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Bankruptcy Survey

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BANKRUPTCY SURVEY

INTRODUCTION

During the survey period, the Tenth Circuit Court of Appeals addressed a variety of bankruptcy issues. The cases in this Survey were chosen because they modified, rather than reaffirmed, existing precedent. Two cases clarify prior decisions by this circuit about the non-dischargeability of debts under Section 523 of the Bankruptcy Code, and one case discusses the preclusion of judicial review of trustees' fees under Chapter 12.

The first case, *In re Sampson*,[1] reconciles two inconsistent rulings by the Tenth Circuit respecting the actual nature of post-marital obligations. Under the Bankruptcy Code, property settlements between former spouses are dischargeable while support payments are not.[2] Often, however, these post-marital obligations have characteristics of both a property settlement and support. The Tenth Circuit has now articulated a rule to deal with such payments.

The second case, *In re Pasek*,[3] deals with the non-dischargeability exemption of debts that arise from a "willful and malicious injury by the Debtor to another entity or to the property of another entity."[4] This Survey examines the evolution of the "willful" and "malicious" standards of this exemption and clarifies the types of acts that satisfy this exemption.

Finally, *In re Scholleti*[5] demonstrates how the failure of Congress to expressly provide for judicial review of trustees' fees under Chapter 12 manifests an intent by Congress to preclude judicial review of such fees.

I. THE DISCHARGEABILITY OF DEBTS OWED BETWEEN FORMER SPOUSES

A. *Background*

The Bankruptcy Code of 1978 allows a debtor to seek a discharge of most debts that arise before the date of the order for relief.[6] The discharge extinguishes any personal liability of the debtor and is intended to further the "fresh start"[7] policy contained in the Bankruptcy Code.[8] Absolution, or a "fresh start," means that debtors may use the Bankruptcy Code to "reorder their affairs, make peace with their creditors, and enjoy 'a new

1. 997 F.2d 717 (10th Cir. 1993).
2. *See* 11 U.S.C. § 523 (1988 & Supp. IV. 1992).
3. 983 F.2d 1524 (10th Cir. 1993).
4. *Id.* at 1526.
5. 980 F.2d 639 (10th Cir. 1992).
6. 11 U.S.C. § 727(b) (1988); *In re* Sampson, 997 F.2d 717, 721 (10th Cir. 1993); *see also* 11 U.S.C. § 523 (exceptions to discharge).
7. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
8. *See* 11 U.S.C. § 524(a) (1988); Shaver v. Shaver, 736 F.2d 1314, 1315-16 (9th Cir. 1984); *see generally* Kenneth T. Fibich & Ben B. Floyd, *Impact of Bankruptcy on Family Law*, 29 S. TEX. L.J. 637, 646 (1988) (discussing § 524(a) discharge).

opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' "[9]

An individual debtor, however, does not receive a discharge for debts owed "to a spouse, former spouse, or child . . . for alimony to, maintenance for, or support of such spouse or child" if the debt is "actually in the nature of alimony, maintenance, or support."[10] This exception reflects a predominant public policy that favors the enforcement of familial obligations.[11] The policy rests on three rationales: (1) a spouse who lacks job skills or is incapable of working needs protection from destitution; (2) minor children may suffer if the custodial parent is forced into the work force due to the non-custodial parent's bankruptcy filing; and (3) society should abate the potential increased burden upon the welfare system which results from a debtor avoiding familial obligations through bankruptcy.[12]

Although post-marital obligations can be categorized as nondischargeable support or dischargeable property settlement,[13] sometimes the exact characterization of post-marital obligations is unclear. In these cases, the final clause of 11 U.S.C. § 523(a)(5) requires the post-marital obligation to actually be in the nature of support to be nondischargeable. However, determining the actual nature of the obligation has proven difficult.[14]

B. *Prior Case Law in the Tenth Circuit Regarding the Characterization of Post-Marital Obligations*

In *In re Yeates*,[15] the Tenth Circuit stated that the "intention of the parties" is "the initial inquiry" into the actual nature of the post-marital obligation,[16] and the parties' intent is dispositive on the question of nondischargeability under Section 523(a)(5).[17] The court also remarked that "[a] written agreement between the parties is persuasive evidence of intent, [and] if the agreement between the parties clearly shows that the parties intended the debt to reflect either support or a property settlement, then that characterization will normally control."[18] The *Yeates* court

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9. Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co.*, 292 U.S. at 244).

