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Representing Victims of Domestic Violence in Property Distribution Proceedings After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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I. Introduction

With the adoption in 2005 of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005,[1] Congress substantially changed the framework for consumer bankruptcies. The changes raise particularly difficult challenges for former spouses who are victims of domestic violence. While the new law accords significantly greater protection to spousal and child support obligations and eliminates some of the differences in the treatment of property settlement and support obligations,[2] it has other negative effects. In its attempts to crack down on the skyrocketing number of consumer bankruptcies,[3] Congress has indirectly limited

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1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) (hereinafter BAPCPA)

2. BAPCPA creates a new category of family law-related debts called "domestic support obligations." The new statutory provisions regarding the bankruptcy treatment of property settlement debts, spousal support and child support are discussed elsewhere in this issue in detail. *See* Richards, page 227 and White & Caher, page 299.

3. As one commentator observed, "[t]he fundamental purpose behind the new act is to reduce the number of Chapter 7 consumer bankruptcy filings, which have continued to grow at dramatic rates each year over the last decade. It is designed to hold people more accountable for

the autonomy of divorce lawyers to advise clients on how to structure their affairs in the wake of divorce to enable them to avoid or survive a subsequent bankruptcy. The new bankruptcy law makes discharge in bankruptcy and the accompanying fresh start less attainable, makes bankruptcy liquidation proceedings pursuant to Chapter 7 of the Code less available to consumers, and raises the stakes for successful accomplishment of Chapter 13 plans.[4] Finally, while closing the door to successful bankruptcy for many consumers, Congress permitted a loophole to continue that allows certain wealthy debtors to shelter assets from claims for child and spousal support and from claims arising from property settlement.

In this article we discuss the provisions of BAPCPA most relevant to family law practitioners, especially in divorce cases involving victims of domestic violence. The first section of the article focuses on situations in which the abuse victim files bankruptcy. Recent provisions of BAPCPA affecting such bankruptcies that are particularly important to family law attorneys include limitations on the advice attorneys may provide in anticipation of bankruptcy and new rules limiting the dischargeability of credit card debt and the availability of cramdown for automobile loan debts. The second section focuses on situations involving affluent marriages in which the abuse victim is a creditor in the bankruptcy of her former husband. New state law and bankruptcy provisions regarding asset protection trusts may negatively impact an abused woman, particularly in situations where her former husband controls large amounts of property. We make best practice recommendations for family law attorneys advising victims of domestic violence in divorce cases to best position them in case of either their own bankruptcy or that of their former spouse.

By domestic violence, we refer to a broad range of behaviors occurring during marriage[5] in which one spouse, usually the husband,[6] exerts sys-

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their debts and give to creditors more of what they are owed." Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 RUTGERS BUS. L.J. 2, 15–16 (2006). *See also* Ann Morales Olazabal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-based Analysis*, 15 BANKR. DEV. J. 343, 347 (1999) (discussing reform efforts leading to the adoption of BAPCPA).

4. Because most family law obligations are nondischargeable, the discharge of other obligations in a former spouse's bankruptcy can position the debtor to better satisfy the continuing nondischarged obligations. *See* Peter C. Alexander, *"Herstory" Repeats: The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L. REV. 571, 572 (2005) (arguing that families will be most harmed by the unavailability of bankruptcy relief under BAPCPA).

5. Although domestic violence can occur in all forms of intimate relationships, we focus on marriage because, aside from child support, the bankruptcy provisions we discuss only apply to debts arising from divorce.

6. The vast majority of domestic violence victims are women. Most studies indicate that approximately 85% of victims of domestic violence are women. The most recent statistics from the National Crime Victims Survey conducted by the Bureau of Justice Studies indicate that

tematic power and control over the other spouse, usually the wife.[7] Such power and control may be exerted through physical violence and aggression, but also through psychological, emotional, and economic domination.[8] The Department of Justice's Office of Violence Against Women defines domestic violence as including not only physical and sexual abuse but also emotional, economic, and psychological abuse.[9] It defines emotional abuse as "undermining an individual's sense of self-worth and/or self-esteem."[10] Economic abuse includes "making or attempting to make an individual financially dependent by maintaining total control over financial resources, withholding one's access to money, or forbidding one's attendance at school or employment."[11] Psychological abuse includes "causing fear by intimidation, threatening physical harm to self, partner, children or partner's family or friends; destruction of pets and property; and forcing isolation from family, friends, or school and/or work."[12]

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women are substantially more likely to be victims of domestic violence than men. *See* Shannon Catalano, Bureau of Justice Statistics, Intimate Partner Violence in the United States, http://www.ojp.usdoj.gov/bjs/intimate/ipv.htm (last visited Dec. 28, 2006) (indicating that the average rate for 100 people of nonfatal violent victimizations was 6.4 for women and 1.1 for men). *See also* Family Violence Prevention Fund: The Facts on Domestic Violence, http://www.endabuse.org/resources/facts/DomesticViolence.pdf (last visited Mar. 30, 2007) (summarizing research on the incidence of violence against women, which indicates that women are overwhelmingly the victims of domestic violence).

7. *See* Nancy K.D. Lemon, *Domestic Abuse Intervention Project, Power and Control Wheel, in* DOMESTIC VIOLENCE LAW READER: COMPREHENSIVE OVERVIEW OF CASES AND SOURCES 67 (1996) (emphasizing power and control as the central characteristic of abusive relationships).

8. Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 146 SMU L. REV. 2117, 2119–33 (1993) (emphasizing that abuse must be understood within the context of a relationship in which power and control are maintained by one person over another through a system of physical, psychological, emotional, and social cues and triggers).

9. United States Department of Justice, Office on Violence Against Women, *About Domestic Violence*, http://www.usdoj.gov/ovw/domviolence.htm (last visited Mar. 30, 2007) (hereinafter *About Domestic Violence*).

10. *Id. See also* Joy M. Bingham, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 N.D. L. REV. 837 (2005) (discussing the prevalence of emotional abuse as a form of domestic violence).

11. *See About Domestic Violence*, *supra* note 9. *See also*, Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071 (1995) (detailing the connection between women's poverty and domestic violence).

12. *See About Domestic Violence*, *supra* note 9. *See also* Lynn Gold-Bilkin & Jonathan W. Gould, *Post Traumatic Stress Disorder and the Practice of Family Law*, 19 J. AM. ACAD. MATRIM. LAW. 17 (2004) (focusing on the psychological impact of abuse and related representational issues).

Family law attorneys see victims of domestic violence before they come in contact with the bankruptcy system. As such, it is crucial for family law attorneys to identify clients who may be victims of domestic violence. Attorneys must recognize the full range of abusive behaviors and relationships in order to appropriately serve the needs of abused women. Not only is a thoughtful and accurate assessment of a client's situation crucial to her economic well-being, but also to her physical and emotional safety.[13]

At the time of divorce, family law attorneys must be cognizant of the possibility of a future bankruptcy of either their client or their client's spouse. Divorce can have profound economic ramifications for the parties.[14] The economic impact of divorce on women is especially serious.[15] Although reliable statistics are not available, the relationship between divorce and bankruptcy seems undeniable.[16] Practitioners have long

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13. Much has been written about assessing and identifying clients who have been abused. *See, e.g.*, John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 234–40 (2003); Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027 (1995).

