

N.D.A.G. Letter to Mehrer (March 13, 1991)

March 13, 1991

Mr. Owen K. Mehrer
Stark County State's Attorney
P.O. Box 130
Dickinson, ND 58601

Dear Mr. Mehrer:

Thank you for your December 20, 1990, letter requesting my opinion concerning the effect filing a bankruptcy petition has on a child support income withholding order entered pursuant to N.D.C.C. § 14-09-09.11. You also ask if the effect varies according to the chapter under which the bankruptcy petition is filed.

Child support obligations are not subject to discharge under any chapter of the Bankruptcy Code. 11 U.S.C. § 523(a)(5) (1988) provides:

- (a) 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 or 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;

Under this provision, the child support debt, including debt assigned as required by the AFDC program or to a governmental entity, may not be discharged.

In most instances, the filing of a bankruptcy petition stays all debt collection action, even though the debt may ultimately not be discharged. Again, an exception exists with respect

to child support obligations. 11 U.S.C. § 362 (1988) provides, in relevant part:

362. Automatic stay.

- (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), operates as a stay, applicable to all entities, of
 - (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
 - (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
 - (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
 - (4) any act to create, perfect, or enforce any lien against property of the estate;
 - (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
 - (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
 - (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
 - (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.
- (b) The filing of a petition under section 301, 302, or 303 of this title, or of

an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay

.....

- (2) Under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estates;

11 U.S.C. § 362(b)(2) (1988) excepts, from the stay, a collection of alimony, maintenance, or support from property that is not Property of the estate.

Post-petition earnings of individual debtors are usually not property of the estate. However, this rule is modified in Chapter 13 cases. Property of the estate under Chapter 13 includes: "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under Chapter 7, 11 or 12 of this title, whichever occurs first." 11 U.S.C. § 1306(a)(2) (1988). Therefore, in Chapter 13 cases, an income withholding order, which would otherwise affect post-petition earnings, is stayed upon filing of the Petition.

Nothing in the Bankruptcy Code or the legislative history concerning the enactment of 11 U.S.C. § 362(b)(2) (1988) and 11 U.S.C. § 1306(a)(2) (1988) explains, justifies, or even acknowledges that child support collections from post-petition earnings are stayed in Chapter 13 cases. In fact, H.R. Rep. No. 595, 95th Cong., 1st Sess. 342-43 (1977), concerning section 362(b)(2), describes the purpose for excepting alimony, maintenance, and support from the automatic stay in a manner which implies that post-petition earnings are not part of a Chapter 13 debtor's estate. The failure to address post-petition earnings has resulted in the development of a body of case law where the Chapter 13 debtor's former spouse and children are obliged to compete with other unsecured creditors for payments from the debtor's after-tax income under a plan. The case law reflects the conflict between the Chapter 13 policy that encourages debtors to repay their pre-petition debts from future income and two equally strong policies of federal and state law. Those two policies are the federal policy against interference in family law matters and state laws concerning the enforcement of support orders.

The federal policy against interference in family law matters is a well established principle based upon the premise that family law issues "are preeminently matters of state law." Mansell v. Mansell, 490 U.S. 581, 587 (1989). "There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional nature." Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977) (cites omitted). This policy has been frequently echoed in bankruptcy decisions concerned with the support issue. An example is In re Garrison, 5 Bankr. 256 (Bankr. E.D. Mich. July 17, 1980). Sitting en banc, the Garrison court reasoned that Congress did not intend the broad scope of changes brought by the enactment of section 362 and the automatic stay "to thwart and impede the enforcement of nondischargeable alimony and child support obligations by the states against those

who seek refuge in the bankruptcy courts." Id. at 259.

The Garrison court attempted to reconcile the Chapter 13 stay provisions with the general federal policy against interfering in state regulation of family matters. It held that the filing of a Chapter 13 petition did not automatically stay enforcement of such obligations, section 1306 notwithstanding, because "[t]hese sections were not intended to make the bankruptcy courts a sanctuary for those who would avoid alimony and support obligations." Id. at 260.

The significance of Garrison lies in its early recognition of the issue. Garrison has been followed in some cases, i.e., In re Sak, 21 Bankr. 305, 308 (Bankr. E.D. N.Y. June 29, 1982); In re Davidson, 72 Bankr. 384 (Bankr. D. Colo. Apr. 13, 1987). However, a number of courts have addressed the conflict in other ways.

