NFLR
NEVADA FAMILY LAW REPORT

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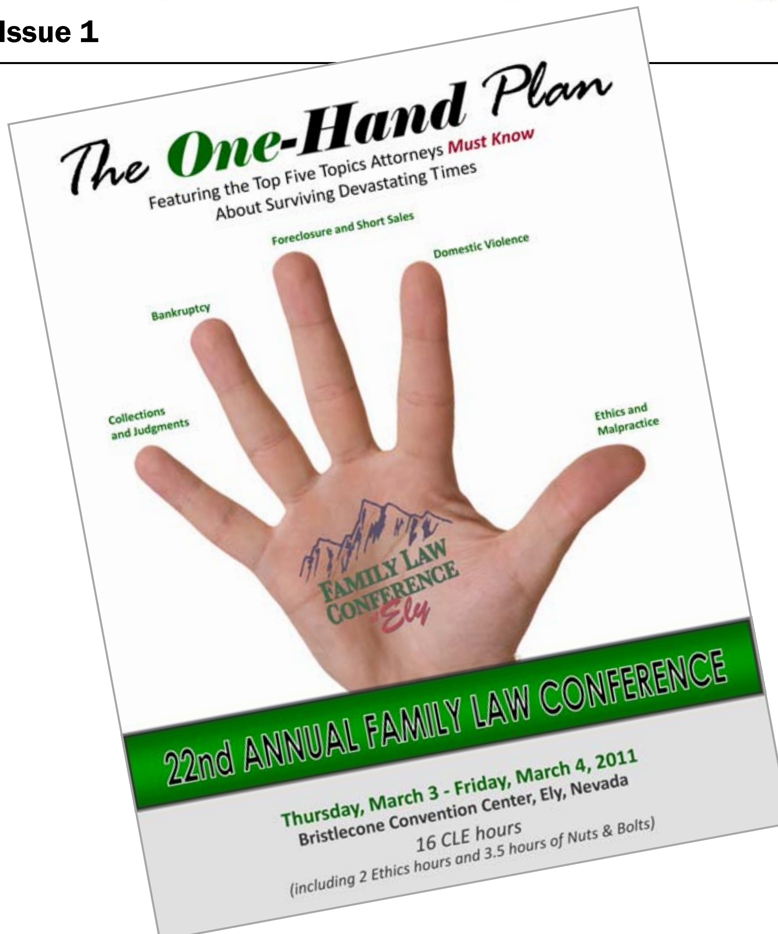

EDITOR'S NOTES

by Shelly Booth Cooley, Esq.

FAMILY LAW CONFERENCE: 2011 EDITION

The 22nd Annual Family Law Conference is scheduled to take place in Ely from March 3 to March 4, 2011. The theme of the Conference this year is "The One-Hand Plan: Featuring the Top Five Topics Attorneys Must Know About Five Subjects to Survive Devastating Times."

This issue of the NFLR is a compilation of all cite-able NFLR articles regarding the topics covered at the conference (collections and judgments, bankruptcy, foreclosure and short sales, domestic violence, and ethics and malpractice) from

(cont'd. inside on page 2)

IN THIS ISSUE:

EDITOR'S NOTES
Page 1

A MESSAGE FROM THE FAMILY LAW SECTION CHAIR: ARE YOU HAPPY BEING A FAMILY LAW ATTORNEY?
Page 3

BENCH/BAR MEETING REPORT: SOUTH
Page 5

COMMENTARY: MEDIATION IN ABUSIVE RELATIONSHIPS
Page 7

CHILD SUPPORT OBLIGATIONS UNDER A CHAPTER 13 BANKRUPTCY PLAN
Page 8

THE FAMILY LAW AMENDMENTS TO THE BANKRUPTCY CODE
Page 11

DISPELLING MYTHS SURROUNDING DOMESTIC VIOLENCE
Page 13

BANKRUPTCY AND FAMILY LAW AFTER ENACTMENT OF BAPCPA
Page 19

CONTEXT IS EVERYTHING: DOMESTIC VIOLENCE IN THE REAL WORLD
Page 22

PARENTING COORDINATION IN DOMESTIC VIOLENCE CASES
Page 26

PRINCIPAL RESIDENCE PRINCIPLES
Page 30

UNDERSTANDING CUSTODY EVALUATION
Page 33

GETTING PAID THROUGH AN ATTORNEY'S LIEN AFTER *ARGENTINA*
Page 38

Nevada Family Law Report

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The *NEVADA FAMILY LAW REPORT* is intended to provide family law-related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.

This publication may be cited as Nev. Fam. L. Rep., Vol. 24, No. 1, 2011 at ____.

The Nevada Family Law Report is supported by the State Bar of Nevada and its Family Law Section.

EDITOR'S NOTES

cont'd. from page 1

the inception of this publication in 1986. Caution: all internal case cites and author bios are original to the date of the article. The formal NFLR citation for each article is stated above its title. I hope you enjoy this issue as much as I enjoyed compiling it.

Specialization Exam:

The Family Law Section is offering a testing date on March 3, 2011, in Ely during the hours of the Nuts and Bolts class (8 a.m. to 12 p.m.). The next test is scheduled for Nevada Day 2011. Those people interested in sitting for the October exam should apply no later than August 1, 2011.

Applications are available at:
http://www.nvbar.org/sections/FamilyLaw/specialization_app.pdf.

Standards are available at:
http://www.nvbar.org/sections/FamilyLaw/Specialization_Standards.pdf.

State Bar of Nevada Annual Meeting:

The State Bar of Nevada Annual Meeting is scheduled to take place at the Grand Hyatt Kauai Resort and Spa, in Koloa Kauai, Hawaii from Thursday, June 23 through Saturday, June 25, 2011. The first 25 Family Law Section Members who register for and attend the meeting will receive a $250 credit to be applied at the hotel (which can be used for rooms, food or any other service charged by the hotel), courtesy of the Family Law Section. Register now to take advantage of this opportunity.

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Message from the Family Law Section Chair:

As I am waiving goodbye, I ask: "Are you happy being a family law attorney?"

By Raymond E. Oster, Esq.

When I was asked to write an article about being chair of the Family Law Section at the end of my term, I thought about all the changes that have occurred in the past two years. Besides all the issues resulting from the recession, I considered writing about the changing landscape of family law caused by *Rivero*, *Landreth* or NRCP 16.2.While considering these topics, my mind kept reverting back to an experience from my personal life that made all these issues insignificant. My father-in-law, Mujahid Rasul, M.D., recently lost his battle with cancer. At various family and public gatherings celebrating Dr. Rasul's life, it was an undeniable truth that he had a passion and love for the practice of psychiatry. When facing such a life altering event, it is impossible not to become introspective and question whether my career was as rewarding. More importantly, I had to ask, "Was I happy being a family law attorney?"

It was not an answer that came quickly. I thought of the clients that refuse to pay their bill even after a favorable outcome. I painfully face the daily avalanche of telephone messages and e-mails from clients that need daily assurances or updates (well, until they receive their first bill). I have experienced the agony of calling a client after receiving an order that results in them playing a significantly reduced role in their child's life. I have felt the perplexity when a judge maintained the same custody arrangement after a two-day trial when both parties presented evidence why the status quo was not working. Unbelievably, I have even lost an unopposed motion. I often sarcastically respond to the question "How are things?" with the phrases: "Living the dream" or "Saving lives." Despite these frustrations and challenges, there are two reasons why I am happy being a family law attorney.

First, I know our work matters. I have witnessed the joy of a parent being reunited with a child that was wrongly removed from a foreign jurisdiction. I have felt the gratuity after receiving an award of support that will result in a parent being able to provide for their child's basic needs. I have experienced the pride of standing up and fighting for someone that did not believe they could stand up for themselves against their abuser. Even when we simply provide words of encouragement or common sense, we aid individuals to bridge the most difficult times of their lives. At the end of our careers, family law attor-

(cont'd. on page 4)

Are You Happy?

cont'd. from page 3

neys have an economic and personal impact on families for generations.

Second, if you become involved, family law provides a supportive community. It is more than having a great time at the annual family law conference, which I probably enjoy too much. When I first started, many veteran attorneys graciously provided mentoring and answered questions. As my career progresses, there is always an avenue to provide my opinion about the relevant issue of the day. Even when my position is in the minority, the debate allows me to escape from my daily tasks and pending deadlines; it forces me to think beyond my own practice and how the system as a whole could be improved. As I became involved in various committees, I was exposed to individuals with different opinions and life experiences than myself that allowed me to more completely understand and appreciate the complexity of family law. I have also developed friendships throughout the state and country that I greatly treasure. These interactions have expanded my enjoyment of the practice of family law and made me feel part of something bigger than myself.

For whatever reason, I hope you were also able to affirmatively answer the question posed. If you were, remember those reasons the next time someone questions why you practice family law and walk proudly. If not, life is too short, so find something that makes you happy. Regardless, it is important to periodically step back from the daily grind and remember that we are all on borrowed time, and I am optimistic when looking at the rewards, we can all find joy and passion in our careers as family attorneys as Dr. Rasul experienced in his profession.

Raymond E. Oster, Esq. is a partner with the firm of Fahrendorf, Viloria, Oliphant and Oster L.L.P. He is a State Bar of Nevada Certified Family Law Specialist and served as chair from March 2009 through March 2011.

Nevada FAMILY LAW PRACTICE Manual

2008 Update

Includes new sections on:

Interstate Child Support
Juvenile Law
Custody Appeals
Forms for New NRCP 16.2

Plus updates to these chapters:

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Bench/Bar Meeting Report: "The South"

by Andrew L. Kynaston, Esq.

With the commencement of a new year, the judiciary of the Clark County Family Court, the clerk's office, court administration, and family law practitioners throughout Southern Nevada have demonstrated an ongoing commitment to improve the level of cooperation and open discourse between the judiciary and family law bar with the common goal of improving the practice of family law for all involved. In this spirit of mutual improvement, Clark County Family Court Bench/Bar meetings were held December 2, 2010 and January 13, 2011, at the Family Courts and Services Center, in Las Vegas. Both meetings were well attended by family law practitioners, members of the judiciary and representatives from the clerk's office along with other court administrators and personnel.

At the meeting held December 2, 2010, Presiding Family Court Judge Gloria Sanchez reported the results of the recently completed marathon mediation event with the assistance of our senior judges. Judge Sanchez reported that the event was a great success with 104 cases referred to the program, 87 cases heard and 63 cases settled. The court hopes to be able to continue sponsoring this highly successful program in the future.

Judge Cynthia Giuliani reported on her committee's efforts in revising EDCR Rules 8.07 and 8.08, regarding the duty to retain original e-filed documents. The proposed revised language can be found for review on the bench/bar page of Marshal Willick's website www.willicklawgroup.com/clark_county_bench_bar. The committee welcomes any comments and suggestions regarding the proposed rule revisions.

It was also announced that a new Financial Disclosure Form has been completed. The form is presently waiting approval from the Nevada Supreme Court and can also be viewed on the bench/bar page of Marshal Willick's website. Any questions or comments should be directed to Willick.

Judge Sandra Pomrenze led a discussion regarding EDCR 5.11 and whether this local rule should be revised to require that counsel contact and communicate with opposing counsel and attempt to resolve an issue prior to *filing* a motion rather than as presently written, requiring said contact prior to the matter being *heard* by the court. Several meeting participants expressed an opinion that modifying the rule in this manner may prevent unnecessary motions. Further, that the filing of a motion makes the opposing party feel inclined to file a responsive pleading that can escalate the level of conflict, increase attorney's fees, and further burden the courts. Any opinions or suggestions in this regard should be directed to Judge Pomrenze's chambers as this issue continues to be explored.

Several matters were also discussed during the meeting held January 13, 2011. Several attorneys expressed concerns about problems with the e-filing system. Many felt frustrated that practitioners are incurring more costs for a system that on many levels is worse than the prior "paper" system. There is still a significant lag time between e-filing submissions and the return of e-filed documents. Attorneys of record are unable to access sealed files, despite prior assurances that they would be able to do so. Now the clerk's office is being told that such access is not possible. Prior discussions suggested that attorneys may be able to access video of hearings through the Attorney's Corner service, but progress in this regard has been completely unsatisfactory thus far.

