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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 13, 1996

The Honorable Douglas C. Murdaugh
Orangeburg County Clerk of Court
P. O. Drawer 9000
Orangeburg, South Carolina 29116-9000

Re: Informal Opinion

Dear Mr. Murdaugh:

You seek an opinion "as to whether or not child support is suspended when the noncustodial parent files for bankruptcy."

LAW / ANALYSIS

The automatic stay provisions of the Bankruptcy Code are deemed by the courts as "quite broad." Carver v. Carver, 954 F.2d 1573 (11 Cir.1992). The federal statute governing automatic stays, 11 U.S.C. § 362(a), provides in pertinent part as follows:

> (a) [e]xcept as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of -
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title ...

Request Letter

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Pursuant to this statutory provision,

> ... all proceedings against the debtor or the debtor's property are stayed during the pendency of the bankruptcy proceedings. Unless the action comes under an exception in 11 U.S.C. § 362(b) or a party seeks relief from the stay under 11 U.S.C. § 362(d), the stay remains in effect until the case is disposed of by the court. 11 U.S.C. § 362(c). This stay relieves the debtor from financial pressure during the pendency of bankruptcy proceedings ... . However, the stay also protects creditors by preventing the premature disbursement of the bankruptcy debtor's estate. "Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors."

Carver, supra, 954 F.2d at 1576.

11 U.S.C. § 362(b)(2) further provides that

> [t]he filing of a petition under section 301, 302, or 303 of this title ... does not operate as a stay - ...
>
> > (2) Under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

The Carver case recognized, however, that the exception contained in Section 362(b)(2) did not cover all situations involving child support. Noting that "[a]lthough appellants are correct that this provision addresses alimony and child support, it clearly does not provide an exception from the automatic stay for all actions involving alimony, maintenance or support." Elaborating further, the Court said that Section 362(b)(2)

> expressly limits its coverage to actions seeking "property that is not property of the estate." Under 28 U.S.C. § 1334(d), the federal district court has exclusive jurisdiction over all the debtor's property as of the date of filing in bankruptcy and over all property of the estate. "Property of the estate"

generally includes all the debtor's property as of the commencement of the bankruptcy case. See 11 U.S.C. § 541. However, when a debtor files under Chapter 13 of the Bankruptcy Code, the estate also includes property and earnings of the debtor acquired after filing for bankruptcy but before the disposition of the case. 11 U.S.C. § 1306(a). In bankruptcy situations, the federal district court usually acts through the bankruptcy court pursuant to 28 U.S.C. § 157. The exception in 11 U.S.C. § 362(b)(2) strikes a balance between the goals of protecting the bankruptcy estate from premature disbursement and protecting the spouse and children of the debtor.

> The automatic stay is one means of protecting the debtor's discharge. Alimony, maintenance and support obligations are excepted from discharge. Staying collection of them, when not to the detriment of other creditors (because the collection effort is against property that is not property of the estate), does not further that goal. Moreover, it could lead to hardship on the part of the protected spouse or children ... .

Therefore, although the Bankruptcy Code does provide an exception from the automatic stay for the collection of alimony, maintenance, or support, that exception is very narrow--i.e., collection efforts may only be made against property that is not property of the estate. Generally that will include property and earnings acquired by the debtor after filing for bankruptcy protection. However, when a debtor files under Chapter 13, the bankruptcy estate includes property and wages gained after commencement of bankruptcy proceedings. Under this statutory scheme, the exception in 11 U.S.C. § 362(b)(2) has little or no practical effect in Chapter 13 situations.

....

In the case at bar, Mr. Carver filed for bankruptcy protection under Chapter 13. Thus, little if any property

> existed from which Paulette Carver could seek collection of the arrearages in the mortgage while the automatic stay was in effect. Even assuming that Mr. Carver had some property that was not property of the estate, however, appellants specifically sought collection of the arrearages from his wages, which were part of the estate because he filed under Chapter 13. The contempt action filed in Family Court in South Carolina by appellants, therefore, did come under the automatic stay provisions of section 362(a), and was not covered by the exception of section 362(b)(2).

954 F.2d at 1576-77.

The Court, however, was quick to point out that because there exists an automatic stay pursuant to 11 U.S.C. 362(a) in support situations where the debtor files under Chapter 13, does not mean that there is no relief available to the spouse to whom the support obligation is owed.

> In such a situation, the proper course of action for appellants was to file for relief from the stay under 11 U.S.C. § 362(d):
>
> > (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
> >
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
> >
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if--
> >
> > > (A) the debtor does not have an equity in such property; and
> > >
> > > (B) such property is not necessary to an effective reorganization.

> When requested, such relief should be liberally granted in situations involving alimony, maintenance, or support in order to avoid entangling the federal court in family law matters best left to state court. See In re White, 851 F.2d 170, 173 (6th Cir.1988); In re MacDonald, 755 F.2d 715 (9th Cir.1985). Moreover, "it would result in great injustice to require children to await a bankruptcy court's confirmation of a debtor's Chapter 13 plan before permitting them to enforce their state court-determined right to collect past due support payments." Caswell v. Lang, 757 F.2d 608, 610 (4th Cir.1985) ... . Such considerations clearly constitute "cause" for which relief from stay may be granted under § 362(d)(1).

