Fordham Law Review

Volume 59 | Issue 3 Article 4

1990

"A Fresh Start with Someone Else's Property": Lien Avoidance, the Homestead Exemption and Divorce Property Divisions Under Section 522(f)(1) of the Bankruptcy Code

Phyllis A. Klein

"A FRESH START WITH SOMEONE ELSE'S PROPERTY":[1] LIEN AVOIDANCE, THE HOMESTEAD EXEMPTION AND DIVORCE PROPERTY DIVISIONS UNDER SECTION 522(f)(1) OF THE BANKRUPTCY CODE

INTRODUCTION

When marital property is distributed during divorce,[2] the family home is frequently given to one spouse and a money judgment to the other.[3] To assure payment by the debtor spouse of the non-debtor's share of the net marital assets, the state divorce court often places a lien[4] on the home retained by the debtor.[5] Because of the widespread adoption of equitable distribution statutes,[6] divorce property divisions represent a state court judgment based on principles of fairness and sharing,[7] regardless of whether the parties have consented to a settlement agreement or the court has imposed its own determination.[8] When debtors file a petition for bankruptcy before the lien is satisfied, however, they may seek to reduce or eliminate a postmarital obligation secured to the former marital property by using provisions of the Bankruptcy Code[9] that are intended to ensure a fresh start for debtors.[10]

---

1. Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 608 (7th Cir.) (Posner, J., dissenting), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

2. *See infra* note 8.

3. *See Sanderfoot*, 899 F.2d at 599; Boyd v. Robinson, 741 F. 2d 1112, 1113 (8th Cir. 1984); *see also* R. Aaron, Bankruptcy Law Fundamentals § 7.01[3], at 7-12.1 (1990) ("The house is frequently the major asset of the spouses. . . .").

4. *See infra* note 18 (discussing liens and bankruptcy).

5. State divorce laws empower the divorce court to make such property divisions. *See* 2 H. Clark, The Law of Domestic Relations in the United States § 16.1, at 176-77 (1987).

Two essential characteristics in the cases denying avoidance are: (1) the lien imposed as part of the divorce proceedings is written into the final divorce decree and (2) the lien is placed on the marital home, not on the debtor's property in general. *See* Borman v. Leiker (*In re* Borman), 886 F.2d 273, 274 (10th Cir. 1989); Boyd v. Robinson, 741 F.2d 1112, 1113 (8th Cir. 1984). The Tenth Circuit avoided a lien in Maus v. Maus, 837 F.2d 935 (10th Cir. 1988), holding that the lien was not placed on the marital home and the property settlement made grant of the property "free and clear" of the non-debtor spouse's claims. *See id.* at 939. The court subsequently limited *Maus* to its facts in Parker v. Donahue (*In re* Donahue), 862 F.2d 259, 263-65 (10th Cir. 1988).

6. *See infra* note 39.

7. *See infra* notes 40-42 and accompanying text.

8. Divorce property distributions in which liens are enforceable by the court, and are therefore vulnerable to interpretation as court-obtained liens, are determined either by the divorce court or by agreement of the parties prior to the court's final judgment granting the divorce. *See infra* text accompanying notes 44-45. In this Note, "property settlement" refers to consensual divorce property divisions that have been incorporated into the final decree.

9. [Bankruptcy Reform] Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)) [hereinafter the Bankruptcy Code or the Code].

10. *See infra* notes 105-148 and accompanying text (discussing grounds on which

Under federal bankruptcy law, the debtor is permitted to exempt[11] a homestead[12] from the reach of creditors.[13] A homestead is generally real property that a debtor uses as a residence.[14] The purpose of exemptions is to allow the debtor to come through bankruptcy with adequate possessions for a fresh start.[15] Section 522(f)(1),[16] a new provision of the 1978 Bankruptcy Reform Act,[17] specifically gives debtors the right to avoid certain liens[18] on exempt property.[19] Debtors have sought to apply the

---

debtors have attempted to avoid divorce decree homestead liens and citing relevant cases).

11. *See* 11 U.S.C. § 522 (1988) (Bankruptcy Code exemption provision). Section 522 applies to individual debtors, *see* 11 U.S.C. § 103(a) (1988), who most commonly file for liquidation under Chapter 7 or for readjustment of their debts under Chapter 13. *See* G. Treister, J. Trost, L. Forman, K. Klee & R. Levin, Fundamentals of Bankruptcy Law § 7.01, at 295 (2d ed. 1988) [hereinafter G. Treister]; *see generally* T. Crandall, F. Hagedorn & F. Smith, Debtor-Creditor Law Manual ¶ 13.07[3], at 13-39 to -41 (1985) (discussing protection of debtors' exemptions) [hereinafter T. Crandall]; G. Treister, *supra*, § 1.04, at 17-19 (describing Code chapters).

12. *See infra* notes 59-70 and accompanying text.

13. The exemptions that are defined in section 522(b) of the Code allow the debtor to remove certain property from the estate that the trustee brings together in accordance with section 541 for distribution to the debtor's creditors. *See* 11 U.S.C. §§ 522(b), 541 (1988). The purpose of exemptions is to protect the debtor's fresh start by leaving the debtor an amount of real and personal property that is necessary for beginning a new life. *See infra* notes 56, 58 and accompanying text.

14. In divorce decree lien avoidance cases, the homestead claimed as exempt by the debtor had been the spouses' marital home prior to divorce. *See* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 599-600 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990). In bankruptcy, after debtors claim their exemption, the property defined in divorce as the marital home is referred to as the debtor's homestead. *See id.* at 599.

15. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 126 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6318 [hereinafter House Report].

16. Section 522(f)(1) reads: "Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . , if such lien is— (1) a judicial lien; . . ." 11 U.S.C. § 522(f)(1) (1988).

17. [Bankruptcy Reform] Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). *See infra* note 166.

18. A lien is one method by which unsecured creditors who have successfully obtained a court judgment seek to enforce that judgment. *See* T. Crandall, *supra* note 11, ¶ 5.01, at 5-3. Outside of bankruptcy law, a lien is "an interest in the debtor's property that affords the creditor the legal power to ultimately satisfy the debt from the assets subject to the lien." *Id.* The lien is a right created either by agreement or under state law. *See id.* ¶ 6.05[2][a], at 6-67; 51 Am. Jur. 2d *Liens* § 6 (1970).

"Lien" is defined in the Code as a "charge against or interest in property to secure payment of a debt or performance of an obligation; . . ." 11 U.S.C. § 101(33) (1988). A lien in bankruptcy is a claim, or right to payment, that is allowed under Section 502 and secured to property in which the debtor's estate has an interest. *See id.* §§ 101(4)(A), 502; *see also* Bowmar, *Avoidance of Judicial Liens That Impair Exemptions in Bankruptcy: The Workings of 11 U.S.C. § 522(f)(1)*, 63 Am. Bankr. L.J. 375, 377-79 (1989) (describing allowed claims and liens in bankruptcy). On types of liens defined in the Code, see *infra* notes 77-78 and accompanying text.

19. *See* 11 U.S.C. § 522(f)(1)(1988). In addition to removing an encumbrance from the exempt property, avoidance under section 522(f)(1) also reduces the previously secured claim to unsecured debt. *See* T. Crandall, *supra* note 11, ¶ 13.07[3], at 13-39. Bankruptcy offers relief to debtors by allowing most of their debts to be discharged,

avoidance powers of the section to property division divorce decree liens on their homesteads.[20] Because of the complex interrelationship between bankruptcy and domestic relations laws,[21] a debtor spouse may succeed in avoiding the lien,[22] thereby putting the non-debtor spouse on line with all other unsecured creditors to collect whatever proceeds are available from the debtor's estate[23] and effectively nullifying the divorce property division.[24]

The question of whether the lien avoidance provision of the Bankruptcy Code applies to divorce property divisions[25] is "muddied"[26] by the variety of theories courts have used to support decisions denying

---

which leaves unsecured bankruptcy creditors limited to payment out of whatever proceeds are available from the debtor's estate. *See infra* note 57 (discussing discharge of debts). The debtor is relieved of personal liability for the underlying debt. *See* Bowmar, *supra* note 18, at 379. Thus, the result of lien avoidance of dischargeable debts is enhancement of both parts of the fresh start policy for individual debtors: exemption of certain property, which is intended to provide basic necessities for starting anew, and discharge of debts, which essentially protects the debtor's future earnings from liabilities the debtor incurred in the past. *See* T. Crandall, *supra* note 11, ¶ 10.02[2], at 10-3, ¶ 13.07[3], at 13-38; *see also* Cross, *The Application of Section 522(f) of the Bankruptcy Code in Cases Involving Multiple Liens*, 6 Bankr. Dev. J. 309, 310 (1989) (on usefulness of section 522(f) to debtors in maximizing exemptions); Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C.L. Rev. 769, 769 (1980) ("Permitting debtors to retain part of their assets while relieving them of all or most of their debts puts them on the road to a new financial future without the necessity of assistance. . . .").

20. *See infra* Parts IIA-B and accompanying text. Property distributions that the debtor may attempt to avoid pursuant to section 522(f)(1) are limited to dischargeable property debts; exempt property remains liable for debts that are non-dischargeable. *See* 11 U.S.C. § 522(c)(2)(A)(i) (1988); *see also infra* notes 83-95 and accompanying text (on relationship between exempt property, debts and lien avoidance).

21. *See* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 605 (7th Cir.) (quoting *In re* Worth, 100 Bankr. 834, 837 (Bankr. N.D. Tex. 1989)), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

22. *See infra* Part IIA and accompanying text.

23. *See infra* note 57 and accompanying text.

24. The percentage of the total property division that can be avoided depends largely upon the debtor's exemption allowance. *See infra* notes 70-71 and accompanying text.

25. Like the lower courts, the four circuit courts that have addressed lien avoidance in the context of the homestead exemption and divorce property divisions are divided. *See infra* notes 105-148 and accompanying text. Split panels of the Seventh Circuit and the Ninth Circuit have avoided divorce-decree homestead liens. *See* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 605 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 784 (9th Cir. 1989). In the Eighth Circuit, on the other hand, the majority denied lien avoidance in Boyd v. Robinson, 741 F.2d 1112, 1115 (8th Cir. 1984). A panel of the Tenth Circuit unanimously upheld a divorce-decree homestead lien in Borman v. Leiker (*In re* Borman), 886 F.2d 273, 274 (10th Cir. 1989), citing its reasoning in Parker v. Donahue (*In re* Donahue), 862 F.2d 259 (10th Cir. 1988). Although *Donahue* addressed lien avoidance only in dictum, the court, in defining an unrecorded divorce decree homestead lien as secured debt, specifically limited to its facts Maus v. Maus, 837 F.2d 935 (10th Cir. 1988), a Tenth Circuit case decided less than a year earlier in which the court granted lien avoidance. *See Donahue*, 862 F.2d at 264-65; *see also infra* note 117 (discussing *Maus*).

26. *See In re* Rittenhouse, 103 Bankr. 250, 252 (D. Kan. 1989) ("With some trepidation, the court wades into waters muddied before it with little hope of settling anything but the instant dispute.").

avoidance[27] and by uncertainty about the role of agreement by the parties in an uncontested divorce.[28] Courts have usually focused on issues of statutory construction and legislative intent, but traditional principles that have long guided the relationship between federal law and state domestic relations law offer another dimension to the legal and policy tensions addressed in the divorce lien avoidance case law. In large part, the judicial disagreement about homestead lien avoidance in the divorce setting reflects a conflict between the fresh start policy that is fundamental to the federal law of bankruptcy[29] and the equitable goals that are the foundation of modern divorce statutes.[30]

This Note argues that liens imposed on the marital home by state courts in divorce decrees should not be subject to the debtor's avoidance power under the Bankruptcy Code. Part I examines modern divorce law as it applies to homestead liens and gives a brief history and description of the lien avoidance provision. Part II analyzes approaches to the language of the provision in the context of divorce decree homestead liens. Part III offers a resolution of the issue based upon statutory construction of section 522(f)(1) within the framework of the relationship between domestic relations law and federal law. This Note concludes that Congress and the United States Supreme Court should expressly exclude divorce decree homestead liens from the reach of section 522(f)(1) in order to correct the imbalance that is created between state divorce law and the Bankruptcy Code when debtors are permitted to avoid such liens.

I. BACKGROUND

A. *State Divorce Law and Property Division Liens*

The past twenty years have "witnessed a virtual revolution in matrimonial law in the United States."[31] At the same time that federal bankruptcy law was undergoing major revision, states began to reform their divorce laws in response to significant changes in American attitudes towards marriage and divorce.[32] Some form of no-fault divorce, a ground for divorce initiated by California in 1970,[33] is part of the domestic rela-

27. *See infra* Part IIB and accompanying text.

28. *See infra* notes 117, 140 and accompanying text.

29. *See infra* note 56 and accompanying text.

30. *See infra* notes 39-45 and accompanying text. The United States Supreme Court has agreed to decide whether a debtor spouse can use section 522(f)(1) unilaterally to avoid a lien imposed by a state divorce court on the former family home. *See* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

31. J. Gregory, The Law of Equitable Distribution, at v (1989); *see also* L. Weitzman, The Divorce Revolution, at ix (1985) (after California adopted first no-fault divorce law, "the entire landscape of American family law [was] transformed in a mere decade"); Scheible, *Defining "Support" Under Bankruptcy Law: Revitalization of the "Necessaries" Doctrine*, 41 Vand. L. Rev. 1, 2 (1988) ("divorce law in the United States has undergone radical changes in the past few decades").

