New Perspectives:
Property Settlements in Same Sex Divorces, DOMA and Bankruptcy Trustee Avoiding Powers

Ray Obuchowski, Esq.[1] and Professor Jackie Gardina

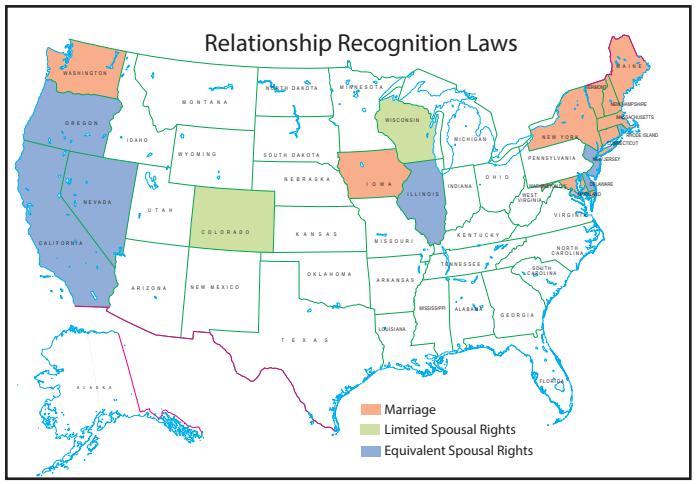
The review of divorce-related property transfers is not a new concept for Chapter 7 Bankruptcy Trustees. Transfers of property and payments between married or formerly married parties have long been the source of litigation regarding the application of "avoiding powers" found in sections 544, 547 and 548 of the Bankruptcy Code. Up to this point, however, cases have considered the avoidance powers solely in the context of heterosexual divorces. With enactment of same sex marriage laws and the unfortunate dissolution of those relationships[2] a new approach to avoidance analysis is required. The federal Defense of Marriage Act[3] (DOMA) and the state law marriage equality and prohibition[4] laws require Trustees to consider the sometimes volatile mix of state and federal law.

The Avoidance Powers

The Bankruptcy Trustee has multiple ways in which he or she can avoid pre-petition transfers. Section 544(b) authorizes the Trustee to avoid unperfected security interests.[5] Under § 547 the Trustee may avoid a transfer which prefers one creditor over similarly situated creditors and allows the transferee to receive more than it would have received in a Chapter 7 case.[6] Finally, §548(a) authorizes the Trustee to avoid a transfer made for less than reasonably equivalent value within two (2) years prior to the petition date. [7]

The majority of divorce-related avoidance cases involve §548 - fraudulent transfers. The fact that a transfer occurs within a divorce proceeding does not immunize it from a §548 attack.[8] But a Trustee may not avoid alimony or support payments under §547 if those transfers were the payment of a "domestic support obligation" ("DSO").[9] DSO is explicitly defined as a debt owed to a "spouse or former spouse" for maintenance or support.[10]

In the context of divorces involving same-sex couples, however, the Code is applied differently. Trustees may be able to use §547 to avoid alimony and support payments to same-sex former spouses. Under DOMA, a court-ordered alimony or support payment may not be recognized as a "domestic support obligation" because, for purposes of federal law, the parties are not recognized as spouses.[11] The Trustee's role is made even more complex when state law is added to the mix – not all states will recognize the marriage, the divorce or the required support payments as legitimate thus opening the door even wider for avoidance actions under §§544 and 548.[12]



Same Sex Marriage Laws and Divorces

At this writing nine states recognize marriage between individuals of the same sex.[13] In addition, another eight states extend the equivalent of state-level spousal rights to same-sex couples.[14] Two states, Colorado and Wisconsin, provide limited relationship recognition[15] To further complicate matters, January 2011, the New Mexico Attorney General issued an opinion letter stating that out-of-state marriages would likely be recognized in New Mexico.[16]

But forty states currently have constitutional amendments or statutes prohibiting marriage between same-sex couples. These prohibitions, the so-called "mini-DOMAs," may prohibit the marriage of same-sex couples in the state, restrict the state's ability to recognize marriages between couples validly performed in other states, refuse to recognize contractual rights arising from those marriages[17] and even refuse to enforce *judgments* that involved a marriage between persons of the same sex.[18]

The New Analysis

Given the federal DOMA and the various state law prohibitions, how does the analysis of property transfers in heterosexual divorces differ from same sex divorces? Consider the following simple hypothetical: Ingrid and Judy are legally married and eventually divorce in Vermont. Under the court approved divorce agreement, Ingrid agrees to pay alimony to Judy. Ingrid eventually files for bankruptcy.

