have become a different case. *Benich*, 811 F.2d at 945. In that instance the court would not have discharged the ex-wife's rights because her share in the pension would not be property of the bankruptcy estate. *Id.* For a comparison of this idea with the court's expression in *Chandler*, see *supra* note 98.

106. 5 Bankr. 317 (Bankr. N.D. Tex. 1980).

107. *Id.* at 318. The couple's agreement, incorporated into the divorce decree, structured the award in question in this way:

One half (1/2) of JAMES R. FOX'S United States Air Force retirement to be paid in monthly installments of Two Hundred Fifty Dollars (\$250.00) beginning July 6, 1977, said award to be a debt against JAMES R. FOX in a negotiated amount of Seventy Thousand Dollars (\$70,000.00) based on his life expectancy and other factors, evidenced by a note of even date in favor of BETTY L. FOX.

Id. (emphasis by the court).

108. 506 F.2d 1024 (5th Cir. 1975). For a discussion of *Nunnally*, see *supra* notes 76-91 and accompanying text.

109. *Fox*, 5 Bankr. at 320.

ruptcy Code.¹¹⁰ The *Fox* court argued that the Bankruptcy Act made it easier on the obligee ex-spouse to prove the alimony exception to discharge.¹¹¹ According to the *Fox* court the old Bankruptcy Act only required that considerations of support play some part in the creation of the obligation while the Bankruptcy Code requires that the award in question be “actually in the nature of” alimony or support; that is, that the award be *mainly* for the purpose of providing essential support for the obligee ex-spouse.¹¹² Therefore, in the bankruptcy court’s view, the enactment of the Bankruptcy Code overruled *Nunnally* to some extent.¹¹³ Second, the *Fox* court stated its belief that the decision in *Nunnally* was insufficiently tied to its facts.¹¹⁴ The *Fox* court observed that *Nunnally* seemed to rest on the proposition that Texas divorce courts make all property awards based on the respective support needs of the spouses.¹¹⁵ Under the *Nunnally* court’s reasoning, therefore, the bankruptcy courts should except all Texas divorce awards from discharge in bankruptcy, irrespective of the circumstances giving rise to the obligation.¹¹⁶ The *Fox* court asserted that Congress could not have intended such a result.¹¹⁷ Third, the court in *Fox* took issue with *Nunnally*’s all-or-nothing approach.¹¹⁸ The *Fox* court saw no reason to believe that an obligation arising in divorce could not be partly dischargeable.¹¹⁹ The *Fox* court stated that a bankruptcy court should find nondischargeable only that portion of the award representing support or maintenance for the obligee ex-spouse; any amount beyond that should be dischargeable.¹²⁰

The *Fox* court decided that a more searching analysis of the facts was appropriate.¹²¹ The court presented a list of factors for determining whether the pension award was “actually in the nature of” support for Mrs. Fox, and therefore excepted from discharge under section 523(a)(5).¹²² These criteria included: (1) the spouses’ relative earning capacities; (2) their comparative business opportunities; (3) their respective levels of education; (4) their health; (5) their probable requirements for support in the future; (6) responsibility in ending the marriage; and (7) the benefits accruing to the innocent spouse if the marriage had not ended.¹²³ Applying the factors to the facts, the court viewed as critical the former spouses’ disparate future earning capacity: Mr. Fox had worked steadily during the marriage, while Mrs. Fox

110. *Id.*

111. *Id.*

112. *Id.* For a comparison of § 523(a)(5) at the Bankruptcy Code and § 17(a) of the old Bankruptcy Act, see *supra* notes 35-37 and accompanying text.

113. *Fox*, 5 Bankr. at 320.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 320-21.

122. *Id.*

123. *Id.*

had kept house and had little outside job experience.¹²⁴ The court noted also that the retirement payments were to begin at the time the child support payments ended. The court took this as evidence that the support of Mrs. Fox was a factor in the creation of the pension payment obligation.¹²⁵ The court, therefore, held the pension payments to be in the nature of support and nondischargeable under section 523(a)(5).¹²⁶

In *In re Teter*¹²⁷ the bankruptcy court had to determine the dischargeability of the husband's agreement in the couple's property settlement that caused a corporation, of which he was majority stockholder, to pay his wife \$125 per week.¹²⁸ The court indicated that the *Nunnally* opinion had created confusion.¹²⁹ While examining the particulars of the case the *Teter* court listed facts pointing toward the support nature of the weekly payments: that the ex-wife did not in fact have to work for the corporation in order to get the money; that all five children of the marriage resided with the ex-wife; that the former spouses were of unequal earning power; and, that extrinsic evidence showed that the husband's main intention in agreeing to the payments was to provide necessities for his wife.¹³⁰ The bankruptcy court concluded on the basis of the evidence that the wife's salary constituted payment of support and declared the obligation nondischargeable.¹³¹

In *In re Bell*,¹³² decided in 1986, the spouses executed a property settlement that the divorce court incorporated into the divorce decree. In the settlement the husband agreed to pay his wife an undisclosed amount in 121 monthly installments. The husband filed for bankruptcy, and the wife sought to exclude the payment obligation from discharge under section 523(a)(5). As the *Fox* court had done, the *Bell* court listed several considerations for determining whether the obligation in question was really one of