32. *See* L. Halem, Divorce Reform 233, 237-38 (1980).

33. Fault-based grounds for divorce were required by every state prior to 1970. *See* L.

tions law of nearly every state today,[34] manifesting widespread recognition that "parties to irretrievably broken marriages are best off ending such relationships."[35]

Divorce laws governing property divisions have also changed drastically in recent years.[36] Title-based[37] statutes, under which the court was not permitted to divide marital property by transferring title from one spouse to the other,[38] have been replaced in almost every state by equitable distribution laws, which do allow such title assignments.[39] In implementing the general theory that marriage is a partnership or shared enterprise and that post-divorce property should be distributed accordingly,[40] equitable distribution laws[41] give the divorce court discretion to

---

Weitzman, *supra* note 31, at x. Traditional moral concepts about the nature and permanence of the marital relationship were embodied in statutes requiring that "[o]ne party had to be judged guilty of some marital fault, such as adultery or cruelty, before a divorce could be granted." *Id.* The no-fault laws, first adopted by California in 1970, were the first significant alteration in divorce codes in the United States in the twentieth century. *See* L. Halem, Divorce Reform 233, 238 (1980). The California law recognized "irreconcilable differences" as a legal cause for divorce. *See* L. Weitzman, *supra* note 31, at x.

34. State laws vary considerably, some permitting irreconcilable differences without further limitation as a ground for divorce, while others permit conditional no-fault, such as a waiting period between separation and divorce. *See, e.g.*, Cal. Civ. Code § 4506 (West 1983) (irreconcilable differences or incurable insanity); N.Y. Dom. Rel. Law § 170 (McKinney 1988) (living separately and apart for at least one year pursuant to a separation agreement, or, alternatively, one of five traditional grounds). *See generally* State Divorce Laws, Fam. L. Rep. (BNA) at 401:001-453:001 (summarizing divorce laws of each state).

In some states, the misconduct of the parties continues to be one factor in property division determinations. *See* J. Gregory, *supra* note 31, ¶ 9.03, at 9-11; 2 H. Clark, *supra* note 5, § 16.3, at 194.

35. J. Gregory, *supra* note 31, at v.

36. *See id.*

37. *See id.* ¶ 1.01, at 1-1.

38. *See* Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. Rev. 165, 167-68 (1976).

39. *See* J. Gregory, *supra* note 31, ¶ 1.06, at 1-16. Mississippi is the only state that has not clearly adopted the system of permitting divorce courts to divide certain property owned by the parties at the time of divorce. *See id.*; Oldham, *Tracing, Commingling, and Transmutation*, 23 Fam. L.Q. 219, 219 and n.1 (1989). However, the Mississippi courts do sometimes use their equitable powers to effect a transfer of property. *See* J. Gregory, *supra* note 31, ¶ 1.06, at 1-19.

40. *See* J. Gregory, *supra* note 31, ¶ 1.02, at 1-5; 2 H. Clark, *supra* note 5, § 16.3, at 194; *see also* Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 Fam. L.Q. 253, 256-57 (1989) (the purpose of court-ordered economic settlement at marriage dissolution is fair sharing so one party "does not suffer unduly while the other gains because of marriage experience" and to achieve fair sharing of benefits and burdens of the marriage). Because state statutes vary widely, a universal definition of equitable distribution that is more specific than the principle of shared enterprise is difficult to formulate. *See* J. Gregory, *supra* note 31, ¶ 1.02, at 1-6.

41. Although there are many variations in property division statutes, the states can generally be divided into two groups: community property states, in which each spouse has an interest in the assets of the marriage during the marriage, and common-law property states, in which each spouse owns the property held in his or her name. *See* 2 H. Clark, *supra* note 5, § 16.1, at 177-78. Almost all of the common-law states have adopted equitable distribution laws. *See supra* note 39. In some of the common-law equitable

assign property.[42] When the marital home is the only substantial asset, the court often divides the net marital assets by giving one spouse the property and the other a money judgment secured by a lien on the property.[43] Liens on homestead property that secure a money judgment are based either on settlements agreed upon by the parties and approved by the judge[44] or, in contested divorces, on fact-specific determinations by state divorce courts.[45]

Property division has begun to replace alimony as a device for adjusting the financial relationship of the spouses,[46] partly because women today are more likely to hold jobs outside the home,[47] and partly because property division promotes finality in resolving a divorcing couple's financial obligations.[48] In encouraging finality, as well as peaceable reso-

---

distribution states, spouses' property is classified as either marital or separate, with the courts dividing only the marital property; in others, the courts divide all property owned by either spouse. *See* 2 H. Clark, *supra* note 5, § 16.1, at 177-78. The theory of shared enterprise derived from the community property system underlies the equitable distribution laws of the common-law states. *See* J. Gregory, *supra* note 31, ¶ 1.02, at 1-5. Some common-law states grant each spouse a "vested interest" in the marital property after a matrimonial action is filed, although the amount of the interest is unknown until the final decree is entered by the divorce court. 2 H. Clark, *supra* note 5, at 177-78 nn. 11-12. The Uniform Marital Property Act provides that each spouse owns an "undivided one-half interest in the marital property" at the time the property is acquired. Unif. Marital Prop. Act § 4(c) and comment, *reprinted in* Fam. L. Rep. (BNA) at 201:0100-0101 (1983); *see* Wis. Stat. Ann. § 766.31(3) (West 1988). In contrast, under most equitable distribution statutes, family law interests in marital property are "delayed-action in nature and come to maturity only during the dissolution process." Unif. Marital Prop. Act § 4 comment, *reprinted in* Fam. L. Rep. (BNA) at 201:0101 (1983).

42. *See* 2 H. Clark, *supra* note 5, § 16.1, at 176-77; J. Gregory, *supra* note 31, ¶ 1.03, at 1-6. Most statutes provide for either equal or equitable distribution. *See generally* State Divorce Laws, Fam. L. Rep. (BNA) at 401:001-453:001 (1989) (summarizing each state's divorce property statutes). In statutes or through judicial interpretation, states also usually provide the court with factors to consider. *See, e.g.*, Ark. Stat. Ann. § 9-12-315(a)(1)(A) (1991) (one-half to each party but equitable distribution permitted if court takes nine factors into consideration); Col. Rev. Stat. § 14-10-113(1) (1987) (equitable distribution based on all relevant factors, including four specified); N.Y. Dom. Rel. Law § 236(B)(5)(d) (McKinney 1986) (equitable distribution, listing thirteen factors, including "any other factor which the court shall expressly find to be just and proper"). *See generally* State Divorce Laws, *supra*, at 401:001-453:001 (surveying statutory law on factors courts take into account in making property divisions); 2 H. Clark, *supra* note 5, § 16.3, at 190-96 (same). The equitable distribution provision of the Uniform Marriage and Divorce Act " 'authorizes the division . . . as the primary means of providing for the future financial needs of the spouses.' " Levy, *An Introduction to Divorce-Property Issues*, 23 Fam. L.Q. 147, 148 n.4 (1989) (quoting Commissioners' Prefatory Note to the Unif. Marriage and Divorce Act, § 307, 9A U.L.A. 5 (1987)); *see also* 2 H. Clark, *supra* note 5, § 16.1, at 181-82 (justifiable to infer from statutes that "purpose of the property division is as much to provide for the financial needs of the spouses after the divorce as to award to each what he or she equitably owns").

43. *See supra* note 3 and accompanying text.

44. *See* 2 H. Clark, *supra* note 5, § 19.1, at 408-09 (discussing settlement agreements).

45. *See supra* note 42 and accompanying text.

46. *See* 2 H. Clark, *supra* note 5, § 16.1, at 175.

47. *See id.*

48. *See* Scheible, *supra* note 31, at 2-3.

lution through negotiation rather than litigation,[49] the policies of current divorce law attempt to afford both former spouses a fresh start.[50]

B. *The Debtor's Fresh Start and Divorce Property Divisions*

1. The Homestead Exemption and Section 522(f)(1)

Bankruptcy law seeks to provide a fresh start of another sort—a fresh start for debtors.[51] By the 1970s, the ascendancy of the consumer credit industry[52] and a "rising tide of consumer bankruptcies"[53] threatened this traditional policy of protecting debtors, leading Congress to modernize bankruptcy law in the Bankruptcy Reform Act of 1978.[54] Placing strong emphasis on effective implementation[55] of the fresh start policy for debtors,[56] Congress sought to ensure that the debtor would emerge from bankruptcy with most of his debts discharged,[57] and with at least some of

49. *See id.* at 2; 2 H. Clark, *supra* note 5, § 19.1, at 410 (general considerations relating to purposes and advantages of property settlements).

50. *See* Scheible, *supra* note 31, at 3.

51. *See infra* note 56.

52. *See* House Report, *supra* note 15, at 116, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6076 ("Consumer finance has become a major industry, and more and more goods have been sold on credit.").

53. *See* I *Report of the Comm'n on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 2 (1973) [hereinafter *Commission Report*], *reprinted in* [2 App. Legis. Hist.] L. King, Collier on Bankruptcy I at I-2 (15th ed. 1990) [hereinafter Collier on Bankruptcy (15th ed.)]; *see also* 124 Cong. Rec. S14,719 (daily ed. Sept. 7, 1978) (remarks of Sen. DeConcini), *reprinted in* [3 App. Legis. Hist.] Collier on Bankruptcy (15th ed.), *supra*, at viii-4.

54. *See* [Bankruptcy Reform] Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). The 1978 statute, often referred to as the Bankruptcy Reform Act of 1978, replaced the 1898 Bankruptcy Act. *See* G. Treister, *supra* note 11, § 1.01, at 1. *See generally* Klee, *Legislative History of the New Bankruptcy Law*, *reprinted in* [2 App. Legis. Hist.], Collier on Bankruptcy (15th ed.), *supra* note 53, at vi, xxv-xxvii (describing ten-year legislative history of Bankruptcy Code and suggesting order in which to use sources for interpreting Code's provisions).

55. *See* Ginsberg, *Introduction to the Symposium: The Bankruptcy Reform Act of 1978 — A Primer*, 28 DePaul L.Rev. 923, 923 (1979) (Code reflects a "swing of the pendulum from the spirit of creditor protection to the spirit of debtor protection in the legal age of the consumer").

56. House Report, *supra* note 15, at 126 ("a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start"), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6087. The "fresh start" concept has traditionally been a primary goal of bankruptcy law. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (bankruptcy "gives to the honest but unfortunate debtor . . . a new opportunity in life . . . unhampered by the pressure and discouragement of preexisting debt").

57. *See* House Report, *supra* note 15, at 128 ("Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge."), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6089. A discharge bars "all future legal proceedings for the enforcement of the discharged debt . . . ." [Index & Tables] Collier on Bankruptcy (15th ed.), *supra* note 53, at GT-5. Discharge measures the rights of claimants against the individual debtor and determines which assets should be kept from creditors. *See* T. Jackson, The Logic and Limits of Bankruptcy Law 225 (1986). The primary effect of discharge for the debtor is relief from personal liability for pre-petition debts. *See* 11 U.S.C. § 524 (1988) (provision defining protections for debtor to preserve effectiveness of discharge). If a debt is discharged, the creditor's non-bankruptcy entitlement will

his property exempt from the claims of his creditors.[58]

In keeping with the fresh start policy, section 522(b)[59] makes the traditional homestead exemption[60] available to debtors. Debtors' exemptions are given further protection[61] in section 522(f)(1),[62] which enables debtors to avoid certain liens on their exempt property, including their homesteads.[63] The extent to which debtors can avoid a lien depends primarily upon the types and amounts of homestead property they can exempt.[64] The Code authorizes states[65] to choose between limiting the debtor to the exemptions allowed under state law[66] or permitting a debtor to choose

---

be treated under bankruptcy law. *See* T. Jackson, *supra*, at 225. The creditor will share in the distribution from the debtor's estate and may not seek any further payment from the debtor. *See* G. Treister, *supra* note 11, §§ 7.05, at 311, and 7.10(g), at 347 (effect of discharge for individual debtors in Chapters 7 and 13).

58. *See* G. Treister, *supra* note 11, § 7.02, at 299 ("One way the Bankruptcy code works to give the debtor a fresh start is through the exemption provisions.").

59. 11 U.S.C. § 522(b) (1988).

60. *See generally* T. Crandall, *supra* note 11, ¶ 6.07[1][d], at 6-132-35 (describing state homestead exemptions). The federal definition of homestead refers to property that the debtor or a dependant uses as a residence but also includes personal property and several other kinds of real property up to an aggregate value of $7,500. *See* 11 U.S.C. § 522(d)(1) (1988). Although most states have exemption laws, their substance varies widely. *See* T. Crandall, *supra* note 11, ¶ 6.07[1][d], at 6-132. State definitions of homestead usually require that the property be used as a residence. *See, e.g.*, Wash. Rev. Code Ann. § 6.13.010(1) (Supp. 1991) ("The homestead consists of the dwelling house"); Wis. Stat. Ann. § 815.20 (Supp. 1990) ("An exempt homestead . . . selected by a resident owner and occupied by him or her"). *But see* Tex. Prop. Code Ann. § 41.002 (1991 Supp.) (defining homestead as property "used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area").