14. While there is a paucity of recent research and dispute over the scope of the problem, it is clear that divorce has profound economic consequences. In the mid-1980s Lenore Weitzman concluded that, in the first year after divorce, the average standard of living of divorced women decreased by 73%. LENORE K. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 323, 324–36 (1985). Weitzman's work was controversial in two respects—she blamed the economic impact of divorce on the advent of no-fault divorce and some questioned her analysis of the economic data. Even the critics of Weitzman's analysis of the economic data concluded that women's standard of living decreased by 27% in the first year after divorce. *See* Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1996) (reanalyzing the same data used by Weitzman). Other research, aimed at disputing Weitzman's analysis of the reasons for the disproportionately negative economic impact of divorce on women, nonetheless documents the profound negative financial impact of divorce. *See* Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, *in* DIVORCE REFORM AT THE CROSSROADS 1 (S. Sugarman & H. Kay eds., 1990). Another study found that some women can experience a decrease in their income-to-needs ratio of at least 50%. Greg J. Duncan & Richard Burkhauser, *Economic Risks of Gender Roles: Income Loss and Life Events Over the Life Course*, 70 SOC. SCI. Q. 3, 7 (1988). More recent research continues to confirm the profound economic impact of divorce. One recent study concluded that divorce reduces a person's wealth by 77% compared to that of a single person. *See* Jay L. Zagorsky, *Marriage and Divorce's Impact on Wealth*, 41 J. OF SOCIOLOGY. 406, 410 (2005).

15. Almost all the research indicates that the economic impact of divorce on women is more profound than on men. *See supra* note 14 and sources cited therein. In addition, women are many times more likely to be the victims of violent, abusive, or controlling behaviors in marriage. While there is significant debate over the relative aggression and involvement in violence of men and women, the vast majority of intimate partner violence reported to law enforcement authorities (90%) is perpetrated by men. *See* Demie Kurz, *Physical Assaults by Husbands: A Major Social Problem*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 89–90 (R. J. Gelles & Dorileen R. Loeske, eds. 1993). For a recent, feminist analysis of male/female aggression, *see* LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE (2003)

16. *See, e.g.*, Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the*

known that many of their family law clients will file for bankruptcy within a short time after their divorce; often bankruptcy is anticipated at the time of the divorce. One of the most common causes of marital breakdown is financial stress.[17] The expense of the divorce itself and the financial pressures of maintaining two households on incomes that previously supported only one cement the relationship between divorce and bankruptcy.[18] Where bankruptcy is a future possibility for either spouse, family law practitioners must be conscious of bankruptcy when negotiating property settlement agreements and should plan to minimize the impact of bankruptcy on their client or position their client more favorably in a possible bankruptcy of either spouse.

For a divorcing woman who is a victim of domestic violence, the new limitations on bankruptcy raise special concerns. Many times, she will be contractually responsible with her former husband for debts incurred during the marriage whether she realized any of the direct benefits of credit or had any bargaining power over whether debts were incurred or paid.[19] In addition, while often women trying to leave abusive marriages have no access to credit, other times they may build up large credit card debt in order to obtain the economic means of escape.[20] To leave, a woman may need to finance a car or take substantial cash advances from credit cards. Because she is experiencing freedom from the control of her abuser, she may incur improvident debts for luxury goods during her flight. Because of the new limits on consumer bankruptcy, such women may find that protection in bankruptcy to shed such debts is elusive.

Unhappy Union of Bankruptcy and Divorce, 45 BUFF L. REV. 369, 429 (1997) (noting that the time between divorce and bankruptcy is often less than a year).

17. At least one commentator has argued that the unavailability of bankruptcy relief to financially stressed families under the new act will contribute to a feeling of powerlessness that will push already abusive husbands to violence. *See* Alexander, *supra* note 4, at 578–81.

18. *See* Daniel A. Austin, *For Debtor or Worse: Discharge of Marital Debt Obligations Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 51 WAYNE L. REV. 1369, 1372–75 (2005) (discussing and summarizing the available data on the relationship between bankruptcy and divorce).

19. We do not discuss the theories under which both spouses may be personally liable for debts incurred by one spouse during marriage. Nor do we analyze the ability of creditors of one spouse to execute upon the marital property of both spouses. For further analysis of these issues *see* Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1 (2007); Margaret Mahoney, *Debts, Divorce, and Disarray in Bankruptcy*, 73 UMKC L. REV. 83 (2004).

20. A woman's financial dependence on her abuser can make it difficult or impossible to leave the relationship. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 28–34 (1984); Karla M. Digirolamo, *Myths and Misconceptions About Domestic Violence*, 16 PACE L. REV. 41, 45 (1995).

II. Bankruptcy Filed by the Abuse Victim: Limits on the Attorney-Client Relationship and Dischargeability of Debt

A number of concerns arise in cases in which the abuse victim and her attorney are contemplating a possible bankruptcy filing at the time the property settlement in a divorce is negotiated. BAPCPA purports to limit the advice attorneys can give clients in contemplation of bankruptcy. In addition, the new act significantly limits the availability of discharge for certain credit card debt and limits cramdown for automobile loans.

A. Attorneys as "Debt Relief Agencies"

One issue that jumps out at the practitioner under BAPCPA is the new statute's prohibition against advising a client to incur more debt in contemplation of filing for relief under the Code if the attorney is considered a "debt relief agency."[21] It appears to be almost universally accepted that attorneys are included in the definition of "debt relief agency," and, as such, the requirements set forth in 11 U.S.C. § 526(a)(4) have fairly ominous implications.[22] If the prohibition included in Section 526(a)(4) of the Code does, in fact, restrict the ability of attorneys to advise their clients who might be contemplating bankruptcy, then it will obviously be problematic for a family lawyer who might be counseling an abused woman with current or foreseeable debt problems.

The problematic text of Section 526(a)(4) provides:

> Restrictions on Debt Relief Agencies
>
> (a) A debt relief agency shall not—
>
> . . . .
>
> (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.[23]

A "debt relief agency" within the meaning of the statute is "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration. . . ."[24] An assisted person is "any person whose debts consist primarily of consumer debts the value of whose nonexempt property is less than $150,000."[25] Thus, a debt

21. *See* 11 U.S.C § 526(a)(4).

22. *See* note 26, *infra*, for reference to authority finding that attorneys are included in the definition of "debt relief agency" in the Code.

23. *Id.*

24. *See* 11 U.S.C. § 101.

25. *See id.* This definition is broad enough to cover the vast majority of consumer debtors in the United States.

relief agency is prohibited from advising a consumer debtor to incur additional debt if bankruptcy is even remotely contemplated. Courts that have addressed the issue of whether or not the definition of a "debt relief agency" includes attorneys counseling clients have generally, with few exceptions, concluded that it does.[26]

This presents a serious question for a family law practitioner: does Section 526(a)(4) apply to a family law attorney focusing on a pending divorce if bankruptcy is looming on the horizon for her client? Unfortunately, the statutory definition of "bankruptcy assistance" appears to be broad enough to include all forms of information, advice, and counsel regarding the filing of a bankruptcy petition, whether such information, advice, and counsel is expressly or impliedly given.[27] The safe and advisable course of action is to assume that Congress intended for all preplanning advice regarding bankruptcy given in exchange for a fee, whether from a bankruptcy attorney, a family law attorney, or some other type of practitioner, to be subject to Section 526(a)(4). Therefore, if that prohibition on free speech is constitutionally valid,[28] an attorney is always prohibited from advising a client to incur additional debt if he knows that there is an anticipated bankruptcy.[29]

Potential liability and penalties for failing to comply with Section 526(a)(4) can come from three sources: the client, the state, and the court.[30] An assisted person can recover reasonable attorney fees and costs

26. *See* Hersh v. United States, 347 B.R. 19, 22 (N.D. Tex. 2006) (". . .the term 'debt relief agency' includes bankruptcy attorneys. . ."); Olsen v. Gonzales, 350 B.R. 906, 912 (D. Ore. 2006) (". . .it is the plain language of the Act that leads to the conclusion that attorneys are to be included in the definition of 'debt relief agency.'"); Zelotes v. Martini, 352 B.R. 17 (D. Conn. 2006); Milavetz v. United States, 355 B.R. 758 (D. Minn. 2006). *But see In re* Reyes, 2007 WL 136934, *4 (Bankr. S.D. Fla. 2007) (attorney who takes a bankruptcy case on pro bono basis not deemed to be a "debt relief agency;" no valuable consideration was received for the services, therefore 11 U.S.C. § 526(a)(4) held not applicable); *In re* Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. D. Ga. 2005) (attorneys not "debt relief agencies" within the meaning of BAPCPA).