10. 11 U.S.C. § 523(a)(5)(B) (1988); *Shaver*, 736 F.2d at 1315.

11. *Shaver*, 736 F.2d at 1316; *see generally* Madison Grose, Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 UCLA L. REV. 96 (1977) (discussing the purpose of the Bankruptcy code); Carl D. Young, Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L.J. 469 (1977) (discussing the proposed Bankruptcy Act of 1973).

12. *Shaver*, 736 F.2d at 1316 n.3; Grose, *supra* note 11, at 96-97 n.7; *see also* Audubon v. Shufeldt, 181 U.S. 575 (1901)(debts arising out of a husband's natural legal duty to support his wife are not dischargeable under the Bankruptcy Act of 1898).

13. *See* 11 U.S.C. § 523(a)(5); *In re* Yeates, 807 F.2d 874, 876 (10th Cir. 1986); *see also* Fibich, *supra* note 8, at 647.

14. *See* Fibich, *supra* note 8, at 650-51.

15. 807 F.2d 874 (10th Cir. 1986).

16. *Id.* at 878.

17. *Id.*

18. *Id.*

further declared that resorting to extrinsic evidence of the parties' intent is necessary only when the agreement between the parties is ambiguous.[19]

Shortly after *Yeates* was issued, the Tenth Circuit articulated a seemingly different standard in *In re Goin*.[20] Instead of finding the intent of the parties in the expressed terms of the agreement, the *Goin* court stated "a bankruptcy court must look beyond the language of the [agreement] to the intent of the parties and to the substance of the obligation."[21] The court then enumerated four factors "pertinent" to the inquiry of whether an obligation is support:

> 1) if the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support; (2) when there are minor children and an imbalance of income, the payments are likely to be in the nature of support; (3) support or maintenance is indicated when the payments are made directly to the recipient and are paid in installments over a substantial period of time; and (4) an obligation that terminates on remarriage or death is indicative of an agreement for support.[22]

C. *Clarification of the Inquiry:* In re *Sampson*[23]

1. Facts

Ira N. Sampson and Katherine Lavonne Sampson divorced in 1984 after nine years of marriage.[24] As part of the divorce proceedings, the parties incorporated an agreement entitled "Property Settlement and Permanent Orders Agreement"[25] into the final judgment. Article I of the Agreement was entitled "Maintenance (Spousal Support)," in which Ira agreed to pay Katherine a specific monthly amount over an eight-year period.[26] Article III of the Agreement specifically dealt with the property settlement between the parties.[27]

In November 1990 Ira Sampson filed a voluntary petition under Chapter 7 of the Bankruptcy Code.[28] He claimed at an evidentiary hearing that the parties intended the payments specified in Article I of the Agreement to be a part of the property settlement but designated them as maintenance so Ira could deduct the payments from his gross income for tax purposes.[29] This claim was supported by testimony from his attorney and accountant. Katherine Sampson testified that she did not remember such an intention, but her testimony was unsupported because her attor-

19. *Id.*
20. 808 F.2d 1391 (10th Cir. 1987).
21. *Id.* at 1392.
22. *Id.* at 1392-93.
23. 997 F.2d 717 (10th Cir. 1993).
24. *Id.* at 719.
25. *Id.*
26. *Id.* at 719-20.
27. *Id.* at 720.
28. *Sampson*, 997 F.2d at 720.
29. *Id.*

ney from the divorce proceeding had died. Therefore, she was unable to refute the testimony of Ira Sampson's attorney and accountant.[30]

The bankruptcy court found for Katherine Sampson, stating that the Agreement unambiguously provided that the subject payment obligation was for Katherine's support, and reasoned that extrinsic evidence to the contrary should be precluded under *Yeates*.[31] The bankruptcy court did recognize that the *Yeates* decision conflicted with the Tenth Circuit's holding in *Goin*, which required a "bankruptcy court [to] look beyond the language of the [agreement] to the intent of the parties and the substance of the obligation."[32]

2. The Court's Opinion

The Tenth Circuit reconciled *Yeates* and *Goin* in *Sampson*. The court reasoned that a written agreement is persuasive evidence of the parties' intent at the time the obligation arose.[33] Additionally, in *Sampson* the Agreement " 'did more than simply label payments as alimony or property settlement; [i]t exhibited a structured drafting that purported to deal with separate issues in totally distinct segments of the document.' "[34] While recognizing that the language of the document "erected a substantial obstacle" for the party challenging the expressed terms to overcome, the court added that the express language was not determinative.[35]

