

# Family Law Forum

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## **Pesky Problems in Family Law**

Letter from the Editor <i>Linda L. Wold</i>	2
Letter from the Chair <i>Pamela Waggoner</i>	3
Letter from the Treasurer <i>Ryan Anderson</i>	4
Domestic Abuse Committee <i>Loretta Frederick &amp; Ellen Abbott</i>	5
Bankruptcy 101 for the Family Law Practitioner <i>Colin Kreuziger</i>	6
Bankruptcy Notes for Family Law Practitioners <i>Kurt Anderson</i>	19
The Balance of Attorney-Client Privilege and Domestic Violence Advocacy <i>Rana Fuller and Domestic Violence Advocate Kathi</i>	20
Preparing and Arguing Effective Family Law Motions <i>Judge Sharon Hall &amp; Judge Steven Halsey</i>	25
Pesky Child Support Problems – Calculating Gross Income for the Self-employed in a Sole Proprietorship or Single-Person Limited Liability Company <i>Judith Payne</i>	28
Answers to Pesky Family Law Questions Regarding Never Married Parents with Custody and Child Support Issues, and a Few Useful Charts! <i>Melissa Froehle, Melissa Rossow, &amp; Sandra Torgerson</i>	31
How to Refer Child Support to a Magistrate <i>Maria K. Pastoor</i>	51
<b>ADDENDUM</b>	
What is the Uniform Collaborative Law Act? <i>An Interview with ULC Observer Linda K. Wray</i>	53
Drinking the Kool-Aid <i>Nancy Zalusky Berg</i>	58
Uniform Collaborative Law Act	71



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## Letter from the Editor

*Linda Wold*

Welcome to the MSBA Family Law Section's publication: the Family Law Forum. This edition's topic is Pesky Problems Family Law. We've all had our own "pesky problems" to deal with in this field of law. Some of your colleagues have graciously agreed to share some of theirs with you and to offer some tips and practices to assist you in their resolution.

This edition is different in two aspects. We have some information from your section officers about their respective offices or committees and the duties and activities they perform on your behalf. Secondly, we have a point/counter-point offering in our Addendum section focusing on Collaborative Law, including the full text of the Uniform Collaborative Law Act.

We look forward to hearing your comments as well as any suggestions for future topics, authors, and of course any questions you might have regarding the Family Law Forum.

Linda Wold  
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### **Publications Committee**

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## SECTION CHAIR

I first joined the Section in 1993 when I was new to the practice of law and new to Minnesota. As I recall, Suzanne Born was the Chair at the time, and I was in awe of the breadth of knowledge and experience around the room. Throughout the years, I have admired the people who have led the Section – Don Enockson, Gary Voegele, Barb Runchey, Ellen Abbott, Cheryl Prince, Tami Peterson – all inviting the voices of new and more experienced attorneys to weigh in on the issues affecting the practice of family law; all managing the Section meetings efficiently and diplomatically, clarifying issues and breaking deadlock when necessary; representing to the other sections of the MSBA, and to the MSBA governing body the Section's positions and concerns. It is an honor and a privilege to follow in their stead.

So what are the duties of the Chair? Enumerated in the Section By-laws are the following responsibilities:

- (1) to preside over all Section meetings;
- (2) to arrange for and preside over the Executive Council meetings;
- (3) to be the spokesperson for the Section to the MSBA;
- (4) to supervise the Chairpersons of the Standing Committees;
- (5) to report the work of the Section for the past year to the MSBA;
- (6) to certify the annual financial report proposed by the MSBA; and
- (7) to provide to all Executive Council members the contact information for all members.

Not enumerated in the By-laws is the Chair's partnership with Tim Morrow of Minnesota CLE in designing and coordinating the annual Family Law Institute. In short, the Chair is the public face and voice of the Section during the year in which the Chair presides. Always feel free to contact me during my tenure as Chair at [pjwaggoner@pjwaggonerlaw.com](mailto:pjwaggoner@pjwaggonerlaw.com). And see you at next month's meeting!

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## **Ryan Anderson**

### ***MSBA Family Law Section Treasurer***

As Treasurer of the Family Law Section of the MSBA, I oversee all the financial aspects of our section. On a daily basis, I review expense reimbursement forms sent in by our members to determine if the Section should provide funds for the expenses. On a monthly basis, I review our financial statements and ensure that we have accounted for every revenue/expenditure from the previous month, reporting at the monthly meeting on any large expenditures and the overall financial status of the Section. On an annual basis, I look at the “big picture” and help the Section determine our overall budget for the upcoming fiscal year. Less often, if there is a discrepancy in our accounting, or if a Section member calls something to my attention, I will communicate with Tim Giving, to resolve the issue. While I may jokingly refer to my power over the purse, everyone in the Section knows that I only have one vote when it comes to determining how we spend/collect our money. I just ensure that we properly account for our spending and collecting.

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## Domestic Abuse Committee

*Loretta Frederick and Ellen Abbott*

The Domestic Abuse Committee works to identify what family lawyers in Minnesota can do to prevent domestic violence and to respond effectively to individual cases of domestic violence.

The members work to assess the effect of any existing or proposed policy or law on victims or perpetrators of domestic violence and their children and to inform the section and others accordingly. They also work cooperatively with other local and state organizations that have similar purposes, bringing the perspective of the family law bar to the statewide effort to reform practitioners' responses to domestic violence cases. For example, in September the committee called together a statewide inter-disciplinary group to design a strategy for reducing the media's use of misleading language in the coverage of recent domestic violence murders and assaults.

The committee has produced a guide which describes the qualities that domestic abuse victims should look for in an attorney (available at MSBA's Family Law Section's home page, <http://www.mnbar.org/sections/family-law>). And recently, in recognition of the need for attorneys to avoid malpractice by screening clients for domestic violence and then addressing the issues in the course of their representation, the committee has begun drafting DV screening tools and procedures for use by attorneys, mediators and others. Training based upon the use of the tools is also forthcoming.

The DA Committee generally meets at MSBA offices in downtown Minneapolis from noon to 1:30 or 2:00 pm on the second Saturday of the month, immediately following the Family Law Section meeting. Lunch is provided to those committee members who RSVP. New members are very welcome. To join the committee and receive meeting notices, please email Ellen Abbott, one of the Committee Co-Chairs.

### **Co-Chairs**

Loretta M. Frederick, Winona, MN  
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# Bankruptcy 101 for the Family Law Practitioner

*Colin Kreuziger*

It is no secret that the current financial crisis is driving more people into bankruptcy. And financial problems may drive many divorce proceedings in the United States.<sup>1</sup> Similarly, divorce appears to be, at a minimum, correlated with an increased likelihood of filing for bankruptcy.<sup>2</sup> As a result, you are likely to see increasing numbers of clients in your office who are either in bankruptcy or have a spouse or ex-spouse in bankruptcy. The following provides an introduction to some commonly-encountered bankruptcy issues that may impact your practice. Bankruptcy is an immensely complex area of the law. This article does not provide comprehensive coverage of bankruptcy law. Instead, it presents an overview of the bankruptcy process and examines selected bankruptcy law issues that bear on family law practice.

## **Overview of Bankruptcy Procedures**

### *Different Types of Relief*

The Bankruptcy Code is divided into “chapters,” all of which are odd-numbered (except for chapter 12).<sup>3</sup> Chapters 1, 3, and 5 contain the basic “rules” of bankruptcy applicable to all cases, while chapters 7, 9, 11, 12, 13, and 15 contain the substantive provisions that govern relief in a particular case. The most common forms of bankruptcy relief for individuals are chapter 7, sometimes called “straight” bankruptcy, and chapter 13. In chapter 7, a bankruptcy trustee liquidates the debtor’s nonexempt assets to pay creditors, while chapter 13 permits the debtor to retain assets and pay creditors from future income. In chapter 13 cases, debtors pay regular income to creditors over a specified period of time, typically between three to five years,

through a court-confirmed “plan.” In either type of case, debtors seek a discharge of personal liability for debts. Successful completion of a chapter 7 case discharges debts incurred before the case was filed, and a successful chapter 13 case discharges debts incurred prior to plan confirmation. Although amendments to the Bankruptcy Code in 2005 (“BAPCPA”) sought to channel more debtors into chapter 13, recent statistics indicate that chapter 7 cases are once again on the rise.<sup>4</sup>

It is possible that your client or your client’s ex-spouse may become involved in a chapter 11 case, especially if the source of marital problems is the collapse of a family business, or one spouse has unusually large debt obligations. Chapter 11 is intended for reorganization of businesses, but it is available to individuals. The basic design of chapter 11 resembles that of chapter 13, but chapter 11 is unique in its business-specific procedures and forms of relief.

The design of chapter 12 parallels that of chapter 13, but chapter 12 contains provisions specifically designed to aid farmers and fishermen in reorganizing their personal and business finances.<sup>5</sup> Chapter 9 applies only to municipalities,<sup>6</sup> and chapter 15 applies to international bankruptcy cases.<sup>7</sup>

## **The Bankruptcy Estate**

When a person (or entity) files for bankruptcy protection, the Bankruptcy Code sweeps all of that person’s existing interests in property into a “bankruptcy estate.”<sup>8</sup> The concept of the bankruptcy estate resembles that of a personal estate created upon the death of a person. In bankruptcy, however, the financial “death” of

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a person or entity creates the estate. The bankruptcy estate therefore includes tangible property, such as real estate or automobiles, and intangible property, such as stocks, causes of action against a third party, or even the right of redemption to a foreclosed property.<sup>9</sup> The bankruptcy estate encompasses a very broad array of property interests.<sup>10</sup> When in doubt, assume that any interest the debtor has in property is property of the estate.

#### *Property excluded from the Bankruptcy Estate*

While nearly all of the debtor's interests in property prior to the bankruptcy case flow into the bankruptcy estate, property acquired by the debtor after filing for bankruptcy does not. This means that post-petition wages are not property of the estate. Property acquired post-petition in a chapter 13 case constitutes the most important exception to this general rule.<sup>11</sup> Characterizing post-petition wages as property of the estate facilitates execution of a chapter 13 plan. But as discussed below, whether property is property of the estate does not necessarily settle the question of whether your client may collect from his or her spouse or ex-spouse during the pendency of a bankruptcy proceeding.

#### *Exemptions*

The Bankruptcy Code removes exempt property from the bankruptcy estate.<sup>12</sup> Federal exemptions permit a debtor to exempt, among other interests in property, up to \$20,200 in real or personal property that the debtor uses as a residence,<sup>13</sup> \$3,225 of the debtor's interest in one motor vehicle,<sup>14</sup> and \$1,075 plus up to \$10,125 of any unused homestead exemption.<sup>15</sup>

Alternatively, the debtor may exempt property under the law of the debtor's state of residence.<sup>16</sup> However, each state may choose to "opt out" of the federal exemption scheme and limit the debtor to the exemptions provided by the debtor's state of residence.<sup>17</sup> Minnesota has not opted out of the federal exemption scheme.

The Bankruptcy Code specifies that exempt property is not liable during or after the case for any prepetition debt, subject to certain exceptions.<sup>18</sup> For example, domestic support obligation creditors may proceed against exempt property.<sup>19</sup> Similarly, secured creditors are not subject to the restriction on recovering from exempt property, that is, their collateral.<sup>20</sup>

#### *Preferences*

The bankruptcy estate may include prepetition "preferential" payments to creditors. The bankruptcy trustee can avoid preferential payments, subject to certain exceptions discussed below.<sup>21</sup> A successful avoidance action results in disgorgement of the preferential payments to the bankruptcy estate. A preferential transfer occurs when a debtor transfers an interest in property to a creditor in the ninety days preceding the bankruptcy filing and, as a result, that creditor receives more than it would have in a chapter 7 liquidation.<sup>22</sup> The transfer must be made while the debtor is insolvent (insolvency is presumed during the ninety day period prior to bankruptcy), and must be made to pay a debt that arose prior to the transfer.<sup>23</sup> The "look-back" period for such transfers extends to a year for so-called "insiders."<sup>24</sup> An insider includes a "relative" of the debtor,<sup>25</sup> and a relative of the debtor includes an "individual related by affinity."<sup>26</sup> Therefore, a bankruptcy trustee may attack as preferential a transfer from the debtor spouse to the creditor spouse if it occurred within one year of the bankruptcy.

The creditor may assert several defenses to a preference claim, the most prominent of which is the assertion that the payment was for a domestic support obligation.<sup>27</sup> In addition, a new provision exempts preferential payments that aggregate less than \$600.<sup>28</sup>

Three unique areas of dispute typically arise in the family law context: (1) whether or not the spouse or ex-spouse is an insider; (2) whether

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a payment was for a domestic support obligation; and (3) whether the payment was on account of an antecedent debt. The first issue may arise when the debtor and creditor spouse are still married, but a dissolution proceeding is pending. The second issue may arise whenever the status of a payment is not clear. For example, the parties may agree to periodic payments that are not specifically designated as child support or maintenance in lieu of an actual award of support. The third issue arises in the context of payments made pursuant to a divorce decree. For example, if a bankruptcy court finds that a property settlement equalizer payment was on account of an antecedent debt, it may be considered a preference.

#### *Judicial Liens*

The Bankruptcy Code empowers the debtor to avoid certain liens whether or not the bankruptcy trustee avoids the liens for the benefit of the bankruptcy estate. Specifically, the debtor may avoid judicial liens, among others, that impair exemptions the debtor would otherwise be entitled to assert.<sup>29</sup> In other words, if the judicial lien causes an exempt asset of the debtor to be fully encumbered, the debtor may avoid the lien.<sup>30</sup> If successful, the debtor “steps into the shoes” of the party that held the avoided lien.<sup>31</sup>

This power may be significant in the family law context, particularly where a court order grants one spouse a lien in the other spouse’s property to secure a debt. A typical example occurs when a divorce decree grants a lien to the spouse that moves out of the homestead to secure the debt that the spouse occupying the homestead owes the other spouse. If the lien created by the divorce decree impairs the debtor’s homestead exemption and the debtor files for bankruptcy protection, the debtor may be able to avoid the lien, subject to the exceptions discussed below.

The Bankruptcy Code accords domestic

support obligations special treatment in this context as well. Judicial liens that secure a domestic support obligation are not avoidable.<sup>32</sup> For example, a lien securing a maintenance obligation cannot be avoided. A lien imposed to secure an obligation of the debtor that is not found to be a domestic support obligation may be avoided to the extent of the debtor’s exemption in the property.

The parties may dispute whether or not a lien was created by the divorce decree. Specifically, non-debtor spouses have argued that their interest in the debtor’s property is a consensual security interest, not a judicial lien. Although this argument has gained little traction among many courts that have considered it,<sup>33</sup> the Eighth Circuit appears to have embraced this view in the context of both stipulated decrees and decrees entered as the result of a trial.<sup>34</sup>

Another critical issue concerns the timing of the “fixing” of the lien. In 1991, the Supreme Court appeared to hold that a judicial lien created by a divorce decree could not be avoided because the debtor’s property interest was created simultaneously with the judicial lien.<sup>35</sup> In other words, in a typical divorce decree, which awards property to the debtor spouse subject to the non-debtor spouse’s lien, the lien does not fix “on the interest of a debtor in property” and cannot be avoided by the debtor. This holding created a significant, case law-based exception to the debtor’s power to avoid judicial liens created by divorce decrees. It should be noted, however, that judicial liens created by post-decree orders of a court may not fall within the *Sanderfoot* exception because the lien attaches to the debtor spouse’s post-divorce decree property.

The careful practitioner should proceed cautiously when structuring a property settlement with a debtor who may be contemplating bankruptcy or when pursuing

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post-decree collection from property of such a debtor. In the event of a bankruptcy filing, the amount of equity in the debtor's property may determine whether a judicial lien is enforceable. In addition, proper characterization of debt secured by a judicial lien may be critical to defeating a debtor's action to avoid the judicial lien of a spouse or ex-spouse.

#### *Statutory Liens*

The Bankruptcy Code empowers the bankruptcy trustee to avoid certain statutory liens.<sup>36</sup> The Bankruptcy Code defines the term "statutory lien" to mean a lien

arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.<sup>37</sup>

There is uncertainty regarding whether this definition encompasses liens that arise as a result of unpaid support. The Bankruptcy Code further limits the category of statutory liens that may be avoided to those that are "not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser . . . whether or not such a purchaser exists."<sup>38</sup>

### **Collections in Bankruptcy**

#### *The Automatic Stay*

The automatic stay affords bankrupt debtors a powerful form of relief. It bars most actions to collect pre-petition debt while the bankruptcy case is pending. The stay takes effect immediately upon filing of a bankruptcy petition and applies to all creditors regardless of whether they receive notice of the filing.<sup>40</sup>

Like the concept of the bankruptcy estate, the automatic stay is broad in scope. It encompasses almost any action that is taken to collect a debt. When in doubt, assume that the automatic stay applies to the action your client is contemplating.

#### *Remedies for Violations of the Automatic Stay*

The Bankruptcy Code contains a rather lengthy list of exceptions to the automatic stay. Section 362(b)(2) of the Bankruptcy Code contains the exceptions relevant to family law practitioners. Basically, exceptions exist to start, finish, or modify divorce, custody, domestic violence, paternity, or support proceedings.<sup>41</sup> The exception for divorce proceedings does *not* apply, however, to the portion of the proceeding that seeks to "determine the division of property that is of the estate."<sup>42</sup> Accordingly, where one or both spouses have filed or will file bankruptcy, consider bifurcation of a divorce proceeding to expedite the actual dissolution of marriage and resolution of issues such as maintenance, child support, or custody.<sup>43</sup> Property division issues may be reserved until conclusion of the bankruptcy proceeding. Of course, such a course of action may be problematic in the context of a Chapter 13 case because the bankruptcy case will likely last for at least three years. In those cases, it may be appropriate to seek relief from the automatic stay to obtain a division of the marital estate.<sup>44</sup>

In addition, the stay does not bar "the collection of a domestic support obligation from property that is not property of the estate,"<sup>45</sup> income withholding to satisfy a "domestic support obligation,"<sup>46</sup> suspending or otherwise restricting a driver's, occupational, professional, or recreational license,<sup>47</sup> the interception of a tax refund,<sup>48</sup> or "the enforcement of a medical obligation, as specified under title IV of the Social Security Act."<sup>49</sup>

#### *Remedies for Violations of the Automatic Stay*

A debtor injured by a willful violation of the

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automatic stay is entitled to “actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.”<sup>50</sup> In addition, bankruptcy courts are given broad authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”<sup>51</sup> Many bankruptcy courts have held that § 105(a) includes the power to impose civil contempt sanctions for a violation of the automatic stay.<sup>52</sup>

### *The Co-debtor Stay*

Chapters 12 and 13 offer additional protection to co-debtors.<sup>53</sup> In both chapters, the co-debtor stay prohibits creditors from collecting consumer debts from co-debtors.<sup>54</sup> The Bankruptcy Code defines a consumer debt as debt “incurred by an individual primarily for a personal, family, or household purpose.”<sup>55</sup> The co-debtor stay lasts until the case is closed, dismissed, or converted to chapter 7 or 11.<sup>56</sup> The voluminous exceptions to the automatic stay do not apply to the co-debtor stay. Instead, the Bankruptcy Code excludes only debts incurred in the ordinary course of the co-debtor’s business from the co-debtor stay.<sup>57</sup>

Creditors may obtain relief from the co-debtor stay if the co-debtor received the consideration for the creditor’s claim,<sup>58</sup> if the debtor’s plan does not propose to pay the claim,<sup>59</sup> or if the creditor’s interest “would be irreparably harmed by continuation” of the co-debtor stay.<sup>60</sup> Relief from the co-debtor stay occurs within twenty days of a creditor’s request unless the debtor or co-debtor objects.<sup>61</sup>

The co-debtor stay therefore protects the spouse or ex-spouse of a chapter 12 or 13 debtor, at least to the extent that the spouse or ex-spouse is a co-debtor on consumer debt. This may significantly benefit an ex-spouse in the post-decree period because divorce decrees cannot bind third-party creditors who would otherwise look to the non-bankrupt spouse for

relief. The co-debtor stay may last up to five years in a typical chapter 13 case, at least in theory. Practically speaking, however, most chapter 13 plans do not provide for full payment of unsecured debt, and a significant portion of consumer debt falls into this category. Accordingly, a creditor may obtain relief easily from the co-debtor stay when the chapter 13 plan is confirmed. Still, the Bankruptcy Code places the onus upon creditors to obtain relief from the co-debtor stay. . If such relief has not been granted, a co-debtor may be able to seek relief from the actions of a creditor in bankruptcy court.<sup>62</sup>

### *Distribution of the Debtor’s Property*

The Bankruptcy Code contains a complex scheme of payment priorities that can be boiled down to a few simple propositions. First, secured creditors always receive (at least) their collateral or its full value, unless they agree to different treatment.<sup>63</sup> Second, certain unsecured creditors receive highly preferential treatment, particularly in chapter 13 cases. Happily (or not, if you represent the debtor), the Bankruptcy Code awards domestic support obligations, discussed in detail below, *first priority*.<sup>64</sup> In other words, the holder of a domestic support obligation claim receives payment before all other unsecured claims, including the administrative expenses of the bankruptcy estate. Third, general unsecured creditors receive the leftovers. Frequently in chapter 7 cases, no non-exempt assets remain for distribution to general unsecured creditors.<sup>65</sup> General unsecured creditors receive nothing in such a case. In chapter 13 cases, unsecured creditors do markedly better, but they still receive comparatively little when compared with priority unsecured creditors or secured creditors.<sup>66</sup>

### *What Constitutes a “Domestic Support Obligation”?*

When it comes to collecting debt from a former spouse, the Bankruptcy Code

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distinguishes between two types of debt: “domestic support obligations” and everything else. The Bankruptcy Code excepts domestic support obligations, in part, from the general rule that debt cannot be collected through the usual procedures during the debtor’s bankruptcy.<sup>67</sup>

The Bankruptcy Code defines a “domestic support obligation” as:

a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable non-bankruptcy law notwithstanding any other provision of this title, that is—

- (A) owed to or recoverable by—
  - (i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or
  - (ii) a governmental unit;
- (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;
- (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
  - (i) a separation agreement, divorce decree, or property settlement agreement;
  - (ii) an order of a court of record; or
  - (iii) a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and

- (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.<sup>68</sup>

Clearly, debts for child support and maintenance, including those assigned to a governmental unit, fall within the scope of § 101(14A). Characterization of debts other than obvious child support or maintenance debts, however, proves more difficult. Oddly enough, the task of characterization lies finally with the bankruptcy court as a matter of federal law.<sup>69</sup> For example, one bankruptcy court held that fees owed to a “child representative” for services rendered on behalf of the debtor’s child during a divorce action did not constitute a domestic support obligation because the child representative was not a “payee” for purposes of § 101(14A).<sup>70</sup> Conversely, the Eighth Circuit held that an attorney fee award to an ex-spouse in a divorce decree, payable directly from the debtor to the ex-spouse’s attorney, was a nondischargeable domestic support obligation. In another case, the Bankruptcy Appellate Panel for the Eighth Circuit concluded that birthing expenses owed by the debtor to the mother of his child pursuant to a paternity judgment was a nondischargeable support obligation.<sup>72</sup>

For debts that are not domestic support obligations, it is advisable to seek relief from the automatic stay promptly. The bankruptcy court can lift the stay “for cause, including the lack of adequate protection of an interest in property of such party in interest”<sup>73</sup> or if “the debtor does not have an equity in such property [of the estate]; and . . . such property is not necessary to an effective reorganization.”<sup>74</sup> “Cause” is a highly subjective term and thorough analysis of court treatment of the term is beyond the scope of this article. Courts have, however, lifted the

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stay to allow a former spouse to pursue claims of nondischargeability in state court,<sup>75</sup> to pursue an appeal of a divorce decree,<sup>76</sup> and to foreclose a lien in an ex-spouse's former homestead owned by the debtor.<sup>77</sup> Conversely, relief from stay has been denied where the debtor's ex-spouse sought to enforce a provision of the divorce decree that required the debtor to make payments on an automobile.<sup>78</sup>

In addition, this discussion suggests an important practice point. Bankruptcy courts routinely grant relief from stay to secured creditors who do not have "adequate protection," which is typically read to mean that the debtor has no equity in the creditor's collateral or fails to make periodic payments to the creditor. To the extent that your client is a secured creditor, the prospect for obtaining relief from stay is greatly improved. If bankruptcy is a concern during the divorce proceeding and your client is owed money (think of a property settlement equalizer), it is wise to obtain security in the form of collateral that can be easily repossessed and sold to satisfy debts owed to your client.

