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Feature

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Parental Pitfalls in the Code

Discharge Exception for Judgment Against Parent Based on Willful and Malicious Acts of Children

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Raising children is not cheap. The U.S. Department of Agriculture estimated that the cost of raising a child in 2015 was $233,610,[1] which goes mostly to housing, food, clothing and childcare.[2]

Not surprisingly, having a child is one of the best predictors of bankruptcy,[3] and numerous Bankruptcy Code provisions address debt related to raising children.[4] However, in addition to the voluntary expenses that parents incur in raising a child, parents can also incur vicarious tort liability for the willful and malicious acts of their children.

Most states have enacted statutes that hold parents vicariously liable for the willful and malicious acts of their minor children.[5] If the parent's liability does not arise under a statute, it may also arise under the common law. In fact, the common law appears to be expanding parents' exposure to liability for their child's acts.[6] These forms of vicarious liability can lead to state court judgments against the parents of the tortfeasor children.[7]

Eventually, some parents file for bankruptcy and list the state court judgment as a debt for discharge. Judgment creditors have objected to discharge under § 523(a)(6), which excepts from discharge any debt "for willful or malicious injury by the debtor to another entity or to the property of another entity." Judgment creditors argue that the child's willful or malicious actions are imputed to the debtor/parent and are thus nondischargeable.[8]

Is Vicarious Liability for a Child's Willful/Malicious Act Dischargeable by a Parent in Bankruptcy?

Generally, the answer is "yes."[9] Bankruptcy courts have reasoned that the statute's plain meaning requires that the *debtor* must cause the willful and malicious injury.[10] Imputed liability from intentional acts of the debtor's child requires a "proof of intention over and beyond some gradation of negligence" in order to fall within the scope of § 523(a)(6).[11]

The statute's history supports that reasoning. The Bankruptcy Reform Act of 1978 added the phrase "by the debtor," which indicates rejection of imputed liability. The predecessor to § 523(a)(6) —

1 M. Lino, K. Kuczynski, N. Rodriguez and T. Schap, "Expenditures on Children by Families, 2015, Miscellaneous Report No. 1528-2015," U.S. Department of Agriculture, Center for Nutrition Policy and Promotion (2017).

2 *Id.* at ii.

3 *See* E. Warren and A. Tyagi, *Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke*, 6 (Basic Books 2003).

4 *See, e.g.*, §§ 507(a)(1) (priority of "unsecured claims for domestic-support obligations that ... are owed to or recoverable by ... [the] child of the debtor, or such child's parent"); 522(f)(4) ("household goods" that might be exempted by debtor include educational materials, furniture, toys and hobby equipment that are used by or for use of debtor's minor dependent children); and 523(a)(5) (domestic-support obligations are excepted from discharge).

5 Almost every state has a parental responsibility law, with various liability limits and other conditions. *See, e.g.*, Minn. Stat. Ann. § 540.18; Cal. Civil Code § 1714.1; N.Y. Gen. Oblig. Law § 3-112(1); and 740 I.L.C.S. § 115/3. For a list of individual states' parental responsibility laws, *see* mwl-law.com/wp-content/uploads/2013/03/parental-responsibility-in-all-50-states.pdf (last visited June 22, 2017).

6 *Compare Restatement (Second) of Torts* § 316 (1965) ("A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control."); *with Restatement (Third) of Torts: Phys. & Emot. Harm* § 41 (2012) ("An actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship. Special relationships giving rise to the duty ... include: (1) a parent with dependent children."). *See also* Elizabeth G. Porter, "Tort Liability in the Age of the Helicopter Parent," 64:3 *Ala. L. Rev.* 533, 568-70 (2013) (arguing that *Restatement (Third)* broadens scope of parental liability).

7 *See, e.g., Nieuwendorp v. Am. Family Ins. Co.*, 529 N.W.2d 594 (Wis. 1995); *Parsons v. Smithey*, 504 P.2d 1272 (Ariz. 1973).

8 *See, e.g., Matter of Miller*, 196 B.R. 334, 336 (Bankr. E.D. La. 1996).

9 *In re Cornell*, 42 B.R. 860 (Bankr. E.D. Wash. 1984); *In re Eggers*, 51 B.R. 452 (Bankr. E.D. Tenn. 1985); *In re Horne*, 46 B.R. 814 (Bankr. N.D. Ga. 1985); *In re Whitacre*, 93 B.R. 584 (Bankr. N.D. Ohio 1988); *Matter of Miller*, 196 B.R. 334 (Bankr. E.D. La. 1996); and *In re Garner*, 2015 WL 3825979 (Bankr. N.D. Tex. June 18, 2015).