124. *Id.*

125. *Id.*

126. *Id.* The court expressly disregarded the fact that the parties structured the obligation as a debt. *Id.* For the structure of the award, see *supra* note 107. The substance of the award, not its form, controls the analysis under § 523(a)(5). *Ravin & Rosen, supra* note 24, at 7. In *Fox* Judge Robert A. Wright of the 225th Judicial District Court testified as an expert witness on the reason behind the parties' use of the word "debt" in their agreement. At the time the spouses executed the instrument, it was unclear whether, under Texas law, a court could divide upon divorce the right to receive a military pension before the right had matured. Divorcing spouses often placed pension divisions in the form of promissory notes to ensure their enforceability. *Fox*, 5 Bankr. at 321. The Texas Supreme Court removed the uncertainty in *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976), when it held that such contingent rights are divisible. *Id.* at 666; see also *McKnight, supra* note 13, at 426-29 (discussion of *Cearley*).

127. 14 Bankr. 434 (Bankr. N.D. Tex. 1981).

128. The settlement stated:

Husband agrees to cause Direct Fashions, Inc., (or at his election, some other entity) to continue employment of Wife, but as a consultant, for a salary of \$125.00 per week with hospitalization and Social Security benefits. Wife . . . agrees to work at such times and places (consistent with her position and age as well as good taste) as her employer reasonably directs.

Id. at 435.

129. *Id.* at 436.

130. *Id.* The husband stated in his deposition that he agreed to have his corporation make these payments in order to "help support her." *Id.*

131. *Id.*

132. 61 Bankr. 171 (Bankr. S.D. Tex. 1986).

support.¹³³ The court noted that the ex-husband's earning capacity, as an attorney, far exceeded that of the ex-wife, who had simply maintained the family home during the marriage.¹³⁴ The fact that the obligation was payable in periodic installments, and that the agreement resulted from extended arm's-length bargaining weighed in favor of nondischargeability under section 523(a)(5).¹³⁵ In addition, the ex-husband had included the amount paid as an alimony deduction on his income tax.¹³⁶ The court held on the basis of these considerations that the monthly payments constituted support of the ex-wife, rather than a property division, and therefore were nondischargeable under the Bankruptcy Code.¹³⁷

The bankruptcy courts in Texas, therefore, have employed a more pragmatic, fact-based analysis in addressing the issue of dischargeability under section 523(a)(5) than did the Fifth Circuit court in *Nunnally*. The courts in *Fox*, *Teter*, and *Bell* in essence applied the intent/factor approach. The remainder of this Comment describes and critically assesses a third way of dealing with section 523(a)(5).

3. In re Calhoun

In 1983 the Sixth Circuit set out an entirely new method for determining the dischargeability of marital property awards under the Bankruptcy Code. In *In re Calhoun*¹³⁸ the husband agreed in contemplation of divorce to assume five debts on which both spouses were personally liable, and to hold the wife harmless on each.¹³⁹ After the divorce the husband declared bankruptcy. The wife filed a complaint challenging the discharge of the husband's hold-harmless obligations. Judge Cornelia Kennedy, writing for the circuit court, criticized exclusive reliance on the parties' intent as determina-

133. *Id.* at 174-75. Factors of particular importance to the court in *Bell* were:

[T]he description and context of the disputed provisions in the divorce agreement; whether a lump sum or terminable periodic payments were provided for; . . . the relative earning power of the spouses, the adequacy of support absent the payments in questions; the parties' negotiations and understanding of the provisions, and the function which the award was intended to accomplish.

Id. at 175. For a discussion of the factors important in *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317 (Bankr. N.D. Tex. 1980), see *supra* text accompanying note 123.

134. *Bell*, 61 Bankr. at 174-75.

135. *Id.*

136. *Id.* For a discussion of the importance of how parties treat payment on their tax returns, see *supra* notes 62-65 and accompanying text.

137. *Bell*, 61 Bankr. at 175-76.

138. 715 F.2d 1103 (6th Cir. 1983).

139. Initially it was unclear whether the *Calhoun* rule would apply to obligations other than assumptions of joint debts. See B. WEINTRAUB & A. RESNICK, *supra* note 4, ¶ 3.09[5]. Before long, however, the courts applying *Calhoun* extended its holding to cover all cases under § 523(a)(5): "[T]o perceive it [*Calhoun*] only as a narrow assumption-of-debt case is to view the world through the wrong end of a telescope." *In re Helm*, 48 Bankr. 215, 220 (Bankr. W.D. Ky. 1985); see *In re Singer*, 787 F.2d 1033, 1038 n.2 (6th Cir. 1986) (Guy, J., concurring); *Taylor v. Lineberry* (*In re Lineberry*), 55 Bankr. 510, 515 (Bankr. W.D. Ky. 1985); *Deatherage v. Wallace* (*In re Deatherage*), 55 Bankr. 268, 271 (Bankr. S.D. Ohio 1983). Courts have yet to decide whether the *Calhoun* analysis will apply in cases filed under chapters 11, 12, or 13 of the Bankruptcy Code.