27. *See* 11 U.S.C. § 101(4A) ("The term 'Bankruptcy Assistance' means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.").

28. *See* notes 37–39, *infra*, addressing challenges to section 526(a)(4) as an unconstitutional restriction on free speech.

29. *But see In re* Reyes, 2007 WL 136934, at *4 (correctly pointing out that § 526(a)(4) is not applicable to pro bono work or charitable organizations).

30. *See* 11 U.S.C. § 526(c); *see also* Robert Wann, Jr., *"Debt Relief Agencies:" Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Violate Attorneys' First Amendment Rights?*, 14 AM. BANKR. INST. L. REV 273, 284 (2006) (generally setting forth the statutory penalties enumerated in § 526(c)).

associated with the provision of any bankruptcy assistance, actual damages and additional attorney fees and costs associated with this recovery if the debt relief agency acted either intentionally or negligently failed to comply with Section 526.[31] The attorney general of a state may seek an injunction, damages, and attorney fees and costs associated with an action against a debt relief agency found to violate the section.[32] Lastly, the court may impose injunctive and civil relief if Section 526 is violated.[33] Given these risks, determining the constitutionality of this section becomes paramount. Until such time as there is an answer to this question, a lawyer with a family law practice would be wise to avoid violating this section's provisions.

From an economic standpoint, the problem with prohibiting an attorney from advising a client to incur additional debt that is perfectly legal prior to the filing of a bankruptcy petition is readily apparent. For example, it might make economic sense for a client to take out a second mortgage or home equity loan at a relatively low interest rate and with a favorable payment term in order to pay off her unsecured high interest-rate credit card debt.[34] It might also be wise for a client to enter into a retail installment loan contract for a new (or perhaps quality used) automobile before filing a petition for bankruptcy relief with the express intention of reaffirming this debt during the pendency of the case.[35] In most regions of the country, a debtor's ability to find and maintain employment sufficient to support the debtor, as well as to maintain the ability to pay creditors, is highly dependent on having the mobility afforded by owning an automobile. It therefore stands to reason that it would be beneficial to enter into a con-

31. *See* 11 U.S.C. § 526(c)(2) (these damages also apply for failure to comply with sections 527 and 528 of the Code, which are additional changes to the Code that have been challenged in court. These sections are not within the scope of this article, but they are potentially applicable to certain family law practitioners).

32. *See* 11 U.S.C. § 526(c)(3); *see also* Hersh, 347 B.R. at 21 (stating that both the United States Attorney General and the Texas Attorney General can enforce the provisions of § 526).

33. *See* 11 U.S.C. § 526(c)(5) (". . .if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may. . ." provide appropriate relief as allowed by §526(c)(5)).

34. *See, e.g.*, Hersh, 347 B.R. at 24; Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005) ("For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time.").

35. *See, e.g.*, Hersch, 347 B.R. at 24; Chermerinsky, *supra* note 34, at 579 (". . .the client may intend to keep all payments fully current and to *reaffirm such debt once the case is filed*.") (emphasis added); Gary Neustadter, *2005: A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225, 319 (2006) ("Searching for an appropriate strategy to lessen that risk, the attorney might wish to advise the sale of the expensive late-model automobile and the credit purchase of a less expensive automobile.").

tract to purchase an automobile at a prepetition interest rate rather than doing so postpetition at perhaps a much higher interest rate once the bankruptcy is reported on the debtor's credit report.

Having the ability to provide appropriate financial advice to the abused spouse during the dissolution of a marriage is arguably even more important than in other situations. It is vital that the abused spouse be able to achieve financial stability and independence on her own, whether through the divorce proceeding at issue, or ultimately by taking advantage of the bankruptcy laws. Without this independence and stability, it is questionable whether the abused spouse will be able to break free from the perpetrator in the immediate future and whether the abused spouse will be able to maintain her independence for the long term.[36]

There is some good news on this point, however. As one might imagine, Congress's attempt to limit the speech of attorneys met a less than enthusiastic response from the bar and has been the subject of numerous challenges.[37] The first test cases are wending their way through the courts. So far it appears that the courts hearing the cases are unanimous in the opinion that Section 526(a)(4), as applied to attorneys, is an unconstitutional prohibition on free speech.[38] Because the reported cases are still at the district court level, it remains to be seen what the outcome will be in the various circuit courts and, ultimately, the Supreme Court. On the one

36. The American Psychological Association concluded: "Violence interferes with work, job training, and education and thus undermines women's attempts at economic independence. In addition, pervasive violence may also leave women with physical injuries and psychological consequences that make work difficult." Am. Psychological Ass'n, *Making "Welfare to Work" Really Work: Domestic Violence*, http://www.apa.org/pi/wpo/domestic.html (last visited Mar. 14, 2007). For discussions of inter-relationship of domestic violence and women's lack of economic independence, *see* Patricia Cole & Sarah Buel, *Safety and Financial Security for Battered Women: Necessary Steps for Transitioning from Welfare to Work*, 7 GEO. J. ON POVERTY L. & POL'Y 307, 312 (2000) (discussing the failure of welfare reform to respond to the needs of low income women escaping domestic violence); Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U.J. GENDER, SOC. POL'Y & L. 367, 373-75 (2003) (discussing the difficulty experienced by low income women in escaping domestic violence).

37. It seems clear that Congress's intended objective was at least partly to silence the speech of attorneys in including § 526(a)(4) in BAPCA. A stated objective of Congress was to "improve the bankruptcy law and *practice* by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. REP. NO. 109-31, pt.1, at 1 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89. (Emphasis added). Therefore, BAPCA included consumer protections provisions "strengthening professionalism standards for *attorneys* and others who assist consumer debtors with their bankruptcy cases." *Id.* at 103 (emphasis added).

38. *See Hersh*, 347 B.R. at 21–25 (strict scrutiny test applies to § 526(a)(4)'s prohibition against attorney speech, that section constitutes an overinclusive restriction on speech and is therefore unconstitutional); *Olsen*, 350 B.R. at 918–22 (agreeing with *Hersh* court); *Zelotes*, 352 B.R. at 24–25 (§ 526(a)(4) overbroad and would even fail "intermediate scrutiny" test); *Milavetz*, 355 B.R. at 765.

hand, it is easy to review the cited case law, and the unanimity therein, and make an academic prediction that ultimately Section 526(a)(4) will be found unconstitutional in all respects as applied to attorneys. But this academic prediction will be of little value to the practitioner whose case is the first brought by the Attorney General of the United States to test the validity of Section 526(a)(4). Therefore the practicing family law lawyer, at the very least, needs to remain cognizant of Section 526(a)(4), particularly when advising an abused spouse regarding her present and future financial circumstances.[39]

B. Automobile Loans

Section 1325 of the Bankruptcy Code has been changed to the benefit of secured automobile lenders. This change is aimed at limiting the availability of cramdown for debtors who are financing a vehicle purchased for personal use.[40] Cramdown comes into play when a debtor is "underwater" or "upside down" on a loan.[41] That is, the debtor owes more than the col-

39. It also might be good to keep track of any clients that you may think are going into bankruptcy and look for a potential chance to bring suit as a family law practitioner adversely affected by Section 526(a)(4) and, at the very least, attempt to get an opinion that defines and narrows the scope of that section to only bankruptcy practitioners or, at best, obtaining an opinion that strikes that section down as unconstitutional. This appears to be exactly what one of the plaintiffs in *Olsen* had in mind. *Olsen,* 350 B.R. at 910–11 (Plaintiff McBride, a family law practitioner, seeking to have § 526(a)(4) of BAPCPA and other sections declared unconstitutional).

40. *See* 11 U.S.C. § 1125 (2005). Another change that affects approximately half of the circuit court jurisdictions is BAPCPA's ending the practice of "ride through." Ride through occurs when a debtor retains possession of a financed vehicle but fails, or refuses, to reaffirm the underlying financing contract. BAPCPA amended Section 521 of the Code to require a debtor to state her intention, whether she will surrender the collateral or reaffirm the contract and retain the collateral, within 45 days of the first meeting of creditors. 11 U.S.C. § 521(a)(6) (2005). If the debtor fails to do so, the automatic stay imposed by 11 U.S.C. § 362 is "terminated with respect to the personal property of the estate or of the debtor which is affected," and "the creditor may take whatever actions as to such property as is permitted by applicable nonbankruptcy law. . . ." This could result in the creditor using self-help repossession without resorting to filing a motion to lift the automatic stay in the bankruptcy court. This result is possible even if the debtor is not behind on her payments as long as the original financing agreement provides that bankruptcy is a default. For a broader discussion of these issues, *see* William C. Whitford, *Symposium: Consumer Bankruptcy and Credit in the Wake of the 2005 Act: A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 150–55 (2007); Ricardo Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse and Prevention and Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 827–28 (2005). Still, a creditor is not required to repossess a vehicle if the debtor fails to reaffirm the debt, therefore the concept of ride through may continue to exist, only now it is for the creditor to decide if it is acceptable for the debtor to retain the vehicle without reaffirmation. *See* Whitford, *supra* at 153–54; Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding On to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 475 (2005).

41. "Cramdown" in simplest terms refers to the ability of a debtor in bankruptcy to cram a plan down the throats of creditors who would otherwise not be paid the full outstanding balance owed to them, and are thus presumed to object to the plan.

lateral is actually worth. Section 506 of the Bankruptcy Code defines an allowed secured claim as the lower of either the amount owed on the obligation or the actual value of the collateral.[42] What typically happens when a debtor is "underwater" on an obligation is the secured creditor is secured at an amount that is equal to the value of the collateral[43] and becomes *unsecured* with regards to the remainder of the obligation. For example, it is not uncommon in a modern auto lending transaction for a debtor to pay either no down payment or a nominal down payment in return for a sizeable purchase-money loan that will, in addition to the price of the vehicle, include dealer delivery and preparation fees; document preparation fees; and fees for tax, title, and license for the vehicle. In addition to these fees and taxes raising the total loan amount, on the debit side, the vehicle begins depreciating in value as soon as it is driven off the dealer's lot. This depreciation curve is relatively steep at first, leveling off and slowing down after two to three years of ownership.[44]

The end result of all of this is a loan that, at least for the first half of the lending relationship, is significantly higher than the value of the motor vehicle.[45] This situation led to substantial losses for the lending industry under the pre-BAPCPA law because debtors would finance a vehicle, file for bankruptcy protection, and then cramdown a plan where the value of the secured claim matches the actual current value of the vehicle, leaving a lender with a significant portion of the original loan (the value that is in excess of the current value of the vehicle) as unsecured. This process in cramdown is known as bifurcation: the loan is bifurcated between the secured portion, e.g., the value of the vehicle, and the unsecured portion, e.g., the remainder of the loan above the vehicle's value.[46] Lenders were

42. *See* 11 U.S.C. § 506(a)(1) (2005).

43. In regards to the method of determining the value of collateral, *see id.* ("If the debtor is an individual in a case under Chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.")

44. *See* ConsumerReports.org, *available at* http://www. consumerreports.org/cro/cars/new-vs-used-cars-404/index.htm?resultPageIndex=1&resultIndex=1&searchTerm=depreciation %20curve (last visited Apr. 4, 2004) New vs. Used Cars (indicating a new car's value depreciates the most in the first three years of ownership, up to forty percent); Which Cars Depreciate Fastest?, Smartmoney.com, http://www.smartmoney.com/ask/index.cfm?story=20 060516 (last visited May 16, 2006), (showing depreciation curve for a new automobile typically steepest during the first two to three years at which point it flattens out).

45. *See* Auto, C.O.E. Inc. *available at* http://www.coeinc.org/allsections/auto.htm (last visited Mar. 31, 2007), (explaining the relationship between depreciation of a new automobile to the amount outstanding on an automobile finance loan).

46. *See,* Whitford, *supra* note 40, at 145–46.

not pleased with this situation.

This led to lobbying for the change in BAPCPA that is currently embodied in Section 1325 of the Bankruptcy Code.[47] Congress added what has sometimes been referred to by commentators as the hanging paragraph to Section 1325:[48]

> For the purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for the debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing. . . .[49]

The net result of the hanging paragraph in Section 1325 is that bifurcating a claim into secured and unsecured portions and cramming down the lowered unsecured claim is no longer available to Chapter 13 debtors who have financed a personal-use vehicle within the last 910 days.[50] 910 days translates to a few days over two years and six months, a time where, not surprisingly, the value of a large number of motor vehicle loans will start to match the value of the collateral.[51]

This presents an interesting dilemma to the lawyer advising an escaping victim of an abusive marriage: both culturally and practically it seems that it is better to possess a newer automobile because people tend to believe it will last longer, have lower maintenance, and culturally at least, Americans have a love affair with new automobiles. Also, from a pre-bankruptcy standpoint, having more secured debt can increase the chances for a debtor to avoid failing the means test, thus enabling the debtor to file under Chapter 7 of the Code, liquidating her debts and moving on to the

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47. *Id.* at 164–87.

48. *See* 11 U.S.C. § 1325 (2005); Whitford, *supra* note 40, at 150 (reference to this section being called the "hanging paragraph." This term appears to reference the fact that the language containing the 910-day restriction on the bifurcation of claims related to certain automobiles is added to the end of Section 1325 and seems somewhat out of place.)

49. *Id.*

50. The 910-day provision is limited to vehicles being used for personal use. *See In re* Jackson, 338 B.R. 923, 925–26 (Bankr. M.D. Ga. 2006) (stating that where debtor purchased motor vehicle at issue for his wife, it was not acquired for the personal use of the debtor; so plan can therefore bifurcate debt for purchase-money loan); *In re* Montoya, 341 B.R. 41, 45 (Bankr. Ut. 2006). (Even if creditor doesn't object, BAPCPA changes to the bankruptcy code make it clear that a cramdown attempt in violation of § 1325 is improper and plan cannot be approved). *But see* Whitford, *supra* note 40, at 150–51 (pointing out interpretive difficulties associated with the drafting of the new section).