10 *Miller*, 196 B.R. at 336 ("In Section 523(a)(6), the phrase 'by the debtor' follows the phrase 'for willful and malicious injury.' Thus, the plain-meaning test requires that the debtor must have been the one who caused the willful and malicious injury."); *see also Eggers*, 51 B.R. at 453 ("The addition to the present [Bankruptcy] Code of the phrase 'by the debtor' clearly indicates a rejection of an imputed liability theory.").

11 *In re Cornell*, 42 B.R. at 864.

former Bankruptcy Act § 17(a)(8) — did not contain any designation of whose conduct was necessary in order to find an obligation to be dischargeable.[12] Thus, "the statutory modification was deliberate and designed to give relief to debtors from imputed and vicarious liability."[13]

In 2015, a Texas bankruptcy court rejected the idea that a debtor/parent's debts — incurred through a Texas statute that holds parents vicariously liable for the tortious acts of their minor children — are excepted from discharge under § 523(a)(6).[14] In *Garner*, the debtor's minor child and his friends threw rocks at a neighbor's van and broke a window.[15] The neighbor settled with the other children's families and filed suit against the debtor to collect on the remaining costs.[16] The debtor, who had been in chapter 13 at the time of the incident, converted to chapter 7 and listed her neighbor's claim.[17]

The neighbor had argued that his claim be excepted from discharge under § 523(a)(6) as a debt that had been incurred for the "willful and malicious injury by the debtor to another entity or to the property of another entity."[18] The neighbor based his argument on a Texas statute that holds parents vicariously liable for "the willful and malicious conduct of a child who is at least 10 years of age but under 18 years of age."[19]

The bankruptcy court rejected the neighbor's argument.[20] First, the court reasoned that § 523(a)(6) does not apply to debts for which the debtor is only vicariously liable because it uses the language "for willful and malicious injury *by the debtor*" and thus was designed to give relief to debtors from imputed and vicarious liability.[21]

Second, the court reasoned that the *mens rea* of the discharge exception requires that the *debtor's* actions be willful and malicious, and as such, a parent who is merely negligent in his/her supervision of a child does not satisfy the *mens rea* required under § 523(a)(6).[22] The court cited a U.S. Supreme Court case holding that "'willful' ... modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."[23]

But Can Parents' Omissions Be Willful and Malicious?

Notwithstanding this construction and Supreme judicial gloss, a debtor/parent who seeks or encourages a child to commit a willful and malicious act may fall within § 523(a)(6)'s exception to discharge. This encouragement could also include an omission, "if such an omission was calculated by the debtor in a willful and malicious manner to cause injury."[24]

In *Sintobin*, the debtor/tenants' minor children and their friends vandalized the house that they were leasing and in which they are residing.[25] The debtors were subsequently evicted from the house for nonpayment of rent.[26] Upon the landlord's reentry, the landlord discovered extensive damage throughout the house and subsequently obtained a state court judgment against the debtors based on nonpayment of rent and the damage to the house.[27] The debtor/tenants filed for chapter 7 and listed an obligation owed to the landlord.[28] The landlord filed a complaint seeking to hold the debt as nondischargeable on the basis that the debt arose from the debtor/tenants' willful and malicious conduct pursuant to § 523(a)(6).[29] The court subsequently held that under § 523(a)(6), $3,500 in damages would be excepted from discharge.[30]

Acknowledging the holding in *Matter of Miller*,[31] the court agreed that a person's willful and malicious actions cannot be imputed to another person for the purpose of holding a debt as nondischargeable under § 523(a)(6). However, the court reasoned that "the [debtors'] complete apathy over what occurred to the [landlord's] house both influenced and encouraged their children and their friends to commit acts of vandalism against the house, and that the end result was intended by the [debtors]."[32] The court found that the debtors allowed their children and the children's friends to vandalize the residence — spray-painting walls, knocking doors off hinges and otherwise damaging the property — which amounted to willful and malicious actions on the part of the debtors. The debtors did nothing to discourage the behavior, repair the damage, notify the landlord or ban the children's friends from the home, nor did they even seem to think the damage and the behavior that caused it was anything to be concerned about.[33] The court also noted the "policy goal of § 523(a)(6), which is to except from a bankruptcy discharge those debts incurred by morally reprehensible conduct."[34] Thus, a debtor/parent's omissions or failure to act following the tortious conduct of its child may constitute a willful or malicious injury of another.[35]

