

Q8 – July 2016 – Selected Answer 1

1) As explained below, while the bankruptcy stay is in effect, the court may require Wife to pay the child support and spousal maintenance, but not the mortgage payments.

A bankruptcy stay is essentially comparable to a castle's drawbridge that is raised to protect the assets inside the castle from an oncoming hoard of barbarians (a.k.a. creditors). The stay comes into effect when the bankruptcy proceeding is initiated by filing for bankruptcy protection under Chapters 7, 11 or 13. In effect, the bankruptcy stay prevents creditors from attempting to collect on their debts, thereby protecting the bankruptcy estate for the benefit of both the bankrupt individual and her creditors. The Bankruptcy Code's automatic stay provision also prevents judgment creditors from collecting, or litigants from finalizing a litigation judgment, prior to the conclusion of the bankruptcy proceedings. However, public policy dictates some exceptions to the protections afforded by the stay. Child support is one of the exceptions to the protection afforded by the stay, as is alimony or spousal maintenance. However, attempts to collect on a home mortgage will be blocked.

a) **Temporary Child Support** - The Court may require the Wife to pay temporary child support during the bankruptcy stay, because public policy dictates that the needs of a child are paramount to the interests involved in the bankruptcy proceedings. Under the Bankruptcy Code and Texas Law, payments made for child support may be enforced despite the existence of the stay, provided the order awarding child support is determined prior to the declaration of bankruptcy. Here, the temporary child support order was granted prior to Wife's filing for bankruptcy. Therefore, because child support may be enforced by a court despite the raised drawbridge that is the automatic stay, Wife will likely be required to pay her child support obligation while the stay is in effect.

However, there does appear to be another issue with the child support award. Texas Family Law dictates that when a court awards child support, a presumption arises that a child support payment of 20% of the first \$7,500/month earned by the obligated parent is in the best interests of the child. If the court chooses to deviate from this number, it must issue findings of fact that support the award's deviation from the statutory presumption. Here, Wife earns \$20,000/month, yet the child support award of \$1800 exceeds \$1500 (i.e. \$1500 = 20% of \$7,500). Although a child support award is generally enforceable despite the existence of an automatic stay in bankruptcy, here the award may not be enforceable until the court issues findings of fact to demonstrate why it chose to deviate from the statutory presumption. That said, the court, in its discretion, is entitled to award an amount greater than the statutory presumption, and matters outside the facts presented here may give more support for the judge's determination.

b) **Temporary Spousal Maintenance** - The court may also enforce the spousal maintenance order. As described above, enforcement of spousal maintenance and alimony payments are within the exception to the automatic stay in bankruptcy. Here, the award of spousal maintenance was ordered prior to Wife's filing for bankruptcy. Therefore, Texas Law, the Bankruptcy code and public policy dictate that the spousal maintenance award will be enforceable against wife despite the existence of the bankruptcy stay.

c) **Mortgage Payments** - The court certainly may not require Wife to pay the mortgage payments in light of the bankruptcy stay. As explained above, the primary purpose of the automatic stay is to prevent creditors from bleeding the bankruptcy estate dry of collateral which could be used to satisfy superior creditors' obligations. Furthermore, attempts to collect on or foreclose secured debts may result in the security interest being terminated, resulting in the violating creditor being relegated to general unsecured status. Here, the court cannot require Wife to pay the mortgage payments while the stay is in effect, because the stay is explicitly created to prevent these kinds of enforcement. Therefore, Wife will not be required to pay the mortgage payments until the stay is lifted and bankruptcy proceedings are finalized.

2) The court may not finalize the divorce or divide Husband and Wife's property and debts. Under the bankruptcy code, the bankruptcy court in which proceedings have been filed is the ultimate authority on distribution of the bankruptcy estate. Under the automatic stay, judgments against the bankrupt individual may not be finalized, because they are considered an attempt to collect on debts. Therefore, the divorce may not be finalized until the bankruptcy stay is lifted. In addition, here the personal debts are community debts, because they were incurred during the marriage. Therefore, the debts should be paid from community assets. If the community assets are divided prior to the lifting of the stay, then the debt that should be satisfied out of community property could have the effect of making the judge's just and equitable division of community property completely and utterly debilitating for one party or the other. As such, the husband and wife's property and debts may not be divided while the stay is in effect.