The bankruptcy laws of the United States have always permitted debtors to exempt some property from the reach of creditors. *See* 3 Collier on Bankruptcy (15th ed.), *supra* note 53, ¶ 522.01, at 522-8. The homestead exemption has been a primary source of debtor protection since 1839, when it first appeared in the laws of the Republic of Texas. *See* Riesenfeld, *Homestead and Bankruptcy in Colorado and Elsewhere*, 56 U. Colo. L. Rev. 175, 175 (1985).

61. For a comparison with debtors' lien avoidance rights on exempt property under the 1898 Bankruptcy Act, see *infra* note 166.

62. *See* 11 U.S.C. § 522(f)(1) (1988).

63. *See id.* The bankruptcy trustee has broad lien avoidance powers; the debtor is limited to section 522(f). *See* 11 U.S.C. § 522(f) (1988); Treister, *supra* note 11, § 7.03, at 305; *see also* Treister, *supra* note 11, § 4.03, at 137-91 (survey of trustee's avoiding powers).

64. *See* 11 U.S.C. §§ 522(b)(1)-(2) (1988).

65. *See* 11 U.S.C. § 522(b)(2)(A) (1988).

66. Like the 1898 Act, the Bankruptcy Code permits debtors to use state exemption statutes. *See* 3 Collier on Bankruptcy (15th ed.), *supra* note 53, ¶ 522.02, at 522-10-11. In contrast to the 1898 Act, however, and like the 1867 Bankruptcy Act, the Code also offers a federal exemption scheme. *See id.* States may withdraw or "opt out" of the federal scheme, thereby restricting debtors domiciled in those states to their state exemption laws, but section 522(b)(1) requires that states must take the step of indicating specifically that its citizens are not authorized to use the federal exemption. *See* 11 U.S.C. § 522(b)(1); 3 Collier on Bankruptcy (15th ed.), *supra* note 53, ¶ 522.02, at 522-12; *see, e.g.*, Neb. Rev. State § 25-15,105 (1989) ("The federal exemptions provided in [the Bankruptcy Code] are hereby rejected by the State of Nebraska. The State of Nebraska elects to retain the personal exemptions provided under Nebraska statutes and the Nebraska Constitution . . . ."); N.Y. Debt. & Cred. Law § 284 (McKinney 1990 and Supp. 1991)

the exemptions provided in the Code.[67] Some three-quarters of the states require debtors to use their state homestead statutes.[68] Other states allow debtors to elect either their state homestead law or the federal homestead provision.[69] Because homestead allowances vary widely from state to state, the homestead liens that debtors can avoid range from below the federal level of $7,500 to substantially over $80,000.[70] Consequently, the proportional impact of homestead lien avoidance on divorce property divisions is dependent upon the debtor's homestead entitlement.[71]

Within the homestead allowance, debtors may avoid liens encumber-

("debtors domiciled in this state are not authorized to exempt from the estate property that is specified under subsection (d) of [§ 522(b) of the Bankruptcy Code]").

Congress rejected efforts by reformers to require a uniform federal exemption in order to overcome the wide variations in state laws. *See* I *Commission Report* 169-71, *supra* note 53, *reprinted in* [2 App. Legis. Hist.] Collier on Bankruptcy (15th ed.), *supra* note 53, at I-I-169-71. *See generally* Haines, *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 Ariz. St. L.J. 1, 5-10 (background of the "opt-out" clause).

67. *See* 11 U.S.C. § 522(d) (1988) (defining the federal "menu" listing types of property and the aggregate value of each that can be exempted). In addition to real or personal property used as a residence, types of exempt property include one motor vehicle, household furnishings, professional books or tools, professionally prescribed health aids and various benefits. *See id.* Section 522(d)(1) is commonly referred to as the federal homestead exemption. *See* G. Treister, *supra* note 11, § 7.02, at 301. In addition to the section 522(d) list, debtors may also exempt any property that is exempt under federal law, such as social security payments and veterans benefits. *See* 11 U.S.C. § 522(b)(2)(A); House Report, *supra* note 15, at 360-61, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6316. State exemption provisions vary widely in types and amounts of property that can be exempted. *See, e.g.*, N.Y. Debt. & Cred. Law §§ 282-283 (McKinney 1990) (exemptions include motor vehicles not exceeding $2,400 in value); S. D. Codified Laws Ann. § 43-45-2 (1983) (books and pictures absolutely exempt).

68. *See* 3 Collier on Bankruptcy (15th ed.), *supra* note 53, ¶ 522.02, at 522-11 n.4a (listing states that have enacted legislation prohibiting their citizens from electing the section 522(d) federal exemption scheme).

69. *See id.* at ¶ 522.02, at 522-11.

70. *See, e.g.*, Ala. Code § 6-10-2 (Supp. 1990) ($5,000 homestead exemption); N.D. Cent. Code § 47-18-01 (Supp. 1989) ($80,000 of debtor's equity); N.Y. Civ. Prac. L. & R. 5206 (McKinney Supp. 1990) ($10,000); Wash. Rev. Code Ann. § 6.13.030 (Supp. 1991) ($30,000); Wis. Stat. Ann. § 815.20(1) (Supp. 1990) ($40,000). Some states define homestead allowance in acreage rather than dollar value. *See, e.g.*, Kan. Stat. Ann. § 60-2301 (1983) (160 acres of farming land or one acre within an incorporated town or city); Tex. Prop. Code Ann. § 41.002 (Vernon 1991 Supp.) (urban home, not more than one acre; rural home, up to 100 acres for a single, adult person, or up to 200 acres for a family).

Some commentators have criticized the Code's exemption provisions on the grounds that debtors in states with liberal exemptions are able to get "a 'head start' rather than a 'fresh start'." *See* Vukowich, *supra* note 19, at 802. The constitutionality of the opt-out provision has withstood challenge in the appellate courts against arguments that the bankruptcy laws are required to be uniform and that the opt-out provision is an impermissible delegation of congressional power to the states. *See* T. Crandall, *supra* note 11, ¶ 13.07[1], at 13-32-33; G. Treister, *supra* note 11, § 7.02, at 299-301 (citing, as an example, Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983)).

71. In *Farrey v. Sanderfoot*, for example, the debtor husband claimed the $40,000 Wisconsin homestead exemption and then sought to avoid his ex-spouse's lien of over $29,000, which was her entire share of the net marital assets. *See* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 599 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

ing homestead rights when the following conditions are met:[72] first, the debtor must have an interest[73] in the property on which the lien is fixed;[74] second, the lien must impair or reduce[75] an exemption to which the debtor is entitled;[76] finally, the lien must be a judicial lien, which is defined in the Code as a lien "obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."[77] Significantly, the Code differentiates between judicial liens and liens that are security interests created by agreement.[78] Neither the language of section 522(f)(1)[79] nor its legislative history,[80] however, expressly addresses divorce-related liens. Yet because divorce decrees, whether contested or uncontested, are obtained by a state court judgment,[81] debtors seeking avoidance may argue that property division homestead liens that are part of a divorce decree are judicial liens.[82]

---

72. *See* 11 U.S.C. § 522(f)(1) (1988). *See also Sanderfoot*, 899 F.2d at 601 (listing three requirements for lien avoidance) (citations omitted). The majority view holds that section 522(f) applies to state exemption statutes in states that have opted out. *See* G. Treister, *supra* note 11, § 7.03, at 307; Bowmar, *supra* note 18, at 385; *see also infra* note 101 (discussion of judicial debate over federal pre-emption of state exemptions conflicting with the intent of section 522(f)).

73. *See* Bowmar, *supra* note 18, at 388-91 (discussing issues involved in determining the debtor's interest). The debtor can avoid the lien only to the extent of the exemption allowance; thus, if the property division exceeds the exemption allowance, the excess amount of the lien will remain valid to the extent of the debtor's remaining interest in the property and may be enforced by the creditor. *See* 3 Collier on Bankruptcy (15th ed.), *supra* note 53, ¶ 522.29, at 522-90.

74. *See infra* notes 107-114, 122-133 and accompanying text (on the requirement that the lien fix on an interest of the debtor in property).

75. On impairment and methods for calculating the debtor's interest, see *infra* note 100.

76. *See infra* note 101.

77. 11 U.S.C. § 101(32) (1988); *see also supra* note 18 (discussing liens in bankruptcy).

78. A judicial lien is specifically distinguished in the Code from two other kinds of liens, which are not subject to section 522(f)(1): a "security interest," which means "a lien created by an agreement," 11 U.S.C. § 101(45) (1988), and a statutory lien, which is a lien "arising solely by force of a statute on specified circumstances or conditions," *id.* § 101(47), such as mechanics' liens. *See* Bowmar, *supra* note 18, at 376 and nn. 5-6. Security interests are voluntary, consensual types of liens, such as real estate mortgages. *See id.* (comprehensive discussion of security interests and statutory liens in bankruptcy); *see also infra* notes 117, 140 and accompanying text (on consent in property settlement agreements).

79. *See* 11 U.S.C. § 522(f)(1).

80. *See infra* notes 166-178.

81. *See generally* 2 H. Clark, *supra* note 5, § 16.1, at 176 (discussing authority of state courts to order property divisions).

82. *See, e.g.*, Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 603 (7th Cir.) ("no doubt that [non-debtor spouse's lien], granted by Wisconsin Circuit Court . . . was obtained by 'legal proceedings' "), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); *In re* Porter, 112 Bankr. 979, 980 (Bankr. W.D. Mo. 1990) (debtor "alleges that a judicial lien was created . . . by virtue of a judgment during the judicial dissolution of their marriage").

2. Dischargeability and Lien Avoidance: Section 523(a)(5) and Section 522(f)(1)

While debtors seeking to attack divorce decree homestead liens must meet the specific requirements of section 522(f)(1), debtors are also limited by other Code provisions that require that the underlying debt must be dischargeable;[83] if it is not, exempt property is available for the satisfaction of the debt, whether the debt is secured or not.[84] Under section 523(a)(5),[85] property division debts that are intended to provide alimony, maintenance or child support are non-dischargeable,[86] and both the debtor and the debtor's exempt property remain liable for their payment.[87] But property division debts that are not intended as family support, even if part of a pre-divorce agreement of the parties,[88] are dischargeable,[89] and the debtor is excused from personal responsibility for paying for them.[90] The exempt property itself, however, continues to be available for the satisfaction of a dischargeable debt, unless the lien securing the debt is avoidable under section 522(f)(1) or one of the Code's other avoidance provisions.[91] Thus, a homestead lien securing a dischargeable property division debt is preserved and survives bankruptcy unless it is avoided.[92]

---

83. *See* 11 U.S.C. §§ 522(c), 523(a)(5) (1988). On discharge, see *supra* note 57.

84. *See* 11 U.S.C. § 522(c) (1988) ("property exempted under this section is not liable . . . for any debt . . . except . . . a debt of a kind specified in . . . section 523(a)(5)").

85. 11 U.S.C. § 523(a)(5) (1988). Section 523 provides for exceptions to discharge. Section 523(a)(5) specifies, as one type of non-dischargeable debts, debts "to a . . . former spouse . . . for alimony to, maintenance for, or support of such spouse . . . , in connection with a . . . divorce decree . . . or property settlement agreement. " *Id.* Regardless of the terminology used by the divorce court, the liability must be "actually in the nature of alimony, maintenance, or support." *Id.* § 523(a)(5)(B).

86. *See id.* § 523(a)(5). For a discussion of federal court determinations of dischargeability, see *infra* note 188 and accompanying text.

87. *See* 11 U.S.C. § 522(c)(1) (1988). A determination of liability assumes that the other prerequisites to liability are met, such as filing a proper claim under section 501 and 502; *see* 11 U.S.C. §§ 501, 502 (1988); *see also supra* note 11 (on allowed claims).

88. *See* 11 U.S.C. § 523(a)(5) (1988).

89. *Id.*

90. *See supra* note 57.

91. *See* 11 U.S.C. § 522(c)(2)(A)(i) (1988). The principle that valid liens on exempt property survive the bankruptcy discharge was established in Long v. Bullard, 117 U.S. 617, 620-61 (1886) and reaffirmed in the House and Senate comments on section 522(c). *See* House Report, *supra* note 15, at 361, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6316-17; S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5861-62; *see also* Bowmar, *supra* note 18, at 379 (discharge of debt "means only discharge of the *personal liability* of the debtor;" a holder of a lien that survives bankruptcy may resort only to property itself for payment) (emphasis in original).

92. Whether the dischargeability of a property division debt should be given weight in, or even be determinative of, the avoidability of a lien to secure that debt is a subject of controversy in the divorce decree homestead lien avoidance cases. *See, e.g.*, Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 784 (9th Cir. 1989) (award of property would have been dischargeable in bankruptcy under section 523(a)(5); allowing avoidance is thus "consistent with Congress's policy"); Coffman v. Coffman (*In re* Coffman), 52 Bankr. 667, 676 (Bankr. D. Md. 1985) (debt found dischargeable under section 523(a)(5)

As the Code applies to the debtor's rights with respect to divorce property divisions, the personal liability of the debtor is determined under section 523(a)(5), while the availability of the homestead property as the source for payment of the debt is determined by the avoidance inquiry under section 522(f)(1).[93] The divorce decree lien avoidance issue, however, involves only property divisions that are dischargeable.[94] Consequently, when such liens are avoided, the non-debtor spouse, reduced to the status of an unsecured creditor, is limited to sharing the proceeds of the pre-petition estate with other general creditors.[95] When bankruptcy intervenes after divorce but before the property division debt is satisfied,[96] application of section 522(f)(1) to divorce decree homestead liens brings into conflict the fresh start goals of the divorced couple as debtor and non-debtor spouse.