In Caswell, our Fourth Circuit Court of Appeals concluded that past due child support obligations could not be included in a Chapter 13 bankruptcy plan. The Court emphasized the importance of the State's insuring that the spouse's obligation to pay child support is met. Concluded the Court,

> [t]he Supreme Court has long favored state court retention of exclusive control over the collection of child support. ... Pursuant to its police power, Virginia has a strong and compelling interest in protecting the welfare of its dependent citizens. ... We agree with the district court that it would result in great injustice to require children to await a bankruptcy court's confirmation of a debtor's Chapter 13 plan before permitting them to enforce their state court-determined right to collect past due support payments. The bankruptcy code may not be used to deprive dependents, even if only temporarily, of the necessities of life.
>
> Equally important, a federal court may not interfere with the remedies provided by a state court in these areas of particular state concern, provided, of course, that these remedies are constitutional. ... To permit child support arrearages to be included in a Chapter 13 plan would invite a federal bankruptcy court to alter or modify a state court decision regarding

> the payment and discharge of the overdue debt. This we cannot countenance. Rather, we agree with the bankruptcy court in Matter of Garrison, 5 B.R. 256, 260 (Bkrtcy.E.D.Mich.1980), that it was not the "intent of the new Bankruptcy Code to convert the bankruptcy courts into family or domestic relations courts--courts that would in turn, willy-nilly, modify divorce decrees of state courts insofar as these courts had previously fixed the amount of alimony and child support obligations of debtors."

757 F.2d at 619.

Applying this reasoning, some Bankruptcy courts have also taken the position that the automatic stay provided by § 362 does not apply to enforcement of alimony and child support obligations against the debtor in Chapter 13 cases. See, In re Gomez Molina, 77 B.R. 368 (Bankr.D.Puerto Rico 1987); In re Garrison, 5 B.R. 256 (Bankr.E.D.Mich.1980). In other Chapter 13 decisions, the Bankruptcy court has declined to enjoin proceedings to collect past due support obligations. See, Nelson v. Nelson (In re Nelson) 85 B.R. 731 (Bankr.E.D.Va.1988); In re Bernstein, 20 B.R. 95 (Bankr.E.D.Mich.1980).

In Garrison, the Bankruptcy Court posed the relevant question as whether Congress "by virtue of its definition of 'property of the estate' intended the mere filing of a Chapter 13, petition to automatically stay the enforcement of a non-dischargeable debt." The Court found "clear intent insofar as the Constitution permits to leave to the states, with as little interferences as possible, the exclusive right to regulate the dissolution of marriages and to provide for the maintenance and support of those affected thereby."

While Congress clearly intended by the Bankruptcy Reform Act of 1978 "to expand the jurisdiction of bankruptcy courts and to enhance the control of those courts over the estates of debtors",

> ... the changes brought by Section 362 of the Bankruptcy Code, when considered in a historical and constitutional light, were not intended to thwart and impede the enforcement of nondischargeable alimony and child support obligations by the states against those who seek refuge in the bankruptcy courts, Rather, the expanded jurisdiction and the stay provided by Section 362 was intended to prohibit disruptive interference in the administration of bankruptcy estates by overzealous private creditors who would engage in the "race of diligence". These

> sections were not intended to make the bankruptcy courts a sanctuary for those who would avoid alimony and child support obligations.

Therefore, concluded the Court,

> ... the mere filing of a debtor's petition does not automatically stay the enforcement of alimony and child support obligations ... . Thus, in holding that the institution of a Chapter 13 proceeding does not automatically stay enforcement of nondischargeable alimony and child support obligations, our ruling is limited to those instances where the decree of the state court fixing alimony or child support precedes the order of the bankruptcy court confirming a plan in Chapter 13 proceedings.

Based upon the foregoing authorities, it is my opinion that there exists a good legal argument that a preexisting child support obligation and the enforcement thereof is not subject of the automatic stay upon the filing of a Chapter 13 bankruptcy. Moreover, it is also my opinion that past due child support obligations may not be included in a Chapter 13 bankruptcy plan.

With respect to such Bankruptcy issues, however, I must caution that these are questions of federal law, not state law, and that there is a sharp division of opinion among the federal courts, particularly as to the automatic stay issue. Nevertheless, at the very least, it appears that the federal courts generally agree that relief from any automatic stay may be given upon the "request of a party in interest and after notice and hearing" and that such "relief should be liberally granted in situations involving alimony, maintenance or support in order to avoid entangling the federal court in family law matters best left to state court." Carver, supra. Thus, federal Bankruptcy courts are inclined to remove the automatic stay in support situations if the obligee (here the mother) seeks such relief before the court.

Unfortunately, the confusion among the courts over the automatic stay question places a public official, such as yourself, in a difficult dilemma. Until the obligee procures relief from the stay, the South Carolina courts and court officials are caught in a quandary. An outstanding order of the Family Court, requiring support payments has been made, but the federal Bankruptcy court's involvement may stay the proceedings. This means that there may be conflicting orders, depending upon whether the automatic stay is deemed applicable to a preexisting support order.

My best advice to you, therefore, to avoid getting caught between court orders, is to seek guidance from the Bankruptcy court and the Family Court. Certainly, it is up to the obligee to seek relief from any automatic stay; however, you are also under a duty as an officer of the Family Court to insure that the Family Court's orders - to the extent legally permissible - are carried out. Thus, if there is no exemption here with respect to enforcement of the existing support order from an automatic stay, such should be known by all persons as soon as possible.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph