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WHERE'S MY REFUND? HOW TO ADDRESS OVERPAID DOMESTIC SUPPORT OBLIGATIONS UNDER THE BANKRUPTCY CODE

ABSTRACT

Domestic support obligations are a source of much debate among bankruptcy courts throughout the United States. Concomitantly, overpayments of domestic support obligations are no exception. Courts across the nation are split as to whether overpayments of support debts fall within the definition of a domestic support obligation listed in 11 U.S.C. §101(14A). The specific language enumerated in §101(14A) giving rise to the jurisdictional split pertains to whether the debt in question is “in the nature of alimony, maintenance, or support.” Courts that deem overpaid support debts as domestic support obligations focus on the debt’s function at the time of the original agreement whereas other courts reject this approach and view the overpayment as a simple money judgment. This discrepancy has led to an inequity for families across the nation as jurisdictions throughout the United States produce distinctive interpretations of overpaid support debts. This Comment will specifically analyze overpaid domestic support obligations with reference to the 11 U.S.C. §507 list of priorities and §523 exceptions to discharge. In order to remedy the jurisdictional split, I propose a new set of standards for bankruptcy courts to follow when confronted with overpaid domestic support obligations.

Instead of understanding child support and alimony collectively within the term domestic support obligation, I propose that the two obligations should be considered independently. The emerging standards include three main factors: (1) all domestic support obligations should be excepted from discharge, (2) the overpayment of child support should be entitled to priority status whereas (3) the overpayment of alimony should not. These standards are determined after analyzing the jurisdictional split, Congress’s intent in drafting the U.S. Bankruptcy Code, the substance of the obligation, and the intent and current condition of the parties. Exceptions to the standards arise when confronted with unique circumstances; however, this interpretation should be followed as a general rule.

INTRODUCTION

Courts across the nation attempt to comply with two competing principles laid out in the U.S. Bankruptcy Code (Code):¹ (1) the debtor's fresh start and (2) the creditors' right to payment.² When confronted with an overpaid support obligation,³ it becomes difficult for courts to appropriately apply these principles.⁴ The Code inadvertently fails to clarify what "overpaid support obligations" are and how these debts should be managed throughout bankruptcy proceedings.⁵ This gap in the Code creates an inequity for families across the nation because different jurisdictions produce differing outcomes on how these debts are treated.

In the Southern District of Ohio, in *In re Norbut*, Margaret and Theodore Norbut were divorced after twenty-seven years of marriage.⁶ The Judgment Entry and Decree of Divorce dictated that Margaret was entitled to fifteen years of alimony payments that remained in effect until Theodore's retirement.⁷ Years later, Theodore sought termination of the alimony payments in state court as a result of his early retirement.⁸ After years of litigation, the state court retroactively terminated his alimony payments, resulting in Margaret owing \$72,694.14 in overpayment expenses.⁹ Subsequently, Margaret filed a petition under chapter 7 of the Code.¹⁰ Theodore then commenced an adversary proceeding against Margaret seeking summary judgment for the non-dischargeability of the debt declaring it a domestic support obligation.¹¹ In other words, while Margaret would no longer owe her other debts once she concludes the bankruptcy process, her obligation to Theodore would survive. The Bankruptcy Court for the Southern District of Ohio relied on the previous state court decision and granted Theodore's motion for summary judgment.¹² Specifically, the court found "that an obligation consists of support whenever

¹ Robert C. Yan, *The Sign Says "Help Wanted, Inquire Within" — But It May Not Matter if You Have Ever Filed (or Plan to File) for Bankruptcy*, 10 AM. BANK. INST. L. REV. 429, 432 (2002).

² *Id.* (citations omitted).

³ See *infra* Background Part B (explaining what a domestic support obligation entails).

⁴ See Beth Holiday, Annotation, *Construction and Application of Bankruptcy Abuse Prevention and Consumer Protection Act's (BAPCPA's) Provision Defining "Domestic Support Obligations"* (11 U.S.C.A. § 101(14A)), 56 A.L.R. FED. 2D 439 (2011).

⁵ See generally 4 Collier on Bankruptcy ¶ 523.11 (16th ed. 2018).

⁶ *In re Norbut*, 387 B.R. 199, 201–02 (Bankr. N.D. Ohio 2008).

⁷ *Id.* at 202.

⁸ *Id.*

⁹ *Id.* at 205.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 211.

there is a legal duty to pay such an obligation.”¹³ The court followed previous decisions that found overpaid support obligations to be “in the nature of alimony, maintenance or support.”¹⁴

In the Middle District of Florida, in *In re Galiardo*, Joyce Lynn Galiardo and Frederick Galiardo were divorced in 1992.¹⁵ A separation agreement ordered Frederick to pay Joyce alimony payments in installments over a number of years.¹⁶ Following the satisfaction of the installments, Frederick unintentionally continued to pay Joyce alimony for an additional two years.¹⁷ Upon recognizing this mistake, Frederick brought suit in state court where Joyce was ordered to pay him \$222,650.00 for unjust enrichment.¹⁸ Subsequently, Joyce filed a petition for chapter 7 relief under the bankruptcy code which was later converted to a chapter 13 case.¹⁹ Similar to the *Norbut* case, the question at issue was whether the \$222,650.00 retained its character as a domestic support obligation.²⁰ In reaching its conclusion in *In re Galiardo*, the Bankruptcy Court for the Middle District of Florida reasoned that Frederick did not have any personal need for support in regard to the repayment of the debt.²¹ The court found that the debt was not in the nature of support and therefore was not a domestic support obligation.²² In contrast to *In re Norbut*, the bankruptcy court in this case decided to overlook the state court’s decisions and declared the overpaid debt as dischargeable.²³

These two cases consider the same issue but reach two vastly different conclusions.²⁴ Both courts attempt to decipher how overpaid support obligations should be treated under the Code. Different conclusions emerge because the Code does not provide clear instructions on how to proceed when confronted with an overpaid support obligation. This complication affects the personal lives of individuals across the country.²⁵ An equitable remedy must rise to the surface

¹³ *Id.* at 210 (internal citation omitted).

¹⁴ *Allen Co. Child Enf’t Agency v. Baker (In re Baker)*, 294 B.R. 281, 289 n.3 (Bankr. N.D. Ohio 2002) (citing 11 U.S.C. § 507(a)(7)(B) (2019); *see also In re Norbut*, 387 B.R. at 199, 210–11).

¹⁵ *Galiardo v. Galiardo (In re Galiardo)*, 526 B.R. 897, 898 (Bankr. M.D. Fla. 2013).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 898–99.

¹⁹ *Id.* at 899.

²⁰ *Id.*

²¹ *Id.* at 900.

²² *Id.* at 902.

²³ *Compare In re Galiardo*, 526 B.R. at 902, with *In re Norbut*, 387 B.R. 199, 211 (Bankr. N.D. Ohio 2008).

²⁴ *Compare In re Galiardo*, 526 B.R. 897, with *In re Norbut*, 387 B.R. 199.

²⁵ *See In re Galiardo*, 526 B.R. 897; *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010); *In re Norbut*,

to allow individuals to obtain uniform treatment in bankruptcy proceedings across the country.

Federal bankruptcy law and state family law inevitably overlap with one another. Domestic relations are traditionally matters reserved for state courts,²⁶ but once a debtor files a petition for bankruptcy relief, federal law comes into play.²⁷ The balance between state and federal law in bankruptcy is clear from the plain language of the Code. The Code, throughout its many provisions, respects the decisions of the states²⁸ and looks to state law for guidance when considering issues of family law that are not clearly discernable.²⁹ When a domestic support obligation (DSO) has been overpaid by a creditor, the relevant state law must be addressed to determine the nature of the debt. When federal bankruptcy courts neglect state court decisions, an incohesive, mechanical approach is forced upon federal courts when deciphering whether a judgment can be stretched to fit within the definition of a DSO or contracted to be excluded from its terms. Because the Code does not provide clear guidelines on how to settle an overpaid support debt, sound arguments can be crafted for either interpretation resulting in inequitable outcomes.

This Comment proposes a new set of standards to remedy this inequity. The standards are characterized as follows: (1) all overpaid DSOs must be excepted from discharge,³⁰ (2) the overpayment of child support should be entitled to priority status,³¹ whereas (3) the overpayment of alimony and maintenance should not be entitled to priority status. These standards are determined after analyzing the jurisdictional split, Congress's intent in drafting the Code, the substance of the obligation, and the intent and current condition of the parties. The division between alimony and child support is vital because the mothers and fathers of society should not be disincentivized from continuing to pay their child support. If an overpaid support debt is not returned to the provider, this may cause future providers to withhold their child support payments. Exceptions

387 B.R. 199; *Allen Co. Child Enf't Agency v. Baker (In re Baker)*, 294 B.R. 281 (Bankr. N.D. Ohio 2002); *Kassicieh v. Mascotti*, 2007 Ohio App. LEXIS 4494 (Ohio Ct. App. 2007).

²⁶ See *In re Norbut*, 387 B.R. at 210.

²⁷ See 11 U.S.C. § 301 (2019).

²⁸ See § 523(a)(5) (to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement . . .).

²⁹ See *In re Norbut*, 387 B.R. at 210 (citation omitted).

³⁰ An exception from discharge will allow a creditor's claim to pass through bankruptcy unaffected.

³¹ See *infra* Background Part D.1.

to the listed standards arise when there is a unique circumstance, but courts should follow this interpretation as a general rule.

I. BACKGROUND

This Comment first considers foundational principles underlying the proposed standards. Generally, the foundation arises from (1) the family unit, divorce, and support obligations, (2) the definition of a domestic support obligation and how it relates to overpayments, (3) why overpayments occur, and (4) how these debts function within the Code.

A. *The Family Unit, the Introduction of Divorce, and Emerging Support Obligations*

The family unit is a delicate yet resilient facet of society. The significance of bankruptcy decisions concerning overpayments of DSOs are best understood through a discussion of the values and evolving functions of the family unit. The family unit is the central and most important part of civilization.³² “Marriage and family are perhaps society’s oldest and most resilient institutions.”³³ Since the creation of humanity, individuals have situated themselves into units of families as a defense mechanism for various types of support.³⁴ Over thousands of years, families have surmounted economic, legal, and societal fluctuations while evolving along the way.³⁵ In whichever way a family decides to function, it is in society’s best interest to create a positive outlook and environment for families across the world.³⁶ The legal system must consider familial values when dictating how to treat certain DSOs within bankruptcy because efficient legal systems are tailored to deep societal structures.

As time has passed, the family unit has endured the introduction of divorce. Now commonplace in American culture, statistics from the American Psychological Association indicate that forty to fifty percent of the American population divorces.³⁷ Because divorce is now recognized as a societal norm,

³² See William Bennet, *Stronger Families, Stronger Societies*, N.Y. TIMES, (Apr. 24, 2012, 6:43 PM), <https://www.nytimes.com/roomfordebate/2012/04/24/are-family-values-outdated/stronger-families-stronger-societies>.

³³ John DeFrain et al., *Creating a Stronger Family: Why are Families So Important?*, NEBGUIDE (Sept. 2008), <http://extensionpublications.unl.edu/assets/pdf/g1890.pdf>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Marriage and Divorce*, AM. PSYCHOL. ASS’N, <https://www.apa.org/topics/divorce/> (last visited Jan. 31, 2020).

the culture within the United States has adjusted and reconstructed family life to reflect the notion that a traditional family unit is no longer necessary for the success of future and current generations.³⁸ Families will continue to prosper when divorces are finalized appropriately. Couples may achieve divorce through litigation or settlement, but similar to other lawsuits, couples may resolve divorce by a settlement agreement commonly referred to as a separation agreement.³⁹ The creation of laws and regulations governing this new familial norm of divorce has allowed society to develop ways to interact and integrate divorced families into our communities in a way that does not threaten the fabric of society.⁴⁰

The way in which a family functions has far reaching effects.⁴¹ “Sustainable societies depend upon strong families.”⁴² Anything that tampers with the functioning of a family may cause widespread consequences that impact other areas within society.⁴³ For example, lower rates of educational success for children emerge when families are confronted with high rates of poverty.⁴⁴ Bankruptcy law destabilizes families by neglecting to address how overpaid DSOs should be treated under the Code. The Code does not supply a uniform set of standards for overpaid support obligations which results in an inequity amongst families across the nation.