II. DOES THE LANGUAGE OF SECTION 522(F)(1) ALLOW DEBTORS TO AVOID DIVORCE DECREE LIENS ON THEIR HOMESTEADS?

Determining whether divorce decree homestead liens[97] qualify as liens subject to invalidation by the debtor is problematic in that its language can arguably support either avoidance or non-avoidance.[98] Such secured

---

and lien avoided without discussion). *But see* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598 (lien avoided but dischargeability of debt not part of court's analysis), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); Williams v. Williams (*In re* Williams), 38 Bankr. 224, 226-27 (Bankr. N.D. Okla. 1984) (lien not avoided; analyzes issues of dischargeability and avoidance separately); *see also supra* notes 120, 146, 192-193 and accompanying text (on relationship between dischargeability of debt and avoidance of liens).

93. Although by its language section 522(f)(1) does not require that the bankruptcy court analyze the nature of the debt under section 523(a)(5) when making a lien avoidance determination, *see* 11 U.S.C. § 522(f)(1) (1988), non-debtor spouses sometimes defend against avoidance on the basis of non-dischargeability of the property division debt, thus leading the court to make determinations of both dischargeability and avoidance. *See Coffman*, 52 Bankr. at 676; *Williams*, 38 Bankr. at 225-27.

94. *See Pederson*, 875 F.2d at 784; *In re* Sanderfoot, 83 Bankr. 564, 566 (Bankr. E.D. Wis.), *rev'd*, 92 Bankr. 802 (E.D. Wis. 1988), *aff'd sub nom.* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

95. *See supra* note 57.

96. The frequency with which recently divorced individuals file for bankruptcy is well-documented. *See* Scheible, *supra* note 31, at 3 & n.8. In commenting on the Seventh Circuit's decision affirming the husband debtor's motion to avoid his ex-wife's homestead lien in *Sanderfoot*, 899 F.2d 598, one journalist noted, "The very ordinariness of the Sanderfoot story suggests how far-reaching the case's ramifications could be." Margolick, *Can Bankruptcy Reduce The Price of a Divorce?*, N.Y. Times, Mar. 2, 1991, at 9, col. 2.

Nearly 1.2 million divorces were granted by state courts in 1988. *See* United States Dep't of Commerce, Statistical Abstract of the United States 89 (1990). Personal bankruptcies filed and pending nearly doubled between 1981 and 1988, rising from 312,914 to 526,066. *See id.* at 532.

97. *See generally supra* notes 72-77 and accompanying text (on requirements for section 522(f)(1) lien avoidance).

98. *See infra* Parts IIA-B and accompanying text.

claims must be liens (1) "fixing . . . on an interest of the debtor in property,"[99] (2) obtained by a legal or equitable proceeding[100] and (3) impairing an exemption[101] to which the debtor would otherwise have been entitled.[102] One approach focuses on the technical definitions in the Code and its fresh start principles, leading to affirmance of the debtor's avoidance powers.[103] The other relies primarily on the equitable principles of modern divorce law and the nature of the marital relationship to distinguish divorce decree homestead liens from the federal definition of judicial lien, with the result that the lien is preserved for the non-debtor spouse.[104]

A. *Reading The Language of Section 522 (f)(1) So That Lien Avoidance Must Be Granted*

The conclusion that the language and principles of the Bankruptcy

99. 11 U.S.C. § 522(f)(1) (1988).

100. *See* 11 U.S.C. § 101(32) (1988); *see also supra* note 78 (describing liens).

101. *See In re* Porter, 112 Bankr. 979, 984-85 (Bankr. W.D. Mo. 1990); *see generally* Bowmar, *supra* note 18, *passim* (for issues relating to methods of calculating impairment). For a discussion of whether states that 'opt out' can legislate exceptions to state exemptions that otherwise would be subject to avoidance by the debtor under section 522(f), see *infra* note 101.

102. An unsettled issue relating to impairment of the debtor's exemption is whether state exemption statutes can exclude divorce decree homestead liens and thereby frustrate section 522(f)(1). The debtor's exemption would not be impaired because the debtor would never have been entitled to exempt the property secured by the lien in the first instance and therefore the lien is not avoidable. *See, e.g., In re* Stone, 119 Bankr. 222, 236 (Bankr. E.D. Wash. 1990) (liens in which debtors elected the Washington homestead exemption are type of lien excluded from state exemption statute; therefore, lien underlying judicial lien imposed by the divorce court does not impair state exemption and judicial lien is unavoidable); Holtzhauser v. Holtzhauser (*In re* Holtzhauser), 117 Bankr. 519, 521 (Bankr. D. Neb. 1990) (court construed state law and concluded that "[u]nder Nebraska law the debtor may not invoke the homestead exemption in the home owned during the marriage, against the claims of his former spouse under a divorce decree"). The failure of a divorce-related lien to impair the debtor's state homestead exemption as a ground for denying avoidance has not been specifically challenged in the circuit courts. *See supra* note 25.

For a discussion of the relationship between state exemptions and the general federal exemption statutes, see 3 Collier on Bankruptcy (15th ed.), *supra* note 53, § 522.29, at 522-95-96 and n.2a (prevailing view is that states cannot defeat section 522(f)); *see also* T. Crandall, *supra* note 11, ¶ 13.07[1], at 13-34 (federal courts differ on whether states can preclude lien avoidance under 522(f)). *See generally*, Parkinson, *The Lien Avoidance Section of the Bankruptcy Code: Can It Be Avoided By State Exemption Statutes?*, 11 Ohio N.U.L. Rev. 319 (1984) (analysis of history and issues relating to federal-state exemption provisions). The United States Supreme Court has granted certiorari on whether section 522(f)(1) preempts state exemption laws. *See* Owen v. Owen, 877 F.2d 44 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2166 (1990) (No. 89-1008).

The state exemption issue is beyond the scope of this Note. Determination of the status of divorce decree homestead liens under state exemption laws would not address their avoidability when debtors elect the federal exemption scheme. This Note argues for a uniform exception for divorce decree homestead liens under section 522(f)(1).

103. *See infra* Part IIA and accompanying text.

104. *See infra* Part IIB and accompanying text.

Code require that debtors have a right to avoid[105] divorce decree homestead liens is based on the view that such a lien fits within the requirements of section 522(f)(1).[106] The requirement of a lien "fixing on an interest of the debtor in the property"[107] is met because the divorce court's judgment effectuates a sequential exchange when the words in the dissolution decree grant the marital residence to the debtor spouse subject to the non-debtor's lien.[108] The divorce decree extinguishes any prior interest of the spouses in the marital property.[109] Next, the decree creates new interests by giving title to the debtor spouse and a secured money judgment to the non-debtor spouse.[110] Lastly, the decree fixes the lien onto the debtor spouse's new interest.[111] The non-debtor spouse's property interest becomes "simply collateral for a debt."[112] Accordingly, the non-debtor spouse's prior interest in the homestead[113] is "simply irrelevant" because the divorce decree terminated that interest.[114]

105. *See* Farrey v. Sanderfoot (*In re* Sanderfoot, 899 F.2d 598, 605-06 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 783 (9th Cir. 1989); Wood v. Godfrey (*In re* Godfrey), 102 Bankr. 769, 773 (Bankr. 9th Cir. 1989); *In re* Porter, 112 Bankr. 979, 982 (Bankr. D. Mo. 1990); Duncan v. Sczepanski (*In re* Duncan, 85 Bankr. 80, 82 (W.D. Wis. 1988); *In re* Showinsky, 117 Bankr. 284, 287 (Bankr. W.D. Mich. 1990); Boggess v. Boggess (*In re* Boggess), 105 Bankr. 470, 475 (Bankr. S.D. Ill. 1989); *In re* Brothers, 100 Bankr. 565, 567-68 (Bankr. N.D. Ala. 1989); *In re* Alvarado, 92 Bankr. 923, 926-27 (Bankr. D. Kan. 1988).

106. *See supra* note 72 and accompanying text.

107. 11 U.S.C. § 522(f)(1) (1988).

108. *See Sanderfoot*, 899 F.2d at 602.

109. *See id.*; *infra* note 114 and accompanying text.

110. *See Sanderfoot*, 899 F.2d at 602.

111. *See id.* The *Sanderfoot* court noted that "the 'convoluted theory' [of preexisting interest] espoused in *Boyd* [*see infra* note 124] ignored the fact that 'the decree gives one party title outright and that is the interest to which the lien attaches.' " *Id.* (quoting Maus v. Maus, 837 F.2d 935, 939 (10th Cir. 1988)), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350). For a discussion of *Maus*, see *supra* note 117.

112. Boyd v. Robinson, 741 F.2d 1112, 1115 (8th Cir. 1984) (Ross, J. dissenting). Judge Ross noted in dissent, "What had been a property interest became simply collateral for a debt . . . . the lien *must* have attached to [the debtor's] interest in the house, for no one else possessed any ownership interest in the house."). *Id.*; *accord Sanderfoot*, 899 F.2d at 601-02; Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 783 (9th Cir. 1989).

Judge Ross suggested that there would have been no problem if the court had given the non-debtor spouse an ownership interest rather than a lien. *See Boyd*, 741 F.2d at 1115 n.1 (Ross, J., dissenting). *But see infra* note 181 (on why joint ownership after divorce may not be a fair resolution of the issue on policy grounds).

113. *See infra* notes 122-129 and accompanying text.

114. *See* Farrey v. Sanderfoot (*In re* Sanderfoot, 899 F.2d 598, 602 (7th Cir.) (quoting Duncan v. Sczepanski (*In re* Duncan), 85 Bankr. 80, 82 (W.D. Wis. 1988)), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

The *Sanderfoot* court also noted that, to the extent state property law was relevant, great weight had been accorded in reaching its decision to the two Wisconsin district courts that had avoided divorce decree homestead liens. *See id.* at 602 n.12.

The Seventh Circuit affirmed the district court's reversal of the bankruptcy court decision denying lien avoidance. *See id.* at 606, *aff'g* 92 Bankr. 802 (E.D. Wis. 1988). The bankruptcy court applied the Eighth Circuit's analysis in Boyd v. Robinson, 741 F.2d 1112 (8th Cir. 1984) and determined that under Wisconsin's equitable property division law as well as Wisconsin's Marital Property Act, the non-debtor wife had an interest in the homestead that survived the divorce because it did not attach to the debtor's interest.

The rationale supporting lien avoidance maintains that the requirement of section 522(f)(1) that the lien be a judicial lien is clearly met in a contested divorce because the encumbrance is imposed by the court without prior consent of the parties.[115] The lien therefore falls within the Code's "unambiguous definition"[116] of judicial lien. In an uncontested divorce, however, where the parties' agreement is incorporated into the final decree, a finding that the lien is a judicial lien requires looking to the final court order making the property settlement judicially enforceable rather than to the underlying consensual arrangement.[117]

By focusing largely on the language of the lien avoidance section and the interlocking statutory provisions[118] defining that language, it is possible to be led "ineluctably" to the conclusion that divorce decree liens on exempt homestead property are avoidable.[119] Permitting lien avoidance arguably supports Congressional policy that property settlement debts are dischargeable because the debtor's fresh start is more fully protected from the post-marital obligation.[120] Although affirmation of lien avoid-

---

See In re Sanderfoot, 83 Bankr. 564, 568 (Bankr. E.D. Wis.), *rev'd* 92 Bankr. 802 (E.D. Wis. 1988), *aff'd sub nom.* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 606 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990). For the approach to lien avoidance that focuses on the non-debtor spouse's prior interest, see *infra* notes 122-132 and accompanying text.

115. *See Sanderfoot*, 899 F.2d at 605.

116. *See id.*; *see also* Pederson v. Stedman (*In re* Pederson), 78 Bankr. 264, 267 (Bankr. 9th Cir. 1987) (lien "fits precisely within the Code's definition of 'judicial lien' "), *aff'd sub nom.* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781 (9th Cir. 1989). The *Sanderfoot* court expressly rejected other rationales developed by courts to "salvag[e] liens enforcing property settlements." 899 F.2d at 604 (quoting *Pederson*, 875 F.2d at 783 n.4). For alternative definitions of the divorce decree lien, see *infra* notes 135-143 and accompanying text.

117. There is no recorded decision of an appellate court granting lien avoidance in a divorce in which a property agreement embodying the parties' consent was incorporated into the final decree, except Maus v. Maus, 837 F.2d 935, 938 (10th Cir. 1988). In that case, unlike the *Sanderfoot* line of cases, the lien was not placed on the homestead in the divorce document. *See* Parker v. Donahue (*In re* Donahue), 862 F.2d 259, 266-67 n.11 (10th Cir. 1988) (distinguishing Maus because in *Maus*, lien was not "*created in the divorce decree itself*") (emphasis in original). *But see In re* McCormmack, No. OR-90-1341 (Bankr. 9th Cir. 1991) (rejecting trial court determination that the mortgage instrument, rather than the divorce decree, was "the operative document that created the lien"), *rev'g* 111 Bankr. 330 (Bankr. D. Or. 1990); *In re* Showinsky, 117 Bankr. 284, 287 (Bankr. W.D. Mich. 1990) (lien avoided despite consent of parties to property agreement incorporated into decree).