Members of the bar were also advised that the cost for filing a peremptory challenge had in-

(cont'd. on page 6)

Bench/Bar Meeting

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creased from $300 to $450 as of January 12, 2011.

A discussion was held regarding "zooming" unopposed motions. Again, frustration was expressed that attorneys are being required to incur fees to appear at hearings on unopposed motions. Members of the judiciary expressed an understanding of this concern, but also indicated that the issue has to be addressed on a case by case basis. For example, many of the judges expressed reservations about zooming a motion addressing custody or other matters directly impacting children without a hearing.

The issue of civility in the courtroom was also raised. It was noted that there appears to be an increase in the level of uncivil behaviors and personal attacks by counsel during court hearings. Several suggestions were made by the bar and the judiciary to improve civility and increase professionalism. It was noted that due to the nature of the issues addressed in the family court, emotions often run high and extra precautions must be taken to keep behaviors in check. One judge indicated that it was the judge's responsibility to set the tenor of a hearing and reign in the attorneys and litigants when personal attacks or other inappropriate behaviors occur. It was also noted by several members of the bar and judiciary, that such behaviors were counterproductive and ineffective in trying to achieve a favorable outcome for a client. There is a distinction between being a zealous advocate for one's client and engaging in personal attacks.

Finally, a concern was raised as to how to handle the requirement to include an address for your client when filing a Notice of Withdrawal when the address of the party should be kept confidential due to domestic violence or other concerns. A request was made that the court develop a uniform standard to be universally applied across all judicial departments. Those in attendance were advised that the Nevada Secretary of State offers a confidential address program when there has been domestic violence. Attorneys were advised that a client's address can be registered with the SOS's office, as a means of keeping it confidential while still providing an address for service of future pleadings. Details can be found at the SOS's website at: http://ww.nvsos.gov. Please join us for the next Bench/Bar meeting scheduled for February 24, 2011, at 12:00 p.m. at the Family Courts and Services Center located at 601 North Pecos Road, Las Vegas, Nevada 89101, when we answer the question: "How will we identify family court departments when we run out of letters in the alphabet?"

Mark Your Calendar!

The 2011 schedule for this year's Bench/Bar meetings is as follows:

- **January 13, 2011**
- **February 24, 2011**
- **April 7, 2011**
- **May 26, 2011**
- **June 30, 2011**
- **August 11, 2011**
- **September 22, 2011**
- **November 3, 2011**
- **December 15, 2011**

Each meeting commences at 12:00 noon, in Courtroom No. 9, of the Family Court and Services Center located at 601 North Pecos Road, Las Vegas, Nevada 89101. Please put these dates in your calendar.

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Commentary: Mediation in Abusive Relationships

Reprinted from: Nev. Fam. L. Rep., Vol. 6, No. 2, Fall 1991, at 11

by Robert E Gaston, Esq.

Although mediation is a technique that can be extremely useful in resolving conflicts between parties in a domestic case, mediation in relationships where there is physical abuse can be dangerous and harmful.

Mediation by definition is a voluntary attempt by both parties to cooperatively seek, through open and honest communication, a compromised resolution. When the "voluntary" nature of mediation is removed, the entire process is emasculated.

The nature of the abuser is to control his victim. One who has been a victim of spousal battery through years of marriage may be intimidated and controlled by a stare, a hand movement or degrading words.

How is a woman who has been unable to protect herself from physical assault and abuse expected to engage in face-to-face, honest, direct and open discussion with her abuser and reach a "mutually acceptable agreement"?

Our court system cannot mandate a victim of a crime to negotiate an agreement with the perpetrator about one of the most important issues of her life (i.e. the caretaking and welfare of her children).

The main goal of mediation is to arrive at a resolution. Many times mediators, driven by a desire to reach an agreement, yield to the impulse to put pressure on the parties. The more aggressive spouse is least likely to yield to this pressure so that if a resolution is to result, it is up to the less aggressive spouse to make concessions.

"A battered women in mediation cannot usually advocate for herself without fearing her batterer's reaction. An abused woman attempting to reach a divorce or custody settlement through mediation is in danger of being further abused or intimidated for standing up for herself, Indeed, she may give in to all of the abuser's demands due to intimidation." ("Geffner, Robert and Pagelow Mildred, 'Mediation and Child Custody Issues in Abusive Relationships,' Behavioral Science and the Law.")