The Code intends for a uniform application of its laws.⁴⁵ Nonetheless, a jurisdictional split exists among bankruptcy courts on how to construe overpayments of support obligations.⁴⁶ This split affects families across the country in dissimilar ways.⁴⁷ In this instance, the continuous inconsistent application of bankruptcy law has left families in a state of disarray. “The family is the human institution most vital to the perpetuation of the [human] race, and

³⁸ See Kristen Glaeser, *Threatening the Fabric of Our Society: Divorce in Modern Societies*, 4 OLGETHORPE J. OF UNDERGRADUATE RES. 1 (2014), <https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1039&context=ojur>.

³⁹ Meredith Johnson, *At the Intersection of Bankruptcy and Divorce: Property Division Debts under the Bankruptcy Reform Act of 1994*, 97 COLUM. L. REV. 91, 95 (1997).

⁴⁰ See Glaeser, *supra* note 38, at 1.

⁴¹ See DeFrain, *supra* note 33.

⁴² Institute for Family Studies, *Strong Families, Sustainable Societies*, INST. FOR FAM. STUD. BLOG (Sept. 18, 2013), <https://ifstudies.org/blog/strong-families-sustainable-societies>.

⁴³ See *id.* (citing to studies showing that children are less likely to graduate from college when they do not have a strong family unit).

⁴⁴ *Id.*

⁴⁵ See Joseph Pace, *Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory to Abrogate State Sovereign Immunity*, 119 YALE L.J. 1568, 1592 (2010).

⁴⁶ See cases cited *supra* note 25.

⁴⁷ See cases cited *supra* note 25.

its sound ordering [is] the consideration of deepest social concern.”⁴⁸ Society encourages individuals to have strong familial values that the Code reflects.⁴⁹ When litigation arises concerning overpaid DSO debts, bankruptcy courts must diligently interpret these values within the Code and uphold standards that are not contrary to society’s constructions.⁵⁰

Child support and spousal support arise from separation agreements.⁵¹ Both spousal support and child support were created as remedies available to individuals upon separation and are currently used as bargaining tools in divorce proceedings.⁵² Child support and spousal support serve as vital components of divorce. Support obligations are often seen as contentious aspects of divorce proceedings, but nonetheless, they must be settled in order to maintain the equilibrium of the family unit. Without legal standards, the family unit would fail to function properly following a divorce.

Child support is a legal mechanism for the support of a minor provided by the child’s parents or legal guardians.⁵³ Child support orders are at issue in a multitude of contexts including divorce, annulment, and direct suits for child support.⁵⁴ The amount of support is determined by two main factors: (1) the needs of the child and (2) the parent’s ability to pay.⁵⁵ Children are the “true assets of the State[,]” and protecting them is society’s highest priority.⁵⁶ Child support cases are controversial because setting guidelines in the best interest of a child does not amount to a simple calculation.⁵⁷ The future of the world is determined by subsequent generations, and those generations learn and develop from the consequences of the present.⁵⁸ When confronted with a divorce, children must be provided with adequate care and sources of stability for both the success of themselves and the success of society.⁵⁹ Court orders mandate

⁴⁸ Robert W. Kelso, *The Changing Societal Setting of Alimony Law*, 2 L. AND CONTEMP. PROB. 186, 189 (1939).

⁴⁹ See 11 U.S.C. §§ 507(a)(1), 523(a)(5) (2019).

⁵⁰ See Bennet, *supra* note 32.

⁵¹ See Johnson, *supra* note 39, at 95.

⁵² See Judith G. McMullen, *Spousal Support in the 21st Century*, 29 WIS. J.L. GENDER & SOC’Y 1 (2014).

⁵³ See 1 Collier Family Law and the Bankruptcy Code ¶ 3.02 (16th ed. 2018).

⁵⁴ See Amy H. Kastely, *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody*, 6 U. HAW. L. REV. 381, 416 (1984).

⁵⁵ See *id.*

⁵⁶ See Kelso, *supra* note 48, at 189.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

child support obligations and if a parent neglects those payments it can result in serious legal consequences for contempt, including incarceration.⁶⁰

Spousal support, otherwise known as alimony or maintenance, derives directly from divorce proceedings.⁶¹ Spousal support is defined as any payment made to a former spouse that is both for the sustenance and support of that former spouse.⁶² A spouse, who made sacrifices and contributions during the course of a marriage, must be able “to continue to live according to the economic standard that was established during marriage.”⁶³ Likewise, courts’ consider a spouse’s “ability to pay” when rendering orders.⁶⁴ Courts consider many factors when deciding on an issue of alimony.⁶⁵ Most jurisdictions have been moving away from distributing awards of permanent alimony and have instead been awarding increasing amounts of rehabilitative alimony.⁶⁶ This new trend of alimony distributions focuses more on the facts of the case instead of relying on sweeping conclusions.⁶⁷

Divorce and bankruptcy go hand in hand with one another. The correlation between financial hardship and divorce is irrefutable.⁶⁸ Financial distress is oftentimes a direct cause of divorce for the vast majority of Americans.⁶⁹ Once a couple initiates a divorce proceeding, they incur more costs through the process of divorcing.⁷⁰ A typical divorce costs around \$15,500, and a common hourly rate for a divorce attorney is \$250 an hour.⁷¹ Many individuals are left

⁶⁰ See Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 619 (2012).

⁶¹ For the purpose of this comment, alimony and maintenance are considered interchangeable terms. See Kelso, *supra* note 48, at 193.

⁶² See Kelso, *supra* note 48, at 193.

⁶³ Toby Solomon, *Trends in Alimony Law*, 1989 N.J. LAW. 30 (1989).

⁶⁴ See 1 Collier Family Law and the Bankruptcy Code ¶ 3.02 (16th ed. 2018).

⁶⁵ See Solomon, *supra* note 63, at 30–31 (1989) (listing the actual need and ability of the parties to pay, the duration of the marriage, the age, physical and emotional health of the parties, the standard of living, the earning capacities, the length of absence from the job market and so on and so forth).

⁶⁶ See Jeff Landers, *What Divorcing Women Need To Know about Alimony ‘Reform,’* FORBES (May 17, 2013), <https://www.forbes.com/sites/jefflanders/2013/05/17/what-divorcing-women-need-to-know-about-alimony-reform/#556764c51260>.

⁶⁷ See Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now?*, AM. BAR ASS’N (Apr. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/april_2012/current_trends_alimony_law/.

⁶⁸ 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, 1374 (2005).

⁶⁹ *Id.* at 1374–75.

⁷⁰ See Samuel Stebbins, *How Much Does It Cost to Get a Divorce? 10 States with the Highest Price Tags*, USA TODAY, (Nov. 26, 2018), <https://www.usatoday.com/story/money/2018/11/26/how-much-does-cost-get-divorce-most-expensive-states/38446243/>.

⁷¹ *Id.*

with a tremendous amount of debt post-divorce along with newly mandated support obligations leaving bankruptcy as the only viable option.⁷² Bankruptcy and divorce overlap when a debtor seeks to discharge obligations arising from a divorce decree.⁷³ This intersection has led to considerable litigation⁷⁴ and overpayments of support obligations are no exception.

B. Defining Domestic Support Obligation and Understanding How Its Definition Affects Overpayments

A DSO is defined in § 101(14A) of the Code.⁷⁵ The broad statutory language listed in §101(14A) was added by the 2005 BAPCPA amendments⁷⁶ and has since been an area of much debate amongst bankruptcy courts in the United States.⁷⁷ A DSO is defined as:

[A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable non-bankruptcy law notwithstanding any other provision of this title, that is--

(A) owed to or recoverable by--

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child

⁷² See Austin, *supra* note 68, at 1375.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 11 U.S.C. §101(14A) (2019).

⁷⁶ See Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, §801(a), 119 Stat. 23, 141 (2005).

⁷⁷ Compare *Kassicieh v. Mascotti*, 2007 Ohio App. LEXIS 4494 (Ohio Ct. App. 2007), with *Galiardo v. Galiardo* (*In re Galiardo*), 526 B.R. 897, 900 (Bankr. M.D. Fla. 2013).

of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.⁷⁸

Most relevant to an overpaid DSO debt is whether the overpayment falls within the language listed in section (B).⁷⁹ When examining this provision, courts are split on *when* and *why* DSOs stop functioning as means of support.⁸⁰ Bankruptcy courts must understand how the overpaid DSO functions between the parties and how the family originally construed it to determine if the debt fits this provision.⁸¹ In deciphering how the overpaid DSO functions, a factor test is created.⁸² The “courts look at many factors focusing on (1) the language and substance of the agreement; (2) the financial situation of the parties at the time of the agreement, including prospects for future income; and (3) the function served by the obligation at the time of the agreement.”⁸³ Some courts embrace the third criteria of the factor test when determining if a debt is a DSO.⁸⁴ These courts find overpaid support debts to fit within the definition listed in § 101(14A), reasoning that, at the time of the agreement, the debt's primary function was in the nature of support.⁸⁵ However, many other courts focus on the second criteria of the factor test and assess the need for the refund.⁸⁶ These courts commonly render overpaid debts as money judgments and exclude them from the definition listed in § 101(14A) because there was no need for the refund.⁸⁷

Labels attached to provisions in separation agreements do not signify certain debts to be in the nature of alimony, maintenance, or support.⁸⁸ Rather, courts must look beyond the labels attached to debts when determining if the debt retains its character as a DSO as defined by the Code.⁸⁹ Though labels are not conclusive, they may be important in deciphering the intent of the parties involved.⁹⁰ Courts may consider labels, but with much trepidation. DSOs have

⁷⁸ 11 U.S.C. §101(14A) (2019).

⁷⁹ See Holiday, *supra* note 4, at 439.

⁸⁰ See *In re Norbut*, 387 B.R. 199, 210 (Bankr. N.D. Ohio 2008); *Allen Co. Child Enf't Agency v. Baker (In re Baker)*, 294 B.R. 281 (Bankr. N.D. Ohio 2002); *Lankford v. Drinkard (In re Drinkard)*, 245 B.R. 91, 93 (Bankr. N.D. Tex. 2000).

⁸¹ See Diane Brazen Gordon, *Feature: Marital Debt Disputes in Chapter 13: Is the Debt a DSO?*, 33-3 ABIJ 60, 61 (2014).

⁸² *Id.*; see also *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 723-26 (10th Cir. 1993).

⁸³ Gordon, *supra* note 81, at 61; see also *In re Sampson*, 997 F.2d at 723-26.

⁸⁴ See *In re Baker*, 294 B.R. 281.

⁸⁵ See *id.*

⁸⁶ See *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010).

⁸⁷ See *id.*

⁸⁸ See Holiday, *supra* note 4, at 439.

⁸⁹ *Taylor v. Taylor (In re Taylor)*, 737 F.3d 670, 676-77 (10th Cir. 2013).

