

Outline for Teleconference Briefing on the Provisions of H.R. 975
Enhancing the Enforcement of Support During Bankruptcy

Philip L. Strauss
Principal Attorney, Department of Child Support Services
City and County of San Francisco
(415) 356-2960; philipstrauss@yahoo.com

Representing

The National Child Support Enforcement Association

1. Problems in enforcing support during bankruptcy under current law
 - a. When a bankruptcy case is filed all activities to collect support from property that is under the control of the bankruptcy court must cease. In Chapter 7 cases postpetition acquired property, including wages, is not property of the estate and support enforcement is not affected. However, because virtually all property of Chapter 12 and 13 debtors is under such control, support creditors of Chapter 12 or 13 debtors face serious adverse consequences when they try to collect support.
 - (1) Approximately 53% of the bankruptcy cases received by our department are Chapter 13 cases. This percentage has held steady for years and there is no reason to believe it is not representative of support debtors in general.
 - (2) The most commonly used collection procedures which must cease upon the filing of a Chapter 12 or 13 bankruptcy petition are: (i) income withholding, (ii) the non-renewal or suspension of drivers, professional, and recreational licenses; (iii) reporting of overdue support to credit reporting agencies; (iv) interception of tax refunds to pay support arrearages, and (v) the collection of medical support obligations.
 - b. A chapter 13 debtor may obtain all of the benefits of bankruptcy [confirmation of a plan, cessation of collections during the 3-5 year term of the plan, and discharge of dischargeable debts] and not pay one cent of his or her court ordered on-going support obligation.
 - c. A Chapter 13 debtor may obtain confirmation of a bankruptcy plan and delay the payment of his or her permanently or *temporarily*¹ assigned support debt for 3-5

¹ "Temporarily" assigned support refers to support arrearages which are assigned to the government while the applicant or child is receiving public assistance. When assistance ceases those arrearages (which were not collected while assistance was being paid) are no longer assigned and once again become the property of the custodial parent. Therefore, during the 3-5 year term of a chapter 12 or 13 plan arrearages, which would have to be paid fully through the plan if they were not assigned, may be paid at some small percentage while the plan is in effect if they were assigned at the time the bankruptcy petition was filed. Thus, under current law, a custodial parent who leaves public assistance during

years because confirmation may permit provisions limiting payment to general unsecured creditors to as little as nothing during the plan.

- d. A debtor may void liens on property which secure debts permanently or *temporarily* assigned to the government, and the trustee may recover support payments made to pay debts assigned to the government when such payments were made within 90 days prior to filing for bankruptcy protection.
- e. Frequently, a debtor may discharge a debt owing to a former spouse which is based on a division of their marital property. And even in those circumstances in which a spouse might be able to prevent such a discharge, that spouse *must* bring a *timely* special proceeding in bankruptcy court to prevent the discharge. Such proceedings are uncertain and expensive and the spouse must be aware of the necessity of bringing a proceeding in order to avoid a discharge of debts based on that spouse's right to a portion of the marital property.
- f. The current status of the law puts the debtor's children, and very frequently the mother of the children, at enormous economic risk when the debtor seeks bankruptcy protection.

The problem is magnified when the creditors of these support obligations are unrepresented and unable to afford representation. Even those who have sought the assistance of government support enforcement agencies frequently find that they cannot get the individualized attention and expertise required for representation in the highly technical bankruptcy system. The Bankruptcy Code places many detailed and stringent requirements on creditors and sets rigid deadlines. Creditors who fail to comply with all of those requirements will be bound by the terms of a plan, even if the plan fails to meet the requirements of the Code.

- 2. Facing these problems, the largest organization of support collection professionals, the National Child Support Enforcement Association, developed, in consultation with the National Association of Attorneys General, a wish list of amendments to the bankruptcy code which were designed to clear most of the impediments to the enforcement of support during bankruptcy. This list is reflected in sections 211-217 of H.R. 975.

One of the primary effects of those sections is to reverse the current approach to crafting a Chapter 12 or 13 plan. Under the code as now written, support creditors vie with all other creditors for payment during bankruptcy. Under the reform amendments, a Chapter 12 or 13 bankruptcy plan would have to be drafted to insure the full payment of support obligations in order to succeed.