The hypothetical involves the interplay of both federal and

continued on page 36

About the Author

Raymond J. Obuchowski practices law and is a Chapter 7 Trustee in Bethel, Vermont under the firm name of Obuchowski & Emens-Butler, PC. His practice concentrates on all areas of bankruptcy law, with the handling of both consumer and business cases for debtors, creditors, and trustees. He received his B.S. degree in 1976 from Western Illinois University and his J.D. degree from Vermont Law School in 1980. He is admitted to the Vermont and Illinois bars. Mr. Obuchowski is a Fellow in the American College of Bankruptcy since 2005, and has been a Chapter 7 trustee for the District of Vermont since 1986. He is a Member and a Director on the Board for the NABT. He is also a Director on the American Board of Certification and has been certified in both business and consumer bankruptcy law by the ABC since 1992. Mr. Obuchowski has been a member of the American Bankruptcy Institute for over 25 years and has been listed in both the *Best Lawyers* and *Super Lawyers* publications.

Jackie Gardina is a professor at Vermont Law School where she specializes in four main areas: civil procedure; administrative law; bankruptcy, with a special emphasis on environmental obligations in bankruptcy; and sexual orientation and gender identity issues. Professor Gardina received her B.A. degree in political science from the University of Iowa in 1988 and her M.S.W. in social work from Boston University in 1993. Before attending law school, she worked as an outpatient clinical social worker. Six years later, she graduated *magna cum laude* from Boston College Law School. Upon graduation, she clerked for Chief Judge William Young of the United States District Court for the District of Massachusetts and then for the Honorable Levin Campbell of the First Circuit Court of Appeals. In addition, she was an associate at the Boston firm of Choate, Hall, and Stewart, where she practiced in the commercial litigation department. Professor Gardina has spoken and written on the intersection of the Defense of Marriage Act and the Bankruptcy Code, including *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 BOSTON L. REV. 881 (2006); *The Defense of Marriage Act, Same-Sex Relationships & the Bankruptcy Code* (Federal Judicial Center, Spring 2011); and the *Conflict of Laws: DOMA and the Bankruptcy Code* (NCBJ 2012).

state law and the geographic location of the filing becomes critical to the outcome. First, consider the uneven application of the Code. If Ingrid files for bankruptcy in Florida, for example, the Trustee can seek to avoid the alimony payments made by Ingrid to Judy in the three months before filing under §547. Ingrid's alimony payments to Judy may not be considered "domestic support obligations" under §547(c) because DOMA requires courts to interpret the word "spouse" in federal law to apply only to opposite sex couples.[19] But if Ingrid files in Vermont, her payments to Judy will be considered a payment for a "domestic support obligation" because both the First and Second Circuits have declared DOMA unconstitutional and until the Supreme Court decides otherwise, debtors and creditors in those circuits will not be burdened by §3 of DOMA.[20] The complexities described above arise not only in the context of the avoiding powers, but also in the exception to discharge provisions for domestic support obligations,[21] and for trustees, distribution.[22]

Second, consider how the application of state law results in a similar lack of uniformity and predictability. If Ingrid files in Vermont and Vermont law is applied, Ingrid's alimony payments to Judy - which are recognized as legitimate support payments under state law - will likely be immune from attack. If Ingrid files in Florida, however and Florida law is applied then a Trustee could seek to avoid Ingrid's payments to Judy under §548 as a fraudulent conveyance because under Florida law it is not recognized as a legitimate transfer of property.[23]

The Florida Trustee's success will depend on whether the bankruptcy judge applies Florida's or Vermont's domestic relations law. The Supreme Court has yet to address the appropriate choice of law rule in bankruptcy.[24] In the absence of guidance, lower courts have followed various paths when determining choice of law rules in bankruptcy cases. Some bankruptcy courts have applied the forum state's choice of law rule and others have applied a distinct federal rule that attempts to respond to bankruptcy policy rather than the domestic agendas of individual states.[25]

Conclusion

DOMA is predicted by many pundits to be "doomed,"[26] and following the recent decision by the United States Court of Appeals for the First and Second Circuits conclusions that § 3 of DOMA violates equal protection and is therefore unconstitutional, such pundits may be correct. The United States Supreme Court is likely to consider this question next term. However, even if the Supreme Court were to affirm, the potential for transfer avoidance will still exist. "Choice of law" issues in non-recognition states provide a foundation for avoidance claims and Trustees in those states will need to consider such transfers carefully. 🏛

FOOTNOTES:

[1] We extend our appreciation to Geoff Neumann, Vermont Law School 3L extern for his research.