tive of whether the award is dischargeable.¹⁴⁰ In addition to the difficulties inherent in discerning intent,¹⁴¹ the *Calhoun* court found that section 523(a)(5) by its language does not turn on what the parties intended.¹⁴² The court pinpointed the fundamental problem of deciding which awards constitute support and which do not: all obligations created on divorce to some extent support the obligee ex-spouse, but not all should survive discharge under section 523(a)(5).¹⁴³

The heart of *Calhoun* is its three-part test for determining whether a given marital property obligation is dischargeable in bankruptcy.¹⁴⁴ First, the state divorce court, or the spouses, if the obligation in question arose by agreement, must have intended to create the obligation as a means of supporting the obligee ex-spouse.¹⁴⁵ In resolving the question of intent the bankruptcy court may refer to the form and content of the divorce decree, factors indicating the propriety of ordering support payments, as well as extrinsic evidence of the parties' negotiating stances and understanding of the provision in question.¹⁴⁶

Second, the obligation must in fact have the intended effect of meeting the obligee ex-spouse's and any children's day-to-day needs.¹⁴⁷ Here the bankruptcy court must consider the obligee's support needs as compared with his ability to discharge those needs through independent support funds and the obligee's own assets.¹⁴⁸ The court should also consider the likely effect on

140. *Calhoun*, 715 F.2d at 1109.

141. See *In re Helm*, 48 Bankr. 215, 221 (Bankr. W.D. Ky. 1985) (court must determine the intent of each party under circumstances in which neither party is concerned with the legal characterization of the obligations).

142. *Calhoun*, 715 F.2d at 1109-10. Only those awards "actually in the nature of alimony, maintenance, or support" survive discharge in bankruptcy. 11 U.S.C. § 523(a)(5)(B) (1982).

143. *Calhoun*, 715 F.2d at 1108. The court stated:

The initial difficulty is that every assumption of a joint loan obligation in a divorce settlement at least indirectly contributes to support. The former spouse is relieved of payments on that debt and thus has funds for other purposes including necessary support. Support in this broad sense results even if the assumption of joint marital debts is actually a division of property. It is clear from the statute and legislative history that Congress could not have intended that all assumptions of joint debts would be nondischargeable.

Id.; see also *Tilton v. Richardson*, 403 U.S. 672, 693 (1971) (Douglas, J., dissenting) ("[m]oney not spent for one purpose becomes available for other purposes").

144. *Calhoun*, 715 F.2d at 1109-10. Some courts describe the *Calhoun* rule as a four-part test, dividing the query into reasonableness and the setting of a reasonable dischargeable amount of the award into two separate steps. See *In re Delaine*, 56 Bankr. 460, 466 (Bankr. N.D. Ala. 1985); *In re Helm*, 48 Bankr. 215, 221 n.17 (Bankr. W.D. Ky. 1985). Under either analysis the result is the same. Freeburger & Bowels, *What Divorce Court Giveth, Bankruptcy Court Taketh Away: A Review of the Dischargeability of Marital Support Obligations*, 24 J. FAM. L. 587, 609 n.100 (1985).

145. *Calhoun*, 715 F.2d at 1109.

146. *Id.* at 1108 n.7, 1109. The court specified several appropriate factors for consideration. *Id.* at 1108 n.7. The *Calhoun* court's list of factors substantially parallels those in *Fox* and *Bell*. *Carlisle v. Fox (In re Fox)*, 5 Bankr. 317, 321 (Bankr. N.D. Tex. 1980); *In re Bell*, 61 Bankr. 171, 175 (Bankr. S.D. Tex. 1986); see *In re Singer*, 787 F.2d 1033, 1036 (6th Cir. 1986) (Guy, J., concurring).

147. *Calhoun*, 715 F.2d at 1109.

148. *Id.*

the obligee of ordering the obligation discharged in bankruptcy.¹⁴⁹

Finally, if the first two tests are met, the bankruptcy court must determine whether the amount of the award is so far beyond that dictated by traditional notions of support as to be patently unreasonable.¹⁵⁰ At this point the court will look to the debtor ex-spouse's present ability to comply with the obligation.¹⁵¹ To except from discharge the entire amount of an obligation that, although created with the intent and having the effect of providing support for the obligee ex-spouse, far exceeds the debtor's ability to pay, would do violence to the bankruptcy policy of extending to the debtor a fresh start on life.¹⁵² If the court finds that the amount of the obligation is excessive, it must determine the portion of the award that appears reasonable in view of the debtor's post-bankruptcy financial condition.¹⁵³ Again, the court should refer to general state-law principles to guide it in fixing the limit on dischargeability.¹⁵⁴ The *Calhoun* court was sensitive to the fact that a bankruptcy court's determination of what is reasonable as support may have the practical effect of modifying the divorce decree, which federal courts lack jurisdiction to do.¹⁵⁵ Nevertheless, the bankruptcy court cannot avoid the inquiry into reasonableness, given Congress's mandates that only a divorce award "actually in the nature of" support is nondischargeable, and that a state court's determination of what is necessary for the nondebtor spouse's support is not controlling on the question of discharge.¹⁵⁶ The circuit court reversed and remanded to the bankruptcy court for reconsideration of whether the ex-husband's obligation was dischargeable under section 523(a)(5).¹⁵⁷

III. ANALYSIS AND RECOMMENDATIONS

*In re Nunnally*¹⁵⁸ cannot stand as the Fifth Circuit's definitive word on the alimony exception to discharge in bankruptcy. As the court in *In re Fox*¹⁵⁹ pointed out, the *Nunnally* court's application of law to facts leaves

149. *Id.* In deciding whether the obligation in question in fact provides necessary support, the bankruptcy court should define "necessary" with reference to the former spouses' standard of living during the marriage. *In re Helm*, 48 Bankr. 215, 224 (Bankr. W.D. Ky. 1985).

