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I. INTRODUCTION

In recognition of the social reality that marriage often does not last forever, divorce law in the United States has undergone radical changes in the past few decades.[1] All states have relaxed restrictions on divorce by adopting some form of no-fault divorce grounds.[2] In addition, recent developments have facilitated the termination of a married couple's relationship in economic terms as well. For instance, states today are less inclined to consider the role of marital fault in the settlement of the financial incidents of divorce,[3] and encourage divorcing couples to end their marriages by negotiation and contract in order to minimize the conflicts inherent in litigation.[4] Furthermore, although ensuring the protection of dependent family members remains an important state objective, contemporary family law promotes finality in the resolution of financial obligations between a divorcing couple whenever practical

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1. *See generally* J. BERNARD, THE FUTURE OF MARRIAGE (1972); M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); L. WEITZMAN, THE DIVORCE REVOLUTION (1985); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974).

2. In 1985 South Dakota became the last state to adopt a no-fault ground for divorce. *See* S.D. CODIFIED LAWS ANN. § 25-4-2 (1984 & Supp. 1987). For a state-by-state breakdown of divorce grounds, see 1985 *Survey of American Family Law*, 11 Fam. L. Rep. (BNA) 3015 (1985), and Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369, 379-83 (1985). Following the leads of California, CAL. CIV. CODE §§ 4506, 4507 (West 1983 & Supp. 1987), and the Uniform Marriage and Divorce Act, 9A U.L.A. 97, 147 (1987), both promulgated in 1970, approximately one-third of the states have replaced completely the traditional fault grounds with a single no-fault ground. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-312 (1956 & Supp. 1987); COLO. REV. STAT. § 14-10-110 (1973 & Supp. 1986); FLA. STAT. ANN. § 61.052 (West 1985 & Supp. 1987); MICH. COMP. LAWS ANN. § 552.6 (West 1967 & Supp. 1987). Other states have added a no-fault ground to existing fault grounds. *See, e.g.*, ILL. ANN. STAT. ch. 40, para. 401 (Smith-Hurd 1980 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 208 & § 1-1B (Supp. 1987); PA. STAT. ANN. tit. 23, § 201 (Purdon Supp. 1987); TEX. FAM. CODE ANN. §§ 3.01-3.07 (Vernon 1975 & Supp. 1987). The Prefatory Note to the Uniform Marriage and Divorce Act, 9A U.L.A. 147 (1987), noted that "there is virtual unanimity as to the urgent need for basic reform," especially with regard to the fault-based ground, described as "an unfortunate device which adds to the bitterness and hostility of divorce proceedings" and which has established an "ineffective barrier" to marriage dissolution at the price of perjury and disrespect for the law. *Id.* at 148.

3. *See* Freed & Walker, *supra* note 2, at 394-95 (outlining states' positions regarding the relevance of marital fault as a factor in property division and maintenance awards); *see also* L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY 255 (1983) (noting judicial reluctance to consider marital fault in property division in absence of direct authorization).

4. The Uniform Marriage and Divorce Act attempts to "reduce the adversary trappings of marital litigation" and to encourage parties "to make amicable settlements of their financial affairs." UNIF. MARRIAGE AND DIVORCE ACT prefatory note, 9A U.L.A. 147, 149 (1987).

by favoring property divisions and temporary spousal support awards as opposed to permanent alimony.[5] To the extent possible, then, current family law policy attempts to afford former spouses a fresh start by promoting finality and peaceable resolution.

A fresh start following divorce cannot always be achieved, however. In some cases continued support of a dependent spouse after divorce, as well as support of the couple's minor children, necessarily entails an indefinite or long-term series of payments. Property division also often must be accomplished by a series of post-divorce installment payments rather than an outright transfer of assets.[6] Furthermore, a spouse may have contracted or been ordered to assume liability for debts incurred jointly during marriage. Starting a fresh, single life may be costly, and maintaining two households instead of one obviously requires additional funds or a lower standard of living.[7] Financial burdens following divorce may prove to be more onerous than anticipated; consequently, many recently divorced persons find themselves in bankruptcy court in the wake of their marital breakup.[8]

Bankruptcy law, as well as modern divorce law, is grounded on fresh start principles: an underlying policy of bankruptcy law is to provide the honest debtor an economic fresh start.[9] Bankruptcy law achieves this goal, in part, by permitting discharge of certain debts existing at the time the bankruptcy petition is filed.[10] Discharge of a debt releases the debtor from further liability and bars the creditor from enforcement attempts.[11]

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5. *See id.* (describing property division "as the primary means of providing for the future financial needs of the spouses"). Section 308 of the Act authorizes maintenance for a spouse only if that spouse "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." *Id.* at 348.

6. Property division must be accomplished by means of installment payments when insufficient liquid assets exist or the marital assets themselves are physically awarded to one spouse alone. Typically, such assets include items such as the family home or an interest in an ongoing business or professional corporation.

7. Woodworth v. Woodworth, 126 Mich. App. 258, 269, 337 N.W.2d 332, 337 (1983) (indicating tbat "[t]he tablecloths . . . will not cover both tables"); *see* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 184 (1968).

8. A 1965 study revealed that one-third of the parties in bankruptcy proceedings had been involved in a divorce within the previous year. Shiffer, *The New Bankruptcy Reform Act: Its Implications for Family Law Practitioners*, 19 J. FAM. L. 1, 3 (1980-81) (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. I, at 42 (1973)). The financial strain that leads to bankruptcy may add to the deterioration of a marriage. *Id.*

9. *See* Local Loan Co. v. Hunt, 292 U.S. 234 (1934); Williams v. United States Fidelity & Guar. Co., 236 U.S. 549 (1915); Wetmore v. Markoe, 196 U.S. 68 (1904).

10. *See* 11 U.S.C. § 523(a) (1982 & Supp. III 1985).

11. 11 U.S.C. § 524 (1982 & Supp. III 1985). For a thorough overview of a typical bankruptcy

Countervailing policies, deemed superior to bankruptcy's fresh start policy, demand that some types of debts escape discharge in bankruptcy[12] and that the debtor remain liable for those nondischargeable obligations. Bankruptcy law long has regarded obligations for support of certain family members, namely spouses[13] and children, as one category of debts that should not be discharged.[14] The current Bankruptcy Code,[15] enacted in 1978, continues to acknowledge that certain divorce-related debts should remain intact following a bankruptcy action. Sec-

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proceeding, see White, *Strange Bedfellows: The Uneasy Alliance Between Bankruptcy and Family Law*, 17 N.M.L. REV. 1 (1987).

12. *See* 11 U.S.C.S. § 523(a) (Law. Coop. 1986 & Supp. 1987) (enumerating the debts that are not dischargeable by an individual debtor in a Chapter 7, 11, or 13 bankruptcy).

13. The exception includes former spouses. 11 U.S.C. § 523(a)(5) (1982 & Supp. III 1985). The use of the term "spouse" in this Article refers to former spouses as well as current spouses.

14. 11 U.S.C.S. § 523(a)(5) (Law. Coop. 1986 & Supp. 1987) excepts from discharge debts:

> 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.

See generally Freeburger & Bowles, *What Divorce Court Giveth, Bankruptcy Court Taketh Away: A Review of the Dischargeability of Marital Support Obligation*, 24 J. FAM. L. 587 (1985-86); Hoffman & Murray, *Obligations that Cannot Be Erased*, 5 FAM. ADVOC., Winter 1983, at 18; Munson, *Discharge of Post-Marital Support Obligations Under the New Bankruptcy Code*, 4 HARV. WOMEN'S L.J. 177 (1981); Ravin & Rosen, *The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations*, 60 AM. BANKR. L.J. 1 (1986); Shiffer, *supra* note 8; Staggs, *Bankruptcy After Divorce: Rights and Liabilities of Former Spouses in Texas*, 23 S. TEX. L.J. 173 (1982) (outlining Texas' classification of debts for dischargeability purposes); Swann, *Dischargeability of Domestic Obligations in Bankruptcy*, 43 TENN. L. REV. 231 (1976) (providing a detailed analysis of pre-Code case law); Tucker, *The Treatment of Spousal and Support Obligations Under Chapter 13 of the Bankruptcy Reform Act*, 45 TEX. B.J. 1359 (1982); White, *supra* note 11; Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L.J. 469 (1977) (discussing pre-Code law and projected effect of proposed 1973 amendments); Note, *The Effect of the Indiana Divorce Law upon the Application of Section 17a(7) of the Bankruptcy Act*, 12 IND. L. REV. 379 (1979) [hereinafter Note, *Indiana Divorce Law*] (discussing pre-Code law, with emphasis on Indiana law); Note, *Bankruptcy: Dischargeability of Divorce Related Expenses Under 11 U.S.C. § 523(a)(5)*, 35 OKLA. L. REV. 799 (1982) [hereinafter Note, *Dischargeability of Divorce Related Expenses*]; 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 (1983) [hereinafter Comment, *Dischargeability of Obligations*].

The exception from discharge for support obligations applies regardless of the type of bankruptcy proceeding involved. In most cases, the exception is relevant not only in a Chapter 7 liquidation, 11 U.S.C. § 727(a), or a Chapter 13 wage earner plan, 11 U.S.C. § 1328(a)(2), but may be applicable in a Chapter 11 reorganization as well. 11 U.S.C. § 1141(d)(2).

15. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1982 & Supp. III 1985).

tion 523(a)(5) of the Bankruptcy Code excepts from discharge a debt:

> 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 . . . .[16]

To retain its nondischargeable character, the debt may not be assigned to another party, except to certain governmental entities in connection with public assistance programs.[17] Perhaps most importantly, the obligation must be "*actually in the nature* of alimony, maintenance or support"[18] in order to escape discharge, regardless of the language used to describe the debt in the original instrument or decree.[19] Thus, a person who has been unable to achieve a complete fresh start through divorce because of continuing financial obligations to family members may find an economic fresh start in bankruptcy similarly thwarted.

In revising the earlier statutory exception to discharge for support debts,[20] Congress intended that federal law, not state law, should determine when an obligation is "actually in the nature" of alimony, maintenance, or support.[21] A tremendous volume of litigation has been generated under section 523(a)(5) largely because of the courts' failure to develop a clear federal standard for determining the nature of these debts. The major problem in formulating a federal standard has been distinguishing support-related debts from those incurred pursuant to property divisions. For, unlike a support obligation, an unpaid portion of a property division is not included within the statutory exception and is dischargeable as an ordinary debt.[22] In an individual case, there-

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16. 11 U.S.C. § 523(a)(5) (1982 & Supp. III 1985).

17. 11 U.S.C.S. § 523(a)(5)(A) (Law. Coop. 1986 & Supp. 1987) denies discharge of certain family related debts if they are assigned "involuntarily, by operation of law, or otherwise" to another entity "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."

18. *Id.* (empbasis added).

19. *Id.*

20. Act of Feb. 5, 1903, Pub. L. No. 57-62, ch. 487, § 5, 32 Stat. 797, 798 (amending Bankruptcy Act of 1898 ch. 541, § 17, 30 Stat. 544, 550 (repealed 1979)).

21. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320; S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865; *see also In re* Spong, 661 F.2d 6 (2d Cir. 1981).

22. *See* Boyle v. Donovan, 724 F.2d 681 (8th Cir. 1984); *In re* Maitlen, 658 F.2d 466 (7th Cir. 1981). When, however, the debtor holds specific property or the proceeds thereof, which were previously awarded to the spouse, the obligation to deliver or pay over is not dischargeable. *In re* Dunlap, 15 Bankr. 737 (Bankr. W.D. Mo. 1981). Courts may treat a failure to pay a spouse a lump sum payment pursuant to a property division as an action for reclamation or relief from the stay, rather than as a dischargeability issue. *In re* Underwood, 17 Bankr. 417, 419 (Bankr. W.D. Mo. 1981). Alternatively, courts may consider the failure as nondischargeable under § 523(a)(6) (willful or malicious injury to property). *Id.* Similarly, in *In re* Teichman, 774 F.2d 1395 (9th Cir. 1985),

fore, the precise classification of the obligation becomes critical.

Much of the lack of clarity and consistency in the cases attempting to distinguish support obligations from payments made pursuant to property divisions results from a failure to recognize the distinct theoretical foundations of the two concepts. Property division is a separation of ownership rights, legal or equitable,[23] while support is a continuation of the duty imposed by operation of law because of the status of the parties as husband and wife or parent and child.[24] The failure on the part of many state courts to recognize as discrete doctrines the fundamental principles governing alimony, maintenance, and support,[25] on the one hand, and property division, on the other, often has led to reclassification of debts when bankruptcy courts apply federal law.[26] Consequently, neither the debtor nor the obligee can rely entirely on the original decree or agreement.

Additional problems related to differentiating support-related debts from property division debts occur because of the recent trend in state courts to favor property division and new forms of short-term spousal support awards over traditional permanent alimony whenever

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the Ninth Circuit held that post-petition payments to the wife of the debtor's Air Force retirement benefits were the wife's property and thus were not subject to discharge. The court found that prepetition arrearages, concededly arising from a property division, were dischargeable and that § 523(a)(4) (nondischarge of debts for fraud or defalcation as a fiduciary) did not apply because the court could discern no valid trust arrangement between the parties. *Id.*; *accord In re* Hall, 51 Bankr. 1002 (Bankr. S.D. Ga. 1985) (husband's military retirement pay awarded wife is wife's property interest, not dischargeable debt); *cf. In re* Boyd, 31 Bankr. 591 (Bankr. D. Minn. 1983) (wife's lien on homestead pursuant to divorce decree constitutes her property interest in real estate, which is not avoidable by debtor), *aff'd*, 741 F.2d 1112 (8th Cir. 1984).

23. H. CLARK, *supra* note 7, at 450.

24. *Id.* at 187-88. Because determining whether a debt is an obligation for child support is usually relatively simple, *see* White, *supra* note 11, at 28, this Article focuses primarily on post-divorce spousal support. The Article addresses child support only as a reference to related principles.

25. Although on occasion courts have purported to distinguish between alimony, maintenance, and support, *see, e.g., In re* Crist, 632 F.2d 1226, 1233 n.11 (5th Cir. 1980), *cert. denied sub nom.* Crist v. Crist, 451 U.S. 986, 454 U.S. 819 (1981), the terms generally are used synonymously with respect to a post-marital obligation to a former spouse. Alimony historically was a court-ordered amount of money awarded to substitute for the marital duty of support owed to a wife by her husband after their legal relationship terminated. Today, the terms "maintenance" or "support" generally are preferred, *see* UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147 (1987), because alimony has a connotation of fault, although, in substance, the terms all relate to the provision of sustenance or means of living. *See* BLACK'S LAW DICTIONARY 67 (5th rev. ed. 1979) (alimony); *id.* at 859 (maintenance); *id.* at 1291 (support). This Article, therefore, uses the terms interchangeably, with a focus on support.

26. For discussions of the lack of clarity between support and property at the state level, see Feder, *The Contempt Dilemma: Support vs. Property and Third Party Debts (Part 2)*, FLA. B.J., Jan. 1985, at 67, and Comment, *California Divorce Agreements—Alimony or Property Settlement?*, 2 STAN. L. REV. 731 (1950).

practical.[27] Although property division and temporary support awards may fulfill the function of supporting a dependent, their non-traditional forms potentially subject many of those debts to discharge in bankruptcy. While bankruptcy courts will look behind the parties' labels or the state-law classification of a debt,[28] the federal courts have yet to arrive at a uniform and comprehensive federal standard for categorization.

This Article evaluates the major issues confronted by the courts in determining dischargeability of divorce-related debts and analyzes the courts' treatment of those issues. This Article attempts to resolve the inconsistencies and ambiguities in the existing bankruptcy law by reconciling the history and statutory language of section 523(a)(5) with the conflicting policies of providing the debtor an economic fresh start, while assuring the debtor's dependents a continuing source of support. This Article proposes a federal approach that accommodates non-traditional and innovative forms of support and that is consistent with contemporary state family law policies regarding continued support following family dissolution.

To arrive at a uniform federal definition of nondischargeable debts under section 523(a)(5), the courts must consider not only the development of the support exception under bankruptcy law, but the historical bases of intrafamily support obligations and the current role of support in modern family law. Part II of this Article outlines current state-law concepts of support and property division and concludes that support is a relative concept based on the traditional doctrine of "necessaries." Part III illustrates that, historically, bankruptcy law paralleled family law in defining support until the emergence of non-traditional forms of support obscured the underlying nature of support obligations. Part IV recommends an analytical framework, suggested by the 1983 Sixth Circuit decision in *In re Calhoun*,[29] that federal courts can utilize to resolve the problems of classification for dischargeability purposes. This analysis invokes and revitalizes the "necessaries" doctrine, which will result in a federal bankruptcy standard of support that is consistent with the role of support in modern divorce law.

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27. *See supra* note 5 and accompanying text.

28. 11 U.S.C. § 523(a)(5)(B) (1982 & Supp. III 1985); *see, e.g.*, Pepper v. Litton, 308 U.S. 295 (1939), *rev'g* 100 F.2d 830 (4th Cir. 1939); Stout v. Prussel, 691 F.2d 859 (9th Cir. 1982).

29. 715 F.2d 1103 (6th Cir. 1983).

II. STATE LAW DEVELOPMENT

A. *Post-Marital Spousal Support*

The common-law duty of support, exclusively a function of state law,[30] required a man to support his wife and children solely because of their legal relationship.[31] The duty was based on the notion of dependency, which, although presumed in all cases, was real in most instances.[32] When the family unit was intact, courts were reluctant to interfere with a man's discretion in setting the level of support and presumed that the duty of support was fulfilled.[33]

Courts tempered this attitude of noninterference with the doctrine of necessaries, which protected dependents from nonsupport by holding a husband or father liable to third parties who supplied essential goods or services to his dependents when the husband or father failed to provide those items himself.[34] The scope of the necessaries doctrine de-

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30. Under the "domestic relations exception" to federal subject matter jurisdiction, developed in a long line of cases beginning with Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859), the federal courts have refused to hear cases involving family law matters, including issues of support, despite the existence of diversity of citizenship. *See, e.g., In re* Burrus, 136 U.S. 586, 593-94 (1890); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975), *rev'g* 373 F. Supp 1036 (E.D. Pa. 1974). Although the doctrine has eroded to some extent, *see* Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d. 509 (2d Cir. 1973), it nevertheless remains vital with respect to the common-law duty of support.

31. *See* W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 281 (1983); *see also* H. CLARK, *supra* note 7, at 181.

32. H. CLARK, *supra* note 7, at 181.

33. *See* McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953); H. CLARK, *supra* note 7, at 181.

34. One commentator describes the necessaries doctrine as the common law's "customary method for enforcing the husband's duty to support his family [by permitting] the wife or child to buy what they needed and charge it to the husband . . . . [T]he husband was thereby made responsible directly to the merchant who supplied the goods to the wife or child." H. CLARK, *supra* note 7, at 189.

The necessaries doctrine, however, had a number of qualifications. For instance, courts refused to apply the doctrine to money or articles gratuitously supplied to wives or children; nor would courts find the husband liable when the husband previously had supplied his dependents with necessaries. Furthermore, if the wife wrongfully lived apart from her husband, he incurred no liability. Some courts held the doctrine inapplicable if merchants extended credit directly to the husband. Because of the risk to the merchant or supplier, the doctrine had limited value in enforcing the duty of support. *Id.*

Although the common-law necessaries doctrine created liability only in the husband or father, more recent decisions have extended its application to both spouses. *See* Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 417 A.2d 1003 (1980); Richland Memorial Hosp. v. Burton, 282 S.C. 159, 318 S.E.2d 12 (1984); *In re* Estate of Stromsted, 99 Wis. 2d 136, 299 N.W.2d 226 (1980). The Supreme Court of Virginia took the opposite approach and judicially abolished the doctrine as outdated and violative of equal protection. Shilling v. Bedford County Memorial Hosp., 225 Va. 539, 303 S.E.2d 905 (1983). The Virginia legislature, however, reinstated the doctrine, declaring it equally applicable to both spouses. *See* VA. CODE ANN. § 55-37 (1986); *see also* Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221 (1983-84); Note, *The Unnecessary Doctrine of Neces-*

pended on the family's standard of living and the man's ability to provide;[35] support, therefore, was defined in terms of relative need, even within the context of an ongoing family relationship.

The idea of need as a relative concept was used by state courts to set the actual measure of support upon dissolution of the family unit. After divorce,[36] courts determined the level of support owed former wives[37] with reference to the standard of living enjoyed during the marriage, which meant balancing the needs of the wife against the means and ability of the husband, according to the parties' station in life.[38]

Although the concept of post-marital spousal support in the form of alimony is somewhat incongruous, since the underlying basis for the support obligation—the marriage itself—has terminated,[39] courts have justified alimony as a means of protecting society at large from the burden of providing for destitute former wives.[40] Furthermore, in the past, alimony generally was available only to an innocent wife because it was meant to compensate an injured woman who had been deprived of her means of support and legitimate expectations through no fault of her own,[41] while punishing her derelict husband.[42]

Alimony could be ordered as a liquidated amount, payable from the husband's existing property, in a lump sum or installments.[43] More typically, alimony was awarded on a permanent basis,[44] payable period-

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saries, 82 MICH. L. REV. 1767 (1984); Comment, *The New Doctrine of Necessaries in Virginia*, 19 U. RICH. L. REV. 317 (1985).