⁹⁰ See Holiday, *supra* note 4, at 439.

a powerful influence on personal bankruptcy proceedings because they are constantly referenced throughout the Code. Therefore, courts must tread carefully when the status of a familial debt is uncertain.⁹¹

C. *Why Overpayments of DSOs Occur and Its Significance in Bankruptcy*

Because support obligations are interwoven into divorce proceedings, overpayments may emerge as a consequence.⁹² Overpayments stem from a variety of circumstances including failing to timely end a wage garnishment,⁹³ paying child support for children who are later found not to be biologically related to the support provider,⁹⁴ or unknowingly providing payments that are no longer court ordered.⁹⁵ Most frequently, overpayments occur because litigation concerning these obligations persists while the payments are court ordered.⁹⁶ At the end of litigation, many state courts retroactively terminate support obligations as deemed necessary in order to rightfully return outstanding funds.⁹⁷ Outside of bankruptcy, these overpayments would be ordered to be paid back in full to the original support provider.

Within bankruptcy, courts are split on whether these payments are in the nature of support as a DSO.⁹⁸ Labeling this debt as a DSO determines whether the creditor should be paid back and if so, to what extent. Throughout the Code, familial obligations are afforded much significance.⁹⁹ However, overpaid support debts are not mentioned at all.¹⁰⁰ This gap has caused much consternation among bankruptcy courts because there is no clear answer on how to address these types of obligations. Support obligations are vital tools in our society, and we want to encourage individuals to pay these debts. Problems arise from these fluctuating decisions because if an individual believes his or her former spouse is financially distressed, he or she may stop providing support obligations if the jurisdiction does not reimburse creditors for overpaid support debts in bankruptcy proceedings.

⁹¹ See *In re Norbut*, 387 B.R. 199, 210 (Bankr. N.D. Ohio 2008).

⁹² See *In re Vanhook*, 426 B.R. 296; *In re Norbut*, 387 B.R. at 210; Allen Co. Child Enf't Agency v. Baker (*In re Baker*), 294 B.R. 281 (Bankr. N.D. Ohio 2002); Lankford v. Drinkard (*In re Drinkard*), 245 B.R. 91, 93 (Bankr. N.D. Tex. 2000).

⁹³ See *In re Baker*, 294 B.R. 281.

⁹⁴ See *In re Vanhook*, 426 B.R. 296.

⁹⁵ See Galiardo v. Galiardo (*In re Galiardo*), 526 B.R. 897, 899 (Bankr. M.D. Fla. 2013).

⁹⁶ See *In re Norbut*, 387 B.R. at 210; *In re Baker*, 294 B.R. 281.

⁹⁷ See *id.*

⁹⁸ See *In re Norbut*, 387 B.R. at 210; *In re Baker*, 294 B.R. 281; Lankford v. Drinkard (*In re Drinkard*), 245 B.R. 91, 93 (Bankr. N.D. Tex. 2000).

⁹⁹ See 11 U.S.C. §507(a)(1)(A) (2019).

¹⁰⁰ See generally 11 U.S.C. (2019).

D. Domestic Support Obligations Within the Bankruptcy Code

DSOs are given special treatment and receive much attention throughout the Code.¹⁰¹ Specifically, DSOs are (1) given first priority¹⁰² for repayment from the estate and (2) listed as an express exception to discharge in chapters 7 and 13.¹⁰³ These provisions direct courts on how to treat DSOs themselves, but lack guidelines for overpayments of these same support obligations.¹⁰⁴ How these provisions function and how courts have construed them in connection with overpaid support debts is pertinent in understanding why a standard set of guidelines is needed.

1. Domestic Support Obligations Listed as a Priority under 11 U.S.C. § 507

Priority claims play a significant role in bankruptcy proceedings. When drafting the Code, Congress dictated that an unsecured¹⁰⁵ priority claim will receive special treatment.¹⁰⁶ If the debtor's estate produces distributable funds, priority claims will be paid before other unsecured nonpriority claims.¹⁰⁷ Prior to the introduction of the 1994 amendments, domestic support obligations were deemed nondischargeable but retained no priority status.¹⁰⁸ After the 1994 amendments, DSOs were given seventh priority out of a list of nine.¹⁰⁹ This elevation resulted in DSOs being treated more stringently in bankruptcy proceedings and reduced the chances that the claim would be subject to preference attacks if it were categorized as a general unsecured claim.¹¹⁰

In 2005, BAPCPA radically changed a DSO's position in § 507's list of priorities.¹¹¹ Priority status is now distinguished among ten categories with descending levels of priority. Congress elevated the position of DSOs from seventh priority to first priority.¹¹² This revision has resulted in larger payouts

¹⁰¹ See 1 COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 3.02 (16th ed. 2018).

¹⁰² See 11 U.S.C. §507(a)(1)(A) (2019).

¹⁰³ See 11 U.S.C. §523(a)(5) (2019).

¹⁰⁴ See generally 11 U.S.C. §§ 507, §523.

¹⁰⁵ Unsecured meaning that there is claim against the property.

¹⁰⁶ See 11 U.S.C. §507 (2019).

¹⁰⁷ *Id.*

¹⁰⁸ See Lynne F. Riley, *BAPCPA at Ten: Enhanced Domestic Creditor Protections and Enforcement Rights*, 90 AM. BANKR. L.J. 267, 271 (2016).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See 11 U.S.C. §507 (2019).

¹¹² See 1 COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 3.02 (16th ed. 2018); see 11 U.S.C. §507(a)(1)(A) (2019).

on DSO claims in various chapters within the Code.¹¹³ This distinction proves Congress's intent that pressing familial matters outweigh the debtor's fresh start and the interests of other creditors.

2. *Exceptions to Discharge Under 11 U.S.C. § 523*

A main objective of the Code is to provide the debtor with a fresh start. Congress crafted § 523¹¹⁴ of the Code to balance the debtor's fresh start with the rights of creditors by designating a list of claims that are deemed to be nondischargeable.¹¹⁵ Obligations in the nature of support have been excepted from discharge since the Code's enactment in 1978.¹¹⁶ When rendering support obligations excepted from discharge, courts must be provided with independent findings supporting the proposition that the debt is in the nature of alimony, maintenance, or support.¹¹⁷ In a judicial proceeding, the party who seeks to have the debt deemed nondischargeable bears the burden of proof under § 523(a)(5).¹¹⁸

Bankruptcy courts consider the totality of the circumstances when determining if a debt is in the nature of alimony, maintenance, or support. The language of section § 523(a)(5) simply states "A discharge under [§] 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt for a domestic support obligation."¹¹⁹ Bankruptcy courts have understood this language to include various expenses surrounding the DSO.¹²⁰ Some expenses that courts have deemed nondischargeable under § 523(a)(5) include mortgage payments, attorneys fees, psychologist, and accountant fees.¹²¹ What is considered to be in the nature of alimony, maintenance, or support is far-reaching and construed broadly by courts.¹²²

Many debts that appear to be DSOs are not always excepted from discharge under § 523(a)(5). These debts are not always excepted from discharge because the presiding court has discretion in what is considered to be a DSO. If

¹¹³ See 1 COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 3.02 (16th ed. 2018).

¹¹⁴ See 11 U.S.C. § 523 (2019).

¹¹⁵ See *id.*

¹¹⁶ See Riley, *supra* note 108, at 293.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 11 U.S.C. § 523(a)(5) (2019); see also 11 U.S.C. § 101(14)(A) (2019) for the full definition of a domestic support obligation.

¹²⁰ See Riley, *supra* note 108, at 294–295.

¹²¹ *Id.*

¹²² *Id.*

§ 523(a)(5) is deemed inapplicable to a related debt, § 523(a)(15) may apply.¹²³ The BAPCPA amendments reconstructed § 523(a)(15) to provide a safety net for these related debts.¹²⁴ The former version of § 523(a)(15), added to the Code in 1994, required the non-debtor to file an adversary proceeding to prove the debtor was able to pay the obligation and show that the detriment to the plaintiff outweighed the debtor's right to a discharge.¹²⁵ Because courts commonly found that the debtor was unable to pay, these assertions were routinely defeated.¹²⁶ In 2005, BAPCPA eliminated this process and instead stated that a debt was nondischargeable if it is owing:

[T]o a spouse, former spouse, or child of the debtor and not the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.¹²⁷

Recent caselaw has construed § 523(a)(15) broadly to include debt divisions, mortgages, car payments, and other nonsupport marital dissolution matters.¹²⁸ Section 523(a)(15) is expansive; hence, overpayments of DSOs should easily fall within the parameters of its terms. If a familial debt is “in connection with a separation agreement, divorce decree, or other order of a court of record,” the debt will be excepted from discharge.¹²⁹ Because of the language that Congress included in §§ 523(a)(5) and 523(a)(15), all overpayments of DSOs should be excepted from discharge.¹³⁰

3. *Lack of Guidance from the Code on How to Construe an Overpaid DSO*

The Code does not provide a definition for the term “overpayment.”¹³¹ Because of this omission, case law is the only area of guidance dictating how overpayments of particular debts should be construed.¹³² In dealing with overpayments of DSOs, the case law varies from jurisdiction to jurisdiction.

¹²³ See 11 U.S.C. § 523(a)(15) (2019).

¹²⁴ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 523, 119 Stat. 23 (2005).

¹²⁵ See Riley, *supra* note 108, at 295.

¹²⁶ *Id.*

¹²⁷ 11 U.S.C. § 523(a)(15) (2019).

¹²⁸ See Riley, *supra* note 108, at 296.

¹²⁹ § 523(a)(15).

¹³⁰ § 523(a)(15) does not apply in Chapter 13 cases.

¹³¹ See 11 U.S.C. § 101 (2019) (listing definitions used within the Code).

¹³² See generally 11 U.S.C. (2019).

Some courts follow the principle of reimbursement.¹³³ These courts look to the current function of the debt between the debtor and the creditor and thus, these courts construe overpayment of a domestic support obligation as a simple money judgment. This approach results in a pro-debtor outcome.¹³⁴ In contrast, other courts look to “the function served by the obligation at the time of the divorce” for guidance when deciding if the debt falls within the nature of support.¹³⁵ These courts find that an overpaid DSO still retains its character as a DSO at the time the creditor has filed his or her proof of claim.¹³⁶ This approach results in a pro-creditor outcome. In order to remedy this discrepancy and respect family law values, bankruptcy courts need to follow a uniform set of standards.

II. ARGUMENT: CREATING A NEW SET OF STANDARDS

All DSOs should be excepted from discharge. In addition, the overpayment of child support should be entitled to priority status whereas the overpayment of alimony should not. Exceptions to these standards arise when confronted with extreme circumstances. These standards emerge after (1) analyzing the jurisdictional split, (2) understanding Congress’s intent in drafting the Code, (3) unpacking the substance of the obligation, and (4) deciphering the intent and current condition of the parties.

A. *Addressing the Jurisdictional Split*

Overpayments of DSOs present a gray area within the Code that causes courts to be divided on the issue. Debts that do not fit squarely within the definition listed in § 101(14A) give rise to contentious judicial proceedings. “A properly filed claim is presumed valid and is prima facie evidence of its own validity and amount.”¹³⁷ The presumption is rebuttable, but it is up to the objecting individual to provide evidence to overcome the claim.¹³⁸ Once the party opposing the debt produces a basis for questioning the validity of the claim, the burden shifts to the initial claimant.¹³⁹ As a general rule, a party seeking to except a debt from discharge or gain priority status bears the burden of proof and must establish each element of his or her claim by a preponderance of the

¹³³ See Lankford v. Drinkard (*In re Drinkard*), 245 B.R. 91, 93 (Bankr. N.D. Tex. 2000).

¹³⁴ *Id.* at 94.

¹³⁵ See Sampson v. Sampson (*In re Sampson*), 997 F.2d 717, 725 (10th Cir. 1993) (internal citation omitted).

¹³⁶ *Id.*

¹³⁷ *In re Alewelt*, 520 B.R. 704, 708 (Bankr. C.D. Ill. 2014) (emphasis in original).

¹³⁸ See *In re Vanhook*, 426 B.R. 296, 298–99 (Bankr. N.D. Ill. 2010).