51. *See* New vs. Used Cars, ConsumerReports.org, *supra* note 44; Auto, C.O.E. Inc., *supra* note 45.

fresh start sooner.[52] However, leaving an abusive relationship and looking for a fresh start may not be the time to assume complete responsibility for a debt, a significant portion of which will be above the value of the asset being gained. It would be wiser for a client to exit the relationship with a vehicle that will support her needs while she gains independence and successfully navigates the waters of the bankruptcy rather than attempting to leave the relationship with the best or most expensive vehicle, only to be sunk by the excess ballast of the outstanding loan.

There appear to be four main options when looking at what to advise a client to do if a financed single vehicle is at issue in a property settlement: (1) take possession of the vehicle and refinance the loan; (2) assume responsibility for paying the note in the situation where both spouses signed the note and also perhaps in a community property jurisdiction; (3) settle for cash and purchase a replacement vehicle outright; and (4) don't take the vehicle and finance a replacement vehicle.

At this point, advising options one and four seems to be somewhat risky given the fact that Section 1125 of the Code apparently prohibits attorneys from advising their clients to incur additional debt if a bankruptcy is contemplated. While the general feeling is that this section will ultimately be declared unconstitutional, that is not the case in any federal circuit court's jurisdiction yet, nor has the issue been addressed by the United States Supreme Court. The safe approach is to attempt to advise a client while at the same time complying with Section 1125's requirements. Also, financing and refinancing may not be in a client's best interest anyway, depending on her financial circumstances. Therefore, options one and four are probably not in keeping with best practices at this juncture.

Option three is only on the table if, given the assets of the familial estate, there will be sufficient funds in the settlement to realistically give the client the ability to make such a purchase. In order to advise this course of action, a client's circumstances must be such that making this type of substantial expenditure is a sound idea and in her best interests. As discussed in the preceding paragraphs, a new automobile is subject to very rapid depreciation—a cost that the purchaser will bear. Purchasing a vehicle that is two or three years old would make more sense in this situation because someone else would have already taken the financial loss caused by depreciation, yet one could expect several good remaining years of use out of the vehicle.[53] Even at this point in option three, however, there is still the assumption of enough cash in the settlement to pay for the vehicle *and* to support the client in obtaining independence from the abuser.

52. For a discussion of the means test and its implications, *see* Bowles, page 348.

53. *See Which Cars Depreciate Fastest?*, *supra* note 44.

If bankruptcy is contemplated, it seems unlikely that the settlement would have enough cash value to support option three, and if it did, the client would likely be wiser to use the cash for some other purpose.

If, after evaluating the client's situation, there is a need for taking a financed vehicle in the settlement, option two is a good course of action. Part of the process of evaluating a client's needs should also include finding out the date the vehicle at issue was financed and estimating the likely time frame for the filing of a bankruptcy petition. The analysis should include looking at how much extra debt will be assumed versus the actual value of the vehicle if the 910-day bar eliminates the possibility of cramdown. The familial estate may also include a second car, either paid for or also being financed, but one that is closer to the maturity date of the loan. Obviously, if the car is paid for and will reasonably meet the needs of the client, the settlement should include that car for the client. But even if the older car isn't paid for, it will still be further along in the life of the loan and the client would take less of a financial loss, if any, relating to the depreciation by assuming the loan and taking that vehicle. Finally, obtaining the more mature financed vehicle will increase the likelihood that when the client files her bankruptcy petition, she will be beyond the 910-day window and will be able to bifurcate the secured creditor's claim in a cramdown. Whichever vehicle is chosen, it should meet the client's needs, last through the pendency of a Chapter 13 plan, and also assist the client in achieving independence from the abusive former spouse.

Assuming a loan that the client is already a party to should not run afoul of the prohibition against advising a client to incur additional debt contained in Section 1125 of the Code because she is not assuming a new debt—a joint signatory is jointly and severally liable for the debt in the first place. In a community property state, she is still jointly and severally liable for the obligation; therefore, transferring the equity in the vehicle to her and assuming the loan is arguably not incurring additional debt because she was already obligated on the debt.[54]

One additional point that is unique to the abuse situation and makes assumption of the loan of more importance is that assumption removes the abusive spouse from the financial part of the relationship and can therefore eliminate an avenue that he can use to harass the abuse victim. For example, if he remains an obligor on the loan, it is possible that he can call the lending institution and track his victim's address and contact information; use account information to gain financial information; damage the client's credit by causing billing statements to be sent to him; or otherwise

54. Doing so might increase the client's *risk* in the event of a default, but increased risk is not the same as incurring additional debt, which in this case she would not be doing.

provide false information to the lending institution as an account holder. This harassment factor that is often present in abusive relationships strongly favors counseling the client to assume the loan and break off the financial relationship simultaneously with the ending of the marital relationship.

C. Credit Card Debt

Another change that BAPCPA made to the Bankruptcy Code is in the way credit card and consumer cash advance debt is dealt with. More accurately, the part of Section 523 of the Code that excepts these debts from discharge has been changed in a way that broadens its scope. That section excepts from discharge any debt:

> (2) for money, property, services, or an extension, renewal, or financing of credit, to the extent obtained by—
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtors or an insider's financial condition;
> >
> > . . .
> >
> > (C)(i) for the purposes of subparagraph (A)—
> >
> > > (I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
> > >
> > > (II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; . . . [55]

In essence, under Section 523(a)(2)(C) credit card debt in excess of $500 for luxury goods or services incurred within ninety days of filing a bankruptcy petition and any cash advances of more that $750 within seventy days of filing are presumptively fraudulent and nondischargeable.[56] That there is a presumption of nondischargeability for fraud is not new;

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55. *See* 11 U.S.C. § 523(a)(2); *see also* 15 U.S.C. § 1602(i) (2007) (the definition of an "open end credit plan" is governed by the Consumer Credit Protection Act, which states in relevant part: "The term 'open end credit plan' means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan which is an open end credit plan within the meaning of the preceding sentence is an open end credit plan even if credit information is verified from time to time.").

56. *See In re* Labvick, 355 B.R. 508, 515 (Bankr. W.D. Penn. 2006) (applying pre-BAPCPA law to facts, describing the presumption that incurring debt in close proximity to the bankruptcy means the debtor did not intend to repay the debt; presumption shifts the burden of proof and is rebuttable).

pre-BAPCPA, the amount of the debt at issue had to exceed $1,225 for both classes of debt. By lowering the threshold dollar amounts and extending the respective look-back periods, BAPCPA effectively broadens the already existing presumption.[57] The overall effect of this change is to make more credit card and cash advance debt nondischargeable.

In order to effectively advise a client regarding the change in treatment of credit card debt, one first must understand the meaning of "luxury goods or services." According to the Code, "luxury goods or services does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor."[58] The definition of "luxury goods or services" also did not change, therefore, pre-BAPCPA case law still governs. What is or is not luxury goods ultimately depends on the circumstances of each case—for example, a car may be a luxury good if it was not needed and was a high-end brand, while it would not be considered a luxury good if it was necessary to get the debtor to work and was a midrange brand.[59] Additionally, "cash advance" does not appear to include balance transfers to other accounts.[60]

Since the only thing that BAPCPA changed with regards to Section 532(a)(2)(C) was the relevant dollar amounts and time periods for looking back, the practitioner should ensure that the client knows about what the section means if she were to charge luxury goods on her credit card or contemplates taking out cash advances. Keeping the prohibition against advising clients to incur additional debt in mind, the advice given regarding credit card debt should be compliant, meaning a client should be advised not to incur these sorts of debt.

It is, of course, not so simple in the case of a debtor who is leaving an abusive relationship. In some cases, the only access to funds that the victim of abuse has when escaping *is* a credit card, and this may be her only source of funds with which to establish herself initially and establish her independence from the abuser. When viewed in this light, BAPCPA seems to have a particularly detrimental effect on victims of abuse who

57. *See* Eugene Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31, 42 (2007).