35. H. CLARK, *supra* note 7, at 190 (defining necessaries as "articles or services reasonably appropriate for the support of wife and child, bearing in mind botb their needs and the husband's means," or "whatever is suitable to the family's economic position"); *see* State v. Clark, 88 Wash. 2d 533, 563 P.2d 1253 (1977) (construing family expense statute as broadly as necessaries doctrine, including liability for wife's legal expenses); *see also* Long v. Carter, 39 N.M. 255, 44 P.2d 1040 (1935) (necessaries include more than absolute essentials).

36. Courts intervened when the family separated without dissolving the legal marital relationship, as well as when an absolute divorce was granted. *See* W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 894, 994-98 (successor ed. 1984).

37. The same general principles applied to the father's duty to support his cbildren who were not in his custody. *See* H. CLARK, *supra* note 7, at 188.

38. *See id.* at 198-99, 441-45.

39. *Id.* at 421.

40. *See* Burteff v. Burtoff, 418 A.2d 1085 (D.C. 1980); Alibrando v. Alibrando, 375 A.2d 9 (D.C. 1977); Majette v. Majette, 261 A.2d 824 (D.C. 1970); *cf.* Newman v. Newman, 653 P.2d 728 (Colo. 1982) (state interested in maintenance provision in antenuptial contract to prevent spouse from becoming public charge).

41. *See* H. CLARK, *supra* note 7, at 420.

42. *Id.* at 421-22; Martin v. Martin, 366 So. 2d 475 (Fla. Dist. Ct. App. 1979); Oliver v. Oliver, 285 So. 2d 638 (Fla. Dist. Ct. App. 1973).

43. *See* H. CLARK, *supra* note 7, at 447 (noting that some states do not permit alimony in gross, absent statutory authority).

44. The term "permanent alimony" does not imply that the payments may not be terminated or modified upon showing of sufficient change of circumstances; rather, the term refers to alimony payable in installments over an indefinite period that may be terminated upon the occur-

ically from the husband's future income.[45] Although its form could vary, alimony was always based in theory on the marital duty of support. Therefore, in determining the appropriate amount of alimony in an individual case, courts defined the general level of support by evaluating the parties' relative financial circumstances.[46] Need, therefore, was the primary criterion for calculating support, but relative need, not absolute need, was the relevant standard.[47] Because of the historical compensatory and punitive aspects of alimony, however, marital fault was often a major factor in the support calculation, despite its lack of relationship to actual need.[48]

At least in earlier times, alimony often was imperative because married women had severely limited property rights and were seldom equipped to be self-supporting.[49] As states removed legal restrictions on married women[50] and women began entering the job market in greater numbers,[51] however, alimony lost much of its conceptual justification, because many divorced women were capable of supporting themselves. In recent years, not only have courts extended the duty of marital and post-marital support to both spouses irrespective of gender,[52] but the

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rence of some contingency. *See* Couzens v. Couzens, 140 Mich. App. 423, 428, 364 N.W.2d 340, 343 (1985); Welch v. Welch, 112 Mich. App. 524, 526, 316 N.W.2d 258, 259 (1982).

45. *See* H. CLARK, *supra* note 7, at 447 (noting a preference for periodic alimony even when alimony in gross is authorized).

46. *See id.* at 443-47.

47. *See* W. WEYRAUCH & S. KATZ, *supra* note 31, at 315. Factors considered in determining the amount of alimony varied among jurisdictions, but generally included such factors as the age, health, education, and work skills of the parties, the length of the marriage, and the custody of minor children. *See* H. CLARK, *supra* note 7, at 442-48. While the extent of the husband's assets was relevant, the wife's own property sometimes was not a permissible factor to consider in setting the amount of an alimony award. *See* Bowzer v. Bowzer, 236 Mo. App. 514, 155 S.W.2d 530 (1941); McLaughlin v. McLaughlin, 207 Misc. 700, 142 N.Y.S.2d 407 (N.Y. Sup. Ct. 1955).

48. *See* W. WEYRAUCH & S. KATZ, *supra* note 31, at 314-16.

49. *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (Cooley 4th ed. 1899); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 525-27 (3d ed. 1923); W. WEYRAUCH & S. KATZ, *supra* note 31, at 281, 314; Bartke & Zurralec, *The Low, Middle and High Road to Marital Property Reform in Common Law Jurisdictions*, COMMUNITY PROP. J. 201-02 (1980); Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1272-76 (1981).

50. Near the beginning of the twentieth century, every state enacted Married Women's Property Acts, which removed many of the legal disabilities imposed on married women and permitted them to own property. H. CLARK, *supra* note 7, § 7.2; *see, e.g.*, FLA. STAT. ANN. § 708.08 (West 1969 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 209 (West 1958 & Supp. 1987). *See generally* Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3 (1985) (outlining history of Oregon married women's property law).

51. *See* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 606-07 (3d ed. 1985). About half of married women, however, especially those with preschool children, still are not employed outside the home, and women's earning power continues to lag substantially behind that of men. *See* J. KRAUSKOPF, CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION 5-6 (1983).

52. *See* Orr v. Orr, 440 U.S. 268 (1979) (statute authorizing alimony for wives, but not hus-

emphasis has shifted to actual dependency and need, relative to the parties' overall circumstances, as the primary criteria for continuing spousal support after the dissolution of marriage.

Non-traditional forms of support have evolved during the past few decades. Temporary support, in the form of rehabilitative alimony, frequently is promoted to encourage and facilitate self-support and to eliminate a perpetual drain on a former supporting spouse.[53] Additionally, certain types of intangible marital acquisitions or achievements that have economic implications do not fit neatly into traditional dissolution awards.[54] To compensate the spouse who contributed to these intangible "assets" for lost financial expectations caused by divorce, and to avoid unjust enrichment of the acquiring spouse, many courts recently have developed a hybrid type of award, often referred to as reimbursement alimony.[55] Although clearly capable of functioning as

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bands, is unconstitutional), *rev'g* 351 So. 2d 904 (Ala. Civ. App. 1977); Murphey v. Murphey, 103 Idaho 720, 653 P.2d 441 (1982) (interpreting statute to apply benefits in gender-neutral manner; statute subsequently replaced by nondiscriminatory IDAHO CODE § 32-705 (1983)); *see also* FLA. STAT. ANN. § 61.08 (West 1975). In practice, however, the wife usually remains the dependent spouse and recipient of alimony. Munson, *supra* note 14, at 177.

53. *See* W. WEYRAUCH & S. KATZ, *supra* note 31, at 320; Otis v. Otis, 299 N.W.2d 114 (Minn. 1980); Lovato v. Lovato, 98 N.M. 11, 644 P.2d 525 (1982). *But cf.* Walter v. Walter, 464 So. 2d 538 (Fla. 1985) (indicating that preference for rehabilitative alimony does not limit court to awarding permanent alimony only as last resort); *see also* Comment, *Rehabilitative Alimony—A Matter of Discretion or Direction?*, 12 FLA. ST. U.L. REV. 285 (1984).

54. Typically these intangible "assets" include professional degrees, licenses, and practices, and various types of employment benefits that were acquired by one spouse during the marriage with the other partner's assistance by means of financial contribution, household services, emotional support, or foregone opportunity. In O'Brien v. O'Brien, 66 N.Y.2d 576, 587, 489 N.E.2d 712, 717, 498 N.Y.S.2d 743, 748 (1985), the court observed: "Limiting a working spouse to a maintenance award, either general or rehabilitative, not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the Legislature sought to extinguish by equitable distribution." The *O'Brien* court concluded that a wife acquired a property interest in her husband's medical license for purposes of equitable division of marital property. 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748; *see also In re* Marriage of King, 150 Cal. App. 3d 304, 197 Cal. Rptr. 716 (1983) (property interest in business developed during marriage includes goodwill); *In re* Marriage of White, 98 Ill. App. 3d 380, 424 N.E.2d 421 (1981) (same); *In re* Marriage of Hull, 712 P.2d 1317 (Mont. 1986) (goodwill in medical practice is marital property); Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (1983) (goodwill in professional practice constitutes marital property). *But see* Powell v. Powell, 231 Kan. App. 2d 456, 648 P.2d 218 (1982) (goodwill not subject to division on divorce); Archer v. Archer, 303 Md. 347, 493 A.2d 1074 (1985) (professional degree is not property); Lehmicke v. Lehmicke, 339 Pa. Super. 559, 489 A.2d 782 (1985) (same); Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 343 (Wis. Ct. App. 1981) (same). *See generally* Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 771 (1982); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980).

55. *See* CAL. CIV. CODE § 4800.3 (West Supp. 1987) (providing that payments made from community property for education or training of spouse or for repayment of loan for same reimbursable on divorce; consideration of education, training, or enbancement or amount of reimbursement for purposes of awarding support not limited by this statute). *See generally* Note,

support, reimbursement alimony is difficult to classify as either support or property division. These non-traditional forms of support, as well as lump sum alimony, may lack the formal features of conventional concepts of support. Furthermore, the role of property division in divorce, which often fulfills the role of support, has overshadowed the importance of alimony.

B. Property Division

Although most states continue to authorize alimony under appropriate circumstances, property division has become the focal point in resolving the economic incidents of marriage at the time of divorce. The Uniform Marriage and Divorce Act, as well as many state statutes, require a couple's property to be divided prior to determining whether continued support should be ordered; a dependent spouse's post-divorce need is to be evaluated in light of the property so distributed.[56] At least when sufficient marital property exists, property division can permit a dependent spouse to become totally or partially self-supporting and can enable a couple to sever their relationship more completely and finally.

Except in the eight community property states,[57] which deem most property acquired during marriage to be owned equally by the spouses,[58] ownership of a married couple's property traditionally has been attributed to title.[59] In the past, and to a significant extent today, title usually could be traced to the husband as the primary wage earner in the marital relationship. Thus, to divide property on divorce was to allocate most of the accumulations of the marriage to the husband—a result widely regarded as inequitable.[60] Societal and legal concepts of

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Matrimonial Law—Equitable Distribution—Nature of a Professional Degree—Traditional Alimony Can Be Restructured to Provide Reimbursement to a Spouse Who Supports His or Her Partner in the Quest for an Advanced Degree—Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), 14 SETON HALL 437 (1984).

56. *See* UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 347-48 (1987); MINN. STAT. ANN. § 518.55 (West 1978 & Supp. 1987); TENN. CODE ANN. § 36-5-101(d)(7) (1984 & Supp. 1987).

57. The eight traditional community property states are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. Wisconsin, historically a common-law property state, adopted a community property system in 1983 hy enacting the Uniform Marital Property Act. 1983 Wis. Laws 186, §§ 8-20 (codified at WIS. STAT. ANN. § 766 (West Supp. 1986)).

58. *See generally* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971); W. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES (1982).

59. *See* Comment, *supra* note 49. About half the common-law jurisdictions permitted reallocation of separately titled property upon divorce prior to the enactment of equitable distribution statutes, although application of those statutes has been severely limited. *See* R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS, app. B, Property Divisions (1968), *cited in* J. KRAUSKOPF, *supra* note 51, at 8.

60. *See* Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1036 (1972); Krauskopf &

marriage have shifted toward the community property view of marriage as a partnership enterprise. This view recognizes that a spouse who contributed to the relationship in nonmonetary, intangible ways, as well as the party who supplied the funds for acquisitions, should share in the accumulated property when the marriage terminates by divorce. Today, all common-law jurisdictions allocate property upon divorce based on theories of equitable distribution, which acknowledge ownership rights of both marital partners in a manner comparable to community property theory.[61]

Although variations exist among equitable distribution schemes,[62] the general approach is the same: once a court isolates the divisible pool of property, it allocates the property between the spouses in an equitable manner.[63] Courts determine the proportionate share of property to which each spouse is entitled by applying a variety of factors generally related to the spouses' needs, their capacity for self-support and ability to acquire further property after divorce,[64] as well as their respective tangible and intangible contributions to the acquisition of property dur-

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Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45 (1981).

61. *See* Freed & Walker, *supra* note 2. The community property states, except for California, New Mexico, and Louisiana, permit unequal division of community assets at divorce. *See* J. KRAUSKOPF, *supra* note 51, at 13.

62. Two general types of equitable distribution systems have been adopted in common-law jurisdictions: the "all property" and "dual property" approaches. "All property" statutes subject all assets to distribution, regardless of how or when the assets were acquired, *see, e.g.*, CONN. GEN. STAT. ANN. § 46b-81(a) (West 1986 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1987); MICH. COMP. LAWS ANN. §§ 552.19, 552.23, 552.407 (1967 & Supp. 1987); NEB. REV. STAT. § 42-365, 42-366 (1984). "Dual property" statutes require that property be categorized as either marital or separate and permit division of only the former, *see, e.g.*, ILL ANN. STAT. ch. 40, para. 503 (Smith-Hurd 1980 & Supp. 1987); MICH. COMP. LAWS ANN. § 518.54 (1969 & Supp. 1987); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1987); N.Y. DOM. REL. LAW § 236(B)(5) (Consol. 1986 & Supp. 1987), which constitutes an application of community property principles for the limited purpose of distribution on divorce. *See* J. KRAUSKOPF, *supra* note 51, at 14-16; Scheible, *Marital Property in Tennessee: An Evolution, Not a Revolution*, 15 MEM. ST. U.L. REV. 475, 485 (1985).

63. Some jurisdictions presume an equal division, absent facts that indicate such a division would be unfair. *See, e.g.*, IDAHO CODE § 32-712(1)(a) (1983 & Supp. 1987); N.C. GEN. STAT. § 50-20(c) (Supp. 1986); *see also* Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. REV. 165, 176-77 (1976) (stating that presumption of equal division consistent with partnership theory of marriage). Most states apply a statutory or judicially created list of factors to determine the equitable share of each spouse. *See, e.g.*, ILL. ANN. STAT. ch. 40, para. 503 (Smith-Hurd 1980 & Supp. 1987); TENN. CODE ANN. § 36-4-121(e)(2) (Supp. 1987); *cf.* Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 31-32 (1981) (noting that presumption of equal division could result in inadequate consideration of relevant factors).

64. *See* J. KRAUSKOPF, *supra* note 51, at 226 (indicating that the major purpose of many states' equitable law is to provide for future support needs); UNIF. MARRIAGE AND DIVORCE ACT prefatory note, 9A U.L.A. 147 (1987) (asserting that property division should be primary means of providing for future support).

ing the marriage.[65] Many factors in the property division analysis are similar to those applied in awarding alimony, although marital fault typically is excluded from consideration in property division.[66]

While ideally, in either community property or equitable distribution states, property division is accomplished by physically separating the couple's assets, the division frequently must be achieved or supplemented by one spouse's payment of a fixed sum of money to the other in installments over time or by one spouse's assumption of sole responsibility for specified marital debts. Regardless of how it is accomplished, property division often operates to provide support for a dependent spouse. Therefore, in form and in function, a property division debt frequently resembles a support debt.

C. Private Contracting

Contracts between divorcing couples further may obscure the distinctions between property division and support obligations. In the recent past, state law severely restricted married couples in their legal ability to contract with each other prior to, during, and at the termination of marriage, especially if the couple attempted to alter the marital duty of support.[67] Today, states grant married couples significant freedom in contracting between themselves with respect to their property rights[68] and, to a lesser extent, post-marital support.[69] Antenuptial con-

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65. *See, e.g., In re* Marriage of McMahon, 82 Ill. App. 3d 1126, 403 N.E.2d 730 (1980); *In re* Marriage of Cornell, 550 S.W.2d 823 (Mo. Ct. App. 1977); *In re* Marriage of Knudson, 186 Mont. 8, 606 P.2d 130 (1979).

66. *See* UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 147, 238-39 (1987); *see also supra* note 3 and accompanying text. One commentator notes that marital fault is "one of the most controversial issues" in property division. L. GOLDEN, *supra* note 3, at 255.

67. *See* Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819 (1981); W. WADLINGTON, *supra* note 36, at 1137; *see also In re* Duncan's Estate, 87 Colo. 149, 285 P. 757 (1930) (voiding antenuptial agreement providing for property division on divorce as promoting dissolution); Romeo v. Romeo, 84 N.J. 289, 418 A.2d 258 (1980) (reversing common law to extent that employee spouse may recover worker's compensation benefits).

68. *See* Posner v. Posner, 233 So. 2d 381 (Fla. 1970) (permitting premarital contracts for property division if stringent test for validity met); Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962) (same). *See generally* S. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS (1984); A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS (1985); Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984).

69. *See* Sharp, *supra* note 67, at 861-65; Newman v. Newman, 653 P.2d 728 (Colo. 1982) (applying conscionability standard to maintenance provisions of antenuptial contract, but not to property division terms); Posner v. Posner, 233 So. 2d 381 (Fla. 1970) (support terms of premarital agreement may be modified to reflect change of circumstances since original contract). Contracts purporting to waive or eliminate the duty of support remain invalid in a few jurisdictions. *See* Mulford v. Mulford, 211 Neb. 747, 320 N.W.2d 470 (1982); Duncan v. Duncan, 652 S.W.2d 913 (Tenn. Ct. App. 1983).

tracts, property settlements, and separation agreements are encouraged in divorce cases,[70] provided the parties comply with certain fairness and disclosure requirements.[71] More often than not, divorcing parties today will negotiate an agreement or stipulate to terms regarding their economic interests rather than litigate them.[72]

Negotiation of a post-marital contract allows the parties to extend support obligations beyond the time and to a greater extent than the law otherwise would impose.[73] On the other hand, contractual waivers of spousal support generally are enforceable,[74] as are agreements concerning post-divorce treatment of the contractual terms.[75] A dependent spouse may be willing to waive or accept a lower amount of support in exchange for a more favorable property settlement. In such cases, a property settlement obviously functions as support.

The same factors that a court would consider in a litigated case generally influence a divorcing couple's private negotiations; the poten-

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70. *See* UNIF. PREMARITAL AGREEMENT ACT, 9A U.L.A. 419 (Supp. 1987); UNIF. MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 147, 216-17 (1987).

71. *See In re* Estate of Benker, 416 Mich. 681, 331 N.W.2d 193 (1982) (discussing elements of valid antenuptial agreement, including presumption of nondisclosure); Levine v. Levine, 56 N.Y.2d 42, 436 N.E.2d 476, 451 N.Y.S.2d 26 (1982) (presenting standards for valid separation agreement); FLA. STAT. ANN. 732.702 (West 1976 & Supp. 1987) (indicating that disclosure not required if contract executed prior to marriage but required if executed after marriage); VA. CODE §§ 20-147 to -154 (Supp. 1987); UNIF. PREMARITAL AGREEMENT ACT, 9A U.L.A. 419 (Supp. 1987); UNIF. MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 147, 216-27 (1987) (separation agreement). *See generally* Sharp, *supra* note 67, at 832-38; Sharp, *supra* note 68, at 1407-60.

72. *See* Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525, 530 (1984) (estimating 85% to 90% of divorce actions resolved by negotiation); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1195 (1981) (noting increased use of private settlements); *see also* W. WADLINGTON, *supra* note 36, at 1137.

73. *See* Simpson v. Simpson, 108 So. 2d 632 (Fla. Dist. Ct. App. 1959) (estate of father bound by separation agreement to continue child support); Bell v. Bell, 393 Mass. 20, 468 N.E.2d 859 (1984) (holding that clause providing that alimony should terminate upon wife's cohabitation with appearance of marriage enforceable), *cert. denied*, 470 U.S. 1027 (1985); Taylor v. Gowetz, 339 Mass. 294, 158 N.E.2d 677 (1959) (holding that alimony payments enforceable against estate); *cf.* Knox v. Remick, 371 Mass. 433, 358 N.E.2d 432 (1976) (stating that cohabitation clause to be interpreted narrowly; support should not be contingent on unjust and unreasonable conditions because of inferior bargaining power of wife).

74. *See* Newman v. Newman, 653 P.2d 728 (Colo. 1982); Posner v. Posner, 233 So. 2d 381 (Fla. 1970). Child support, on the other hand, may not be contracted away. *See* Kaiser v. Kaiser, 290 Minn. 173, 186 N.W.2d 678 (1971); UNIF. MARRIAGE AND DIVORCE ACT § 306(f), 9A U.L.A. 147, 217 (1987).

