THE ROCKY MARRIAGE OF FAMILY LAW AND BANKRUPTCY

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PREFILING CONSIDERATIONS[1]

I. Conflicts of Interest

A. *Two categories of clients*: former clients and current clients. Conflicts can be potential or actual. All couples contemplating bankruptcy have potential conflicts. When a dissolution is in the offing, those conflicts can become actual quite quickly. Actual conflicts can arise between spouses or between the lawyer and the client(s).

B. *Ethics Opinions*:

1. The relevant OSB Formal Ethics Opinion No's are: 2005-11 (Former Clients- Matter Specific), 2005-40 (Current Clients - Debtor and Creditor in Bankruptcy), 2005-86 (Current Clients - Spouses in Bankruptcy), and 2005-111 (Current Clients - Bankruptcy & Fees Owed Lawyer); and the relevant Oregon Rules of Professional Conduct, Conflict of Interest: Rule 1.7 (Current Clients), Rule 1.8 (Current Clients, Specific Rules), and Rule 1.9 (Duties to Former Clients).

2. "Pursuant to Oregon RPC 1.0(h), a lawyer is charged with all knowledge that a reasonable investigation of the facts would show. Typically, such an investigation will not lead the lawyer to conclude that a conflict exists under Oregon RPC 1.7(a) when joint bankruptcies or wills are contemplated, because the interests of the spouses in such matter will generally be aligned." Opinion 2005-86 (citations omitted).

3. Opinion 2005-86 goes on to state that "parties to a marital dissolution will almost always have directly adverse interests . . .". And then lists nine factors at a minimum which must be meet before representation of both can be contemplated. One of those factors is that the "marital estate must not contain substantial assets or liabilities."

4. It is then the rare case where the intersection of bankruptcy and dissolution doesn't give rise to an actual conflict of interest. Instances where joint representation might be possible are a pre-dissolution Chapter 7 where the martial assets can be preserved through exemptions and there is significant individual and joint debt which can be discharged; or post-dissolution individual Chapter 7s where the both ex-spouses waive any potential conflicts. In all cases, the attorney should obtain "informed consent" in writing signed by each debtor. See, Oregon Rules of Professional Conduct 1.0(b), (g) and (h).

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1 Thank you to C. Casey White, who prepared the course materials related to Prefiling Considerations

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5. Opinion 2005-111, Representing Bankruptcy Client Who Owes Lawyer Substantial Fees, in practical terms can be summed up by **don't** unless you: (1) are prepared to waive your fees or (2) have a preexisting lien to secure your fees or (3) have contract for a contingent fee in a civil case. Even then, the court may find that you have an adverse interest which is not waivable.

II. Exemptions

A. The tension in bankruptcy is always between debts and assets. What debts can be discharged and what assets be kept. In Oregon, a debtor can choose between the judgment debtor exemptions (ORS § 18.345) and the Federal exemptions (11 U.S.C. § 522).

B. Conflicts can arise between spouses when both are filing and a particular exemption scheme is better for one spouse. If spouses have filed separate individual cases, the court may order joint administration of their estates. If that happens and they have not used the same exemption scheme, then 11 U.S.C. § 522 (b)(1) controls. As set forth procedurally by Rule 1015 (b), "the court may order a joint administration of the estates" after giving consideration to protecting creditors of the different estates. If a consolidation is ordered and one spouse has elected state exemptions and the other federal exemptions, the court will allow a reasonable time for the spouses to amend the exemptions. If they fail to do so within that time, "they will be deemed to have elected the exemption provided by § 522 (b)(2) or the Federal exemptions."

C. Where the marital status is terminated, or when one spouse files before the marital status is terminated and the other after, each is free to choose the exemptions which benefit their particular situation. As an example, husband has a truck with equity and want to use the Federal exemptions, wife wants to use the Oregon exemptions because she expects to keep the house and wants to maximize her homestead exemption. If husband files before the dissolution is final, he is free to use the Federal exemptions. Ex-wife is free to use the Oregon exemptions when marital status is terminated. Caveat: Pursuant to 11 U.S.C. § 541(a)(5)(B), if the husband in this example receives a share of the equity in the house or a equalizing award within 180 days of his filing, that property comes back into his estate. This may present a problem for the attorney if this contingency could not be completely exempted or had not been anticipated and discussed with the client.