¹³⁹ See *In re Alewelt*, 520 B.R. at 708.

evidence.¹⁴⁰ It is the creditor who must prove that the debt at issue is entitled to be excepted from discharge or is entitled to priority status.¹⁴¹ Due to the gap in the Code and the discontinuity in existing case law, the amount of reimbursement that overpaid support creditors will receive varies from jurisdiction to jurisdiction. The language BAPCPA added to the Code is not unclear. Rather, the drafters did not anticipate the issue of overpaid DSOs. In order to preserve the uniform application intended by the Code, the discrepancy in the Code pertaining to the overpayments of DSOs must be ameliorated.

The jurisdictional split does not openly address the difference between priority status and an exception to discharge. This distinction is significant because each represents an isolated concept within the Code. This section considers how the jurisdictional split addresses (1) priority status and (2) exception to discharge. An inquiry into a support debt entails the same analysis for both priority status and exception to discharge, but different results are produced for both the creditor and the debtor. Priority status results in the support creditor receiving his or her funds before other creditors whereas exception to discharge means that the debtor may never forgo paying the particular support debt.¹⁴² The question at stake for both inquiries is whether the debt is in the nature of alimony, maintenance, or support, and is thus a DSO.¹⁴³ When a debt is considered a DSO, it is both excepted from discharge¹⁴⁴ and entitled to first priority status.¹⁴⁵ When BAPCPA amended § 523(a)(15), some courts relied on this provision to except an overpaid support obligation from discharge rather than labeling the obligation itself as a DSO. Because of the newly amended section,¹⁴⁶ some courts chose not to consider the priority status of overpaid support debts because only debts clearly labeled as DSOs are entitled to priority status.¹⁴⁷ How each court construes what overpayments of support obligations encompass greatly impacts both the creditor and the debtor throughout a bankruptcy proceeding.

¹⁴⁰ See *Martin v. Pelley (In re Pelley)*, Nos. 17-10007-BAH, 17-1011-BAH, 2017 Bankr. LEXIS 3254 (Bankr. D.N.H. Sept. 26, 2017).

¹⁴¹ See *id.*

¹⁴² See 11 U.S.C. §§ 523(a)(5), 507(a)(1)(A) (2019).

¹⁴³ See 11 U.S.C. § 101(14)(A) (2019).

¹⁴⁴ See § 523(a)(5).

¹⁴⁵ See § 507(a)(1)(A).

¹⁴⁶ See 11 U.S.C. § 523(a)(15) (2019).

¹⁴⁷ See generally 11 U.S.C. § 507(a)(1)(A) (2019).

1. Priority Status Under Section 507(a)

On one side of the split, courts have ruled that overpaid domestic support obligations are not DSOs at all and therefore are not entitled to priority status under § 507(a)(1)(A).¹⁴⁸ These courts emphasize the current application of the debt.¹⁴⁹ In other words, at the time the creditor demands to be reimbursed, the debt is not considered a DSO if there is no current need for the support.¹⁵⁰ The debt is instead viewed as a money judgment that does not fall within the definition listed in § 101(14A).¹⁵¹ For these reasons, courts will not find wrongfully paid DSOs within the nature of alimony, maintenance, or support and therefore these courts deny such claims priority status.

In *In re Alewelt*, a claim for maintenance reimbursement was at issue before the United States Bankruptcy Court for the Central District of Illinois.¹⁵² Mr. Hardin and the debtor were legally divorced in January 2010.¹⁵³ The state court ordered that Mr. Hardin would have custody of their one minor child but was obligated to pay debtor \$500 a month in spousal support.¹⁵⁴ The state court then deducted sixty-eight dollars from Mr. Hardin's maintenance payment for child support he was receiving.¹⁵⁵ In March 2013, the state court retroactively terminated the maintenance award as of June 1, 2011, because the debtor was cohabitating with a new boyfriend.¹⁵⁶ The court concluded that debtor owed Mr. Hardin \$42,953.86 in maintenance reimbursements.¹⁵⁷ After further calculation, the court found \$6,384 worth of child support arrearage through March 2013, and \$12,624 through March 2014.¹⁵⁸ On March 31, 2014 the debtor filed for

¹⁴⁸ See, e.g., *Martin v. Pelley (In re Pelley)*, Nos. 17-10007-BAH, 17-1011-BAH, 2017 Bankr. LEXIS 3254 (Bankr. D.N.H. Sept. 26, 2017); *Taylor v. Taylor (In re Taylor)*, 478 B.R. 419 (B.A.P. 10th Cir. 2012); *Vaughn v. Reid-Hayden (In re Reid-Hayden)*, 2011 Bankr. LEXIS 980 (N.D. Ind. Mar. 22, 2011); *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010); *Lankford v. Drinkard (In re Drinkard)*, 245 B.R. 91 (Bankr. N.D. Tex. 2000); *In re Lutzke*, 223 B.R. 552 (Bankr. D. Or. 1998).

¹⁴⁹ See *In re Vanhook*, 426 B.R. at 301.

¹⁵⁰ See *In re Alewelt*, 520 B.R. 704, 712 (Bankr. C.D. Ill. 2014) (“An established need for support is a key factor in determining whether an obligation is in the nature of support.”).

¹⁵¹ See *id.*

¹⁵² *Id.* at 706.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (in addition to a percentage of Mr. Hardin's overtime income).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 707.

¹⁵⁸ *Id.* at 706–707. In 2014, the court also concluded that \$42,953.86 was due to Mr. Hardin for maintenance payments. Overall, there was \$55,577.86 due to Mr. Hardin for support purposes.

chapter 13 relief and Mr. Hardin timely filed a proof of claim asserting the full amount¹⁵⁹ as entitled to priority status as a domestic support obligation.¹⁶⁰

The bankruptcy court determined that Mr. Hardin's claim was not entitled to priority status.¹⁶¹ In reaching this conclusion, the court recognized Mr. Hardin's "original obligation" as one in the nature of support.¹⁶² Instead of honoring the character of the original obligation, the court questioned what the purpose of the debt was as it stood at issue before the court.¹⁶³ In analyzing the debt, the court acknowledged the jurisdictional split and noted that there is "no per se rule."¹⁶⁴ Because Mr. Hardin did not present sufficient evidence proving his current need for the funds, the court determined the debt was not a DSO and therefore not entitled to priority status.¹⁶⁵

Many bankruptcy courts have agreed with the reasoning set forth in *In re Alewelt*.¹⁶⁶ Denying creditors priority status for overpaid DSOs leaves these creditors without recourse. This outcome allows debtors to avoid paying the full amount of reimbursement for support obligations ordered by state courts by simply filing for bankruptcy.¹⁶⁷ In turn, the creditor's claim is treated as a general unsecured claim, and if lucky, the creditor will receive just a small portion of the total amount due and owing to him or her. Because of the financial distress these debtor's face post-divorce, there is a higher percentage of no asset cases or the creation of low payment plans making claim reimbursement even more difficult. Even though both courts and the Code have concluded that

¹⁵⁹ The full amount owed to Mr. Hardin totaled to \$55,577.86. *Id.* at 707.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 710.

¹⁶² *Id.* at 711.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (emphasis in original).

¹⁶⁵ *Id.* at 712 (Bankr. C.D. Ill. 2014).

¹⁶⁶ See *Martin v. Pelley (In re Pelley)*, Nos. 17-10007-BAH, 17-1011-BAH, 2017 Bankr. LEXIS 3254 (Bankr. D.N.H. Sept. 26, 2017); *Taylor v. Taylor (In re Taylor)*, 478 B.R. 419 (B.A.P. 10th Cir. 2012); *Vaughn v. Reid-Hayden (In re Reid-Hayden)*, 2011 Bankr. LEXIS 980 (N.D. Ind. Mar. 22, 2011); *In re Vanhook*, 426 B.R. 296 (Bankr. N.D. Ill. 2010); *Lankford v. Drinkard (In re Drinkard)*, 245 B.R. 91 (Bankr. N.D. Tex. 2000); *In re Lutzke*, 223 B.R. 552 (Bankr. D. Or. 1998).

¹⁶⁷ See *In re Alewelt*, 520 B.R. at 712.

enforcement of familial support obligations outweigh the debtor's fresh start,¹⁶⁸ it seems that rulings similar to *In re Alewelt* undermine that principle.¹⁶⁹

In addition to the immediate consequences arising when courts deny wrongfully paid support obligations priority status, there are also long-standing implications. If an overpayment is not treated as a DSO, this poses serious societal concerns. This view may cause support providers to pay closer attention to the intricacies of their initial support obligations and contest payments on the basis of fear of overpayment. If a support provider suspects that his or her ex-spouse is on the verge of filing for bankruptcy, this may trigger the support provider to discontinue payments of support. These rulings present a slippery slope; contrary to society's construction, many individuals may begin to disregard and neglect familial support obligations. When this occurs, greater problems will surface affecting more than just the creditor and the debtor. They will affect individual family units and society as a whole.

In contrast to *In re Alewelt* and similar decisions, a few courts have ruled that wrongfully paid support obligations are DSOs and therefore are entitled to priority status under § 507(a).¹⁷⁰ These courts acknowledge that "one of the consistent underlying themes of [the Code] is to accord great deference to familial obligations."¹⁷¹ Furthermore, the perception that support obligations in the Code clearly outweigh the debtor's fresh start is reiterated and emphasized through these court opinions.¹⁷² While explaining why priority is afforded to these debts, courts recognize that "principles of federalism require that in matters that are traditionally reserved to state courts, any doubt[s] as to a statute[']s interpretation are to be resolved in favor of not interfering with state court matters."¹⁷³ These principles and ideologies emulate the idea that when dealing with wrongfully paid familial obligations, the interest of creditors must be

¹⁶⁸ See *In re Taylor*, 737 F.3d at 675.

Two provisions of the Bankruptcy Code except from discharge debts arising out of obligations to the family: § 523(a)(5) excepts from discharge any "domestic support obligation," as defined in the Bankruptcy Code; and § 523(a)(15) excepts from discharge obligations arising in connection with a divorce proceeding or settlement agreement. 11 U.S.C. § 523(a)(5), (15). "These provisions reflect the congressional preference for the rights of spouses to alimony, maintenance or support over the rights of debtors to a 'fresh start' free of debts." (internal citation omitted).

¹⁶⁹ See *In re Alewelt*, 520 B.R. 704.

¹⁷⁰ See, e.g., *Kerr v. Meadors (In re Knott)*, 482 B.R. 852 (Bankr. N.D. Ga. 2012); *In re Norbut*, 387 B.R. 199 (Bankr. N.D. Ohio 2008); *Allen Co. Child Enf't Agency v. Baker (In re Baker)*, 294 B.R. 281 (Bankr. N.D. Ohio 2002).

¹⁷¹ *In re Norbut*, 387 B.R. at 210.

¹⁷² See *id.*

¹⁷³ *Id.*

construed broadly and bankruptcy court decisions must not contradict state court matters.¹⁷⁴ Priority status is afforded to these debts because courts conclude that the debt retained its supportive nature based on the initial obligation.¹⁷⁵

A select number of courts consider overpaid DSOs to be in the nature of alimony, maintenance, or support. In the Northern District of Georgia, Helen Jean Knott (Knott) filed a petition for chapter 7 relief.¹⁷⁶ Knott's former husband, William Meadors, filed a proof of claim for \$41,581.79 arising from a state court judgment ordering Knott to repay him for overpaid child support.¹⁷⁷ Mr. Meadors categorized the debt as a DSO entitled to priority under § 507(a)(1)(A).¹⁷⁸ Knott objected, arguing that the overpayment of child support did not retain its character as a DSO because the debt was not current.¹⁷⁹ The court analyzed the definition of a DSO in the Code and found the debt to be in the nature of support because the purpose of the initial payment was for the support of the children and therefore, the court categorized the claim as a DSO entitled to priority status.¹⁸⁰ Hence, certain jurisdictions will allow overpaid support debts to fall within the definition of a DSO.