Finally, forced mediation in a spousal abuse case subjects the abused spouse into a confrontation with her abuser with the approval and authority of the court system. This confrontation may exacerbate post-traumatic stress symptoms in the victim and result in serious psychological harm.

Therefore, mandated mediation "Not only allows the abuser to maintain an upper hand over his former victim and children but has empowered him to maintain this control and domination with the sanction of the Courts." (Skaggs, K. (1988). NCADV Voice, Special Edition Winter, 16-17.)

In re Pacana: Child Support Obligations Under a Chapter 13 Bankruptcy Plan

Reprinted from: Nev. Fam. L. Rep., Vol. 7, No. 1, Spring 1992, at 11.

by Deborah E. Schumacher

A recent Ninth Circuit Bankruptcy Appellate Panel decision provides an important tool for a family law practitioner whose client wants to collect child support, spousal maintenance or alimony arrearages from a debtor during a Chapter 13 bankruptcy case. The decision effectively makes rehabilitation through Chapter 13 unavailable to a debtor with heavy child support arrearages and, by reasonable extension, spousal support, alimony and maintenance arrearages, which are treated the same as child support under the Bankruptcy Code.

The Appellate Panel held that a debtor was not required to include child support obligations in a Chapter 13 bankruptcy plan and that the debtor's ex-spouse was not stayed from collecting delinquent child support during the debtor's Chapter 13 case. *Pacana-Siler v. Parana*, (*In re Pacana*), 125 Bankr. 19 (Bankr. 9th Cir. 1991).

Ninth Circuit Bankruptcy Appellate Panel opinions are binding authority on Nevada bankruptcy courts, and, on bankruptcy issues, would be followed by Nevada state courts as well.

Background

The debtor ex-husband filed a petition under Chapter 13 of the Bankruptcy Code, accompanied by schedules showing un-secured debt that included $13,900 to his ex-wife for child support arrearages. His Chapter 13 plan stated that the ex-wife's debt was classified as "priority," but the plan's disbursement provisions did not include any priority payment. Rather, the $13,900 was included in the total sum of unsecured debt, which was to be paid over 36 months, at $0.14 on the dollar. The ex-wife did not appear at the plan confirmation hearing, or object to the plan, and the plan was confirmed.

After confirmation, the ex-wife sought relief from the automatic stay to collect the past due child support. The bankruptcy court granted her motion, and ruled that in addition to what she received under the plan, the ex-wife "may collect an additional $250 per month from the debtor to be applied against the arrearages. This additional $250 may be collected upon immediately by agreement with or levy upon the debtor's wages or other moneys due him."

The debtor appealed, arguing (1) that the lift stay order rendered his plan unfeasible because he would have insufficient income to pay living expenses after making plan payments, and (2) that his plan impliedly provided for 100 percent payment of the arrearages by designating them as a priority claim (even though it included no payment schedule.)

The Opinion

The Bankruptcy Appellate Panel first considered the relevant bankruptcy statutes.

It summarily rejected the argument that support obligations were a

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In re Pacana

cont'd. from page 8

priority claim because Bankruptcy Code Sec. 507 (which defines priority claims) does not include support obligations.

It next discussed the Bankruptcy Code provisions which govern treatment of claims under Chapter 13 and the effect of confirming a Chapter 13 plan on creditors' lights, Generally, a debtor may modify the rights of unsecured creditors by paying them less than the full amounts of their claims, as long as they receive more than they would if the debtor's assets were liquidated under Chapter 7.

Once a plan is confirmed, assuming the creditor got proper notice, the plan binds the debtor and the creditor, regardless of whether the creditor acquiesced or its claim is treated in the plan. Further, upon confirmation, absent a contrary provision in the order confirming the plan, bankruptcy estate property vests in the debtor free of all creditor claims, except as the Chapter 13 plan requires those claims to be paid.

Upon completing all plan payments, the debtor receives a discharge of all debt provided for by the plan. A Chapter 13 discharge, however, does not include debts for child support or to a former spouse for support, alimony or maintenance.