75. For example, the parties' contractual agreement to bar modification of a spousal support award will be upheld in some jurisdictions, even when the agreement has been merged into a court decree. *See* Lay v. Lay, 162 Colo. 43, 425 P.2d 704 (1967); Kaiser v. Kaiser, 290 Minn. 173, 186 N.W.2d 678 (1971). *But see* Spingola v. Spingola, 91 N.M. 737, 580 P.2d 958 (1978) (alimony provision merged into decree may be modified despite contractual term to the contrary); C. FOOTE, R. LEVY & F. SANDER, *supra* note 51, at 722 (observing that most courts hold power to modify support provisions unaltered by parties' agreement).

tial for litigation if a husband and wife cannot agree will color their demands and expectations.[76] Thus, a spouse may be willing to forgo some rights or make certain economic concessions if the likelihood of a contested divorce exists or the spouse is anxious to end the marriage. Additionally, the couple must reach an agreement that will be acceptable to the divorce court. The divorce decree frequently merges the private agreement, converting the contract into a judicial order.[77] Thus, because the same principles will guide both a contractual arrangement and a court order, the contractual arrangement will accommodate the dependent spouse's actual needs regardless of its final form.

D. Implications of Categorization

A clear theoretical basis exists for distinguishing support, which is based on a spouse's legal duty, from property division, which is based on ownership. In practice, however, precise classification of a debt as one or the other is often difficult because of the formal and functional similarities between spousal support and property division.[78]

In the past, characterization of an obligation by a state court as either support or property division could result in crucial differences in post-divorce treatment of the obligation. Support payments lasted only for the lifetime of either party because the duty of support ended on death of either.[79] Similarly, remarriage of the recipient generally terminated the obligation to pay support, because the new spouse incurred the duty.[80] The divorce court usually retained jurisdiction of support

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76. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

77. *See* Johnston v. Johnston, 297 Md. 48, 465 A.2d 436 (1983); Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964). Court-decreed support provisions, although usually not property division provisions, differ from mere contractual terms in that the court may modify them upon change of circumstances and may enforce them through contempt proceedings. Whether contractual terms have been merged into a decree or whether they survive independently has been a continuing constructional problem. *See* Sharp, *supra* note 67, at 847-53; *see also* C. FOOTE, R. LEVY & F. SANDER, *supra* note 51, at 721-23; Comment, *Divorce Agreements: Independent Contract or Incorporation in Decree*, 20 U. CHI. L. REV. 138 (1952).

78. The difficulty stems not only from the similarities of form and function but also because the language used to create an obligation in either a court decree or a private agreement frequently is imprecise and ambiguous. Property divisions and support obligations are often created in a single, integrated instrument, with little or no delineation as to the precise nature of its terms. Sharp, *supra* note 67, at 826-27.

79. *See* H. CLARK, *supra* note 7, at 461-63.

80. *Id.*; Price v. Price, 243 Ga. 4, 252 S.E.2d 402 (1979); UNIF. MARRIAGE AND DIVORCE ACT § 316(b), 9A U.L.A. 147, 490 (1987). Furthermore, a numher of jurisdictions have enacted statutes that terminate support when the recipient lives in unmarried conjugal cohabitation. *See, e.g.*, ILL. ANN. STAT. ch. 40, para. 510(b) (Smith-Hurd 1980 & Supp. 1987). The majority of these jurisdictions apply an economic test te determine whether cobabitation should affect spousal support. *See* Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Along or with Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453 (1980 &

orders indefinitely and could modify the obligation upon a material change of circumstances concerning either party's relative need or ability to pay.[81] In addition, the recipient could enforce judicially ordered support payments by invoking the court's contempt power.[82] The distinction between support and property division was relevant on the federal level as well: the Internal Revenue Code made qualifying spousal support deductible from the payor's income for tax purposes, with a corresponding recognition of taxable income to the recipient.[83]

Converse principles applied to property division obligations. Courts regarded property division as final and treated an award of payments pursuant to a property division as an ordinary debt.[84] At the death of either party, unpaid amounts were enforceable by the recipient's estate against the payor's estate,[85] and property division debts were unaffected by remarriage or other change of circumstances.[86] Even when the terms of a property settlement were merged into a court decree, the court could not enforce a property division debt through contempt proceedings.[87] Payments made pursuant to property division had no direct fed-

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Supp. 1986). *See generally* Note, *Alimony, Cohabitation, and the Wages of Sin: A Statutory Analysis*, 33 ALA. L. REV. 577 (1982); Note, *Domestic Relations: Oklahoma's Live-In Lover Statute: § 1289(D) of Title 12*, 36 OKLA. L. REV. 906 (1983).

81. *See* H. CLARK, *supra* note 7, § 14.9; Note, *Domestic Relations: Modification of Future Alimony Payments Due to Changed Circumstances*, 20 WASHBURN L.J. 66 (1980). Professor Michaela White notes that all states will modify future alimony payments, although only a few will permit retroactive modification of accrued amounts. White, *supra* note 11, at 32-33. For a state-by-state list of modification provisions, see *id.* at 32 n.216. Section 316(a) of the Uniform Marriage and Divorce Act requires a change of circumstances "so substantial and continuing as to make the terms unconscionable" in order to authorize modification. UNIF. MARRIAGE AND DIVORCE ACT § 316(a), 9A U.L.A. 147, 489-90 (1987).

82. *See, e.g.*, MICH. COMP. LAWS ANN. § 552.631 (West Supp. 1987); N.M. STAT. ANN. § 40-4-19 (1986); WIS. STAT. ANN. § 767.305 (West 1981); *see also* Feder, *supra* note 26, at 67-69 (discussing use of contempt remedy even in cases when debts not clearly labeled support).

83. I.R.C. § 71 (1982) included as income to a wife periodic payments from her husband, if made pursuant to a divorce or separate maintenance decree and in discharge of his duty of support. Section 215 granted the husband a corresponding deduction. I.R.C. § 215 (1982). The Deficit Reduction Act of 1984, Pub. L. No. 98-369, substantially changed the alimony provisions of the Internal Revenue Code by eliminating the support and periodicity rules of § 71 and replacing them with, *inter alia*, a complex six-year rule and equally complex recapture provisions. The sections were again revised by the Tax Reform Act of 1986, Pub. L. No. 99-514. *See generally* O'Connell, *History of the Act*, 7 FAM. ADVOC., Fall 1984, at 4; Hopkins, *Alimony*, 7 FAM. ADVOC., Fall 1984, at 8.

84. *See* Goggans v. Osborn, 237 F.2d 186 (9th Cir. 1956); Dailey v. Dailey, 171 Ohio St. 133, 167 N.E.2d 906 (1960).

85. *See* Farrand v. Farrand, 246 Iowa 488, 67 N.W.2d 20 (1954).

86. *See* Goggans v. Osborn, 237 F.2d 186 (9th Cir. 1956); Flannery v. Flannery, 203 Kan. 239, 452 P.2d 846 (1969); Dailey v. Dailey, 171 Ohio St. 133, 167 N.E.2d 906 (1960); Annotation, *Alimony as Affected by Wife's Remarriage, in Absence of Controlling Specific Statute*, 48 A.L.R.2d 270 (1956).

87. *See* Luna v. Luna, 125 Ariz. 120, 608 P.2d 57 (Ariz. Ct. App. 1980).

eral income tax consequences.[88]

Today, the distinctions between support and property division have lost much of their practical impact. Because of the extensive use of private contracts, parties frequently alter the consequences that death, remarriage, or changed circumstances have on the payments. Court-ordered support obligations in the form of lump sum, rehabilitative, or reimbursement alimony may be treated like property divisions.[89] Some courts, recognizing the practical effect of property division as support, authorize enforcement of property divisions through contempt proceedings, as well as by the more circular method of ordering specific performance subject to enforcement by a contempt order.[90] Likewise, under federal income tax amendments, either spousal support or property division can be structured by the parties to be deductible by the payor, while taxable to the recipient.[91]

Because of the diminishing distinctions between support and property division, both state and federal law acknowledge that today property division and support frequently are functional equivalents. The final area in which classification remains critical—perhaps anachronistically—is in bankruptcy. Due largely to historical developments and conflicting policies, and perhaps primarily due to a lack of understanding of state law concepts of support, property division debts remain dischargeable in bankruptcy; debts in the nature of support are not. Federal courts should discern the inherent nature of a divorce-related debt under federal bankruptcy law by considering the contemporary family law meaning of support in light of the new forms for fulfilling the support obligation. To achieve this goal, the federal judiciary must

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88. The *Davis* rule treated property transfers between spouses as a "sale," which subjected such transfers to capital gain treatment. United States v. Davis, 370 U.S. 65 (1962) (requiring recognition of gain or loss on transfer of property between spouses in exchange for release of marital rights). The *Davis* rule was repealed by § 1041 of the Deficit Reduction Act of 1984. I.R.C. § 1041 (Supp. III 1985) (no gain or loss on transfer between spouses incident to divorce, except for nonresident alien transferor); *see* Kittrell, *Property Transfers*, 7 FAM. ADVOC., Fall 1984, at 22.

89. *See* Olson v. Olson, 114 Ill. App. 3d 28, 448 N.E.2d 229 (1983) (maintenance in gross not modifiable); Doerflinger v. Doerflinger, 646 S.W.2d 798 (Mo. 1983) (en banc) (lump sum maintenance award payable in installments not modifiable); Gunkel v. Gunkel, 633 S.W.2d 108 (Mo. Ct. App. 1982) (maintenance in gross survives former spouse's death or remarriage).

90. *See In re* Marriage of Ramos, 126 Ill. App. 3d 391, 466 N.E.2d 1016 (1984) (property settlement and maintenance provisions of dissolution decree enforceable through contempt proceedings), *cert. denied*, 471 U.S. 1017 (1985); Smoot v. Smoot, 329 N.W.2d 829 (Minn. 1983) (contempt order valid sanction for failure to comply with property division decree); Huber v. Huber, 649 S.W.2d 955 (Mo. Ct. App. 1983) (same).

91. *See supra* note 83 and accompanying text. One commentator has stated that "recent developments in the substantive law of support and its relationship to determination of marital property rights raise important questions about the relevance of any concept of support to the tax incidents. Do the conditions imposed on taxable alimony accurately reflect state law concepts of support or maintenance?" W. WADLINGTON, *supra* note 36, at 287 (Supp. 1987).

focus on the relative nature of support as it originated in the doctrine of necessaries.

III. Bankruptcy Law Development

A. Pre-Code Development

The early development in bankruptcy law of the exception from discharge for support obligations parallels the evolution in state family law of the concept of support. Throughout this century, American bankruptcy law has continuously protected support obligations from discharge[92] to assure a continued source of support both to society and the individual dependents. Although no express statutory provision existed in the nineteenth-century versions of the Bankruptcy Act,[93] the United States Supreme Court formulated an exception from discharge for support obligations in a trilogy of cases beginning in 1901 with *Audubon v. Shufeldt*.[94]

In *Audubon* the Court held that the debtor's general discharge affected neither alimony arrearages nor alimony accruing after bankruptcy. The Court reasoned that alimony, unlike other debts, is not dischargeable because:

> 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 . . . .[95]

Because of its unique legal features, the Court regarded alimony as the continuation of a duty imposed by law rather than a debt in the conventional sense.[96] And because it was not a "debt," an alimony award could not be "proved" in bankruptcy.[97] Thus, the alimony award re-

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92. A few early cases, however, decided under the Bankruptcy Act of 1898 ch. 541, 30 Stat. 544 (1898), allowed discharge of alimony, for hoth arrearages and future payments. *See In re* Houston, 94 F. 119 (D. Ky. 1899); Fite v. Fite, 110 Ky. 197, 61 S.W. 26 (1901). Others discharged only past due alimony payments. *See In re* Challoner, 98 F. 82 (N.D. Ill. 1899); *In re* Van Orden, 96 F. 86 (D.N.J. 1899). In *In re* Lachemeyer, 14 F. Cas. 914 (S.D.N.Y. 1878) (No. 7966), the court held that the Bankruptcy Act of 1867 discharged neither arrearages nor post-bankruptcy alimony. Some courts reached the same result under the Bankruptcy Act of 1898. *See, e.g., In re* Nowell, 99 F. 931 (D. Mass. 1900); *In re* Shepard, 97 F. 187 (S.D.N.Y. 1899).

93. Bankruptcy Act of 1898 ch. 541, 30 Stat. 544 (1898); Bankruptcy Act of 1867 ch. 176, 14 Stat. 517 (1867).

94. 181 U.S. 575 (1901).

95. *Id.* at 577-78.

96. *Id.*

97. Section 63 of the Bankruptcy Act of 1898 included among provable debts " 'a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing,' at the time of the petition in hankruptcy, whether then payable or not, and debts 'founded upon a contract, expressed or implied.' " *Audubon*, 181 U.S. at 577 (quoting Bankruptcy Act of 1898 ch. 541, § 63,

mained intact because discharge released a debtor only from his provable debts.[98]

Although the *Audubon* Court distinguished alimony from a contractual debt, two years later in *Dunbar v. Dunbar*[99] the Supreme Court extended the holding of *Audubon* to include as nondischargeable a contractually created alimony obligation.[100] The Court in *Dunbar* focused on the contingent nature of the obligation,[101] and concluded that it was not provable and therefore was not dischargeable. Similarly, the Court found contractual child support, payable to the wife, to be likewise nondischargeable. Emphasizing the nature and source of the obligation, the Court again held that the contract did not affect the underlying duty of support. Rather, the contract was merely a recognition, presumably reasonable in amount, of the father's legal obligation to support his children.[102] Since, the Court reasoned, it was unlikely that Congress intended to abrogate this duty by discharge in bankruptcy, it would be illogical to permit discharge when the father had acknowledged his responsibility by contract. The *Dunbar* Court thereby authorized protection of support payments regardless of whether the payments originated involuntarily by court order or voluntarily by contract.

The Court's emphasis in *Audubon* and *Dunbar* on the contingent nature of the obligation was consistent with the state-law idea that support, by its nature, was indefinite because it was determined by the parties' relative needs and abilities, which could vary over time. In 1904, however, in *Wetmore v. Markoe*,[103] the Supreme Court deemphasized the contingency aspect by declaring that even when an alimony award was not modifiable,[104] arrearages, as well as later installments, remained

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30 Stat. 562-63 (1898)).

98. Bankruptcy Act of 1898 ch. 541, § 1, 30 Stat. 544, 544 (1898).

99. 190 U.S. 340 (1903).

100. The contract at issue in *Dunbar* was a result of negotiations in which Mrs. Dunbar, a Massachusetts resident, agreed not to contest her husband's divorce action in Ohio, provided that suitable support provisions were made for her and their children. *Id.* at 341. Like most states at the time, *see supra* notes 41-42 and accompanying text, Ohio would not grant alimony to a wife whose husband had been granted a divorce. *See Dunbar*, 190 U.S. at 344. Therefore, absent the contract, Mrs. Dunbar would have had no basis for a support claim if Mr. Dunbar had been granted a divorce. Mr. Dunbar probably signed the contract because he would have been unable to prove fault grounds sufficient to entitle him to the divorce decree had Mrs. Dunbar contested.

101. The payments to Mrs. Dunbar would terminate upon her death or remarriage. Although her life expectancy was capable of calculation, the Court concluded that the possibility of her remarriage was not subject to reasonable evaluation. The Court noted, however, that the English courts had attempted to make such estimations, which were required by the English Bankruptcy Act of 1869. *Dunbar*, 190 U.S. at 346-50.

102. *Id.* at 351-52.

103. 196 U.S. 68 (1904).

104. Then-existing New York law required an express reservation of the court's power in order to later modify an alimony award. *Id.* at 74-75 (citing Walker v. Walker, 155 N.Y. 77, 49 N.E.

nondischargeable in bankruptcy. The lack of a divorce court's continuing jurisdiction over the award did "not change the essential character of the liability nor determine whether a claim for alimony is in nature contractual so as to make it a debt."[105] According to the Court, the underlying nature, not the form, of the obligation determined its dischargeability.

The *Wetmore* Court then pronounced a principle that remains a polestar in determining dischargeability: a court must look behind the decree to uncover the true nature and extent of the obligation in determining whether or not the obligation constitutes support.[106] That duty of support, according to the Court, is paramount to the purposes of bankruptcy law, which are "to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligations and responsibilities which may have resulted from business misfortunes."[107] The Court indicated, on the other hand, that the obligation of support should not be avoidable, absent a direct command from Congress, because alimony was a "legal means of enforcing the obligation of the husband . . . to support and maintain his wife,"[108] rather than a debt.

Although the three Supreme Court cases rested largely on the idea that a debtor's obligations to a spouse or child escaped discharge because the obligations were not provable debts, the trilogy also emphasized the underlying policy of protecting post-marital support because it stems from a state-imposed duty created by virtue of the relationship of the parties. Consistent with then-existing family law theories of support,[109] the Court found presumed need, as evidenced by the state court decree or the couple's contract, to be paramount to actual need. The trilogy suggests that courts must protect that pre-existing duty of support, based on presumed need arising from legal dependency, over and above the debtor's bankruptcy rights.

The trilogy provided the basis for interpreting the statutory exception added to the Bankruptcy Act in 1903[110] in the wake of *Audubon.*

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663 (1898), and Livingston v. Livingston, 173 N.Y. 377, 66 N.E. 123 (1903)). In many jurisdictions today, the contrary is true; a court may modify an alimony award upon sufficient proof of change in the parties' circumstances, unless the award is expressly nonmodifiable. *See supra* note 81 and accompanying text.

105. *Wetmore*, 196 U.S. at 74.

106. *Id.*

107. *Id.* at 77.

108. *Id.* at 74.

109. *See supra* notes 32-38 and accompanying text; *see also In re* Vadner, 259 F. 614, 640 (D. Nev. 1918).

110. Bankruptcy Act ch. 487, 32 Stat. 797, 798 (1903).

Section 17a(2),[111] (later section 17a(7)[112]) excepted from discharge debts "for alimony due or to become due, or for maintenance or support of wife or child."[113] While the language of the support exception remained essentially unchanged until 1978, judicial interpretation of the exception grew increasingly complex. Once the exception was codified, courts[114] generally regarded support obligations as "debts," and therefore provable; analysis shifted to distinguishing support-related debts from ordinary contractual obligations. The former survived bankruptcy, while the latter were discharged.

Early case law interpreting the statutory exception developed around the policies for the exception. While some courts placed primary importance on protecting both individual dependents[115] and society at large,[116] other courts justified the exception by considering the compensatory and punitive aspects of post-marital support[117] in accordance with the prevailing state-law concept of alimony.[118] This latter analysis was consistent with other statutory exceptions from discharge that effectively were punitive in nature. For instance, debts incurred by fraud, debts arising from intentional torts, and debts falsified in bankruptcy pleadings were nondischargeable.[119] Since courts ordered alimony based upon the debtor's *breach* of his duty of support, courts similarly penalized the debtor by continuing his responsibility for support debts beyond his general discharge.

The narrow judicial interpretation of the type of obligation that would qualify as support demonstrates the policy objectives surrounding the exception. Although courts reaffirmed the principle established in *Dunbar*, that nondischargeable support debts could arise from contracts as well as court decrees,[120] and extended protection to arrearages

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111. Bankruptcy Act ch. 487, § 17a(2), 32 Stat. 797, 798 (1903) (current version codified at 11 U.S.C. § 523(a)(5) (1982 & Supp. III 1985)).

112. Bankruptcy Act § 17a(7), 11 U.S.C. § 35a(7) (1976).

113. Bankruptcy Act ch. 487, § 17a(2), 32 Stat. 797, 798 (1903).

114. Before the 1970 amendment of the Bankruptcy Act, Pub. L. No. 91-467, 84 Stat. 990 (1970), most actions to determine the effect of discharge were heard in state courts. *See* Swann, *Discharge of Domestic Obligations in Bankruptcy*, 43 TENN. L. REV. 231, 234 (1976).

115. *See* Wetmore v. Markoe, 196 U.S. 68 (1904); Gonzalez Hernandez v. Borgos, 343 F.2d 802 (1st Cir. 1965); Poolman v. Poolman, 289 F.2d 332 (8th Cir. 1961).

116. *See* Goggans v. Osborn, 237 F.2d 186, 189 (9th Cir. 1956); Fernandes v. Pitta, 47 Cal. App. 2d 248, 117 P.2d 728 (Cal. Dist. Ct. App. 1941); Deen v. Bloomer, 191 Ill. 416, 61 N.E. 131 (1901).

117. *See* Welty v. Welty, 195 Ill. 335, 63 N.E. 161 (1902) (alimony not debt but penalty for failure to perform duty); Barclay v. Barclay, 184 Ill. 375, 56 N.E. 636 (1900) (same); Gilchrist v. Cotton, 83 Ind. App. 415, 148 N.E. 435 (1925) (same).

118. *See supra* notes 39-42 and accompanying text.

119. 11 U.S.C. § 24(c) (1976); *see also* 3 COLLIER BANKRUPTCY MANUAL § 9.005 (2d ed. 1954) (indicating that Congress intended to discharge debts of "honest debtors" only).