The court then examined the extrinsic evidence surrounding the Agreement. The court found that the alimony and support provisions of the Agreement would survive Katherine's remarriage, which is suggestive of a property settlement.[36] The payments terminated on her death, however, which is characteristic of a support obligation.[37] The alimony and support payments also could be modified depending on their tax benefit to Ira, thereby strengthening Katherine's position that the payments were in the nature of alimony and support.[38] Finally, the court recognized that, at the time of the divorce, Katherine had an obvious need for support. She had no job, no marketable skills, little education, a health condition, no income, and monthly living expenses of $4165.00[39] Therefore, the court ruled that the parties' expressed intent, coupled with a functional analysis of the nature of the payments, demonstrated that the payments were nondischargeable in bankruptcy.[40]

30. *See id.*
31. *Id.*
32. *See id.* at 720 n.3.
33. *See Sampson*, 997 F.2d at 723.
34. *Id.* (quoting Tilley v. Jessee, 789 F.2d 1074, 1077-78 (4th Cir. 1986)).
35. *Sampson*, 997 F.2d at 723.
36. *Id.*
37. *Id.* at 724.
38. *Id.*
39. *Id.* at 725.
40. *See Sampson*, 997 F.2d at 726.

3. Analysis

The court seemed concerned that Ira Sampson was attempting to benefit under the tax and bankruptcy codes by arguing inconsistent positions. Like the Fifth Circuit in a similar case, the Tenth Circuit relied upon a "quasi-estoppel" doctrine that prevents a party from accepting the benefit of a statute and then taking an inconsistent position to avoid any deleterious effects.[41] The court emphasized that inconsistent positions would amount to a manipulation of the bankruptcy and tax codes.[42] The Tenth Circuit also found that proof of detrimental reliance, though not necessary, was an important factor in overturning Ira Sampson's position.[43] *Sampson* demonstrates a willingness on the part of the Tenth Circuit to look beyond the four *Goin* factors to other surrounding circumstances.

II. THE DISCHARGEABILITY OF DEBTS THAT ARISE FROM WILLFUL OR MALICIOUS ACTS

A. *Background*

Section 523(a)(6) of the Bankruptcy Code of 1978 provides that a debtor is not discharged from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."[44] The language "willful and malicious" is identical to the original exceptions from discharge found in the Bankruptcy Act of 1898, which provided a debtor "[a] discharge in bankruptcy . . . from all his provable debts, except such as . . . are . . . for willful and malicious injuries to the person or property of another."[45]

One of the first cases to deal with the non-dischargeability of debts for "willful and malicious" injuries was *Tinker v. Colwell*.[46] In *Tinker*, the debtor sought discharge in bankruptcy for a $50,000 judgment against him for the act of criminal conversation with Colwell's wife.[47] The United States Supreme Court held that the $50,000 judgment was for a willful and malicious injury, stating, "a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and

41. *Id.* at 724 n.6 (quoting *In re* Davidson, 947 F.2d 1294, 1297 (5th Cir. 1991)).

42. *See Sampson*, 997 F.2d at 724-25 n.6 (citing *Davidson*, 947 F.2d 1294, 1297).

43. *See Sampson*, 997 F.2d at 726 ("Plaintiff had an obvious need for support at the time of the divorce . . .[and] [d]efendant was clearly in a position to provide support."). *See also Davidson*, 947 F.2d at 1297. For other decisions within the Fifth Circuit explaining this "quasi-estoppel" theory, see Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 371 (5th Cir. 1990); Kaneb Serv., Inc. v. FSLIC, 650 F.2d 78, 81 (5th Cir. 1981).

44. 11 U.S.C. § 523(a)(6) (1988).

45. Bankruptcy Act of 1898 § 17(a)(2), 11 U.S.C. § 35(a)(2) (1941) (current version at 11 U.S.C. § 523 (a)(16) (1988 & Supp. IV 1992); *see* Jeffrey H. Weinberg, Comment, *Accidental "Willful and Malicious Injury": The Intoxicated Driver and Section 523(a)(6)*, 1 BANKR. DEV. J. 135, 139 (1984).

46. 193 U.S. 473 (1904).