118. *See* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 782 (9th Cir. 1989).

119. *See id.* ("Although somewhat complex, the interlocking statutory provisions lead ineluctably to the conclusion that [the] lien was avoidable. . . "). Courts granting lien avoidance also find that, under the facts of the particular case, the impairment requirement has been met. *See Sanderfoot*, 899 F.2d at 605; *Pederson*, 875 F.2d at 782 & n.2. On impairment, see *supra* notes 100-101 and accompanying text.

120. *See Pederson*, 875 F.2d at 784 (citing Boyd v. Robinson, 741 F.2d 1112, 1116 (8th Cir. 1984) (Ross, J., dissenting)); Duncan v. Sczepanski (*In re* Duncan), 85 Bankr. 80, 83 (W.D. Wis. 1988); Pederson v. Stedman (*In re* Pederson), 78 Bankr. 264, 267 (Bankr. 9th Cir. 1987), *aff'd sub nom.* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781 (9th Cir. 1989); *see also infra* notes 146, 191-193 and accompanying text (on the relationship between sections 522(f)(1) and 523(a)(5)).

ance fails to address the special nature of marital property rights in a dissolution decree, the rationale for granting divorce decree lien avoidance is consistent with the view that the Code provisions must be "given their plain meaning despite the seemingly inequitable results in a divorce setting."[121]

B. *Reading The Language of Section 522(f)(1) as Inapplicable to Divorce Decree Homestead Liens*

Another approach to the problem of whether divorce decree homestead liens are avoidable by the debtor draws on modern divorce property concepts[122] and concludes that when a divorce decree gives the debtor spouse the marital home, the lien does not attach to the debtor's interest.[123] Rather, the lien protects a pre-existing interest of the non-debtor spouse[124] in the family residence that was created during or as a result of the marriage[125] and under the state's equitable distribution statute.[126] Under this theory, the spousal interest pre-exists the final divorce judgment and remains valid afterwards until the debtor's property division obligation is satisfied, whether or not the divorce was contested.[127]

---

121. Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 605 (7th Cir.) (quoting *In re* Boggess, 105 Bankr. 470, 474 (Bankr. S.D. Ill. 1989)), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); *see also* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 784 (9th Cir. 1989) (arguments about injustice or undue interference with authority of state divorce courts "must be directed to Congress"); Boyd v. Robinson, 741 F.2d 1112, 1116 (8th Cir. 1984) (Ross, J., dissenting) (avoidance is "harsh result" but decision not to reach such liens is for Congress); *Duncan*, 85 Bankr. at 83 ("This Court declines to join the herd of prior courts who have trampled the Bankruptcy Code in a rush to achieve their own perception of justice in the divorce setting.").

122. *See, e.g.*, *Boyd*, 741 F.2d at 1114 ("under Minnesota law it is assumed that marital property is shared property"); *In re* Rittenhouse, 103 B.R. 250, 255 (D. Kan. 1989) (discussing marital property interests under Kansas law). On state divorce property law, see *supra* note 41.

123. *See Boyd*, 741 F.2d at 1114-15.

124. *See id.* at 1114.

125. *See id.*

126. *See id.* at 1114; *see also* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 606 (7th Cir.) (Posner, J., dissenting) (criticizing *Sanderfoot* and *Pederson* approach), *cert. granted*, 111 S. Ct. 507 (1990). In *Boyd*, the Eighth Circuit denied avoidance of the non-debtor husband's $7,000 homestead lien. *See* 741 F.2d 1112, 1115 (8th Cir. 1984). Under Minnesota law, both spouses had an undivided interest in marital property before the divorce. *See id.* at 1114. The husband never owned the marital home but did contribute to mortgage payments and to the home's improvement. *See id.*

Many courts have adopted the *Boyd* theory that the lien protects a pre-existing property interest of the non-debtor spouse and is unavoidable because it does not fix on the debtor's interest. *See In re* Rittenhouse, 103 Bankr. 250, 255 (D. Kan. 1989) (debtor's interest transferred subject to non-debtor spouse's preexisting interest; therefore lien not avoidable); Zachary v. Zachary (*In re* Zachary), 99 Bankr. 916, 919-20 (S.D. Ind. 1989) (same); Holtzhauser v. Holtzhauser (*In re* Holtzhauser), 117 Bankr. 519, 520 (Bankr. D. Neb. 1990) (same); *In re* Warren, 91 Bankr. 930, 931-32 (Bankr. D. Or. 1988) (same); *see also Sanderfoot*, 899 F.2d at 607 (Posner, J., dissenting) (advocating *Boyd* position and noting that most bankruptcy judges have also adopted it). *But see supra* notes 105-114 and accompanying text (on approach rejecting pre-existing interest theory).

127. *See* Boyd v. Robinson, 31 Bankr. 591, 595-96 (D. Minn. 1983) (to avoid a lien in

The homestead lien protects the non-debtor's prior interest; therefore, it never fixes or attaches onto the debtor's interest or portion.[128] As a result, the lien fails to meet the requirement of section 522(f)(1) that it fix on the debtor's interest in the property.[129]

Another line of reasoning supporting the view that the lien does not attach to the debtor's interest revolves around the critical issue of timing.[130] The timing argument takes the position that when both the debtor's interest in the entire property and the lien on that property arise in the same transaction, the debtor does not have the interest at the time the court places the lien on it.[131] Because the lien is created in the same document that gives the debtor his or her interest in the property, the lien qualifies that interest from the start.[132] In this way, the simultaneous transfer of interests in a dissolution decree distinguishes a divorce decree lien from other judicial liens intended to secure debts.[133]

Failure to meet any one of section 522(f)(1)'s requirements is sufficient to deny lien avoidance;[134] thus, an alternative basis for rejecting the debtor's lien avoidance motion is to identify the lien so as to exclude it from the Code's definition of a judicial lien.[135] In a contested divorce, where agreement of the parties is clearly absent, the analysis rests not on the technical form of the state court judgment but on the underlying

---

contested divorce but preserve it where there is a property settlement "ignores the function and purpose of the marriage dissolution proceedings and creates an artifical and unfair distinction between the two manners of distributing property"), *aff'd*, 741 F.2d 1112 (8th Cir. 1984).

128. *See Boyd*, 741 F.2d at 1114-15.

129. *See id.*

130. *See In re* Rittenhouse, 103 Bankr. 250, 255 (D. Kan. 1989) (citing Zachary v. Zachary (*In re* Zachary), 99 Bankr. 916, 919 (S.D. Ind. 1989).

131. "It is settled in the nonfamily context that a debtor cannot avoid a lien on an interest acquired after the lien attached. . . . The principle should be the same if the interest and lien arise from the same transaction." Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 607 (7th Cir.) (Posner, J., dissenting) (citations omitted), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); *see also* Owen v. Owen, 86 Bankr. 691, 694 (M.D. Fla. 1988) ("A judgment attaching to property and becoming a lien prior to bankruptcy survives the discharge and remains enforceable"), *cert. granted*, 110 S. Ct. 2166 (1990) (89-1008). For a discussion of the issue on which the Supreme Court agreed to hear *Owen*, see *supra* note 101.

132. *See Sanderfoot*, 899 F.2d at 607-08 (Posner, J., dissenting) ("There was no instant at which [the debtor] owned the property free and clear of the wife's interest."); *see also* Zachary v. Zachary (*In re* Zachary), 99 Bankr. 916, 919 (S.D. Ind. 1989) ("The lien attaches at the same time as title is transferred; therefore, it does not attach to an interest of the debtor in property for purposes of section 522(f)(1).").

133. *See* Hart v. Hart (*In re* Hart), 50 Bankr. 956, 961-62 (Bankr. D. Nev. 1985); Williams v. Williams (*In re* Williams), 38 Bankr. 224, 228 (Bankr. N.D. Okla. 1984); *In re* Thomas, 32 Bankr. 11, 12 (Bankr. D. Or. 1983).

134. *See supra* note 72 and accompanying text.

135. Some courts find that the lien is a judicial lien but because it does not fix on the interest of the debtor, the lien is not avoidable. *See* Holtzhauser v. Holtzhauser (*In re* Holtzhauser), 117 Bankr. 519, 520 (Bankr. D. Neb. 1990); Williams v. Williams (*In re* Williams), 38 Bankr. 224, 228 (Bankr. N.D. Okla. 1984).

intent of the court to make a fair distribution of the marital assets.[136] One view of the lien, linked to the pre-existing interest theory,[137] is that the lien is transformed into a mortgage that simply recognizes and provides a remedy to enforce a pre-existing interest.[138] Under this view, the lien is not "obtained by judgment" nor is it the usual type of judicial lien.[139]

Where there is a property settlement incorporated into the decree, the consensual nature of the underlying lien makes it appear to be similar to a security interest or purchase-money obligation, so that the lien is unavoidable although judicially sanctioned.[140] When the focus is the spouse's property rights under state law, it is also possible to identify the lien in a judicially determined divorce as a non-avoidable security interest.[141]

Yet another view of the nature of the lien, based on a somewhat different rationale, results in denial of lien avoidance by finding the lien to be an implied equitable lien, even in the absence of a consensual agreement, because the lien is placed on specific property that is intended to be the

136. *See* Boyd v. Robinson, 741 F.2d 1112, 1114 (8th Cir. 1984); Zachary v. Zachary (*In re* Zachary), 99 Bankr. 916, 919 (D. Ind. 1989).

137. *See supra* notes 122-129 and accompanying text.

138. *See* Boyd v. Robinson, 741 F.2d 1112, 1114 (8th Cir. 1984); *see also* Boyd v. Robinson (*In re* Boyd), 31 Bankr. 591, 595 (D. Minn. 1983) (award of lien interest in homestead "stated in express mortgage language"; lienholder's satisfaction must derive from specific asset, not general property of debtor), *aff'd*, 741 F.2d 1112 (8th Cir. 1984); *Sanderfoot*, 899 F.2d 598, 606 (7th Cir.) (Posner, J., dissenting) (divorce court "transformed [wife's interest] from that of co-owner to that of mortgagee"), *cert granted*, 111 S. Ct. 507 (1990) (No. 90-350). *But see Boyd*, 741 F.2d at 1115 (Ross, J., dissenting) ("If state law were allowed to vary what would otherwise be a judicial lien by merely calling the interest an 'equitable mortgage,' havoc would result.").

139. *See Zachary*, 99 Bankr. at 920 (" 'To label this a judicial lien merely because it is a lien which was imposed in a judicial proceeding puts form over substance.' ") (emphasis omitted) (quoting Boyd v. Robinson, 31 Bankr. 591, 595 (D. Minn. 1983), *aff'd* 741 F.2d 1112 (8th Cir. 1984)); *In re* Warren, 91 Bankr. 930, 931 (Bankr. D. Or. 1988) (not a judicial lien within the meaning of section 522(f)(1)); *In re* Erwin, 25 Bankr. 363, 366 (Bankr. D. Minn. 1982) (finds equitable mortgage because lien is security for payment of money). *But see Boyd*, 741 F.2d at 1115 (Ross, J., dissenting) (criticizing majority for finding non-debtor husband's interest a mortgage because no consent by parties).

140. *See, e.g.*, Wicks v. Wicks (*In re* Wicks), 26 Bankr. 769, 770-71 (Bankr. D. Minn. 1982) (lien is a security interest and is not avoidable), *aff'd*, Boyd v. Robinson, 741 F.2d 1112 (8th Cir. 1984); Cowan v. Cowan (*In re* Scott), 12 Bankr. 613, 617 (Bankr. W.D. Okla. 1981) (" 'consensual and voluntary although judicially sanctioned' ") (quoting *In re* Dunn, 10 Bankr. 385, 387 (Bankr. W.D. Okla. 1981)); *In re* Shands, 57 Bankr. 49, 51 (Bankr. D.S.C. 1985) (spouse's lien was an unavoidable security interest); *In re* Stone, 119 Bankr. 222, 236 (Bankr. E.D. Wash. 1990) (property settlement agreement, note and deed of trust created unavoidable security interest even if judicial lien is avoidable; court denied lien avoidance). *But see In re* Showinsky 117 Bankr. 284, 287 (Bankr. W.D. Mich. 1990) (lien avoided despite uncontested divorce and settlement agreement).