III. Effect of Pre-Filing Conduct

A. *Fraudulent Conveyances*. In the Ninth Circuit, property division in dissolution proceedings and fraudulent conveyances have been addressed by *In re Bledsoe*, 569 F.3d 1106 (9th Cir. 2009), and *In re Beverly*, 374 B.R. 221 (BAP 9th Cir. 2007, aff'd in part 551 F.3d 1092 (9th Cir 2008).

1. *In re Bledsoe*: The wife received a fraction of what husband received under a default judgment because she failed to comply with the Oregon court's orders or

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otherwise participate in the proceeding. *Bledsoe* at 1008. The Ninth Circuit held in *Bledsoe*:

> "…Under Oregon law, a party who challenges a dissolution judgment must allege and prove "extrinsic fraud." Following the lead of the Fifth Circuit in *Ingalls v. Erlewine* (*In re Erlewine*), 349 F.3d 205 (5th Cir. 2003), we also hold that a dissolution judgment from a regularly conducted, contested divorce proceeding conclusively establishes "reasonably equivalent value" under 11 U.S.C. § 548(a)(1)(B) in the absence of fraud, collusion, or violation of state law." *Bledsoe* at 1108.

2. *In re Beverly*: The debtor transferred non-exempt assets pursuant to a marital settlement agreement and received in return exempt retirement funds in a dissolution proceeding. He then filed for Chapter 7 bankruptcy. The Bankruptcy Appellate Panel ("BAP") found, "This is a paradigm case of actual intent to hinder, delay, or defraud creditors under the Uniform Fraudulent Transfer Act ("UFTA")." *Beverly* at 227. (The debtor in *Beverly* was an attorney who anticipated a large judgment on a debt before entering into the settlement agreement.)

The BAP in *Beverly* also found overwhelming evidence that William Beverly "actually intended to hinder and delay creditors" by transferring the non-exempt assets to his ex-spouse in return for exempt assets and instructed the bankruptcy court to enter a judgment denying his discharge pursuant to 11 U.S.C. § 727(a)(2)(A). *Beverly* at 246. Because the discharge decision by the BAP and the bankruptcy court were both interlocutory, the Ninth Circuit dismissed this portion of the BAP decision. *In re Beverly*, 551 F.3d 1092 (9th Cir 2008).

In affirming *Beverly* in part, Ninth Circuit stated: "The BAP held that the Beverlys' transfer of assets through a martial settlement agreement was an avoidable transfer pursuant to 11 U.S.C. § 544(b) and Cal. Civ. Code § 3439.04. . . . We . . . adopt as our own the well-reasoned BAP opinion, *In re Beverly*, 374 B.R. 221." *Beverly*, 551 F.3d 1092 (9th Cir 2008).

B. *Preferences*. 11 U.S.C. § 523 (c)(7) states that a trustee may not avoid a transfer "to the extent such transfer was for a bona fide payment of a debt for a domestic support obligation."

1. *In re Halbert v. Dimas (In re Halbert)*, 576 B.R. 586 (Bankr. N.D. Ill., 2017): Issue was whether the Illinois DHS received a preference when it took the debtor's income tax refund in payment of an overpayment of SNAP benefits. The court considered cases which found overpayments as being in the nature of support and cases which found overpayments as not being in the nature of support. The *Halbert* court found: "The debt owed to DHS is merely a debt for the return of benefits that should never have been paid to the Debtor at all, and that debt does not automatically retain any supportive nature that the benefits may have had." *Id* at 589.

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2. *Rivera v. Orange County Prob. Dep't (In re Rivera)*, 823 F.3d 1103 (9th Cir. 2016): Cited by the *Halbert* court, the issue was whether a debt which arose from a child's involuntary juvenile detention was a "domestic support obligation" ("DSO") and therefore non-dischargeable. In holding that the debt was not a DSO, the Ninth Circuit found that the detention served a correctional purpose and not a domestic support purpose. *Id*. at 1108-1109.

C. *Prior Bankruptcy*

1. If either spouse has filed a bankruptcy and had it dismissed either for willful failure to provide by orders of the court or to appear in prosecution of the case, or the debtor obtained an order of dismissal after a motion for relief was filed, there is 180 day bar against that spouse refiling. 11 U.S.C. § 109(g).

2. A prior filing may effect a spouse's discharge, if he/she was granted a discharge in a Chapter 7 case commenced within 8 years of the current filing (11 U.S.C. § 727 (a)(8)), or was granted a discharge in a Chapter 13 case commenced within 6 years of the current filing (11 U.S.C. § 727 (a)(8)).