Finally, the Bankruptcy Appellate Panel noted that the automatic stay of all collection efforts, explicitly excepts actions to collect "alimony, maintenance, or support from property that is not property of the estate...."

Considering these provisions together, the panel found that Congress manifested an "intent that child support obligations be excepted from the broad reach of Sec. 1322 [regarding permissible and mandatory plan contents] and 1327 [regarding the legal effect of plan confirmation], and therefore from the effects of a Chapter 13 plan, as well as the post-confirmation automatic stay." The panel concluded: "...[C]hild support claimants need not wait in line with [ordinary unsecured creditors], but rather may proceed against the debtor without hindrance of either automatic stay or discharge."

A Critique

Bankruptcy and state domestic relations law and policy often collide, and can be difficult to reconcile. This opinion is inadequate, however, because it fails to answer a central question.

A key legal issue in this appeal, on which the panel "punts," is

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In re Pacana

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whether post-confirmation wages are bankruptcy estate property. This is important because: the exception from the automatic stay for collection of alimony, maintenance and support during a Chapter 13 bankruptcy is limited to "property that is *not property of the estate*."

Bankruptcy Code Sec. 1306 provides that estate property in a Chapter 13 case includes a debtor's earnings "after the commencement of the case but before the case is closed, dismissed or convened...." A Chapter 13 case is not closed on confirmation, but upon completion of the plan period or dismissal of the case. Bankruptcy Code Sec. 1306 thus seems to mean that wages are estate assets during the plan period.

The competing view is that Bankruptcy Code Sec. 1327, which vests all bankruptcy estate property in the debtor upon plan confirmation, means that future wages also vest in the debtor at confirmation. Under this interpretation, the estate "vanishes" upon plan confirmation. Since there no longer is any estate property, non-dischargeable support or alimony can be collected from any property of the debtor.

A third, hybrid, view is that any property designated in the Chapter 13 plan or the order confirming it as necessary for the plan's execution remains bankruptcy estate property. All other bankruptcy estate property vests in the debtor at confirmation. Under this reasoning, after plan confirmation, non-dischargeable support or alimony may be collected from assets not needed to fund the plan.

The Appellate Panel acknowledges only in a footnote the legal issue of whether post-plan confirmation wages are bankruptcy estate property. It states it is not deciding the issue because it is not necessary to resolve the appeal. Since the order that the panel affirms specifically allows garnishing the debtor's wages during his Chapter 13 plan, the issue in fact is central to the decision. The holding in *Pacana* is logical only if the panel has concluded that post-confirmation earnings are not estate property. Otherwise, the panel's ruling sanctions violating the automatic stay.

A Chapter 13 debtor must commit all of his or her disposable income to paying unsecured debt during the plan period in order to confirm a plan, if a creditor or the trustee insists. Consequently, few Chapter 13 debtors will have any additional funds to pay support arrearages. Clearly, most Chapter 13 debtors will be using post-plan confirmation wages as the source of plan payments. An order to pay arrearages from wages during the plan period virtually will guarantee default on plan payments.

The Bankruptcy Code does not grant priority status to the payment of ongoing or delinquent support debt. Where *Pacana* is followed, however, the aggrieved former spouse can attach assets (usually wages) that would otherwise pay other creditors through the repayment plan. Other general creditors must accept payment under the plan's terms and are stayed by the Bankruptcy Code from instituting similar collection action. *Pacana* gives support, maintenance and alimony arrearages a *de facto* priority status in a Chapter 13 case.