141. *See, e.g., In re* Worth, 100 Bankr. 834, 840 (Bankr. N.D. Tex. 1989) (purchase-money obligation under Texas law); *In re* Stone, 119 Bankr. 222, 236 (Bankr. E.D. Wash. 1990) ("The agreed dissolution decree creates a security interest in the residence"); Boyd v. Boyd (*In re* Boyd), 93 Bankr. 538, 539 (Bankr. S.D. Tex. 1988) ("An equitable lien awarded in a divorce decree . . . will support a finding of an implied vendor's lien [as] a valid lien upon a homestead.").

source from which the debt is to be paid.[142] The equitable lien, which is distinct from the judicial lien arising from the money judgment, is unavoidable.[143]

The approach to the lien avoidance problem that focuses on the intent of the divorce property law comprises a variety of theories, but all lead to the conclusion that section 522(f)(1) is inapplicable to divorce decree homestead liens.[144] It is consistent with this approach to reject a "mechanistic construction" of the language of the statute[145] and to find that the dischargeability of the debt is not a factor in the lien avoidance analysis.[146] Decisions denying lien avoidance find additional support in equita-

142. *See* Parker v. Donahue (*In re* Donahue, 862 F.2d 259, 266 (10th Cir. 1988). The court determined that the non-debtor's unrecorded lien was a secured equitable lien. *See id.* The court remanded the case to the bankruptcy court on the avoidance issue, noting in dictum that granting avoidance would create unjust enrichment and that equitable liens imposed by federal bankruptcy courts are arguably outside the scope of judicial liens. *See id.* at 266, 266-67 n.11. On remand, the lien was avoided, without discussion. *See* Donahue v. Parker (*In re* Donahue), 110 Bankr. 41, 43 (Bankr. D. Kan. 1990); *see also* Bailey v. Bailey (*In re* Bailey), 20 Bankr. 906, 912 (Bankr. W.D. Wis. 1982) (unavoidable equitable lien, even though lien not on specific property, based on divorce court's equitable division of assets). *But see* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 604-05 (7th Cir.) ("whether liens of the type at issue in this case [a contested divorce] are called equitable liens or vendor's liens or security interests, they still are 'judicial liens' " within the Code's definition), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); Boyd v. Robinson, 741 F.2d 1112, 1116 (8th Cir. 1984) (Ross, J., dissenting) (arguing that lien could not be a judicial lien because whether it attached to a specific piece of property is "irrelevant, since the Bankruptcy Code does not require that a judicial lien attach to all of the debtor's property").

There are pre-Code cases that recognized divorce property obligations as equitable liens that survived bankruptcy. *See, e.g.*, Caldwell v. Armstrong, 342 F.2d 485, 490 (10th Cir. 1965) (non-debtor spouse had equitable lien against life insurance policy owned by debtor; policy was the fund out of which divorce monetary judgment was intended to be paid); Thumm v. Thumm, (*In re* Thumm), 2 Bankr. Ct. Dec. (CRR) 1347, 1350 (Bankr. E.D. Wis. 1976) (divorced wife entitled to equitable lien over husband's homestead property because the property was the source of payment, even though debt was dischargeable).

143. *See Donahue*, 862 F.2d at 265-66; Borman v. Leiker (*In re* Borman), 886 F.2d 273, 274 (10th Cir. 1989); Hart v. Hart (*In re* Hart), 50 Bankr. 956, 961 (Bankr. D. Nev. 1985) (unavoidable equitable lien).

Avoiding a judicial lien under section 522(f)(1) "does not extinguish a valid security interest . . . upon which the lien is based." 1 W. Norton, Norton Bankruptcy Law and Practice § 26.41, at 32 (1981). Where courts find a valid underlying lien, avoidance under section 522(f)(1) has generally been denied. *See Donahue*, 862 F.2d at 265, 266-67 n.11; *Stone*, 119 Bankr. at 238.

144. *See supra* notes 122-140 and accompanying text.

145. *See* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 784 (9th Cir. 1989) (Reinhardt, J., dissenting) ("I would give the state court decree a far less mechanistic construction. The division of property rights that *Boyd* envisions seems eminently sensible to me.").

146. *See, e.g.*, Parker v. Donahue (*In re* Donahue), 862 F.2d 259, 262 (10th Cir. 1988) (central issue is whether obligation is simply an unsecured debt from a property settlement or a secured debt not dischargeable in bankruptcy); Boyd v. Robinson, 741 F.2d 1112, 1112-15 (8th Cir. 1984) (does not mention section 523(a)(5) or dischargeability of the property settlement debt); *see also* Williams v. Williams (*In re* Williams), 38 Bankr. 224, 225-28 (Bankr. N.D.Okla. 1984) (dischargeability and avoidance examined sepa-

ble factors relating largely to fairness to the non-debtor spouse[147] and to unjust enrichment for the debtor spouse.[148]

C. *Section 522(f)(1) Should Shelter Divorce Decree Homestead Liens From Avoidance By The Debtor*

The lien avoidance statute gives the greatest support to the debtor's fresh start when the divorce decree is construed to provide for a sequential transfer of interests, which, occurring in a judicial proceeding, meets the requirements of section 522(f)(1) as long as the debtor's exemption allowance is impaired.[149] An alternative way to view the language of the provision, however, is to focus on three essential factors: the purpose of the divorce decree, the interest of the non-debtor spouse derived from shared marital property, and the timing of the transaction. These fundamental elements of the property division lien lead to the conclusion that the lien fails to attach to the debtor's interest and that the debtor does not have the interest before the lien is fixed.[150] The lien is therefore outside the scope of the debtor's lien avoidance powers.[151]

Although the language of section 522(f)(1) arguably supports either analysis, the reading that protects divorce decree homestead liens from avoidance by the debtor is the better approach because it is consistent with both the words of the statute[152] and the intent of a divorce decree.[153] Nor does this result "deform"[154] the Bankruptcy Code by defeating the fresh-start goal for the debtor, because the debtor is relieved of personal liability for the dischargeable debt.[155] In addition, a "straightforward distinction" between a judicial lien on the debtor's property and one intended to secure a spouse's interest in the marital property applies fairly to all divorces, contested and uncontested, on a uniform basis.[156]

Furthermore, denying debtors the right to avoid divorce-generated homestead liens through statutory construction of section 522(f)(1) is consistent with traditional federal deference to important state policies[157] where, as here, other essential factors are also present: this interpretation

---

rately). For approaches to the relationship between dischargeability and avoidance, see *supra* note 120 and accompanying text; *infra* notes 191-193 and accompanying text.

147. *See infra* notes 207-208, 211 and accompanying text.

148. *See infra* note 210 and accompanying text.

149. *See supra* Part IIA and accompanying text.

150. *See supra* notes 122-133 and accompanying text.

151. *See supra* notes 130-141 and accompanying text; *see also supra* notes 142-143 and accompanying text (on equitable liens).

152. *See* 11 U.S.C. § 522(f)(1) (1988).

153. *See supra* notes 36-45 and accompanying text.

154. *See* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 607 (7th Cir.) (Posner, J., dissenting), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

155. *See infra* notes 205-206 and accompanying text.

156. *See Sanderfoot*, 899 F.2d at 607 (Posner, J., dissenting).

157. *See infra* notes 182-183 and accompanying text.

does not contravene express Congressional policy,[158] it supports a paramount state interest in implementing domestic relations law,[159] and it does not unreasonably diminish the federal interest in the debtor's fresh start.[160] Such an analytical framework, which has not been sufficiently articulated in the divorce decree homestead lien avoidance case law, gains greater force from the equitable considerations that are inherent in the conflict that section 522(f)(1) has instigated[161] between the legitimate goals of both bankruptcy and divorce.

III. DIVORCE DECREE HOMESTEAD LIEN AVOIDANCE DISTURBS A PROPER BALANCE BETWEEN FEDERAL AND STATE INTERESTS

A. *The Legislative History of Section 522(f)(1) Calls for Excluding Divorce Decree Homestead Liens*

When faced with the "opposing interests"[162] implicated in the divorce homestead lien avoidance issue, courts have turned to section 522(f)(1) for guidance. Unfortunately, the language of this provision is unclear and has thus engendered a conflict over its meaning.[163] Where a provision of the Bankruptcy Code is " 'subject to interpretation,' "[164] the United States Supreme Court has indicated that it is proper to consider legislative history.[165]

Although the revision of the bankruptcy law generated an extensive written record, there is little legislative history of section 522(f)(1).[166]

158. *See infra* notes 169-179, 191-195 and accompanying text.

159. *See infra* notes 36-50, 181, 197-200 and accompanying text.

160. *See infra* notes 205-207 and accompanying text.

161. *See infra* note 181 and accompanying text.

162. *See* Farrey v. Sanderfoot, 899 F.2d 598, 605 (7th Cir.) (citing *In re* Worth, 100 Bankr. 834, 837 (Bankr. N.D.Tex. 1989)), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

163. *See supra* Parts IIA-B and accompanying text.

164. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 244 (1989) (quoting Kelly v. Robinson, 479 U.S. 36, 50 (1986)); *see also* United States v. Security Industrial Bank, 459 U.S. 70, 82 n.12 (1982) (" 'When aid to construction of the meaning of words, as used in the [bankruptcy] statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." ' ") (quoting United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940)) (citation omitted). Although the Seventh Circuit majority did not find the words of section 522(f)(1) unclear, Judge Posner in dissent stated that the result of the *Sanderfoot* decision, permitting the divorce decree homestead lien to be avoided, was a "product . . . of judicial misunderstanding." Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 606 (7th Cir.) (Posner, J., dissenting), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

165. *See Ron Pair Enters.*, 489 U.S. at 242.

166. *See* Parkinson, *supra* note 101, at 324. *See generally* Klee, *Legislative History of the New Bankruptcy Law, reprinted in* [2 App. Legis. Hist.] Collier on Bankruptcy (15th ed.), *supra* note 53, at xxv-xxvii (listing Bankruptcy Code legislative history materials and suggesting order in which they should be consulted).

Although there is only slight authority in the 1898 Bankruptcy Act for the expanded lien avoidance powers given to the debtor in the Code, *see* 1 W. Norton, Norton Bank-

Section 522(f)(1) was not mentioned in the floor statements in either the House or Senate upon final passage of the Bankruptcy Reform Act.[167] Moreover, although the House and Senate committee reports commented on section 522(f)(1), they merely stated that the debtor's exemptions, his discharge and thus his fresh start are protected by permitting him to avoid certain liens on exempt property.[168]

The introductory pages of the *House Report*, however, contain one passage that is more instructive. Referring to section 522(f)(1), it explains that

> The debtor may void any judicial lien on exempt property, ... [This] . . . right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.[169]

---

ruptcy Law and Practice § 26.39, at 31 (1981), debtors were given limited rights to avoid liens on exempt property in the Bankruptcy Act. *See* 30 Stat. 544, *as amended* 52 Stat. 840, 875-76 § 67a (1)(4) (1938) (repealed 1978); *see also* Geo. A. Clark & Son, Inc. v. Nold, 85 S.D. 468, 472, 185 N.W.2d 677, 679 ("As to property set aside as exempt it is for the bankrupt to avoid the lien."), *cert. denied*, 404 U.S. 833 (1971).

The exemption concept found in section 522(f)(1) originated in the Bankruptcy Act of 1867, when for the first time liens created by a legal proceeding were permitted to be invalidated in bankruptcy. *See* J. Moore & L. King, 4 Collier on Bankruptcy § 67.01, at 18 (14th ed. 1978) [hereinafter Collier on Bankruptcy (14th ed.)]. This right was expanded, in turn, by section 67 of the 1898 Bankruptcy Act, and by section 67a(1) of the Bankruptcy Act as it was amended in 1938. *See id.* § 67.02, at 20, 48. The purpose of lien avoidance had long been to negate efforts by "diligent" creditors to secure antecedent debts on exempt property before the debtor declared bankruptcy, thereby gaining preferential treatment over unsecured creditors. *See id.* § 67.01, at 17-18.

Under the Bankruptcy Act prior to 1978, the debtor, independently of the trustee, could invalidate "any lien" against the bankrupt's exempt property "obtained by attachment, judgment, levy, or other legal or equitable process or proceedings" within the four-month period before the debtor filed for bankruptcy. 30 Stat. 544, *as amended* 52 Stat. 840, 875-76 (1938) (repealed 1978); *see* 4 Collier on Bankruptcy (14th ed.), *supra*, § 67.15[2], at 169-72. In addition, the debtor had to be insolvent at the time the lien attached to receive the protections of section 67a. *See* 30 Stat. 544, *as amended* 52 Stat. 840, 876 (1938) (repealed 1978). Furthermore, a debtor was barred from avoiding liens where he had signed a waiver of exemption. *See* 4 Collier on Bankruptcy (14th ed.), *supra*, § 67.15[2], at 169 n.14.

The avoidance powers granted the debtor in section 522(f) of the Bankruptcy Code removed many of the conditions barring debtor suits against lienholders under the former Act. Section 522(f) requires neither insolvency nor a time limitation before the debtor files a petition for bankruptcy. *See* 11 U.S.C. § 522(f) (1988). Furthermore, a waiver of exemption is ineffective. *See id.* ("Notwithstanding any waiver of exemptions, . . .").

167. *See* Final House Debate, 124 Cong. Rec. H11,866 (daily ed. Oct. 6, 1978) (remarks of Rep. Don Edward), *reprinted in* [3 App. Legis. Hist.] Collier on Bankruptcy (15th ed.), *supra* note 53, at X5-6; Senate Debate on Compromise Bill, 124 Cong. Rec. S17,403-34 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini), *reprinted in id.* at X9-69.

168. *See* House Report, *supra* note 15, at 362, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6318; S. Rep. 989, 95th Cong., 2d Sess. 76 (1978) (under subsection (e)), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5862.

169. *See* House Report, *supra* note 15, at 126, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6087-88.