Courts deciding in accordance with *In re Knott* follow a backward-looking approach when confronted with overpaid support obligations.¹⁸¹ Most of these courts outwardly reject the decisions of alternate courts that deny overpaid support obligations priority status.¹⁸² In *In re Baker*, where an overpayment of child support was at issue, the court stated, "the particular attention the above decisions pay to the 'need' of the parent-creditor does not find support in the statute."¹⁸³ The court in *In re Baker* continued to explain "it is noted that had Congress wanted a court to take into account factors such as 'need' and/or a disparity in the parties' income, it certainly knew how to make its wishes known[.]"¹⁸⁴ The nature of support language that Congress includes in § 101(14A) when defining a DSO is different than the "need" of support.¹⁸⁵ Since these courts rule out the requirement for "need" of support, the

¹⁷⁴ *See id.*

¹⁷⁵ *See In re Baker*, 294 B.R. at 288.

¹⁷⁶ *Kerr v. Meadors (In re Knott)*, 482 B.R. 852, 853 (Bankr. N.D. Ga. 2012).

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* at 853–54.

¹⁸⁰ *See id.* at 856.

¹⁸¹ *See, e.g., Allen Co. Child Enf't Agency v. Baker (In re Baker)*, 294 B.R. 281 (Bankr. N.D. Ohio 2002).

¹⁸² *See id.* at 287.

¹⁸³ *See id.* at 287 (referring to the decisions of *In re Lutzke*, 223 B.R. 552 (Bankr. D. Or. 1998) and *Lankford v. Drinkard (In re Drinkard)*, 245 B.R. 91 (Bankr. N.D. Tex. 2000)).

¹⁸⁴ *In re Baker*, 294 B.R. at 287.

¹⁸⁵ *See Kassicieh v. Mascotti*, 2007 Ohio App. LEXIS 4494 (Ohio Ct. App. 2007).

overpayment is assessed based on the function the obligation served at the time the agreement was created.¹⁸⁶

A prominent and consistent underlying theme of bankruptcy law is to afford familial obligations a substantial amount of deference.¹⁸⁷ By doing so, courts conclude that it would be counterintuitive to deny priority status to overpayments of support obligations by defining them as money judgments.¹⁸⁸ The Code acknowledges the importance of the family unit and its stability as a highly regarded concept in our society.¹⁸⁹ Courts reinforce this underlying concept when they afford priority status to overpaid support debts in bankruptcy proceedings.

Short term implications of affording overpaid support obligations priority status arise in connection to the debtor's fresh start. A fundamental goal of the Code is to provide debtors with this notion of a fresh start.¹⁹⁰ That is, the debtor is freed from any personal liabilities owed to creditors.¹⁹¹ A debtor's fresh start is achieved through discharge¹⁹² and the more debts a debtor incurs, the further he or she is from discharge. Although familial obligations are held in high regard, it is possible that stretching the definition of a DSO to include an overpaid support debt is too broad of an interpretation.¹⁹³ When courts label these overpayments as money judgments, they safeguard a debtor under the Code and protect the principle of the fresh start.

On the opposite end of the spectrum, these decisions are arguably necessary to keep familial obligations in high regard. If bankruptcy courts grant deference to state court decisions it will promote a stable judicial environment. When judicial decisions are respected amongst state and federal levels, family members will be more likely to abide by their support obligations because there will be a clear demarcation of what law families must follow. Hence, if an individual is aware that there is no way to avoid a child support or alimony payment, it is more likely that he or she will eventually provide that payment. Moreover, the judicial branch in upholding the importance of family obligations

¹⁸⁶ Sampson v. Sampson (*In re Sampson*), 997 F.2d 717, 723–26 (10th Cir. 1993).

¹⁸⁷ See, e.g., *In re Baker*, 294 B.R. at 287–88.

¹⁸⁸ See, e.g., *In re Norbut*, 387 B.R. 199, 211 (Bankr. N.D. Ohio 2008).

¹⁸⁹ See 11 U.S.C. §§ 523, 507 (2019).

¹⁹⁰ See *Process—Bankruptcy Basics*, UNITED STATES COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> (last visited Oct. 27, 2018) (discussing a case from 1934 stating “it gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”).

¹⁹¹ See *id.*

¹⁹² See 11 U.S.C. §§ 727, 1328 (2019).

¹⁹³ See *In re Vanhook*, 426 B.R. 296, 301 (Bankr. N.D. Ill. 2010).

will shed a great amount of influence onto individuals who are confronted with these obligations.

2. *Exceptions to Discharge Under Section 523(a)(5) and (a)(15)*

The jurisdictional split becomes vastly complicated when courts consider exceptions to discharge. Because BAPCPA revised § 523(a)(15) of the Code, many courts have overlooked the possibility of an overpaid support debt existing as a DSO. Section 523(a)(15) provides that, in order to be excepted from discharge in chapter 7 cases, the debt in question has to be connected to a divorce decree.¹⁹⁴ With this provision intact, whether the overpayment of a support obligation is a DSO becomes an unnecessary analysis that many courts do not even consider. However, the application of § 523(a)(15) is conditional to chapter 7 cases and creates a loophole for chapter 13 cases.¹⁹⁵ If courts do not construe overpaid support obligations as DSOs, then these debts may be discharged in chapter 13 proceedings.¹⁹⁶

Courts that determine an overpaid DSO is not excepted from discharge under 11 U.S.C. § 523 follow the same reasoning of courts who deny priority status for these debts. Once again, these courts focus on the current need of the DSO creditor.¹⁹⁷ Most creditors who seek a reimbursement from an overpaid DSO do not have the “need” for support. Because of this factor, many courts have decided that these debts cannot be excepted from discharge.¹⁹⁸ Cases concerning DSOs are predominately dealt with in chapter 7 and chapter 13. With this in mind, the Code notes in § 1328(a)(2) that debts falling within § 523(a)(15) are dischargeable in a chapter 13 case.¹⁹⁹ This gap in the Code allows debtors to avoid paying certain debts, such as overpaid DSOs, because if the jurisdiction does not consider wrongfully paid support obligations DSOs themselves, then debtors will be able to escape that debt.²⁰⁰ This loophole is an area in the Code that can be easily abused when overpaid support obligations are present.

¹⁹⁴ See 11 U.S.C. § 523(a)(15) (2019).

¹⁹⁵ See *id.*

¹⁹⁶ See generally *id.*

¹⁹⁷ See *Martin v. Pelley (In re Pelley)*, No. 17-10007-BAH, 2017 Bankr. LEXIS 3254, at *11–12 (Bankr. D.N.H. Sept. 26, 2017); *Galiardo v. Galiardo (In re Galiardo)*, 526 B.R. 897, 898 (Bankr. M.D. Fla. 2013).

¹⁹⁸ See *In re Pelley*, 2017 Bankr. LEXIS 3254, at *11–12; *In re Galiardo*, 526 B.R. at 898.

¹⁹⁹ See 11 U.S.C. § 1328(a)(2) (2019) (“[T]he court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under § 502 of this title, except any debt . . . of the kind specified in [§] 507(a)(8)(C) [11 USCS § 507(a)(8)(C)] or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of [§] 523(a) [11 USCS § 523(a)]”).

²⁰⁰ See *In re Galiardo*, 526 B.R. at 899–900 (explaining that § 523(a)(15) does not apply to the facts of the case because the debtor converted her case from a chapter 7 to a chapter 13 and the debt in question does not fall within the definition of a DSO).

In *In re Taylor*, the Bankruptcy Appellate Panel of the Tenth Circuit (BAP), determined that an overpaid support obligation was nondischargeable pursuant to 11 U.S.C. § 523(a)(15).²⁰¹ The debtor appealed arguing in her brief that Congress intended a different result from the plain language of the statute.²⁰² The BAP rejected her approach and instead stated, “there is no indication that congressional concern extended to the protection of a debtor-dependent spouse who may be responsible for repayment of wrongfully paid spousal support.”²⁰³ Bankruptcy is not a forum where a debtor can avoid alimony and child support payments.²⁰⁴ The Tenth Circuit affirmed the BAP’s ruling supporting the proposition that the overpayment of spousal support is nondischargeable in a chapter 7 case under § 523 (a)(15).²⁰⁵ In affirming the BAP’s ruling, the Tenth Circuit reiterated that the debt does not fall under the definition of a DSO and therefore is not nondischargeable under § 523(a)(5).²⁰⁶ Due to this distinction, if the debtor filed for relief under chapter 13, the debt would be dischargeable.

In *In re Galiardo*, the court held that an overpaid support debt was nondischargeable.²⁰⁷ In this case, the debtor initially filed for chapter 7 relief and owed her ex-spouse over \$200,000 in excess alimony payments.²⁰⁸ The debtor converted her case to chapter 13 soon after the debtor’s ex-spouse filed an adversary proceeding against her.²⁰⁹ Once the debtor converted the case to a chapter 13 case the bankruptcy court deemed the overpaid alimony debt dischargeable, leaving the debtor’s ex-spouse unable to recover the debt.²¹⁰ The court concluded that, due to a lack of need by the debtor’s ex-spouse, the debt was not in the nature of alimony, maintenance, or support and thus the debt was dischargeable under § 523(a)(5).²¹¹ This decision undermines the fundamental principle of bankruptcy law that bankruptcy is not a forum where an individual can escape support payments.²¹²

Exceptions to discharge become convoluted and disordered when courts are confronted with overpaid support debts. As seen in *In re Galiardo*, overpaid

²⁰¹ See *Taylor v. Taylor (In re Taylor)*, 737 F.3d 670, 673 (10th Cir. 2013).

²⁰² See *id.* at 681. (citing *Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006)).

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.* at 682.

²⁰⁶ See *id.* at 676–77.

²⁰⁷ See *Galiardo v. Galiardo (In re Galiardo)*, 526 B.R. 897 (Bankr. M.D. Fla. 2013).

²⁰⁸ See *id.* at 898.

²⁰⁹ See *id.* at 899.

²¹⁰ See *id.* at 902.

²¹¹ See 11 U.S.C. § 523(a)(5) (2019); *In re Galiardo*, 526 B.R. at 899–900.

²¹² See H.R. Rep. No. 103-835, at 32, 54–55 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3342, 3363–64.

support obligations can amount to a large sum of money.²¹³ The Code should not allow access to loopholes for individuals trying to avoid support obligations. However, the application of § 523(a)(15) is conditional to chapter 7 cases, therefore the Code inadvertently creates this loophole with regard to overpaid support debts. Debtors can specifically file for chapter 13 or convert their cases to chapter 13 to avoid this obligation.²¹⁴ Hence, the distinction between priority debts and non-priority debts is critical. The only ways to remedy the issue are (1) for Congress to apply § 523(a)(15) to chapter 13 cases or (2) for courts to construe overpaid support debts as DSOs under § 523(a)(5) and § 507(a)(1)(A).

Furthermore, when bankruptcy courts base overpaid support obligations on current need, it defeats the purpose of the divorce decree and goes against the authority of state courts. State courts consider a multitude of factors when they determine support obligations.²¹⁵ After much analysis and consideration, these courts comprise their findings into a divorce decree.²¹⁶ The divorce decree is a highly regarded document that dictates how a family will continue to function after a legal separation.²¹⁷ Within the decree are support obligations that state courts deem necessary. Because financial issues commonly arise between ex-spouses and ex-partners, overpayments occur, and state courts must order the overpaid amount to be returned to the provider. By allowing debtors to avoid repaying overpaid DSOs, bankruptcy courts are undermining state court decisions.²¹⁸ Bankruptcy courts must respect state court decisions concerning domestic relations within their proceedings.