150. *Calhoun*, 715 F.2d at 1110.

151. *Id.*

152. *Id.* For discussion of the bankruptcy policy of providing a fresh start, see *supra* note 4.

153. *Calhoun*, 715 F.2d at 1110.

154. *Id.* The court in *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317 (Bankr. N.D. Tex. 1980), also believed that a court could divide a marital property award into dischargeable and nondischargeable portions. *Id.* at 320. Indeed the legislative history of the Bankruptcy Reform Act of 1978 confirms the idea. See 124 CONG. REC. 32,399 (1978) (remarks of Rep. Edwards) (property award is dischargeable under section 523(a)(5) "to the extent that [the obligation] is not actually in the nature of alimony, maintenance, or support").

155. *Calhoun*, 715 F.2d at 1109-10 n.10.

156. *Id.*

157. *Id.* at 1111.

158. 506 F.2d 1024 (5th Cir. 1975). For a discussion of *Nunnally*, see *supra* notes 76-91 and accompanying text.

159. *Carlile v. Fox* (*In re Fox*), 5 Bankr. 317, 320 (Bankr. N.D. Tex. 1980).

much to be desired.¹⁶⁰ The fact that Texas law does not permit alimony as such does not answer the question of dischargeability.¹⁶¹ In dividing property and debts, Texas divorce courts *may* consider the same elements that courts in alimony states refer to in awarding support payments.¹⁶² The substance of the award, not its label, determines its dischargeability.¹⁶³ At this juncture, the *Nunnally* court simply concluded that the award, a reimbursement to the wife's separate estate, was not dischargeable.¹⁶⁴ Not only did the court fail to heed its own advice in not examining the substance of this particular award,¹⁶⁵ but it engaged in faulty logic. The argument in *Nunnally* seems to proceed in this manner: Texas divorce courts may consider support factors in creating obligations between spouses; *some* Texas divorce obligations, therefore, are based on support and are nondischargeable in bankruptcy; this obligation (or *all* obligations), therefore, is (are) nondischargeable.

Apart from the flaws of reasoning in *Nunnally*, the case's result also appears suspect. An award of reimbursement is simply the restoration of a specific dollar amount that one marital estate advanced for the benefit of another.¹⁶⁶ In effect a reimbursement award stands as an order compelling payment of a debt.¹⁶⁷ Two bankruptcy courts have held reimbursement-type awards dischargeable in bankruptcy.¹⁶⁸ In *In re Lineberry*¹⁶⁹ the divorce court awarded the wife \$24,353.65 as representing her contribution to the family's living expenses in excess of what the husband contributed. The bankruptcy court treated the award as a judgment debt in favor of the wife and declared it discharged.¹⁷⁰ *In re Coffman*¹⁷¹ dealt with the dischargeability under section 523(a)(5) of a \$1,250 award constituting the ex-husband's sole property (inheritance from his mother received during his marriage) used to help pay the mortgage on the spouses' home. The debtor ex-wife sought to have the obligation discharged in bankruptcy. The bankruptcy court found the award to be in the nature of a property division, not a support obligation, and therefore not included in the alimony exception to

160. *Id.* at 320.

161. *Nunnally*, 506 F.2d at 1027; *see supra* note 81.

162. *Nunnally*, 506 F.2d at 1027.

163. *Id.*

164. *Id.*

165. *See In re Teter*, 14 Bankr. 434, 436 (Bankr. N.D. Tex. 1981).

166. *See supra* note 78.

167. *See Horlock v. Horlock*, 533 S.W.2d 52, 57 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ *dism'd w.o.j.*). The *Horlock* court stated that:

it should be kept in mind that in seeking reimbursement the appellee does not ask to share in the actual assets which have been determined to be community property. Rather, the appellee seeks to recover an amount substantially equal to the amount of capital which he brought into the marriage as separate property and which he utilized for the benefit of the community estate.

Id.

168. *Taylor v. Lineberry (In re Lineberry)*, 55 Bankr. 510, 515 (Bankr. W.D. Ky. 1985); *In re Coffman*, 52 Bankr. 667, 675 (Bankr. D. Md. 1985).

169. 55 Bankr. 510 (Bankr. W.D. Ky. 1985).

170. *Id.* at 515. In Texas, however, separate property used to meet family living expenses is not reimbursable. *Norris v. Vaughan*, 152 Tex. 491, 502-03, 260 S.W.2d 676, 683 (1953).