47. *Id.* at 474.

which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously."[48]

After *Tinker*, the ensuing decisions by bankruptcy courts evolved into two separate interpretations of "willful and malicious" injury. One interpretation focused on whether the debtor acted "deliberately and intentional[ly]" in causing injury.[49] The other focused on whether the debtor acted with "reckless disregard" of the known rights of others.[50] Thereafter, in drafting the current Bankruptcy Code, Congress explicitly rejected the "reckless disregard" standard under the new Section 523(a)(6).[51]

The Tenth Circuit defines the willful component as "deliberate and intentional."[52] To define "malicious," the court inquires into the debtor's actual knowledge, or reasonable foreseeability that his conduct will result in injury to the creditor.[53] The malice inquiry is not upon "abstract and perhaps moralistic notions of the 'wrongfulness' of the debtor's act."[54] Malicious intent can be demonstrated two ways: (1) through direct evidence that the debtor's conduct was specifically intended to harm the creditor; and (2) by evidence, inferred from the debtor's experiences, acts, or admissions that he "had knowledge of the creditor's rights and that, with that knowledge, proceeded to take action in violation of those rights."[55] Therefore, in light of these two components, the Tenth Circuit has ruled that not every intentional act falls within the exception to discharge if that act is not malicious.[56]

B. In re *Pasek*[57]

1. Facts

Debtor Gregory James Pasek was an accountant employed by a CPA firm. On the firm's request, Pasek signed a covenant not to compete within fifty miles of a city where the firm had an office for a period of three years should Pasek leave the firm.[58] Liquidated damages for violation of this covenant were set at "150% of the amount billed by [the firm]

48. *Id.* at 487.

49. *See In re* Compos, 768 F.2d 1155, 1157 (10th Cir. 1985) (discussing different interpretations of the "willful and malicious" injury provision).

50. *See id.*; Weinberg, *supra* note 45, at 140.

51. H.R. Rep. No. 595, 95th Cong., 1st Sess. 362-65 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865 ("[t]o the extent that Tinker v. Colwell, 193 U.S. 473 (190[4]), held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled."); *see* Weinberg, *supra* note 45, at 140.

52. *Compos*, 768 F.2d at 1158; *see In re* Posta, 866 F.2d 364, 367 (10th Cir. 1989) ("[w]illful conduct is conduct that is volitional and deliberate and over which the debtor exercises meaningful control."); *cf.* RESTATEMENT (SECOND) OF TORTS, § 8A, cmt. b (1965) (acts "substantially certain" to cause harm are treated as intentional).

53. *Posta*, 866 F.2d at 367 (citing *In re* Egan, 52 B.R. 501, 507 n.4 (Bankr. D. Minn. 1985)).

54. *Posta*, 866 F.2d at 367.

55. *Id.* (citations omitted).

56. *See Posta*, 866 F.2d at 367; *Compos*, 768 F.2d at 1158.

57. 983 F.2d 1524 (10th Cir. 1993).

58. *Id.* at 1525.

to the client for services rendered in the prior twelve months."[59] Soon afterward, the CPA firm began to make additional demands of Pasek. The firm decided that the accountants and their spouses should project a certain image to the community and clients. The image required conformity in home decoration, automobile selection, spousal attire, grooming, and manners.[60] The firm was particularly critical of Pasek's wife.[61] The firm also assigned Pasek one of the two highest billing quotas, even though Pasek had two children with serious, time-consuming medical problems.[62] Pasek disagreed with the firm's decisions about client allocation, leverage, and what he perceived as inequitable enforcement of the non-competition covenant.[63]

Eventually, Pasek left the firm for the sake of his family.[64] He opened a competing office and several of his clients followed him.[65] The CPA firm sued Pasek. Several days before the trial commenced, Pasek filed a voluntary petition for bankruptcy and sought discharge of the damages alleged by his former firm.[66]

2. Opinion

The bankruptcy court found that, although Pasek was aware of the covenant not to compete,[67] the CPA firm had not established a "willful and malicious" injury partly because Pasek acted due to severe economic and family needs.[68] On appeal, the Tenth Circuit opined that non-dischargeability under Section 523(a)(6) requires proof of deliberate and intentional injury.[69] Malicious intent may be demonstrated by evidence that the debtor knew of the creditor's rights and, with that knowledge, acted in violation of those rights.[70] Therefore, " 'the debtor's actual knowledge or the reasonable foreseeability that his conduct will result in injury to the creditor'[is] highly relevant."[71] Nevertheless, the *Pasek* court ruled that such knowledge or reasonable foreseeability does not automatically require a finding of "willful and malicious" injury. The court reasoned that any asserted motivation, justification, or excuse must also be examined to discover the malice in addition to willfulness.[72] In the case at bar, the bankruptcy court's ruling that Pasek had adequate justifications and ex-