D. *Taxes and Tax Returns*

1. Taxes and tax returns are often a consideration. Before dissolution takes place, is it to the debtors' advantage to file any outstanding tax returns as married filing separately or as joint returns? Does one spouse claim zero exemptions, and the other multiple exemptions? Is earned income credit an issue?

2. If a dissolution has taken place, one spouse may be made responsible for any joint outstanding tax liability by the judgement. Like all other creditors, this may bind the parties to the dissolution but not the taxing agencies. Have your client(s) discuss tax issues with his/her or their tax preparer.

3. *Joint Tax Debt Generally*:

a. If spouses have filed joint tax returns, they are jointly and severally liable for any taxes which are due. 26 U.S.C. § 6013(d)(3). There are three categories of tax returns: (1) tax returns that have been filed and the tax assessed, (2) tax returns that have been filed but the tax has not yet been assessed, and (3) tax returns that have not yet been filed.

b. Taxes that have been assessed can be priority and unsecured 11 U.S.C. 507(a)(8), secured, or unsecured. Taxes for which returns that have not been filed or which have been filed but the tax has not been assessed are not dischargeable.

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c. 11 U.S.C. § 1308(a) requires a Chapter 13 debtor to file "all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition." Any outstanding tax returns are required to be filed before the first meeting of creditors.

4. *Relief*:

a. If spouses have filed joint tax returns, it is possible for one spouse to get relief from joint and several liability on a joint return under very limited circumstances dealing with an understatement of tax - the "innocent spouse" relief. 26 U.S.C. § 6015(b).

b. Additionally, if a joint return has been filed and the taxpayers are no longer married or are legally separated or not living together, then under certain circumstances a taxpayer may be able to limit or eliminate any item giving rise to a deficiency. 26 U.S.C. § 6015(c).

c. Finally, equitable relief may be available under 26 U.S.C. § 6015(f) if a taxpayer is liable for any unpaid taxes or deficiency can't qualify under subsections (b) or (c).

d. While relief may be available under 26 U.S.C. § 6015, the taxpayer must first request a determination by the IRS. Any appeal from an adverse determination is to the Tax Court as it has exclusive jurisdiction to review an adverse decision by the IRS. 26 U.S.C. § 6015(e)(1)(A). See, *In re Mikels*, 524 B.R 805, 807 (Bankr. S.D. Ind. 2015) ("Although the statute does not address whether the Tax Court's jurisdiction is exclusive, court interpreting the statute have concluded it is.") See also, *United States v. Stein* (W.D. Ky, 2015) in footnote 1. ("While there is a dearth of published authority, low courts have spoken with near unanimity on this question.") [citations omitted]. It is only after a determination by the Tax Court that the parties can look to the District Court for relief.

e. Because of the time it takes to get relief from joint tax liability, it may be prudent to seek the relief before a Chapter 13 case is filed. In *Ordlock v. C.I.R.*, 533 F.3d 1136 (9th Cir. 2008), the wife filed a request in March of 1999 for relief from tax debt under the 26 U.S.C. § 6015(b). Relief was eventually granted over 3 years after the request was made. However, during the pendency of a Chapter 13 case, the debtor in *In re Mikels*, 524 B.R 805, 807 (Bankr. S.D. Ind. 2015), was able to obtain a determination in just eight months.

IV. **Effect of Means Test**

A. For petitions filed after May 1, 2018, in Oregon, an individual is considered to have disposable income if his/her gross annual income is over $53,501. A married couple is considered to have disposable income if the combined gross income is over $65,190. A married couple with one child is considered to have disposable income if their combined gross annual income is over $76,603.

B. For parties contemplating bankruptcy and divorce, it may be to their advantage to file bankruptcy after separation of the household and/or after dissolution. As an example, each spouse earns about $40,000. Their combined gross income, without more, means that they would be ineligible for Chapter 7. Individually, both would be eligible for Chapter 7 if they are separated/or divorced and maintaining separate households.

C. An issue under the means test may arise if one of the parties is living with a parent and not paying rent. Pursuant to the Statement of the U.S. Trustee Program's Position on Legal Issues Arising Under the Chapter 7 Means Test, the allowance for housing is not applicable. As a practical matter, the easiest way to make this adjustment to the debtor's gross income may be by simply adding back in the housing allowance as other income.