Some courts deem overpaid support debts nondischargeable under § 523(a)(5).²¹⁹ These courts follow the rationale that “[t]he critical question in determining whether the obligation is, in substance, support is the function served by the obligation at the time of the divorce [decree].”²²⁰ This notion allows courts to except overpaid support debts from discharge in both chapter 7 and chapter 13 cases. These courts align themselves closely with the state court’s findings. In doing so, these courts are respecting the intentions of the drafters of

²¹³ See *In re Galiardo*, 526 B.R. at 899 (noting that the debtor owed her ex-spouse \$222,650.00).

²¹⁴ See *id.* at 898.

²¹⁵ See generally 3 FAMILY LAW AND PRACTICE § 33.05 (2018), Lexis (database updated November 2019).

²¹⁶ See Johnson, *supra* note 39, at 95.

²¹⁷ See Johnson, *supra* note 39, at 95, 97.

²¹⁸ Cf. *Norbut v. Norbut* (*In re Norbut*), 387 B.R. 199, 210 (Bankr. N.D. Ohio 2008).

²¹⁹ See *Taylor v. Taylor*, 737 F.3d 670 (10th Cir. 2013); *Martin v. Pelley* (*In re Pelley*), No. 17-10007-BAH, 2017 Bankr. LEXIS 3254 (Bankr. D.N.H. Sep. 26, 2017).

²²⁰ See *Sampson v. Sampson* (*In re Sampson*), 997 F.2d 717, 725 (10th Cir. 1993) (internal quotation omitted).

the Code.²²¹

An example where a court found an overpaid support debt nondischargeable under § 523(a)(5) is seen in *Kassicieh v. Mascotti*.²²² The court in this case considered an overpaid child support debt in the amount of \$28,000 that arose from a retroactive reduction.²²³ The court determined that the overpayments “were made pursuant to an order for child support, and as such *Kassicieh* was under a legal duty to make such payments.”²²⁴ The court found this legal duty was in the nature of support and therefore considered the overpayment a DSO.²²⁵ This court followed the decision from *In re Baker*,²²⁶ which reiterates the notion that an overpaid support obligation must be excepted from discharge as a DSO.²²⁷ Similarly, the court in *In re Baker* concluded that courts should take a broader approach when determining “whether an overpayment of . . . support was entitled to favorable treatment under [the Code].”²²⁸

3. *The Perpetuation of the Jurisdictional Split*

As illustrated by case law, overpayments of DSOs are handled very differently throughout the United States. Because bankruptcy is a matter of federal law, there should be a uniform application of its provisions. The disconnect between jurisdictions emerges when courts interpret the Code in drastically different ways. In order to apply the provisions of the Code uniformly and respect the intentions of the drafters, something must change. Since the 2005 BAPCPA amendments altered the language of § 523(a)(15) to include any debt incurred by the debtor in the course of a divorce or in connection with a court order,²²⁹ all overpayments of DSOs should be excepted from discharge. The best way to ensure overpayments of DSOs are excepted from discharge is to eliminate the loophole available to debtors who choose to file for chapter 13 relief. This is important because, as we have seen above, overpayments of support obligations can amount to a large sum of money. A debtor should not be able to escape this type of debt by simply filing for relief through a different chapter.

²²¹ See *infra*, Part B.

²²² See *Kassicieh v. Mascotti*, 2007 Ohio App. LEXIS 4494, at *10 (Ohio Ct. App. 2007).

²²³ *Id.* at 12.

²²⁴ *Id.* at 39.

²²⁵ *Id.*

²²⁶ *Allen Co. Child Enf't Agency v. Baker (In re Baker)*, 294 B.R. 281 (Bankr. N.D. Ohio 2002).

²²⁷ *Id.* at 288.

²²⁸ See *id.*

²²⁹ See 11 U.S.C. § 523(a)(15) (2019).

In order to understand how courts should handle overpayments of DSOs, each support obligation must be considered separately. Child support must be separated from alimony because each support obligation carries a different amount of weight. As a general matter, when a creditor overpays a DSO, the reimbursement of that overpayment should be excepted from discharge. Furthermore, when analyzing (1) Congress's intent in drafting the Code, (2) the intent and current condition of the parties, and (3) the substance of the obligation, the overpayment of child support should be entitled to priority status whereas the overpayment of alimony and maintenance should not.

B. Congress's Intent in Drafting the Bankruptcy Code

The drafters of the Code did not intend for bankruptcy courts to serve as domestic relations courts.²³⁰ Traditionally, federal courts avoid issues of family law because state courts retain expertise on these matters.²³¹ In drafting the Code, Congress reiterates this traditional approach in many of its provisions.²³² Bankruptcy courts often declare that *res judicata* bars litigation of any matter that was litigated or had the opportunity to be litigated in state court.²³³ The 2005 BAPCPA amendments further solidify Congress's opinion that family law matters are better left to be decided by state courts.²³⁴

The 2005 BAPCPA amendments created and defined the term, "domestic support obligation."²³⁵ Congress created this new term to provide more protections to support claimants throughout the Code.²³⁶ The special treatment DSO claimants receive extends to the automatic stay, priorities, exemptions, and discharge.²³⁷ Not only does the Code reflect Congress's opinion that issues of domestic relations should be left to state courts, but it also reflects the opinion that when a DSOs is included in a bankruptcy proceeding, it is the most important claim to consider.²³⁸

²³⁰ See 1 COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 5.01 (16th ed. 2018).

²³¹ See *id.*

²³² See *id.*

²³³ See *id.*; *Milliren v. Milliren (In re Milliren)*, 387 B.R. 72 (B.A.P. 1st Cir. 2008).

²³⁴ See COLLIER, *supra* note 230, at ¶ 5.01.

²³⁵ See *Holliday*, *supra* note 4, at 439.

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See 11 U.S.C. § 507(A)(1)(a) (2019); George L. III Clauer, *Domestic Support Obligations in the Bankruptcy Briar Patch*, 20 S.C. LAW. 12, 14 (2008).

DSOs are considered to be a super-priority claim.²³⁹ Because BAPCPA afforded DSOs first priority under § 507,²⁴⁰ these claims rank higher than other critical claims.²⁴¹ Under the Code, DSOs must be paid off before taxes owed to the IRS and trustee's commissions.²⁴² In § 522 of the Code,²⁴³ BAPCPA further allows trustees to liquidate exempt property for DSO claimants.²⁴⁴ Property that a debtor exempts remains liable both during and after a bankruptcy proceeding to pay pre-petition DSO debts notwithstanding state exemption laws that state the contrary.²⁴⁵ Hence, "[t]he BAPCPA amended bankruptcy code preempts and eliminates the normally applicable state law exemptions with regard to pre-bankruptcy DSO debt for any property exempted in the bankruptcy case."²⁴⁶ Additionally, the automatic stay does not stop the collection of DSO claims.²⁴⁷ Further, § 362(b)(2)(B) notes that the automatic stay does not stay the enforcement of DSOs "from property that is not property of the estate[.]"²⁴⁸ These provisions clearly indicate that when a DSO is present in a bankruptcy proceeding Congress denotes it as the most important debt to pay.²⁴⁹ The Code designates many provisions to the extreme protection of DSO claims. With this in mind, if certain types of overpaid support debts are considered to be DSOs within the meaning of the Code, these are just a few of the treatments Congress would afford to these claimants.

Many courts recognize the principles of federalism intertwined within the bankruptcy code.²⁵⁰ The Code clearly acknowledges that state laws govern domestic relations between husband and wife or parent and child.²⁵¹ Bankruptcy proceedings are a matter of federal law, but state law should be "consulted for guidance" when determining whether an obligation falls into a certain provision

²³⁹ *See id.*

²⁴⁰ *See* 11 U.S.C. § 507(a)(1)(A) (2019).

²⁴¹ *See id.*

²⁴² *See* 11 U.S.C. § 507(a)(1)(C) (2019) (excepting to the extent that the commissions are associated with the DSO); Clauer, *supra* note 238, at 14.

²⁴³ *See* 11 U.S.C. § 522(c)(1) (2019).

²⁴⁴ *See* Clauer, *supra* note 238, at 14.

²⁴⁵ *See id.*; *see also* § 522(c)(1).

²⁴⁶ Clauer, *supra* note 238, at 14 (emphasis omitted); *see* Alan M. Ahart, *The Liability of Property Exempted in Bankruptcy for Pre-Petition Domestic Support Obligations after BAPCPA: Debtors Beware*, 81 AM. BANKR. L.J. 233, 254 (2007).

²⁴⁷ *See* 11 U.S.C. § 362(b) (2019).

²⁴⁸ *See* 11 U.S.C. § 362(b)(2)(B) (2019).

²⁴⁹ *See* §§ 362(b), 522(c)(1).

²⁵⁰ *See, e.g., In re Burrus*, 136 U.S. 586, 594 (1890), *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717 (10th Cir. 1993), *In re Norbut*, 387 B.R. 199, 210 (Bankr. N.D. Ohio 2008).

²⁵¹ *In re Burrus*, 136 U.S. at 594.

of the Code.²⁵² “Of equal importance, basic principles of federalism hold that in matters which are traditionally reserved to the states—for example, domestic relations—any doubt as to a statute’s interpretation should be resolved in favor of not interfering in the state court matter.”²⁵³ If a state court determined an individual overpaid a support debt, that debt would be court-ordered to be reimbursed. This division of authority between state courts and federal bankruptcy courts explains the jurisdictional split.

Implications arise for both the debtor and the creditor when bankruptcy courts ignore state court decisions ordering support reimbursements. Debtors may use bankruptcy as a way to avoid paying state court orders, such as overpaid familial obligations. In other words, if a debtor is aware that the jurisdiction they reside in refuses to regard overpaid support debts as DSOs, the debtor may choose to file for bankruptcy to purposely avoid reimbursement. This negatively affects creditors because many times, especially in chapter 7 cases, the debtor does not have sufficient funds to repay unsecured creditors.²⁵⁴ Hence, overpaid support claimants will oftentimes never see a penny that they overpaid to debtors if they are categorized as general unsecured claimants.²⁵⁵ In these scenarios where a support obligation is wrongfully paid, the claims of creditors arise because of an initial support obligation. Congress did not intend to group these claimants with every other general unsecured creditor. This outcome places too much power in the hands of the debtor, leaving the creditor at a grave disadvantage.

On the other hand, when bankruptcy courts respect state court decisions, a pro-creditor outcome prevails. When wrongfully paid support obligations are considered DSOs within the meaning of the Code, debtors are unable to use bankruptcy as a way to avoid reimbursements of support obligations. This, in turn, forces potential debtors to pay their debts. This is what Congress prefers; Congress did not draft the Code to allow debtors to use bankruptcy as a way out of dealing with familial hardships. This approach is proven by the many special provisions in the Code favoring DSO claimants.²⁵⁶ Unfortunately, when drafting the Code, Congress likely did not think about what would result if there were to

²⁵² *In re Norbut*, 387 B.R. at 206; *see also In re Calhoun*, 715 F.2d 1103, 1106 (6th Cir. 1983); *Allen Co. Child Enft Agency v. Baker (In re Baker)*, 294 B.R. 281, 284 (Bankr. N.D. Ohio 2002).

²⁵³ *In re Baker*, 294 B.R. at 288.

²⁵⁴ *See* Ann K. Wooster, *Construction and Application of Fed. R. Bankr. P. 9019(a), Concerning Judicial Approval of Compromise or Settlement in Bankruptcy Proceeding – Based on Paramount Interest of Creditors*, 35 A.L.R. FED. 2D 209 (2009).