59. *Id.* at 1525-16.
60. *Id.* at 1526.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Pasek*, 983 F.2d at 1526.
67. *Id.*
68. *Id.*
69. *Id.* at 1527.
70. *Id.* at 1527; *see Posta*, 866 F.2d at 367; *see also In re* Grey, 902 F.2d 1479, 1481 (10th Cir. 1990).
71. *Pasek*, 983 F.2d at 1527 (quoting *Posta*, 866 F.2d at 367).
72. *Pasek*, 983 F.2d at 1527; *see Posta*, 866 F.2d at 367 ("willfulness" is straightforward; "maliciousness" is more complex).

cuses for his conduct was affirmed.[73] Given the justification, the conclusion of the bankruptcy court that the CPA firm's injury was not the result of "willful and malicious" actions on the part of Pasek was not clearly erroneous.[74]

3. Analysis

Before *Pasek*, the "willful and malicious" standard applied to a debtor who knew or could reasonably foresee that his conduct would cause injury.[75] Under this old standard, it was clear that Pasek's intentional acts (of opening his own office and taking clients with him) were "willful and malicious" because Pasek knowingly violated the CPA firm's contractual rights.

In *Pasek*, however, the Tenth Circuit viewed the debtor's personal excuse as a defense to the non-dischargeability of alleged "willful and malicious" injuries. *Pasek* thus expands on *Posta*, which rejected consideration of "abstract and perhaps moralistic notions of the 'wrongfulness' of the debtor's act" when analyzing the malice component.[76] The Tenth Circuit has significantly broadened the "malice" inquiry, and has done so in a manner that furthers the Bankruptcy Code's policy of "fresh start."[77] In this case, the discharge of Pasek's debts to the CPA firm will allow him to start his life over, free from any "pressure or discouragement"[78] from the covenant not to compete.

III. THE PRECLUSION OF JUDICIAL REVIEW OVER TRUSTEE'S FEES UNDER CHAPTER 12: IN RE *SCHOLLETT*.[79]

A. *Background*

Bankruptcy courts handled both judicial and administrative functions prior to the passage of the Bankruptcy Reform Act of 1978.[80] These administrative functions included: organizing and scheduling meetings of creditors, composing creditors' committees, appointing trustees, and setting trustees' fees.[81] Under the former statutory scheme, the bankruptcy court had the power to review and adjust the trustee's fee in individual cases.[82] Congress believed this combination of judicial and administrative functions eroded public confidence in bankruptcy proceedings and un-

73. *Pasek*, 983 F.2d at 1528. These justifications and excuses included the material alterations of the partnership agreement by the CPA firm including: the attempt to regulate debtor's personal affairs, imposing unreasonable billable hour quotas, and the reasonable reliance by the debtor on a legal opinion that the covenant not to compete was unenforceable. *Id.*

74. *Id.*

75. *Posta*, 866 F.2d at 367.

76. *Id.*

77. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

78. *Id.*

79. 980 F.2d 639 (10th Cir. 1992).

80. *Id.* at 641.

81. *Id.*

82. *See id.*

necessarily burdened bankruptcy judges.[83] Therefore, Congress created the United States Trustee "pilot program" as part of the Bankruptcy Code of 1978 to address these concerns.[84] Under this "pilot program," a limited number of bankruptcy jurisdictions transferred their administrative functions under Chapter 13 to the United States Trustees.[85]

The United States Trustees, appointed by the United States Attorney General,[86] are authorized to appoint private trustees for all bankruptcy cases arising under Chapters 7 and 13, and where appropriate to appoint standing trustees for all Chapter 13 cases within a given judicial district.[87] Over time, this "pilot program" appointment of standing trustees "resulted in a more efficient . . . Chapter 13 program than the appointment of different trustees to serve in particular Chapter 13 cases."[88]

The "pilot program" was such a success that it was included in the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986[89] for phase-in nationwide under the newly created Chapter 12 bankruptcy.[90] Under the 1986 Act, certain judicial districts are chosen by the Attorney General for implementation of the United States Trustee System. Once a district is certified, the United States Trustee for that district determines the district's need for a standing trustee.[91] Compensation for the standing trustee is determined by the Attorney General after consultation with the United States Trustee.[92]