Note also that relief from stay proceedings are expedited by statute. The stay automatically terminates thirty days after the request for relief from stay is made unless the court rules otherwise, after notice and a hearing.<sup>79</sup> Therefore, the automatic stay need not have a catastrophic effect on your client's finances.

Creditors may also move for dismissal or conversion of a chapter 13 case. For example, a chapter 13 case may be dismissed or converted to chapter 7 if the debtor fails to pay a domestic support obligation that "first becomes payable after the date of the filing of the petition."<sup>80</sup> This provides a powerful incentive for the debtor to pay child support or maintenance claims.

### *Proofs of Claim*

If your client has a claim against his or her ex-spouse, whether it is a domestic support obligation or a property settlement claim, it is imperative that you file a proof of claim on his or her behalf.<sup>81</sup> A proof of claim entitles the claimant to whatever payment may be realized in the case.<sup>82</sup> Without a timely proof of claim, there is no payment. This is particularly important in chapter 13 cases because domestic support obligations are given first priority when distributing funds to unsecured creditors<sup>83</sup> and must be paid in full.<sup>84</sup> Note also that the trustee of the bankruptcy estate is required to provide notice to domestic support obligation creditors of their claim.<sup>85</sup>

### **Dischargeability of Debt**

Successful completion of a bankruptcy case entitles the debtor to a discharge.<sup>86</sup> In chapter 7, the debtor obtains a discharge at the close of the case.<sup>87</sup> In chapter 13, the debtor receives a discharge upon successful completion of the confirmed plan.<sup>88</sup> It is also worth noting that a debtor required to pay a domestic support obligation cannot obtain a discharge in chapter 13 until the debtor "certifies that all amounts payable . . . that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid."<sup>89</sup> The discharge creates a standing injunction that prohibits prepetition creditors from pursuing any collection activity against the debtor for prepetition debts,<sup>90</sup> or in the case of a chapter 13 discharge, debts that are "provided for by the plan."<sup>91</sup> But a discharge in bankruptcy does not discharge all debt. The Bankruptcy Code provides numerous exceptions to discharge, two of which are of particular relevance to the family law practitioner.<sup>92</sup> First, domestic support obligations are not dischargeable in bankruptcy.<sup>93</sup> Second, all other obligations owed to an ex-spouse by virtue of a divorce decree are not dischargeable in *chapter 7*.<sup>94</sup> If

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your client's ex-spouse is a chapter 7 debtor, the debt owed your client likely cannot be discharged. Conversely, if the ex-spouse is a chapter 13 debtor, the distinction between a domestic support obligation and a property settlement or other obligation becomes critical.

As expected, the most litigated issue in this area concerns whether a debt is "in the nature of support." The courts appear to agree that whether or not a debt to a former spouse is in the nature of support is a question of bankruptcy law, not state law.<sup>95</sup> Courts construe exceptions to discharge narrowly, but in the Eighth Circuit, "exceptions from discharge for spousal and child support deserve a more liberal construction."<sup>96</sup> Creditors bear the burden of proof when seeking to establish an exception to discharge.<sup>97</sup> But "there is a presumption of nondischargeability for an award labeled as alimony."<sup>98</sup> Upon presentation of a decree that labels a debt alimony, "the burden of going forward and proving the obligation was not in the nature of alimony" shifts to the debtor.<sup>99</sup>

As the Bankruptcy Code makes clear, determination of whether a particular obligation is "in the nature of support" focuses on the nature of the obligation, not the label affixed to the obligation by the parties or the court.<sup>100</sup> In the Eighth Circuit, however, the intended function of the obligation controls the determination.<sup>101</sup> A common dispute concerns whether an indemnification agreement in a divorce decree constitutes a nondischargeable debt pursuant to § 523(a)(5). For example, in *Anderson v. Anderson (In re Anderson)*,<sup>102</sup> the court found the debtor spouse's obligation to indemnify the other spouse for farm-related debt nondischargeable.<sup>103</sup> A memorandum attached to the decree, issued after trial of the dissolution matter, contained the following language:

The Court has given careful consideration to the possibility of dividing marital property as opposed

to awarding maintenance for a period of time. The [Plaintiff's] business is complex and debt-laden. The Court has concluded that a division of property in place of maintenance would not be appropriate in that it would not guarantee the [Defendant] the necessary amounts to sustain herself in any appropriate lifestyle over the period that maintenance is payable. Since the [Defendant] is a co-debtor on most of the debts incurred by the [Plaintiff], a division of property would not result in any income to her, but may in fact result in a substantial liability for these debts.<sup>104</sup>

The court considered ten factors and found that the state court intended the indemnification provisions to create an obligation in the nature of support and held the debt nondischargeable pursuant to § 523(a)(5).<sup>105</sup> Notably, the court gave greater deference to the decree because it was "the product of impartial fact-finding and decision-making after contested hearing" rather than "the embodiment of mutually self-serving characterizations by stipulating parties."<sup>106</sup> Most recently, the Minnesota Court of Appeals held that a debtor spouse's obligation to indemnify the nondebtor spouse for debt related to the couple's business was nondischargeable pursuant to § 523(a)(15).<sup>107</sup>

State courts and bankruptcy courts exercise concurrent jurisdiction over most nondischargeability proceedings, including § 523(a)(5) and (a)(15) claims.<sup>108</sup> In addition, nondischargeability may be asserted at any time.<sup>109</sup>

This recognition leads to the following two practice pointers. First, wherever possible, for bankruptcy purposes, you should obtain support rather than promises to pay money or deliver property. As discussed above, the label attached to an obligation to pay is not

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controlling, but it is a starting point. Take care to categorize the obligation to pay accurately, and make it clear that the parties intend the obligation to be in the nature of support. This may prevent your client's ex-spouse from characterizing support debt as property settlement debt and discharging it in a chapter 13 case. Second, it is not necessary to commence an adversary proceeding in bankruptcy court to determine dischargeability of domestic support obligations or other debts owed by one spouse to another in connection with a divorce decree. Your client may choose to wait to assert nondischargeability until after the bankruptcy proceedings terminate, or simply allow the debtor spouse to raise it as a defense in a post-discharge collection proceeding. As discussed below, however, pursuing collection of a discharged debt may subject the nondebtor spouse to sanctions.<sup>110</sup>

#### *Sanctions for Violating the Discharge Injunction*

Knowing violation of the discharge injunction may result in contempt of court.<sup>111</sup> Notably, the discharge injunction does not prevent creditors from enforcing liens that were not avoided during the bankruptcy. This again underscores the importance of obtaining an actual security interest rather than a promise or an order to pay money in a divorce proceeding. The former may survive the bankruptcy; the latter may not.

#### **Post-Bankruptcy Modification of Divorce Decree**

Post-decree, Minnesota courts are empowered to modify maintenance or support obligations upon a finding of a substantial change in circumstances that renders the current order unreasonable and unfair.<sup>112</sup> Discharge of a debtor's debts to a nondebtor ex-spouse may significantly alter the financial circumstances of the parties. In Minnesota, the case law clearly permits a nondebtor spouse to seek modification of a support award based, at least in part, upon a debtor's discharge of non-support debts (whether owed to the spouse or a third party) in bankruptcy.<sup>113</sup>

Similarly, an ex-spouse may seek modification of a property division, although the grounds for such modification are typically narrower than the grounds for modification of support.<sup>114</sup> In Minnesota, for example, grounds for modification include mistake or fraud.<sup>115</sup> A motion for relief on these grounds must be filed within one year of the judgment or order.<sup>116</sup> Prior to enactment of Minn. Stat. § 518.145, the Minnesota Court of Appeals held that modification of a property settlement after the debtor discharged a property settlement equalizer debt in bankruptcy "would deny him the relief granted him by the bankruptcy."<sup>117</sup> In addition, discharge of a property settlement debt in bankruptcy does not permit the state court to later award spousal maintenance where the state court did not initially award or reserve jurisdiction to award maintenance.<sup>118</sup> Curiously, Minnesota law appears to hold that a debtor spouse may discharge an obligation to pay a nondebtor spouse one-half of a vested pension.<sup>119</sup> Other state courts conclude that a nondebtor spouse acquires a vested property interest in the pension at the time of the divorce decree, the property interest never becomes property of the bankruptcy estate, and it therefore cannot be a debt subject to discharge.<sup>120</sup>

#### ***Further Reading***

William Houston Brown, *Bankruptcy and Domestic Relations Manual* (2008)

Cathy E. Gorlin, *Minnesota Family Law Practice Manual*, Chapter 12: Bankruptcy (2009)

Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* (2008).

Shayna M. Steinfeld & Bruce R. Steinfeld, *The Family Lawyer's Guide to Bankruptcy: Forms, Tips and Strategies* (2nd ed. 2008).

Michaela M. White, et al., *When Worlds Collide: Bankruptcy and Its Impact on Domestic Relations and Family Law*, Third Edition (3d ed. 2005).

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## Notes

<sup>1</sup> This is not an undisputed point. Compare Nathalie Martin & Ocean Tama y Sweet, *Mind Games, Rethinking BAPCPA's Debtor Education Provisions*, 31 S. ILL. U. L.J. 517, 524 (2007) (“Overindebtedness is a frequent cause of divorce.”) with Nathalie Martin, *Winners and Losers in Bankruptcy Reform: Do Women and Children Really Come Out on Top?*, 41 FAM. L.Q. 219, 221 (2007) (noting that “we have always assumed that these two problems go hand in hand, but the connection between money problems and divorce is still unclear”).

<sup>2</sup> See, e.g., Jay L. Zagorsky & Lois R. Lupica, *A Study Of Consumers' Post-Discharge Finances: Struggle, Stasis, Or Fresh-Start?*, 16 AM. BANKR. INST. L. REV. 283, 300 (2008) (examining data collected in National Longitudinal Survey of Youth 1979 and noting that “[i]ndividuals who have filed for bankruptcy have much higher divorce rates (52.5%) than non-filers (31.1%), though it is impossible to tell the extent to which divorce is a cause or one of the effects of bankruptcy”). See generally Teresa A. Sullivan, et al., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000) (discussing causes of bankruptcy, including divorce). Not everyone fully agrees with this assessment, however. See Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1513 (2005) (noting that between 1979 and 2002, “the divorce rate fell by 25% . . . the bankruptcy filing rate rose by 583%” and arguing that divorce cannot explain increased bankruptcy filing in this time period).

<sup>3</sup> The Bankruptcy Code is codified at 11 U.S.C. §§ 101-1532 (2009).

<sup>4</sup> Ed Flynn & Phil Crewson, *Data Show Trends in Post-BAPCPA Filings*, AM. BANKR. INST. J., July—Aug. 2008, at 14, 14 (observing that

Pre-BAPCPA, chapter 7 cases represented about 71 percent of filings as compared to 57 percent of filings in the first 12 months post-BAPCPA. During the same 12 months, chapter 13 cases increased from 29 percent to 42 percent of all filings. This redistribution of cases subsided somewhat in the first half of fiscal year 2008, when chapter 7 cases represented about 63 percent of filings).

<sup>5</sup> For example, chapter 12 debtors are permitted to reduce secured debt on their homestead (frequently a farm) to the value of the homestead, while chapter 13 debtors are not permitted to alter the rights of a lender with a security interest in the debtor’s homestead. Compare 11 U.S.C. § 1222(b)(2) with 11 U.S.C. § 1322(b)(2).

<sup>6</sup> See *id.* § 109(c).

<sup>7</sup> See *id.* § 1501.

<sup>8</sup> See *id.* § 541(a)(1) (defining the bankruptcy estate as, in part, “all legal or equitable interests of the debtor in property as of the commencement of the case”).

<sup>9</sup> See, e.g., *Johnson v. First National Bank*, 719 F.2d 270, 276 (8th Cir. 1983) (noting that when a mortgage is foreclosed in Minnesota, “it is only the right of redemption, rather than the property itself, which passes into the bankruptcy estate if the redemption period has not expired at the time of [sic] the bankruptcy petition is filed.”).

<sup>10</sup> See *Patterson v. Shumate*, 504 U.S. 753, 757 (1992) (noting the “broad definition of ‘property of the estate’ contained in § 541(a)(1) of the Code”); see also *Sosne v. Reinert & Duree P.C. (In re Just Brakes Corporate Systems, Inc.)*, 108 F.3d 881, 884 n.2 (8th Cir. 1997) (“We note that property of the bankruptcy estate is broadly defined in § 541(a)(1) of the Code.”).

<sup>11</sup> See 11 U.S.C. § 1306(a):

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

<sup>12</sup> See *id.* § 522(b)(1) (“Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection.”).

<sup>13</sup> See *id.* § 522(d)(1).

<sup>14</sup> See *id.* § 522(d)(2).

<sup>15</sup> See *id.* § 522(d)(5). This exemption is colloquially referred to as the “wildcard” exemption.

<sup>16</sup> See *id.* § 522(b)(1), (3).

<sup>17</sup> See *id.* § 522(b)(2)-(3).

<sup>18</sup> See *id.* § 522(c).

<sup>19</sup> See *id.* § 522(c)(1) (specifying that debts nondischargeable pursuant to § 523(a)(5) are not subject to the bar on collection from exempt property).

<sup>20</sup> See *id.* § 522(c)(2).

<sup>21</sup> See *id.* § 547(b)

<sup>22</sup> See *id.*

<sup>27</sup> See *id.* § 547(c)(7); see also § 547(c)(1)-(6) for additional exceptions.

<sup>28</sup> See *id.* § 547(c)(8).

<sup>29</sup> See *id.* § 522(f).

<sup>30</sup> See *id.* § 522(f)(2)(A).

<sup>31</sup> See *id.* § 522(i).

<sup>32</sup> See *id.* § 522(f)(1)(A) (permitting the debtor to avoid “a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5)”).

<sup>33</sup> See, e.g., *In re Sanderfoot*, 899 F.2d 598, 604-05 (7th Cir. 1990), *rev'd on other grounds sub nom., Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (“We conclude that, whether liens of the type at issue in this case are called equitable liens or vendor’s liens or security interests, they still are ‘judicial liens’ within the definition of section 101(32) and, consequently, are within the embrace of section 522(f)(1).”).

<sup>34</sup> See *Boyd v. Robinson (In re Boyd)*, 31 B.R. 591, 595 (D. Minn. 1983), *aff’d on other grounds by Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984) (holding that

The lien created by the family court is not a judicial lien as contemplated by section 101(27) of the bankruptcy code. The interest in this case is not one which was created by the imposition of the lien, but one which was created by state statutory and court made law and was effectuated by the imposition of the lien. There is a distinction.)

<sup>35</sup> See *Sanderfoot*, 500 U.S. at 299-301.

<sup>36</sup> See 11 U.S.C. § 545.

<sup>37</sup> *Id.* § 101(53).

<sup>38</sup> *Id.* § 545(2).

<sup>39</sup> See *id.* § 362(a) (defining collection activities barred by the automatic stay).

<sup>40</sup> See, e.g., *In re Collins*, 334 B.R. 655, 659 n.10 (Bankr. D. Minn. 2005) (noting that “the short-duration automatic stay of § 362(c)(3)(A) can be roughly analogized to a temporary restraining order. It does come into existence without notice to those parties that are bound by it—indeed, by operation of law.”).

<sup>41</sup> See 11 U.S.C. § 362(b)(2)(A).

<sup>42</sup> *Id.*

<sup>43</sup> It may be difficult for a Minnesota court to award maintenance while a bankruptcy proceeding is pending because the court must consider “the financial resources of the party seeking maintenance, including marital property apportioned to the party.” Minn. Stat. § 518.552, subd. 2 (2008). Since the automatic stay bars state courts from dividing property of the bankruptcy estate, it may be impossible for the state court to make adequate findings with respect to

maintenance while a bankruptcy proceeding is ongoing unless relief from the automatic stay is granted by the bankruptcy court.

<sup>44</sup> See *infra* notes 73-78 and accompanying text.

<sup>45</sup> 11 U.S.C. § 362(b)(2)(B).

<sup>46</sup> *Id.* § 362(b)(2)(C).

<sup>47</sup> See *id.* § 362(b)(2)(D).

<sup>48</sup> See *id.* § 362(b)(2)(F).

<sup>49</sup> *Id.* § 362(b)(2)(G).

<sup>50</sup> *Id.* § 362(k)(1).

<sup>51</sup> *Id.* § 105(a).

<sup>52</sup> See Robert E. Ginsberg & Robert D. Martin, *Ginsberg & Martin on Bankruptcy*, § 1.03[C][4] (Susan V. Kelley ed., 5th ed. 2008) (“A majority of courts after the 1984 Amendments have held that bankruptcy judges may order civil contempt sanctions where parties fail to abide by court orders or violate the automatic stay or discharge injunction.”); see also Fed. R. Bankr. P. 9020 (providing that “Rule 9014 governs a motion for an order of contempt”). Notably, the Eighth Circuit appears to have rejected this proposition. See *Sosne*, 108 F.3d at 885 (stating that

Many courts have said that those who violate the automatic stay “may be held in contempt” . . .

Calling this remedial power contempt overlooks a serious question whether bankruptcy courts have contempt powers after the 1984 Amendments. . . . More narrowly, it overlooks the fact that contempt is a remedy for violating court orders, not statutes.)

(citations omitted).

<sup>53</sup> See 11 U.S.C. §§ 1201, 1301.

<sup>54</sup> See *id.* §§ 1201(a); 1301(a) (“[A] creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt.”).

<sup>55</sup> *Id.* § 101(8).

<sup>56</sup> See *id.* §§ 1201(a)(2), 1301(a)(2).

<sup>57</sup> See *id.* §§ 1201(a)(1), 1301(a)(1).

<sup>58</sup> See *id.* §§ 1201(c)(1), 1301(c)(1).

<sup>59</sup> See *id.* §§ 1201(c)(2), 1301(c)(2).

<sup>60</sup> *Id.* §§ 1201(c)(3), 1301(c)(3).

<sup>61</sup> See *id.* §§ 1201(d), 1301(d).

<sup>62</sup> It is not clear what remedies are available for violations of the codebtor stay. Compare *In re Sommersdorf*, 139 B.R. 700, 702 (Bankr. S.D. Ohio 1991) (awarding damages for violation of codebtor stay but declining to hold creditor in contempt) with *In re Hughes*, No. B0580389C13D, 2005 WL 1293982, at \*1 (Bankr. M.D. N.C. May 2, 2005) (ordering creditor to “to cease and desist from any further contact with the co-debtor unless and until relief from the co-debtor stay has been granted by the Court” and

noting that “[s]ection 1301 does not however provide for sanctions for a violation of the co-debtor stay”).

<sup>63</sup> See, e.g., 11 U.S.C. § 506 (outlining procedure for determining amount of allowed secured claim in bankruptcy).

<sup>64</sup> See *id.* § 507(a)(1).

<sup>65</sup> See Ed Flynn, et al., *Chapter 7 Asset Cases*, AM. BANKR. INST. J., DEC.—JAN. 2003, at 22, 22 (“About <sup>96</sup> percent of chapter 7 cases are closed without any funds collected and distributed to creditors by the assigned trustee.”).

<sup>66</sup> See Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 477 (2006) (“The primary creditor beneficiaries by far of the Chapter 13 system are secured creditors. Nationally, the percentage of trustee disbursements to secured creditors ranged between 60% and 69% of total disbursements between 1994 and 2003.”). By contrast, “[l]ess than a third of trustee disbursements were to general unsecured creditors.” *Id.*

<sup>67</sup> See *supra* notes 19, 45-49 and accompanying text.

<sup>68</sup> 11 U.S.C. § 101(14A).

<sup>69</sup> See *infra* note 95 and accompanying text.

<sup>70</sup> See *Levin v. Greco (In re Greco)*, 397 B.R. 102, 107-110 (Bankr. N.D. Ill. 2008) (analyzing application of § 101(14A) to debt incurred in Illinois divorce proceeding).

<sup>71</sup> See *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995) (“[W]e believe the statute continues to except from discharge attorney fees, even if payable to an attorney rather than to a former spouse, if such fees are in the nature of maintenance or support of the former spouse or of the child of the debtor.”); see also *Foster v. Childers*, 416 N.W.2d 781, 785 (Minn. Ct. App. 1987) (holding that attorney fees awarded to spouse pursuant to need-based provision of Minn. Stat. § 518.14 are “a debt to a former spouse for maintenance or support of that spouse”).

<sup>72</sup> See *Williams v. Kemp (In re Kemp)*, 242 B.R. 178, 181 (B.A.P. 8th Cir. 1999) (“Since *Kline* specifically holds that the debt, although not payable directly to a spouse, former spouse, or child of the debtor, was in the nature of support and thus nondischargeable, the debt owed by the debtor to Williams in this case is similarly nondischargeable.”).

<sup>73</sup> 11 U.S.C. § 362(d)(1).

<sup>74</sup> *Id.* § 362(d)(2).

<sup>75</sup> See *Rubera v. Rubera (In re Rubera)*, 289 B.R. 520 (Bankr. D. Conn. 2003) (granting relief from stay to debtor’s ex-spouse to pursue non-dischargeability action in state court where dissolution decree was entered).

<sup>76</sup> See *Chunn v. Chunn (In re Chunn)*, 202 B.R. 876 (Bankr. S.D. Tex. 1995); *In re Kelly*, 125 B.R. 301

(Bankr. D. Kan. 1991).

<sup>77</sup> See *In re Buffington*, 167 B.R. 833 (Bankr. E.D. Tex. 1994).

<sup>78</sup> See *Shaver v. Forgette (In re Forgette)*, 379 B.R. 623, 626 (Bankr. W.D. Va. 2007) (holding that cause did not exist to lift stay because debtor’s ex-spouse had no claim against the debtor).

<sup>79</sup> See 11 U.S.C. § 362(e)(1).

<sup>80</sup> *Id.* § 1307(c)(11).

<sup>81</sup> See *id.* § 501(a) (“A creditor or an indenture trustee may file a proof of claim.”).

<sup>82</sup> See *id.* § 502(a) (“A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.”).

<sup>83</sup> See *supra* note 64 and accompanying text.

<sup>84</sup> See *id.* § 1322(a)(2) (“The plan shall . . . provide for the full payment . . . of all claims entitled to priority under section 507 of this title . . .”).

<sup>85</sup> See *id.* § 704(a)(10), (c).

<sup>86</sup> See *id.* § 727(b) (granting debtor discharge for “all debts that arose before the date of the order for relief” and specifying circumstances that can be cause for denial of discharge); *id.* § 1328(a) (granting debtor discharge “of all debts provided for by the plan” and specifying debts that are non-dischargeable).

<sup>87</sup> See *id.* § 727(a) (instructing bankruptcy court to grant chapter 7 debtor discharge unless certain exceptions apply); see also Fed. R. Bankr. P. 4004(c) (specifying that court ordinarily should grant discharge to debtor after 60 days from the date scheduled for the meeting of creditors unless a party in interest objects).

<sup>88</sup> See 11 U.S.C. § 1328(a) (directing court to enter discharge “as soon as practicable after completion by the debtor of all payments under the plan”).

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* § 524(a)(2) (describing scope of discharge injunction).

<sup>91</sup> *Id.* § 1328(a).

<sup>92</sup> See *id.* § 523(a) (listing exceptions to discharge).

<sup>93</sup> See *id.* § 523(a)(5).

<sup>94</sup> See *id.* § 523(a)(15); see *id.* § 1328(a)(2) (listing exceptions to discharge applicable in chapter 13).

<sup>95</sup> See, e.g., *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1056 (8th Cir. 1983) (“Whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law.”).

<sup>96</sup> *Kline*, 65 F.3d at 751.

<sup>97</sup> See *Portwood v. Young (In re Portwood)*, 308 B.R. 351, 355 (B.A.P. 8th Cir. 2004) (“The burden of proof in establishing a section 523(a)(5) exception to discharge is on the non-debtor spouse.”).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See 11 U.S.C. § 101(14A)(C) (defining “domestic support obligation” to include only debts that are “in the nature of alimony, maintenance, or support”); see also *Weaver*, 316 B.R. at 706 (“The parties’ characterization of the obligation is not dispositive.”).

<sup>101</sup> See *Williams*, 703 F.2d at 1057 (“[T]he crucial issue is the function the award was intended to serve.”).