The amendments would have the following effect

the pendency of the debtor's bankruptcy may have to wait until the case is completed or dismissed before collecting the support arrearage.

- a. Collection of support through the most commonly used procedure [income withholding orders] will cease being affected by bankruptcy. This key provision will mean that support deducted from and employee's wages by an employer and paid to the support creditor will not be interrupted. This provision applies to both the on-going support obligations and support arrears.

In addition, other means of enforcement will remain available after the filing of a bankruptcy petition. Such enforcement tools include: (1) the revocation or non-renewal of drivers, professional, and recreational licenses; (2) the reporting of overdue support to credit reporting agencies; (3) the interception of tax refunds to pay support arrears, and (4) the collection of medical support obligations.

- b. The proposed bankruptcy amendments have set up self-executing checkpoints to insure the continuing payment of support by all support debtors, but of particular significance, by those support debtors who are self-employed or not otherwise subject to income withholding orders. The amendments prevent such debtors from obtaining confirmation of Chapter 11, 12, or 13 plans unless all of the on-going support, due after the date the petition is filed, is paid. The amendments further prevent the discharge of debts in Chapter 12 or 13 cases unless the debtor certifies that all support required to be paid in the plan (which includes all on-going support) has been paid.

In addition, if, during the term of a 3-5 year plan, the debtor ceases paying on-going support, the support creditor may obtain dismissal of a Chapter 12 or 13 case.

- c. All support debts will be entitled to the status of a "priority claim." Unless the individual support creditor agrees to accept a lesser payment, a priority status means that *all of the support owed directly to the support creditor* must be paid during the term of the plan in order for the debtor to obtain a discharge of dischargeable debts. In addition, all of the support debt assigned to government at the time the petition is filed is also a priority debt which must be paid in full unless the debtor can demonstrate a hardship.
- d. No lien securing a support obligation may be voided in bankruptcy. No prepetition payment of support by the support debtor may be recovered by the trustee as a preference.
- e. A debtor may not discharge debts owed to a former spouse as the result of the division of marital property.
- f. Because bankruptcy will no longer interrupt the collection of support through income withholding and because there are self-executing provisions requiring the payment of on-going support during the term of Chapter 12 and 13 plans, the risk of economic disruption to the support creditors is greatly reduced. Also, the need

to hire counsel to represent such creditors during the bankruptcy process is minimized.

3. Enforcing support after bankruptcy

a. Some criticism has been leveled at H.R. 975 (or its predecessors) because *after* bankruptcy financial institutions will be in a better position to collect their non-discharged debts than child support creditors. Nothing could be further from the truth.

b. Outside bankruptcy, support collection techniques are far superior to those of other creditors and free government services are available to enforce support. Among these techniques which are not available to financial institutions are

- (1) criminal prosecution, both state and federal
- (2) contempt proceedings
- (3) interception of tax refunds
- (4) wage garnishments that take precedence over any other garnishment
- (5) interception of up to 25% of debtor's unemployment and workers compensation benefits
- (6) revocation of drivers, professional, and recreational licenses
- (7) non-renewal of passports
- (8) judgment liens on debtor's real property (since all support debts are based on judgments and it is not likely that financial institutions will obtain judgments on their debts).
- (9) judgment liens on personal property
- (10) free interstate enforcement of support
- (11) ability to obtain security deposits to insure future support
- (12) ability of governmental support enforcement agencies to obtain otherwise protected confidential information regarding the existence of assets.
- (13) collection of support debts from exempt assets

c. Thus, to the extent a delinquent parent can be located and the parent has any reasonable amount of wages or property, collection of support outside the bankruptcy process is fairly straight forward—even routine.

4. **Summary:** The bankruptcy reform proposals will be of immediate and palpable benefit to the large population of mothers and children needing support during the period the obligated parent is in bankruptcy. The possible addition of nondischargeable debts which the obligated parent will have after bankruptcy will have negligible impact on the post-bankruptcy enforcement of support obligations.