[2] Statistics suggest that bankruptcy courts will soon be facing in increasing numbers divorcing same-sex couples in bankruptcy. In the heterosexual context, first marriages last an average of 8 years. After the landmark case *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), Massachusetts passed the first marriage equality law in 2004. The named plaintiffs in that case, Julia and Hillary Goodridge divorced in 2009.

[3] The federal DOMA contains two relevant provisions – the federal definitions provision and the so-called choice of law provision. 1 U.S.C. §7 in defining "marriage" and "spouse" states: In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. 28 U.S.C. § 1738C creates an exception to the Full Faith and Credit Clause and provides that no state is "required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

[4] *See* infra notes 13-18 and accompany text.

[5] 11 U.S.C. §544(b).

[6] 11 U.S.C. §547.

[7] 11 U.S.C. §548.

[8] See, e.g., *Gray v. Snyder,* 704 F.2d 709 (4th Cir. 1983); *In re Lange,* 35 B.R. 579 (Bankr. E.D. Mo. 1983); The standards for measuring the fairness of a property division in the domestic relations arena and reasonably equivalent value in a fraudulent transfer case are separate and distinct. *In re: Fordu,* 201 F.3rd 693, 707 (3rd Cir. 1999).

[9] 11 U.S.C. §547(c).

[10] 11 U.S.C. §101(14A).

[11] I U.S.C. §7; *In re Goodale*, 298 B.R. 886 (Bankr. W.D. Wash. 2003) (refusing to recognize a state court support award as a "domestic support obligation" because of DOMA).

[12] *See* infra note 17-18 and accompanying text.

[13] These states include Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington and the District of Columbia. Conn. Gen. Stat. §§ 46b–20–46b–38i (2010); Iowa Code § 595.2 (defining marriage as between a man and a woman) overturned by *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Mass. Gen. Laws. ch. 207 § overruled by *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941 (Mass. 2003); N.H. Rev. Stat. Ann. §§ 457:1–457:3 (2010); Vt. Stat. Ann. Tit. 15 § 8 (2010); Council B. 18-0482, 18th Council Period (D.C. 2009); NEW YORK A-8529-2011 (amending domestic relations law to allow for marriage between persons of the same sex). Maine, Maryland and Washington all approved marriage equality referendums on the November 6, 2012 ballot.

[14] These states include California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island . Cal. Fam. Code § 297.5 (West 2006); 13 DEL. CODE § 201, *et seq.*; Hawaii Act 001 (2011); 750 Ill. Comp. Stat. 75/20 (2011); Nev. Rev. Stat. § 122A.200 (2010); N.J. Stat. Ann. § 37:1–31 (West 2010); Or. Rev. Stat. § 106.340 (2010); R.I. GEN. LAWS §15-3.1.

[15] Colo. Rev. Stat. §§ 15–22–101–105 (2010); Wis. Stat. §§ 770.1–10 (2010).

[16] 11–01 Op. Att'y Gen. 1 (2011) *available at* http://www.democracyfornewmexico.com/files/4-jan-11-rep.-al-park-opinion-11-01.pdf

[17] Alaska Stat. § 25.05.013 (2004); ("A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.") Minn. Stat. Ann. § 517.03 (West 2006) ("A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another

state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state."); Va. Code. Ann. § 20-45.2 (West 2005) ("A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable."). Arkansas has a modified version of the language that is a bit clearer, referring to "contractual or other rights" granted by virtue of the marriage license, but it remains obscure what the reference to contract is intended to accomplish. Ark. Code Ann. § 9-11-208(c) (2006) ("Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts."). But see Ark. Code Ann. § 9-11-208(d) (2006) ("[N]othing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.").