<sup>102</sup> 62 B.R. 448 (Bankr. D. Minn. 1986).

<sup>103</sup> *Id.* at 457 (concluding that “all of the awards at issue are in the nature of maintenance or spousal support rather than in the nature of property division.”).

<sup>104</sup> *Id.* at 451.

<sup>105</sup> See *id.* at 456 (noting that the state court judge’s “memorandum clearly establishes that he structured the debt-indemnification . . . provisions to protect Defendant’s maintenance award. In imposing responsibility for marital debts . . . , he acted to see that Defendant need not divert spousal maintenance funds from her own subsistence and educational needs”).

<sup>106</sup> *Id.*

<sup>107</sup> See *Fast v. Fast*, --- N.W.2d ---, No. A08-0688, 2009 WL 1181941, at \*2-3 (Minn. Ct. App. May 5, 2009).

<sup>108</sup> See *id.* § 523(c)(1) (listing nondischargeable debts that must be asserted in bankruptcy court).

<sup>109</sup> See Fed. R. Bankr. P. 4007(b) (“A complaint other than under § 523(c) may be filed at any time.”).

<sup>110</sup> See *infra* note 111 and accompanying text.

<sup>111</sup> See *e.g.*, *In re Howard*, 307 B.R. 659, 665 (Bankr. D. Minn. 2004) (“Once discharge is granted, a creditor that proceeds in collection on a discharged debt, knowing of the grant of discharge, may be found in civil contempt of the discharge injunction.”).

<sup>112</sup> See Minn. Stat. § 518A.39, subd. 2 (specifying circumstances that may support modification).

<sup>113</sup> See, *e.g.*, *Marden v. Marden*, 546 N.W.2d 25, 27 (Minn. Ct. App. 1996) (holding that “where a child support obligor’s discharge in bankruptcy negatively affects the obligee’s financial circumstances, the obligee may seek modification of child support under Minn.Stat. § 518.64”).

<sup>114</sup> See, *e.g.*, Minn. Stat. § 518.145, subd. 2 (setting forth grounds for relief from dissolution decree).

<sup>115</sup> See *id.* § 518.145, subd. 2(1), (3).

<sup>116</sup> See *id.* § 518.145, subd. 2.

<sup>117</sup> *Coakley v. Coakley*, 400 N.W.2d 436, 440 (Minn. Ct. App. 1987); see also *Foster v. Childers*, 416 N.W.2d 781, 785 (Minn. Ct. App. 1987) (reversing trial court’s nondebtor spouse’s attempt to modify property settlement after debtor spouse’s bankruptcy discharge).

<sup>118</sup> See *Stolp v. Stolp*, 383 N.W.2d 409, 412-13 (Minn. Ct. App. 1986).

<sup>119</sup> See *Foster*, 416 N.W.2d at 786 (“As a result of appellant’s discharge in bankruptcy, respondent lost her right to collect one-half of appellant’s vested pension benefits (\$3,163).”).

<sup>120</sup> See *Dewey v. Dewey*, 188 Wis.2d 271, 276-77, 525 N.W.2d 85, 87 (Wis. Ct. App. 1994) (“Consequently, Violet’s one-half interest was neither part of David’s bankruptcy estate . . . nor was it a debt David owed to Violet.”) (footnote omitted).



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# Bankruptcy Notes for Family Law Practitioners

*Kurt Anderson*

Protecting homesteads. In general, Minnesota Statutes Ch. 510 protects up to \$300,000 in home equity (\$750,000 if the land use is agricultural) from claims of the owner's creditors. However, under Minn. Stat. § 510.07, a person who moves out of the home loses that homestead status after six months, unless s/he files a notice of intent to continue to claim the homestead. *In re Mueller*, 215 B.R. 1018 (BAP 8th Cir. 1998), but see *In re Joy*, 5 B.R. 681 (Bankr. D. Minn. 1980). Ironically, a person absent from the home due to incarceration is not deemed to have abandoned the home. *Millett v. Pearson*, 143 Minn. 187, 173 N.W. 411, 5 A.L.R. 256 (1919).

Collusive or unbalanced property divisions. A debtor found to have transferred property to his ex-wife via divorce decree, with an inferred intent to defraud his creditors, was denied a Chapter 7 bankruptcy discharge, based on 11 U.S.C. § 727 (a)(2). *In re Clausen*, 44 B.R. 41 (Bankr. D. Minn. 1984). Although denial of discharge is the "losing" spouse's problem, *Clausen* cited several cases supporting the trustee's power to get the property back from the "winning" spouse, under fraudulent conveyance law:

The case of *In re Lange*, 35 B.R. 579 (Bkrcty., E.D.Mo.1983) deemed it a transfer for purposes of finding a fraudulent "transfer" under 11 U.S.C. § 548. Also in a fraudulent transfer situation, the case of *Britt v. Damson*, 334 F.2d 896 (9th Cir. 1964) deemed a divorce decree a "transfer". *Gray v. Snyder*, 704 F.2d 709 (4th Cir.1983) and *In re Chappel*, 243 F.Supp. 417 (S.D.Cal.1965) which, although decided on other grounds, assume a divorce decree is a "transfer".

Interspousal financial obligations, including the duty to pay marital debt, are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5) and (15). Whether a non-spouse creditor has independent standing to raise the 523(a)(15)

nondischargeability issue is unknown.

Division of IRAs and other retirement assets. Minn.Stat. § 550.37, subd. 24 exempts employee and similar retirement benefits up to a limited amount (currently \$63,000) from creditors. However, the federal bankruptcy courts have construed the exemption to exclude amounts awarded from one spouse to another in dissolution decrees. *In re Anderson*, 269 B.R. 27 (BAP 8th Cir. 2001). The Minnesota Supreme Court has not definitively addressed the issue although it frequently reverses narrow bankruptcy court constructions of Minnesota exemption law. (side note to bankruptcy practitioners – if you want a state law issue referred to a state supreme court, make the request at the trial court level in order to preserve it on appeal). The issue may be mooted in bankruptcy by the expansion of retirement fund exemptions in the 2005 bankruptcy law changes. See 11 U.S.C. 522(b)(3)(C) and (d)(12), both limited to approximately \$1.095 million by § 522(n). However, it remains a matter of grave concern to persons who wish to avoid filing bankruptcy. A further tip: ERISA-regulated pension and profit sharing plans are treated as spendthrift trusts and therefore are completely off the game board as between debtors, creditors, and bankruptcy trustees, until the debtor actually receives cash proceeds. *Patterson v. Shumate*, 504 U.S. 753 (1992). Thus, persons in financial distress should consider *not* rolling their fund balances into non-ERISA funds such as IRAs when they leave a job (or getting QDROs in a marriage dissolution?), but instead leaving them in the former employer's plan.

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## The Balance of Attorney-Client Privilege and Domestic Violence Advocacy

*Attorney Rana SA Fuller and Domestic Violence Advocate  
Kathi*

One of the oldest and most protected legal concepts is that of attorney-client privilege. For attorneys who work closely with advocates in assisting domestic violence victims, there exists a conflict between preserving attorney-client confidentiality and securing the indispensable services and resources of domestic violence advocates. However, several arguments exist to support the notion that domestic violence advocates are essential members of a legal team and thus their inclusion in meetings and conversations does not waive attorney-client privilege.

### **An Advocate's Story:**

*Domestic violence victims are often the victims of economic abuse. Many victims do not have any information on the family finances. Advocates will often advise a woman who is thinking of leaving her abuser is try to save some money. They will need money to secure housing, pay deposits for utilities and give an attorney a retainer. Since many domestic violence victims do not have experience in handling money, it is difficult to decide how to prioritize needs. Which is more immediately important, getting safe housing or hiring an attorney?*

*Most victims do not know how to search for an attorney who can help them and who understands domestic abuse. Advocates empower women to take some control over their own business by advising them on how to contact an*

*attorney and how to ask for a free consultation before hiring anyone. Many women are timid about making these calls, so an advocate may sit with them for support and encouragement. Advocates can also help women prepare for a meeting with an attorney by helping her to sort her documents, make a list of things she wants to ask and deciding on what her most pressing needs are.*

*Years ago, Jane<sup>1</sup> came to me asking for help finding an attorney for a divorce. During our conversation, she disclosed some frightening incidents of domestic abuse. She had an adult daughter and a seventeen-year-old son. Her husband was verbally abusive to the children but had never physically hurt them. Jane told me if her husband found out she was thinking of leaving him, he would become even more dangerous. However, Jane told me he was probably going to kill her if she stayed or if she left, so she was going to try to get away. We talked about her immediate safety needs, what Orders for Protection were and how it might help her, and what her financial position was. She had no idea if the family had any assets beyond the mortgage on their house, because her husband handled all their money. Her mother had agreed to help her hire an attorney, but she had no idea how to find one or how much it would cost.*

*Jane's husband was prominent in the community and had a lot of business and social connections. He golfed with some*

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attorneys, belonged to several service clubs and was a deacon in their church. She was afraid the attorneys in her community would not believe her. I suggested a list of attorneys I had observed in court who work hard for their clients and appeared to understand domestic violence issues. She was not aware she could ask for a free consultation with an attorney and did not know she could talk to several attorneys to make sure she found the right attorney for her. If she did not feel safe with a local attorney, we would try to find one in a nearby community. I also advised her on what documents she might need, and we discussed the questions she wanted to ask of the attorney. I suggested she might want to make lists detailing what relief she needed in an OFP and a divorce, if she decided to get one, and what areas she would leave open for negotiation.

I suggested we could make some calls immediately to attorneys, but Jane was afraid the receptionists might not be trustworthy. I tried to reassure her by telling her they had an obligation to keep people's confidences just like attorneys do, but she was still uneasy. I suggested I would call and ask for the attorney and then she could talk to him. I warned her the attorney would have to know her name right away to be sure there was not a conflict of interest. When we reached the attorney, I told him I was with someone who wanted to talk to him.

Jane told him she wanted to set up a meeting and gave her name. The attorney did a conflict check and luckily, there was not one. Jane gave him a brief description of her problems and he agreed to meet with her. She explained her husband was out of town for a few days and asked how soon he could see her. I encouraged her to ask if she could have a free consultation to

which he agreed. Jane also remembered to ask what she needed to bring with her to the meeting.

When she hung up, I could sense her feeling of relief that the first step had been taken. She then asked me to go with her to the appointment. I agreed, but I explained about privilege and told Jane she and her attorney would have to discuss his views on it before we met together. I reminded her that she was the client and if she did not feel comfortable with this attorney, she could try others.

### **Statutory Arguments**

A fundamental principle in the attorney-client relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. However, Minnesota's Rules of Professional Conduct provide ten examples of when it is appropriate for an attorney to disclose confidential communications between herself and her client. One of these exceptions provides that a lawyer may reveal information relating to a client if "the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation." Minn. Rules of Prof'l Conduct 1.6 (b)(3). Where the victim of domestic violence has been violently betrayed by the person she trusted most, the lawyer's collaboration with an advocate, with whom the victim has built an initial bond, should be recognized as an essential way to develop the attorney-client relationship and to facilitate successful representation of the victim. By empowering the client to invite the advocate to accompany her into meetings with the attorney, the attorney will be sending a powerful message to the client that she trusts the client's judgment and appreciates the complexity of her situation. Thus, the client will be more inclined to be forthcoming

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with the lawyer about the facts of the case, and in turn, the lawyer will be better able to effectively represent the client. Additionally, attorneys have a duty to carry out representation in the way the client desires. See Minn. Rules of Prof'l Conduct 1.2(a), which says, "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."

*I met Jane at the attorney's office. When Jane went in to see the attorney she told him she wanted me to come into the meeting with them. I waited while they discussed how she thought I could help and the attorney explained his view that an advocate can become part of the team of legal help in situations where there was domestic violence. They agreed to include me in their meeting. He asked her what her immediate concerns were and she told him how afraid of her husband she had become. Jane described a recent event when her husband had become enraged, threw a hot skillet at her, and told her he would kill her if she left. A few days later, he was cleaning his guns in the basement. He came upstairs to tell her he was deciding which gun he would use when the time came. She knew what he meant.*

Furthermore, if the advocate participates in client meetings with the attorney, the advocate will be able to demystify the initial experience for the client and alleviate some of the anxiety the client is experiencing. In preparing the client for what to expect, the advocate will be able to help the client focus, clarify her thoughts, and help her to more efficiently utilize her time with the attorney. If

the attorney gives the client assignments or asks her to provide additional information for her next visit, the advocate can help the client remember what she needs to do and work directly with her to facilitate effective and considerate attorney-client interactions. In this light, if the attorney finds the advocate's presence is essential to or enriches the quality of the representation, then it seems apparent that the privilege is not broken.

*The attorney told Jane he understood how dangerous her situation was. He explained what an Order for Protection was and how the application process worked. He asked if she had discussed with me other safety measures she could take, including going to the shelter. Jane assured him we had discussed her safety and she understood the limitations of an OFP.*

Domestic violence advocates serve an imperative purpose in the context of an attorney-client relationship. Mainly, they facilitate communication between a client who has been traumatized and an attorney, who despite her best efforts, is simply an intimidating stranger. The reality of domestic violence representation is that a client must be truthful about her victimization despite the anxiety, anger, or shame she is experiencing. The domestic violence advocate can comfort the apprehensive client and encourage her to communicate effectively with the attorney. An advocate can translate the complex personality and emotions of a domestic violence victim and facilitate communication with an unfamiliar attorney. Therefore, it is against logic to accept that privilege would be defeated in the presence of an advocate who serves an analogous purpose as an interpreter for clients with unique needs. Certainly, no one would argue that privilege is defeated when a sign language interpreter is present to facilitate communication between a hearing-impaired client and an attorney. Similarly, the

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same holds true for a language translator when an English-speaking attorney represents a non-English speaking client.

*The attorney took out an OFP form and they began to fill it out. When they came to line 8, I suggested Jane describe the two most recent events with her husband that had lead her to ask for my help. I reminded Jane her husband would read whatever she wrote in her application, so she should use what she needed to get the order but be cautious about putting any additional information on the form.*

### **Case Law Arguments**

Generally, courts have found that the presence of someone who is determined to be helpful or essential in facilitating the attorney-client relationship is allowed to be present during an attorney's conversations with her client without breaching the privilege. Specifically, in *In re Bieter Co.*, 16 F.3d 929, 936-940 (8th Cir. 1994) the court found that too narrow a definition of "representative of the client" will lead to attorneys not being able to confer confidentially with outside agents who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely. In *Bieter*, the court found that a consultant (who was not an advocate or an attorney) to the client who was retained to provide advice and guidance, was at times the client's sole representative at meetings, and possessed information possessed by no other person, made him "precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand [a client's] reasons for seeking representation." *Bieter*, at 940.

While the consultant in *Bieter* was not a domestic violence advocate, his job description (retained to provide advice and guidance, the client's sole representative at

meetings, possesses information possessed by no other person) is almost identical to the role of a domestic violence advocate in a domestic violence proceeding. An advocate maintains such a unique relationship with a client that at times, the advocate may be the only person with whom the attorney can confer to understand the legal needs of the client. Thus, the maintenance of privilege in these conferences is essential to serving the needs of the client.

*The following Tuesday, Jane called saying the order had been served and her husband had requested a hearing and she asked if I would come along. I promised to attend the hearing with her and asked her to meet me at my office so we could go together. When Jane arrived at my office, she was pale but looked resolute. Jane told me she had talked over the situation with her son and he wanted to stay in the house with his dad at least until she found a place to live. We discussed her safety plan and made some changes based on some of the threats he had made to friends and relatives. I urged her to call the police if her husband violated the order and she promised she would.*

*We made our way to the courthouse and I took her into a private waiting area. I told the guard where we would be and asked him to let the attorney know when he got there. Jane was very nervous. Her attorney arrived and described to her what would happen during the hearing. Her husband had hired an attorney. However, her attorney was confident and seemed well-prepared which allowed Jane to relax a little. When we were called into the courtroom, the judge asked the attorneys to see him in chambers. I sat at the counsel table with her. When the guard slipped out of the courtroom, Jane's husband started talking to her under his breath. I reminded him he was subject to a court*

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*order. The guard returned and warned him against having contact with his wife. When the attorneys returned, the judge started the hearing. After taking testimony from both of the parties, the judge issued the order for two years. There was a discussion of the other relief. The guard asked us to wait in the courtroom for a copy of the order and we could hear the husband talking loudly and angrily in the corridor. When Jane was given a copy of the order, we reviewed it very carefully to be sure it said what we thought it did.*

### **Work Product Argument**

In addition to the statutory and case law, the legal concept of “work product” presents another way to protect the collaborative efforts of attorneys and advocates.

During the discovery process, the parties may obtain discovery regarding any matter that is not privileged and that is relevant to the parties’ claim or defense. Certain material, including an attorney’s mental impressions, trial strategy, and legal theories in preparing a case for trial, are considered “work product.” Such work product is considered privileged and non-discoverable. Minn.R.Civ.P. 26.02(3); *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn. 1986); *National Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979); *Brown v. St. Paul City Railway*, 241 Minn. 15, 35, 62 N.W.2d 688, 701 (1954).

One suggestion is that collaboration with victim advocates represents an attorney’s mental impressions, trial strategy, or legal theories about a case. Therefore, the communication between the attorney and the advocate is protected from being discovered by the opposing party. The court has found work product to be a broader concept than attorney-client privilege, “While the ‘work product’ may be, and often is, that of an

attorney, the concept of “work product” is not confined to information or materials gathered or assembled by a lawyer. Further, a communication may be immune from discovery as work product even though it was not made to or by a “client” of an attorney.” *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977). Thus, communication between an attorney and an advocate regarding the client’s emotional state, purpose in representation, history of abuse, etc. can be deemed ‘work product’ as such communication can represent trial strategy, especially in an order for protection hearing.

Having a domestic violence advocate as a vital part of the legal team, not only can be beneficial to the victim, but also can be beneficial to the attorney/client relationship. Advocates can provide the emotional support the client needs, allowing the attorney to provide the legal support and hopefully reduce costs for the client. Advocates can also help gather police reports. Many advocacy programs already receive all domestic violence related police reports. Advocates can help the victim focus on her next steps or help the client remember her “to do” items from the attorney. Many domestic violence advocates spend a lot of time in court helping victims obtain orders for protection. This gives domestic violence advocates a unique perspective on the judges and the court system in their community.

The benefits of working with a domestic violence advocate are numerous, but the benefits to your client are extensive. Working with domestic violence victims can be very difficult. We as attorneys need to use the resources available to us to facilitate the best representation of our clients as possible. Advocates have knowledge, expertise and resources that we as attorneys do not have. Therefore, to represent properly a domestic violence victim, attorneys need to be utilizing domestic violence advocates.

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Notes

<sup>1</sup>Jane is a composite of many battered women seen by a domestic violence advocate over her 20 years as an advocate. The story of Jane is in no way representative of one specific woman's story.

*Rana Fuller has worked in the domestic violence field since 1997. Ms. Fuller joined the Battered Women's Legal Advocacy Project (BWLAP) in 2005 and is a Managing Partner. Ms. Fuller is the attorney for the statewide organization and she provides legal*

*advice and consultation to battered women, advocates and attorneys on legal issues that affect domestic violence victims. Ms. Fuller is responsible for training and outreach to attorneys involving issues of domestic violence and the law.*

*Ms. Fuller is a graduate of Northeastern University School of Law in Boston, Massachusetts, and received, with distinction, her Bachelors of Science degree in Psychology and Women Studies from Iowa State University. Ms. Fuller is licensed in both Massachusetts and Minnesota.*

## **Preparing and Arguing Effective Family Law Motions**

*Judge Sharon Hall & Judge Steven Halsey*

Effective advocacy in family law cases requires a variety of skills that are not taught in law schools. A family lawyer must be counselor, advocate, confidante, and advisor. Occasionally, a family lawyer must, or should, counsel clients that their "take no prisoners" approach to the divorce or custody dispute will, ultimately, be unsuccessful in obtaining a favorable decision from the court, will cost a lot of money, and could significantly harm their children. Unfortunately it appears from the bench that lawyers rarely give this advice to their clients and, instead, are permitting them to present their case in a manner that not only violates the Rules of Family Court, but also the "Professional Aspirations" adopted by the Minnesota Supreme Court in 2001. The purpose of this article is to provide a judicial perspective to making effective family law motions since family judges and referees are the sole decision makers at those hearings.

The motion itself must comply with Rule 303.02 of the Rules of Family Court Procedure and specify, with particularity, the relief the party is seeking. It must be properly and timely served. Be aware of, and comply with, Family Court Procedure Rule 303.03 (a) requiring 14-day and 10-day (new issues motions) service of motions and affidavits; and 5-day service of a response. Please avoid the common practice of faxing documents on the last day after working hours. Judges generally will not allow counsel to argue for relief that was not noticed in the notice of motion and motion and not supported by relevant information contained in an affidavit. Be certain that the relief you seek at a temporary hearing is within the authority of the Court under Minnesota Statute 518.131. In temporary custody hearings, provide a brief trial memorandum summarizing the facts which bear on each of the 13 "best interests of the child" factors in Minn. Stat. § 518.17.

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You should be familiar with the practice in the County in which you are bringing the motion. For example, some judges may not appoint a guardian ad litem for the children absent actual physical abuse. Some counties no longer provide custody or parenting time evaluations. The Rules of Guardian Ad Litem Procedure at Rule 903.04 specifically preclude judges from appointing guardians ad litem to conduct custody or parenting time evaluation.

Rule 303.03(d) contains the requirements for providing oral testimony at a motion. If you want to present oral testimony at the motion hearing and the court does not have enough time on the calendar to hear the testimony, the motion hearing may be used as a prehearing conference. If you believe you will need more than one-half hour for your motion, this rule contains several procedural requirements you must comply with before the court will issue an order granting your request. This request must be submitted in motion form with names of witnesses, types of exhibits and the reasons why the evidence cannot be submitted by affidavit. Only then should the court grant your request though the court can restrict your request to a shorter period of time including reducing the number of witnesses you may be permitted to call. Never presume the court will have unlimited time to hear your client's motion even if your client believes it is the most important case the judge is scheduled to hear that day.

Frequently-ignored rules include the following:

- a. Rule 303.01(a) (2) requiring counsel to advise the opposing party or counsel of the scheduling of a motion. Judges know that attorneys are scheduling motions weeks and even months in advance of the hearing date, and then serving the motion with the absolute minimum of 14-days' notice, in order

to obtain a perceived tactical advantage. Such practices may result in continuances which might not otherwise be necessary. You may also be required to pay attorneys' fees to the opposing side if its request for a continuance is granted.

- b. Rule 303.03(c) requiring counsel to certify settlement efforts. While there certainly are abusive relationships in which negotiating with an opposing party may not reasonably occur, there are many more cases with counsel on both sides where there is no justifiable excuse for ignoring the requirements of this rule.
- c. If an Order to Show Cause is required, such as for a contempt motion, be certain that it complies with Family Court Rules 303.05 and 309. Judges frequently receive proposed orders to show cause that are not in proper form and require redrafting, thereby costing your client precious time and money.

Motions for temporary relief must be supported by a sworn affidavit under Rule 303.02. There is a long-standing practice among the Family bar of attaching numerous pages of unsworn material to the client's affidavit. Your client's affidavit does not give evidentiary credibility to the unsworn though attached school records, police reports, letters from relatives, teachers or daycare providers or medical records. These documents should be ignored by the judge.

Another common motion practice is submitting notarized letters "To Whom it may Concern" or "Dear Judge" or other similar documents. A notarized signature is NOT a sworn affidavit; the signer must be sworn that the information in their affidavit is true and correct. If the document is not an affidavit, it can be objected to by the other party and should always be ignored by the judge.

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Although clients may get some cathartic relief by trashing the other parent in their affidavit, it is very important to remain focused on the requirements of Minn. Stat. 518.17. Subdivision (1) requires that “the Court shall not consider conduct of a proposed custodian that does not affect the custodian’s relationship to the child.” Since judges cannot consider it, family lawyers should cease the practice of allowing client’s to vent their anger and frustrations by expounding in their affidavits, at length, about the following conduct of the opposing party, unless it clearly impacts the children:

- a. Adulterous relationships or flirting
- b. Criminal histories of relatives
- c. Drug or alcohol dependency histories of relatives
- d. Juvenile or school age disciplinary problems
- e. Abortions

It continues to amaze judges that attorneys sometimes behave like they are in the midst of a political campaign, accentuating all of the bad behavior of the opposing party, while saying little or nothing about the nature of their own client’s relationship with the children. Attorneys have started to attach to their clients’ affidavits tens or hundreds of pages of emails between the parties, apparently to show the court how nasty and profane the opposing party can be. Remember, your client chose this allegedly nasty person to marry and these affidavits may cause the Court to question your client’s judgment.

