

Bankruptcy and the Application of the Automatic Stay to Family Law Cases

One does not have to be a bankruptcy specialist to be aware of the automatic stay provisions that go into effect immediately upon the filing of any type of bankruptcy proceeding. [11 USC sec. 362](#). Because the stay is extremely broad and prohibits the continuation or commencement of most legal proceedings against the debtor or the debtor's property and because violation of the stay can lead to harsh sanctions against creditors and attorneys alike, most lawyers and judges are inclined to immediately stop litigating a case once they become aware that a bankruptcy case has been commenced by one of the parties.

While that generally is an appropriate response, the federal law actually excludes a number of family law proceedings from the scope of the stay.

The Automatic Stay: Immediate Relief to a Debtor

The stay has been described as “an injunction against all the world, obtained simply by filing a bankruptcy petition.” Sommer & McGarity, *Collier Family Law and the Bankruptcy Code*, sec. 5.03, p. 5-29 (Matthew Bender 2015). The intent of the stay is to:

“give the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization, or simply to be relieved of the financial pressures that drove him into bankruptcy.”

Id., citing a 1997 House Congressional Report.

Unless the bankruptcy court grants relief from the stay, it generally remains in effect until the debtor is granted or denied a discharge or until the bankruptcy case is dismissed or closed.

Family Law Exceptions to the Automatic Stay

[The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8](#), made extensive changes to the Bankruptcy Code. [USC Title 11](#). A number of those changes made it easier to move forward with some family law issues despite the filing of a bankruptcy petition and other provisions added protections from discharge for some family related debts and financial obligations.

[11 USC sec. 362](#) provides that the automatic stay does not apply to the commencement or continuation of a legal proceeding against the debtor:

- For divorce or dissolution of marriage except to the extent that the action seeks to determine the division of property that is property of the estate.
- Concerning child custody or visitation.
- Regarding domestic violence.
- To establish or modify an order for a domestic support obligation.
 - A domestic support obligation is defined in [11 USC sec. 101\(14A\)](#). In general, a domestic support obligation is alimony and child support that arises from a court order or separation agreement. Collier, sec. 302[1][a], p. 3-6.
- To establish paternity.

[11 USC sec. 362](#) provides that the automatic stay also does not prohibit:

- Withholding the debtor's income (regardless of whether the income is or is not property of the debtor's bankruptcy estate) for payment of a domestic support obligation under a judicial or administrative order or statute.
- Revoking a debtor's drivers license, recreational license, or professional or occupational license to enforce the debtor's child support obligation in accordance with state child support enforcement statutes.
- Enforcing a debtor's medical support obligation in accordance with federal and state child support enforcement statutes.
- Attaching a debtor's federal or state income tax refund by or on behalf of a state or local child support enforcement agency to collect past-due spousal or child support in accordance with federal and state child support enforcement statutes.
- Reporting the debtor's child support debt to a consumer reporting agency in accordance with federal child support enforcement requirements.
- Collecting a domestic support obligation from property that is not property of the debtor's bankruptcy estate.

In addition:

- The automatic stay does not prohibit the commencement or continuation of a criminal contempt proceeding against a debtor based on the debtor's failure to pay a pre-bankruptcy spousal or child support debt *if* the purpose and effect of the criminal contempt proceeding is to punish the debtor's failure to pay spousal or child support and not to coerce or require the debtor's payment of spousal or child support.
- The automatic stay does not prohibit the commencement or continuation of an action against the debtor for divorce, equitable distribution, alimony, child custody, or child support if the action accrued after the debtor filed for bankruptcy and could not have been commenced before the debtor filed for bankruptcy *and* does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.
- The automatic stay does not prohibit the collection, through civil contempt or otherwise, of

court-ordered spousal or child support that accrues after the debtor files for bankruptcy as long as such action does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.

- The automatic stay does not prohibit the commencement or continuation of an action by the debtor for divorce, equitable distribution, alimony, child custody, or child support as long as it does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.

Some Family Law Proceedings That are Barred by the Stay

The automatic stay bars commencement or continuation of a legal proceeding against the debtor for equitable distribution of marital property if (a) the proceeding involves property that is property of the debtor's bankruptcy estate *or* (b) the claim for equitable distribution arose before the debtor filed for bankruptcy and it is not joined in an action for divorce.

The automatic stay bars any action to establish, enforce, or collect a pre-bankruptcy debt incurred in connection with divorce or separation that is not a debt for a domestic support obligation.

The automatic stay prohibits collection of a pre-bankruptcy or post-bankruptcy domestic support obligation from property that is property of the debtor's bankruptcy estate by means other than income withholding, license revocation, or attaching the debtor's federal or state income tax refund.

The automatic stay prohibits creating, perfecting, or enforcing a lien for pre-bankruptcy or post-bankruptcy domestic support obligation against property that is property of the debtor's bankruptcy estate.

The Collier Bankruptcy Treatise cited above is an excellent resource for information about the impact of bankruptcy on family law cases.