References

1. Chapter 13 proceedings are voluntary, Generally, Chapeter 13 is available to individuals with regular incomes. As long. as creditors receive more than they would in a Chapter 7 liquidation, a Chapter 13 debtor may retain iliN or her property while repaying creditors over usually three, and not to exceed five, years.
2. *Pacana*, 125 Bankr. at 21.
3. *Id.*
4. *Id.*
5. 11 U.S.C. Sec. 1322(b)(2) & 1325 (a)(4)
6. 11 U,S,C, Sec, 1327(a).
7. 11 U.S.C. Sec. 1327.
8. 11 U.S.C. Sec. 1328.
9. 11 U.S.C. 1328(a)(2) & 523(a)(5).
10. 11 U.S.C. Sec. 362(b)(2).
11. *Id. Pacana*, 125 Bankr. at 22.
12. *Id.* at 24.
13. 11 U.S.C. Sec. 362(b)(2) (emphasis added).
14. *See*, *e.g.*, Judge Ashland's dissent in *Pacana*, 125 Bankr. at 27, which flatly assets that post-confirmation wages are estate property. *See also*: Note, "Property of the Estate After Confirmation of a Chapter 13 Repayment Plan," 65 Wash. L. Rev. 677.
15. *See*, *e.g.*, *Mason v. Williams* (*In re Mason*), 51 Bankr. 548 (D.Ore. 1985).
16. *In re Root*, 61 Bankr.984, 985 (Bankr. D. Colo. 1986) (reasoning that there must be a post-confirmation estate because all plan payments are administered by a court-appointed trustee and the trustee must have something to administer).
17. 125 Bankr. at 22 n. 4.
18. Id.
19. 11 U.S.C. Sec. 362(b) (2).
20. 11 U.S.C. Sec. 1325(b)(1)(B).

The Family Law Amendments to the Bankruptcy Code

Reprinted from: Nev. Fam. L. Rep., Vol. 10, No. 3, Summer 1995, at 1.

By David Rankine, Esq.

Congress amended the Bankruptcy Code in October 1994. The amendments generally reduce the ability of a debtor in bankruptcy to undo provisions of a divorce decree. When the original code was enacted in 1978, (before that it was known as the Bankruptcy Act) Congress had provided that debts for alimony or support would not be discharged in bankruptcy, debts not "in the nature of support" could he discharged. This attempt to treat a property settlement debt in a similar fashion as any other unsecured debt proved to be unpopular, particularly with appellate judges.

After 1978, judicial sleight of hand tricks eroded the distinction between non-dischargeable debt for support, and other obligations that could he discharged. The Bankruptcy Code only discharges debt. Courts, whenever possible, started to rule that the obligations in divorce decrees did not create debts. For example, an early case held that the division of a military pension did not create a debt, just the obligation to sort through a monthly payment, and separate out the non-debtors-spouse's share (*Teichman*, 774 F.2d 1395. 1398 (9th Cir. 1985)). Other cases liberally interpreted obligations to be in the "nature of support" and thus non-dischargeable. Often the best advice that bankruptcy lawyers could give divorce lawyers drafting findings of fact and conclusions of law was to emphasize facts or factors such as financial need, or disparity of income in the decree. This would make it easier for a bankruptcy lawyer to persuade a bankruptcy judge that the obligation was "in the nature of support" even though a family lawyer would know no spousal support obligation was intended or created. This advice is still useful.

The new amendments add to the code several more layers of protection for former spouses of debtors. First, a new class of priority claim is created in 11 U.S.C. § 507 for support. This permits the spouse to receive proceeds of funds that come into the hands of a bankruptcy trustee. A spouse need only file a court form called a Proof of Claim in the Bankruptcy Court to have this right to a bankruptcy dividend. The claim is given a higher priority than the IRS, which means in some cases that the spouse may be the only creditor paid as a result of a bankruptcy. The new section of code has the same "nature of support" language, and thus support would likely be as broadly interpreted as described above. Note that the right to file such a claim belongs only to the spouse. Congress did not grant priority status to government agencies such as state welfare departments collecting support to receive reimbursement for AFDC payments.

Secondly, a new exception to a bankruptcy discharge is created at 11 U.S.C. § 523(c)(14). Debts for obligations in divorce decrees or separation agreements may he rendered non-dischargeable unless the court finds "the debtor does not have the ability to pay such debt from income or property not reasonably necessary ... for the support of the debtor" or discharging such debt "would result in a benefit to the debtor that outweighs the detrimental consequences to the spouse, former spouse or child of the debtor." Some of the language used in this context appears elsewhere in the code. For example, pursuant to §522 of the code a debtor is allowed to exempt retirement funds if reasonably necessary for his support. The court looks at the debtor's income and expenses,

(cont'd. on page 12)

Bankruptcy Code

cont'd. from page 11

health, age, and the liquidity of his other assets in determining what is reasonably necessary for his or her support (*In re Comp*, 134 B.R. 544 (Bankr. M.D. Pa. 1991)). The Conference Report provides the following example of how the court might analyze the relative benefit/detriment of permitting the debtor to discharge a community debt he or she had agreed to pay in the divorce:

For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would he discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start.