120. Schlessinger v. Schlessinger, 39 Colo. 44, 88 P. 970 (1907) (contract); *In re* Williams, 208

that had been reduced to judgment,[121] courts began to limit the types of contractual obligations that fell within the exception. The court in *In re Ostrander*,[122] for example, rejected application of the statute to a debt arising from support furnished by a third party after the debtor had failed to support his dependents himself. In *Ostrander* the court held that a debt for medical treatment provided to the debtor's family members at his express or implicit request during an ongoing family relationship was dischargeable.[123] The court's extension of liability past bankruptcy would exclude from discharge any debts incurred for goods or services that benefited the debtor's wife or children, thus circumventing the fresh start policy of bankruptcy law.[124] The *Ostrander* court therefore confined nondischargeable debts held by third party creditors to those analogous to debts on which the debtor would be held liable pursuant to the necessaries doctrine.[125]

Subsequent cases refined the statutory exception by applying it to involuntary liabilities incurred by the debtor, but not to purchases made by or with the consent of the debtor, for necessary goods or services that merely had the effect of benefiting his family members.[126] When a third party provided support to a debtor's dependent after the debtor had reneged on his duty, however, courts would not discharge the ensuing debt for necessaries.[127] Accordingly, bankruptcy law embraced state family law concepts of support by limiting the support exception to the debtor's obligations that arose from the common-law or statutory duty to support his own dependents,[128] as circumscribed by the necessaries doctrine. The countervailing policy of affording the debtor a fresh start prevailed unless a particular debt clearly fell within the support exception.[129]

After implicitly limiting application of the support exception to

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N.Y. 32, 101 N.E. 853 (1913) (court decree).

121. *See* Westmoreland v. Dodd, 2 F.2d 212 (5th Cir. 1924), *cert. denied*, 267 U.S. 595 (1925); *see also* Hylek v. Hylek, 148 F.2d 300 (7th Cir. 1945).

122. 139 F. 592 (E.D.N.Y. 1905).

123. *Id.*

124. *Id.*

125. *Id.*; *see supra* notes 34-35 and accompanying text.

126. *See In re* Lo Grasso, 23 F. Supp. 340 (W.D.N.Y. 1938); Schellenherg v. Mullaney, 112 A.D. 384, 98 N.Y.S. 432 (1906); Schwoll v. Meeks, 76 Ohio App. 231, 63 N.E.2d 831 (1944); Wintrode v. Connors, 67 Ohio App. 106, 35 N.E.2d 1018 (1941).

127. The principle applied even if the debtor notified the creditor that he would not assume responsibility. *See In re* Meyers, 12 F.2d 938 (W.D.N.Y. 1926) (debt not dischargeable when incurred by third party who had provided shelter for debtor's wife); Leib v. Auerbacb, 10 N.J. Super. 391, 76 A.2d 726 (1950).

128. *See In re* Sullivan, 262 F. 574 (N.D.N.Y. 1920) (exception not applicable to bond securing other's debt). *But see* Rape v. Lenz, 151 Wash. 675, 276 P. 868 (1929) (duty extends to natural children even after adoption by third party).

129. *See In re* Sullivan, 262 F. 574 (N.D.N.Y. 1920).

debts that could qualify as necessaries, courts extended the limitation to distinguish support obligations from associated property divisions.[130] For example, courts held as dischargeable payments that constituted consideration for a release of dower rights or restoration of a wife's property brought into marriage, because the origin of such debts did not stem from the husband's duty of support.[131] Early on, courts distinguished property division debts from support debts and permitted discharge of the former in bankruptcy. Although such differentiation was justified when post-marital support was awarded independently of a wife's own assets, this differentiation later caused confusion when state courts began to recognize the interrelationship of support and property division.

Although courts expressly limited the statutory exception, the overriding importance of preserving debts that were directly related to support was apparent in the liberal judicial interpretation of the statute in other respects. Not only were awards that were unquestionably alimony or child support classified as nondischargeable, but courts demonstrated their willingness to look beyond the language of an instrument to discern the true nature of the obligation.[132] The substance of the debt, not its form, controlled, although courts frequently relied on the existence of the traditional features of alimony awards before concluding that a debt was support.[133] Similarly, classification under state law would not control dischargeability.[134] Nor would a debt's ori-

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130. *See In re* Jones, 518 F.2d 678 (9th Cir. 1975); *In re* Avery, 114 F.2d 768 (6th Cir. 1940).

131. *See* Heimberger v. Joseph, 55 F.2d 171 (6th Cir. 1931); Tropp v. Tropp, 129 Cal. App. 62, 18 P.2d 385 (Cal. Dist. Ct. App. 1933).

132. *See, e.g.*, Blair v. Blair, 44 Cal. App. 2d 140, 112 P.2d 39 (Cal. Dist. Ct. App. 1941) (agreement to create trust to pay wife monthly installments for her life, with husband to make up deficiency if trust income insufficient); Remondino v. Remondino, 41 Cal. App. 2d 208, 106 P.2d 437 (Cal. Dist. Ct. App. 1940) (agreement to make monthly payments for support of wife and maintain life insurance policy for her benefit); Battles v. Battles, 205 Okla. 587, 239 P.2d 794 (1952) (agreement to buy or build house for wife and pay monthly allowance until wife's death or remarriage). Conversely, description of the debt as alimony or support in the creating instrument was not determinative either. *See, e.g., In re* Usher, 442 F. Supp. 866 (N.D. Ga. 1977); *see also* Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 UCLA L. REV. 96, 99-104 (1977); Annotation, *Obligation Under Property Settlement Agreement Between Spouses as Dischargeable in Bankruptcy*, 74 A.L.R.2d 758 (1960) (treatment in bankruptcy of obligations under property settlement agreement).

133. *See, e.g., In re* Woods, 561 F.2d 27 (7th Cir. 1977); *In re* Liverman, 463 F. Supp. 906 (E.D. Va. 1978); *In re* Smith, 436 F. Supp. 469 (N.D. Ga. 1977); *In re* Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958); Tropp v. Tropp, 129 Cal. App. 62, 18 P.2d 385 (Cal. Dist. Ct. App. 1933); Krupp v. Felter, 191 Misc. 726, 77 N.Y.S.2d 665 (N.Y. Sup. Ct.), *aff'd*, 274 A.D. 761, 80 N.Y.S.2d 725 (1948); *see also* Swann, *supra* note 14, at 232 (concluding that pre-Code results were effectively determined in drafting).

134. *See In re* Adams, 25 F.2d 640 (2d Cir. 1928) (contract to pay wife annuity nondischargeable maintenance, although debt could not be classified as alimony under state law when not part of court decree and wife was ineligible for alimony because of marital fault); Egbers v. Northern

gin in a property transaction taint the entire debt because courts would except support-related provisions from discharge.[135] And even though an agreement exceeded the debtor's legal duty, courts nevertheless could regard the agreement as a liquidation of his support obligation.[136]

Other examples exist of the courts' liberal interpretation of the bankruptcy statute in order to preserve debts that were directly related to support. For instance, when debts owed to third parties originated from the divorce action itself, in the form of attorney's fees or court costs[137] that the debtor had agreed or been ordered to pay, most courts concluded that such obligations were actually in the nature of alimony.[138] Because attorney's fees were generally authorized by statute and were awarded based on the same criteria as alimony, courts often regarded such debts as equivalent to alimony and treated attorney's fees the same as other allowances for necessaries.[139] Similarly, when the post-divorce effect of the debt was to permit the former spouse or children to maintain their actual living expenses, even though payments were not made directly to the dependent, many courts found them to be nondischargeable forms of support by considering the actual function of the debt.[140] Actual need—the evolving state-law standard for setting support awards—relative to the parties' circumstances and roughly defined by the doctrine of necessaries evolved as the basis for evaluating nondischargeable divorce-related debts.

Pac. Ry., 98 Wash. 531, 167 P. 1073 (1917) (dehtor's agreement to pay definite sum to former wife held to he in the nature of alimony, despite divorce court's earlier refusal to modify because of its conclusion that deht was part of property settlement).

135. *See In re* Avery, 114 F.2d 768 (6th Cir. 1940); *In re* Ridder, 79 F.2d 524 (2d Cir. 1935); Battles v. Battles, 205 Okla. 587, 239 P.2d 794 (1952).

136. *See In re* Hollister, 47 F. Supp. 154 (S.D.N.Y. 1942), *aff'd*, 132 F.2d 861 (2d Cir. 1943); D'Andria v. Hageman, 253 A.D. 518, 2 N.Y.S.2d 832 (1938), *aff'd*, 278 N.Y. 630, 16 N.E.2d 294 (1938); Battles v. Battles, 205 Okla. 587, 239 P.2d 794 (1952).

137. Other than with respect to attorney's fees or court costs, however, debtors generally continued to be relieved of liability for dehts for predivorce goods or services supplied to dependents by third parties. *See* Schellenberg v. Mullaney, 112 A.D. 384, 98 N.Y.S. 432 (1906); Kanter v. Crimmins, 87 Misc. 2d 647, 385 N.Y.S.2d 935 (N.Y. Sup. Ct. 1976).

138. *See In re* Birdseye, 548 F.2d 321 (10th Cir. 1977); *In re* Jones, 518 F.2d 678 (9th Cir. 1975); *In re* Nunnally, 506 F.2d 1024 (5th Cir. 1975); *In re* Hargrove, 361 F. Supp. 851 (W.D. Mo. 1973).

139. *See In re* Gorski, 25 F. Supp. 551 (W.D.N.Y. 1938) (wife's attorney's fees equivalent to maintenance and support and therefore not dischargeahle); Merriman v. Hawbaker, 5 F. Supp. 432 (E.D. Ill. 1934) (wife's attorney's fees equivalent to alimony and therefore not dischargeable); Krupp v. Felter, 191 Misc. 726, 77 N.Y.S.2d 665 (N.Y. Sup. Ct.), (attorney's fees obtained from husband hy wife's attorney in a separate action equivalent to support of wife and therefore not dischargeable), *aff'd*, 274 A.D. 761, 80 N.Y.S.2d 725 (1948).

140. *See* Poolman v. Poolman, 289 F.2d 332 (8th Cir. 1961) (payments on mortgage in nature of support and therefore not dischargeable); *In re* Gorski, 25 F. Supp. 551 (W.D.N.Y. 1938) (accrued interest on mortgage of realty transferred to wife nondischargeahle); Nesbit v. Nesbit, 80 N.M. 294, 454 P.2d 776 (1969) (order to pay community debts in nature of alimony or support and therefore not dischargeable).

The result in an individual case, however, was not entirely predictable. Courts developed a confused and often contradictory body of case law partly because of their failure to agree as to the underlying source of applicable law. One line of cases, typified by *In re Waller*,[141] looked to the law of the state in which the obligation had arisen and classified the obligation in the manner that the state court would have done, had it been required to do so.[142] This approach was expedient because courts needed to consult only the alimony and support statutes and interpretive case law of a single jurisdiction to determine whether the state court would have ordered support in the state divorce action.[143] Obviously, this approach treated debtors and their dependents differently under identical circumstances for the sole reason that they happened to live in different states.[144] Formality, therefore, could override actual need.

Another line of cases developed that avoided the emphasis of form over substance. In these cases the courts relied on support principles in general, rather than the law of a particular state, to determine the underlying nature of a debt.[145] To classify an obligation under this approach, courts typically considered the traditional features of alimony, such as termination of the obligation on death of either party or remarriage of the recipient or modifiability of the payment.[146] Often, these courts would consider the parties' actual circumstances at the time the debt was created to determine whether the debt fulfilled the function of

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141. 494 F.2d 447 (6th Cir. 1974).

142. *See* Nitz v. Nitz, 568 F.2d 148 (10th Cir. 1977); *In re* Cox, 543 F.2d 1277 (10th Cir. 1976); *In re* Jones, 518 F.2d 678 (9th Cir. 1975); Hylek v. Hylek, 148 F.2d 300 (7th Cir. 1945); Westmoreland v. Dodd, 2 F.2d 212 (5th Cir. 1924), *cert. denied*, 267 U.S. 595 (1925); *In re* Alcorn, 162 F. Supp. 206 (N.D. Cal. 1958). Courts applied state law so predominantly that they often regarded this approach as "uniform." *See In re* Shaver, 40 Bankr. 964 (Bankr. D. Nev. 1983), *aff'd*, 736 F.2d 1314 (9th Cir. 1984).

143. Although the result was consistent with Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which required application of underlying state law in federal court diversity actions, the *Erie* doctrine does not apply in bankruptcy cases. *See* Fore Improvement Corp. v. Selig, 278 F.2d 143 (2d Cir. 1960); *see also* Note, *Indiana Divorce Law*, *supra* note 14, at 391-94.

144. The result was particularly unfortunate when a dependent spouse did not qualify for support because of strict state alimony statutes, especially when fault could constitute a complete bar. For example, Indiana courts cannot award alimony agreed upon by the parties absent a written instrument reflecting the agreement. IND. CODE ANN. § 31-1-11.5-10(a) (Burns 1987). Moreover, Indiana courts cannot award alimony absent a finding that the spouse requesting support possesses a physical or mental handicap that renders the spouse incapable of self-support. *Id.* § 31-1-11.5-9(c); *see In re* Shaver, 40 Bankr. 964 (Bankr. D. Nev. 1983), *aff'd*, 736 F.2d 1314 (9th Cir. 1984).

145. *See In re* Nunnally, 506 F.2d 1024, 1027 (5th Cir. 1975); *In re* Shacter, 467 F. Supp. 64 (D. Md.), *aff'd*, 610 F.2d 813 (4th Cir. 1979); *In re* Usher, 442 F. Supp. 866 (N.D. Ga. 1977).

146. *See In re* Melichar, 661 F.2d 300 (4th Cir. 1981) (decided under old bankruptcy law), *cert. denied*, 456 U.S. 927 (1982); *In re* Shacter, 467 F. Supp. 64 (D. Md.), *aff'd*, 610 F.2d 813 (4th Cir. 1979); *see also* Eigenbrode v. Eigenbrode, 19 Md. App. 597, 313 A.2d 569 (1973).

support.[147] Although purporting to apply general family law doctrine, these courts still reached unpredictable results because they could not agree on the relevant features required to classify the debt as support.

Under both the specific state law and the general law approaches, the appropriate criteria for determining the nature of a debt remained uncertain. Courts in both types of jurisdictions developed various versions of an "intent" test, which focused on the express or implicit intention of the parties or the court that had created the obligation.[148] Disagreement existed as to whether that intention must be apparent from the contract or decree itself[149] or whether court records regarding its creation[150] or relevant extrinsic evidence of the parties' circumstances could be considered.[151] Furthermore, the exact nature of the requisite intention was unclear. While some courts required a specific intention to create a debt that would fulfill a defined state-law duty of support,[152] other courts required an intention to have the obligation fulfill the *function* of support.[153] Although these latter courts focused more on the effect of the debt than on any explicit or implied intention, they generally couched their decisions in intent language.

Thus, while state-law concepts of support concededly were important, few courts concurred as to the precise role of state law or the approach to be taken in classifying a particular debt. The courts focused too extensively on the particulars of state law without evaluating the underlying state-law concepts of support. Although definite patterns had developed and various approaches had been formulated, the law regarding dischargeability of divorce-related debts was far from uniform at the time Congress, in a major overhaul of American bankruptcy

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147. *See In re* Smith, 436 F. Supp. 469 (N.D. Ga. 1977); Myhers v. Myhers, 6 Cal. App. 3d 855, 86 Cal. Rptr. 356 (Cal. Dist. Ct. App. 1970) *See generally* Staggs, *supra* note 14, at 180-81 (discussing the nondischargeahility of support debts in Texas, where no alimony authorized).

148. *See* Barth v. Barth, 448 F. Supp. 710 (E.D. Mo. 1978), *aff'd*, 590 F.2d 340 (8th Cir. 1978); Sloan v. Mitchell, 28 Cal. App. 3d 47, 104 Cal. Rptr. 418 (1972). *See generally* Swann, *supra* note 14 (providing a detailed analysis of pre-Code cases).

149. *See* Fernandes v. Pitta, 47 Cal. App. 2d 248, 250-51, 117 P.2d 728, 729-30 (1941); Abrams v. Burg, 367 Mass. 617, 327 N.E.2d 745 (1975).

150. *See In re* Payne, 13 Bankr. 481 (Bankr. D. Nev. 1981); *In re* Allen, 4 Bankr. 617, 620 (Bankr. E.D. Tenn. 1980).

151. *See* Sloan v. Mitchell, 28 Cal. App. 3d 47, 104 Cal. Rptr. 418 (1972); *see also In re* Smith, 436 F. Supp. 469, 475 (N.D. Ga. 1977); West v. United States, 332 F. Supp. 1102, 1106 (S.D. Tex. 1971), *aff'd*, 477 F.2d 563 (5th Cir. 1973); Lyon v. Lyon, 115 Utah 466, 206 P.2d 148 (1949).

152. *See In re* Cornish, 529 F.2d 1363 (7th Cir. 1976); Kadel v. Kadel, 21 Ohio Misc. 232, 250 N.E.2d 420 (Clark County Ct. C.P. 1969).

153. *See* Williams v. Department of Social & Health Servs. of Wash., 529 F.2d 1264, 1270-71 (9th Cir. 1976); Poolman v. Poolman, 289 F.2d 332, 335 (8th Cir. 1961); Henson v. Henson, 366 S.W.2d 1 (Mo. Ct. App. 1963); Erickson v. Beradall, 20 Utah 2d 287, 289-90, 437 P.2d 210, 212 (1968).

law, enacted the Bankruptcy Reform Act of 1978.[154]

B. Development Under the Bankruptcy Reform Act

1. Section 523(a)(5)

The current Bankruptcy Code,[155] enacted in 1978, was the product of a long legislative process and considerable compromise.[156] Section 523(a)(5), reinstating the exception from discharge for alimony, maintenance, and support, likewise was a compromise resolution of alternate proposals.[157] The final product retained the historical distinction between debts incurred pursuant to support obligations and those resulting from property divisions, because Congress expressly rejected proposals that would have eliminated the distinction.[158]

Section 523(a)(5) is narrower than its predecessor in some respects by limiting nondischargeability to only those support-related debts "to a spouse, former spouse, or child of the debtor"[159] that arose "in connection with a separation agreement, divorce decree or other order of a court of record, . . . or property settlement agreement."[160] Thus, some support payments remain dischargeable regardless of their character.[161]

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154. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-1330 (1982)).

155. *Id.*

156. For thorough accounts of the legislative process and alternative proposals, see M. VOGES & K. SHIMPOCK, THE BANKRUPTCY REFORM ACT OF 1978 (1981); Bare, *The Bankruptcy Reform Act of 1978*, 47 TENN. L. REV. 501 (1980); Kennedy, *Foreword: A Brief History of the Bankruptcy Reform Act*, 58 N.C.L. REV. 667 (1980); King, *The Code: Adding up the Changes*, 5 FAM. ADVOC., Winter 1983, at 2; Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275 (1980); Pickard, *The New Bankruptcy Code, Part I: A Review of Some of the Significant Changes in Bankruptcy Law*, 10 MEM. ST. U.L. REV. 177 (1980).

157. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 5963, 6320; S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 5865.

158. Senate Debate on Compromise Bill, 124 CONG. REC. H1164-66 (daily ed. Oct. 6, 1978); *Id.* at H11,096 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); *Id.* at S17,412 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

159. 11 U.S.C.S. § 523(a)(5) (Law. Coop. 1986 & Supp. 1987). Thus, for instance, "palimony" payments ordered payable to a nonmarital cohabitant do not fit within the exception. *See In re* Marcus, 45 Bankr. 338, 342 (Bankr. S.D.N.Y. 1984).

160. 11 U.S.C.S. § 523(a)(5) (Law. Coop. Supp. 1987). A 1984 amendment, Pub. L. No. 98-353, added the language "or other order of a court of record," clarifying that predivorce support awards and awards unrelated to divorce actions, such as judgments in paternity suits, also are nondischargeable. *See* 11 U.S.C. § 523(a)(5) (Supp. III 1985).

161. *See In re* Marino, 29 Bankr. 797 (Bankr. N.D. Ind. 1983) (order to reimburse county when child made ward of county not within enumerated types of agreements under original statutory exception and thus dischargeable). *But see In re* Shine, 57 Bankr. 386 (Bankr. D.N.H.) (consent order reducing separate maintenance arrearages to lump sum and vacating support order nondischargeable despite fact that order was not "in connection with a separation agreement, divorce decree or property settlement"), *aff'd*, 802 F.2d 583 (1st Cir. 1986); DuPhily v. DuPhily, 52 Bankr. 971 (Bankr. D. Del. 1985) (discharge of child support arrearages for illegitimate child not "in connection with" appropriate instrument violates equal protection clause); Oregon v. Richards,

Furthermore, section 523(a)(5)(A) requires discharge when the "debt is assigned to another entity, voluntarily, by operation of law, or otherwise," except for assignments to specified governmental entities.[162]

Most importantly, and least clearly, section 523(a)(5)(B) specifies that the language of the creating instrument will not control classification for dischargeability purposes; rather, the liability must be "*actually in the nature* of alimony, maintenance, or support."[163] Congress indicated that in determining the actual nature of a debt, courts should apply federal, rather than state, law.[164] Unfortunately, Congress provided few additional clues as to how the judiciary was to develop that underlying body of federal law of support.