V. **The Chicken or the Egg**

A. Whether it more advantageous to divorce first or to file bankruptcy first is entirely fact driven. One of the comments that regularly pops up in blogs on the issue is that it may be less expensive for the divorcing spouses to file together before filing for dissolution. Less expensive for whom? As one or more of the foregoing factors may arise during representation and the attorney has to withdraw, where is the benefit to any of the parties, including the attorney?

B. With that warning, there are clearly situations where it might be to the advantage of the parties to file together before dissolution - (joint debt, exemptible assets, only one spouse is working, and wages are being garnished) - but these cases are rare and should only be undertaken after a thorough investigation and obtaining informed written waivers. All other things being equal, filing after dissolution, makes more sense in most cases.

EFFECT OF AUTOMATIC STAY

I. **Takes Effect Upon Filing - *11 USC 362(a)***

A. Filing a bankruptcy petition triggers an "automatic stay" that prohibits, among other things, the commencement or continuation of judicial proceedings that were or could have been commended before the filing.

B. Prevents creditors and others from undertaking collection efforts or otherwise interfering with the property of the bankruptcy estate and administration of the case.

II. **Exceptions to Stay for Domestic Relations Matters - *11 USC 362(b)***

A. *Commencement of Proceedings:*

1. To establish paternity.

2. To establish or modify an order for a domestic support obligation.

3. Concerning child custody or visitation.

4. To dissolve a marriage as long as it doesn't determine the division of bankruptcy estate property.

5. Regarding domestic violence.

B. *Collection of Domestic Support Obligations*

1. Collection of DSOs from non-estate property, such as exempt property ("The general rule is that exempt property immediately revests in the debtor... 'the effect of an exemption is that the debtor's interest in the property is 'withdrawn from the estate (and hence from the creditors) for the benefit of the debtor.'" *Mwangi v. Wells Fargo Bank*, 764 F3d 1168, 1175 (9th Cir 2014) (quoting *Gebhart v. Gaughan*, 621 F.3d 1206, 1210 (9th Cir 2010).

2. Collection of DSOs via withholding of post-petition wages (Note - this exception does not apply in Chapter 13 cases as post-petition earnings are estate property).

3. Withholding, suspending or restricting a driver's license, a professional or occupational license, or a recreational license under state law, as specified by the Social Security Act (42 USC 466(a)(16)).

4. Reporting overdue support to any consumer reporting agency as specified in the Social Security Act (42 USC 466(a)(7)).

5. Intercepting a tax refund, as required by the Social Security Act or under an analogous state law.

6. Enforcing a medical obligation as specified by the Social Security Act (Title IV).

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III. **Duration of Stay - *11 USC 362(c)***

Generally, the automatic stay continues until either the case closes, is terminated, or discharge is granted or denied.

IV. **Practical Effect of Stay**

A. The existence of an open bankruptcy case does not prevent the initiation / continuation most family law proceedings. Biggest hiccup with concurrently pending bankruptcy and family law proceedings is determining the division of non-estate property.

B. *Non-Judicial Relief from Stay* - A "belt and suspenders" filing if wanting to initiate/continue dissolution case when bankruptcy case is pending (see attached form).

C. *Judicial Relief from Stay under 11 USC 362(d)* - Can be used to obtain relief to allow the court in the family law case to determine ownership of property, the value of an equitable division of the parties debts/assets, or even equitable distribution itself. *See In re Goss*, 413 BR 843 (Bankr D Or 2009); *In re Kostenko*, 2:12-BK-02741-DPC (BAP 9th Cir July 9, 2015).

ISSUES IN CHAPTER 7 BANKRUPTCY

I. **Non-Dischargability of Obligations Generally**

A. See 11 USC 523 for a complete list.

II. **Non-Dischargability of Obligations Specifically – *11 USC 523(a)(5) & 11 USC 523(a)(15)***

A. 11 USC 523(a)(5) - For a domestic support obligation:

1. Never dischargeable.

2. Pre-petition payments are not considered a preference under 547(c)(7).

B. 11 USC 523(a)(15) - To a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

1. Never dischargeable.

2. No adversary complaint needed (no adversary complaint / no balancing test).

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3. Different rule for Chapter 13 - can be discharged in a completed case.