²⁵⁵ *See* Alexander F. Clamon, *Per Se Bad Faith? An Empirical Analysis of Good Faith in Chapter 13 Fee-Only Plans*, 30 EMORY BANKR. DEV. J. 473, 474 (2014).

²⁵⁶ *See, e.g.*, 11 U.S.C. §§ 507(a)(1)(A), 523(a)(5) (2019).

be overpayment of a support obligation. Courts, instead of utilizing the plain meaning in the definition of a DSO, have instead substituted the word “need” for “nature” when determining if an overpaid support debt fits within the definition.²⁵⁷ The Code’s definition of a DSO does not use the word “need.”²⁵⁸ Rather, courts must take a step back and look to see if the debt is in the nature of support before constructing their own definition contrary to the one listed in § 101(14A).²⁵⁹ When courts recognize that certain overpaid support debts are DSOs, creditors will rightfully be afforded all of the privileges listed for DSO claimants and reimbursed for their wrongfully overpaid support debts.

When analyzing the rights of the debtor, DSO claims critically hinder the fresh start principle because the Code affords super-priority benefits to DSO claimants.²⁶⁰ If the debtor is unable to reimburse the support obligation during the bankruptcy proceeding, then he or she will be liable to the DSO claimant post-petition.²⁶¹ Despite the impact of super-priority benefits, Congress purposefully included them in the Code. When Congress drafted § 523 of the Code, it reiterated the notion that familial debts rightfully outweigh the debtor’s fresh start.²⁶² Therefore, a broad definition of a DSO follows the intent of Congress.²⁶³

C. The Substance of the Obligation: Distinguishing Between Child Support and Alimony

To determine whether a debt falls within the nature of alimony, maintenance, or support, courts must consider the substance of the obligation. All support obligations are not the same. Particularly, courts should distinguish alimony from child support when deciphering if an overpaid support debt should be excepted from discharge or entitled to priority status. Generally, all support debts should be excepted from discharge; the overpayment of child support should be entitled to priority status whereas the overpayment of alimony should not. The analysis of the particular support obligation will help to explain this general rule and the exceptions that emerge.

²⁵⁷ See 11 U.S.C. § 101(14A) (2019).

²⁵⁸ See *id.*

²⁵⁹ See § 101(14A).

²⁶⁰ See 11 U.S.C. §§ 507 (a)(1)(A), 522(c)(1), 523(a)(5), 362(b)(2)(B) (2019).

²⁶¹ See § 522(c)(1).

²⁶² See 11 U.S.C. §§ 523(a)(5), 523(a)(15) (2019); see also *Taylor v. Taylor* (*In re Taylor*), 737 F.3d 670, 675 (10th Cir. 2013).

²⁶³ See §§ 523(a)(5), 523(a)(15).

Generally, the overpayment of child support should be excepted from discharge and entitled to priority status. Child support serves as an inherent requirement amongst split families within our society.²⁶⁴ Due to this societal construction, overpaid child support debts should be treated more favorably than overpaid alimony debts. “[M]odern child support treats parent-child ties as more lasting than spousal relationships and independent of the relationship between [parties].”²⁶⁵ In order to encourage support providers to continue making payments for their children, overpaid child support claimants must be reimbursed for support payments that were not necessary for the adequate care and protection of the child.

Child support is a complex concept.²⁶⁶ It is essential to make sure children who are not residing with two parents are receiving adequate care and protection.²⁶⁷ Often times, individuals end up as overpaid child support claimants when state courts retroactively terminate support payments.²⁶⁸ When a state court determines that a support provider has overpaid child support, there should be a more forgiving interpretation allowing for reimbursement within the Code. It is likely that overpayments of child support emerge from good faith intentions for the protection, safety, nourishment, and health of the child or children involved. Hence, the overpayment falls within the nature of support. The overpaying support claimant should not be penalized for doing everything in his or her power to provide for his or her children. Therefore, all overpayments of child support should be excepted from discharge and entitled to priority status.

When overpaid child support claimants are not rightfully reimbursed, consequences arise. “There is a strong public policy objective of protecting the best interests of the child.”²⁶⁹ Financial support is pertinent so that the child will not suffer economic hardships due to the parents’ action or inaction.²⁷⁰ The concept of the best interest of the child will be overlooked if these creditors are not reimbursed. If a child support provider is aware that his or her ex-spouse is suffering from financial hardships, which is not rare before, during, or after a

²⁶⁴ See Clauer, *supra* note 238, at 14.

²⁶⁵ Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY LAW & POL’Y 127, 132 (2011).

²⁶⁶ See Adrienne J. Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for “Limited Equalization” as a Theory of Child Support*, 32 HARV. J.L. & GENDER 109 (2009).

²⁶⁷ See Judith G. McMullen, *Prodding the Payor and Policing the Payee: Using Child Support Trusts to Create an Incentive for Prompt Payment of Support Obligations*, 32 NEW ENG. L. REV. 439 (2018).

²⁶⁸ Overpaid child support claimants emerge when child support funds are overpaid either to an ex-spouse or an individual who is in custody of the claimant’s children.

²⁶⁹ McMullen, *supra* note 267, at 442.

²⁷⁰ *Id.*

divorce proceeding, the provider may be inclined to stop providing child support payments. This is because the support provider is aware that he or she might not be reimbursed if the payments are eventually deemed to be unnecessary funds in front of a bankruptcy court. The judicial branch should be encouraging payments of child support, not discouraging. This is a detrimental effect arising from bankruptcy courts ruling that overpaid child support debts are either not entitled to priority status or entirely dischargeable under the Code.

Two exceptions arise when confronted with overpaid child support obligations. The first exception pertains to priority status. When the creditor is knowingly overpaying his or her child support, that creditor should not be afforded priority status. If the overpayment is not controlled by some sort of pending litigation and the creditor is aware that the payments he or she is making are not court ordered, then it follows that the debt should not fall within the definition of a DSO and therefore should not be entitled to priority status. Even though the debt is not categorized as a DSO in the nature of alimony, maintenance or support, it should still be excepted from discharge under § 523(a)(15).²⁷¹ Because child support is connected to the divorce decree, the debt should be deemed nondischargeable. Overall, when the creditor is fully aware that his or her child support payment is no longer enforced by the controlling state court, that creditor should not be afforded priority status because the child support debt is not a domestic support obligation in the nature of support.

The second exception pertains to exceptions to discharge. When an overpaid child support claimant does not have primary custody of the children involved, and the quality of life of the young children is inadequate, the overpayment should be dischargeable in a bankruptcy proceeding. In other words, if the debtor has primary custody of the children and the payments from the creditor are necessary for the adequate care of the children, the creditor should not be reimbursed when the debt amounts to an overpayment. This goes back to the public policy objective of serving the best interests of the child.²⁷² If the child in question is not receiving adequate care, society must do everything it can to protect this child. Courts must take this scenario into consideration when determining if a debt should be excepted from discharge. Even though the debt is connected to a divorce decree, the interests of the child outweigh the rights of the creditor. In this sense, the DSO is still due and owing to the child in the care of the debtor.

²⁷¹ See 11 U.S.C. § 523(a)(15) (2019).

²⁷² McMullan, *supra* note 267, at 442.

In comparison to the overpayments of child support, the overpayments of maintenance and alimony should not be treated as favorably. This is partly because “parenting involves a more predictable set of obligations” than marriage.²⁷³ In other words, the parent-child relationship lasts longer than the spousal relationship.²⁷⁴ Furthermore, child support payments are much more important than alimony payments. When confronted with alimony payments, the person receiving support is an adult capable of providing for themselves; when confronted with child support payments, the person receiving support is a minor who is incapable of providing for themselves. Because of this distinction, overpaid alimony claimants should not be afforded all of the rights that overpaid child support claimants receive. Generally, the overpayment of alimony should not be entitled to priority status but should always be excepted from discharge.

When confronted with an alimony payment, the person providing support should be held to a higher standard of diligence. This standard should be applied because the person providing support is generally an adult who is capable of providing for his or her own self. Furthermore, “[c]urrent social attitudes seem to hold that women and men have equal opportunities to become self-supporting in the paid work-force and equal obligations with respect to home and family care.”²⁷⁵ This statement supports the proposition that current trends have been moving toward providing alimony as a rehabilitative tool and not a lifelong safety net.²⁷⁶ Because modern day alimony payments serve to prepare the former spouse’s entrance into the workforce,²⁷⁷ the person providing support should be up-to-date and cognizant of the alimony payments that he or she is ordered to provide by the court. If, after satisfying all payment obligations, the support provider continues making payments without realizing that such payments are no longer mandated, the burden should be placed on the overpaying creditor in a bankruptcy proceeding.

This standard of diligence takes an overpaid alimony debt and renders it a money judgement within the Code. The debt is connected to a divorce decree and hence excepted from discharge under § 523(a)(15).²⁷⁸ The overpaid alimony creditor, in being held to this standard of diligence, retains a claim that is not in the nature of alimony, maintenance, or support. Therefore, the claim is not

²⁷³ Robin Fretwell Wilson, *A Review of From Partners to Parents: The Second Revolution in Family Law* by June Carbone, 35 FAM. L.Q. 833, 835 (2002) (internal citation omitted).

²⁷⁴ See Cammett, *supra* note 265, at 132.

²⁷⁵ McMullen, *supra* note 267, at 9.

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See 11 U.S.C. § 523(a)(15) (2019).

categorized as a DSO. Due to this distinction, the creditor should not be afforded priority status, but rather be treated as a general unsecured claimant whose debt is excepted from discharge.

One exception arises from this general rule. This exception pertains to priority status. If the alimony provider is being manipulated by the alimony recipient in a way that is deemed to be malicious and deceitful, the support provider should be entitled to priority status for his or her overpaid alimony debt. This often occurs when ex-spouses have a hostile relationship. Oftentimes, when the recipient remarries, the alimony provider's payment obligations terminate. In an effort to sustain alimony payments, the ex-spouse that contemplated remarriage may decide to reside with his or her new partner in a way that resembles a common-law marriage.²⁷⁹ This is a form of manipulation because if there had not been alimony payments, the ex-spouse would remarry without hesitation. In situations like these, the overpaid alimony creditor should be afforded first priority status because the payment would amount to a DSO in the nature of alimony, maintenance, or support.

The substance of the obligation must be scrutinized when deciding if an overpaid support debt should be entitled to priority status or excepted from discharge. Alimony must be distinguished from child support because each obligation provides its own, distinct function. Children are dependent upon support because they do not have the capacity to provide for themselves, whereas full-grown adults do retain this capacity. Overall, all support debts should be excepted from discharge. With respect to a few previously noted exceptions, the overpayment of child support should be entitled to priority status, whereas the overpayment of alimony should not.

D. The Intent and Current Condition of the Parties Involved

To further understand how overpaid support creditors should be treated within the Code, specific facts pertaining to the parties involved must be considered. The Code dictates that a debt in the nature of alimony, maintenance, or support is considered a DSO.²⁸⁰ Whether an overpaid support obligation falls within this definition of a DSO is dependent on a multitude of fact-specific criteria.²⁸¹ An inquiry into these factors is necessary to determine if overpaid support debts are (1) defined as DSOs, (2) excepted from discharge, and (3) entitled to priority status.

²⁷⁹ See *In re Alewelt*, 520 B.R. 704, 706 (Bankr. C.D. Ill. 2014).

²⁸⁰ See 11 U.S.C. § 101(14A) (2019).

²⁸¹ See Gordon, *supra* note 81, at 61.

Time and time again, bankruptcy courts have noted that an insight into the intent and current condition of the parties involved is necessary in understanding the debt in question.²⁸² Furthermore, even though labels attached to debts can be helpful in deciphering intent, “[t]he nature of the obligation is not restricted to the parties’ label in the settlement agreement”²⁸³ Two perspectives must be analyzed when looking at both the intent and the conditions of the parties. The perspective of the creditor and the perspective of the debtor must be illustrated respectively in order to understand why (1) the overpayment of child support should be entitled to priority status, whereas the overpayment of alimony and maintenance should not, and (2) all domestic support obligations are excepted from discharge. This analysis will further help to explain the exceptions to these standards.