While the statutory language and legislative history of the Bankruptcy Reform Act of 1978 make clear that much of the judicial precedent created under the former Bankruptcy Act would be inapplicable,[165] early commentary suggested that the new provision was substantively a reenactment of its predecessor and predicted that section 523(a)(5) would effect little change.[166] Such predictions have proved correct in one sense: the confusion, disagreement, and controversy over the appropriate method of determining the nature of a divorce-related debt, and thereby its status for the purpose of discharge,[167] has continued. Although the courts, to some extent, have

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45 Bankr. 811 (Bankr. D. Or. 1984) (child support obligation owed directly to state nondischargeable because of policy reasons for statutory exception, although debt not "in connection with" listed types of agreements or orders).

162. 11 U.S.C. § 523(a)(5)(A), in its original form, excepted specified support-related debts from discharge, "but not to the extent that—(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise." The 1981 amendment, Pub. L. No. 97-35, qualified the assignment subsection (A) to add "(other than debts assigned pursuant to section 402(a)(26) of the Social Security Act)." The 1984 amendment, Pub. L. No. 98-353, further added "or any such debt which has been assigned to the Federal government or to a State or any political subdivision of such State" to the type of permissible assignees.

163. 11 U.S.C. § 523(a)(5)(B) (1982 & Supp. III 1985) (emphasis added).

164. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320.

165. The congressional reports state that "cases such as In re Waller, 494 F.2d 447 (6th Cir. 1974) . . . are overruled." H.R. REP. No. 595, 95th Cong. 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320; S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865. See *supra* text accompanying notes 141-44, for discussion of the *Waller* line of cases.

166. *See, e.g.*, Note, *Dischargeability of Divorce-Related Expenses, supra* note 14, at 806 (indicating that "[a]lthough section 523(a)(5) has not changed prior bankruptcy law dramatically, the changes that have resulted are important"); *see also* Comment, *Dischargeability of Obligations, supra* note 14.

167. Classification of family-related debts is important in other bankruptcy contexts as well. For example, alimony, maintenance, and support payments are exempt property under 11 U.S.C. § 522(d)(10)(D), and the automatic stay of 11 U.S.C. § 362 does not affect the collection of these payments.

refined the variations of the "intent" tests developed under prior law[168] and have resolved some of the issues necessary to establish a cohesive debt classification standard, the courts have not developed a uniform approach for isolating the precise criteria that should be applied in categorizing debts as "actually in the nature of alimony, support, or maintenance."[169]

2. Interpretation of the Code

The early cases interpreting the Bankruptcy Code of 1978 differed little from those decided under the prior law.[170] Many courts continued to use an ad hoc approach by classifying an individual debt on the basis of whether it resembled traditional state court alimony.[171] Thus, if a debt were payable in installments over a long or indefinite period of time and terminated upon the death or remarriage of the former spouse, courts most likely would classify the debt as nondischargeable support.[172]

The courts generally placed considerable significance on the language of the creating instrument.[173] For example, in *Stout v. Prussel*[174] the Court of Appeals for the Ninth Circuit held that the bankruptcy court had not grossly abused its discretion by looking "solely at the property settlement as a whole" to determine that a debt was dischargeable.[175] The Ninth Circuit found significant the fact that other provisions of the agreement were designated support and terminated upon specific dates or events.[176] Many courts applied traditional rules of construction,[177] but disagreed as to the admissibility of extrinsic evi-

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168. *See supra* text accompanying notes 148-53.

169. *See* Freeburger & Bowles, *supra* note 14, at 600-13 (detailing five general categories of tests used to identify support obligations for bankruptcy purposes: state law standards, factors tests, intent tests, facts and circumstances tests, and the *Calhoun* doctrine).

170. *See* Comment, *Dischargeability of Obligations*, *supra* note 14, at 531-34 (comparing cases under old Act and new Code).

171. *See In re* Catlow, 663 F.2d 960, 962 (9tb Cir. 1981); *In re* Lesher, 20 Bankr. 543, 545 (Bankr. W.D. Pa. 1982); *In re* Ingram, 5 Bankr. 232, 234 (Bankr. N.D. Ga. 1980).

172. *See In re* Wesley, 36 Bankr. 526 (Bankr. S.D. Ohio 1983); *In re* Rachmiel, 19 Bankr. 721 (Bankr. M.D. Fla. 1982); *In re* Newman, 15 Bankr. 67 (Bankr. M.D. Fla. 1981); *In re* Henry, 5 Bankr. 342 (Bankr. M.D. Fla. 1980).

173. *See In re* Alloway, 37 Bankr. 420, 424-25 (Bankr. E.D. Pa. 1984); *In re* Wiley, 27 Bankr. 21, 23 (Bankr. D. Or. 1982); *In re* Kaplan, 18 Bankr. 1018 (Bankr. E.D.N.Y. 1982); *In re* Eisenberg, 18 Bankr. 1001, 1003 (Bankr. E.D.N.Y. 1982); *cf. In re* Demkow, 8 Bankr. 554 (Bankr. N.D. Ohio 1983) (court must examine debts designated as support but may not examine those labeled property settlement).

174. 691 F.2d 859 (9th Cir. 1982).

175. *Id.* at 861.

176. *Id.*

177. *See In re* Wah Chin, 3 B.C.D. 1363 (Bankr. N.D. Cal. 1978) and cases cited therein, *cited in In re* Warner, 5 Bankr. 434 (Bankr. D. Utah 1980).

dence.[178] Responding to widespread criticism that the focus on the verbal formulation of the debt emphasized form over substance and ignored the statutory language,[179] courts attempted to formulate a more precise and consistent test to determine when a debt should be classified as support, and therefore be nondischargeable under section 523(a)(5).

Most bankruptcy and appellate courts continued to apply some variation of an "intent" test, which was developed under the old bankruptcy law.[180] In most cases, however, no express intention was apparent from the relevant documents, and the parties' testimony with respect to their original intentions generally conflicted.[181] And, as was the case before enactment of the Bankruptcy Reform Act, courts remained uncertain as to the precise nature of the relevant intent and mechanically applied a somewhat standard list of factors deemed to indicate whether the parties intended a debt to provide support.[182] Such an intent test provided no real test at all, because its reasoning was circular: if a debt is "actually in the nature" of support, the parties intended it to act as support, and the parties' intentions must be determined by the "actual nature" of the debt.

For example, in *In re Coil*[183] the Court of Appeals for the Seventh Circuit approved the bankruptcy court's application of an intent test to determine the dischargeability of a debtor's agreement to hold his former wife harmless from marital debts owed to third party creditors. Without discussing the establishment of a federal standard, the appellate court held that the intentions of the parties controlled as to

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178. *Compare In re* Kagan, 42 Bankr. 563 (Bankr. N.D. Ill. 1984) (bankruptcy court must examine document providing award); *In re* Story, 36 Bankr. 546 (Bankr. M.D. Fla. 1983) (obligations *in form* of alimony nondischargeable, although label not controlling); *In re* Kaplan, 18 Bankr. 1018 (Bankr. E.D.N.Y. 1982); *In re* Eisenberg, 18 Bankr. 1001 (Bankr. E.D.N.Y. 1982) (court must consider parties' stipulation as a whole to determine intent); Harbour v. Harbour, 590 S.W.2d 838 (Tex. Civ. App. 1979) (order of divorce court must be examined to determine dischargeability) *with In re* Miller, 34 Bankr. 289, 292 (Bankr. E.D. Pa. 1983) (extrinsic evidence of intention should be considered along with document); *In re* Smotherman, 30 Bankr. 568, 570 (Bankr. N.D. Ohio 1983) (court must look beyond four corners of instrument); *In re* Thomas, 21 Bankr. 571, 573 (Bankr. E.D. Pa. 1982) (same); *In re* Ingram, 5 Bankr. 232, 234 (Bankr. N.D. Ga. 1980) (extrinsic evidence may be considered to uncover ambiguities).

179. *See In re* Story, 36 Bankr. 546, 549 (Bankr. M.D. Fla. 1983) (mere denomination not determinative); *In re* Wesley, 36 Bankr. 526, 529 (Bankr. S.D. Ohio 1983) (intent and circumstances of creation prevail over labels).

180. *See* Melichar v. Ost, 661 F.2d 300, 303 (4th Cir. 1981) (although state law important factor in determining parties' intent, agreement may be hybrid and combination does not necessarily destroy nature of payment), *cert. denied*, 456 U.S. 927 (1981); *In re* Cowley, 35 Bankr. 520, 522-23 (Bankr. D. Kan. 1983); *In re* Hawkins, 25 Bankr. 430, 434-35 (Bankr. E.D. Tenn. 1982).

181. *See, e.g., In re* Warner, 5 Bankr. 434 (Bankr. D. Utah 1980).

182. *See In re* Wesley, 36 Bankr. 526, 529 (Bankr. S.D. Ohio 1983); *In re* Wolfe, 26 Bankr. 781 (Bankr. D. Kan. 1982).

183. 680 F.2d 1170 (7th Cir. 1982).

whether a debt would be considered part of a support allowance or, instead, as an allocation of marital property.[184] The *Coil* court held that the bankruptcy court's determination was not clearly erroneous in light of the former wife's testimony that she had agreed to reduced child support payments because of the hold harmless agreement.[185] Therefore, the debt functioned as support because discharge of the debt would decrease the wife's ability to support the children. Thus, *Coil* suggested a formulation of a federal standard that considered the purpose of the parties' original agreement, which was discernible from the practical function of the debt.[186]

The intent test gradually evolved into an "effect" or "function" test. In many jurisdictions courts began searching for the purpose of effectively providing a source of support for dependents, rather than examining the intended use of the actual, specific funds supplied by payment of the debt. A finding that the parties had created a debt as a *substitute* for support determined the outcome in many cases. For example, in *In re Troup*[187] the Court of Appeals for the Sixth Circuit affirmed the bankruptcy and district court decisions that a hold harmless agreement for all marital debts was nondischargeable. In seeking the

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184. *Id.* at 1172. To determine that intent, the court suggested that the bankruptcy court look for the types of factors set out in *In re* Woods, 561 F.2d 27 (7th Cir. 1977), a pre-Code decision. Those factors included, among others, direct payments to the former spouse, indications of an intention "to balance the relative incomes of the parties," the placement of the hold harmless clause among either support or property provisions, and a description of the type and method of debt payment assumed by the spouse. *Coil*, 680 F.2d at 1172.

185. 680 F.2d at 1172.

186. *Cf.* Shaver v. Shaver, 736 F.2d 1314 (9th Cir. 1984). In *Shaver* the initial divorce decree provided that the husband would pay the wife, in addition to child support, $150,000 "in settlement of [the wife's] property rights," payable at $2000 a month for seventy-five months. *Id.* at 1315. After negotiations between the couple, the divorce court further amended the decree to award the wife $197,300 over a ten-year period, and referred to the debt as her "marital and dower rights," ending on her death during the ten-year period. The amendment allowed the hushand to deduct the payments from his federal income tax; the wife's additional amount represented the sum that she would pay as taxes. In the husband's subsequent bankruptcy action, the bankruptcy court concluded that the debt was in the nature of support.

On appeal, the district court held that the parties intended the payment as support, *In re* Shaver, 40 Bankr. 964 (Bankr. D. Nev. 1983), and the Court of Appeals affirmed. *Shaver*, 736 F.2d at 1314. The appellate court focused largely on the absence of other spousal provisions in the decree and the wife's status at the time of divorce as an unemployed, unskilled woman with three minor children in her custody, while the husband owned a business that produced a substantial income. Although the divorce court initially had labeled the award a property division, it had considered the parties' economic circumstances, which the Court of Appeals found to be irrelevant to a true property settlement but of primary importance to a settlement intended for support. *Id.* at 1316-17. The Ninth Circuit noted that the amended divorce decree spread out the payments for a longer time and provided that the payments were to cease upon the wife's death within that period. Thus, in applying an intent test, the Ninth Circuit considered the parties' actual circumstances to determine if the debt functioned as support. *Id.* at 1317.

187. 730 F.2d 464 (6th Cir. 1984).

intent of the parties and the purpose of the agreement, the lower courts found that the wife's agreement not to seek alimony, but rather to accept the property settlement in lieu of alimony, was itself in the nature of support and not a waiver of support. Furthermore, the bankruptcy court credited the wife's testimony that she had agreed to lower child support payments in consideration of her former husband's agreement to assume their debts: "It is clear that this particular provision reflects the intent of the parties to have defendant pay the mutual debts in substitution of alimony or child support."[188] Thus, the purpose and function of the obligation provided the basis of nondischargeability, rather than the form of the debt itself.

Although courts continued to use the language of the intent test, courts shifted their focus to an analysis of the practical effect of the debt on the dependent. In *In re Williams*[189] the Court of Appeals for the Eighth Circuit applied such a version of the intent test to affirm the bankruptcy court's determination that debts assumed by the former husband payable to banks, finance companies, department stores, and an order to pay his wife's attorney's fees, were nondischargeable. The court looked to the function of the debts and found that, because the purpose of the underlying expenditures was to furnish "necessities and ordinary staples of everyday life,"[190] the husband intended the obligations as support for the wife. Likewise, a 15,000 dollar sum, payable to the wife in monthly installments of 300 dollars, reasonably could have been intended to assist the wife in meeting her living expenses, although the obligation was originally labeled part of a "property settlement" to prevent modification under state law.[191] Although unclear from the parties' separation agreement incorporated in their Missouri divorce decree, the husband's intention to support his wife was evident from the wife's extrinsic evidence of her poor health and the amount of her living expenses, which greatly exceeded her monthly income. Although the husband presented evidence that attorney's fees were not considered support under Missouri law,[192] the court found that, in light of the wife's circumstances, the parties intended the payments to function as support, especially since the attorney's fees were to be paid di-

188. *Id.* at 466 (quoting bankruptcy court's conclusion of law).

189. 703 F.2d 1055 (8th Cir. 1983).

190. *Id.* at 1057 (quoting *In re* Jensen, 17 Bankr. 537, 540 (Bankr. W.D. Mo. 1982), which cited Poolman v. Poolman, 289 F.2d 332 (8th Cir. 1961)). The debts assumed by the husband in *Williams* had been "incurred to purchase farm equipment, furniture, clothing, appliances, and the like." 703 F.2d at 1057.

191. 703 F.2d at 1057.

192. *Id.* Although the *Williams* court stated that it would regard state law with deference, the court distinguished the husband's Missouri authority and indicated that it was not bound by such authority in any event. *Id.* at 1057-58.

rectly to the wife who would remain liable if the debt were discharged.[193] The court looked strictly to the underlying effect of the debts and disregarded their classification by the state court and the parties' agreement. By shifting the focus of the inquiry to the function of the debt, the court emphasized the actual needs of the dependent. *Williams* thus illustrates a movement toward recognizing a definition of support that corresponds to the necessaries doctrine.[194]

Despite the evolution of the intent test into a "function" or "effect" standard, the federal appellate courts have articulated relatively few definitive and comprehensive statements to guide bankruptcy courts in classifying debts under section 523(a)(5).[195] The lower courts continue to reach inconsistent and unpredictable results, and divorce planning to accommodate the contingency of bankruptcy remains a risky venture.

Much of the disorder could be reduced, if not eliminated, if courts were thoroughly to consider the concept of support in contemporary family law and acknowledge that support is a relative concept as defined under the necessaries doctrine. When courts define support in relative terms, according to the parties' standard of living, courts can apply that definition to resolve the remaining areas of dispute. These areas of dispute include the following: (1) the extent to which indirect support payments, although payable to a party other than a spouse or

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193. *Id.* at 1057 n.3. The court commented that the fact that the payment was owed to the wife, and not the attorney, prevented the payment from heing classified as an assignment under § 523(a)(5)(A).

194. *Id.* at 1056-58. Relying on *Williams*, the Eighth Circuit again recognized the role of relative need with respect to child support in applying a "function" test in Boyle v. Donovan, 724 F.2d 681 (8th Cir. 1984). The debtor in *Boyle* sought to discharge an obligation created in a property settlement agreement, incorporated into their Arkansas divorce decree, to pay college and professional school expenses for his two sons after they reached the age of majority. Despite the father's lack of a post-majority continuing duty under Arkansas law to support the children or to pay for their education, the court held that the function of the debt was as a support mechanism. Support was what the parties had intended. At the time of the agreement's execution, the debtor had a substantial income, his former wife was a student, and the debtor himself had suggested inclusion of the provision, which provided for his financing of a post-graduate degree as well as a college education for his sons. The facts indicated that the parties considered such expenses part of the "family pattern of life," and, therefore, the expenses were in the nature of support. *Id.* at 682-83. The court stated that the federal bankruptcy fresh start policy "must give way before the rights [the debtor] recognized to provide his children with a start in life comparable to that which he enjoyed." *Id.* at 683.

195. One reason for the paucity of appellate guidance is the standard for appellate review. Bankruptey Rule 8013 authorizes reversal of bankruptcy court determinations of facts only if the decision of the lower court is clearly erroneous. Even within particular jurisdictions the results under the clearly erroneous standard have been divergent. For example, in Stout v. Prussell, 691 F.2d 859 (9th Cir. 1982) (per curiam), the Ninth Circuit affirmed a bankruptcy court classification based solely on the language of a separation agreement. Two years later that same court approved examination of any relevant extrinsic evidence, without reference to its earlier decision. *See* Shaver v. Shaver, 736 F.2d 1314 (9th Cir. 1984).

child, may escape discharge; (2) the proper role of state law in formulating a federal bankruptcy definition of support; and (3) the proper method of analyzing an individual debt to determine its "actual" nature. Alternatively stated, courts must initially resolve the first two threshold issues. Then courts can clarify and define the type of debt that survives discharge under section 523(a)(5) by identifying the factors relevant to testing an individual debt for the appropriate attributes of support. Because of a failure to segregate these distinct questions, the decisions have been inconsistent and the results unpredictable. In *In re Calhoun*,[196] however, the Court of Appeals for the Sixth Circuit provided a structure for resolving these continuing controversies in a manner consistent with prevailing state family law concepts of support.

3. The *Calhoun* Approach

Calhoun presented the Sixth Circuit with the recurring problem of determining whether the bankruptcy court had properly categorized post-marital debts for dischargeability purposes. The debtor in *Calhoun* had assumed five loans pursuant to a separation agreement with his former wife, whom he had agreed to hold harmless.[197] The bankruptcy court decided that the assumption was nondischargeable and held that the language of the parties' agreement, which characterized the assumption as support,[198] controlled "unless the compelling weight of the evidence suggests that enforcement of the agreement would work a manifest injustice."[199] The court required the debtor spouse to prove that the agreement would work such an injustice or that the language meant something other than what it said.

In rejecting the bankruptcy court's decision, the Sixth Circuit critiqued the existing approaches for determining dischargeability of divorce-related debts and clarified the threshold issues regarding indirect support payments and the appropriate role of state law. The court systematically formulated a three-step test for analyzing individual debts, which considered intent, effect, and reasonableness.

Before applying its three-step test, the *Calhoun* court addressed the first threshold issue concerning the dischargeability of indirect sup-

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196. 715 F.2d 1103 (6th Cir. 1983).

197. The expenses for which the debts had been incurred included construction of a swimming pool at the home owned by the wife, a loan to consolidate the couple's prior debts, various charge card accounts related to the debtor's vocational training and business, and a vehicle titled to the debtor. The court properly distinguished the underlying debts owed to the couple's creditors from the obligation to the wife as evidenced by the hold harmless agreement, recoguizing that only the latter was at issue. *Id.* at 1106 & n.4.

198. "The agreement characterizes this assumption as alimony and support although it is found in the section of the document labeled Division of Property." *Id.* at 1105.

199. *Id.* at 1111.

port payments. The *Calhoun* court concluded that, in light of the legislative history of section 523(a)(5)[200] and earlier appellate court decisions,[201] a debt need not be payable directly to the former spouse in order to escape discharge. Bankruptcy courts uniformly have included hold harmless agreements, like direct support obligations, within the support exception.[202]

After addressing the dischargeability of indirect support payments, the court discussed the second threshold issue: the extent to which federal courts should utilize or consult state law in creating the federal law of support. Noting that the legislative history of section 523(a)(5) clearly required application of federal law, rather than state law, the court nevertheless reasoned that the latter could not be ignored, because a support obligation arises only under state law.[203] Although most courts used state law as a source of judicial guidance, no consensus existed as to how the federal courts should utilize state law and the extent to which they should rely upon it. The *Calhoun* court adopted the principle that state-law concepts of support in general, rather than the law of any individual state, should provide the basis for the federal standard. In determining whether a loan assumption was meant as a substitute for support payments or was merely a method of dividing property at divorce, the appropriate federal test, according to the *Calhoun* court, is one based on "those factors most often considered relevant by state courts generally in determining whether to grant support without reference to any particular state's law."[204]

After resolving these two preliminary issues, the court addressed the ultimate question of determining the nature of a specific debt. The essential problem, according to the *Calhoun* court, is that one spouse's assumption of a joint obligation always will contribute, at least indirectly, to the other spouse's support. This support contribution occurs even if the debt arose from a property division, since the assumption frees additional funds that the one spouse may then use for support.[205] A refusal of discharge based solely on that rationale would thwart bankruptcy law's fresh start doctrine, which courts must consider in any in-

200. *Id.* at 1106 (citing S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865; H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6320).