58. *See* 11 U.S.C. § 523(a)(2)(C)(ii)(II).

59. *See In re* Larisey, 185 B.R. 877, 880–81(Bankr. M.D. Fla. 1995) (finding air conditioning repair and carpeting not "luxury goods or services." "In determining if an item is a luxury good, one should consider whether the item purchased served any significant family function and whether the transaction evidenced some fiscal irresponsibility. Extravagant, indulgent or nonessentials are considered luxury goods."); *In re* Davis, 56 B.R. 120, 121–22 (Bankr. D. Mont. 1985) (finding a vehicle not luxury good within the meaning of the Bankruptcy Code).

60. *See In re* Goodman, 2007 Lexis 613, *11–12 (Bankr. N.D. Ga. 2007) (finding a cardmember who obtains a balance transfer clearly not obtaining "cash" within the meaning of § 523(a)(2)(C) is merely satisfying "one debt with a separate credit line.").

are in financial straits and trying to escape. However, this does not change the recommended advice. At the very least, a client should understand what is at risk when she incurs such debt, and perhaps this advice will persuade her to limit how much she ultimately borrows for luxury goods or as cash advances. Any ability to limit incurring this debt will be beneficial to a client in the long run.

III. Victim of Domestic Violence as Creditors: The Potential Impact of Asset Protection Trusts

Changed treatment of self-settled asset protection trusts (SSAPTs)[61] under the BAPCPA may disproportionately affect abused women in affluent marriages. This is true where the husband in an abusive marriage places assets that would have been available for equitable distribution or for the satisfaction of creditor's claims in such a trust. Depending on the state or foreign asset protection trust statute, the trust not only may remove assets from the reach of the settlor's general creditors, but may also insulate assets from equitable distribution at divorce, from claims arising from the debtor's default on child and spousal support obligations and from the debtor's bankruptcy estate.[62] The insulation of assets in an SSAPT will negatively affect the nonbeneficiary spouse by placing the

61. For detailed discussion of the development of asset protection trusts, *see* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1047–50 (2000) (hereinafter *Asset Protection Trusts*); Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 56–66 (1994) (hereinafter *Having Your Cake*); Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 26 CARDOZO L. REV. 2685, 2687 (2006) (hereinafter *Fear Not*); Jason K. Eason, *Policy, Logic & Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2655 (2006) (hereinafter *Policy Logic & Persuasion*). To date eight states have adopted statutes permitting self-settled assets protection trusts. *See* MO. STAT. ANN. § 456.5-505.3(2) (West 2006); NEV. REV. STAT. ANN. § 166.040 (LexisNexis 2003); R.I. GEN. LAWS § 18-9.2-3 (2003); OKLA. STAT. ANN. tit. 31, § 13, 16 (West 2006); UTAH CODE ANN. § 25-6-14(1)(a), (10) (West 2006); DEL. CODE ANN. tit. 12, § 3570(9) (2001); S.D. CODIFIED LAWS § 55-16-3 (West 2005); ALASKA STAT. § 34.40.110(f) (2004).

62. *See* Kalimah Z. White, *Domestic Asset Protection Trust: An Alternative to Prenuptial Agreements*, 2:2 GP/SOLO LAW TRENDS & NEWS, Feb. 2006, *available at* http://www.abanet.org/genpractice/newsletter/lawtrends/0602/family/domestictrust.html (advising the use of domestic asset protection trusts instead of prenuptial agreements because the former are more impervious to claims by a spouse at divorce). For example the Nevada asset protection trust statute specifically provides that a creditor for child or spousal support or for equitable distribution may not reach the assets of a qualifying trust. NEV. REV. STAT. § 166.170 (1) & (2). *But see* DEL. CODE ANN. tit. 12, § 3570(b)(2) (specifically providing that a creditor whose claims arise from an order for child or spousal support or for equitable distribution may reach the assets of a self-settled asset protection trust). *See* Debra Baker, *Island Castaway*, A.B.A. J., Oct. 1998, at 54 (referred to in Susanna C. Brennan, *Comment: Changes in Climate: The Movement of Asset Protection Trusts from International to Domestic Shores and Its Effect on Creditors' Rights*, 79 OR. L. REV. 755 (2000).

trust assets out of the reach of the family law court and by removing the trust assets from the reach of creditors and, consequently, shifting responsibility for joint debts to the nonbeneficiary spouse. Abused spouses in affluent marriages[63] are particularly vulnerable to losses through use of SSAPTs. In affluent marriages, financial abuse is often a characteristic of domestic violence. Such abuse can include limiting a woman's access to resources and keeping her uninformed about the family assets.[64] SSAPTs will likely attract abusers seeking to extend their control over family assets.

Since the 1980s, the phenomenon of self-settled asset protection trusts has been growing in the United States. It started as an off-shore movement by countries seeking to become a financial haven of choice for trust investments.[65] Beginning in the late 1990s, several U.S. states began adopting statutes authorizing the creation of self-settled asset protection trusts in an effort to compete with offshore trust havens for lucrative U.S. trust business.[66] There is reason to believe that as states compete for trust investment business, and as they reconsider their trust laws as part of consideration of the UTC, this trend will continue.[67] While domestic SSAPTs do not offer as much protection from creditors' claims as do similar foreign trusts, domestic SSAPTs have the important advantages of accessi-

63. *See* Kara Bellew, *Note: Silent Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities*, 26 WOMEN'S RTS. L. REP. 39 (2005) (describing the unique characteristics of abuse in affluent communities).

64. *Id.* at 42–44; SUSAN WEITZMAN, NOT TO PEOPLE LIKE US: HIDDEN ABUSE IN UPSCALE MARRIAGES 11–13 (2000).

65. *See* Sterk, *Asset Protection Trusts, supra* note 61, at 1047–50 (2000) (describing the shift in the offshore trust industry from tax avoidance and evasion to asset protection and creditor control.) These offshore trusts are typically irrevocable spendthrift trusts. The laws of some countries may limit their duration to a term of years. Often, the trustee has complete discretion over the management of the trust. Despite this apparent control, the settler of the trust usually retains substantial influence over the trust by retaining the power to appoint additional or new trustees, serving as a formal "advisor" to the trustee on trust management issues, or by providing a nonbinding "letter of intent" describing the settlor's management preferences. These trusts include a conflict-of-law provision requiring that the law of the situs as interpreted by that country's courts be applied to the trust. Finally, many offshore trusts contain an anti-duress provision that strips the settlor of any retained powers in the case of the issuance of a court order regarding the trust property from a jurisdiction other than that governing the trust. For a detailed description of offshore asset protection trusts, *see* Marty-Nelson, *Having Your Cake, supra* note 61, at 56–66.

66. Sterk, *Asset Protection Trusts, supra* note 61, at 1051. *See also* Hirsch, *Fear Not, supra* note 61, at 2687 ("The driving force behind these legislative initiatives is clear enough. States are vying for trust business."); Eason, *Policy, Logic & Persuasion, supra* note 61, at 2655 (discussing the politics of asset protection legislation).