Under the compensation plan, a standing trustee receives a fee set by a fixed percentage of the payments to the trustee by the debtor.[93] This fee is not to exceed ten percent of payments up to $450,000 under a Chapter 12 reorganization plan.[94] If the payments exceed $450,000, then the trustee's fee is reduced to three percent for the surplus payments.[95] The total fees collected from all debtors is limited to the basic pay for level V employees on the executive schedule.[96] Excess fees are then used to fund the United States Trustee System.[97]

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83. *Id.* (citing H.R. Rep. No. 764, 99th Cong. 2nd Sess. 17-18 (1988), *reprinted in* 1986 U.S.C.C.A.N 5227, 5230).

84. *See In re* Savage, 67 B.R. 700, 702 (Bankr. D.R.I. 1986).

85. *Schollett*, 980 F.2d at 641.

86. *Id.*

87. *Id.* at 642; 28 U.S.C. § 586(b) (1988).

88. *Savage*, 67 B.R. at 702 (quoting 5 COLLIER ON BANKRUPTCY ¶ 1302.01 at 1302-20 (15th ed. 1984)).

89. Pub.L. No. 99-554, 100 Stat. 3088 (1986).

90. *Schollett*, 980 F.2d at 642.

91. *See id.*

92. 28 U.S.C. § 586(e) (1988).

93. *Schollett*, 980 F.2d at 643 (citing 28 U.S.C. § 586(e)).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

B. In re *Schollett*

1. Facts

The day the 1986 Act took effect, the bankruptcy judge for the District of Wyoming appointed Sharon Dunivent as standing trustee for all Chapter 12 cases in the district.[98] Wyoming was eventually certified by the Attorney General, and the United States Trustee determined that a standing trustee in Wyoming was warranted.[99] Therefore, Sharon Dunivent was immediately reappointed on August 31, 1987 as standing trustee[100] with a fee arrangement of ten percent as set by the Attorney General.[101]

Andrew and Lynn Schollett filed a Chapter 12 reorganization plan for their family farm with the bankruptcy court for the District of Wyoming on April 15, 1987. This plan required the Scholletts to make five annual payments of approximately $30,000 to the standing trustee, Sharon Dunivent, who would then pay their various creditors.[102] Although the reorganization plan was approved before the Attorney General certified Wyoming, the plan was to take effect after certification. Therefore, the Attorney General's fee schedule applied to the standing trustee.[103]

The first payment by the Scholletts was made to Dunivent on August 4, 1988, but Dunivent refused to pay the creditors until the Scholletts paid the ten percent fee as well.[104] On September 23, 1988, the bankruptcy court issued an order to the Scholletts, requiring them to pay Dunivent her ten percent fee. The Scholletts refused.[105] They appealed to the district court, arguing that the ten percent fee of $15,000 was unreasonable since Dunivent's duties, involving writing seven checks over the next five years, would take no more than a total of fifteen hours.[106] The district court determined that Dunivent's fee was unreasonable, reduced the fee to five percent, and remanded the case.[107] The district court reasoned that, even though 11 U.S.C. § 326(b) and 28 U.S.C. § 586 removed the bankruptcy court's authority to appoint standing trustees, the statute did not explicitly preclude a review of the trustees' fees. Since the bankruptcy court did have the power to review the fees prior to the 1978 and 1986 Acts, and since those acts failed to explicitly preclude review, the court reasoned that "the power to review trustees' fees for reasonableness had not been stripped from the courts."[108] Dunivent appealed.[109]

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98. *Schollett*, 980 F.2d at 642.
99. *Id.*
100. *Id.*
101. *Id.*; *see supra* text accompanying note 80.
102. *Schollett*, 980 F.2d at 640.
103. *Id.* at 642.
104. *Id.* at 640.
105. *See id.* at 641.
106. *Id.*
107. *Schollett*, 980 F.2d at 641.
108. *Id.*
109. *See id.*

2. Opinion

In *Schollett*, the Tenth Circuit had to decide whether the 1986 Act removed the power of federal courts to review the fees set by the Attorney General for standing trustees.[110] The Scholletts argued that preclusion of review would be contrary to the legislative intent of the 1986 Act, which was to provide family farmers advantages not available in other forms of bankruptcy.[111] They further argued the ten percent fees added cost to a reorganization plan, risking the destruction of an otherwise viable opportunity for reorganization.[112]