1. Intent of the Parties

To embark on this analysis, the intent of the creditor must be understood. All creditors that fall into this category have overpaid a support debt of some type at some point in their lives.²⁸⁴ How this overpayment occurred is a pertinent element for determining if the debt should be excepted from discharge or entitled to priority status. The creditor can exhibit one of two intentions. The creditor could either knowingly overpay the debt or unknowingly overpay the debt.

When knowingly overpaying a support debt, the creditor’s claim should not fall within the nature of alimony, maintenance, or support. This is because the creditor is aware that his or her payments were completed and for some reason, the creditor has continued providing support. At this point, the debt is no longer in the nature of support. This is not because there is no “need” for support. Rather, it is because the payments are no longer mandated by court order. As previously discussed, when a creditor is knowingly overpaying a support debt that is not controlled by pending litigation, the creditor is at fault for providing such overpayments and should not be entitled to priority status.

A different outcome results when the creditor unknowingly overpays a support debt.²⁸⁵ This analysis is complicated because it is dependent on the facts of the specific case. This often occurs when a court retroactively terminates support obligations. If the overpaid support debt at issue is a child support order,

²⁸² See *Taylor v. Taylor (In re Taylor)*, 737 F.3d 670, 676–77 (10th Cir. 2013).

²⁸³ See *id.*

²⁸⁴ See, e.g., *id.*; *Norbut v. Norbut (In re Norbut)*, 387 B.R. 199, 210 (Bankr. N.D. Ohio 2008).

²⁸⁵ See *In re Alewelt*, 520 B.R. 704, 712 (Bankr. C.D. Ill. 2014) (alimony payments were retroactively terminated but the court found no “need” for the funds).

then it will be more likely than not that the debt should be afforded first priority.²⁸⁶ If the child is deemed to have been provided with adequate care, then there is no reason that the debt should not be returned as a DSO. This is true because the debt is in the nature of support because the creditor believed the payment was necessary for the adequate care and protection of the child or children involved. On the contrary, if the creditor unknowingly overpaid an alimony debt it is more likely than not that the creditor will not be afforded priority status.²⁸⁷ This is because a higher standard of diligence²⁸⁸ should be placed on overpaying alimony creditors in a bankruptcy proceeding. Current trends show that alimony serves as a rehabilitative tool and not a lifelong safety net.²⁸⁹ Thus, the creditor should carry the responsibility of knowing how long and to what extent alimony payments are needed.

While looking at intent, a deeper analysis of the debtor's motives for filing a bankruptcy petition is needed. A bankruptcy court should evaluate a debtor's history and ask: why is this individual filing for bankruptcy? If it seems as if the debtor is filing for relief predominantly to escape the overpaid DSO, red flags should be raised. For instance, in the case of *In re Galiardo* the support receiver debtor owed the support provider creditor over \$200,000 in overpaid alimony payments.²⁹⁰ It is likely that these debts triggered the filing of the bankruptcy petition. In these situations, a court should scrutinize the situation to see if the debtor is acting deceitful and declare the debt as a DSO prohibiting the debtor from taking advantage of the chapter 13 loophole.²⁹¹ However, if a debtor is filing for bankruptcy predominately for other purposes, such as foreclosure or consumer debt, the court does not have to scrutinize the debtor so closely.

Overall, the intent analysis requires courts to explore the perspectives of both the creditor and debtor. If a creditor knowingly overpays a support debt, then the debt is no longer within the nature of alimony, maintenance, or support and, therefore, should not be entitled to priority status. The current structure of the Code allows these debts to be discharged in chapter 13 cases.²⁹² However, if a creditor unknowingly overpays a support debt, a further analysis of the substance of the obligation is needed. Creditors who overpay alimony are held to a higher

²⁸⁶ See, e.g., *Kerr v. Meadors (In re Knott)*, 482 B.R. 852, 856 (Bankr. N.D. Ga. 2012).

²⁸⁷ See generally *Galiardo v. Galiardo (In re Galiardo)*, 526 B.R. 897 (Bankr. M.D. Fla. 2013).

²⁸⁸ See *supra* Part C.

²⁸⁹ See McMullen, *supra* note 52, at 9.

²⁹⁰ See *In re Galiardo*, 526 B.R. at 899.

²⁹¹ See 11 U.S.C. § 1328(a)(2) (2019) (noting that debts listed in §523(a)(15) are dischargeable in a chapter 13 proceeding).

²⁹² See *id.*

standard of diligence than those who overpay child support. Furthermore, the debtor's motives for filing the petition must be considered. If the court finds that the debtor filed their petition predominately to escape the overpaid DSO, the debt should be found in the nature of alimony, maintenance, or support to avoid the debtor benefiting from the chapter 13 loophole.

2. *Current Condition of the Parties*

After analyzing the intent of the parties, the court must consider the parties' current physical, mental, and financial condition. How a family functions is critical in determining how a debt should be treated within a bankruptcy proceeding. Regardless of whether the overpaid debt arises from child support or alimony, the quality of care and the quality of life must be considered. The undertaking of this analysis is case-specific in most circumstances. Because child support and alimony are two distinct obligations, each one must be considered separately. This inquiry is more relevant for cases concerning overpaid child support orders.

When confronted with an overpaid child support debt, the court should look to the current condition and treatment of the children. The age of the child or children determines how much scrutiny the court needs to place on analyzing the obligation. If the child is under sixteen years old, the court should be extremely thorough in its investigation.²⁹³ However, the main aspect a court must analyze, irrespective of age, is the quality of care the child is currently receiving. If the overpayment is deemed necessary for adequate care, then the debt should not be afforded priority status and should be discharged in a bankruptcy proceeding. Once again, the rights of a child outweigh both the creditor's rights and the debtor's rights.²⁹⁴ When looking to the best interest of a child, there should always be a level of adequate care and protection provided.²⁹⁵ If the court finds the overpayment is not necessary for the adequate care of the children involved, the debt should be considered a DSO in the nature of alimony, maintenance, or support. Unless the creditor is knowingly overpaying, an overpaid child support debt should always be considered a DSO that is excepted from discharge and afforded first priority status.

²⁹³ See *United States Age of Consent Map*, <https://www.ageofconsent.net/states> (last visited Feb. 25, 2019) (This age derived from the majority age of consent in the United States).

²⁹⁴ See generally Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. 293, 299–300 (2012).

²⁹⁵ See generally 3 NEW YORK CIVIL PRACTICE: MATRIMONIAL ACTIONS § 40.03 (2018) (This source describes New York law and procedure but mirrors jurisdictions throughout the United States).

When confronted with an overpaid alimony debt, the court should look to the condition of the debtor. When analyzing the debtor's quality of life, the debtor's condition must be analyzed in connection with the divorce decree. If the court finds the overpayment was necessary²⁹⁶ according to the divorce decree, then the debt may still be nondischargeable because it falls under § 523(a)(15).²⁹⁷ However, because of its nature, it should not be afforded first priority status. Rather, it should be treated as a general unsecured claim. This scenario protects the fresh start of the debtor. This situation is highly unlikely because once a divorce is finalized, the alimony receiver is commonly required to begin providing for him or herself rendering excess alimony payments unnecessary.²⁹⁸

In most instances, where the overpayment is considered unnecessary, there is no need to protect the debtor's fresh start. This analysis is only needed in extreme circumstances that the general rule does not provide for. The condition of the creditor does not need to be scrutinized because it does not matter if the creditor "needs" the payment. If the debt falls within the nature of support the debt should automatically be a DSO that is both excepted from discharge and entitled to priority status. Though overpaid alimony creditors are held to a higher standard of diligence, courts must not confuse the word "need" for "nature" when rendering opinions on overpaid support debts. When confronted with an overpaid alimony debt, courts should declare the debt nondischargeable while denying priority status due to the substance of the obligation.

Generally, the condition of the parties is a greater concern when analyzing an overpaid child support debt. As long as children are receiving adequate care, the general rule applies. Though the debtor's quality of life may be analyzed when confronted with an overpaid alimony debt, it is highly unlikely that a court will find an overpayment necessary in accordance with the prescribed divorce decree.

CONCLUSION

The Code fails to directly address overpaid support debts, leaving case law as the sole source of guidance. The Code's inattention to the issue has led to a jurisdictional split that does not allow for a uniform set of standards. When federal law is not evenly applied throughout the United States, the public's

²⁹⁶ This scenario is very rare but may occur if the original divorce decree was insufficient for the needs of the parties.

²⁹⁷ See 11 U.S.C. § 523(a)(15) (2019).

²⁹⁸ See McMullen, *supra* note 52, at 8–9.

values become skewed and individuals may attempt to use this inconsistency to their advantage. Furthermore, when domestic relations are not left to the discretion of state courts, the balance between federal bankruptcy law and state domestic relations laws is disrupted. In order to reconcile this discrepancy, bankruptcy courts should allow for a uniform set of standards when confronted with overpaid support debts.

While all support debts should be excepted from discharge, the overpayment of child support should be entitled to priority status whereas the overpayment of alimony should not. After analyzing Congress's intent in drafting the Code, the intent and current condition of the parties, and the substance of the obligation, a few exceptions emerge to this general rule. First, creditors who knowingly overpay their child support debts should not be afforded priority status. Second, if the child's quality of life is inadequate, the debt should neither be afforded priority status nor excepted from discharge when considering the public policy objective of protecting the best interests of the child.²⁹⁹ Third, exceptions to overpaid alimony debts arise when the debtor manipulates the creditor in a malicious or deceitful manner. When this occurs, the overpaid alimony debt must be afforded priority status.

The chapter 13 loophole partially restricts the application of these standards. Because the application of § 523(a)(15) is conditional to chapter 7 cases, the Code unintentionally creates this loophole³⁰⁰ allowing individuals to discharge large sums of money stemming from a divorce decree. To close this gap, § 523(a)(15) should apply to chapter 13 cases conditional to overpaid support obligations. If Congress elected to amend § 523(a)(15), debtors would not be able to specifically file or covert their case to chapter 13 in hopes of avoiding large sums of overpaid support debts.³⁰¹ Currently, the only way to avoid this area of contention is for courts to scrutinize why a debtor is filing for bankruptcy to determine if he or she is acting deceitful.

This Comment creates standards that stem from public policy concerns. The drafters of the Code sought to reflect the values and objectives of our society.³⁰² As society has evolved, it has become clearly discernable that the parent-child relationship is longer lasting than the spousal relationship.³⁰³ Due to this

²⁹⁹ See McMullen, *supra* note 266, at 442.

³⁰⁰ The chapter 13 discharge itself is not a loophole. When overpaid support debts get discharged is when the loophole emerges.

³⁰¹ See *Galiardo v. Galiardo (In re Galiardo)*, 526 B.R. 897, 902 (Bankr. M.D. Fla. 2013).

³⁰² See 11 U.S.C. §§ 507, 523(a)(5) (2019).

³⁰³ See Cammett, *supra* note 265, at 132.

distinction, overpaying alimony creditors should be held to a higher standard of diligence than overpaying child support creditors.³⁰⁴ Moreover, the bankruptcy system must encourage parents to continue paying their child support without hesitation. Overpaid support debts should not be categorized as general unsecured claims in bankruptcy proceedings. This may cause future payees to withhold their child support payments when suspicion arises that an ex-spouse is suffering from financial hardship. In order to keep familial values in high regard, these general sets of standards must be followed when courts are confronted with overpaid support debts.

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³⁰⁴ See Kelso, *supra* note 48, at 189.

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