Family lawyers considering filing such affidavits should first review Rule 11.02 of the Minnesota Rules of Civil Procedure, which provides as follows:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion,

or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

- (a) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (b) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (c) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (d) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Financial affidavits should be supported by paystubs or relevant portions of tax returns and, once again, the amount of attached documentation should be reasonable. Attaching several hundred pages of bank statements or credit card statements is not helpful to the court. Summaries of those records are very helpful to trial judges and much appreciated at a trial, but rarely at a temporary hearing. Lists of monthly expenses should be reasonable and itemized as much as possible. Listing “Social obligations \$500” is not very helpful to the decision maker and a list of itemized expenses all ending in “00” may lack credibility. Do not include the cost of health

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insurance or other expenses that are already reflected in your client's income information as a deduction to the gross income at paragraph 7 of the Application for Temporary Relief. This "double dipping" looks like a fraud or trick is being perpetrated on the judge and will also negatively impact your client's credibility. List these expenses once – in the income information area or the expense information area – but not twice.

Finally, we come to the issue of affidavits from minor children. The practice of filing sworn affidavits by children of the parties is discouraged. The children are not parties to the dissolution or custody case and usually do not have a guardian ad litem. Allowing one

(or both) parent(s) to "ally" with a child has adverse consequences too numerous to mention in this article. NEVER bring the minor children to court for the motion hearing.

In summary, follow the rules, stick to the facts, avoid hyperbole, and be concise in your arguments. In doing so, you will be more likely to obtain a favorable result for your client.

*Judge Sharon Hall is a Tenth District Judge chambered in Anoka and Judge Steven Halsey is a Tenth District Judge chambered in Buffalo.*

## **Pesky Child Support Problems – Calculating Gross Income for the Self-employed in a Sole Proprietorship or Single-Person Limited Liability Company**

*Judith Payne*

One consequence of the troubled economy is that more down-sized workers are taking a shot at starting their own businesses. Consequently, it is becoming more common to have a child support case where at least one of the parents involved is self-employed. Determining gross income for these newly self-employed parents poses some challenges.

### *Income for the self-employed defined*

For purposes of calculating child support, gross income from self-employment or the operation of a business, including joint ownership of a partnership or closely held corporation, is defined at Minn. Stat. § 518A.30 as "...gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation."

Specifically excluded from "ordinary and necessary expenses" are accelerated depreciation expenses, investment tax credits and any other business expenses determined by the court to be inappropriate or excessive even though they may be allowable by the Internal Revenue Service. *Id.* If challenged, it is the self-employed person's burden to prove that an expense is ordinary and necessary. *Id.*

### *The Basics*

A good starting point to determine the self-employed gross monthly income for child support purposes is to look at the prior years' tax returns.

Generally, the term "self-employed" is applied to people who report their income on an individual 1040 income tax return,

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Schedule C, as a “sole proprietor.” However, a “self-employed” individual may be both an employer and an employee at the same time. How income is reported to the Internal Revenue Service depends on how the business is organized.

Best practice for determining gross monthly income of self-employed individuals used to be to obtain their income tax records from the previous five years. In a good economy, the court could often be convinced to do income averaging over the five year period. Now, especially with entities related to the real estate market or entities in business for less than five years, the number of years of tax records may be limited. In such situations, obtain tax records from as many years as are available. In cases where there is a lot of cash remaining in the pass-through entities’ cash accounts at year’s end, challenge whether the cash is being held for child support income reporting reasons. If copies of the other party’s tax returns are not readily available or if you suspect that they are not copies of the actual forms that were filed, you can obtain copies directly from the IRS by using form 4506.

Other entities have different tax-filing forms and are not addressed here.

#### *Using the Schedule C*

Owners of sole proprietorships use Schedule C of federal form 1040 to report their gross receipts and expenses. A single member limited liability company may also choose to use Schedule C.

Use Schedule C attached to federal income tax form 1040, to identify the gross receipts and the expenses that the taxpayer has used as offsets to receipts.\* (\*All references are to 2009 tax forms; future years’ forms may vary) Gross receipts are identified in “Part I” of the form, followed by the offsetting

expenses in “Part II.” The result is on line 29, net profit before deductions for business use of the home.

Under the current child support rules, only ordinary and necessary deductions are allowed for business-related expenses.

Next, consider whether the remaining business expenses are “ordinary and necessary.” The term “necessary” can be illusive, but take a look at the larger expenses to see if the percentage of cost is in line with the other expenses. The Court may be persuaded to find an expense excessive or inappropriate.

Pay particular attention to the business-related expenses that may reduce a person’s monthly household expenses. Vehicle expenses, cell phone use, dining out, club dues, education or business trip costs that may include a pleasure or vacation component, insurance benefits, etc., are all categories that may contain personal expense components. Challenged amounts to those portions of the business expenses that may be personal can be added back into the gross income, thereby increasing net profit for child support purposes. For example, if a home-based daycare provider claims a relatively large deduction for food expenses, query whether that food is also being used to feed household members; or, if a mortgage broker claims both office rent and depreciation on his home office, consider whether both expenses should be allowed as deductions from income for child support purposes.

Ordinary depreciation is allowed under the child support rules, while accelerated depreciation is not. To determine what portion of 2009 Schedule C, line 13 is accelerated depreciation versus ordinary depreciation see Schedule 4562. The accelerated depreciation expense is added

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back in to income for child support purposes under Minn. Stat. § 518A.30 (2006).

*Beyond the 1040*

The 1040 and its attachments may only begin to tell the story.

There are some businesses that are traditionally known for cash receipts. Home-based daycare, vending machine sales, and home repair or cleaning services are just a few. In situations such as these, watch for expenses exceeding known sources of income. If one's expenses are \$4,000 per month, but the only known sources of income amount to \$2,000 per month, there may be hidden income. All sources and uses of cash flow must be considered, whether originating from taxable income, loans, gifts, transfers between bank accounts or other sources.

A statement of financial position, such as a balance sheet or statement of operations, prepared for a lender may identify additional sources of income. One's own client can be an excellent source of information regarding acquisition of assets by the other party, particularly if they tell you the other side has just purchased a sporty new car, snowmobiles, jet skis or other toys just prior to, or during, the proceeding. This could be an indicator of available cash.

*Discovery in District Court*

Discovery in a child support motion brought in district court is not limited to income tax returns and paycheck stubs.

It is appropriate to request all financial statements, business checking and depository account records, specifically including account statements, cancelled checks and check registers for any joint or separate account used by the individual and the entity; payroll records, partnership agreements, business equipment records, assets and

liabilities, accounts receivable, accounts payable, budget and projection information, and business credit card statements.

Match up bank deposits and credits. Transfers between accounts do not represent income, but watch for checks issued to cash, bad checks redeposited, loans and gifts.

Receipts held in a checking account may really be undistributed income just waiting for the child support hearing to pass. Request additional discovery from these individuals and their entities. Check for excessive prepayment of debts, such as estimated tax payments, rent insurance premiums, and charge accounts, which can all be a way of hiding cash that might otherwise be considered income. Also, check credit card statements for unusual expenditures, such as a year's worth of supplies or the purchase of equipment in advance of a need. Cash flow can include loans to business owners and cash distributions of residual earnings for business entity.

*Discovery in the Expedited Process*

Access to some of the opposing party's pertinent financial information may be limited. The Expedited Process allows for only specific discovery. The prior two years tax returns and three months worth of paycheck stubs are discoverable by written request. See Minn. Gen. R. Prac. 361.02. The requested documents are due back to the requesting party no later than 10 days from the date of service of the written request.

Obtaining additional financial and business information, such as, profit and loss statements, general journal entries and credit card statements, requires a motion to the Magistrate for permission to demand production. Minn. Gen. R. Prac. 361.03. Motions made at the hearing date delay the process and may require a second hearing, so

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motions should be made prior to the hearing date to secure a ruling and the production of documents prior to the hearing. The motion must include the reason for the request and notify the other parties of the opportunity to respond within five days. The Magistrate may decide to grant or deny the discovery request without a hearing or decide that a hearing is necessary. Unless otherwise directed, discovery responses are due 10 days following issuance of the order.

#### *Conclusion*

Ultimately, an accountant may be needed to help sort through and identify the issues of the newly self-employed. This can be an

expensive approach so, as always, weigh the benefits and discuss the costs with your client before going down this path.

*Judith Payne represents parties in a wide variety of family law matters, including custody, adoption and financial issues. She has a journalism degree from the University of Wisconsin-Madison and is a 1997 graduate of William Mitchell College of Law. The Payne Law Office is located in the southern metro area where Judith is an active volunteer with Dakota County Legal Assistance, Scott County Self-Help Clinics and Resource Center for Fathers and Families.*

## **Answers to Pesky Family Law Questions Regarding Never Married Parents with Custody and Child Support Issues, and a Few Useful Charts!**

***Melissa Froehle, Melissa Rossow & Sandra Torgerson***

Preface: In Minnesota, when a child is born to a mother who was never married,<sup>i</sup> the mother has sole legal and sole physical custody until a court order says otherwise. In Minnesota there are two ways to establish parentage of a child born to a never married parent, either by a Recognition of Parentage that has been filed with the Department of Vital Statistics or by a court order determining (adjudicating) the father. If a Recognition of Parentage has been filed, a paternity action can no longer be brought unless there are competing presumptions of parentage.<sup>ii</sup>

If the parents sign a Recognition of Parentage, the mother still has sole physical and legal custody, until a court order specifying a different arrangement is entered. If parentage

is determined in a paternity action, the court must address the custody arrangement in the court order that determines parentage.

Because 2/3 of Minnesota's child support caseload is currently composed of families whose parents were never married at birth, it is likely that you will come across "IV-D" cases working with this population of clients. However, any case involving child support can start out or become an IV-D case, regardless of the parents' marital status at the birth of the child, or the socio-economic background of the family. IV-D stands for the section of the federal law that created federal oversight and regulation in child support cases (Title IV-D of the Social Security Act of 1975, found at 42 U.S.C. section 651-669 and 45 C.F.R. sections

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301-308). An IV-D case is a case in which the county child support office is involved either because of current or past expenditure of certain kinds of public assistance, or because someone applied for help from the child support office. See the detailed Q&A for more information.

Before answering many “pesky” questions, three predicate questions should be asked of the client: (1) Has paternity been established? And if so, how? (2) Has there ever been a court order regarding custody or parenting time? (3) Has there ever been an IV-D case? The practitioner should obtain a copy of any relevant documents (ROP, Paternity Order, etc.) and child support orders.

Disclaimer: This article is to assist family law lawyers in answering the many “pesky” questions in this area. Information in this article is for general information purposes only, and is not legal advice. This information should not be considered the position of either the Dakota County or Ramsey County Attorney’s Offices.

**1. When do you have to give notice to an absent biological father in a third-party custody proceeding or adoption proceeding?**

A: Both are governed by statute.

For a third-party custody proceeding, Minn. Stat. § 257C.03, subd. 3(a) contains seven clauses that describe when a “parent” must be given notice. For an adoption proceeding, Minn. Stat. § 259.49, subd. 1(b), contains eight clauses that describe when a parent must be given notice of a hearing to adopt the child. The clauses are *identical* between these two statutes *except* that an adoption proceeding contains an additional requirement regarding the Minnesota Fathers’ Adoption Registry. Notice is required in both instances for a father who has had paternity established. However, there are many instances in which paternity *may not be established* in which notice must

be given. For example, notice must be given to a parent if “the person has substantially supported the child” or is “openly living with the child or the person designated on the birth record as the natural mother of the child, or both.” If you are representing a possible biological father who wants to assert parentage, timely action to preserve his rights is important. *See T.D. v. A.K.*, 677 N.W.2d 110 (Minn. Ct. App. 2004).

**2. What happens to custody if the mother dies (assuming she has physical custody of the child) and the parents were never married?**

A: It depends on if, or how custody was established.

According to case law involving divorced parents, the surviving parent who “lost” custody in a divorce decree usually would have custody after the custodial parent’s death, assuming that person is not unfit and there are no extraordinary circumstances. *See In re Custody of N.A.K.*, 649 N.W.2d 166 (Minn. 2002) (“[f]ollowing the death of a custodial parent, a surviving, non-custodial parent is entitled to custody unless the presumption that the parent be awarded custody is overcome by extraordinary circumstances of a grave and weighty nature, indicating that the best interests of the child require that the surviving parent be denied custody.”).

If never married parents established paternity for the father by a paternity adjudication order, then according to case law, the father’s custodial rights would be “reinstated.” *See, e.g., Petition of Hohmann*, 95 N.W.2d 643, 647 (Minn. 1959) (“As an adjudication of custodial rights a divorce decree is conditioned upon the continued life of both parents, and when the custodial parent dies, the decree *eo instante* ceases to be operative and the custodial rights of the surviving parent are reinstated as if no decree of divorce has ever been entered.”).

If the parents have never had a custody order (for example, they signed a Recognition of Parentage but never went to court for custody),

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then technically the father has no rights of custody to reinstate. In practice, a never-married father who signed a ROP, who wants to ensure his custodial rights following the death of the mother, should seek a court order. This issue may be forced upon the surviving parent if another person seeks custody—even in situations where the ROP parents lived together right up until one parent’s death.<sup>iii</sup>

Note that since *In re N.A.K.* (referenced above) was decided, Minnesota Chapter 257C went into effect. This chapter contains the de facto custodian and interested third party custody laws. Although prior case law states a strong preference for a biological parent, Minn. Stat. § 257C.04, subd. 1(c) states the court “must not give preference to a party over the de facto custodian or interested third party solely because the party is a parent of the child.” The statute also provides that the “fact that the parents of the child are not or were never married to each other must not be determinative of the custody of the child.” Minn. Stat. § 257C.04, subd. 1(e).

### **3. What is the time limit on establishing paternity?**

A: The statute of limitations for paternity actions requires action to be commenced by time child is 19. Minn. Stat. § 257.58.

However, the statute of limitations for probate actions differs. Minnesota Statute § 524.2-114 permits, but does not require, parentage in a probate proceeding to be determined under the Parentage Act. The Parentage Act and Probate Code serve different purposes. The purpose of the Parentage Act is to establish the legal parent/child relationship. Child support is a major concern for actions under the Parentage Act. The purpose of the Probate Code is to determine transfer of property. The two acts have different limitation periods for filing claims due to different purposes of each statute. See *In Re the Estate of Palmer*, 658

N.W.2d 197, 200 (Minn. 2003); *In Re the Estate of Jotham*, 722 N.W.2d 447 (Minn. 2006); and *In re the Estate of Martignacco*, 689 N.W. 2d 262, 267–268 (Minn. Ct. App.2004).

### **4. What is the procedure for establishing custody for never married parents?**

A: It depends on how paternity is established.

If the parents signed a Recognition of Parentage (ROP), either parent<sup>iv</sup> wishing to establish a court order for custody must petition in a separate legal action. See Minn. Stat. § 257.541, subd. 3 (father’s right to custody and parenting time) and Minn. Stat. § 518.156 (commencement of a custody proceeding). The forms on the Minnesota State Court’s website contain a Summons/Petition form for this type of custody action for unmarried parents. Good practice is to file a certified copy of the ROP and attach a copy to the petition. Certified copies can only be obtained by mail from the Department of Health, Office of the State Registrar (webpage for the form is listed at the end of the article).

When a ROP is properly executed and filed, if there is no competing presumption of paternity (and there are only very limited circumstances in which there will be), it is improper to file a paternity adjudication action. Minn. Stat. § 257.75, subd. 3. If there are no competing presumptions, a ROP “has the force and effect of a judgment or order determining the existence of the parent and child relationship under section 257.66 [paternity statute].” *Id.* Rather, the proper course of action after a ROP is to serve and file a Summons and Petition to establish custody and parenting time.

If the parents are going through a paternity adjudication action in court, the issue of custody/parenting time must be pled in the Complaint, and will be addressed if the man is adjudicated the father of the child and

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Minnesota is the home state of the child. *See* Minn. Stat. § 257.66, subd. 3 (“The judgment or order shall contain provisions concerning the duty of support, the custody of the child... parenting time with the child...”). Any parent (including an alleged father) can apply for IV-D services, which includes services for the commencement of the paternity action. Indigent parents are eligible for court-appointed attorneys in paternity cases.

**5. Can a parent who is a minor sign a stipulation on custody and parenting time? Can a minor parent sign a ROP?**

A: Yes, with caveats.

A minor parent can sign a stipulation on custody or parenting time. But, they must also have an adult guardian ad litem appointed for the case. *See* Minn. R. Civ. Pro. 17.02. Typically this is a minor’s parent, but not always. That guardian ad litem’s signature will also be required on the stipulation. This person is not a guardian ad litem within the typical meaning contained in Minn. Stat. § 518.165. *See* Minn. R. Civ. Pro. 17.02.

And yes, minors can sign a ROP. *See* Minn. Stat. § 257.75, subd. 9. However, there is some question about whether the ROP remains a presumption of paternity requiring a paternity adjudication to establish custody, parenting time, and support, or whether the ROP becomes a final adjudication after both parents are no longer minors. Unlike a minor signing a custody and parenting time stipulation, nothing in the law requires counter-signatures of the minor’s parents or guardians ad litem on the ROP, *and in fact*, if that were to occur on a ROP, more than likely the Minnesota Department of Health would reject the ROP for an error. From the county IV-D office perspective:

- Some counties pursue a paternity adjudication in court in any case in which it is involved, and consider the ROP to be

a presumption of paternity, even after both parents are no longer minors, and

- Some counties proceed directly with an establishment of support action 6 months after the youngest parent is no longer a minor (because a minor cannot bring an action under Ch. 257 to declare the nonexistence of the father child relationship after 6 months after the youngest minor parent turns 18).

Both practices have been accepted by the courts. Check with your local IV-D office on how they proceed on cases after a minor has signed a ROP.

**6. If a county files an action to establish child support pursuant to Minn. Stat. § 256.87, how does the responding parent procedurally get custody and parenting time addressed?**

A: The responding parent (generally the father) must commence a separate action to establish custody and parenting time in District Court. Sometimes, a responding motion is served and filed in the 256.87 action asking that child support issues either be addressed in District Court with the action to establish custody and parenting time, or be delayed until the custody and parenting time issues have been addressed. However, the Child Support Magistrate may also issue a temporary child support order pending the outcome of the custody and parenting time determination by the District Court.

Remember, the 256.87 action relates to child support issues only. The filing of a Recognition of Parentage provides a basis for the mother or county to bring a support action under Minn. Stat. § 256.87. It also provides a basis for the father to bring a custody/parenting time action. Minn. Stat. § 257.75, subd. 3. The Expedited Process is a court of limited jurisdiction, and Child Support Magistrates cannot hear custody matters except under limited circumstances in paternity actions. *See* Minn. R. Gen. P. 353.01.

**7. Does a father who has executed a ROP have the right to access medical or educational information (the rights recited in Appendix A)?**

A: No.

The “ROP” father has no parental rights unless and until an action for custody/parenting time has been brought and an order has been entered providing for access. The ROP only gives the father the standing to request custody and/or parenting time rights. *See, e.g.*, Minn. Stat. § 257.75, subd. 3 (“Until an order is granting custody to another, the mother has sole custody.”). The granting of rights to access and receive copies of school, medical, dental, religious training, and other important records and information about the minor children is contained in Minn. Stat. § 518.17, subd. 3(b), when custody and support of the children is determined “on judgment.”

**8. Can grandparents be ordered to pay child support if their minor child has a child? Can grandparents be ordered to pay child support if they have visitation with the child (such as when their child is deceased)?**

A: Generally, the answer in Minnesota is no, unless the grandparent(s) have adopted his or her grandchild.

The legal obligation for child support falls to the parents. *See, e.g.*, Minn. Stat. § 518A.35, subd. 1(b) (“The basic child support obligation shall be determined by referencing the guideline for the appropriate number of joint children and the combined *parental income* for determining child support of the *parents*.”). If the child is not in the custody of either parent and support is sought against one or both parents, the income of the non-parent custodian is *not* considered when calculating support. *See* Minn. Stat. § 518A.35 subd. 1(c). *See also*, Minn. Stat. § 256.87, subd. 1 and

subd. 5 (only a *parent* is liable for contribution to the amount of public assistance expended for a child, and if no public assistance is expended, a person or entity having physical custody of a dependent child has a cause of action for child support against the child’s *noncustodial parents*).

A grandparent’s visitation with the child has no bearing on child support.

**9. What happens to child support when custody changes by court order?**

A: Generally, nothing automatically happens, unless someone takes action. Including clear language that child support collection should be suspended due to the modification of custody avoids continued collection of the ongoing support obligation.

Custody/parenting time and child support provisions are separate issues. If the court order modifies custody, the order may also modify support. Unless modified, the prior support order may continue in effect. A change of custody is a basis to modify support. *See* Minn. Stat. § 518A.39.

**10. What happens to child support when the child moves in with the obligor, but he/she doesn’t have an order changing custody?**

A: It depends. This question could entail two questions. (1) How does child support stop and/or can the obligor get “credit” for the time the child has lived with him or her? (2) How is support ordered for the former obligor?

(1) If the statutory conditions are met, the obligation may be subject to satisfaction, under Minn. Stat. § 518A.38, subd. 3. That section specifies that “[t]he court may conclude that an obligor has satisfied a child support obligation by providing a home, care, and support for the child

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while the child is living with the obligor, if the court finds that the child was integrated into the family of the obligor with the consent of the obligee and child support payments were not assigned to the public agency under section 256.741.” Some counties have “satisfaction of support stipulations/orders” that can be drafted by county staff, and signed by all parties and an assistant county attorney. Also see Minn. Stat. § 518A.38, subd. 5 which provides that: “[a] support order issued under this section may provide that during any period of time of 30 consecutive days or longer that the child is residing with the obligor, the amount of support otherwise due under the order may be reduced.” Both provisions in Minn. Stat. § 518A.38 about satisfaction and reduction of support would require a court action or stipulation of the parties.

(2) To obtain a child support in favor of the former obligor, the obligor needs to bring a motion to establish a support order, and may need to establish custody and parenting time as well before a support order is issued. (See also answer to question 9.)

**11. What if the parties were never married, have a custody order, but agreed to reserve child support based on circumstances at that time, but now one or both parents want child support to be ordered now?**

A: If the parties agreed to reserve child support for specific reasons originally, and they agree that child support should be ordered now, they should be able to submit a stipulation and order to the court. Their stipulation and order should outline their agreement and also the basis for the child support, including their gross incomes and attach the child support worksheet (just in case the order needs to be modified in the future, then the modification court knows the basis of the agreement to start support).

If only the potential obligee wants child support to start, but the potential obligor does not, so a stipulation and order is not possible, the answer is not so easy. Two questions must be asked.

The first question is - what was plead out in the original custody and parenting time Petition. Did the original pleadings include child support as an issue, but then the parties agreed that it should not be ordered? Or, did the original pleadings state that child support would not be addressed? The pro se custody forms say:

**Child Support: (check one box)**

- There is no existing child support order and Petitioner is asking the court to establish child support in accordance with child support guidelines.
- There is no existing child support order and child support is not being requested in this Petition.

If the second box is marked, then arguably, the issue of child support has not been plead in the original custody and parenting time Petition, and thus child support is not within the scope of the original action. A support action may need to be initiated or the original Petition amended, and completion of personal service, before the new or additional claim for support can be addressed. *See* Minn. R. Civ. P. 4 and 5.01. It may be appropriate to consolidate the two actions if two actions are commenced.

If child support was plead and is within the scope of the original action, then the second question is – what was the reserved child support decision based on? Was the court aware of the parties’ financial circumstances and the parties’ and/or the court made a conscious decision, in light of the parties’ financial circumstances, to reserve support? If so, then based on case law, the next legal action should be a modification, showing a substantial change in circumstances under Minn. Stat. § 518A.39, because the

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“reservation” of support is truly an established \$0.00 order. If the court was not aware of one or both of the parties’ financial circumstances, and reserved support as no determination could be made, then that is truly a reservation of support, and the next legal action should be an establishment of support, not requiring the showing of a substantial change of circumstances. A motion to establish such an order may be served by mail. The latter occurs most often in pro se cases where one party files for divorce, and the other party has been missing from the picture for quite some time.