201. *Id.* at 1106-07 (citing *In re* Spong, 661 F.2d 6 (2d Cir. 1981); *In re* Petoske, 16 Bankr. 412 (Bankr. E.D.N.Y. 1982); *In re* Gentile, 16 Bankr. 381 (Bankr. S.D. Ohio 1982); *In re* French, 9 Bankr. 464, 466-67 (Bankr. S.D. Cal. 1981)).

202. *Calhoun*, 715 F.2d at 1107.

203. *Id.*

204. *Id.* at 1108.

205. *Id.*

quiry regarding dischargeability.[206] Therefore, the fact that a debt furnishes *some* degree of support should not determine classification for bankruptcy purposes. In *Calhoun* the Sixth Circuit developed a three-step test to resolve this dilemma.

First, according to the *Calhoun* court, when classifying any divorce-related debt, a court must discern an intention of the state divorce court, or of the parties themselves, to create a support obligation. The court may find that intention by considering any relevant evidence, including the traditional criteria used by state courts in awarding support.[207] If the requisite intent is absent, the inquiry ends, and the debt is dischargeable.

Once the court has found an intent to create a support obligation, the second inquiry is to determine if the assumption of liability "has the *effect* of providing the support *necessary* to ensure that the daily needs of the former spouse and any children of the marriage are satisfied."[208] If the spouse has independent assets, acquired through a property settlement or otherwise, the assumption of liability may not be required for maintaining actual and immediate needs. The practical effect on the spouse's ability for self-support, in terms of "daily necessities" absent the assumption of liability, is the key criterion.[209] Under *Calhoun*'s second step, therefore, support means the amount intended and actually required to provide for the dependents' means of survival.

Once the intent and effect tests are met, *Calhoun*'s third step requires a court to determine the reasonableness of the amount of support provided by the debt assumption in order to accommodate bankruptcy's fresh start policy. This step entails balancing the needs of the former spouse against the debtor's ability to pay—"[a] universal consideration of state courts."[210] By applying factors similar to those typically employed by state courts,[211] the bankruptcy court must determine a "reasonable limit" on support, which involves consideration of the debtor's "present and foreseeable ability to pay"[212] at the time he assumed liability. Any amount exceeding that ability to pay would not be classified as support because otherwise the agreement would effectively constitute an illegal contracting away of the right to discharge in bankruptcy.[213] Furthermore, according to the *Calhoun* court, if the

206. *Id.* at 1109.
207. *Id.*
208. *Id.* (emphasis in original).
209. *Id.*
210. *Id.* at 1110. The *Calhoun* court's statement suggests that courts should apply the same analysis to direct support obligations as well as debt assumptions.
211. *Id.*
212. *Id.*
213. *Id.*

debtor's circumstances have changed since the time of the initial agreement to the extent that the amount of support is currently inequitable, the court may consider his current ability to pay "insofar as it relates to the *continuing* obligation to assume the joint debts."[214] The Sixth Circuit remanded the case for consideration of each of the individual loan assumptions under this three-prong test. The Sixth Circuit also reminded the lower court that the burden of proof with respect to nondischargeability remains on the debtor's former spouse, not the debtor, and that general equitable considerations are not relevant apart from their role in the third step.

To date, *Calhoun* represents the most thorough and thoughtful attempt to articulate a test to determine the nature of a divorce-related debt for bankruptcy purposes. Commentators have hailed *Calhoun* as a "landmark decision that has significantly altered the bankruptcy court's role involving domestic relations issues."[215] Although not without its critics or inherent problems, *Calhoun* provides an "elegant formulation"[216] and long-needed structure for resolving dischargeability issues.

The *Calhoun* court expressly limited its decision to analysis of loan assumptions and their associated hold harmless agreements; however, the case provides a useful framework for categorizing all types of divorce-related debts. Courts can use the *Calhoun* approach, modified to accommodate the notion of support as a relative concept, to establish a uniform federal structure for classification of commonly encountered obligations that is consistent with currently accepted state family law principles. The remainder of this Article analyzes, critiques, and reformulates the *Calhoun* approach in an attempt to resolve the two threshold issues—*i.e.*, the dischargeability of indirect support payments and the role of state law in the formulation of a federal standard of support—as well as to articulate the ultimate test for determining the nature of an individual debt.

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214. *Id.* at 1110 n.11 (emphasis in original). The court cautioned, however, that a bankruptcy court should not sit as a "super-divorce court"; rather, it should adjust the amount of support representing the loan assumption only when the amount would "clearly exceed that which might reasonably have been awarded as support by a state court after an adversarial proceeding." *Id.* at 1110 n.12.

215. Weintraub & Resnick, *From the Bankruptcy Courts*, 18 U.C.C. L.J. 272, 275 (1986).

216. *In re* Helm, 48 Bankr. 215, 216 (Bankr. W.D. Ky.), *aff'd*, 49 Bankr. 573 (Bankr. W.D. Ky. 1985).

IV. Resolving the Conflicts

A. Indirect Support Payments

When divorce-related debts are payable directly to a spouse or child, the bankruptcy court immediately can proceed to determine whether those debts are in the nature of support and are thereby nondischargeable. Frequently, however, the debtor will have agreed to or been ordered to make payments to a third party, which raises a preliminary question of whether a debt owed to someone other than a spouse, former spouse, or child still may be exempt from discharge under section 523(a)(5). The identity of the payee should be irrelevant when support is defined in terms of the payment's effect on the dependent's ability to satisfy relative need. Thus, *Calhoun*'s conclusion that hold harmless agreements may constitute nondischargeable support should extend to other types of third party obligations as well, although the issue remains partially unsettled.

1. Assigned Support Debts

The dispute over dischargeability of debts owed to third parties initially centered on the interpretation of section 523(a)(5)(A), which provides that debts assigned voluntarily, involuntarily, or by operation of law, to another entity are dischargeable.[217] The original language of that provision, which contained no exceptions, along with the legislative history of the subsection,[218] led many courts to conclude that only direct payments to a dependent could escape discharge.[219] Early cases interpreted section 523(a)(5)(A) to apply primarily or exclusively to assignments to governmental entities when assignment was required as a condition for receipt of certain public assistance funds.[220] The legisla-

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217. 11 U.S.C. 523(a)(5)(A) (1982 & Supp. III 1985).

218. Both the Senate and House Reports state that the language of § 523(a)(5), "in combination with the repeal of section 456(b) of the Social Security Act (43 U.S.C. 656(b)) . . . will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent." S. Rep. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5865; H.R. Rep. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6320.

219. *See, e.g., In re* Edwards, 31 Bankr. 113 (Bankr. N.D. Ga. 1983); *In re* Drumheller, 13 Bankr. 707 (Bankr. W.D. Ky. 1981); *In re* Daiker, 5 Bankr. 348 (Bankr. D. Minn. 1980).

220. *See, e.g., In re* Glidden, 653 F.2d 85 (2d Cir. 1981) (upholding constitutionality of discharge provision), *cert. denied*, 454 U.S. 1143 (1982); *In re* Marino, 29 Bankr. 797 (N.D. Ind. 1983) (exceptions to discharge strictly construed; debts dischargeable unless specifically excepted); *In re* Deblock, 11 Bankr. 51 (Bankr. N.D. Ohio 1981); *In re* Frencb, 9 Bankr. 464 (Bankr. S.D. Cal. 1981); *In re* Wells, 8 Bankr. 189 (Bankr. N.D. Ill. 1981); *see also* Franklin v. New Mexico, 730 F.2d 86 (10th Cir. 1984) (law at time of filing applies); *In re* Reynolds, 726 F.2d 1420 (9th Cir. 1984) (original statutory provision permitted discharge, but law at time of decision controls); *accord In re* Blair, 538 F.2d 849 (9th Cir. 1976); *In re* Roedel, 34 Bankr. 689 (Bankr. D.N.J. 1983), *aff'd*

tive history supported this result;[221] in fact, the Bankruptcy Reform Act repealed a portion of the Social Security Act that had declared such assignments nondischargeable in bankruptcy.[222] Since the purpose of the exception is to protect dependents, some courts further reasoned that only direct payments could escape discharge because no reason existed for thwarting bankruptcy's fresh start policy if dependents did not benefit directly from the payment.[223]

The incongruity of relieving a debtor of his duty of support because another entity stepped in to assist dependents who may be particularly needy due to the debtor's breach, and the importance of protecting society from fulfilling the debtor's support obligations,[224] led Congress to amend section 523(a)(5)(A) in 1981 and again in 1984.[225] The amended provision authorizes the recipient to assign support payments to specified governmental entities when assignment is required for the receipt of certain public assistance benefits.[226] Current application of section 523(a)(5)(A) thus is limited to assignments to parties other than those authorized by the Code.

Although some controversy continues over the effect of section 523(a)(5)(A),[227] most courts narrowly construe the meaning of the term "assigned." Under this construction, the discharge of debts under section 523(a)(5)(A) would occur only when the recipient expressly has transferred a direct support payment to anotber party,[228] but not when the court or debtor originally created the debt in favor of a third party. Even when an actual assignment has been effected, a number of courts have rejected application of the provision when the assignment is solely for the purpose of collection.[229] The application of section 523(a)(5)(A)

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mem., 734 F.2d 5 (3d Cir. 1984).

221. *See* S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865; H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320.

222. Prior 42 U.S.C. § 656(b), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

223. *See In re* Dirks, 15 Bankr. 775 (Bankr. D.N.M. 1981).

224. *See In re* Reynolds, 726 F.2d 1420 (9th Cir. 1984); *see also In re* Stovall, 721 F.2d 1133 (7th Cir. 1983)(amendment applies to arrearages and future support).

225. Pub. L. No. 97-35, 95 Stat. 357 (1981); Pub. L. No. 98-353 98 Stat. 333 (1984).

226. *Id.*

227. *See In re* Ramirez, 795 F.2d 1494, 1499 (9th Cir. 1986) (Ferguson, J., dissenting), *cert. denied*, 107 S. Ct. 1624 (1987).

228. *See In re* Edwards, 31 Bankr. 113 (Bankr. N.D. Ga. 1983); *In re* Reichurdt, 27 Bankr. 751 (Bankr. W.D. Wash. 1983); *In re* Lang, 11 Bankr. 428 (Bankr. W.D.N.Y. 1981).

229. *See In re* Daumit, 25 Bankr. 371 (Bankr. D. Md. 1982) (court-ordered attorney's fees payable to spouse, who assigned to law firm presumably to facilitate collection, held nondischargeable); *In re* Auer, 22 Bankr. 274 (Bankr. E.D.N.Y. 1982) (same); *In re* Deblock, 11 Bankr. 51 (Bankr. N.D. Ohio 1981) (assignment for collection only not dischargeable). *But see In re* Crawford, 8 Bankr. 552 (Bankr. D. Kan. 1981) (court-ordered attorney's fees payable to wife dischargea-

only in cases when a dependent will not benefit from continuation of the debt because of its transfer to a non-protected party is consistent with the purpose of excepting from discharge those debts that actually function as support for dependents.

2. Payments to Third Parties

Irrespective of section 523(a)(5)(A), however, the result in an individual case still may turn on the identity of the recipient, rather than the substance of the debt, despite a dependent's continued benefit from nondischarge. For purposes of comparing and contrasting bankruptcy court treatment of third party debts, such debts can be grouped into three general categories: (1) obligations to pay future expenses of dependents; (2) assumptions of debts incurred jointly during marriage; and (3) obligations to pay third parties for expenses or costs arising from divorce. Separate analysis of these three categories leads to the conclusion that, if a consistent policy-based result is to be reached, the underlying nature of the debts should control classification, rather than the identity of the person or entity designated to receive the actual payment.

a. Future Expenses

Pursuant to divorce, a debtor frequently will be ordered or will contract to make specified future payments to third parties for the benefit of the former spouse or children. Such obligations often include medical, educational, and insurance expenses, as well as payment of specified living costs, such as rent, mortgage payments, and utility bills. In this context, courts generally disregard the fact that the actual recipient of the payments is not a dependent under the statutory terms.[230] If the debtor incurred the obligation for traditional types of support-related goods or services—health, education, housing, and the like—courts likely will proceed directly to the classification stage regardless of the payee's identity.[231] The majority of courts interpret the

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ble when assigned to attorney).

230. *See In re* Holt, 40 Bankr. 1009 (Bankr. S.D. Ga. 1984). *But see In re* Daiker, 5 Bankr. 348, 352-53 (Bankr. D. Minn. 1980) (debt must be owed directly to spouse).

231. *See In re* Thomas, 21 Bankr. 571 (Bankr. E.D. Pa. 1982) (mortgage payments assumed under property settlement nondischargeable); *In re* Hughes, 16 Bankr. 90 (Bankr. N.D. Ala. 1981) (debtor's agreement to pay second mortgage and hospital bill constitutes support); *In re* Stranathan, 15 Bankr. 223 (Bankr. D. Neb. 1981) (second mortgage payments held, with no discussion, to be in nature of support); *In re* Lineberry, 9 Bankr. 700 (Bankr. W.D. Mo. 1981) (obligation to pay life insurance on own life constitutes support); *In re* Tope, 7 Bankr. 422 (Bankr. S.D. Ohio 1980) (obligation to pay mortgage payments, utilities, telephone bills, real estate taxes, and insurance on home nondischargeable). This disregard for the payee's identity is particularly evident when the payments benefit the debtor's minor children. *See, e.g., In re* Holt, 40 Bankr. 1009

statutory language, which excepts from discharge support debts "to" a qualified dependent, to read "for the benefit of" that dependent.[232] The result is indisputably correct; it would be illogical to demand that payments for essentials flow through the dependent's hands in order to constitute support for bankruptcy purposes.

b. Assumptions

The courts have been less disposed to disregard the recipient's identity when the spouses jointly incurred the obligation during marriage, but the debtor assumed full responsibility for repayment on divorce. Although assumptions of liabilities differ from obligations to pay future expenses because they are collateral obligations owed directly to the spouse for past, as opposed to future, goods or services, assumptions may overlap with future expense obligations to the extent that both types of debt may involve similar underlying expenses, such as mortgage payments, educational expenses, or medical expenses.[233] The distinctive feature of an assumption of liability is the continuing legal obligation of the former spouse to the joint creditor irrespective of the debtor's assumption; the assumption is a secondary agreement that does not alter the underlying obligation to the third party creditor.[234] Absent the creditor's release of the spouse, the assumption merely indemnifies the spouse.

When the hold harmless agreement is express, courts have little difficulty concluding that the debtor may not be relieved of continuing liability to the spouse simply because the underlying debt is owed to a third party.[235] As the *Calhoun* court noted in reaching this result,[236] the House and Senate reports indicated that Congress did not intend for hold harmless agreements to be discharged if the agreement was actually in the nature of support.[237] Accordingly, courts are virtually unani-

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(Bankr. S.D. Ga. 1984) (mortgage payments and payments for children's medical and dental bills); *In re* Growney, 15 Bankr. 849 (Bankr. W.D.N.Y. 1981) (medical, dental, optical, and prescription expenses for children nondischargeable, although not payable directly to wife or children).

232. *See, e.g., In re* Holt, 40 Bankr. 1009 (Bankr. S.D. Ga. 1984).

233. *See* Annotation, *Debts for Alimony, Maintenance, and Support as Exceptions to Bankruptcy Discharge, Under § 523(a)(5) of Bankruptcy Code of 1978*, 69 A.L.R. Fed. 403 (1984 & Supp. 1986) (cases grouped according to type of underlying obligation).

234. *See generally* Robbins, *Advantages of a Timely Bankruptcy*, 5 FAM. ADVOC., Winter 1983, at 14; Shiffer, *supra* note 8, at 9.

235. *See In re* Williams, 703 F.2d 1055, 1057 (8th Cir. 1983) (critical issue is function); *In re* Sledge, 47 Bankr. 349, 352 (Bankr. E.D. Va. 1981) (hold harmless agreement "in lieu of alimony" is nondischargeable support); *In re* French, 19 Bankr. 255 (Bankr. M.D. Fla. 1982).

236. *In re* Calhoun, 715 F.2d 1103, 1106 (6th Cir. 1983).

237. The House Report stated:

> This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the

mous in treating a hold harmless agreement the same as a direct obligation.[238]

Calhoun expressly limited its analysis to the independent agreement between the debtor and spouse.[239] The analysis did not extend nondischargeability to the underlying debt itself, which is the obligation between the debtor and the third party creditor. Such an extension seems warranted if the debtor's continued payment is necessary to assure the dependents an uninterrupted flow of support. For example, if the creditor's successful collection from the spouse is likely, the family may lack necessary funds while pursuing indemnification. On the other hand, nondischarge of the underlying debt could injure the dependents if, for instance, the creditor were to seek recourse against secured property possessed by the spouse or if the debtor were to cease or reduce direct support payments to the dependents in order to satisfy other creditors. In most cases, continuing the obligation on the hold harmless agreement alone will adequately protect the spouse, and the detriment of denying the debtor relief from his contractual debts merely because of his divorce may outweigh any benefit obtained by nondischarge of the underlying debt.

The unanimity among the courts with respect to express hold harmless agreements ends when debt assumptions fail to provide such a clause.[240] While many cases have held simply that an assumption itself implies an agreement to indemnify the former spouse for liability,[241] a number of courts have refused to extend the exception further and have granted discharge in the absence of an express hold harmless provision, regardless of the effect on the dependents.[242] The requirement by some

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agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.

H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320; S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865.

238. *See, e.g., In re* Petoske, 16 Bankr. 412 (Bankr. E.D.N.Y. 1982).

239. *Calhoun*, 715 F.2d at 1107. The distinction, as a practical matter, may be inconsequential. If the court discharged only the debtor's liability to the creditor, the creditor would not be permitted to seek recourse from the debtor himself, but could proceed against the spouse, since the debtor's discharge would not affect her coliahility. If the spouse were required to pay the creditor, sbe then could proceed against the debtor on his undischarged hold harmless agreement. The debtor would risk both payment of the underlying debt and the additional costs incurred by the creditor's debt collection efforts. Thus, the debtor may find it advantageous to pay the creditor directly, despite discharge of the debt.

240. *Calhoun* itself implicitly makes this distinction. *See id.*

241. *See, e.g., In re* Lewis, 39 Bankr. 842 (Bankr. W.D.N.Y. 1984); *In re* Jensen, 17 Bankr. 537 (Bankr. W.D. Mo. 1982).

242. *See, e.g., In re* Lineberry, 9 Bankr. 700 (Bankr. W.D. Mo. 1981) (language of provision in which husband agreed to pay directly to third parties all indebtedness incurred during marriage

courts of an express indemnification clause takes too narrow a view of the exception and exalts form over substance, which undercuts the policy of assuring support for the debtor's dependents. The courts should limit the inquiry to ascertaining the effect of discharge on the dependents' ability to support themselves.

c. Divorce Expenses

A court order or separation agreement frequently obligates a divorcing person to pay a dependent spouse's divorce-related expenses.[243] Typically, when the question of dischargeability arises regarding obligations to pay attorney's fees, courts have continued their pre-Code tendency to refuse discharge.[244] The usual rationale is that most states authorize attorney's fees under the same circumstances as direct alimony and apply the same criteria to either award.[245] Since courts award attorney's fees because of the spouse's need, they consider these fees sufficiently related to support to escape discharge. Similarly, courts have found attorney's fees for drafting documents in predivorce support actions, for post-divorce enforcement of decrees, or for defending modification actions to be nondischargeable.[246]

When the spouse is jointly liable for payment of attorney's fees, courts should apply the rationale employed in assumption cases. Absent the debtor's continued responsibility for the debt, creditors would hold the spouse solely liable, which reduces her independent means of support. In the absence of coliability, nondischarge of attorney's fees is harder to justify. Courts sometimes reason that if the debt goes unpaid, the former spouse may have difficulty obtaining future legal services to bring or defend actions relating to the original divorce. Thus, payment is necessary for continued support and therefore should not be discharged.[247] Some courts have justified nondischarge of attorney's fees on the grounds that attorneys may become reluctant to represent dependent spouses because of the risk of nonpayment due to potential discharge of the debt in a subsequent bankruptcy proceeding.[248] These

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not truly a hold harmless agreement).