171. 52 Bankr. 667 (Bankr. D. Md. 1985).

discharge.¹⁷²

Both of the basic approaches to section 523(a)(5), the intent/factor method and the *Calhoun* method, appear superior to the Fifth Circuit's handling of the issue in *Nunnally*. The intent/factor approach has gained a foothold among bankruptcy courts in Texas,¹⁷³ as it has among bankruptcy courts in the United States generally.¹⁷⁴ This mode of analysis comports with Congress's intent that a section 523(a)(5) case turn on the specific facts and circumstances surrounding the individual award in controversy.¹⁷⁵ Discerning the parties' intent is not enough, however, as section 523(a)(5) speaks not of intent but of awards "actually in the nature of alimony, maintenance, or support."¹⁷⁶ The Bankruptcy Code, therefore, seems to require further inquiry into the actual effect of the obligation on the obligee spouse. The *Calhoun* approach offers this added dimension.

The bankruptcy courts and commentators have hailed *In re Calhoun*¹⁷⁷ as something of a breakthrough in analyzing the alimony exception to discharge in bankruptcy.¹⁷⁸ Not only have courts inside¹⁷⁹ and outside¹⁸⁰ the Sixth Circuit followed the *Calhoun* test, but so has a Texas bankruptcy court.¹⁸¹ In *In re Holland*¹⁸² the husband and wife reached a property settlement agreement in which the husband agreed to assume a bank debt secured by a lien on the family's car. The parties also agreed to give the car to the wife. One month after the divorce the husband filed a petition in bankruptcy, and the wife sought to have the husband's debt assumption excepted from discharge under section 523(a)(5). The bankruptcy court listed the three *Calhoun* prerequisites for finding a divorce obligation nondischargeable in bankruptcy: intent to support, effect of support, and overall reasona-

172. *Id.* at 675.

173. See *supra* notes 106-137 and accompanying text.

174. See Ravin & Rosen, *supra* note 24, at 8.

175. See Long v. Calhoun (*In re Calhoun*), 715 F.2d 1103, 1111 (6th Cir. 1983).

176. 11 U.S.C. § 523(a)(5)(B) (1982) (emphasis added).

177. 715 F.2d 1103 (6th Cir. 1983). For a discussion of *Calhoun*, see *supra* notes 138-157 and accompanying text.

178. In *In re Helm*, 48 Bankr. 215 (Bankr. W.D. Ky. 1985), the court remarked: "Judge Kennedy's writing [in *Calhoun*] is a carefully detailed construct, a literal handbook for bankruptcy judges . . ." *Id.* at 220. Weintraub and Resnick describe *Calhoun* as a "landmark decision . . . significantly alter[ing] the bankruptcy court's role involving domestic relations issues . . ." B. WEINTRAUB & A. RESNICK, *supra* note 4, ¶ 3.09[5]. The court in *Williams v. Holt* (*In re Holt*), 40 Bankr. 1009, 1113 (S.D. Ga. 1984), praised the *Calhoun* court's "detailed and scholarly" opinion.

179. *In re Erler*, 60 Bankr. 220, 221-23 (Bankr. W.D. Ky. 1986); *Brock v. Barlow* (*In re Brock*), 58 Bankr. 797, 806-09 (Bankr. S.D. Ohio 1986); *Deatherage v. Wallace* (*In re Deatherage*), 55 Bankr. 268, 271-72 (Bankr. E.D. Tenn. 1985); *In re Wright*, 51 Bankr. 630, 632-33 (Bankr. S.D. Ohio 1985); *In re Elder*, 48 Bankr. 414, 417-18 (Bankr. W.D. Ky. 1985); *Johnson v. Seta* (*In re Seta*), 45 Bankr. 8, 9 (Bankr. S.D. Ohio 1984); *In re Lelak*, 38 Bankr. 164, 167-69 (Bankr. S.D. Ohio 1984); *In re Plaugher*, 37 Bankr. 760, 763-65 (Bankr. N.D. Ohio 1984); *In re Brown*, 37 Bankr. 295, 299-300 (Bankr. W.D. Ky. 1983); *In re Wesley*, 36 Bankr. 526, 529 (Bankr. S.D. Ohio 1983); *Crouse v. Cleaver* (*In re Cleaver*), 36 Bankr. 516, 518-19 (Bankr. W.D. Ky. 1983).

180. *In re Bedingfield*, 42 Bankr. 641, 646-49 (S.D. Ga. 1983).

181. *Holland v. Holland* (*In re Holland*), 48 Bankr. 874, 876 (Bankr. N.D. Tex. 1984).

182. *Id.* at 874.

bleness with respect to the debtor's present ability to pay.¹⁸³ The court listed eight factors pertinent to the question of intent.¹⁸⁴ Relying largely on the fact that the husband was earning twice as much money as the wife, the court found an intent to create a support obligation.¹⁸⁵ The *Holland* court also found that the loan assumption had the effect of providing necessary support for Mrs. Holland.¹⁸⁶ To meet her daily needs and those of her child Mrs. Holland had to work outside the home, for which she needed an automobile free from the risk of foreclosure.¹⁸⁷ Finally, the court held it was not unreasonable to require Mr. Holland to pay the debt he had agreed to assume since his earning capacity clearly exceeded that of his former wife, and his financial condition had not substantially changed since the time of the divorce.¹⁸⁸ The court, therefore, held that the loan assumption was not discharged in bankruptcy.¹⁸⁹

In spite of the advantages that the *Calhoun* doctrine holds over other approaches, two objections persist. Both concern *Calhoun*'s obtrusiveness into state domestic-relations law.¹⁹⁰ The first objection questions the third test for a nondischargeable award, which requires the bankruptcy court to decide whether the amount of the particular obligation is reasonable in light of the debtor ex-spouse's present ability to fulfill it, and if it is not, to fix a reasonable limit on the amount that a court may exclude from discharge.¹⁹¹ Finding part of an award dischargeable and part nondischargeable reduces the liability of the debtor ex-spouse and thus effectively modifies the divorce court's decree.¹⁹² One line of argument criticizes the third test of *Calhoun* by asserting that section 523(a)(5) does not permit a bankruptcy court to inquire into the reasonableness of a divorce obligation or to separate an award into dischargeable and nondischargeable parts.¹⁹³ The *Calhoun*

183. *Id.*; see *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1109-10 (6th Cir. 1983).