This passage indicates a legislative intent to "thwart unsecured creditors who, sensing impending bankruptcy, rush into court to obtain liens on exempt property, thus frustrating the purpose of the exemptions."[170] Such a scenario is distinguishable from that of an ex-spouse receiving a lien in the divorce setting, where the purpose is not to defeat the debtor's homestead exemption[171] but to resolve the breakdown of a marital relationship and divide marital assets,[172] with each party receiving a reciprocal benefit.[173]

Comments and testimony in the House and Senate committee hearings and reports on ways to protect the debtor's exempt property related primarily to consumer creditor abuses under the 1898 Bankruptcy Act,[174] particularly techniques that predatory creditors[175] imposed on debtors to protect unsecured debts, such as agreements to waive exemptions[176] and "blanket" security agreements on all of the debtor's household goods.[177]

---

170. Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 606 (7th Cir.) (Posner, J., dissenting), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); *see also* Parker v. Donahue (*In re* Donahue), 862 F.2d 259, 267 n.11 (10th Cir. 1988) ("The award of a lien to secure a property settlement in a divorce decree hardly approximates [this] situation . . . ."); Williams v. Williams (*In re* Williams), 38 Bankr. 224, 227 (Bankr. N.D. Okla. 1984) (the "perceived evil" Congress set out to remedy was that wary creditors would leave the debtor with no unencumbered property, but this does not even "remotely resemble" divorce situation); *In re* Thomas, 32 Bankr. 11, 12 (Bankr. D. Or. 1983) ("The relationship of the parties in a dissolution proceeding is not a debtor/creditor relationship as is the case at the time other lien interests are created. This distinction is crucial.").

171. *See Sanderfoot*, 899 F.2d at 606 (Posner, J., dissenting); *see also supra* note 170 (supporting view that legislative intent of section 522(f)(1) was to thwart over-zealous creditors).

172. *See supra* notes 36-45 and accompanying text.

173. One commentator has distinguished the judicial lien creditor from most other secured creditors on "purely economic grounds . . . . The judicial lien creditor . . . does not provide any . . . reciprocal benefit to the debtor when taking her lien." Cross, *supra* note 19, at 315 n.32. A judicial lien is generally perceived as one likely to arise from a tort, a breach of sales contract, or a consumer loan. *See id.* at 315.

174. *See, e.g.*, II *Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, House of Representatives, on H.R. 31 and H.R. 32*, 94th Cong. 2d Sess. 939-40 (1975) [hereinafter *Bankruptcy Act Revision, House Hearings*] (statement of Ernest Sarason, Staff Attorney, National Consumer Law Center); *see also* I *Commission Report* 169, 173, 180 n.35, *reprinted in* [2 App. Legis. Hist.] Collier on Bankruptcy (15th ed.), *supra* note 53, at I-I-169, 173, 180, n.35 (on waivers of exemption and security agreements); II *Commission Report* 130, *reprinted in* [2 App. Legis. Hist.] Collier on Bankruptcy (15th ed.), *supra* note 53, at I-II-130 (same); Cross, *supra* note 19, at 311-15 (legislative history of section 522(f)).

175. *See* Cross, *supra* note 19, at 315.

176. Congress made waivers of exemption ineffective in section 522(f), which begins, "Notwithstanding any waiver of exemptions," and in section 522(e). *See* 11 U.S.C. §§ 522(e)-(f) (1988).

177. *See* House Report, *supra* note 15, at 128 (describing how creditors used security agreements as leverage for reaffirmation of debts), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6088-89. Subsection (f)(2) of section 522 was added to reduce the impact of creditor use of such agreements on exempt household property. *See* 11 U.S.C. § 522(f)(2) (1988); *see also* Mordy, Dunn, & Johnson, *Constitutionality of 'Opt-Out' Statutes Providing for Exemptions to Bankrupts*, 48 Mo. L. Rev. 627, 646 (1983) (commenting on legislative history of the lien avoidance provision); Parkinson, *supra* note 101, at 324-

Discussions and statements relating to creditors and exempt property were generally concerned with consumer debt, not divorce.[178] Furthermore, the legislative history of the Code dealt with property divisions in the context of debt dischargeability, not lien avoidance.[179] In short, while the relevant legislative history of section 522(f)(1) is not conclusive, it does suggest that Congress was contemplating something other than state judgments embodied in divorce-decree homestead liens.

B. *Lien Avoidance Unreasonably Burdens States' Implementation of Divorce Judgments*

The legislative history of section 522(f)(1) does not preclude the exclusion of divorce decree homestead liens from the debtor's avoidance power.[180] This position is further supported by comparison of the history and language of the lien avoidance provision with the traditional relationship between federal and state law in the domestic relations area. Nullification of divorce decree homestead liens creates a conflict between the federal interest in the debtor's fresh start and the states' interest in protecting the enforceability of divorce court decisions.[181] When state family law comes into conflict with a federal statute, the Supreme Court has noted that the standard for its determination is whether Congress has " 'positively required by direct enactment' that state law be preempted."[182] The Supreme Court has "consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in [the domestic relations] area."[183] The question, then, is whether Congress has "positively required by direct enactment"[184] that section 522(f)(1)'s lien avoidance provision override state marital property divisions.

In contrast to section 522(f)(1), section 523(a)(5) directly addresses divorce property division debts.[185] Congressional intent is clearly ex-

25 (same); Note, *Avoiding Liens Under the New Bankruptcy Code*, 15 U. Mich. J. L.Ref. 577, 579-82 (1982) (same).

178. *See supra* notes 174 and 177.

179. *See, e.g.*, III *Bankruptcy Act Revision, House Hearings, supra* note 174, at 1288-90 (testimony of Bankruptcy Judge Joe Lee) (discussing dischargeability of divorce property division debts).

180. *See supra* notes 166-179 and accompanying text.

181. *See In re* McCormmach, 111 Bankr. 330, 331 (Bankr. D. Or. 1990); *see also* Brief for Petitioner at 32-36, Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350) (on file with *Fordham Law Review*).

182. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)). Domestic relations have long been acknowledged as preeminently a matter of state law. *See* Mansell v. Mansell, 490 U.S. 581, 587 (1989); *see also* Sosna v. Iowa, 419 U.S. 393, 404 (1975) ("statutory regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States").

183. *Mansell*, 490 U.S. at 587.

184. *Hisquierdo*, 439 U.S. at 581 (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

185. *Compare* 11 U.S.C. § 522(f)(1) (1988) (applies to liens; divorce-related property not mentioned) *with id.* at § 523(a)(5) (applies to debts; specifically addresses divorce obligations).

pressed in section 523(a)(5) that property divisions that are essentially economic settlements distributing financial assets, and therefore not designed to meet family support obligations, are to be dischargeable.[186] Section 523(a)(5)(B) also authorizes federal courts to examine terms used in the decree such as "alimony" or "property settlement" when making a determination of what is "actually" support.[187]

Both the language of section 523(a)(5) and its legislative history expressly provide that federal bankruptcy law standards can preempt state law and state court judgments in determining whether property settlement debts are dischargeable or non-dischargeable.[188] By requiring that alimony, maintenance and child support remain non-dischargeable, section 523(a)(5) clearly recognizes the general principle that debtors cannot ignore their family obligations[189] while simultaneously indicating that the debtor's fresh start should be protected to the extent that property

186. *See id.* § 523(a)(5) (1988).

187. *See id.* § 523(a)(5)(B) (1988); *see also* House Report, *supra* note 15, at 364 (comment on section 523(a)(5)), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6319; S. Rep. No. 595, 95th Cong., 2d Sess. 79 (under paragraph (6)) (1978) (same), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5865; *infra* note 188 (discussion of how courts make determinations of dischargeability under § 523(a)(5)).

188. *See* House Report, *supra* note 15, at 364 ("What constitutes alimony, maintenance, or support will be determined under the Bankruptcy laws, not State law"), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6320; S. Rep. No. 595, 95th Cong. 2d Sess. 79 (1978) (under paragragh (6)) (same), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5865; G. Treister, *supra* note 11, § 7.08(e), at 321, 323. Many bankruptcy courts look beyond labels characterizing the divorce awards as "alimony" or "property settlement" to determine the intent of the parties, while others hold that state law controls. *See* Coffman v. Coffman (*In re* Coffman), 52 Bankr. 667, 674-75 and n.6 (Bankr. D. Md. 1985); 2 H. Clark, *supra* note 5, § 16.2, at 183.

The Bankruptcy Code "does not define 'alimony, maintenance, or support.'" *See Coffman*, 52 Bankr. at 670. The absence of a uniform federal standard for distinguishing between property divisions that are intended to be support obligations from those that are not has led to a great deal of litigation under section 523(a)(5). *See* Gold, *The Dischargeability of Divorce Obligations Under the Bankruptcy Code: Five Faulty Premises in the Application of Section 523(a)(5)*, 39 Case W. Res. L. Rev. 455, 460-61, 498 (1988-89); *see also Coffman*, 52 Bankr. at 671, 674 n.6 (summarizing different factors used in federal jurisdictions in making dischargeability determinations). Commentators have criticized the tests used by courts in Section 523(a)(5) dischargeability determinations for frequently failing to meet the needs of both spouses. *See, e.g.*, Gold, *supra*, at 456 (court should consider needs and incomes of both spouses as they exist at time of section 523(a)(5) trial, not when divorce decree was awarded); Scheible, *supra* note 31, at 7, 60-61 (suggesting a standard for distinguishing between support and non-support property divisions that is more responsive to the needs of non-debtor spouses); Comment, *Striking the Mean Between the Goals of Bankruptcy and Divorce: Developing a Standard for the Classification of Domestic Obligations Under Section 523(a)(5) of the Bankruptcy Code*, 7 Bankr. Dev. J. 565, 593-94 (1990) (lack of a uniform federal standard needs to be remedied on basis of "reasonableness"); *see also* H.R. 1242, 102d Cong., 1st Sess. 1991 (bill to make property settlement debts non-dischargeable under section 523(a)(5) introduced by Rep. H. Hyde and referred to the Judiciary Comm.).

189. *See* Wetmore v. Markoe, 196 U.S. 68, 77 (1904); *see also* III *Bankruptcy Act Revision, House Hearings, supra* note 174, at 1288-90 (testimony of Bankruptcy Judge Joe Lee) (on dischargeability policy under section 523(a)(5)); Vukowich, *supra* note 19, at 797 ("basic goal" of section 523(a)(5) is to protect debtors' families).

division debts are distinguishable from family obligations.[190]

Because the Code clearly favors discharging the type of divorce-related property settlement debts at issue in the lien avoidance problem, one argument for upholding the debtor's lien avoidance right is that freeing the debtor's exempt property of such an encumbrance "harmonizes different Code sections."[191] But this reasoning is not mandated by the words of either section 522(f)(1) or section 523(a)(5);[192] rather, there is a strong argument that the policy of Congress towards unsecured property division debts expressed in section 523(a)(5) does not apply to the lien avoidance inquiry under section 522(f)(1).[193] In contrast to section 523(a)(5), neither the language nor the legislative history of section 522(f)(1) indicates that Congress " 'positively required by direct enactment' "[194] that the lien avoidance provision embody any specific policy toward property divisions in divorce.[195]

---

190. Property settlements were generally not exceptions to discharge under § 35(a)(7) of the Bankruptcy Act. *See* Note, *Bankruptcy and Divorce in Kansas*, 29 Washburn L.J. 551, 558 n.39 (1990). Efforts by the Commission to make property settlements non-dischargeable were rebuffed by Congress in section 523(a)(5). *See* III *Bankruptcy Act Revision, House Hearings, supra* note 174, at 1288-90 (testimony of Bankruptcy Judge Joe Lee); *see generally* Note, *Congressional Intent in Excepting Alimony, Maintenance, and Support from Discharge in Bankruptcy*, 21 J. Fam. L. 525, 525-42 (1982-83) (background and legislative history of section 523(a)(5)).

191. Pederson v. Stedman (*In re* Pederson), 78 Bankr. 264, 267 (Bankr. 9th Cir. 1987), *aff'd sub nom.* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781 (9th Cir. 1989); *see also Coffman*, 52 Bankr. 667, 676 (Bankr. D. Md. 1985) (debt found dischargeable; lien voided without discussion); *Pederson*, 875 F.2d at 784 (avoiding lien consistent with congressional policy " 'that property settlements should be treated the same as other debts in bankruptcy' " (quoting Boyd v. Robinson, 741 F.2d 1112, 1116 (8th Cir. 1984) (Ross, J., dissenting)).

192. *See* 11 U.S.C. §§ 522(f)(1), 523(a)(5) (1988).

193. *See supra* notes 91-92, 146 and accompanying text. By implication, these courts do not perceive a conflict between section 522(f)(1) and section 523(a)(5) when a lien supporting a dischargeable debt is not avoided. In treating dischargeability and avoidance as separate issues, these judges add additional support to interpreting section 522(f)(1) as excluding divorce decree liens from the debtor's lien avoidance powers. One basis for upholding an interpretation of Code language is that the interpretation does not conflict with another Code section. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242-43 (1989).

194. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).

195. *See* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 784 (9th Cir. 1989) (Reinhardt, J., dissenting) ("it is difficult to see how reaching [the] conclusion [that the lien should not be avoided] does violence to any 'policy judgment made by the political branches of government' ").