67. *See* Eason, *Policy, Logic & Persuasion, supra* note 61, at 2648–55 (arguing that legislative debate over adoption of the UTC will provide a focal point for adoption of statutes protecting self-settled trusts from creditor's claims).

bility and significantly lower transaction costs.[68] SSAPTs have become so well established that some have argued that lawyers have a responsibility to advise clients to use such instruments.[69]

This trend toward the use of self-settled trusts to insulate assets from the claims of creditors may have gained momentum with the adoption of the BAPCPA. Section 541(c)(2) of the Bankruptcy Code has long provided that the bankruptcy court may respect "anti-alienation" provisions in trusts to the extent such provisions are enforceable under state law[70] Historically, Section 541(c)(2) operated to exclude the assets of traditional spendthrift trusts settled by a third party in favor of a bankrupt beneficiary from the reach of creditors in bankruptcy. Section 541(c)(2) did not protect self-settled trusts because anti-alienation provisions in such trusts were not generally enforceable under state law.[71] That changed, and a loophole developed with the recent statutory authorizations of SSAPTs. Although the question of whether SSAPT assets would be excluded from the bankruptcy estate of a debtor beneficiary is unresolved, there is plenty of reason to believe that Section 541 will be interpreted to permit exclusion of SSAPT assets from the bankruptcy estate.[72]

The bankruptcy treatment of SSAPTs became part of the legislative debate over BAPCPA,[73] resulting in the inclusion of a new provision in

68. Sterk, *Asset Protection Trusts, supra* note 61, at 1051 ("Both [Alaska and Delaware] . . . offer the following advantages not available offshore: ease of access to the trust's assets, lower costs associated with trust creation, and greater political stability than some offshore locations.").

69. *See Asset Protection Trusts: What You Need to Know Now,* 31:31 BCD NEWS AND COMMENT (Nov. 18, 1997), *available* at LEXIS Library Legal, File Legal News Publications; Reni Gertner, Ariana L. Johnson, *Asset Protection Practices Pick Up in Wake of New Bankruptcy Law,* LAW. WKLY, USA (Jan. 30, 2006) *available at* LEXIS Library Legal, File Legal News Publications.

70. 11 U.S.C. § 541(c)(2). Section 541(c)(2) provides "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title." Historically, Section 541(c)(2) operated to exclude the assets of traditional spendthrift trusts settled by third parties in favor of a bankrupt beneficiary from the reach of creditors in bankruptcy. Section 541(c)(2) did not protect self-settled trusts because anti-alienation provisions in such trusts were not generally enforceable under state law. *See, e.g.,* Restatement 3d (Trusts) § 58 ("A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid.")

71. *See* IIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 156 (4th ed. 1987) (pointing out that the rule barring self-settled spendthrift trusts originated with Statute of King Henry VII passed in 1487, which prohibited a transferor from establishing a trust for his own use); A. JAMES CASNER & JEFFREY N. PENNELL, 1 ESTATE PLANNING § 4.1.4 nn. 31–32 (6th ed. 1998)

72. *See Eason, Policy, Logic & Persuasion, supra* note 61, at 2669–71 (pointing out that bankruptcy courts had already upheld state law protection of pensions—which are self-settled —from the claims of creditors through the anti-alienation clause provision).

73. *Id.* at 2671–73.

the Bankruptcy Code. This provision, Section 548(e)(1), authorizes the trustee in bankruptcy to avoid any transfer of an interest of the debtor made within ten years of bankruptcy under the following circumstances: "a) the transfer was made to a self settled trust, b) the transfer was made by the debtor, c) the debtor is a beneficiary of the trust, and d) the debtor made the transfer with the "actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made."[74]

Section 548 appears to insulate SSAPTs that are older than ten years from the reach of the bankruptcy court. For younger trusts, the pivotal question that will determine whether the assets of a self-settled asset protection trust become part of a bankruptcy estate is whether the trust was established with the "actual intent to hinder, delay, or defraud" the spouse.[75] Establishing that a transfer was made with actual intent to hider, delay, or defraud has proven difficult.[76] It requires proof of a purposeful act specifically intended to defraud creditors,[77] although a court's finding of actual intent can be inferred from the facts.[78]

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74. 11 U.S.C. § 548(3)(1). *See* Eason, *Policy Logic & Persuasion*, *supra* note 61, at 2669–71 (discussing the legislative debate over the treatment of SSAPTs in the bankruptcy reform legislation).

75. The language of Section 548(e)(1) tracks the provisions of both of the general fraudulent conveyance provision of the Bankruptcy Code, and the Uniform Fraudulent Transfers Act. The general fraudulent conveyance provision of the Bankruptcy Code is found in 11 U.S.C. § 548 (a)(1)(A), which gives the trustee in bankruptcy the power to avoid any transfer made within two years prior to bankruptcy if the debtor "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." The Uniform Fraudulent Transfer Act § 4(a) provides that "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor. . . ."

76. The difficulty of proving actual fraud has led to the development of a factual framework in which fraud may be inferred. This framework is built around the inference of fraud from the presence of certain telltale facts that often accompany fraudulent conduct called "badges of fraud." This inferential analysis has been part of fraudulent transfer law since the first fraudulent transfer statute was adopted during the 1600s in England. Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595, 647, n. 266 (1998) (describing the history of fraudulent transfer law). The leading bankruptcy treatise notes, "to aid in the examination of the circumstances of the transaction in order to determine whether the transfer was made with the requisite intent, courts have developed what are known as 'badges of fraud.'" 5 COLLIER ON BANKR. § 548.04 (Lawrence P. King ed., 15th ed. rev., 1996).

77. 5 COLLIER ON BANKR. § 548.04 ("Actual fraudulent intent requires a purposeful act intended specifically to defraud creditors, although it is not necessary that any particular creditor be the subject of this intent, as evidenced by the fact that the statute's protections extend to those creditors whose claims did not yet arise at the time of the transaction in question.")

78. *Id.* ("[T]he finding of the requisite intent may be predicated upon the concurrence of facts which, while not direct evidence of actual intent, lead to the irresistible conclusion that the

A general goal of shielding assets from creditors, if not undertaken at a time of insolvency or in such a way as to effectively render the debtor insolvent, does not constitute specific intent to hinder, delay, or defraud creditors.[79] Likewise, specific intent does not necessarily require intent to defraud a particular creditor.[80] Thus, if a spouse establishes a SSAPT in anticipation of divorce to shield property from the claims of the other spouse, the trustee in bankruptcy will likely be able to establish the specific intent to hider, delay, or defraud the claims of the spouse and will be able to avoid such a transfer and reach the trust assets. However, where a trust is established before divorce is anticipated for the purposes of extending an abusive spouse's control over the marital finances, or, for example, as part of an investment plan or a plan for future needs, such as retirement, the bankruptcy trustee may not be able to avoid the trust.[81]

The growing popularity of self-settled asset protection trusts and their potentially favorable treatment in bankruptcy together raise concerns for protecting an abused spouse in equitable distribution proceedings and in subsequent bankruptcy proceedings. Even in cases in which the parties have significant assets, these trusts can place a significant portion of those assets out of the reach of the family law court or of a subsequent bankruptcy court. First, although the property in the asset protection trust may be marital property, it may not be available for equitable distribution, part of an action to enforce a right to periodic payments, or other phased-in distribution after the entry of final judgment.[82] In the context of traditional spendthrift trusts, many courts have recognized a limited exception to

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transferor's conduct was motivated by such intent."). The UFTA expressly, and the Bankruptcy Code pursuant to case law, have both identified certain facts, badges of fraud, that are particularly important in giving rise to an inference of actual intent to hinder, delay or defraud creditors. UFTA § 4(a); Emmett Valley Assoc. v. Woodfield, 978 F.2d 516 (9th Cir. 1992); *In re* Sholdan, 217 F.3d 1006 (8th Cir. 2000); General Trading, Inc. v. Yale Materials Corp., 119 F.3d 1485 (11th Cir. 1997); *In re* Sharp International Corp., 403 F.3d 43 (2d Cir. 2005).