So, while this should be an easy question with an easy answer, if the parties don’t agree to child support starting after the initial order reserved or did not address support, you have to look at the details of the original pleadings and the intent of the original order. The difficulties in answering this question can be minimized if clear findings are made at the time of the initial order.

**12. What if my client has no idea what the other parent’s address is, and needs to serve a motion to modify support?**

A: Service of a motion to modify support can be made by U.S. mail to the parties’ last known address.

Also, pursuant to Minn. Stat. § 518A.47, subd. 2, if there is an IV-D case open, a party can request an ex parte court order for the county child support office to serve legal documents on the other party by mail. The party seeking the ex parte order must present a sworn affidavit to the court stating that the legal documents need to be served, that the party has tried to locate the other party, and the other party does not have an attorney. Forms are available at the State Court’s website at the Self-Help Link, under Child Support Forms. The county child support office then must serve the other party at the last known address according to their records, and file an affidavit of service with the court that states that they served the other

party, but the affidavit of service must not indicate the address of service.

A person may also be a participant in the Safe at Home Address Confidentiality Program through the Minnesota Secretary of State. Mailing to Safe at Home participants is made through the Secretary of State. For more information on the Safe at Home program, see Minnesota Statutes Chapter 5B, the Minnesota Rules Chapter 8290, and the Minnesota Secretary of State website, [www.sos.state.mn.us](http://www.sos.state.mn.us).

**13. When do I need to serve the county child support office with the Notice to Public Authority and with pleadings and motions?**

A: Please notify the county IV-D (child support) office if MFIP, Medical Assistance, MinnesotaCare, IV-E Foster Care, or Child Care Assistance is open for the child, or if there is an open IV-D, case regardless of whether there is public assistance open. The county will let you know what they expect to be served with in the future, and what their role will be in the case.

If you have any doubts on whether you should notify and serve the county, err on notifying and serving too often rather than not enough. Remember, if you fail to notify the Public Authority, the county may move the court for a redetermination of the child support order, modify the order, or to vacate the order, depending on how the order affects the county. Minn. Stat. § 518A.45.

**14. How can I tell if my client has an open IV-D case?**

A: Ask your client some questions, including:

- Do you (or your child) receive MFIP, Medical Assistance, MinnesotaCare, IV-E Foster Care, or Child Care Assistance?
- How do you receive (or pay) your child support? Do you receive (or pay) child support directly from (or to) the other

parent, or are payments made through the child support payment center?

- Have you ever been to court about paternity or child support? Do you have a copy of the order?
- Do you receive any letters or documents from a county attorney or county child support office?
- Do you receive a monthly billing statement that says how much you owe in child support (for the obligor)?
- Do you have a stored value card through U.S. Bank (for the obligee)?
- Do you have a PIN for the Minnesota Child Support Online?

If the answer is yes to any of the questions, then there is an open IV-D case. Get a release of information from your client and call the county child support office where your client lives to verify whether or not there is an open IV-D case. (Also see the chart, *When Does Receipt of Public Assistance Make a IV-D Case?*)

#### **15. How does a case become a IV-D case?**

A: A case becomes an IV-D case in one of three ways:

- 1) *Child Receives Public Assistance Assigned to the State* – If a child currently receives public assistance assigned to the State under Minn. Stat. § 256.741, subd. 2, the case is automatically an IV-D case. The case is referred to the county child support office by the public assistance agency. As used in this definition, public assistance means:
  - i. Minnesota Family Investment Plan (MFIP);
  - ii. Medical Assistance (MA);
  - iii. MinnesotaCare;
  - iv. IV-E Foster Care; and
  - v. Child Care Assistance.

(Also see the chart, *When Does Receipt of Public Assistance Make a IV-D Case?*)

- 2) *Application for IV-D Services*– If a child does not currently receive public assistance assigned to the State, or has never received public assistance assigned to the State, a party may apply for IV-D services when:
  - i. the child is financially dependent on that person; and
  - ii. one or both of the child’s parents are absent from the home.

Thus, if the two provisions above are met, a mother, father, or relative caretaker can apply for IV-D services.

Note that “any person” can include a man who may be the father of a child for whom paternity has not been determined.

- 3) *Continued Services*– If a child does not currently receive public assistance, but formerly received public assistance assigned to the State, the custodian of the child will receive a notice that IV-D services will be continued unless the county child support office receives notice that IV-D services are no longer requested by the custodian of the child (See 45 C.F.R. 302.33(a)(4)). If the custodian of the child requests that IV-D services be closed, if there are public assistance arrears owed to the county or State, the IV-D case will remain open only as to the public assistance arrears.

According to the DHS Performance Report for State Fiscal Year 2008, Minnesota had:

- 250,326 open IV-D cases in Minnesota:
  - 33,961 cases with public assistance currently open (13.5%)
  - 82,619 cases where public assistance was never open (33%)
  - 133,746 former public assistance cases (53.5%)

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**16. My client has (or my client’s child has) an open IV-D case. What should I do?**

A: Communicate, Send Signed Release, Serve the County, and use the Expedited Process (generally)!

- Communicate with the county attorney’s office that you represent the client;
- Send a copy of the certificate of representation and a release of information from your client so that the county may discuss the case with you;
- Remember that the county is a party to the action, either through intervention as of right (public assistance cases require no formal notice of intervention), or a notice of intervention (non-public assistance cases). As such, you must serve all pleadings and motions or documents on the county that relate to child support.
  - If you do not serve the county, the county may move to vacate the judgment or order; or at least, if the order affects child support, expect a phone call from the assistant county attorney assigned to the case requesting you to do something about it.

Finally, commence all actions or motions relating to the establishment of or modification of basic, medical, and/or child care support, and contests for income withholding, cost-of-living adjustments, and enforcement of basic, medical, and/or child care support in the Expedited Process.

Also, some counties have elected to have paternities and civil contempt commenced in the Expedited Process, so if that is true for the county in which your action or motion will be filed, you must also commence your paternity or contempt case in the Expedited Process. If an attorney has a question as to whether the county has elected to have paternities or civil contempt commenced in the Expedited Process, contact the county attorney’s office or

court administration in the county in which you plan to file. However, if your action or motion includes a “prohibited issue” as defined under Minnesota Rules of Court, General Rules of Practice 353.01, subd. 3, you must proceed in District Court.

**17. When does a motion need to go to the Expedited Process to be heard by a Child Support Magistrate, and when does a motion need to go to District Court to be heard by a Judge?**

A: Look at whether there is an IV-D case and if there are “prohibited issues.”

- *IV-D Case, No Prohibited Issues* - If there is an open IV-D case, and there are no issues as to custody, parenting time, division of property, establishment or modification of spousal maintenance, or other prohibited issues, then the matter must be brought in the Expedited Process.

**Example** – The child is receiving MFIP, and the obligor wants to modify child support. The motion must be filed and heard in the Expedited Process.

- *Not an IV-D Case* - If there is no open IV-D case (even if there was an open IV-D case that is now closed), the case must be brought in District Court.

**Example** – The parties were divorced four years ago, and there is no and never was public assistance in place and neither party has applied for IV-D services. The Petitioner wants to amend the Judgment and Decree. The motion to amend must be filed and heard in District Court.

- *IV-D Case with Prohibited Issues* - If the case is an IV-D case, but there are issues as to custody, parenting time, division of property, establishment or modification of

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spousal maintenance, or other prohibited issues, then the case must be brought in District Court.

**Example** – The obligee applied for IV-D services two years ago, and the obligee wants to modify child support, but also wants to modify spousal maintenance. The motion must be filed and heard in the District Court. Without the prohibited issue (modification of spousal maintenance), the motion would be filed and heard in the Expedited Process.

The Minnesota Rules of Court, General Rules of Practice (Expedited Process Rules) 353.01, subdivision 3 explains prohibited issues that cannot be addressed in the Expedited Process. Rule 353.02 explains what to do if there are prohibited issues together with permissive issues.

#### **18. Why is my client getting charged fees to have a case open with the county?**

A: Originally, there were only two fees, the \$25 initial application fee for a non-public assistance IV-D case and the \$15 per month income withholding only case fee. However, over the years, some nominal additional fees have been added. As a result, IV-D participants have been given the option of closing their IV-D case when there is no current public assistance open.

The following is a summary of the fees currently being charged on non-public assistance IV-D cases:

- *Application Fee* – There is a one-time \$25 application fee to open an IV-D case when the child is not now on, nor ever has received public assistance. There is no application fee if the child is now receiving public assistance or formerly received public assistance.
- *Cost Recovery Fee* – Starting in 2003, the State began charging a 1% cost recovery fee for all collections to obligees who are not receiving--or the children living with them are not receiving-- public assistance. If the obligee or the children living with the obligee receives public assistance, the fee will begin charging after there is no public assistance open for 24 consecutive months. If the obligee applied for the services, the 1% fee is reduced from each support collection. If the obligor applied for the services, the 1% fee is added to the amount to be collected.
- *Income Withholding Only Services* – There is a \$15 per month fee charged to the obligor if the case is nonpublic assistance and the only service requested is income withholding.
- *Collections Fee* – Under the 2005 Federal Deficit Reduction Act, the Federal Government mandated that states implement a \$25 collection fee for any collections over \$500.00 in the Federal Fiscal Year (October through September) for cases in which there has never been public assistance expended. The \$25 is taken out of the following payment. This law was effective October 1, 2006, and is found in Minnesota Statutes, section 518A.51.

#### **HELPFUL WEBSITES:**

[www.health.state.mn.us/divs/chs/osr/ropform.pdf](http://www.health.state.mn.us/divs/chs/osr/ropform.pdf)  
(Obtaining a certified copy of ROP)

[www.lawhelpmn.org](http://www.lawhelpmn.org) (Easy to read legal information, including “Rights and Responsibilities of Unmarried Parents”, and “Unmarried Fathers’ Guide to Paternity, Custody, Parenting Time and Child Support in Minnesota”)

[www.mncourts.gov](http://www.mncourts.gov) (Links to pro se forms, self help centers and other useful information)

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Notes

<sup>i</sup> A man is presumed to be the biological father of a child under certain conditions if the man and the biological mother married, or attempted to marry. See Minn. Stat. § 257.55, subd. 1. This article does not address situations where a man may be a presumed biological father under said statute

<sup>ii</sup> Minn. Stat. § 257.75, subd. 3 “Once a recognition has been properly executed and filed with the state registrar of vital statistics, if there are no competing presumptions of paternity, a judicial or administrative court may not allow further action to determine parentage regarding the signator of the recognition.”

<sup>iii</sup> Melissa Froehle, author, faced this situation representing the ROP father, in the case of *Lewis-Miller v. Ross*, 710 N.W.2d 565 (Minn. 2006).

<sup>iv</sup> Typically, it is the father petitioning for custody because he has no parental rights in this situation. However, there are some instances in which an unmarried mother may want to petition for a custody order, such as to have “proof” of custody or to get permission for international travel.

**Melissa Froehle** is the Policy and Program Director at the Minnesota Fathers & Families Network, [www.mnfathers.org](http://www.mnfathers.org), a statewide nonprofit organization that works to increase healthy father involvement by serving professionals who work with fathers and families and by educating policy makers. Previously, Ms. Froehle represented low-income noncustodial parents (mostly fathers) in custody, parenting time and other cases at Central Minnesota Legal Services, in conjunction with local fatherhood organizations. Ms. Froehle is a graduate of NYU School of Law and holds a Master’s Degree in Public Affairs from Princeton University.

**Melissa Rossow** is the Assistant Director of Legal for the Office of the Ramsey County Attorney, Human Services Division, Child Support Enforcement Section. She has also supervised the Hennepin County Family Court Self-Help Center, was a Staff Attorney for the Department of Human Services - Child Support Enforcement Section, an Assistant Carver County Attorney, an Associate Attorney with Grannis and Grannis, P.A. in South St. Paul, and worked as a Judicial Law Clerk for the Honorable Richard Spicer in the First Judicial District. Ms. Rossow has worked in the area of Family Law her entire legal career, and has focused in the IV-D Child Support area for the latter part, both in practice as an attorney and in legislative/policy work. She is a graduate of the William Mitchell College of Law and Gustavus Adolphus College.

**Sandra Torgerson** is the Division Head for the Child Support Enforcement Division of the Dakota County Attorney’s Office, located in West St. Paul. She serves as co-chair of the Minnesota County Attorneys Association’s Child Support and Paternity Committee. Prior to joining the Dakota County Attorney’s Office in 1988, Ms. Torgerson worked as a judicial law clerk, was Assistant Otter Tail County Attorney, and an associate in a family law practice. She received her Bachelor of Arts in Political Science and Criminal Justice from Moorhead State University and her J.D. from the University of North Dakota School of Law.

## Differences Between a Paternity Adjudication Court Action and A Recognition of Parentage (ROP)\*

	Paternity Adjudication Court Action	Recognition of Parentage (ROP)
<b>How is paternity established?</b>	By a paternity adjudication action in court that results in a court order.	By both parents signing a Recognition of Parentage (ROP) that is filed with the Minnesota Department of Health.
<b>What if a parent is a minor?</b>	A family member or another responsible adult will be appointed by the court to represent the minor parent's interests as a guardian ad litem.	Minors can sign a ROP, but when one or both parents are a minor at the time of signature, some counties pursue a paternity adjudication in court in any case in which it is involved, and consider the ROP to be a presumption of paternity, even after both parents are no longer minors. Other counties proceed directly with an establishment of support action 6 months after the youngest parent is no longer a minor.
<b>Are custody and parenting time rights established?</b>	<p>Yes. If the child lives in Minnesota, the paternity order will address both parents' custody and parenting time rights.</p> <p>A separate court action <u>is not required</u>.</p> <p>Either parent can ask the court for custody and/or parenting time in the paternity court action. The court will make its decision based on the child's best interests.</p>	<p>No. In Minnesota, the mother starts out with sole legal and sole physical custody of the child when parents are unmarried at the time of the child's birth. Signing a ROP does not change that.</p> <p>A separate court action <u>is required</u> to request a court order establishing the father's custody, parenting time or access rights. The ROP provides a <i>basis</i> for bringing this separate court action. It does not establish any of these rights.</p> <p>A child support action brought by the county based on a ROP cannot include custody and parenting time as an issue.</p>

	<b>Paternity Adjudication Court Action</b>	<b>Recognition of Parentage (ROP)</b>
<b>Is child support established?</b>	<p>The paternity order will address ongoing and past child support. Child support includes basic (cash) support, medical support (insurance or a dollar amount towards the cost of insurance or public assistance), and child care support.</p> <p>A court action separate from the paternity court action <u>is not required</u>.</p> <p>A parenting time adjustment to the amount of support may be ordered, depending on the amount of parenting time ordered. There is also another calculation for parents who have court ordered equal parenting time.</p>	<p>Ongoing and past child support is not established unless the county or a party files a court action.</p> <p>A court action <u>is required</u> to obtain a court order establishing ongoing and past child support. The ROP provides a <i>basis</i> for the mother or the county to bring a support action.</p> <p>A parenting time adjustment to the amount of support or an equal parenting time calculation is not applicable, unless there is already an order establishing custody and parenting time.</p> <p>A child support action brought by the county based on a ROP cannot include custody or parenting time as issues. If the mother or father wants custody and parenting time addressed, the mother or father will need to file a separate court action.</p>
<b>Can I have a court appointed attorney to address establishment of paternity, support, or custody/parenting time?</b>	<p>Yes. The mother and the alleged or presumed father have the right to a court appointed attorney if income eligible. Court appointed attorneys may be provided to low-income parties to address establishment of paternity, support, custody and/or parenting time issues.</p> <p>If the mother and/or father do not qualify for a court appointed attorney, they may hire a private attorney, contact a legal services agency/volunteer lawyer service, or waive their right to be represented by an attorney.</p> <p>The county attorney represents only the county's interests in the case, and does not represent either parent or the child.</p>	<p>No. After a ROP is signed there is no right to a court appointed attorney to address the establishment of paternity, support, custody and/or parenting time issues. A party may hire a private attorney or contact a legal services agency.</p> <p>The county attorney represents only the county's interests in the case, and does not represent either parent or the child.</p>

	<b>Paternity Adjudication Court Action</b>	<b>Recognition of Parentage (ROP)</b>
<b>How long is the process?</b>	The time it takes depends on the facts of each case. In a paternity action, all issues could be resolved very quickly by agreement. If genetic testing is needed and/or some of the issues are contested, it may take longer. The final order must address all issues.	A ROP can be signed before a notary public at a hospital or county office. The ROP can quickly resolve the issue of paternity. However, the ROP is <u>not</u> effective until it is filed with the Minnesota Department of Health. Also, separate court actions are required to establish custody/ parenting time rights or to establish support, which can take time depending on the facts of the case, or the issue may never be determined if no action is brought.
<b>Can genetic tests be done?</b>	Yes. The mother, the alleged or presumed father or the County can ask for genetic tests in paternity adjudications. If there is an open IV-D case, the County will initially pay for the tests. The county may ask for contribution to the cost of the testing. However, the cost for testing through the county is typically less than privately arranged tests, as the negotiated rate is less due to the county's high volume of cases.	<u>Before the ROP is signed</u> , the parents may agree to genetic testing. Contact the child support office to ask about getting genetic tests done. If there is an open IV-D case, the county may pay for all or part of the testing costs.  Once the ROP is signed and filed, a parent seeking to vacate the ROP must bring a court action, seek a court order for testing, and pay for the tests. The court will decide whether or not it is in the child's best interests to order genetic testing.
<b>Can I change my mind after I sign the ROP?</b>	N/A	There are 60 days after the ROP to revoke the ROP. The revocation must be in writing and must be signed before a notary public by the party requesting the ROP to be revoked, and the party must file the revocation with the Minnesota Department of Health.  After the 60 days have passed, if a party wants to vacate the ROP, the party must file a separate court action within 6 months of receiving genetic testing results that show that the man whose name is on the ROP is not the biological father, or if no genetic testing has been done, within 1 year of signing and filing the ROP.

\*This document was originally drafted by the Anoka County Attorney's Office, and adopted and modified by the Dakota and Ramsey County

## When Does Receipt of Public Assistance Make a IV-D Case?

<b>NAME OF PROGRAM OR ASSISTANCE</b>	<b>IS COOPERATION WITH IV-D REQUIRED?<sup>i</sup></b>	<b>IS CHILD SUPPORT ASSIGNED TO THE STATE?<sup>ii</sup></b>	<b>DOES RECEIPT OF ASSISTANCE MAKE IT AN IV-D CASE?<sup>iii</sup></b>
<b>Minnesota Family Investment Plan (MFIP)</b> (A form of TANF)	Yes	Yes, all rights to support	Yes
<b>Diversionsary Work Program (DWP)</b> (A form of TANF)	Yes	No	Yes
<b>Medical Assistance (MA)</b>	Yes, if there is one parent not living in the child's home	Yes, but only medical support is assigned	Yes, but partial services (Medical only) are available as an alternative to full IV-D services
<b>MinnesotaCare</b>	Yes, if there is one parent not living in the child's home	Yes, but only medical support is assigned	Yes, but partial services (Medical only) are available as an alternative to full IV-D services
<b>Child Care Assistance</b>	Yes	Yes, but only child care support is assigned	Yes
<b>IV-E Foster Care</b> (Federal funded)	Yes	Yes	Yes
<b>Non-IV-E Foster Care</b> (private or county funded)	No	No	No, but the county may apply for IV-D services for services
<b>TEFRA (MA for special needs)</b>	No, but can be referred to IV-D if one parent is not living in the child's home	Medical only if referred	Yes, if referred
<b>General Assistance (single adults) (GA)</b>	No	No	No
<b>General Assistance Medical Coverage (GAMC)</b>	No	No	No
<b>Food Support Program (food stamps)</b>	No	No	No, if only food stamps

<b>NAME OF PROGRAM OR ASSISTANCE</b>	<b>IS COOPERATION WITH IV-D REQUIRED?<sup>i</sup></b>	<b>IS CHILD SUPPORT ASSIGNED TO THE STATE?<sup>ii</sup></b>	<b>DOES RECEIPT OF ASSISTANCE MAKE IT AN IV-D CASE?<sup>iii</sup></b>
<b>Emergency Services Program (ESP)</b>	No	No	No
<b>Emergency Shelter Grant Program (ESGP)</b>	No	No	No
<b>Minnesota Supplemental Aid (MSA)</b>	No	No	No
<b>Minnesota Food Assistance Program (MFAP) -- for non-citizens</b>	No	No	No
<b>Transitional Housing Program</b>	No	No	No
<b>Refugee Assistance Program</b>	No	No	No
<b>SSI</b>	No	No	No
<b>RSDI</b>	No	No	No
<b>Unemployment Insurance Benefits</b>	No	No	No
<b>Worker's Compensation</b>	No	No	No
<b>Family Assets for Independence in Minnesota (FAIM)</b>	No	No	No

<sup>i</sup> Cooperation includes taking an active role in the case, including providing the child support office with information that will assist in locating the other parent (naming and providing information about the alleged father(s) in paternity matters), establishing support and collecting support. If cooperation is required and the party fails to cooperate, the party's public assistance benefits may be reduced and coverage under MinnesotaCare or MA may be terminated.

<sup>ii</sup> Assignment of public assistance is defined at Minn. Stat. §256.741, subd. 2.

<sup>iii</sup> If the receipt of assistance does not make the case a 1V-D case automatically, if eligible, a party may apply to open a IV-D case. But remember, IV-D cases are only those that deal with child support issues.

## IV-D Enforcement Tools

	<b>TOOL</b>	<b>APPLICATION</b>	<b>NOTICE</b>	<b>WHERE TO CONTEST</b>
<b>A</b>	<b>Income Withholding:</b> 42 U.S.C. §666(b); 15 U.S.C. §1673(b)(2); M.S. §518A.53	Every order must address income withholding (order or waive)	Administrative notices by the public authority; Notice of Motion and Motion by the obligee	Expedited Process*
<b>B</b>	<b>Federal Tax Offset:</b> 42 U.S.C. §664; 45 C.F.R. §303.72	May be applied if public assistance support arrears are \$150 or non-public assistance arrears are at least \$500	Administrative notice by the public authority	Administrative review through the public authority
<b>B</b>	<b>State Tax Offset (Revenue Recapture):</b> 42 U.S.C. §666(a)(3) (A); 45 C.F.R. §303.102; M.S. Ch. 270A.01, 270A.12, and §518A.61	May be applied if support arrears are at least \$25 and greater than one month's obligation, or if the arrears are less than one month's obligation, the arrears have been entered and docketed as a judgment	Administrative notice by the public authority	Administrative review through the public authority
<b>C</b>	<b>Credit Bureau Reporting:</b> 42 U.S.C. §666(7)(A)	Arrears may be applied if support are 3 times the monthly obligation	Administrative notice by the public authority	Administrative review through the public authority if dispute is before report is sent to credit bureau agency; otherwise, contest through the credit bureau agency.
<b>C</b>	<b>Driver's License Suspension:</b> 42 U.S.C. §666(a)(16); M.S. §§518A.65 and 171.186	May be applied if support arrears are 3 times the monthly obligation and the obligor is not in compliance with a written payment agreement	Administrative notices by the public authority; Notice of Motion and Motion by the obligee	Expedited Process*
<b>C</b>	<b>Financial Institution Data Match (FIDM):</b> 42 U.S.C. §666(a)(17) (A); M.S. §§552.04, 552.06, and 13B.06	May be applied if support arrears are at least 5 times the monthly obligation, has been submitted to either Federal or State Tax Offset, and the obligor is not in compliance with a previously executed payment agreement	Administrative notice by the public authority	Expedited Process*

	<b>TOOL</b>	<b>APPLICATION</b>	<b>NOTICE</b>	<b>WHERE TO CONTEST</b>
<b>C</b>	<b>Motor Vehicle Lien:</b> 42 U.S.C. §666(a)(4); M.S. §518A.67	May be applied if support arrearage are 3 times the monthly obligation and the obligor is not in compliance with a written payment agreement	Administrative notices by the public authority; Notice of Motion and Motion by the obligee	Expedited Process*
<b>C</b>	<b>Occupational License Suspension:</b> 42 U.S.C. §666(a)(16); M.S. §§518A.66 and 214.101	May be applied if support arrearage are 3 times the monthly obligation and the obligor is not in compliance with a written payment agreement	Administrative notices by the public authority; Notice of Motion and Motion by the obligee	Expedited Process*
<b>C</b>	<b>Passport Denial:</b> 42 U.S.C. §§654(31) and 652(k); 22 C.F.R. §51.70	May be applied if support arrearage are at least \$2,500 in arrearage for all of the obligor's cases combined.	Administrative notice by the public authority	Administrative review through the public authority
<b>C</b>	<b>Recreational License Suspension:</b> 42 U.S.C. §666(a)(16); M.S. §518A.68	May be applied if the support arrearage are 6 times the monthly obligation, the obligor is not in compliance with a written payment agreement, and other substantial enforcement mechanisms have been attempted and failed to result in compliance	Notice of Motion and Motion by the public authority or obligee	Expedited Process*
<b>C</b>	<b>Student Grant Denial:</b> M.S. §136.A.121, subd. 2(5)	May be applied if support is in arrearage by at least 30 days and the obligor is not in compliance with a written payment agreement	Notice at time of denial	Administrative review through the public authority
<b>D</b>	<b>Constructive Civil Contempt:</b> M.S. §§518A.72, Ch. 588	May be applied if support arrearage are 3 times the monthly obligation and the obligor is not in compliance with a written payment plan	Order to Show Cause, Notice of Motion and Motion	Some uncontested hearings may be held in the Expedited Process. All contested hearings must be held in District Court.