[18] Ga. Const. art. 1, § 4, cl. 1(b); Fla. Stat. Ann. § 741.212(2) (West 2006); Ohio. Rev. Code Ann. § 3101.01(C)(4) (West 2006); Tex. Fam. Code Ann. § 6.204(c)(1) (Vernon 2006); W. Va. Code Ann. § 48-2-603 (LexisNexis 2006).

[19] 1 U.S.C. §7.

[20] *See* Windsor v. U.S., No. 12-2335, 2012 WL 4937310, (2d. Cir. Oct. 18, 2012); Mass. v. Dept. of Health & Hum. Servs., 682 F.3d 1 (Mass. 2012).

[21] 11 U.S.C. §523(a)(5) and (a)(15).

[22] 11 U.S.C. §726(a)(1) as incorporating §507(a)(1)(A).

[23] The Florida statute provides: "The state, its agencies, and its political subdivisions may not give effect to any public act, record, *or judicial proceeding* of any state, territory, possession, or tribe of the United States or of any jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship." FLA. STAT. § 741.212(2) (West 2008).

[24] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942); *Vanston Bondholder Protective Committee v. Green*, 329 U.S. 156 (1946).

[25] Compare *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Amtech Lighting Servs. v. Payless Cashways, Inc.* (In re Payless Cashways), 203 F.3d 1081, 1084 (8th Cir. 2000); *Carter Enters., Inc. v. Ashland Specialty Co.*, 257 B.R. 797, 801-02 (S.D.W.Va. 2001) with *Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942, 948 (9th Cir. 1995) ("In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules."); *Mandalay Resort Group v. Miller (In re Miller)*, 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003) ("Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws...."); *Olympic Coast Inv., Inc. v. Wright (In re Wright)*, 256 B.R. 626, 632 (Bankr. D. Mont. 2000) and *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 606 (2d Cir. 2001) ("Before federal courts create federal common law, 'a significant conflict between some federal policy or interest and the use of state law must first be specifically shown.'" (quoting *Atherton v. FDIC*, 519 U.S. 213, 218 (1997))); *Compliance Marine, Inc. v. Campbell (In re Merritt Dredging Co.)*, 839 F.2d 203, 206 (4th Cir. 1988) ("We believe, however, that in the absence of a compelling federal interest which dictates otherwise, the Klaxon rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest."); *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 150 n.16 (5th Cir. 1981) (applying the forum's choice of law rule in the absence of an overriding federal policy).

[26] *DOMA is doomed*, Jonathan Capehart, The Washington Post, October 19, 2012.

UPDATED

Policy for Approving the Filing of Amicus Briefs by NABT

Requests for an Amicus Brief

A request for an amicus brief should be made to the chair of the amicus committee, who will then circulate the request to all members of the committee. A request will not be considered unless it contains the following information:

1. The style of the case, and the state, district, and circuit involved.
2. The name of the trustee involved.
3. A brief description of the underlying facts of the case.
4. The legal issue to be briefed by NABT.
5. The national significance of this issue to all trustees.
6. The name and address of the person who will be preparing the brief, if an author has been identified.
7. The nature and amount of any fees or expenses to be paid to the author, if any, and the proposed source of those funds. (An author is expected to provide services on a pro bono basis. NABT will reimburse authors for reasonable and necessary expenses, including the printing, filing, and service of briefs and related pleadings.)
8. The timetable for the filing of briefs.

Consideration by the Committee

The amicus committee shall consider all proper requests as soon as practicable. The committee will make one of three decisions:

1. Approve the request, by consensus.
2. Deny the request, by consensus.
3. Refer the matter to the executive board or full board for its consideration and comment, after which the request shall be returned to the amicus committee for its final approval or denial by consensus.

Factors to be Considered by the Committee

In its consideration of each request, the amicus committee shall consider, among all relevant factors, including (but not limited to) the following:

1. Whether the requesting party is a member in good standing with NABT.
2. Whether the issue involved is legal, or whether it is fact-sensitive.
3. Whether the pleadings are "clean" and whether there are any procedural impediments to a determination of the legal issue.
4. Whether the legal issue is of national significance to all trustees.
5. Whether the decision will hinge on state law, or other matters which may only be relevant to trustees in certain districts.
6. Whether the fees and costs being requested, if any, are appropriate.