79. *See, e.g., In re* Adlman, 541 F.2d 999 (2d Cir. 1976) (payment of premiums on life insurance and repayment of loans to secure "protection" for debtor and her children were not fraudulent even though they put assets out of the reach of creditors); Bank Leumi Trust Co. of New York v. Lang, 898 F. Supp. 883, 885 (S.D. Fla. 1994) (purchase of a homestead and exempt annuities did not, by itself, establish specific intent to defraud).

80. For example, section 4(a)(2)(i) of the UFTA applies not only to creditors at the time of the fraudulent transfer but also to future creditors.

81. *See* Patterson v. Shumate, 504 U.S. 753 (1992) (the debtor's interest in an ERISA-qualified pension plan—essentially a self-settled spendthrift trust—was excludable from the debtor's bankruptcy estate pursuant to § 541(a)(1) and (c)(2)).

82. A spouse in a community property jurisdiction who has a present property right to assets in a SSAPT might be in a theoretically better position than a spouse in a common law state who may not have any ownership claims on the trust property. Nonetheless, the claims of spouses in both types of jurisdictions are in the nature of creditors' claims from which the trust assets may be protected by state SSAPT statutes.

the protection of assets from certain family law creditors, such as those for child support.[83] Such exceptions are unlikely to be recognized by courts in the face of a statute that specifically authorizes protection from such claims.

Not only are some SSAPTs impervious to equitable distribution and its enforcement, but also their insulation of assets from the other third party creditors may have the effect of shifting primary responsibility for joint debt incurred during the marriage to the spouse who has been victimized by domestic violence. This is true where spouses are jointly and severally liable for debt and the creditor is unable to obtain satisfaction of the debt from the beneficiary of the SSAPT and, as a result, pursues the abused spouse who is jointly responsible for the obligation. Provisions in the divorce decree assigning primary responsibility on such obligations do not bind the creditor.[84] At most, such provisions give the other spouse an indemnification claim that is unlikely to be satisfied if the trust assets cannot be reached.[85] Bankruptcy may not provide a backstop to this problem if the trustee in bankruptcy cannot set aside the transfer of property to the SSAPT. Rather, the SSAPT beneficiary may obtain a discharge and enjoy the continued use of the trust assets while the spouse still bears responsibility for any unsatisfied portions of the debt.

Family law attorneys must be alert to the possibility that marital assets may be part of a SSAPT. In cases involving substantial wealth, a family law attorney should take steps to discover the existence of a SSAPT in the initial divorce proceeding. The attorney should not assume there is no trust because the law of the jurisdiction in which the divorce is pending does not authorize SSAPTs—generally, the law of the situs of the trust assets will control the trust, not the law of the settlor's domicile.[86] Family law attorneys must therefore be aware of the specific requirements of the

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83. *See, e.g.*, Shelly v. Shelly, 354 P.2d 282 (Or. 1960); *In re* Marriage of Chapman, 697 N.E. 2d 365 (Ill. App. Ct. 1998); Safe Deposit & Trust Co. v. Robertson, 65 A.2d 292 (Md. 1949). For a discussion of the relationship of child support to spendthrift trusts, see Carolyn L. Dessin, *Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support and Alimony*, 10 GA. ST. U. L. REV. 691 (1994).

84. *See, e.g.*, Blake v. Amoco Federal Credit Union, 900 S.W. 2d 108 (Tex. Ct. App. 1995); Twin Falls Bank v. Holley, 723 P.2d 893 (Idaho 1986).

85. *See, e.g.*, Lorenzana v. Lorenzana, 1994 WL 60755 (Feb. 28, 1994); Winegarden v. Winegarden, 719 A.2d 678 (N.J. Super. Ct. 1998); Lee v. Lee, 996 P.2d 389 (Mont. 2000).

86. *See* Charles D. Fox IV & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP. PROB. & TR. J. 287, 345–46 (2002) (discussing the conflicts of law rules for trusts and concluding that "[t]he Restatement provides that . . . , the local law of the state in which the settlor has manifested an intention that the trust be administered determines the issue of whether a beneficiary's interest in a personal property trust can be reached by the beneficiary's creditors. For all other trusts, the local law of the state to which trust administration is most substantially related determines whether a beneficiary's creditors can reach the beneficiary's interest.").

SSAPT-authorizing statute. Not all such statutes authorize protection from the claims of a former spouse and/or from claims for child and spousal support.[87]

To reach the assets in a SSAPT, a family law attorney should consider whether the trust violated fraudulent transfer law in the jurisdiction in which it was established. Most of the SSAPT-authorizing statutes specifically provide that a trust formed with the actual intent to hinder, delay, or defraud creditors is not valid. If there is a SSAPT that cannot be reached by a family law creditor, the equitable distribution should be satisfied through current assets to the extent possible. If an unequal distribution of assets is available, it should account for the assets in the SSAPT and provide for the distribution of non-SSAPT assets to the nonbeneficiary spouse.

If a bankruptcy results, careful analysis of whether the transfer to the trust was fraudulent should be undertaken. Additional arguments should be considered in bankruptcy. A bankruptcy court may apply the law of the debtor's domicile to determine the basic enforceability of the trust under Section 541(c)(2). If so, the trust property may be included in the bankruptcy estate even if the law of the situs of the trust would not otherwise permit such inclusion. In addition, a bankruptcy court may be persuaded by a public policy argument in favor of the debtor's family that the trust assets should not be insulated from claims.[88]

IV. Conclusion

BAPCPA's limits on the availability of bankruptcy relief affect victims of domestic violence more than other consumers. Such women are trying to gain independence from their abusers at the same time as they are attempting to achieve an economic fresh start. Often, they have not played a role in family financial decisions, are not aware of their own financial

87. *See, e.g.*, R. I. STAT. § 18-9.2-5 (1956) (specifically permitting former spouses and children to reach assets); DEL. CODE ANN. tit. 12 § 3573 (2007) (specifically permitting child support, spousal support and property settlement creditors to reach the assets in a SSAPT); UTAH CODE ANN. § 25-6-14 (West 2003) (allowing child support but not other family law creditors to reach the asset protection trust assets); NEV. STAT. ANN. § 166.101-070 (West 2007) (making no express exception to the self-settled spendthrift trust for claims for child support or by former spouses for spousal support or property settlement debts); ALASKA STAT. § 13.35.035 (1)-(2)(making no express exception for family law creditors); Law of Mar. 26, 2007, ch. 280, §§ 21–24; S.D. CODIFIED LAWS § 55-1-19 (repealed 2007) (permitting family law creditors to reach the asset protection trust property); OKLA. STAT. ANN. tit. 31 §§ 11-17 (West 2007) (allowing child support creditors but not other family law creditors to reach property in asset protection trust).

88. *See* Sterk, *Asset Protection Trusts*, *supra* note 61, at 1088–89 (pointing out that federal bankruptcy courts have declined to enforce the settlor's choice of law regarding trusts for strong public policy reasons).

situation, and do not have access to the tools of economic independence such as cars and credit cards. When they do have some financial wherewithal, they must often incur large amounts of debt during their attempt to leave their abusers. The limits of the new law on the scope of legal advice, the availability of cramdown for automobile loans, and the nondischargeability of certain credit card debt all have a disproportionately negative affect on such women. As we have pointed out, although legal options are limited, effective advice at the divorce stage may assist women leaving abusive relationships in successfully accessing bankruptcy relief. For abuse victims in affluent marriages who are creditors in their abusers' bankruptcy, the failure of BAPCPA to address the loophole created by the advent of SSAPTs may mean that substantial marital assets are beyond their reach.