	<b>TOOL</b>	<b>APPLICATION</b>	<b>NOTICE</b>	<b>WHERE TO CONTEST</b>
E	<b>Administrative Seek Employment Orders:</b> 42 U.S.C. §666(a)(4); M.S. §518A.64	May be applied in any open IV-D case if the obligor's employment cannot be verified, and if support arrears are 3 times the monthly obligation and the obligor is not in compliance with a written payment agreement	"Proper notice...given to the obligor" (usually means in pleadings or motion)	Expedited Process*
E	<b>Criminal Contempt:</b> M.S. §588.20, subd. 2 (8)	May be charged as a misdemeanor if the obligor willfully failed to pay child support when the obligor had the ability to pay	Criminal citation or complaint	District Court
E	<b>Employer Contempt:</b> M.S. §518A.73; Ch 588	May be applied if the employer, trustee, or payor of funds intentionally failed to withhold support after receiving the order or notice for income withholding or notice of enforcement of medical support or withheld support but failed to remit support to the public authority	Order to Show Cause, Notice of Motion and Motion	District Court
E	<b>Federal Criminal Prosecution/ Criminal Non-Support:</b> 18 U.S.C. §228	May be charged if arrears have remained unpaid for more than 1 year or are more than \$5,000, and the obligor had the ability to pay support, willfully failed to pay, and the child lives in another state	Criminal complaint by the U.S. Attorney's Office	Federal District Court*
E	<b>Security and Sequestration:</b> 42 U.S.C. §666; M.S. §518A.71	May be applied in all cases when child support payments are ordered	Notice of Motion and Motion (or in pleadings)	Expedited Process*
E	<b>State Prosecution/ Criminal Non-Support:</b> M.S. §609.375	May be charged as a misdemeanor, gross misdemeanor, or felony if the obligor knowingly fails to pay support without lawful excuse, and if there has been an attempt made to get an order for constructive civil contempt	Criminal citation or complaint	District Court

\* Contest in the Expedited Process unless there are prohibited issues included in the motion to contest the enforcement tool. If so, contest in District Court.

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## **“Creative” and “Magical” orders tend to cause enforcement and modification problems:**

- Creativity is great, but creativity also needs to be enforceable. Creative problem solving to resolve a messy case quickly may seem like a good idea at the time, but may end up being an enforcement nightmare. Think about the trouble your client may go through to enforce the order before agreeing to something creative.
- If the creativity is not clear as to its intent, the county may interpret the order in a way not intended, and your client may need to file a motion to clarify. A few examples of creativity that may not be enforceable include:
  - “percentage orders” (pay X% of gross income each month)
  - “extra stuff orders” (orders that divide extracurricular activities or private school tuition “as and for child support”)
  - “automatic step down orders” under the new guidelines (gone are the days of the 16.7% decrease in child support when the older of the two children emancipates as we used in the percentage of obligor’s income guidelines)
- “Magical orders” can be difficult to enforce, but more often they cause problems later when it is time to modify the order. Examples of “magical orders” include:
  - orders that provide for a dollar amount, but contain no income or expense information
  - orders that take special circumstances into consideration, but those special circumstances are not included in the findings or order
    - orders that are a deviation, but don’t say that and don’t spell out the income clearly
- The medical support offset in Minn. Stat. § 518A.41, subd. 16 should not be ordered in the body of the order. The offset is administrative. Ordering the offset will create havoc for future modifications and cost-of-living adjustments (COLAs) as the offset amount ordered will be the basis for future modifications and COLAs. Rather, if you must, mention the offset in the findings, but leave the pure obligations in the order.
- Make sure there is a finding as to the percentage of court ordered parenting time or division of custody for purposes of the parenting expense adjustment. Minn. Stat. § 518A.36 requires that “Every child support order shall specify the percentage of parenting time granted to or presumed for each parent” because of the newly created “Parenting Expense Adjustment.” Remember, in addition to parentage and Minn. Stat. § 256.87 establishment orders, dissolutions, legal separations, domestic abuse orders that grant child support, and third party custody orders that grant child support are all child support orders. “Parenting time as agreed” could cause a disaster in more areas than parenting time disputes – many counties interpret this phrase as a parenting time order between 10 and 45%, and that may not be what the parties intend.

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## How to Refer Child Support to a Magistrate

*Maria K. Pastoor, Child Support Magistrate, First Judicial District*

Many parties settle dissolutions and paternity cases by agreeing to have the child support magistrate decide child support issues. Sometimes custody modifications also fall into place in this manner. Referrals to the Expedited Child Support Process (Ex Pro), also known as “the magistrate” have advantages. Referrals can save attorney fees if clients represent themselves. Often cases will be heard more quickly than in district court. Magistrates usually issue orders more quickly than district court due to the 30-day deadline in Minn. R. Gen. P. 365.02.

This article offers examples of poorly crafted referrals, the resulting problems, how best to refer support to a magistrate, and tips for representing a client in Ex Pro.

This year marks the 10-year anniversary of the Expedited Child Support Process (Ex Pro) and the magistrates appreciate the confidence you show when referring support issues to us. Unfortunately, referrals to Ex Pro do not always proceed quickly or smoothly.

One dissolution judgment and decree states:  
Child support and related issues, including medical support, division of child care costs and past due support, are referred to the Expedited Child Support Process.

In this case, the child went without support from January 9, 2008, when the judgment was entered until I issued my order on October 27, 2009. This delay would have been avoided by simply inserting a date for

the hearing in the Expedited Child Support Process into the judgment and decree.

Another judgment and decree states:

Respondent shall pay to Petitioner the sum to be calculated by the County.

In addition to lacking a hearing date and using a vague phrase (“the sum”), this referral expects the county child support agency to do something it is not authorized or proper to do. Like any other party, the county agency can bring motions, calculate proposed support amounts, and make requests. It is not authorized to exercise judicial powers. In this case the delay was a bit shorter than the prior example. Five months passed between the date the marital termination agreement was signed and issuance of a support order.

The following tips should prevent the referral to the magistrate becoming yet another pesky problem and improve results for your client.

1. Your client must apply for IV-D services with the county child support agency in order for Ex Pro to have subject matter jurisdiction. Minn. R. Gen. P. 352.01(f) and 353.01. This is true even for referrals from district court. Remember that subject matter jurisdiction cannot be waived. Parents not receiving public assistance must pay a one-time \$25 fee with their application. If support is collected through automatic income withholding, one of the parents is already receiving IV-D services.
2. Include an Ex Pro hearing date in your referral. Such hearing dates are obtained

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from district court administration. In some counties you must speak with the clerk dedicated to Ex Pro.

3. Require the parents to bring information to the hearing, such as the financial affidavit described in Minn. Stat. § 518A.28(a), paycheck stubs, verification of child care costs and verification of the cost of health care coverage. Better yet, require the parents to send that information to the other parties two weeks before the hearing and bring it to the hearing.
4. Serve the county agency with the order referring support to Ex Pro, which of course will include the hearing date. Service of the agency is required by Minn. R. Gen. P. 355.01, subd. 1. This results in the agency serving very helpful information, including wage history from the Department of Employment and Economic Development (via the Department of Human Services) under 518A.46, subd. 3(b).
5. Who exactly is served when serving the county agency? The director of the county human services department or the director's designee. Minn. R. Gen. P.355.02, subd. 1(a)(2). Serving the county attorney does not comply with this rule unless the director has designated the county attorney.
6. If you represent your client at the Ex Pro hearing, check to see whether your client receives the wage history and other information from the county agency. Some county agencies frustratingly serve represented parties instead of their attorneys.
7. If you prepare a worksheet don't forget to click on the tab and print out any child care support calculation. The separate worksheet for the parenting expense adjustment need only be printed if presumed equal parenting time applies.
8. Even if the referral order does not require

it, bring to the hearing paycheck stubs, verification of child care costs, and verification of the cost of health care coverage if available for the child. If the record need not be held open to submit necessary information the order will issue more quickly.

9. After you get the magistrate's decision, there is no need to serve your own notice of filing. The one issued by court administration is all that counts for post-decision review and appeal deadlines. Minn. R. Gen. P. 365, 375, 376, 377, and 378.

Follow the above tips and you will avoid delays and have a productive Ex Pro hearing.

*Maria K. Pastoor has practiced family law since 1985. Currently she serves as a child support magistrate for the First Judicial District.*

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## Addendum

### What Is The Uniform Collaborative Law Act?

#### An Interview with ULC Observer Linda K. Wray

*Linda, just a quick review for those of us who have been out of law school for awhile. What is the Uniform Law Commission?*

**LKW:** In 1889 at its 12th annual meeting, the ABA decided to move toward uniformity in the state laws, thereby igniting the uniform law movement. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was then formed in 1892, and by 1912, uniform law commissioners were appointed to each of the existing 44 states.

Today, the NCCUSL, now known as the Uniform Law Commission (ULC), is in its 116th year of providing states with “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” The ULC has produced more than 250 uniform acts, focusing on a variety of areas of law. Some of the most widely adopted and well-known uniform acts are the Uniform Commercial Code, Uniform Probate Act, Uniform Child Custody Jurisdiction Act, Uniform Interstate Family Support Act, Uniform Partnership Act and Uniform Limited Partnership Act.

The ULC is comprised of commissioners from each state, the District of Columbia, Puerto Rico, and the Virgin Islands. Each state or jurisdiction determines its own method of appointment and the number of commissioners that are appointed, most commonly through statute. No commissioner receives a salary or fee for his or her work with the ULC. The one fundamental

requirement is that commissioners be members of the bar. Therefore, a variety of legal backgrounds and areas of concentration exist among the more than 300 uniform law commissioners, consisting of practicing lawyers, judges, legislators and legislative staff and law professors. [The history of the Uniform Law Commission is set out in the Commission’s website: [www.nccusl.org](http://www.nccusl.org).]

*How did the Commissioners decide to take up work on the UCLA?*

**LKW:** Harry Tindall, a Collaborative Law attorney in Texas and ULC Commissioner, recognized several years ago the discrepancies in the growing numbers of laws and rules regarding Collaborative Law across states, and discussed with the Executive Committee of the International Academy of Collaborative Professionals the need for a Uniform Law. The IACP agreed that the time had arrived to address the differences in laws and rules. Harry then presented the idea of a Uniform Collaborative Law to the Committee on Scope and Program of the ULC informing the Committee that there was a need for uniformity between the states, and that that need was increasing as the years went on. In 2006, the ULC agreed and a Committee to draft a Uniform Collaborative Law Act was formed and began meeting in 2007.

*Minnesota is the birthplace of Collaborative Law – were there any Minnesotans who worked on the drafting committee for the Act?*

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**LKW:** We have several voting members of the Commission who have been appointed by our Minnesota Governor, including Jack Davies, former Minnesota Court of Appeals Judge and Minnesota State legislator. Jack was a member of the UCLA Drafting Committee and contributed a great deal to the drafting process. Also, Robert Stein, former Dean of the University of Minnesota Law School, and President Elect of the Commission while we were doing the drafting work, sat in on some of the drafting meetings. And because Minnesota is the birthplace of Collaborative Practice, our Collaborative Law Institute of Minnesota was invited to send an Observer to the drafting committee, which turned out to be me.

***What was your role with the Commission?***

**LKW:** I was one of several Observers appointed to work with the drafting committee. Other Observers included representatives from the International Academy of Collaborative Professionals (IACP), three Observers from the ABA, two Observers from the American Academy of Matrimonial Lawyers, and Rebecca Henry, from the ABA Commission on Domestic Violence. As Observers, we took a very active role in the drafting process and in advocating for core principles of Collaborative Practice.

***What would you say are the primary purposes behind the Act?***

**LKW:** As with all Uniform Acts, a primary purpose for the Act was to bring order and understanding of the subject matter at hand – in this case, the collaborative process - across state lines, and within the state itself. Thus, identification of the essential features of the Collaborative process was paramount, so as to standardize these features for Collaborative practitioners. In wrestling with this issue, an

important guiding principle was to draft an Act that would allow parties to continue to fully contribute to the creative design of the process and yet not violate the core principles of Collaborative Law. The Act achieved this in two ways: First, Section 4 of the Act has only bare bones requirements for Participation Agreements: the Participation Agreement must state an intent to use the Collaborative Law process and fall under the UCLA; must identify the parties, their Collaborative lawyers and the dispute/matter to be addressed in the process; be signed by the parties; and be acknowledged by the Collaborative lawyers (meaning that the lawyers acknowledge they have been retained by the parties as Collaborative attorneys). Collaborative lawyers and their clients may add other provisions so as to create a process best suited to the clients' needs. Second, the essential features of Collaborative Law – the disqualification provision and the requirement for full and voluntary disclosure of relevant information – are addressed in separate provisions of the UCLA (Sections 9 and 12) and are made a part of Participation Agreements as a matter of law.

***Are there other purposes for the Act?***

**LKW:** Yes. The UCLA.

1. Provides a privilege to parties and collaborative professionals (excluding attorneys), which is critical to protecting the integrity of the Collaborative process and ensuring the free and voluntary disclosure of information. Currently such a privilege does not exist in Minnesota;
2. Creates a stay of court proceedings for those cases that become collaborative after filing;
3. Protects consumers by requiring that lawyers take appropriate steps to obtain the informed consent of their clients prior to entering into the collaborative process;
4. Makes collaborative law more assessable

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to low income clients by modifying the disqualification provision to allow attorneys in a firm of the collaborative lawyer to take over a case if it proceeds to litigation, so long as the second lawyer continues the representation on a pro bono basis and procedures are in place to prevent the collaborative attorney and litigating attorney from working together on the case; and

5. Lays out Collaborative lawyers obligations to screen for domestic violence or coercion before and during a Collaborative case.

***What were the major areas of discussion among the Commissioners?***

**LKW:** Two of the greatest areas of discussion centered around the concept of “contract” and what that meant in terms of our Participation Agreement (what some jurisdictions call the “Collaborative Contract”) and the concept of “privilege” and why there was such a great need not only for our clients to have a privilege around confidential communications, but also why a privilege is needed by the Collaborative Team Professionals we work with in the Collaborative Team Practice model. Another big area of discussion was the topic of Domestic Abuse and how that should be dealt with in the Act. I would say that each member of the drafting committee played a unique and significant role in the development of the Act. Most of the observers were Collaborative lawyers. Although Observers could not vote on matters, Observers fully participated in all discussions and our views were considered along with views of the Commissioners and ABA Advisers. Commissioner Byron Sher [former Stanford University contracts law professor and California state legislator] was indispensable to the development of the structure of the Act and its internal consistency. As a contracts law professor he was particularly helpful in drafting the section

on the Participation Agreement, so as to minimize unintended consequences from professionals’ signing of a contract. Commissioner Elizabeth Kent of Hawaii was also an important voice. She and Byron Sher were members of the drafting Committee for the Uniform Mediation Act, and provided many helpful suggestions for the UCLA based on provisions in the UMA. Andy Schepard, the reporter, worked tirelessly to produce many, many drafts of the UCLA, each one improving on the former. With several drafts he sent out memos identifying issues that required analysis and consensus, and had his law students draft memorandums of law on numerous issues which served to inform the committee. The variety of perspectives expressed at meetings and occasionally between meetings in email communications resulted in vigorous discussions and some disagreement. The Committee however, was unified in its desire to draft a solid Act addressing the core concerns of the Collaborative community.

***I understand this Act creates the first duty under any legislation to screen for cases of Domestic Violence – is that right?***

**LKW:** Yes, that’s right – so far as we know this statute when enacted will create the first such duty. There was substantial discussion among the Commissioners over this subject and the drafting committee adopted a strong stand in support of its inclusion in the Uniform Act. In the final reading of the Act at the ULC annual meeting this past July, a motion was made from the floor to eliminate or significantly weaken the provisions in Section 15 of the Act dealing with Coercive and Violent Relationships. The motion was voted on first by voice vote, and then because of the closeness in the vote, by a show of hands. The provision made it through the vote, and after much more discussion and debate, the final version of the UCLA passed unanimously among all the voting

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Commissioners – that is, every state voted to approve the UCLA. That was an extraordinary moment for all of us!

***What does the Act provide regarding cases of Domestic Violence?***

**LKW:** Section 15 of the Act states that prior to signing a Collaborative Participation Agreement Collaborative lawyers are to make a reasonable inquiry into whether a prospective client has a history of a coercive or violent relationship with the other prospective party, and shall continue to assess throughout the process whether a coercive or violent relationship does or has existed with the other party. If the Collaborative lawyer determines that such a relationship does or has existed, then the lawyer cannot proceed to represent the client in the collaborative model unless the client requests to proceed in the model and the lawyer reasonably believes that the safety of the party can be protected adequately during a collaborative process. Rebecca Henry, staff attorney on the ABA Commission on Domestic Violence and Observer at UCLA drafting committee meetings provided wise and reasoned counsel to the drafting committee in its work on this and related sections of the UCLA.

***If a Collaborative Attorney does take a case in which there has been a history of domestic abuse and despite the lawyer's best efforts an exigent circumstance occurs during the Collaborative process, can the Collaborative Attorney take steps to protect his/her client in court?***

**LKW:** Yes. The Act provides in section 9 (c)(2) that a Collaborative lawyer may seek [or defend] an emergency order to protect the health, safety, welfare, or interests of a party if a successor lawyer is not immediately available to represent that person. The Collaborative lawyer's representation comes to an end when the party obtains a successor

lawyer or when reasonable measures have been taken to protect the health, safety, welfare or interest of the client.

***If the UCLA is passed in Minnesota, will it make other changes to the way collaborative law is practiced here?***

**LKW:** We may want to review our standard forms, such as our Collaborative Participation Agreement in light of the new Act. For example, the UCLA does not require Collaborative lawyers to sign the Participation Agreement; rather they must only acknowledge their representation, as Collaborative counsel, of a client who signs the Participation Agreement. Currently our Participation Agreements are structured so that Collaborative attorneys sign them as well as clients.

Also, certainly the privilege permitted to other Team Professionals working with us may encourage other professionals to try this work. And, lawyers may be more confident in using the collaborative model knowing that their clients will be protected by a privilege, which perhaps will mean that greater numbers of attorneys and divorcing clients will want to try this work.

***What is the legislative status of the UCLA in Minnesota?***

**LKW:** The UCLA has been presented to several legislators on the Civil Justice Committee in the House and the Judiciary Committee in the Senate. Many of these legislators have indicated an interest in authoring the Act. We expect to have authors formally identified before the end of December. The authors may choose to introduce the bill in the upcoming 2010 session, although this will be a short session and it's anyone's guess what will happen,

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given all that the legislature will have on its plate.

***What organizations have chosen to support the UCLA?***

**LKW:** The ABA Section on Family Law and the ABA Section on Dispute Resolution have approved the UCLA and agreed to co-sponsor it with the International Academy of Collaborative Professionals. The ABA Section on Individual Rights and Responsibilities has also approved the UCLA. The Act will be up for approval before the ABA House of Delegates at the ABA mid-term meeting in February, 2010. Within the Collaborative community, the Collaborative Law Institute of Minnesota unanimously approved the Act, and the International Academy of Collaborative Professionals strongly supports its enactment in those states interested in promulgating this legislation. Finally, our own MSBA Family Law Section voted to support the Act at its October meeting.

***What did you take away personally from your experience working with the drafting committee and the ULC?***

**LKW:** I came away with a deep sense of gratitude to so many, both within and outside the Collaborative community who devoted extraordinary amounts of time and effort to the drafting of the UCLA. I already mentioned the work of some of the great legal minds on the UCLA drafting committee. Input also comes from outside the committee. For example, one Supreme Court Judge from South Carolina offered significant assistance in a rewrite of Section 18 of the Act dealing with Exceptions to Privilege so as to make it consistent with the laws of evidence. Those of us who use the Collaborative Law model or who may in the future use this model in representing clients, owe much to the work of the Uniform Law Commission. One great way to honor their work is to be the first state in

the nation to pass the UCLA. We are working to make that happen.

*Linda K. Wray was an Observer to the drafting Committee for the Uniform Collaborative Law Act from 2007 - 2009. She currently is leading the effort with other Collaborative professionals to have the UCLA enacted into law by the Minnesota State legislature. In 2006 and 2007, Linda was actively involved in the promulgation of Rule 111.05 of the General Rules of Practice regarding Collaborative Law. She was the 2006 President of the Collaborative Law Institute and served four years on its Board of Directors. Since 2005, she has been co-chairperson of the International Academy of Collaborative Professionals Research Committee which has launched the first large scale research project regarding Collaborative Law. Linda practices family law and has had her own firm since 1995. She encourages the use of Alternative Dispute Resolution where appropriate, and is an experienced collaborative attorney, mediator and litigator.*

*Judith H. Johnson is a partner in the firm of Speeter & Johnson and has had a full time collaborative law practice since 2005. She served as President of the Collaborative Law Institute of Minnesota in 2007, as a member of the Board of Directors for CLI-MN for four years, and is a former member of the Board of Directors for the Minnesota Association of Mediators. She also was actively involved in the promulgation of Rule 111.05 of the General Rules of Practice regarding Collaborative Law. She is one of the original attorney authors of the Minnesota Parenting Plans Legislation, Minn. 518.1705, as well as the Minnesota summons legislation which requires notice of Alternate Dispute Resolution to divorcing parties in Minnesota. She maintains a second office in Edina for her Collaborative Team Divorce practice.*

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# Drinking the Kool-aid<sup>1</sup>

*Nancy Zalusky Berg*

The practice of family law in Minnesota in the 1980's was tough. Fault as an element of proof in divorce proceedings had been removed from the law in the late 1970's. The tender years doctrine<sup>2</sup> used to determine child custody fell to the feminist movement's demands for gender neutrality in all aspects of the law. No longer able to apply fault to the demise of the marital relationship; the emotional fallout of the divorce relationship had to be acted out in other forums. Allegations of sexual abuse of children, following a national trend, became a frequent aspect of the custody trial in any divorce case.<sup>3</sup> Minnesota law was uniquely structured so as to make the disposition of custody a powerful tool in determining both the flow of cash in the form of support between parties and the power to control a custodial parent's ability to relocate.<sup>4</sup>

Throughout the 1980's the role of men and women both in the home and the work place had begun to change significantly, in many ways beyond what could have been predicted in the tumultuous 1970's. The trend toward both parents working outside the home became the norm. The courts struggled to find their footing in determining difficult matters such as child custody. In Minnesota as well as the nation the courts even stooped to such ridiculous analyses as counting who performed household tasks such as the laundry, food preparation and baby bathing to justify the custody award.<sup>5</sup> Laws concerning child custody and spousal support now gender neutral made little sense within the cultural landscape.<sup>6</sup> And while many courts had yet to "go there" the threat was enough to drive issues which had once been easily settled into the courtroom. The "good ol' boy" wink-and-

a-nod practices of the largely male litigation bar were falling to the wayside as the number of women lawyers and judges increased, which also increased the inevitable recognition of the value of "women's work" in the legal arenas. Ironically, it was in the early 1990s that the call for civility in the practice became a much touted theme for every bar organization.