Examination of the distinction between procedures assigned in the Code for the dischargeability of property settlement debts and for lien avoidance also suggests that Congress may not have contemplated that family law matters would fall within the scope of section 522(f)(1). Section 523(a)(5) debts can only be discharged after an adversarial proceeding initiated by a complaint. *See* Fed. R. Bankr. P. 4007(a), 4007(e), and 7001(6) (1990); 1 A. Herzog & L. King, Bankruptcy Code 321 (Collier pamphlet ed. 1990/91). By contrast, proceedings to avoid liens on exempt property under section 522(f)(1) are contested hearings requiring only that the debtor file a motion. *See* 8 Collier on Bankruptcy, Bankruptcy Rules, § 4003.06 (15th ed. 1987). The contested hearing for deter-

Absent strong evidence that Congress intended to invade the states' traditionally preeminent role in domestic relations,[196] lien avoidance places an unreasonable burden on state divorce courts in fulfilling their statutory duty to make fair property divisions based upon case-specific factors.[197] Lien avoidance allows the debtor to frustrate[198] the divorce court's dual goals of fairly apportioning the net assets of the marriage and protecting that division where there is formerly shared property to which the debt can be secured.[199] Lien avoidance also hampers the ability of divorce courts to enforce their decisions, because without the use of homestead liens, state courts are left without a viable means for dividing property that can withstand a debtor's challenge under the Code.[200]

---

mining the validity of a lien is an exception to the general Code rule requiring adversary proceedings. *See id.* It "is a recognition that . . . the vast majority of cases brought under section 522(f) . . . [are] not contested, and that even where there is a contest the issue is usually a relatively simple question of valuation." *Id.*

Congress was aware of the frequent association of bankruptcy with divorce. *See* I *Commission Report* 42, *reprinted in* [2 App. Legis. Hist.] Collier on Bankruptcy (15th ed.), *supra* note 53, at I-I-42. In addition to section 523(a)(5), Congress also directly addressed divorce property settlements in section 541(a)(5)(B), which includes in the debtor's estate property from a divorce settlement that the debtor acquires or becomes entitled to within 180 days after filing for bankruptcy. *See* 11 U.S.C. § 541(a)(5)(B) (1988).

196. *See supra* notes 182-83 and accompanying text.

197. *See* 2 H. Clark, *supra* note 5, § 16.1, at 176-77; *supra* note 42.

198. On avoidance, see *supra* note 19; on dischargeability, see *supra* note 57 and accompanying text.

199. *See* Boyd v. Robinson, 741 F.2d 1112, 1114 (8th Cir. 1984) (enforcing lien is substantively grounded in state family law because it offers protection for the contributions each spouse makes to the marriage as reflected in the division of marital assets). The *Boyd* court also felt that its interpretation of Minnesota law was neither "a subterfuge to avoid the effect of § 522(f) [n]or would [it] license a state to establish property doctrines that would circumvent this section." *Id.*

200. *See, e.g., In re* McCormmach, 111 Bankr. 330, 331 (Bankr. D. Or. 1990) ("The state courts must have some means of dividing property without running afoul of § 522(f)."), *rev'd*, No. OR-90-1341 (Bankr. 9th Cir. 1991); Brief for Petitioner at 36-38, Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350) (liens are "well-established, practical and effective tool[s] for dividing marital property"). Other alternatives for the courts in contested divorces fail to meet either the requirements of section 522(f)(1) or the goals of modern divorce law policy. *See* Brief for Petitioner at 37, *Sanderfoot* (No. 90-350). A divorce court requirement that debtor spouses take a mortgage, for example, is unlikely to survive scrutiny as a "security interest" under section 522(f)(1), since the debtor would be acting under court order. *See id.* at 37 (citing *Sanderfoot*, 899 F.2d at 604 n.17). Ordering immediate sale of the homestead property would result in forcing families from their homes and would "destroy . . . the very rationale for a homestead exemption." *Id.* at 37; *see also* Boyd v. Robinson, 31 Bankr. 591, 959 (D. Minn. 1983) ("method of a lien was chosen to avoid a forced sale of the property"), *aff'd* 741 F.2d 1112 (8th Cir. 1984). Stipulating that non-debtor spouses have an ownership interest in the homestead property until that interest is paid conflicts with divorce law goals of finality and a fresh start for both spouses, particularly if financial contributions to the maintenance of the property are required. *See* Brief for Petitioner at 37, *Sanderfoot* (No. 90-350); *see also* R. Aaron, *supra* note 3, § 7.01[3] at 7-12.4-5 (on limited methods practitioners can use to protect non-debtor spouses).

C. *Debtor Nullification of Divorce Decrees Undermines the Bankruptcy Code as a Branch of Equity*[201]

Equitable application of the bankruptcy laws in the divorce setting goes beyond policy considerations embedded in state family law,[202] implicating most significantly issues of fairness and "simple justice"[203] for the non-debtor spouse. The exclusion of divorce decree homestead liens from the operation of section 522(f)(1) would admittedly reduce the fresh start available to a debtor spouse through the homestead exemption. Bankruptcy and divorce are both "radical legal remedies for crisis situations,"[204] however, and the interests of both spouses require protection. If section 522(f)(1) is closed off, section 523(a)(5) still protects the debtor by relieving him or her of personal liability for the property settlement debt.[205] Moreover, even when homestead liens on property divisions are not avoided, the workings of other Code provisions may benefit the debtor by reducing the amount recoverable by the ex-spouse.[206] If the former marital home cannot support any portion of the divorce-decree lien, however, the non-debtor spouse may well be left empty-handed.[207]

Lien avoidance enables the debtor to retain what is usually the marriage's most substantial asset while depriving the non-debtor spouse of a rightful share in that asset.[208] As one court commented, lien avoidance

---

201. *See* Farrey v. Sanderfoot (*In re* Sanderfoot, 899 F.2d 598, 607 (7th Cir.) (Posner, J., dissenting) (bankruptcy a "branch . . . of equity"), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350).

202. *See supra* notes 36-45, 181, 197-200 and accompanying text.

203. *Sanderfoot*, 899 F.2d at 607; *see also* R. Aaron, *supra* note 2, § 7.01[3,] at 7-12.1 ("The idea that the debtor may shed a lien imposed to protect the nondebtor spouse seems offensive.").

204. *See* Staggs, *Bankruptcy After Divorce: Rights and Liabilities of Former Spouses in Texas*, 23 S. Tex. L.J. 173, 173 (1982).

205. *See supra* note 57 and accompanying text.

206. In Parker v. Donahue (*In re* Donahue), on remand, 110 Bankr. 41 (Bankr. D. Kan. 1990), for example, the debtor sought to determine the amount of the lien, held by the court to be an unavoidable lien under section 522(f)(1), that was nonetheless avoidable as undersecured under section 506. *See id.* at 44. The Kansas bankruptcy court adopted the majority view of section 506(a) that debtors in Chapter 7 bankruptcies can use section 506(a) and voided nearly $12,000 of the non-debtor's valid claim of approximately $48,000. *See id.* at 45.

207. *See supra* notes 19, 24, and 71 and accompanying text. The resulting loss to the non-debtor spouse is particularly troublesome because section 522(f)(1) does require inquiry into the current circumstances of the non-debtor spouse. *See* 11 U.S.C. § 522(f)(1) (1988). The Tenth Circuit used its equitable powers to impose a non-avoidable equitable lien on the basis of hardship to the non-debtor wife in Borman v. Leiker (*In re* Borman), 886 F.2d 273, 274 (10th Cir. 1989). Some courts granting lien avoidance acknowledged that the results may be harsh but expressed the view that Congress, not the courts, should address policy issues. *See supra* note 121 and *infra* note 212 and accompanying text.

208. *See* Parker v. Donahue (*In re* Donahue), 862 F.2d 259, 265 (10th Cir. 1988); *see also* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 606 (7th Cir.) (Posner, J., dissenting) (non-debtor wife's interest equal to debtor's under state laws "whether or not her name appeared on the title papers"), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); *see also In re* Thomas, 32 Bankr. 11, 13 (Bankr. D. Or. 1983) (lien avoidance "would

"seriously thwart[s] the intended effect" of a divorce decree.[209] Under these circumstances, debtors are unjustly enriched.[210] Furthermore, section 522(f)(1) makes no provision for inquiring into the hardship of the non-debtor spouse.[211] Even those courts that view avoiding divorce decree homestead liens as consistent with congressional policy have nonetheless recognized that avoidance can lead to harsh results and have suggested that "[p]erhaps Congress should reexamine the statute."[212]

The federal interest in legitimate use of the bankruptcy laws is also implicated when disgruntled spouses[213] are able to use the lien avoidance provision to nullify their divorce decrees; the Bankruptcy Code is reduced to a "tool by which bounders defraud their spouses."[214] As Judge Richard Posner has stated, a tactic that allows the debtor to get "a fresh start with someone else's property"[215] is a "perversion of the bankruptcy law."[216]

Removal of divorce decree homestead liens from the operation of section 522(f)(1) would apply to debtors regardless of whether they choose the federal exemption scheme or their state homestead law.[217] It would also eliminate the possibility of differential treatment of liens arising in contested and uncontested divorces under federal law.[218] The Bankruptcy Code must continue to offer the debtor meaningful opportunities for emerging from bankruptcy with a fresh start, but it should not unfairly penalize the non-debtor spouse.[219] With nearly 1.2 million di-

---

allow debtor to keep property or its proceeds which belongs to another person") (citing *In re* Maness, 17 Bankr. 76, 77 (Bankr. W.D. Mo. 1981)).

209. *Thomas*, 32 Bankr. at 12-13.

210. *See* Borman v. Leiker (*In re* Borman), 886 F.2d 273, 274 (10th Cir. 1989); *Donahue*, 862 F.2d at 265.

211. *See* 11 U.S.C. § 522(f)(1) (1988).

212. Farrey v. Sanderfoot, 899 F.2d 598, 605 (7th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); *see also supra* note 121 and accompanying text (on judicial deference to Congress in interpreting section 522(f)(1)). Even under the circumstances of Maus v. Maus, 837 F.2d 935 (10th Cir. 1988), where the divorce decree lien was not placed on the homestead and the court therefore avoided the lien, the Tenth Circuit suggested that lien avoidance in the divorce setting "may produce questionable results in some circumstances"—even where the lien was not specific to the marital property. *See id.* at 940.

213. According to Ms. Farrey, the non-debtor spouse in *Sanderfoot*, her husband "told me when I left him that if I divorced him he'd see to it that I got nothing, that he was going to file for bankruptcy." Margolick, *supra* note 96, at 9, col. 3.

214. *Sanderfoot*, 899 F.2d at 606 (Posner, J., dissenting). The debtor in *Sanderfoot* filed a petition for bankruptcy shortly after the state divorce court rendered its judgment. *See id. But see* Stedman v. Pederson (*In re* Pederson), 875 F.2d 781, 784 (9th Cir. 1989) ("Code provides ample tools for ferreting out abuses.").

215. *Sanderfoot*, 899 F.2d at 606 (Posner, J., dissenting).

216. *Id.* at 608.

217. *See supra* notes 65-69, 101 and accompanying text.

218. *See supra* notes 115-17 and accompanying text.

219. *See* Farrey v. Sanderfoot (*In re* Sanderfoot), 899 F.2d 598, 607-08 (7th Cir.) (Posner, J., dissenting) (avoidance of lien will give debtor husband all rather than half of marital property, allowing husband to "steal from his former wife"), *cert. granted*, 111 S. Ct. 507 (1990) (No. 90-350); *supra* notes 207-11 and accompanying text.

vorces granted annually[220] and the number of personal bankruptcy filings likely to continue rising,[221] lien avoidance must be removed as a means by which divorced debtors can use federal law unilaterally to modify secured divorce property divisions. Bankruptcy law should promote policies that are fundamental to both divorce and bankruptcy: fairness and a fresh start.

CONCLUSION

When applied to divorce decree liens on marital homestead property, the right of debtors to avoid liens under section 522(f)(1) of the Bankruptcy Code upsets the complex interrelationship between federal bankruptcy law and state divorce law. If property agreements incorporated into divorce decrees cannot withstand the operation of section 522(f)(1), the efforts of modern divorce reform to encourage peaceful resolution of divorces will perpetually conflict with federal bankruptcy law. If court judgments enforcing property divisions in contested divorces can be nullified by section 522(f)(1), divorce courts will be severely handicapped in implementing the mandates of state divorce statutes.

Section 522(f)(1) homestead lien avoidance involves property shared in a marital relationship, not a typical debtor-creditor transaction. Most importantly, federal law may deprive a non-debtor spouse of virtually all of the remaining marital assets while giving the debtor property that the divorce decree intended to distribute fairly to both spouses. The debtor's fresh start is already protected by other provisions of the Code that relieve the debtor of personal liability for property division debts. To achieve a more proper balance between federal and state interests in the bankruptcy-divorce setting and to ensure more equitable protection of the fresh start goals of both debtor and ex-spouse, debtors should not be permitted to use federal bankruptcy law to avoid divorce decree homestead liens.

Phyllis A. Klein

220. *See supra* note 96.

221. *See id.*; *see also* Marino, *Business of Going Bankrupt is Booming*, Chi. Trib., Dec. 3, 1989, Bus. at 22F ("stigma once associated with [bankruptcy] has diminished, largely because the number of people swamped in debt has soared and changes in federal laws have made bankruptcy filing easier").