III. **How dischargeability is affected by joint filings or filing by only one spouse**

A. *Joint Debts*:

1. Joint Filing: Debt is dischargeable as to both spouses.

2. Single Spouse Filing: Debt is dischargeable as to filing spouse, but entity holding debt can still come after non-filing spouse, regardless of terms of divorce judgment.

a. Precautions: Inform client.

b. Precautions: Include language in divorce judgment: "This judgment requires each party to pay certain debts; however each party is aware that the court's order cannot modify the repayment agreement between the parties and their creditors. The court's order can only impact the obligation to pay as between the parties themselves.

B. *Indemnification Clauses*:

1. Example: "Husband shall pay according to the creditor's repayment terms, defend, indemnify and hold Wife harmless from the following debts…."

2. Not dischargeable under 11 US 523(a)(15) – Considered a debt incurred as part of a separation agreement and/or divorce judgment if included in the document. *In re Francis*, 505 BR 914, 919 (BAP 9th Cir 2014).

ISSUES IN CHAPTER 13 BANKRUPTCY

I. **Payment of Priority Debt**

A. *11 USC §1322(a)(2)*: The plan shall provide for payment in full of all claims entitled to priority under §507 (domestic support obligation, hereinafter "DSO") unless the holder of a particular claim agrees to a different treatment of such claim.

B. *Exception – 11 USC §1322(a)(4)*: The plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) (DSO assigned, owed to or recoverable by a governmental unit) if the plan provides that the debtor's projected disposable income will be applied to plan payment for a period of five years.

C. *Compare to Chapter 7*: Debts simply not discharged. *11 USC §523(a)(5)*.

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II. **Dischargeability of Non-Priority Debt**

A. *11 USC §523(a)(15)*: No discharge in Chapter 7 OR Chapter 13 hardship discharge of debt to a spouse, former spouse or child incurred by the debtor in the course of a divorce or separation.

B. *11 USC §1328(a)*: Governs discharge in Chapter 13 after completion of all payments under the plan. Contains no exception for non-DSO debts to spouse, former spouse, or child.

III. **Domestic Support Obligations**

A. *Definition:* 11 USC §(14A): The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;
(ii) an order of a court of record; or
(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

B. *Choice of Law*: Whether an obligation is in the nature of support and thus qualifies as support under bankruptcy law is a question of federal law." *Thorud v. Thorud* (Case No. 10-6107, October 26, 2011, slip op. at 4 (citations omitted); *In re Moser,* 530 B.R. 872 (Bankr. D. Or. 2015).

C. *Burden of Proof*: "The marital claimant has the burden of proving by a preponderance of the evidence that the obligation is in the nature of support." *Thorud, supra,* slip op. at 5 (citation omitted).

D. *Relevance of "labels"*: The labels parties used for the payments may provide evidence of intent *In re Nelson,* 451 B.R. 918, 923 (Bankr. D. Or. 2011) but are not binding on the bankruptcy court. *Moser, supra,* 530 B.R. at 874.

E. *Relevant Intent*: When the judgment is entered following a contested trial, the intent of the state court is controlling. *Moser, supra* 530 B.R. at 874. When the obligation is created by a stipulated judgment, the intent of the parties at the time the agreement is executed is dispositive. *Nelson, supra*¸ 451. B.R. at 921.

IV. **Is it Spousal Support?**

A. *Factors to consider:*[2]

1. Presence of minor children;

2. Imbalance in the income of the parties;

3. Whether obligation terminates on death or remarriage of recipient spouse;

4. Whether award is affected by change in circumstances;

5. Nature and duration of the obligation;

6. Whether payments are made directly to the recipient;

2 The Ninth Circuit articulated standards for analyzing whether an award is a DSO or property settlement in *Shaver v. Shaver,* 736 F.2d 1314 (9th Cir. 1984): "Factors indicating that support is necessary include the presence of minor children and an imbalance in the relative income of the parties. Similarly, if an obligation terminates on the death or remarriage of the recipient spouse, a court may be inclined to classify the agreement as one for support. A property settlement would not be affected by the personal circumstances of the recipient spouse; thus, a change in those circumstances would not affect a true property settlement, although it would affect the need for support. The court will look also to nature and duration of the obligation to determine whether it is intended as support. Support payments tend to mirror the recipient spouse's need for support. Thus, such payments are generally made directly to the recipient spouse and are paid in installments over a substantial period of time." *Shaver, supra,* 736 F.2d at 1316-1317 (citations omitted). How the parties treat the claim or debt for tax purposes is also a factor. *Thorud v. Thorud* (Case No. 10-6107, October 26, 2011)

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7. Whether payments are made in installments over a period of time;

8. Treatment of claim for tax purposes.

B. *Selected cases*:

1. *Thorud v. Thorud*, (Case No. 10-6107, October 26, 2011) – even though there was an imbalance in income and claimant was awarded custody, the debt was not a DSO. The obligation survived the parties' death; it was payable in a lump sum rather than installments; it was labeled a "proper division" by the parties; it was structured so as not to be taxable to claimant and deductible by Debtor.