In this context the Collaborative Law movement was born – separate and distinct from the alternative dispute movement which was contemporaneous but unique in its source and foundation. In the 1980's, Minnesota lawyer Stu Webb was preparing to retire from the practice of law after 25 years due to "burnout" when, after completing psychology courses at the local university, he concluded that there existed the possibility of creating a settlement specialty bar consisting of lawyers who would limit their practice to cases in which the parties agreed to work on settlement only.<sup>7</sup> In 1990 Mr. Webb coined the phrase "collaborative law" and sent out letters of invitation to fellow family law attorneys to join him. He formed a core group to develop the concept. Since that time Collaborative Law has become a distinct theory of legal practice. Webb recently estimated there are presently 8,000 to 9,000 collaborative practitioners in at least 40 states of the U.S., all the Canadian provinces, Austria, Australia, Ireland, Northern Ireland, Scotland and Britain.<sup>8</sup>

In approximately 18 years since its development, Collaborative Law has taken the family law bar by storm in the United States, Great Britain and Europe:

"I am shocked at how quickly

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collaborative practice has exploded in the dispute resolution field,” says Christopher Fairman, associate professor of law at Ohio State University, who studies alternative dispute resolution and ethics. “It is clearly the hottest area in dispute resolution.”<sup>9</sup>

As a remedy for the burned-out lawyer and the terrified divorce client the Collaborative Law movement has struck a chord; for many it has become a religion. As we have come to learn in our current economic fallout, when a thing appears too good to be true, that is because it isn't true - for example, the recent news of the Ponzi scheme of Bernard Madoff.<sup>10</sup> It is my position that Collaborative Law is not a panacea for all that ails family law, the unhappy lawyers and bitter angry clients: It is an alternative dispute resolution method that will be appropriate for a discrete and unique set of clients represented by an experienced, highly trained and psychologically minded attorney. Successful Collaborative Law results are and will continue to be rare and individual. There are five areas of specific concern in the Collaborative process:

1. The Disqualification Agreement. The contract between the parties and counsel requires that the attorneys limit their representation to the Collaborative Law process and not be available to represent the parties in any subsequent litigation.
2. An Impure Negotiation Process. The negotiation process is tainted by manipulations the Collaborative Law doctrine encourages the lawyers and other professionals to utilize in order to obtain an agreement. Manipulations which expose the client to risk of a non-confidential attorney-client relationship, a lawyer who owes no duty of loyalty to the client (the duty is to the process) and a lawyer serves no purpose other than a resource of information rather than advocacy.

3. The Compromise of the Role of the Lawyer. What is the lawyer in the Collaborative Law process? Can the Collaborative Law lawyer be an advocate? Is the Collaborative Law lawyer simply a functionary or neutral in the Collaborative Law process?
4. The Evangelical Marketing of Collaborative Law. Collaborative Law is sold by testimonials of the life saving impact it has had on lawyers burned out by the most hideous aspects of the family law practice. Lawyers who experience a conversion to Collaborative Law and become “recovered lawyers” short change their clients’ in the Collaborative Law process and disrespect the entire profession.

#### **IS IT STRAWBERRY OR GRAPE?**

Collaborative Law (CL) is an approach to the practice of law which defines by contract the process and context of negotiation. The Collaborative Law contract between the parties and their counsel known as a *disqualification agreement*,<sup>11</sup> requires all to agree that the lawyers’ role in the case is limited to advice and negotiation. If the negotiations fail and the case must be tried, the lawyers will withdraw, forcing the parties to secure new legal representation.<sup>12</sup> Pauline Tesler, an early and vocal proponent of Collaborative Law, states it is a paradigm shift in dealing with family law cases wherein the lawyers’ consciousness is “retooled” from adversary to collaborator by becoming aware of their adversarial patterns of thoughts and behaviors; the lawyer develops new, collaborative thoughts and behaviors which are then communicated or imposed upon, depending on your perspective, the client.<sup>13</sup> Hence, Collaborative Law is not just another method of alternative dispute resolution; it is a way of life. Which begs the question of the ethical inclinations of the lawyers who practices Collaborative Law as a means to heal themselves in the practice of law rather

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than as a means to advance the interests of their clients; exposing clients to the risk that their lawyers' personal distaste for litigation may cloud their judgment regarding the suitability of Collaborative Law for their clients.<sup>14</sup>

A troubling aspect to the Collaborative Law movement are the lawyer-practitioners who believe in the "spirituality" of the movement; the practice being akin to a religious conversion, with some practitioners referring to it as their "calling" and "ministry", introducing themselves as "true believers".<sup>15</sup> Tesler, the Billy Graham of Collaborative Law, is evangelical in her promotion of Collaborative Law and scathing in her criticism of non-believers - referring to them pejoratively as "gladiators" who promote a "scorched earth" approach to any litigation.<sup>16</sup> Proselytizing Collaborative Law like the Jehovah's Witnesses who appear at your door offering to save you from an eternity of fire and brimstone; the Collaborative Law trainers appear at bar meetings and Continuing Education programs offering not only a better professional lifestyle through Collaborative Law, but improved income through better marketing and networking with all new professional "friends".<sup>17</sup>

The Collaborative Law process is primarily identified by what the practitioners refer to as "four-ways"; meetings in which the attorneys, their clients and often their team of financial and mental health professionals meet to address issues. All are expected to participate actively to assure the parties that the process is transparent.<sup>18</sup> There are some Collaborative Law practitioners who believe all communications with their "client" should occur within the four-way to ensure complete transparency. Collaborative Law practitioners generally use interest-based negotiation techniques according to Professor Julie Macfarlane in her leading study of the Collaborative Law phenomena.<sup>19</sup>

Generally interest-based negotiation is conducted in the following manner:

1. Identify each parties' interests
2. Brainstorm possible solutions with no valuation or ownership
3. Identify solutions which are promising without priority
4. Identify those solutions which satisfy each parties' interests; identify interests as follows:
  - a. What do you want?
  - b. Why do you want that?
  - c. What is most important in this situation?
  - d. How would what you are asking for help you?
  - e. What would you give to get what you want?
  - f. Why doesn't what the other party suggests work for you?
  - g. Can you accept any compromise by yourself – the other side?
  - h. What are the opposing party's interests – are any shared?
5. Identify and accept emotional components of interests; determine if there is an acceptable place for those feelings in the process<sup>20</sup>

Unlike other methods of dispute resolution which avoid the courtroom,<sup>21</sup> Collaborative Law practitioners expect to monitor and control the emotional attitudes and temperaments of the parties. Tesler states that the lawyers in a Collaborative Law process are committed to keeping the process honest, respectful and productive on both sides. The parties are expected to be courteous, provide full disclosure of all relevant information and consider each other's perceived needs in the four-way.<sup>22</sup> Every skilled family law attorney is mindful of the attitude and mood of the parties in the negotiation process. Collaborative Law goes one step beyond acknowledging and dealing with the feelings that arise in the divorce proceedings,

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Collaborative Law practitioners “manage” those shadowy feelings of the client in such a way as to coerce a settlement. As discussed below, the impact on lawyer ethical precepts requiring confidentiality and competent and vigorous advocacy are obvious.

Collaborative Law theory allows that clients will have “shadow feelings”<sup>23</sup> such as anger, fear and grief, and that these feelings, while expected, are not to be permitted to impact the Collaborative Law process and cannot be interpreted to represent the client’s true wishes and direction.<sup>24</sup> These shadow feelings are negative and not conducive toward compromise and settlement. According to Tesler, the Collaborative Law practitioner actually only represents the client who is in his or her highest-functioning state, capable of planning for his or her enlightened long-term self-interest and the interests of the children and other loved-ones; in short the “true client”.<sup>25</sup> Critical to the over-arching concepts of Collaborative Law is the responsibility of the Collaborative Law practitioner to control the entire process to the extent that it is the suggestion by some theorists that the Collaborative Law disqualification agreement effectively amounts to a “durable power of attorney”, directing the Collaborative Law lawyer to take direction only from the client’s higher-functioning self and to politely disregard the client who appears angry, distrustful and willful.<sup>26</sup> To do otherwise requires the Collaborative Law practitioner to withdraw according to Tesler.

Research conducted in the United States suggests that at least 14.8% of the general population meet the diagnostic criteria for personality disorder.<sup>27</sup> On December 1, 2008 a study was released in *Archives of General Psychiatry* which was based on interviews with 5,092 young adults in 2001 and 2002. The study, funded with grants from the National Institutes of Health, the American Foundation for Suicide Prevention and the

New York Psychiatric Institute, revealed that 1 in 5 young adults had a personality disorder and, counting substance abuse, nearly one-half of the young people surveyed had some sort of psychiatric condition.<sup>28</sup> The Collaborative Law practitioner who believes they have the skill set necessary to screen out or manage the “shadow client” (who is more likely than not personality-disordered) is arrogant and not terribly psychologically-minded.<sup>29</sup> Personality disorders are intractable and difficult for trained mental health professionals to spot quickly and flourish within the legal system, whether in the courtroom before a judge or the conference room in negotiations.<sup>30</sup>

#### **BUT IS IT REALLY POISONOUS?**

The hallmark of Collaborative Law is the disqualification agreement clause of the Collaborative Law contract. This clause provides that the Collaborative Law lawyers represent the parties only in negotiation and are disqualified from representing them in any subsequent litigation, providing strong incentives for the parties and lawyers to stay in the negotiation process. The risk of abuse should be obvious to any lawyer trained under a system of laws in which the freedom to disagree is held sacred.<sup>31</sup> Many experts find the disqualification agreement gives the Collaborative Law practitioner incentive to encourage the client to settle inappropriately, leaving the client without an effective advocate to promote their interests and protect them from settlement pressures.<sup>32</sup>

It is this aspect of Collaborative Law which has engendered the most informative and quantifiable debate. Before getting to the obvious and much discussed ethical issues, discussion of the elemental issue of problem-solving and human nature is appropriate. Problem-solving is perhaps the single greatest task of a lawyer; conflict is a trigger to problem-solving. Anger and fear are not emotions to be feared but honest reactions to real situations. Denial, which is a behavior

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Collaborative Law would seem to promote, is dangerous and counterproductive to real emotional growth. An early proponent of interest-based negotiation, Mary Parker Follett, wrote “All polishing is done by friction”.<sup>33</sup> Stop, read that line again and think about the metaphor. Friction is good and leads to connection.

The inherent flaw in Collaborative Law is that it is a problem-solving approach which requires the absolute elimination of one form of dispute resolution, a decision by a judge. Problem-solving should be characterized by creativity, flexibility and openness to all possibilities. Problem-solving is one of our highest intellectual functions, requiring the modulation and control of the more routine and fundamental mental skills.<sup>34</sup> Wikipedia, one of my favorite resources, explains that a *problem* is an obstacle which makes it difficult to achieve a desired goal, objective or purpose. It refers to a situation, condition, or issue that is yet unresolved. In a broad sense, a problem exists when an individual becomes aware of a significant difference between what actually is and what is desired. Every problem requires an answer or solution. The word *problem* derives from Greek *próblema*; something that has been presented [for solving]. The metaphors I conjure up when faced with a problem are two mental images: The first is a Rubik’s Cube slowly turning in my hands until a solution comes to mind. It doesn’t have to be a complete resolution to the problem, but simply a starting place. The second is an iceberg or mountain of stone blocking my path, at which I steadfastly chip away until my goal is achieved. In both of my personal problem solving metaphors all possibilities are considered and no tools are excluded. I will use a jackhammer or claw with my nails to attack that mountain– in other words I will do whatever it takes. That statement thus calls into question that element of human resourcefulness for change that Collaborative Law seeks to control:

Perseverance; “*by any means necessary*” as a problem solving tool.<sup>35</sup>

However, the Collaborative Law disqualification agreement is the proverbial sledge hammer used on a thumb tack. All lawyer jokes and the references to sharks aside, the fact is that most lawyers and particularly family lawyers are committed to being reasonable in negotiations and securing a deal for their clients that is fair and reasonable.<sup>36</sup> The disqualification agreement, absent the enormous social pressure placed on local ethics boards by the proponents of Collaborative Law, would ordinarily be unethical, *per se*. The lawyer’s ability to advocate for the client is rendered impotent by the inherent pressure to avoid risk to the collaborative process. The Collaborative Law process is held superior to the individual rights and interests of the client – a complete anathema to every precept of what it means to be a lawyer. Generally ethics rules, for example ABA Model Rules of Professional Conduct, Rule 1.16 (b) (2002),<sup>37</sup> restrict a lawyer’s authority to withdraw because threats to withdraw can coerce or manipulate clients, especially when the clients are uniquely vulnerable and in a stressful situation, such as divorce.<sup>38</sup> Model Rule 1.2 (a) suggests that the client’s failure to follow the attorney’s advice about settlement is not a basis for the lawyer to terminate the attorney client relationship.<sup>39</sup> Yet it is that same Rule, 1.2, which permits limited representation that is relied upon in support of the disqualification agreement: “(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent”.

Particular attention must be paid to the subtle, but not unanticipated, by-products of the disqualification agreements. It is the moment at which negotiations have failed that the clients are most vulnerable and in need of the professional and emotional counsel of their

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lawyer. It is at that moment when the specter of the disqualification of the trusted “advocate” looms.<sup>40</sup> The question has to be asked. Is the lawyer showing the requisite commitment to the client and the task of obtaining a fair resolution of their matter by entering into a contract that ensures his or her unavailability at the most critical point in the representation of the client?<sup>41</sup> Can a client truly give “informed consent” to the limitation of legal services before the event of failed negotiation? Certainly a primary motivator for the attorney to engage in the Collaborative Law process is the promise of a better, less stressful life for the lawyer. “There is nothing wrong with wanting a satisfying life, but the lawyer must be very sure to not to attain it at the expense of their clients”.<sup>42</sup>

Tesler and her cohorts claim the disqualification agreement creates a metaphorical “container” in which the lawyers and parties are protected from the threat of potential litigation which they believe motivates despicable behavior. Yet the container is created and controlled by the lawyers, whose interests are likely not congruent with the client. It is the lawyers that decide the appropriate matters for negotiation. It is the lawyers that decide “if the client present is the ‘true client’ or the ‘shadow client’”. The disqualification agreement increases the incentive to reach an agreement, any agreement, regardless of the fairness or equity of the agreement. The client feels trapped in the Collaborative Law process because there is so much time and money invested, a dynamic which gives power to the other party who may have chosen to stall or outlast the weaker party.<sup>43</sup> Ultimately the disqualification agreement effectively permits one party to fire the other party’s lawyer.<sup>44</sup> Such a result is reasonably anticipated when the stakes are as high and emotionally-driven as in a marriage dissolution proceeding.

Collaborative Law statistics are impressive, apparently a 90% settlement rate.<sup>45</sup> However, there does not seem to be any research on the quality of the settlement and if post decree litigation ensues to address flawed agreements reached in the Collaborative Law process. Every prominent family law attorney has war stories of “fixing” a Collaborative Law case when the language of the document is not easily interpreted for enforcement, the financial aspects and impact on both parties are not fully vetted and there is a need to address undisclosed issues when the “truth” does not come out in the Collaborative Law process (domestic violence, drug and alcohol abuse or emotional abuse). What is missing in the Collaborative Law process is advocacy; that most basic characteristic of the attorney-client relationship.

Another vital tenet of the attorney-client relationship that disappears in the Collaborative Law process is the confidentiality of communications between the lawyer and client. Just read the blogs of dissatisfied former Collaborative Law clients:

**Collusion and who’s working for who?** The lack of implicit confidentiality between the collaborative lawyers and their client, and the fact that such non-guaranteed confidence even if stated in the Collaborative Law contract deviates so widely from the general notion of lawyer-client relationships, can create an environment where the client feels that their lawyer is betraying their confidence and colluding with the other side. It also adds to the paternalistic feel of Collaborative Law where the attorneys are “mom and dad” discussing the behavior of the kids (spouses). While in a true collaboration, sharing of some information would be harmless and productive, once the case turns south towards a litigious style, the lack

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of confidentiality becomes a nuisance. I suspected my lawyer of revealing things that I wanted to tell the group directly to the other side before I had a chance to express myself, or he kept advising (almost exclusively) compromises on my part that would aid the other side's position. As a result, It felt as though he was on the opposing attorney's payroll and not mine.

See <http://www.mycollaborativelawdivorce.org/pitfalls.htm>. Accessed December, 2008

The ABA Model Rules, Rule 1.6 (a) requires the clients give informed consent before their confidential information is disclosed. That consent, argues the Collaborative Law practitioner, is an essential element of the Collaborative Law agreement. It is well established that the Collaborative Law process requires the participating lawyer to share information which may affect the negotiation process including such "facts" as the client's emotional state and concerns which would never be subject to traditional discovery.<sup>46</sup> It is this infringement upon the most basic aspect of the lawyer-client relationship as understood by laypersons which gives rise to the greatest rage by Collaborative Law clients later.<sup>47</sup> The sense of betrayal felt by a client when *their* lawyer discloses to the other side their privately confessed fears, distrusts and cautions is understandable and predictable.<sup>48</sup> Susan B. Apel in her early critique of Collaborative Law quotes Robert Collins, professor of ADR, describing the role of confusion inherent in the Collaborative Law process, stating Collaborative Law is "NOT creative, fair negotiations between attorneys who have foregone the threat of court, done in the presence of their clients, but really IS co-mediation with two non-neutral mediators".<sup>49</sup> In Collaborative Law, the lawyer has abandoned the honorable and well-defined role of an advocate while pretending to be a

neutral representative of a party in a legal contest.

To the average client the Collaborative Law participation agreement suggests that all communications in the Collaborative Law process will be protected should the matter end up in court. Yet the privilege rule, Unif. R. Evid. R 510(a) and state counterparts, is effectively waived in any Collaborative Law four-way meeting, permitting disclosure of attorney-client discussions in a four-way when the matter is subsequently litigated. One might presume the communications made in the four-way Collaborative Law meeting would be protected by Rule 408 (Compromise and Offers to Compromise) which is much more limiting than the attorney-client privilege and its exceptions permit introduction of evidence to impeach a witness or prove a wrongful act during negotiations. Any experienced family law attorney will tell you that in a court where there is no jury, the discretion of the trial court rules in all evidentiary decisions. When the basis for reversal on appeal is limited to abuse of discretion the barrier to disclosure of evidence developed during any settlement process regardless of the contract will fall until the trial court has heard enough evidence to believe there has been prejudice to the objecting party. By then the proverbial cat is out of the bag!

Collaborative Law practitioners will tell you it is all about picking the right cases for the Collaborative Law process. Yet anyone who has practiced law for any amount of time will tell you that the client who predicts in the first meeting how the other side will respond to and participate in negotiations is deluded and the lawyer who believes them is naïve and unsophisticated. Power imbalances exist in any relationship and group dynamic. The effect of the power imbalance in the Collaborative Law process conjoint with the disqualification clause in the participation agreements begs the question of how abuse

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cannot be an inherent part of the entire process.

### **BUT WILL IT KILL ME?**

No, but it can make you very ill. Ill because when you slough off your responsibility to the client to be an advocate, you are no longer a lawyer but some other functionary. The ethics codes for lawyers represent the rules for fair competition to achieve a fair result between legal combatants. Confidentiality and legal counsel of your choice are basic tenets. These basic tenets are compromised in the Collaborative Law proceeding in a manner which is not fully understood by the client and even most Collaborative Law practitioners.<sup>50</sup> “[Collaborative Law] lawyers manage the day-to-day and meeting-to-meeting dynamics of their cases within a context of almost unconstrained professional discretion.”<sup>51</sup> When the “shadow client” is denied a place at the negotiation table the inevitable result is cognitive dissonance<sup>52</sup> for all involved. If giving the client the opportunity to heal from the trauma of divorce is the Collaborative Law practitioner’s goal, then limiting the client’s access to all the tools available to have a fair and equitable resolution undermines that goal.

The disqualification agreement is arguably far more damaging to the parties when disputes cannot be put on the table and addressed due to the fear that actually exposing the conflict may cause the loss of counsel. The trauma is exacerbated by repressing the legitimate feelings of the clients. The client is forced to adopt a stilted and artificial attitude toward the divorce process which in turn leads to unenforceable and unfair settlements. Unfortunately, other than Colorado, the several states who have issued advisory ethics opinions on the use of Collaborative Law have given the practice a qualified green light.<sup>53</sup>

Colorado Ethics Opinion 115 issued on February 24, 2007 concluded that the

disqualification agreement in Collaborative Law was *per se* unethical:

Collaborative Law, by definition, involves an agreement between the lawyer and a “third person” (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client. In particular, the lawyer agrees to discontinue the representation in the event that the Collaborative Law process is unsuccessful and the client wished to litigate the matter.<sup>54</sup>

Colorado also concluded the conflict could not effectively be waived by the client:

In fact, the conflict materialized whenever the process is unsuccessful because, in that instance, the lawyer’s contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer’s independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that “reasonably should be pursued on behalf of the client,” or at least considered, is foreclosed to the lawyer.<sup>55</sup>

Lawyers by their nature and training look behind the curtain to see who is pulling the levers. The black and white/good and evil approach of the Collaborative Law theorists that it is all good and lawyers who are not practicing it are all bad must by the very nature of the assertion call the theory of Collaborative Law into question.

However, the narcissistic tendencies of the Collaborative Law movement cannot be laid

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at the feet of Stu Webb, who just wanted to create a process for parties and their lawyers to settle their cases. The fault has to be attributed to the evangelical proponents of Collaborative Law who effectively state “it is either my way or the highway”. The sanctimonious assertions that Collaborative Law practitioners are “engaged moral agents” and all others are “disengaged (albeit hungry) barracudas” should not continue to be accepted as gospel.<sup>56</sup> Collaborative Law practitioners embrace the disqualification agreement in a manner similar to parishioners’ acceptance of religious doctrine as an article of faith that is not open to question or doubt.<sup>57</sup> Since few potential clients know of Collaborative Law when they first seek representation in a marriage dissolution, Collaborative Law proponents advocate “selling it to them”. Licensed members of the bar who refer to themselves as “recovered lawyers” must be challenged for their degradation of a profession which holds the ideals of fair and unbiased representation high.<sup>58</sup> The practice of law in most courts is an honor and privilege in the United States and beyond. The opportunity to advocate for those who are not able to do so for themselves should never be denigrated.

This most troubling aspect of Collaborative Law is discussed in detail in the excellent article by David Hoffman in the *Journal of Dispute Resolution*, *Colliding Worlds of Dispute Resolution*, Vol. 2008, page 18:

In her study of the CFL, Professor Macfarlane found that some attorneys experience a “conversion” to Collaborative Practice, and their commitment to that practice has a quasi-religious aspect, in the sense of deep commitment to a particular form of practice. If one’s belief in Collaborative Practice becomes visceral in the way that religious belief often does, it is easy to view people who are suing Cooperative Process Agreements as

heretics, or to consider variations on the Collaborative model as endangering the welfare of clients.

All of which leads one to consider the most troubling aspect of Collaborative Law – that it is merely a marketing tool of the marginally competent lawyer. Integral to the Collaborative Law training is the establishment of a network of lawyers and other divorce related professionals for cross-referral.

The team approach inherent to the Collaborative Law process and the four-way meeting includes neutral mental health, financial and child experts who attend these meetings at their hourly rates and by referral of the Collaborative Law practitioners. The family bar in any community is generally relatively small and well-known to the members, as are the “experts”. The relationships with these experts are uniquely troublesome for the family lawyer because of the limited nature of our relationships with our clients. Unlike those in insurance defense, business litigation and the like, our clients generally retain us for one law suit only, and most often do not have return business. A conflict of interest arguably arises when we run up against an expert with whom we have had past dealings with as a source of referral of business or to whom we have referred business. If we need the good will and cooperation of the expert in connection with our other clients’ pending cases we may hesitate to go after them in the instant case, putting the other cases at risk.<sup>59</sup> The commitment of these experts, like the Collaborative Law practitioners, is to the Collaborative Law process and not the individual clients.<sup>60</sup>

David Hoffman and John Lande have written extensively about the Cooperative Process in contrast to and compared to the Collaborative Law. In contrast to the Collaborative Law

practitioner and movement both men are open to and interested in advancing theories to dispute resolution which advance the resolution of disputes.<sup>61</sup> Cooperative Process is not a homogeneous system of legal practice but rather a defined skill set applied to appropriate legal disputes. Typically the parties and counsel agree to a series of “rules of engagement”:

1. Use of four-way meetings with all lawyers and clients present or available as is appropriate to the situation;
2. Commit to the disclosure of all relevant information and honest negotiation;
3. Use joint neutral experts;
4. Use mediation by a third party when necessary;
5. Do not use formal discovery or court proceedings without prior agreement;
6. Hoffman replaces the Collaborative Law disqualification agreement with an agreement that before any litigation may be commenced (absent exigent circumstances) there has to be a cooling off period (30-60-90 days for example) and mandatory mediation.