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12 *In re Whitacre*, 93 B.R. 584, 585 (Bankr. N.D. Ohio 1988) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess., 365, U.S. Code Cong. & Admin. News 1978, pp. 5787, 6320-21); *In re Eggers*, 51 B.R. 452, 453 (Bankr. E.D. Tenn. 1985); *In re Cornell*, 42 B.R. 860, 863 (Bankr. E.D. Wash. 1984).
13 *In re Garner*, 2015 WL 3825979, *5 (Bankr. N.D. Tex. June 18, 2015).
14 *Id.*
15 *Id.* at 1.
16 *Id.*
17 *Id.*
18 *Id.* at 5.
19 *Id.*
20 *Id.* at 6.
21 *Id.* at 5 (emphasis added).
22 *Id.* at 6.
23 *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (court's emphasis).
24 *In re Sintobin*, 253 B.R. 826 (Bankr. N.D. Ohio 2000).
25 *Id.* at 829 (vandalism included spray-painted walls, doors knocked off their hinges, holes in the walls and other destruction).
26 *Id.*
27 *Id.*
28 *Id.* at 828.
29 *Id.*
30 *Id.* at 831-32.
31 *See Matter of Miller*, 196 B.R. 334 (Bankr. E.D. La. 1996).
32 *Sintobin*, 253 B.R. at 831.
33 *Id.* ("Given these observations collectively, the Court finds that the [debtors], by their omissions, willfully and maliciously caused injury to the [landlord's] property.").
34 *Id.* (citing *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 441, 418 n.7 (Bankr. N.D. Ohio 1998)).
35 *See also In re McLain*, No. Adv. P. 06-4047, 2007 WL 7022202, at *7 (Bankr. S.D. Ga. April 30, 2007) (holding debt owed to landlord nondischargeable that resulted from damage caused to leased premises by debtors' children and pets).

Inferring Willful and Malicious Intent — or the Fine Line Between Childhood Mess and Vandalism

Kids draw on walls. They throw food. They break things. Often on purpose. Teenagers break bigger things, usually on purpose, and often with malice. Pets can create similar legal issues.[36] As set forth above, parents are generally insulated from nondischargeable liability for their children's acts.[37] However, before a parent can discharge debt owed due to a child's misdeeds, the parent must discharge a parental duty to adequately respond to a child's damage. This parental duty is not as straightforward.

First, courts recognize a "continuum of damage" from ordinary wear and tear, to wrongful modification, to "quasi-vandalism."[38] Parents are not liable for ordinary wear and tear, but the line between ordinary (for children) wear and vandalism is difficult to articulate. Parents may lose a dischargeability contest if they do not respond adequately to their children's misbehaviors.[39]

Second, parents may find themselves on notice of their children's propensity for damage. A Georgia bankruptcy court explained that "[o]nce the first instance of intentional or negligent damage was observed, [the debtors] had a heightened awareness of the risk to the premises [caused by their children and pets] and a duty to prevent it[; by] failing to do so, they knowingly permitted acts to be committed that were substantially certain to result in injury."[40]

Third, the revised *Restatement* may heighten the ordinary duty of care that parents owe others for damage caused by their children.[41] This may in turn lead bankruptcy courts to scrutinize parental supervision more closely.

A parent/debtor will rarely, if ever, admit to acting in a willful and malicious manner. Courts infer through the circumstances surrounding the injury at issue, wrestling with the context of the limited capacity of children.[42] Thus, "[a] finding of 'willful and malicious injury' depends heavily on the facts of each case."[43] This leaves parents to navigate how to discharge their parental duties to respond to damage done by their children before discharging that debt in bankruptcy. abi

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36 *Compare Sintobin*, 253 B.R. at 831 (holding that debtor/parents' omissions during children's vandalistic acts satisfied requirements of willful and malicious injury), *with In re Peterson*, 332 B.R. 678, 690 (Bankr. D. Del. 2005) (holding that extensive damage that debtor's dogs had caused to apartment repeatedly over period of time, during which time debtor continued to reside in apartment with dogs, was insufficient to show requisite "willful and malicious injury"); *see also In re Lazzara*, 287 B.R. 714, 722 (holding debt dischargeable where debtor "could control the dogs, but failed to do so").

37 Recent developments in law and neuroscience supports insulating parents from liability for their children's acts. Children and "teenagers are not yet adults and ... the legal system should therefore not treat them as such." J. Aronson, "Neuroscience and Juvenile Justice," 42 *Akron L. Rev.* 917, 919 (2009); *see also* F. Shen, "The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw," 38 *Int'l J. Legal Info.* 352 (2010).

38 *McLain*, 2007 WL 7022202, at *6.

39 *Sintobin*, 253 B.R. at 831.

40 *Id.* at *6.

41 *See Restatement (Third) of Torts: Phys. & Emot. Harm* § 41 (2012); *see also* "Tort Liability in the Age of the Helicopter Parent," *supra* fn.6.

42 *Sintobin*, 253 B.R. at 831; *see also In re Lazzara*, 287 B.R. 714, 723 (Bankr. N.D. Ill. 2002) ("Since a person will rarely, if ever, admit to acting in a willful and malicious manner, those requirements must be inferred from the circumstances surrounding the injury at issue.").

43 *In re Alderson*, No. A03-4059, 2004 WL 574134, at *2 (Bankr. D. Neb. Feb. 11, 2004).