184. *Holland*, 48 Bankr. at 876. The court's factors included: (1) the existence of children of the marriage; (2) the ex-spouses' comparative income levels; (3) whether the obligation in controversy attached to the community property awarded to the debtor ex-spouse; (4) whether the nondebtor ex-spouse needed support at the time of divorce; (5) whether the dependence on the debtor ex-spouse during the marriage handicapped the nondebtor ex-spouse in gaining outside employment following the divorce; (6) the age and health of the nondebtor ex-spouse; (7) the ex-spouses' respective levels of wealth; and (8) whether the divorce decree itself reflected an intent to create a support obligation rather than a division of property. *Id.*

185. *Id.* at 877.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. See B. WEINTRAUB & A. RESNICK, *supra* note 4, ¶ 3.09[5].

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

192. In *Deatherage v. Wallace (In re Deatherage)*, 55 Bankr. 268 (Bankr. E.D. Tenn. 1985), the bankruptcy court asserted that the third test of *Calhoun* did not compel bankruptcy courts to act as "super-divorce" courts. *Id.* at 271 n.3. The *Calhoun* analysis, the court continued, does not review the reasonableness of divorce awards; it merely separates dischargeable portions from nondischargeable ones. *Id.* This type of hair-splitting formalism does not aid the discussion. Clearly the effect of finding only half of a \$1,000 divorce award reasonably necessary to support the nondebtor ex-spouse is to create a \$500 award where a \$1,000 award existed before.

193. See *In re Helm*, 48 Bankr. 215, 225 (Bankr. W.D. Ky. 1985). Although following *Calhoun*, the *Helm* court noted that § 523(a)(5) "draws no dischargeability distinctions be-

court, however, successfully answered this criticism: bankruptcy courts must limit the amount of an award excepted from discharge to that portion that is truly for the support of the obligee ex-spouse. Any amount beyond that is discharged in bankruptcy. Reexamination of state divorce decrees is unavoidable because state law cannot control the question of dischargeability under section 523(a)(5).¹⁹⁴

Others attack *Calhoun's* third test by arguing that the court misplaced its focus.¹⁹⁵ The extent to which a divorce obligation is nondischargeable should depend on the support needs of the obligee ex-spouse, not on the debtor ex-spouse's ability to pay.¹⁹⁶ This argument rejects the notion, implicit in *Calhoun*, that the bankruptcy court must in each case balance the policies of providing the debtor with a fresh start and seeing that the debtor's former spouse and children are taken care of. Congress must strike that balance, and it has done so in section 523(a)(5), which excepts from discharge in bankruptcy *all* obligations arising upon divorce to the extent that they are "actually in the nature of alimony, maintenance, or support."¹⁹⁷ Section 523(a)(5) says nothing of the debtor's ability or inability to meet the obligation, nor of the bankruptcy court's power to work equity in the individual case. By contrast, section 523(a)(8) of the Bankruptcy Code, which excludes from discharge debts for government education loans, expressly permits the bankruptcy court to consider the circumstances of the individual debtor in passing on the dischargeability of such a debt.¹⁹⁸ The absence of similar language in section 523(a)(5) implies that Congress did not intend that bankruptcy courts apply equitable considerations in cases involving the alimony exception to discharge.¹⁹⁹

The second major objection to the *Calhoun* rule is that bankruptcy courts should not consider the former spouses' present circumstances in deciding whether section 523(a)(5) applies.²⁰⁰ *Calhoun* does this at two points: in the second test, when the court looks to the nondebtor ex-spouse's current needs

tween 'reasonable' and 'unreasonable' support; either an obligation is for support, and therefore nondischargeable, or it is not." *Id.*; see also *In re Griffin*, 39 Bankr. 112, 114 (Bankr. W.D. Wash. 1984) (practical problems of letting federal courts review decisions of state divorce courts).

194. *Calhoun*, 715 F.2d at 1109 n.10.

195. See *In re Yeates*, 44 Bankr. 575, 579 (D. Utah 1984), *aff'd*, 807 F.2d 874 (10th Cir. 1986).

196. *Id.*

197. 11 U.S.C. § 523(a)(5)(B) (1982); *Harrell v. Sharp* (*In re Harrell*), 754 F.2d 902, 906 n.6 (11th Cir. 1985); *In re Yeates*, 44 Bankr. 575, 579 (D. Utah 1984) ("[T]he bankruptcy court must simply determine whether a particular debt is in the nature of alimony, maintenance, or support. If so, it cannot be discharged."), *aff'd*, 807 F.2d 874 (10th Cir. 1986).