243. Expenses incurred in other type of family-related litigation, such as paternity actions, frequently raise the same issues.

244. *See supra* notes 137-39 and accompanying text.

245. *See, e.g., In re* Catlow, 663 F.2d 960 (9th Cir. 1981); *In re* Spong, 661 F.2d 6 (2d Cir. 1981); *In re* Bodrey, 31 Bankr. 589 (Bankr. M.D. Tenn. 1983).

246. *In re* Gwinn, 20 Bankr. 233 (Bankr. 9th Cir. 1982) (post-divorce domestic relations litigation); *In re* Catlow, 663 F.2d 960 (9th Cir. 1981) (post-divorce custody proceeding).

247. *See In re* Steingesser, 602 F.2d 36 (2d Cir. 1979); *In re* Romeo, 16 Bankr. 531 (Bankr. D.N.J. 1981); *In re* Bishop, 13 Bankr. 304 (Bankr. E.D.N.Y. 1981); *In re* Lang, 11 Bankr. 428 (Bankr. W.D.N.Y. 1981).

248. *See In re* Dupont, 19 Bankr. 605 (Bankr. E.D.N.Y. 1982); Richards v. Loncar, 14 Bankr.

courts focus more on the function of attorney's fees in general than on the circumstances of an individual case.[249] Either analysis entails consideration of the effect of discharge on the spouse's independent means of support, although in many cases the effect is merely presumed.[250]

Somewhat ironically, many of the same courts that liberally refuse discharge of attorney's fees take a much narrower view of other divorce-related debts. For example, bankruptcy courts have allowed discharge of psychologist's fees incurred in custody hearings and fees of accountants hired to evaluate spousal assets.[251] Such cases have justified discharge by classifying the debt as one owed to a party other than a dependent. More commonly, and more appropriately, however, courts will consider the substance of a debt and its relationship to support without regard to the identity of the payee.[252]

Furthermore, as the court noted in *In re Holt*,[253] nothing in section 523(a)(5) or elsewhere in the Bankruptcy Code requires a debt to be payable directly to a dependent.[254] The Code itself defines "debt" as a "liability on a claim."[255] "Claim," in turn, includes not only a right to payment, but also a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."[256] The Code does not require that a payment must be made directly to a dependent in order to constitute a debt.[257]

The courts' discharge of debts based on the identity of the payee thwarts the purpose of the support exception when support capability is thereby affected. If the recipient's identity is critical to discharge,

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276, 278 n.2 (Bankr. N.D. Ill. 1981).

249. The *Spong* court avoided discharge of attorney's fees by viewing an agreement to pay attorney's fees as a third-party beneficiary contract. *Spong*, 661 F.2d at 10-11.

250. *See In re* Shenewolf, 27 Bankr. 187, 188 (Bankr. M.D. Pa. 1982); *In re* Harrod, 16 Bankr. 711, 714 (Bankr. W.D. Ky. 1982); *In re* Demkow, 8 Bankr. 554, 555 (Bankr. N.D. Ohio 1981); *In re* Wells, 8 Bankr. 189, 192 (Bankr. N.D. Ill. 1981) (award of attorney's fees in Illinois divorce generally in nature of alimony); *In re* Knabe, 8 Bankr. 53, 56 (Bankr. S.D. Ind. 1980).

251. *See In re* Linn, 38 Bankr. 762, 763 (Bankr. 9th Cir. 1984) (psychiatrist's fees dischargeable); *In re* Dorman, 3 Collier Bankr. Cas. 2d (MB) 497 (Bankr. D.N.J. 1981) (accountant's fee and debt to investigators whose services established divorce action dischargeable). Similarly, a few cases have refused to classify as nondischargeable medical expenses associated with the birth of a child born out of wedlock. *See, e.g., In re* Brown, 43 Bankr. 613, 615-16 (Bankr. M.D. Tenn. 1984).

252. *See In re* Bedingfield, 42 Bankr. 641, 645 (Bankr. S.D. Ga. 1983); *In re* Holt, 40 Bankr. 1009, 1011-12 (Bankr. S.D. Ga. 1984); Richards v. Loncar, 14 Bankr. 276, 277-78 (Bankr. N.D. Ill. 1981).

253. 40 Bankr. 1009 (Bankr. S.D. Ca. 1984).

254. *Id.* at 1012-13 & nn.2, 3.

255. 11 U.S.C. § 101(11) (1982).

256. *Id.* § 101(4).

257. *See Holt*, 40 Bankr. at 1011.

results may turn on the drafting of the creating document, rather than the substance of the debt.[258] To avoid elevating form over substance, bankruptcy courts should scrutinize initially the function of each debt.

B. The Role of State Law

Under the Bankruptcy Reform Act of 1978 Congress intended courts to apply federal law, not state law, in analyzing the nature of a support-related debt for dischargeability purposes.[259] Disagreement continues, however, as to the appropriate role of state law in formulating that federal law. Because the concept of support is a creature of state law, no federal law of support, nor of domestic relations in general, exists.[260] Although the federal courts have agreed that state law should be used to guide the bankruptcy courts in the creation of the appropriate federal standard,[261] the extent of that guidance remains unclear.

In enacting the current Bankruptcy Code, Congress expressly rejected the state-law approach developed under the former Bankruptcy Act,[262] by which courts generally categorized divorce-related debts by reference to the law of the state in which the obligation arose.[263] The committee reports stated: "What constitutes alimony, maintenance, or support, will be determined under the bankruptcy laws, not State law. Thus, cases such as *In re Waller* . . . are overruled, and the result in cases such as *Fife v. Fife* . . . is followed."[264] Congress clearly intended

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258. *Richards*, 14 Bankr. at 278.

259. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320; S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865.

260. For discussion of the "domestic relations exception" to federal jurisdiction, see *supra* note 30.

261. *See, e.g., In re* Spong, 661 F.2d 6, 8-9 (2d Cir. 1981); *In re* King, 15 Bankr. 127, 129 (Bankr. D. Kan. 1981); *In re* French, 9 Bankr. 464, 467 (Bankr. S.D. Cal. 1981); *In re* Allen, 4 Bankr. 617, 619-20 (Bankr. E.D. Tenn. 1980).

262. Bankruptcy Act ch. 487, 32 Stat. 797 (1903).

263. *See supra* text accompanying notes 141-44.

264. H.R. REP. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320; S. REP. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865. In *Waller*, 494 F.2d 447 (6th Cir. 1974), the court held that the law of the state in which the debt arose must determine what constitutes alimony, maintenance, or support. The reference to Fife v. Fife, 1 Utah 2d 281, 265 P.2d 642 (1954), in the congressional reports was unfortunate, as *Fife* did not suggest, even tangentially, bankruptcy law as the source for classification purposes. *Fife*, a Utah Supreme Court case, merely held that a debt arising from an annulment action had been discharged in bankruptcy. Because of the annulment, the plaintiff was not a "former spouse," and the award could not escape discharge because alimony generally is not available in an annulment action. *Id.* at 282, 265 P.2d at 643. Although *Fife* may stand for the proposition that state law should determine the relationship of the parties in order to determine whether a duty of support exists, the reference in the congressional reports must be interpreted solely in terms of the *result* of the case.

that, for bankruptcy purposes, courts should not categorize divorce-related debts by applying the law of a specific state.[265] Unfortunately, that was about all Congress made clear.

The bankruptcy court in *In re Warner*[266] attempted to delineate the proper role of state law by recognizing that, although federal law must determine dischargeability, the underlying relationship that creates an obligation of support is a state-law question.[267] Based on that principle, the *Warner* court set out a two-step test: first, by applying the law of the state in which the obligation arose, the court should determine whether the debtor had a duty of support;[268] second, once a duty is established, the court should apply federal law to determine whether a particular debt falls within that state-law duty.[269] In other words, according to the *Warner* court, the federal test is to determine whether a debt was created to discharge a particular state-law duty of support.[270]

Although the *Warner* test enjoyed some initial acceptance,[271] later cases rejected it as overemphasizing state law and approximating the *Waller* approach that was expressly repudiated by Congress.[272] In *In re Williams*[273] the Eighth Circuit held that a debt to pay attorney's fees could constitute support even though the state in which the debt arose did not view it as such.[274] Similarly, in *Boyle v. Donovan*[275] the Eighth Circuit again held that the parties' intention that an agreement to pay post-majority child support and educational expenses should function as support controlled classification of the debts even though the debtor had no duty to support his adult children under state law.[276] Under

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265. In Brown v. Felsen, 442 U.S. 127, 136 (1979), the United States Supreme Court also declared that federal law must determine discharge in bankruptcy. While *Brown* involved the issue of discharge under §§ 17(a)(2) and (4) of the former Bankruptcy Act, the courts later interpreted the case to apply in principle to dischargeability under § 523(a)(5) as well. *See In re* Warner, 5 Bankr. 434, 439 (Bankr. D. Utah 1980).

266. 5 Bankr. 434 (Bankr. D. Utah 1980).

267. *Id.* at 439.

268. *Id.*

269. *Id.*

270. *Id.* at 441-42.

271. *See, e.g., In re* Tillett, 22 Bankr. 907, 910 (Bankr. W.D. Okla. 1982); *In re* Miller, 17 Bankr. 717, 720 (Bankr. W.D. Wis. 1982); *cf. In re* Lang, 11 Bankr. 428 (Bankr. W.D.N.Y. 1981) (state law to be disregarded only when state law applies "support" so broadly as to encompass property settlement).

272. *See In re* Yeates, 44 Bankr. 575, 578 (Bankr. D. Utah 1984), *aff'd*, 807 F.2d 874 (10th Cir. 1986) (criticizing *Warner* as impermissibly establishing a different standard in each state and suggesting that the two-step test realistically "collapses down to a simple one-part test based on state law").

273. 703 F.2d 1055 (8th Cir. 1983).

274. *Id.* at 1057.

275. 724 F.2d 681 (8th Cir. 1984).

276. *Accord In re* Harrell, 754 F.2d 902 (11th Cir. 1985); Shaver v. Shaver, 736 F.2d 1314

these later cases, the federal concept of support may be broader than that of any individual state. While state law will control whether the relationship of the parties is sufficient to establish a duty of support, federal law should determine whether a particular obligation fulfills that duty.

In re Spong,[277] decided by the Second Circuit in 1981, was the first appellate case to suggest directly that state-law support principles in general, rather than the law of the state in which the obligation arose, should form the basis of the federal definition of support for bankruptcy purposes. The *Spong* court concluded that because federal courts do not have jurisdiction to grant divorces or award support, "Congress could not have intended that federal courts were to formulate the bankruptcy law of alimony and support in a vacuum, precluded from all reference to the reasoning of the well-established law of the States."[278] The *Spong* court treated attorney's fees as support because a dependent spouse may otherwise lack the ability to sue or defend a divorce action; thus, such fees may be legal necessaries.[279] *Spong* thus relied on general state-law support principles, rather than the law of a specific state, to arrive at its formulation of the federal standard of support.

Unfortunately, the cases purporting to follow *Spong* largely overlooked or misconstrued this aspect of the case.[280] For example, in *In re Knight*[281] the District Court of North Carolina, while professing to adopt *Spong*, directly applied the North Carolina alimony criteria as "guidance" in determining the parties' intent in the husband's agreement to pay attorney's fees.[282] Other courts recognized that specific

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(9th Cir. 1984). Somewhat inconsistently, *Boyle* implied that form might prevail over substance if the parties followed the appropriate state-law formula. The court suggested that had the parties intended to effect a property settlement, they could have structured their agreement accordingly under an Arkansas statute, ARK. STAT. ANN. § 34-1214(A)(1) (Supp. 1985), that authorizes property division only at the time the divorce decree is entered. 724 F.2d at 683.

277. 661 F.2d 6 (2d Cir. 1981).

278. *Id.* at 9.

279. *Id.*

280. The dissent in *Spong* apparently misconstrued the basis of the majority's opinion, when it criticized as impermissible the majority's reliance on state-law principles, declaring that:

> Bankruptcy law is uniform, state law is diverse. When Congress directs us to determine a matter under bankruptcy law, recourse to state law seems inappropriate. It is also an abdication of responsibility. On the majority's reasoning, divorce counsel may collect his fee from the debtor as 'alimony' even where the client spouse has been awarded no alimony at all.

Id. at 11-12 (Lumbard, J., dissenting). Not only did the dissent misread the majority opinion as relying on state law, rather than the *reasoning* behind state-law decisions, as the majority clearly stated, *see id.* at 9 (majority opinion), but the dissent also contradicted itself by implying that only court-awarded alimony should be nondischargeable. *See id.* at 11 (Lombard, J., dissenting).

281. 29 Bankr. 748 (Bankr. W.D.N.C. 1983).

282. The court held that North Carolina case law required application of the test for alimony

state law did not control classification to the extent that a state court's label of a debt would be determinative.[283] Some courts, however, merely concluded that the federal law and the law of a particular state were identical and applied the latter without further analysis.[284] Some courts considered as relevant, but not determinative, the amount of support the state court would have granted had it been required to address the question,[285] while others looked to the specific criteria used to award support in the state in which the debt was created.[286]

Faced with such divergent standards, the *Calhoun* court resolved the issue by expressly rejecting the relevance of an individual state's law.[287] The Sixth Circuit in *Calhoun* concluded that the federal law of support for bankruptcy purposes should be based on factors "most often considered relevant by state courts generally in determining whether to grant support without reference to any particular state's law."[288] The *Calhoun* approach resolves the controversy in a manner consistent with congressional intent.

Other courts have adopted the *Calhoun* approach concerning the role of state law in the formulation of a federal standard of support. For example, in *In re Harrell*[289] the Court of Appeals for the Eleventh Circuit arrived at a similar conclusion by pronouncing that section 523(a)(5) did not require a particular state-law duty of support. The court reasoned that, although Congress might have referred to dischargeability in terms of state law, it chose instead to describe a nondischargeable obligation as one in the "nature" of support. The *Harrell* court stated that "in using this general and abstract word, Congress did not intend bankruptcy courts to be bound by particular state law rules."[290] Thus, the court decided that the debtor's voluntary agreement to pay post-majority child support and his sons' college expenses constituted nondischargeable support payments.

Similarly, the court in *In re Yeates*[291] adopted the *Calhoun* ap-

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pendente lite in awarding attorney's fees; thus, regardless of whether the parties had designated the attorney's fees as alimony, the court would regard the fees as such if it found the spouse to have insufficient means to subsist during the suit and to defray the cost of litigation. *Id.* at 752.

283. *See In re* Williams, 703 F.2d 1055, 1057 (8th Cir. 1983).

284. *See, e.g., Knight*, 29 Bankr. at 752; *In re* Sledge, 47 Bankr. 349, 353 (Bankr. E.D. Va. 1981).

285. *See In re* French, 9 Bankr. 464, 468 (Bankr. S.D. Cal. 1981); *In re* Williams, 3 Bankr. 401, 403 (Bankr. N.D. Ga. 1980).

286. *See In re* Crist, 632 F.2d 1226, 1229 (5th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981), 454 U.S. 819 (1981); *In re* Frey, 13 Bankr. 12, 14 (Bankr. S.D. Ind. 1981).

287. *See supra* text accompanying notes 201-02.

288. *In re* Calhoun, 715 F.2d 1103, 1108 (6th Cir. 1983).

289. 754 F.2d 902 (11th Cir. 1985).

290. *Id.* at 904.

291. 44 Bankr. 575 (Bankr. D. Utah 1984), *aff'd*, 807 F.2d 874 (10th Cir. 1986).

proach and agreed that a uniform federal standard cannot be developed unless courts reject reliance on specific state law; otherwise, according to the court, a different test would necessarily apply in each state and would depend on the "relative strictness or leniency of the state's divorce laws."[292] The *Yeates* court noted that, although the application of a federal law based on general support principles would involve many of the same factors and considerations as the state law determination, the focus of the bankruptcy court is different and the weight accorded the factors will vary.[293] While a state court decides whether a legal obligation exists, the bankruptcy court is faced with an existing obligation and the problem of classifying that obligation as support or property settlement.[294]

Thus, application of general support principles as opposed to specific state law is the emerging trend. While this approach generally has not been disputed,[295] some lower courts continue to overlook its significance by failing to recognize the distinction between general support principles and the specific state law of support.[296] The approach applying general support principles is not only correct in policy terms, but is consistent with other areas of bankruptcy law as well.[297] The task of isolating and weighing the appropriate factors relevant to the federal test is narrowed when the courts uniformly recognize that general, not specific, state law should apply. The remaining problem, then, is the isolation of those relevant general state-law factors in order that courts

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292. *Id.* at 578.

293. *Id.* at 579.

294. *Id.; see In re* Moses, 34 Bankr. 378 (Bankr. S.D. Tex. 1983) (debt constitutes support under federal law despite fact that Texas state law does not allow alimony). *But see In re* Comer, 723 F.2d 737, 739-40 (9th Cir. 1984) (res judicata bars court from looking behind state court default judgment); Goss v. Goss, 722 F.2d 599, 604 (10th Cir. 1983) (collateral estoppel prevents redetermination of state court decision as to nature of debt).

295. *See also* White, *supra* note 11, at 29-31 (discussing lack of uniformity regarding reliance placed on state law). *But see In re* Comer, 723 F.2d 737, 739-40 (9th Cir. 1984) (res judicata bars court from looking behind state court default judgment); Goss v. Goss, 722 F.2d 599, 604 (10th Cir. 1983) (collateral estoppel will prevent redetermination of a state court decision as to the nature of a debt).

296. *See, e.g., In re* Bedingfield, 42 Bankr. 641, 646 (Bankr. S.D. Ga. 1983). *Bedingfield* cited *Calhoun* with approval and noted that bankruptcy courts are not bound to accept state-law characterizations any more than they must accept the language of the decree itself. The *Bedingfield* court went on, however, to state that most bankruptcy courts consider such factors as "applicable state law" in determining the nature of a debt. *Id.* at 646 & n.1 (citing *In re* Crist, 632 F.2d 1226, 1229 (5th Cir. 1980) (decided under the Bankruptcy Act), *cert. denied*, 451 U.S. 986 (1981), 454 U.S. 819 (1981)).

297. While the Bankruptcy Code directs that the law of a specific state should be applied in determining some bankruptcy issues, *see, e.g.*, 11 U.S.C. § 522 (1982 & Supp. III 1985) (exemptions), *Id.* § 502 (allowance of claims or interests), when no such direction applies and no specific federal law exists, general state law principles should be applied in order to achieve national uniformity. *See* Note, *Indiana Divorce Law, supra* note 14, at 391-94 (1979).

can apply them in a uniform manner.

C. Analysis of Individual Debts

Once courts acknowledge both that the payee's identity does not determine whether a debt is in the nature of support and that the applicable federal law must be based on general state-law principles rather than the law of a particular state, the final issue is the proper analysis of a specific debt to identify the attributes of support. The analysis must focus on the underlying family law concept of support as a means of fulfilling a dependent's actual needs as determined by the accustomed standard of living. Since support is based on relative need, every case will require an individualized investigation. Courts can simplify the inquiry, however, by adopting a uniform general approach or test that delineates the factors relevant to categorization of a specific debt. Thus, the final issue has two related but distinct components: the application of the proper analytical approach and the identification of the appropriate factors to apply in that approach.

The *Calhoun* case represents a significant step towards developing the proper approach to categorizing a specific debt. *Calhoun*'s three-step test attempts to encompass both components of this final issue. To achieve the desired comprehensive and consistent result, as well as to facilitate divorce planning, however, the *Calhoun* approach must be modified and clarified to address the dual nature of the inquiry and to focus more directly on the underlying contemporary nature of support.

1. The General Test

Prior to *Calhoun*, courts generally analyzed debts under section 523(a)(5) by applying various and often imprecise versions of an "intent" test developed under the former bankruptcy law.[298] In an attempt to clarify the appropriate standard, the *Calhoun* court proposed a three-step test based on separate inquiries into the following: the intent of the court or the parties creating the obligation; the actual effect of the liability in providing for the necessary support of the debtor's dependents; and the reasonableness of the debt, both at the time of its creation and at the time of the bankruptcy action.[299]

While the first two prongs of the test, intent and effect, are similar to earlier judicial approaches, *Calhoun's* requirement of separate findings of both an intention that the debt constitute support and an actual effect of the debt in functioning as support is questionable. Imposing an intent test as the first step gives rise to the ambiguities and circular

298. *See supra* text accompanying notes 148-53.
299. *In re* Calhoun, 715 F.2d 1103 (6th Cir. 1983).

reasoning that the exclusive use of such a test promoted in the past.[300] In most cases, courts cannot determine intent without analyzing the function of the debt. Apparently, the *Calhoun* court created the initial step to prevent overly liberal interpretation of the second step, since, as the court noted, every assumption of debt may function as support to some extent.[301] The addition of an intent test could act as a check to assure that not every divorce-related debt avoids discharge in bankruptcy.