Some courts lifted the stay in Chapter 13 cases, theorizing that arrears cannot be put through such a plan, i.e., In re Lanham, 13 Bankr. 45 (Bankr. C.D. Ill. May 28, 1981). The Fourth Circuit has held that including of past due child support obligations in a Chapter 13 plan precludes confirmation. Caswell v. Lang, 757 F.2d 608 (4th Cir. 1985). The Caswell court explained:

[I]t would result in great injustice to require children to await a bankruptcy court's confirmation of a debtor's Chapter 13 plan for permitting them to enforce their state court-determined right to collect past due support payments. The Bankruptcy Code may not be used to deprive dependents, even if only temporarily, of the necessities of life.

Equally important, a federal court may not interfere with the remedies provided by a state court in those areas of particular state concern, provided, of course, that these remedies are constitutional. To permit child support arrearages to be included in a Chapter 13 plan would invite a federal bankruptcy court to alter or modify a state court decision regarding the payment and discharge of the overdue debt. This we cannot countenance

....

The state court's determination respecting the rights of the parties in these areas of state concern should not be disturbed by federal bankruptcy courts. Past due child support obligations may not be included in a Chapter 13 plan under the Bankruptcy Code.

Id. at 610-11 (footnotes omitted).

Courts have confirmed Chapter 13 plans which provide for one hundred percent payment of the child support either "outside" the plan (In re Haag, 3 Bankr. 649 (Bankr. D. Or. May 1, 1980)) or within the plan (In re Storberg, 94 Bankr. 144 (Bankr. D. Minn. Dec. 5, 1988)).

(The cases on payment within the plan typically address fairness to other general creditors, i.e., In re Curtis, 2 Bankr. 43 (Bankr. W.D. Mo. Dec. 7, 1979).) At least one court has conditioned confirmation on the consent of the debtor's former spouse or her assignee. In re Davidson, 72 Bankr. 384 (Bankr. D. Colo. Apr. 13, 1987).

Although these cases suggest an outcome different than that provided by section 1306(a)(2), there has yet been no definitive reported decision from the bankruptcy courts of the district of North Dakota or from the Eighth Circuit Court of Appeals.

State law considerations can have obvious impacts in bankruptcy situations also. North Dakota law grants priority over any other legal process to income withholding orders issued to collect child support N.D.C.C. § 14-09-09.16(3). A Chapter 13 plan could limit payments on child support arrears to a far lower amount. A Chapter 13 plan could thus sharply restrict payments that the obligee would otherwise be entitled to seek under North Dakota law.

A state court has the power to modify the original support order, usually based upon evidence which demonstrates a substantial change in circumstances. A debtor can thus get relief if the amount ordered is too high in relation to the obligator's current income and expenses. That relief, however, is prospective only. N.D.C.C. § 14-08.1-05(1)(c). An obligor cannot challenge the amount of the prior support awards.

Unlike other debts, willful failure to make child support payments is punishable under the state court's contempt powers. N.D.C.C. § 14-09-08.1(1). The contemnor can be incarcerated. N.D.C.C. § 27-10-04.

The state's interest in assuring payment of support obligations is also related to the protection of the public fisc. A failure of child support payments often results in the cost of support being born through the Aid to Families With Dependent Children program. N.D.C.C. ch. 50-09. North Dakota requires the assignment of rights to collect child support as a condition of eligibility for AFDC benefits. N.D.C.C. § 50-09-06.

Harmonization of these various principles should, in almost all cases, provide for payment of 100 percent of the arrears at virtually the same rate of payment which the state court required. Similarly, payment of current support obligations should continue absent a determination, in the state court, that the child support obligation should be reduced. However, even though that is the likely outcome in any bankruptcy proceeding, care must be taken to avoid violation of the automatic stay until that outcome is reached. Therefore, from and after receipt of notice of a Chapter 13 filing by an obligor, until notice of the action taken on the petition is received, no action should be taken to punish an income payor for civil contempt for failing to comply with the requirements of N.D.C.C. § 14-09-09.16.

Once a Chapter 13 plan is confirmed (whether or not current support is "outside" the plan), an income withholding order may be entered or enforced with respect to current support obligations. "Thus, once a plan is confirmed, neither post-petition earnings nor

post-petition acquisitions are any longer properties of the estate." In re Bernstein, 20 Bankr. 595, 598 (Bankr. M.D. Fla. June 4, 1982), citing 11 U.S.C. § 1327(b),(c) (1982), which generally vests all property of the estate in the debtor upon confirmation. If the bankruptcy court denies confirmation of the plan or if the plan is converted to a Chapter 7 plan, there is no stay of child support collections.

An income withholding order may thus issue or be enforced.

Sincerely,

Nicholas J. Spaeth

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