198. 11 U.S.C. § 523(a)(8)(B) (1982). The bankruptcy court is to order a government educational loan debt discharged in bankruptcy if not to do so would "impose an undue hardship on the debtor and the debtor's dependents." *Id.*

199. *In re Comer*, 27 Bankr. 1018, 1020-21 (Bankr. 9th Cir. 1983), *aff'd*, 723 F.2d 737 (9th Cir. 1984); see *In re Griffin*, 39 Bankr. 112, 114 (Bankr. W.D. Wash. 1984).

200. The objection discussed in the previous paragraph focused on whether a bankruptcy court should reexamine a divorce award for reasonableness, and if so, whether the debtor ex-spouse's financial condition is at all relevant to the inquiry. The second objection concedes the bankruptcy court's power to hold part of an award dischargeable, but questions whether post-divorce changes in either ex-spouse's wealth or earning capacity should have a bearing on the

and assets;²⁰¹ and in the third test, which emphasizes the debtor ex-spouse's present capacity to pay the obligation.²⁰² The courts are split,²⁰³ even within the Sixth Circuit,²⁰⁴ as to whether *Calhoun* is correct in weighing post-divorce changes in the ex-spouses' financial situations. Those who would discount the parties' present circumstances and test the dischargeability of a divorce obligation at the time of the decree argue that to allow bankruptcy courts an ongoing right to review the propriety of divorce awards constitutes too great an interference with the jurisdiction of state courts.²⁰⁵ If the ex-spouses' financial positions have changed materially since the time of the divorce decree so that the original award no longer reflects the obligee's needs or the obligor's ability to pay, the obligor's remedy should lie in the state court with a petition for modification of the award, not in the bankruptcy court.²⁰⁶

This argument fails to take into account the need to determine the extent

court's decision. Although these two criticisms are related, they attack different parts of the *Calhoun* rule, and for this reason, this Comment addresses them separately.

201. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1109 (6th Cir. 1983) ("The distribution or existence of other property, for example, may make the continuing assumption of joint debts unnecessary for support, as might drastic changes in the former spouse's capabilities for self-support.").

202. *Id.* at 1110 n.11. The court declared:

If the circumstances of the debtor have changed from the time the obligation to the former spouse to pay joint debts was created so as to make such support now inequitable the bankruptcy court may consider the debtor's *current* general ability to pay insofar as it relates to the *continuing* obligation to assume the joint debts.

Id. (emphasis in original).

203. Compare *Forsdick v. Turgeon*, 812 F.2d 801, 803-04 (2d Cir. 1987) (changed circumstances of either ex-spouse irrelevant) and *Draper v. Draper*, 790 F.2d 52, 54 (8th Cir. 1986) (changed circumstances of either ex-spouse irrelevant) and *In re Quinn*, 44 Bankr. 622, 624 n.5 (Bankr. W.D. Mo. 1984) (obligee ex-spouse's present needs irrelevant) and *In re Comer*, 27 Bankr. 1018, 1020-21 (Bankr. 9th Cir. 1983) (changed circumstances of either ex-spouse irrelevant), *aff'd*, 723 F.2d 737 (9th Cir. 1984) with *In re Bedingfield*, 42 Bankr. 641, 646-47 (S.D. Ga. 1983) (debtor ex-spouse's present ability to pay is relevant) and *In re Warner*, 5 Bankr. 434, 442-43 (Bankr. D. Utah 1980) (obligee ex-spouse's present needs are relevant) (decided under former Bankruptcy Act, but with reference to Bankruptcy Code).

204. Compare *In re White*, 55 Bankr. 878, 883 (Bankr. E.D. Tenn. 1985) (debtor ex-spouse's current ability to pay irrelevant) and *In re Brown*, 46 Bankr. 612, 614 (Bankr. S.D. Ohio 1985) (changed circumstances of either ex-spouse irrelevant) with *In re Helm*, 48 Bankr. 215, 225 & n.30 (Bankr. W.D. Ky. 1985) (debtor ex-spouse's current ability to pay is relevant) and *Gerdes v. Gerdes*, 33 Bankr. 860, 870 (Bankr. S.D. Ohio 1983) (changed circumstances of both ex-spouses are relevant).

205. *Harrell v. Sharp (In re Harrell)*, 754 F.2d 902, 907 & n.7 (11th Cir. 1985); *In re Bell*, 61 Bankr. 171, 176 (Bankr. S.D. Tex. 1986); *Ravin & Rosen*, *supra* note 24, at 15.