The advantages of Cooperative Process inure to both the clients and the professionals involved. Cooperative Process does not require the client agree to a limited scope of representation. There is no implicit or explicit expectation that the basic tenets of the attorney-client relationship for confidentiality and advocacy be compromised.

In summary, the Collaborative Law process has a place – a limited place – in the tool belt of the family lawyer. Cooperative Law, which essentially follows the practice of Collaborative Law without the disqualification agreement problem is a far more realistic, practical method to achieve the same goals without the disturbing risks of ethical and psychic harm present in Collaborative Law.

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#### Notes

<sup>1</sup>The term is derived from the 1978 cult suicide in Jonestown, Guyana. Jim Jones, the leader of the Peoples Temple, persuaded his followers to move to Jonestown. Late in the year he ordered his followers to commit suicide by drinking grape-flavored Flavor Aid laced with potassium cyanide. (Those unable, such as infants, and those unwilling to comply received involuntary injections). A camera from inside the compound shows a large chest being opened, clearly showing boxes of both Flavor Aid and Kool-Aid.<sup>[4]</sup> The saying "Do not drink the Kool-Aid" now commonly refers to the Jonestown tragedy, meaning "Do not trust any group you find to be a little on the kooky side," or "Whatever they tell you, do not believe it too strongly."<sup>[6]</sup> Fox News commentator Bill O'Reilly is known for using the term in this manner.<sup>[7]</sup> Having "drunk the Kool-Aid" also refers to being a strong or fervent believer in a particular philosophy or mission — wholeheartedly or blindly believing in its virtues.<sup>[8]</sup><sup>[9]</sup> During the administration of George W. Bush, military officials further refined this usage, joking that the truest believers drink the Kool-Aid

before a meeting, not after it.[10] Wikipedia.com, Kool-Aid, [http://en.wikipedia.org/wiki/Kool-Aid#cite\\_note-militaryaid-9#cite\\_note-militaryaid-9](http://en.wikipedia.org/wiki/Kool-Aid#cite_note-militaryaid-9#cite_note-militaryaid-9) (last visited Dec. 19, 2008).

<sup>2</sup> The “tender years” doctrine, the legal rule that when a child is of a young age, custody should ordinarily be awarded to the mother. That doctrine, unlike the rule we announce today, was premised on a presumed natural capacity of women to selflessly and instinctively raise children, often articulated in terms such as: “[N]othing can be an adequate substitute for mother love—for that constant ministrations required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love”. *Jenkins v. Jenkins*, 181 N.W. 826, 827 (1921)

<sup>3</sup> The Jordan Case in Minnesota in 1983 in which 24 adults were charged with molesting children in a neighborhood sex ring; only three went to trial with one conviction, the case later became notorious for the leading questioning of the children by the “experts”: The McMartin Day Care case also in 1983 in which the satanic ritual abuse of 360 children was alleged, all of which gave rise to a national state of panic over child sexual abuse. (The principle accuser, a mother of one of the children, was subsequently hospitalized with paranoid schizophrenia and later died of chronic alcoholism). JOHN CREWDSON, SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA (Little, Brown & Company 1988).

<sup>4</sup> Until the transformation of the child support formula and the law of child relocation in 2007, the custodial parent’s income and financial means was not taken into consideration in determining child support – only the income and means of the non-custodial parent. Thus many child custody trials had more to do with the finances between the parties than the actual best interests of the child. Until 2007 the *Auge* case controlled the issues of a custodial parent taking the children and moving out of state. In other words, despite a statute which prohibited removal of a child from the jurisdiction of the court without a court order, *Auge* dictated that the trial court must permit the removal by a custodial parent unless there was a separate basis for a change of custody. *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983).

<sup>5</sup> See *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985).

<sup>6</sup> If a wife and mother is fully capable of self-support then what is the purpose of spousal support? Is spousal maintenance compensation for the personal and economic costs of childbirth and child rearing?

<sup>7</sup> Stu Webb, *Collaborative Law: A Practitioner’s Perspective on its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155-157, 156 (2008).

<sup>8</sup> *Id.*

<sup>9</sup> Though the collaborative law movement is just slightly more than 15 years old, it already has a strong foothold in family law. Virtually all of the settlements obtained using collaborative techniques have been in the domestic relations arena, and family lawyers claim that more and more clients are inquiring about it. Jill Schachner Chanen, *Collaborative Counselors: Newest ADR Options Wins Converts, While Suffering Some Growing Pains*, A.B.A. Journal (June, 2006), available at [http://www.abajournal.com/magazine/collaborative\\_counselors/](http://www.abajournal.com/magazine/collaborative_counselors/)

<sup>10</sup> Thomas Zambito & Greg B. Smith, *Feds Say Bernard Madoff’s \$50 Billion Ponzi Scheme was Worst Ever*, N.Y. DAILY NEWS, Dec. 13, 2008, available at [http://www.nydailynews.com/news/n\\_y\\_c\\_r\\_i\\_m\\_e/2008/12/13/2008-12-13\\_feds\\_say\\_bernard\\_madoffs\\_50\\_billion\\_ponzi.html](http://www.nydailynews.com/news/n_y_c_r_i_m_e/2008/12/13/2008-12-13_feds_say_bernard_madoffs_50_billion_ponzi.html).

<sup>11</sup> John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003).

<sup>12</sup> David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field of Theory of ADR*, 2008 J. DISP. 11,14 (2008).

<sup>13</sup> PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (Am. Bar Ass’n 2001). Also known as the ABA CL Manual (2001).

<sup>14</sup> Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIM. LAW 141 (2008).

<sup>15</sup> Lande, *supra* note 11, at 1317, n.3.

<sup>16</sup> Tesler, *supra* note 13.

<sup>17</sup> Webb, *supra* note 7, at 165.

<sup>18</sup> Lande, *supra* note 9 at 1320, n.11.

<sup>19</sup> Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (2005), available at [http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005\\_1/2005\\_1.pdf](http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf).

<sup>20</sup> See generally ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (Harvard University Press 2000).

<sup>21</sup> There remains some controversy if CL is properly called an alternative dispute resolution (ADR) method.

<sup>22</sup> Tesler, *supra* note 13, at 7.

<sup>23</sup> Tesler attributes to psychologist Carl Jung the concept of shadow states, *supra*, note 1 at 81, though she claims the CL practitioner is not required to understand psychology nor are they practicing therapy.

<sup>24</sup> Lande, *supra* note 11, at 1322.

<sup>25</sup> Tesler, *supra* note 13, at 80.

<sup>26</sup> Lande, *supra* note 11, at 1322.

<sup>27</sup> WILLIAM A. EDDY, MANAGING HIGH

CONFLICT PEOPLE IN COURT (Janis Publications USA Inc. 2007).

<sup>28</sup> Carlos Blanco et al., *Mental Health of College Students and their Non-College Attending Peers: Results from the National Epidemiologic Study on Alcohol and Related Conditions*, 65(12) ARCHIVES OF GEN. PSYCHIATRY, 1429 (2008).

<sup>29</sup> “psychological mindedness”, a term of art, best described as a person who is able to access feelings, is open to new ideas, is willing to try and understand oneself and others, and had an interest in the meaning and motivation of his or her own and other’s behavior. See J. Hall, *Psychological-Mindedness: A Conceptual Model*, 66(1) AM. JOURNAL OF PSYCHOTHERAPY 131 (1992).

<sup>30</sup> WILLIAM A. EDDY, HIGH CONFLICT PEOPLE IN LEGAL DISPUTES (Janis Publications 2006).

<sup>31</sup> Hoffman, *supra* note 12, at 19 (“[C]onflict creates opportunities to identify weaknesses and problems in the processes that we use.”).

<sup>32</sup> Lande, *supra* note 11, at 1329.

<sup>33</sup> MARY PARKER FOLLETT, DYNAMIC ADMINISTRATION: THE COLLECTED PAPER OF MARY PARKER FOLLETT (E.M. Fox & L. Urwick, eds., Hippocrene Books 1973) (1940).

<sup>34</sup> F.C. Goldstein & H. S. Levin, *Disorders of Reasoning and Problem-Solving Ability, in NEUROPSYCHOLOGICAL REHABILITATION* (M. Meier, et al, eds., Taylor & Francis Group, 1987).

<sup>35</sup> BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS, AND A LETTER BY MALCOLM X (George Breitman ed., Pathfinder Press 1970).

<sup>36</sup> Lande, *supra* note 11, at 1334 (“[E]mpirical observation of traditional lawyering practice reveals that most lawyers do not believe they must press for every possible advantage and most lawyers do not usually behave that way.”).

<sup>37</sup> ***Client-Lawyer Relationship, Rule 1.16 Declining Or Terminating Representation:***

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

<sup>38</sup> Lande, *supra* note 9, at 1345.

<sup>39</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2004). a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

<sup>40</sup> Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30(1) VT. B.J. 41 (Spring 2004), available at <http://www.vtbar.org/Images/Journal/journalarticles/Spring%202004/Collaborative%20Law%20A%20Skeptics%20View.pdf>.

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.* (quoting M. E. O'Connell, *Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, 40 FAM. CT. REV. 403, 404 (2002)).

<sup>43</sup> John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29, 30.

<sup>44</sup> *Id.*

<sup>45</sup> Lande, *supra* note 11, at 1364, n.184.

<sup>46</sup> See Tesler, *supra* note 13, at 167.

<sup>47</sup> See [mycollaborativelawdivorce.org](http://mycollaborativelawdivorce.org), [mycollaborativelawdivorce.org](http://mycollaborativelawdivorce.org) (last visited Dec. 18, 2008); see also [www.narcissisticabuse.com](http://www.narcissisticabuse.com), Collaborative Law, <http://www.narcissisticabuse.com/collaborativelaw.html> (last visited Dec. 18, 2008).

<sup>48</sup> Lande, *supra* note 43, at 30.

<sup>49</sup> Apel, *supra* note 40, at 5.

<sup>50</sup> Christopher M. Fairman, *Growing Pains: Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L.R. (forthcoming 2008) (manuscript at 14, on file with authors). The Macfarlane study is cited for the conclusion that "[o]utside a small group of experienced practitioners, the study has found little explicit acknowledgment and recognition of ethical issues among CFL lawyers".

<sup>51</sup> Macfarlane, *supra* note 19, at 64.

<sup>52</sup> Cognitive dissonance is an uncomfortable feeling caused by holding two contradictory ideas simultaneously. The "ideas" or "cognitions" in question may include attitudes and beliefs, and also the awareness of one's behavior. The theory of cognitive dissonance proposes that people have a motivational drive to reduce dissonance by changing their attitudes, beliefs, and behaviors, or by justifying or rationalizing their attitudes, beliefs, and behaviors.[1] Cognitive dissonance theory is one of the most influential and extensively studied theories in social psychology. *Dissonance* normally occurs when a person perceives a logical inconsistency among his or her cognitions. This happens when one idea implies the opposite of another. For example, a belief in animal rights could be interpreted as inconsistent with eating meat or wearing fur. Noticing the contradiction would lead to dissonance, which could be experienced as anxiety, guilt, shame, anger, embarrassment, stress, and other negative emotional states. When people's ideas are consistent with each other, they are in a state of harmony or *consonance*. If cognitions are unrelated, they are categorized as *irrelevant* to each other and do not lead to dissonance. A powerful cause of dissonance is when an idea conflicts with a fundamental element of the self-

concept, such as "I am a good person" or "I made the right decision." This can lead to rationalization when a person is presented with evidence of a bad choice. It can also lead to confirmation bias, the denial of disconfirming evidence, and other ego defense mechanisms. Wikipedia.com, Cognitive Dissonance, [http://en.wikipedia.org/wiki/Cognitive\\_dissonance](http://en.wikipedia.org/wiki/Cognitive_dissonance) (last visited Jan. 8, 2009).

<sup>53</sup> Kentucky, Minnesota, New Jersey, North Carolina and Pennsylvania; generally relying on the right of the lawyer and client to limit the scope of representation.

<sup>54</sup> Colo. Bar Ass'n Comm. on Prof'l Ethics, Formal Op.115 (2007).

<sup>55</sup> *Id.*

<sup>56</sup> Apel, *supra* note 40, at 8 (citing Tesler, *supra* note 13, at 169).

<sup>57</sup> Howard I. Goldstein, *Ten "Guaranteed" Practice Building Ideas*, 3 COLLABORATIVE L.J. 15, 15 (2005).

<sup>58</sup> I note when I Google "recovered lawyer" I pick up web sites of comedians, strippers and college recruiters. Particularly interesting was Opium Magazine in which a "recovered lawyer" had published an article.

<sup>59</sup> Elizabeth J. Kates, *Ethical Problems with Therapeutic Jurisprudence*, 13 DOMESTIC VIOLENCE REP. 65 (2008), available at <http://www.thelizlibrary.org/therapeutic-jurisprudence/time-to-end-it.html>.

<sup>60</sup> Outside the scope of this article but a timely and somewhat troubling topic rarely discussed in the incestuous community of family lawyers and experts is the question bias, denial of due process and loss of independence in expert testimony given the ordinarily close relationships between the professionals – social, sitting on committees together, referrals back and forth. The issue of referral sources being a legitimate business interest entitled to the protection of non-compete covenants is a topic of considerable interest in several jurisdictions. See Charles A. Carlson & Amy E. Stoll, *Business is Business: Recognizing Referral Relationships as Legitimate Business Interests Protectable by Restrictive Covenants in Florida*, 82 FLA. B. J. 49 (Mar. 2008).

<sup>61</sup> John Lande can be reached at [lande@missouri.edu](mailto:lande@missouri.edu); his articles and forms for CP can be obtained from [www.law.missouri.edu/lande/publications.htm#ccl](http://www.law.missouri.edu/lande/publications.htm#ccl) David Hoffman can be contacted through his firm web site; [www.BostonLawCollaborative.com](http://www.BostonLawCollaborative.com)

# UNIFORM COLLABORATIVE LAW ACT

## NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

AS APPROVED BY THE UNIFORM LAW COMMISSION  
WITH CHANGES IN STYLE  
APPROVED BY THE DRAFTING COMMITTEE  
AUGUST 21, 2009

### UNIFORM COLLABORATIVE LAW ACT

#### SECTION 1. SHORT TITLE.

This [act] may be cited as the Uniform Collaborative Law Act.

#### SECTION 2. DEFINITIONS.

In this [act]:

- (1) “Collaborative law communication” means a statement, whether oral or in a record, verbal or nonverbal, that:
  - (A) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded; and
  - (B) is made for the purpose of conducting, participating in, continuing, or reconvening a collaborative law process.
- (2) “Collaborative law participation agreement” means an agreement by persons to participate in a collaborative law process.
- (3) “Collaborative law process” means a procedure intended to resolve a matter without intervention by a tribunal in which parties:
  - (A) sign a collaborative law participation agreement; and
  - (B) are represented by collaborative lawyers.
- (4) “Collaborative lawyer” means a lawyer

who represents a party in a collaborative law process.

- (5) “Collaborative matter” or “matter” means a dispute, transaction, claim, problem, or issue for resolution described in a collaborative law participation agreement. The term includes a dispute, claim, or issue in a proceeding.
- (6) “Law firm” means lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or other association, or lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.
- (7) “Nonparty participant” means a person, other than a party and the party’s collaborative lawyer, that participates in a collaborative law process.
- (8) “Party” means a person that signs a collaborative law participation agreement and whose consent is necessary to resolve a matter.
- (9) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
- (10) “Proceeding” means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related pre-hearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(11) “Prospective party” means a person that discusses the possibility with a prospective collaborative lawyer of signing a collaborative law participation agreement

(12) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) “Related to a collaborative matter” or “related to a matter” means involving the same parties, transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a matter.

(14) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) “Tribunal” means

(A) a court, arbitrator, administrative agency or other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter; or

(B) a legislative body conducting a hearing or similar process.

### **SECTION 3. APPLICABILITY; SCOPE.**

(a) This [act] applies to a collaborative law participation agreement that meets the requirements of section 4 signed [on or] after [the effective date of this [act]].

(b) A tribunal may not order a party to

participate in a collaborative law process over that party’s objection.

### **SECTION 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.**

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties’ intention to resolve a matter through a collaborative law process under this [act];

(4) describe the nature and scope of the matter;

(5) identify the collaborative lawyer who represents each party in the collaborative law process; and

(6) contain a statement by each collaborative lawyer confirming the lawyer’s representation of a party in the collaborative law process.

(b) Parties to a collaborative law participation agreement may agree to include additional provisions not inconsistent with this [act].

### **SECTION 5. BEGINNING AND CONCLUDING A COLLABORATIVE LAW PROCESS.**

(a) A collaborative law process begins when the parties sign a collaborative law participation agreement.

(b) A collaborative law process is concluded by a:

(1) negotiated resolution of the matter as evidenced by a signed record;

(2) negotiated resolution of a portion of the matter as evidenced by a signed record where the parties agree that the remaining portions of the matter will not be resolved in the collaborative law process; or

(3) termination of the process.

- 
- (c) A collaborative law process terminates:
    - (1) when a party gives notice to other parties in a record that the collaborative law process is ended; or
    - (2) when a party:
      - (A) begins a proceeding related to the collaborative matter without the agreement of all parties; or
      - (B) in a pending proceeding related to the collaborative matter:
        - (i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;
        - (ii) requests that the proceeding be put on the [tribunal's active calendar]; or
        - (iii) takes similar action requiring notice to be sent to the parties; or
    - (3) except as otherwise provided by subsection (e), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party. The party's collaborative lawyer shall give prompt notice in a record of such discharge or withdrawal to all other parties.
  - (d) A party may terminate a collaborative law process with or without cause. A notice of termination need not specify a reason for terminating the process.
  - (e) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (c)(3) is sent to the parties:
    - (1) the unrepresented party engages a successor collaborative lawyer; and
    - (2) in a signed record:
      - (A) all parties consent to continue the process by reaffirming the collaborative law participation agreement;
      - (B) the collaborative law participation agreement is amended to identify the successor collaborative lawyer; and
      - (C) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.
  - (f) A collaborative law process does not terminate if, with the consent of all parties, a party requests a tribunal to approve a negotiated resolution of the matter or any portion thereof as evidenced by a signed record.
  - (g) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.
- SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.**
- (a) Parties to a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a matter related to the proceeding. Parties shall file promptly a notice of the agreement with the tribunal after the collaborative law participation agreement is signed. Subject to subsection (c) and Section 7 and 8, the filing operates as a stay of the proceeding.
  - (b) Parties shall file promptly a notice of in a record with the tribunal when a collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice is filed with the tribunal. The notice may not specify any reason for termination of the collaborative law process.
  - (c) A tribunal may require parties and collaborative lawyers to provide status reports on the proceeding.
    - (1) A status report may not include a report, assessment, evaluation, recommendation, finding, or other
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communication regarding a collaborative law process.

- (2) A tribunal may require parties and lawyers to disclose in a status report whether the process is ongoing or concluded.
- (3) A communication made in violation of subsection (1) may not be considered by a tribunal.
- (d) A tribunal shall provide parties and their collaborative lawyers appropriate notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

## **SECTION 7. EMERGENCY ORDER.**

During the collaborative law process a tribunal may issue emergency orders to protect the health, safety, welfare, or interests of a party or [insert term for family or household member as defined in [state civil protection order statute]]. The collaborative lawyer is authorized to seek or defend an emergency order under section 9(c)(2).

## **SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL.**

A tribunal may approve an agreement resulting from a collaborative law process.

*Legislative Note: In states where judicial procedures for management of proceedings may be prescribed only by court rule or administrative guideline and not by legislative act, the duties of courts and other tribunals listed in Sections 6 through 8 should be adopted by the appropriate measure.*

## **SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.**

- (a) Except as otherwise provided in subsection (c), a collaborative lawyer may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter.
- (b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).
- (c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:
  - (1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or
  - (2) to seek or defend an emergency order to protect the health, safety, welfare, or interests of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person. In that event, subsections (a) and (b) apply when the party, or [insert term for family or household member] is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interests of that person.

## **SECTION 10. LOW INCOME PARTIES.**

- (a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party without fee.
- (b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent the party without fee in the collaborative matter or

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a matter related to the collaborative matter if:

- (1) the party has an annual income which qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;
- (2) the collaborative law participation agreement so provides; and
- (3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

#### **SECTION 11. GOVERNMENTAL ENTITIES AS PARTIES.**

- (a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.
- (b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent the government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:
  - (1) the collaborative law participation agreement so provides; and
  - (2) the collaborative lawyer is isolated from any participation in the collaborative matter or matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

#### **SECTION 12. DISCLOSURE OF INFORMATION.**

During the collaborative law process on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party shall also update promptly previously disclosed information that has materially changed. Parties may define the scope of disclosure during the collaborative law process, except as provided by law other than this [act].

#### **SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING.**

This [act] does not affect:

- (a) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or
- (b) the obligation of a person to report abuse or neglect of a child or adult as provided by law other than this [act].

#### **SECTION 14. APPROPRIATENESS OF THE COLLABORATIVE LAW PROCESS.**

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

- (a) assess with the prospective party factors the prospective collaborative lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;
- (b) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably

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available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(c) advise the prospective party that:

(1) after signing an agreement:

(A) if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates; and

(B) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not thereafter represent a party before a tribunal in such a proceeding except as authorized by Section 9(c), 10(b), or 11(b);

(2) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(3) when the process concludes, the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Section 9(c), 10(b), or 11(b).

#### **SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.**

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(b) A collaborative lawyer shall throughout the collaborative law process continue to reasonably assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(c) If the collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a collaborative law process; and

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a collaborative law process.

#### **SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION.**

A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law other than this [act].

#### **SECTION 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.**

(a) Subject to Section 18 and 19, a collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from

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disclosing, a collaborative law communication; or

- (2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.
- (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a collaborative law process.

### **SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.**

- (a) A privilege under Section 17 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.
- (b) A person that discloses or makes a representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Section 17, but only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

### **SECTION 19. LIMITS OF PRIVILEGE.**

- (a) There is no privilege under Section 17 for a collaborative law communication that is:
  - (1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;
  - (2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
  - (3) intentionally used to plan a crime, commit or attempt to commit a crime,

or conceal an ongoing crime or ongoing criminal activity; or

- (4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.
- (b) The privileges under Section 17 for a collaborative law communication do not apply to the extent that a communication is:
  - (1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or
  - (2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the collaborative law process.
- (c) There is no privilege under Section 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:
  - (1) a court proceeding involving a felony [or misdemeanor]; or
  - (2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or on which a defense to avoid liability on the contract is asserted.
- (d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the portion of the communication necessary for the application of the exception may be disclosed or admitted.
- (e) Disclosure or admission of evidence excepted from the privilege under

subsection (b) or (c) does not render the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

- (f) The privileges under Section 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

#### **SECTION 20. COLLABORATIVE LAW PARTICIPATION AGREEMENT NOT MEETING REQUIREMENTS.**

- (a) Although a collaborative law participation agreement fails to meet the requirements of Section 4, or a lawyer fails to comply with the requirements of Section 14 or 15, a tribunal may find that the parties intended to enter into a collaborative law participation agreement if they:
  - (1) signed a record indicating an intention to enter into a collaborative law participation agreement; and
  - (2) reasonably believed they were participating in a collaborative law process.
- (b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:
  - (1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;
  - (2) apply the disqualification provisions of Section 6, 9, 10, and 11; or
  - (3) apply the evidentiary privilege of Section 17.

#### **SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

#### **SECTION 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.**

This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

#### **SECTION 23. SEVERABILITY CLAUSE.**

If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

*Legislative Note: Include this section only if the state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

#### **SECTION 24. EFFECTIVE DATE.**

This [act] takes effect.....

*Legislative Note: States should choose an effective date for the act that allows substantial time for notice to the bar and the public of its provisions and for the training of collaborative lawyers.*