This check seems unnecessary, however, given the *Calhoun* court's definition of support in terms of need—the amount necessary to fulfill the dependents' actual living requirements—which is consistent with general state-law principles of support. Since only actual need qualifies a debt for categorization as support under the effect test, a built-in check exists that allows the discharge of excessive obligations. *Calhoun*'s third step, which focuses the inquiry into the reasonableness of the debt, further balances the impact of the effect test by assuring that need is measured on a relative basis that considers the debtor's ability to pay, which again is consistent with general state-law principles.

Perhaps *Calhoun*'s directive to establish intent can be interpreted conversely: if the parties or the court intended the debt to be part of a property distribution, which is a division of ownership interests, then the debt is dischargeable regardless of its effect. In other words, a debt arising from a mere division of property rights is dischargeable and can never be classified as support in the federal bankruptcy sense. *Tilley v. Jessee*[302] illustrates the danger of such an approach.

In *Tilley* the Court of Appeals for the Fourth Circuit concluded that the husband's agreement to pay a lump sum in installments, secured by life insurance, in exchange for the wife's interest in real estate was dischargeable. The wife demonstrated both a need for the payment and her own intention that the agreement was to provide for her support.[303] Although the husband conceded that the payment actually was used for the wife's support, he argued that his intention was merely to gain control of the property and that he had treated his payments as nondeductible for tax purposes. The Fourth Circuit held that the wife had failed to carry the burden of proving mutual intent and permitted discharge of the debt.[304] Although the *Tilley* court did not refer to *Calhoun*, the case exemplifies the consequence of placing excessive impor-

300. *See supra* text accompanying notes 180-86.

301. 715 F.2d at 1108.

302. 789 F.2d 1074 (4th Cir. 1986).

303. The wife was in poor health and unable to support herself or retain her standing in the community without the husband's payment of $2000 per month. *Id.* at 1076.

304. *Id.* at 1078.

tance on an intent test.

If *Calhoun*'s intent test requires a mutual, subjective intention that the obligation constitute support, the test must be erroneous. Because property division today has replaced traditional post-marital support to a significant extent, the support aspects of such a property division should be nondischargeable insofar as they do not exceed actual need. If a property division were ordered or agreed to as a substitute for continued support payments, a court's denial of spousal rights otherwise enforceable, simply because of the form selected, would be inequitable.

Calhoun's intent test may be superfluous, because in most cases intent is unclear and because courts determine intent by applying the same factors used to demonstrate need. In other words, if a debt were to have the effect of providing support under the effect test, undoubtedly the parties would have intended the debt as support unless an unambiguous intent to the contrary was apparent. Application of an initial intent test is unnecessarily dangerous, moreover, because courts may attribute too much import to the language of the document and the placement of its terms. Therefore, the first two steps of *Calhoun* should be compressed into a single test based on need as evidenced by the function of the obligation. Although speaking in terms of intent, the court in *In re Yeates*[305] effectively applied such a test and concluded that generally the determinative criterion should be whether the spouse is able to provide for her own basic necessities. Thus, a debt should not be discharged if discharge would leave the spouse without adequate means to meet those needs. The fresh start policy of bankruptcy should override the statutory exception if the spouse is capable of self-support.

When courts add the third step—reasonableness of the debt—to the formula, the test becomes one of determining relative, rather than absolute, need, which is the same criterion traditionally and currently relied upon by most state courts in ordering support. The relative need standard seems best to approximate the intent of Congress in enacting the exception for debts "actually in the nature" of support, while at the same time rejecting proposals to except from discharge *all* divorce-related debts, especially those arising from property divisions.[306] Congress must have meant for the bankruptcy courts to analyze the actual function of divorce-related debts. For a debt to function as support, the debt must fulfill a need on the part of the dependent. Although needs include goods and services necessary for mere survival, needs must be, and have traditionally been, determined relative to the standard of liv-

305. 44 Bankr. 575 (Bankr. D. Utah 1984), *aff'd*, 807 F.2d 874 (10th Cir. 1986).

306. *See* 3 *Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 1287-88 (1976).

ing previously enjoyed by the parties as balanced against the abilities of the parties to provide for those needs. The ability to provide necessarily relates to the reasonableness of the debt. Thus the "actual nature" of a debt encompasses its reasonableness in terms of ability to pay as well as the function of the debt in any absolute sense.

The *Calhoun* test to determine the reasonableness of a debt consists of two separate inquiries: determining the reasonableness of the debt in light of the debtor's ability to pay at the time of divorce, and reevaluating the reasonableness of the debt at the time of bankruptcy. While courts could easily incorporate the first inquiry into a single test based on function, courts have severely criticized the second inquiry—reevaluating the reasonableness of the debt at bankruptcy—as an impermissible attempt to modify a state court award outside the jurisdiction of the bankruptcy court.[307] In *In re Harrell*[308] the Eleventh Circuit rejected this aspect of *Calhoun* by interpreting the statutory language to require "bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is 'actually in the nature of alimony, maintenance or support,' " a simple inquiry that does not involve a determination of precise financial circumstances or levels of need.[309] According to the *Harrell* court, an ongoing assessment of need due to changing circumstances is strictly a function of the state courts.[310] The *Harrell* approach begs the question and offers no guidance as to how to discern the "nature" of support obligations.

The court in *In re Yeates*[311] also criticized the *Calhoun* inquiry into the reasonableness of the debt at the time of bankruptcy. The *Yeates* court rejected the notion that bankruptcy judges should balance policy considerations by concluding that Congress already had performed that function. The court further disapproved consideration of the debtor's current financial condition, because "[c]ertainly Congress was aware that a debtor in bankruptcy will have suffered a constantly worsening financial condition."[312] However, the *Yeates* court regarded the spouse's present financial condition as relevant by reasoning that if the payment is no longer necessary for support, the "change in the underlying nature of the payment will make it superfluous, and

307. *In re* Harrell, 754 F.2d 902 (11th Cir. 1985); *In re* Yeates, 44 Bankr. 575 (Bankr. D. Utah 1984), *aff'd*, 807 F.2d 874 (10th Cir. 1986).

308. 754 F.2d 902 (11th Cir. 1985).

309. *Id.* at 906.

310. *Id.* at 907.

311. 44 Bankr. 575 (Bankr. D. Utah 1984), *aff'd*, 807 F.2d 874 (10th Cir. 1986).

312. *Id.* at 580.

dischargeable."[313]

Yeates thus refined and compressed *Calhoun*'s reasonableness test to require a determination of the following: first, whether the payment was meant to enable the spouse to meet the basic necessities of life; and, second, whether the payment remained necessary at the time the debtor filed his bankruptcy petition. In *Yeates*, because the wife was in a poor financial position both at the time of the divorce and the time the debtor filed bankruptcy, the court found that the loan was necessary to preserve her ability to keep her home. The wife's receipt of assistance from her parents did not relieve the debtor of his duty of support; nor did the possibility that the wife could find cheaper housing prevent the debt from relating to an essential need. Consistent with the idea of need as a relative concept, the *Yeates* court noted that the couple's lifestyle during their marriage may be relevant in determining the necessary level of support.[314]

Although the effect of reevaluation of a debt in light of present circumstances may be to reduce the amount of a debt that originally constituted support, the *Calhoun* approach may be more in accord with the Code's exception for a debt that "*is*" in the nature of support.[315] The question is perhaps more definitional than jurisdictional: *Calhoun* would allow discharge of debts or portions thereof that, at the time of bankruptcy, do not currently provide actual support to dependents. The limited inquiry into reasonableness of the debt is tempered by the court's caution that only an obligation, otherwise characterized as support, which is "manifestly unreasonable," to the extent it "substantially exceed[s] a spouse's present and foreseeable ability to pay," should be reduced in amount.[316] Furthermore, when the debtor's present circumstances bave changed, *Calhoun* permits reduction of a debt only when continuation of the obligation would be inequitable.[317]

A single integrated function test based on generally accepted state-law concepts of support focuses on the true effect of an individual debt. *Calhoun*'s three-part test should be consolidated into one test that requires analysis of all three steps to assure that all relevant aspects of the inquiry are properly addressed.[318] The courts, however, must be conscious of the interrelationship between intent and effect in order to

313. *Id.*

314. *Id.* at 581 n.5.

315. 11 U.S.C. § 523(a)(5)(B) (1982 & Supp. III 1985).

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

317. *Id.* at 1110 n.11.

318. Courts approving *Calhoun*'s three-step test frequently have failed to delineate those steps in applying the test. *See, e.g., In re* Troup, 730 F.2d 464 (6th Cir. 1984) (applied only first step); *In re* Bedingfield, 42 Bankr. 641 (Bankr. S.D. Ga. 1983) (same).

avoid excessive emphasis on the relevance of intent in ambiguous cases.

While the *Calhoun* court expressly limited application of its analysis to assumptions of indebtedness, several courts have found the *Calhoun* test equally applicable to any case in which the nature of a debt is in question.[319] This extension is warranted because *Calhoun* provides a standard consistent with the language of section 523(a)(5) and congressional intent to except from discharge only those debts that are in the nature of support. Once a court has defined the nature of nondischargeable debts in terms of their function of satisfying relative need, the court can isolate the factors that indicate support in order to characterize an individual debt.

2. Relevant Factors

Calhoun properly mandates that bankruptcy courts should determine the nature of a debt, within its analytical framework, by applying factors typically used by state courts in general. The final inquiry is designed to isolate those factors that are relevant to determining when a debt functions as support as defined by contemporary general state law. While the *Calhoun* court cited examples of factors commonly considered relevant[320] and noted that their application led to "[f]airly divergent dispositions,"[321] the court unfortunately did not go far enough in delineating the appropriateness of specific factors. As a result, bankruptcy courts remain uncertain as to how to categorize an individual debt, even when ostensibly relying on the *Calhoun* approach. Although *Calhoun* failed to analyze the significance of individual factors or to reject completely application of certain other factors, courts must attempt this task in order to achieve uniformity of result.

The bankruptcy courts, as well as the state courts, frequently place considerable significance on the structure and language of the parties' separation agreement or the court's order of support.[322] The indefiniteness of obligations, the existence and form of other payments, and the labeling of debts frequently remain critical. Certainly, such factors may tend to demonstrate an affirmative intention to provide a continuing source of necessary funds; courts, however, should not consider their absence to be indicative of the converse because many, if not most, obli-

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319. *See, e.g., In re* Singer, 787 F.2d 1033 (6th Cir. 1986); *In re* Bedingfield, 42 Bankr. 641, 646 (Bankr. S.D. Ga. 1983).

320. *Calhoun*, 715 F.2d at 1108.

321. *Id.*

322. *See, e.g., In re* Gebhardt, 53 Bankr. 113 (Bankr. W.D. Mo. 1985) (bankruptcy court "cannot ignore the plain language of the separation agreement" and thus should only ascertain function of debt when decree ambiguous); *In re* Hillius Farms, 38 Bankr. 334 (Bankr. D.N.D. 1984) (must ignore parties' circumstances if decree is unambiguous).

gations that function as support today are structured in non-traditional forms.[323]

In re Bedingfield[324] is a case in point. Although the *Bedingfield* court relied heavily on *Calhoun* and emphasized the functional importance of the debt, the court affirmed the bankruptcy court's discharge of the debtor's assumption of first and second mortgage payments. Despite the parties' denomination of part of the award as "additional alimony,"[325] the court concluded that the agreement was dischargeable as part of a property division. In reaching its conclusion, the *Bedingfield* court noted that the debtor was to continue payments beyond the wife's remarriage or death and that the wife and children did not live in the home, but rented it to a third party while the wife attended law school in another city. Furthermore, the court found the debtor's assumption of the wife's automobile loan and his agreement to pay her law school expenses insufficiently related to support to avoid discharge.

By failing to inquire whether the payment of these debts was necessary for the wife to maintain her actual living expenses while pursuing a higher education and new career, the *Bedingfield* decision has the potential to subject to discharge any award of rehabilitative alimony.[326] No dependent spouse will be assured of maintaining an adequate standard of living while attempting to become self-supporting if the courts fail to recognize that rehabilitative alimony lacks the traditional features of permanent alimony but fulfills the same purpose of providing for relative necessaries during the transitional period from dependency to self-support. To conclude that rehabilitative alimony awards, regardless of the label of the obligation, are not in the nature of support contravenes the prevailing state law preference for awarding support on a short-term basis.[327] Courts should limit the significance placed on the language or structure of an obligation to the first inquiry, which focuses on determining the parties' intentions; courts should not use language or structure to defeat an obligation that otherwise functions as support.

The courts' primary inquiry should focus on the parties' existent circumstances, in terms of the actual dollars necessary for the dependents to maintain a reasonable standard of living, with due regard to the dependents' predivorce lifestyle and the debtor's ability to subsidize that standard of living when the dependents are unable to maintain it on their own. In this regard, the following factors bear directly on de-

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323. *See supra* text accompanying notes 53-55.

324. 42 Bankr. 641 (Bankr. S.D. Ga. 1983).

325. *Id.* at 648. The agreement regarding the second mortgage was located in a provision transferring title to the home to the wife. *Id.* at 649.

326. *Cf.* discussion of *Tilley v. Jessee*, *supra* notes 299-301 and accompanying text.

327. *See supra* note 53 and accompanying text.

termining the needs and abilities of the respective parties: mental, physical, and emotional health; age; work skills; educational background and opportunities to enhance earning potentials; and the extent of individual assets. Likewise, courts should consider the presence of minor children, their unique needs, and the custodial and visitational arrangements made regarding them. The length of the parties' marriage may be relevant in determining the standard of living to which all the parties were accustomed, and thus their relative needs.

In *In re Singer*[328] the Court of Appeals for the Sixth Circuit applied such factors[329] to conclude that a debtor's agreement to pay his former wife 800 dollars per month for five years, then 400 dollars per month for five additional years, was nondischargeable, despite the agreement's denomination of the payments as a release of property rights.[330] The court distinguished a "property settlement in connection with alimony, maintenance, or support" from one that is "strictly a property settlement," and held that the former is sufficiently in the nature of support to escape discharge.[331] Similarly, in *Shaver v. Shaver*[332] the Court of Appeals for the Ninth Circuit noted that the absence of express provisions for spousal support in a settlement agreement, in conjunction with circumstances indicating a need for support, may lead to the conclusion that the parties may actually have intended a nominal property settlement to constitute support. Both the *Singer* and *Shaver* decisions accommodate non-traditional forms of support by focusing on the effect of the payment on the spouse's ability to maintain a comparable standard of living, at least on a temporary basis.

While the above-mentioned factors are commonly considered relevant in analyzing the nature of a debt,[333] few courts have attempted to confine the inquiry by eliminating certain other factors as unrelated to categorization of a debt as support. Since courts should define support in terms of its overall function of providing the relative necessaries of the particular dependents, some facts are simply irrelevant to the inquiry.

One such factor is marital fault. Although blame for the breakdown

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328. 787 F.2d 1033 (6th Cir. 1986).

329. Relevant factors considered by the *Singer* court included the wife's advanced age, her lack of employment during the marriage, and the husband's provision of a $200 week support allowance to the wife during the marriage after he had moved from the home. *Id.* at 1035.

330. The wife had contributed the proceeds from the sale of her home from a prior marriage to the purchase of the couple's home, an additional fact which would support a finding that the payments were in the nature of a property division. *Id.* at 1033.

331. *Id.* at 1034.

332. 736 F.2d 1314 (9th Cir. 1984).

333. *See, e.g., In re* Singer, 787 F.2d 1033 (6th Cir. 1986); *In re* Bedingfield, 42 Bankr. 641 (Bankr. S.D. Ga. 1983); Hoover v. Hoover, 38 Bankr. 325 (Bankr. N.D. Ohio 1983).

of the marriage remains relevant in some states in awarding alimony, its importance has declined significantly.[334] Few types of traditionally recognized forms of marital fault, such as adultery or cruelty, have any relationship to the parties' economic circumstances, and thus should not enter into a classification inquiry at the bankruptcy level.[335] While *economic* types of fault, such as dissipation of marital assets or failure to provide for dependents to the best of one's capability, may influence a support award, only their direct connection to the provision of relative necessities seems relevant in determining the nature of a payment. Similarly, desertion, nonsupport, and alcoholism or drug addiction, which are also commonly recognized grounds for divorce, may have an indirect bearing on the nature of a debt if they affect the economic status of the parties. In the typical case, however, courts should regard fault as irrelevant in classifying a debt to a spouse as they should disregard it in classifying child support, in which fault plays no role.

Likewise, in determining the nature of an obligation for dischargeability in bankruptcy, courts should not consider the underlying purpose for which a particular debt was originally incurred. *Calhoun* suggests that such an inquiry may be appropriate, however, at least with respect to classifying hold harmless agreements.[336] Even if the parties initially incurred a debt in the acquisition of a luxury item or for one spouse's personal benefit, the facts surrounding its original purpose become meaningless if the current payment of that debt allows a dependent to maintain the predivorce standard of living.[337]

Courts should consider the original purpose of a debt only if it directly bears on the ability of the dependents to support themselves. For example, the likelihood that a creditor actually would proceed against

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334. *See supra* note 3 and accompanying test.

335. *But see In re* Cleveland, 7 Bankr. 927 (Bankr. D.S.D. 1981) (concluding that award was intended as support when wife granted divorce on grounds of cruelty, under which state court usually awarded support).

336. *In re* Calhoun, 715 F.2d 1103, 1111 (6th Cir. 1983) (stating that "[t]he Bankruptcy Court also erred by not considering each loan obligation assumed individually. Many of the factors considered in determining dischargeability could vary depending upon the type of loan involved, its purposes and the circumstances"); *see also In re* Newman, 15 Bankr. 67 (Bankr. M.D. Fla. 1981) (car payments assumed by husband dischargeable because car not essential to providing transportation for children).

337. The court in *In re* Holt, 40 Bankr. 1009 (Bankr. S.D. Ga. 1984), noted:

> Obviously, when a newly married couple purchases furniture on credit, dischargeability of debt and divorce may be the farthest thing from their minds. Usually, such a debt is dischargeable. It is the legally significant event of the divorce decree or separation agreement by which an old, dischargeable debt is transformed into a different obligation which is rendered nondischargeable by § 523(a)(5). The old debt is not the same. When the old debt is branded by the divorce decree, it attains a new and different status. It is then transmogrified from dischargeable to non-dischargeable.

Id. at 1012.

the dependent rather than against some secured property, if the obligor spouse were discharged, could be relevant in a particular instance. For instance, an obligation would directly relate to support if discharge of a debt secured by an asset would likely deprive the dependent of an article of essential property, such as household furnishings or a necessary means of transportation. In the usual case, however, courts should inquire only into the effect of discharge on the dependents' relative means of support and not on the underlying obligation.

V. CONCLUSION

Bankruptcy law's failure to identify clearly the type of debt that qualifies as support for purposes of nondischargeability results largely from the courts' neglecting to consider closely the contemporary meaning of support in the state family law context. Although the form of support awards has changed dramatically in recent years, those awards serve the same function as they have historically: support is meant to fulfill the necessary living requirements of dependents. Courts cannot identify support in the abstract, however, but must analyze it with reference to the family's accustomed standard of living. What may be essential to one family may not be critical to another. Courts, therefore, must define support in terms of the individual family's circumstances.

The form of the support obligation does not alter its underlying nature, whether the payment is made as traditional alimony or part of a property division, for an indefinite period or a short term, as a liquidated amount or a series of modifiable installments. Nor does the identity of the actual recipient of the payment affect the nature of an obligation as support: a payment made indirectly for the benefit of a dependent can contribute to the dependent's support in just as critical a manner as one paid directly to the dependent. Courts can define support only in terms of its actual function in a given fact situation.

In order to develop a federal law of support, as was intended by Congress, bankruptcy courts must consider state family law principles in general, without regard to the particular laws of an individual state. Those general principles require consideration of factors indicating the function of a debt in providing for the day-to-day maintenance of family members; only those factors that have a direct relationship to the economic means of the parties are relevant. Function, the actual impact on the dependents' means of meeting their necessary financial obligations, is the only true indicia of support. Courts must measure that function in relative terms, as it was measured historically under the necessaries doctrine.

The *Calhoun* case sets out a format, albeit somewhat flawed, for testing individual debts for the attributes of support. By modifying the

Calhoun approach to focus entirely on the function of an individual debt and by clarifying the factors necessary in determining that function, bankruptcy courts will be able to apply a predictable standard for deciding dischargeability questions. A predictable federal standard of support will allow courts to achieve the desired uniformity that is lacking under the current approach.

By its nature, the inquiry requires a case-by-case, factual analysis. But by adopting a standard that clearly defines the nature of support as a concept relative to the parties' standard of living, an approach that constitutes a revitalization of the necessaries doctrine, courts can narrow and simplify that inquiry. Revitalization of the necessaries doctrine will result in a federal standard of support that is consistent with modern divorce law principles and will lead to the uniformity and predictability long sought under the Bankruptcy Code.