206. *Harrell v. Sharp (In re Harrell)*, 754 F.2d 902, 907 n.8 (11th Cir. 1985); *In re Bell*, 61 Bankr. 171, 176 (Bankr. S.D. Tex. 1986); *Ravin & Rosen*, *supra* note 24, at 15; *Recent Developments*, *supra* note 4, at 116. Of the circuit courts that have addressed the issue, only the Sixth Circuit has held that bankruptcy courts must consider the ex-spouses' changed circumstances, if any, in deciding whether divorce related awards are dischargeable under § 523(a)(5). *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1110 n.11 (6th Cir. 1983). Three other circuits have held that changed circumstances are irrelevant. See *Forsdick v. Turgeon*, 812 F.2d 801, 803-04 (2d Cir. 1987); *Draper v. Draper*, 790 F.2d 52, 54 (8th Cir. 1986) (*per curiam*); *Harrell*, 754 F.2d at 906-07. The Tenth Circuit found it unnecessary to reach the question of changed circumstances in *In re Yeates*, 807 F.2d 874, 878 n.3 (10th Cir. 1986). Given this disagreement among the circuit courts, one hopes for a resolution by the Supreme Court in the near future.

to which support is the actual basis of a divorce award. An obligation created entirely for the support of the obligee ex-spouse might, because of improvements in the obligee's wealth or earning capacity, cease to be necessary in its entirety for the obligee's support. Such an award is no longer wholly in the nature of alimony or support, and a court may discharge some of it in bankruptcy. The policy of construing exceptions to discharge narrowly, in favor of the debtor,²⁰⁷ recommends such a reading of section 523(a)(5). The bankruptcy court, therefore, must consider any post-divorce changes in the nondebtor ex-spouse's support needs or ability to satisfy those needs. This examination occurs in the second test of *Calhoun*.²⁰⁸ Looking to the debtor's changed circumstances, however, appears less defensible, since section 523(a)(5) does not permit attention to the debtor's ability to pay.²⁰⁹ The courts should adopt a middle position that looks to the present needs and assets of the obligee ex-spouse, but disregards the debtor ex-spouse's capacity to fulfill the obligation in question.²¹⁰

IV. CONCLUSION

Unless Congress amends the Bankruptcy Code,²¹¹ this Comment recommends that the Fifth Circuit adopt a modified form of the *Calhoun* approach to section 523(a)(5). *In re Nunnally* relied on peculiar reasoning and

207. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Shepherd v. McDonald*, 157 F.2d 467, 469 (9th Cir. 1946), *cert. denied*, 329 U.S. 802 (1947); *Koltman v. Hammill (In re Hammill)*, 61 Bankr. 555, 556 (Bankr. E.D. Pa. 1986); *Quadras Ltd. v. Konchan (In re Konchan)*, 36 Bankr. 393, 396 (Bankr. N.D. Ill. 1984).

208. *See Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1109 (6th Cir. 1983).

209. *See supra* notes 197-99 and accompanying text.

210. The district court adopted this stance in *In re Yeates*, 44 Bankr. 575, 580 (D. Utah 1984). On appeal the Tenth Circuit expressly declined to address the issue, since the ex-wife's financial status had not changed since the divorce. *In re Yeates*, 807 F.2d 874, 878 n.3 (10th Cir. 1986). While the obligee ex-spouse's circumstances at the time of the bankruptcy proceeding are pertinent to the determination of how much of the award is reasonably necessary for support, the debtor ex-spouse's current situation is not material. Surely Congress contemplated that the debtor's financial condition would worsen as bankruptcy approached. Still, Congress made no allowance for the debtor's dire straits in § 523(a)(5). *Yeates*, 44 Bankr. at 580.

An important exception to the applicability of the "present needs test" should be divorce-related obligations in which the debtor ex-spouse is in arrears. *See In re Troxell*, 67 Bankr. 328, 331 n.3 (Bankr. S.D. Ohio 1986); *McArtar v. Rowles (In re Rowles)*, 66 Bankr. 628, 631 (Bankr. N.D. Ohio 1986). As the *Rowles* court pointed out, to make the obligee ex-spouse prove that the past-due payments are currently necessary for his or her support would enable the debtor to stop making payments under an obligation that might clearly be in the nature of support, force the obligee to support himself or herself by other means, and then argue in bankruptcy that the arrearages are now unnecessary to ensure the obligee's support. *Rowles*, 66 Bankr. at 631. Congress could not have intended to permit such subterfuge. *Id.* The *Calhoun* opinion itself contains language supporting this observation. *See Calhoun*, 715 F.2d at 1109 n.9. The *Calhoun* analysis, therefore, applies only to the dischargeability of payments that are not yet due.

211. Commentators have suggested two alternatives for clarifying the alimony exception to discharge. Judge Lee has urged Congress to provide a definition of "alimony, maintenance, or support" in the Code. Lee, *Case Comment, In re Waller*, 494 F.2d 447 (6th Cir. 1984) *Dischargeability of Debt: Alimony, Maintenance, or Support*, 50 AM. BANKR. L.J. 175, 178 (1976). Another observer would have section 523(a)(5) made more specific as to which kinds of debts are nondischargeable. Comment, *supra* note 25, at 538-39.

reached a result that is at best debatable. Furthermore, the bankruptcy courts in Texas have not felt compelled to follow *Nunnally*, but have explored new ways of dealing with the alimony exception to discharge in bankruptcy. The Fifth Circuit should adopt the first and second tests of the *Calhoun* analysis. As for the third test, the court should ask whether the entire divorce obligation in controversy is reasonably necessary to meet the day-to-day needs of the obligee ex-spouse, based on that spouse's present and projected requirements and capacity to fill them by means independent of the award in question. If the answer is no, the bankruptcy court should decide how much of the award is "actually in the nature of alimony, maintenance, or support"²¹² and hold only that portion nondischargeable.

212. 11 U.S.C. § 523(a)(5)(B) (1982).