The Tenth Circuit recognized that the Chapter 12 statutory scheme did not expressly preclude judicial review of trustees' fees.[113] Nevertheless, the court decided that the statutory language and structure indicated that such review was not possible. The court reviewed the "clear and categorical"[114] language of 28 U.S.C. § 586(e) regarding the Attorney General's explicit duty to set fees for trustees. This language "[did] not suggest an oversight function for the courts."[115] The court noted that "28 U.S.C. § 586(e)(1) requires the Attorney General to 'fix' the maximum annual compensation of trustees . . . [and] § 586(e)(2) states that the standing trustee 'shall collect such percentage fee from all payments under the plan.' "[116] This explicit language differs from the language for Chapter 7 and 11 bankruptcy cases. Under these Chapters, the trustee's fees are specifically committed to the discretion of the bankruptcy courts,[117] and the reasonableness of the trustee's fees are to be "based on the nature, the extent, and the value of such services."[118] Thus, the Tenth Circuit concluded that when Congress wanted judicial review of trustees' fees under Chapter 7 and 11 it made that intent clear, and that the absence of similar language for Chapter 12 reflected a congressional intent to preclude such review of trustees' fees.[119]

Finally, the court reasoned that because the amount of the trustee's fee depends upon the total of the payment by the debtor to the trustee, most trustees' fees will be reasonable in each particular case.[120] Also, the fee reduces to three percent once the payments exceed $450,000. This reduction reflects a method to reduce fees when the trustee enjoys "economies of scale."[121] Therefore, the statutory reduction to three percent limits the possibility of abuse for large fees, thereby lessening the need for

110. *Id.*
111. *Id.* at 642.
112. *Schollett*, 980 F.2d at 642. The Scholletts cited *In re* Kline, 94 B.R. 557 (Bankr. N.D. Ind. 1988) in support of this argument.
113. *Schollett*, 980 F.2d at 643.
114. *Id.*
115. *Id.* (citing *In re* Savage, 67 B.R. 700, 705-6 (D.R.I. 1986)).
116. *Schollett*, 980 F.2d at 644.
117. *Id.*; 11 U.S.C. § 326 (1988).
118. 11 U.S.C. § 330(a)(1) (1988); *Schollett*, 980 F.2d at 644.
119. *Schollett*, 980 F.2d at 644.
120. *See id.*
121. *Id.*

judicial review.[122] The court reversed the district court and remanded the case to the bankruptcy court for proceedings consistent with the opinion.[123]

3. Analysis

The *Schollett* decision departs from the bankruptcy policy of "fresh start."[124] The decision to preclude judicial review of trustees' fees places the burden of financing the United States Trustee System upon those debtors who can afford to pay the fee. The court found that large fees in cases where payments are high, but where work is small, will subsidize other cases where the debtor's payments are low but involve a great deal of work.[125] The *Schollett* court noted that it would be unfair to the trustee, who has agreed to serve in all cases regardless of the compensation, to impose another layer of review.[126] However, the court omitted mention of the unfairness to debtors who, already in financial difficulty, are forced to bear the administrative cost of other debtors. This is contrary to the policy of "fresh start"[127] because the debtor under Chapter 12 retains "the pressure and discouragement of [their] preexisting debt"[128] in the form of unreasonably high trustee fees when compared to "the nature, the extent, and the value"[129] of the trustee's services.

IV. CONCLUSION

The cases surveyed reveal the federal judiciary's awareness of other policy considerations beyond the original bankruptcy policy of "fresh start." This is particularly clear in *In re Pasek*, where the court discharged a facially "willful and malicious" injury by the debtor when the debtor had an excuse for the conduct. However, *In re Sampson* shows that the "fresh start" policy must give way when an overriding policy exists, such as the enforcement of familial obligations. Finally, *In re Schollett* demonstrates that certain policies regarding the efficient administration of the bankruptcy system can also override the "fresh start" policy in appropriate cases.

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122. *See id.*
123. *Id.* at 645.
124. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
125. *See Schollett*, 980 F.2d at 644-45.
126. *See id.* at 645.
127. *See supra* note 9 and accompanying text.
128. Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co.*, 292 U.S. at 244).
129. 11 U.S.C. § 330(a)(1) (1988).