2. *In re Morgan*, (Case No. 10-67114, April 26, 2011) – the award was not a DSO despite the requirement of installment payments and a ruling that payments would terminate upon the death of either party. The parties' incomes were relatively equal, and the judgment specifically addressed the bankruptcy consequences of the allocation of debts but failed to include a similar provision regarding the bankruptcy consequences of the equalizing judgment.

3. *In re Nelson*, 451 B. R. 918 (Bankr. D. Or. 2011) – Debtor's obligation to pay mortgage on which ex-spouse was co-debtor was not a DSO. The marriage was short-term; there was no evidence that ex-spouse needed support; the obligation did not terminate on her death or remarriage; the judgment contained contradictory provisions regarding support.

V. **<u>Is it Child Support</u>?**

A. *Factors to consider:*[3]

1. The substance of an award;

2. Whether the state court intended the award to be in the nature of support.

B. *Selected cases*:

1. *In re Chang*, 163 F.3d 1138 (9th Cir. 1998) – attorney fees incurred in a child custody proceeding may be in the nature of support. Fees for representation of a guardian ad litem were in the nature of support.

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3 The factors relevant to an analysis of whether an obligation is spousal support "do not fit neatly within a determination of whether an obligation constitutes *child* support. Thus we look 'at the surrounding circumstances and all other relevant incidents bearing on the [court's] intent' to determine whether [the court] intended a particular obligation to be in the nature of child support. *Moser, supra* 530 B.R. at 876.

2. *Koch v. Olsson*, 532 BR 810 (D. Or. 2015) – attorney fees awarded as a sanction for bringing the action were not in the nature of support and were dischargeable.

3. *In Re Rehkow*, 2006 Bankr. LEXIS 4870 (9th Cir. BAP 2006, aff'd 239 Fed. Appx. 341 (9th Cir. 2007) – attorney fees arising from disputes over service of a mental health expert appointed to provide an opinion regarding custody and visitation were in the nature of support and non-dischargeable.

4. *In re Luetkenhaus,* 2016 Bankr. LEXIS 3115 (Bankr. D. Or. 2016) – even though claimant, while seeking attorney fees in state court, argued that debtor's bad conduct should not be rewarded, the bankruptcy court found that the state court "intended the award not as punishment for bad behavior but instead to compensate [claimant] for harm done from the unnecessary protracted litigation regarding the welfare of the child." Eighty per cent of the award was ruled not dischargeable; the remaining 20% represented fees incurred in matters other than child custody and parenting time.

5. *In re Luetkenhaus,* 2016 Bankr. LEXIS 4254 (Bankr. D. Or. 2016) – fees awarded to legal counsel appointed to represent the interest of the child were in the nature of support, even though counsel was not a "spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative.

6. *In re Moser*, 530 B.R. 872 (Bankr. D. Or. 2015) – state court changed custody from debtor to claimant and awarded claimant $20,000 in attorney fees. The attorney fee award was in the nature of support and therefore a DSO because the proceeding was one to determine the best interests of the child. The issue is whether the basis of the debt benefitted the child, not whether repayment will benefit the child.

V. *Post-Petition Support Obligations:*

A. Confirmation: A Chapter 13 plan cannot be confirmed unless debtor is current on all post-petition support obligations. 11 USC §1325(a)(8).

B. Discharge: Debtors are required to make all required post-petition DSO payments, and prior to receiving a discharge must certify that all such payments have been made. Notice of the certification must be served upon the recipient of the award. 11 USC §1328(a); LBF 525.

VI. *Co-Debtor Stay*: Unlike Chapter 7, Chapter 13 provides protection to co-debtors who are liable on consumer debts unless the debt was incurred in the ordinary course of business. The creditor may seek relief from stay, however, if the co-debtor received the consideration; the debtor's plan proposes not to pay the claim; or the creditor's interest would be irreparably harmed by continuation of the stay.