Texas Essay Question 8:

3. While an automatic stay is in effect, a court can require the wife to pay child support and spousal maintenance but not the mortgage payments

An automatic stay occurs when a bankruptcy petition is filed. At that point, the trustee in bankruptcy steps into the shoes of the debtor and protects the debtor's estate for the bankruptcy proceeding. While an automatic stay is in effect, creditors may not pursue their claims against the debtor, or take other actions against the debtor such as self-help remedies under UCC Article 9. There are limited exceptions to an automatic stay.

Temporary Child Support

Although an automatic stay may be in effect, there are exceptions to the automatic stay such as payments for child support, and spousal maintenance. Child support payments provide necessary support to a child so that the child's basic needs can be provided for and it ensures the welfare of the child is protected. Furthermore, where a parent owes child support, child support arrearages will not be discharged in bankruptcy and the parent owed child support will still be able to obtain a money judgment against the non-paying parent up to 10 years from the date the child turns 18 or graduates from high school, whichever is later. Here, the wife is still liable for the child support payments even though an automatic stay is in effect. This stay does not prevent the husband from pursuing the child support against his wife, or filing a motion for money judgment with the court.

Temporary Spousal Maintenance

Payments for spousal maintenance are another exception to the automatic stay. Spousal maintenance ensures that a spouse can provide for the minimum reasonable needs. Here, although an automatic stay is in effect which would normally prevent a creditor from continuing to pursue a claim against a debtor in bankruptcy, the spousal maintenance exception to the automatic stay would allow the husband to pursue the enforcement action.

Mortgage Payments

Although there are exceptions to an automatic stay, mortgage payments are not an exception. A creditor who is owed mortgage payments must pursue their claim through the bankruptcy proceedings. If the mortgage was recorded before the automatic stay took effect, the recorded mortgage will be able to avoid the strong arm clause of the bankruptcy code. Where a mortgage is not recorded or a security interest is not perfected, the strong arm allows the trustee in bankruptcy to relegate the non-recorded/unsecured claims to the bottom of the priority pile in the bankruptcy proceeding. Here, the wife will not be required to make the mortgage payments while the automatic stay is in effect. Bankruptcy proceedings are meant to protect the debtor in difficult times, to provide fairness to the debtor and creditors, and to possibly rehabilitate the debtor so that the debtor can possibly establish a plan to pay off the debts and become solvent again.

4. While an automatic stay is in effect, the court will not be able to finalize the divorce or divide the husband and wife's property and debts.

Within a divorce proceeding, other proceedings are necessarily joined such as suit affecting the parent child relationship as well as a just and right division of the community property. Consequently, while an automatic stay is in effect, the court will not be able to finalize the divorce or divide the husband and wife's property and debts.

When an automatic stay is in effect, the trustee in bankruptcy steps into the shoes of the debtor and works to protect, account for, and prepare the debtor's assets for bankruptcy so that the assets can be liquidated to satisfy for debts owed by the debtor to creditors. Given this need to freeze the assets of the debtor, a court will not be in a position to divide the husband and wife's property and debts because such division would interfere with the bankruptcy proceeding. If a court were allowed to continue with such division, this arrangement would allow the husband and wife to mislabel property and thereby prevent it from falling within the reach of the trustee in bankruptcy. Here, the court will not be able to finalize the divorce proceeding between the husband and wife or divide their property because of the wife's bankruptcy proceeding and the automatic stay. The wife and husband share community property, and each have separate property, and a division of property occurs within the divorce proceeding. The property cannot currently be divided because such division, and transferring of assets between the husband and wife, will interfere with the actions of the trustee in bankruptcy in protecting the estate of the debtor, the wife. Consequently, The court must wait till the bankruptcy proceedings have terminated before it can divide the property, and then, finalize the divorce.