An interesting issue is whether the debtor will be allowed to argue that the former spouse could, without hardship, file bankruptcy as a defense to a claim to make a hold harmless obligation non-dischargeable under this section. Note, this expanded protection against discharge does not apply in a Chapter 11 Bankruptcy. If the amount at issue is substantial, the debtor may choose to convert to a case under that chapter.

Any court can decide whether a debt is for support and the determination can be made at any time. The determination of whether a hold harmless debt is dischargeable must be made only by the bankruptcy court in a lawsuit called an adversary proceeding. This must be filed in the bankruptcy court before the claims bar date. This dale is shown on the Notice of Bankruptcy mailed to creditors, and is about 90 days alter the case is commenced.

Formerly, the bankruptcy would not stay garnishment proceedings to collect support, but would stay proceedings to determine paternity, or establish a right to alimony, or to modify alimony. Now §362 has been amended so the bankruptcy will not have any effect on these other proceedings, which can continue as though the debtor never filed.

Lastly, the code was amended to ratify those decisions that refused to permit trustees or debtors to void the judgment liens of former spouses, or the debtor's children, for support where the recorded judgments had attached to property such as homesteads, which normally can he exempted in bankruptcy.

As can be seen, the code still treats support obligations differently than property settlement obligations. However, the ability of debtors to use bankruptcy to evade the obligations of divorce decrees arising out of property settlement issues has been restricted.

Article Submissions

Articles are Invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in May, 2011, with a submission deadline of April 15, 2011.

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Power and Control: Dispelling Myths Surrounding Domestic Violence

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By Linda E. Offner

"I didn't mean to hit you."
"You're crazy."
"You really make me mad."
"You never listen to me."
"I'll show you who's boss."

These words are being spoken behind closed doors all over the country. Indeed, the signs and symptoms of domestic violence are classic, and unfortunately the stories we hear victims tell sound much like those we so publicly heard played out in the O.J. Simpson case. Although the Simpson case brought the widespread problem of domestic violence into the limelight, this area continues to be misunderstood not only by the general public, but by clinicians, attorneys, police and the courts who are faced with these issues on a daily basis.

While no one would argue that the statistics show that domestic violence is one of the leading causes of injury among women, there is polarization in the field regarding what constitutes domestic violence, its causes, and appropriate treatment to end that violence. This polarization often acts as an obstacle to understanding, confronting and treating the problem, as illustrated by the following case.

CASE STUDY

Tom, 37 years old, and his wife, Susan, 35, are both professionals who do not fit the stereotypical image still held by many of a couple caught in the cycle of domestic violence. Or do they? Tom is a charming, bright, well-educated pillar of the community who by all standards appears to be secure and successful. He maintains a public image as a friendly, caring person with a calm demeanor. He is well respected in his job and community. Likewise, Susan is a career woman who is viewed as strong, assertive, independent and self-assured; someone who is able to take care of herself.

When Tom and Susan first met, they shared for the most part what appeared to be a warm and loving partnership. However, after marriage, things seemed to change radically. Tom began flying into violent rages and was emotionally and physically unavailable. Susan "walked on eggshells," never knowing when Tom's behavior would become violent. A typical quarrel between Tom and Susan consisted of him yelling at her, dragging or pushing her around, putting her down verbally and threatening to throw her out of "his" house if she ever talked back to him again. Susan's self-esteem plummeted and she couldn't understand how someone who "loved" her could treat her that way. She was too afraid to call the police, too ashamed to tell her friends or family, and thought that if she only tried harder, Tom would change.

Tom refused to acknowledge any wrong-doing on his part and consequently would not seek help. The abuse worsened over time, until one day, after another episode of screaming of obscenities, throwing Susan's property around, and threats to harm her,

(cont'd. on page 14)

Domestic Violence

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she finally called the police. When the police arrived Tom was on his best behavior and because there were no eyewitnesses and Tom left no visible bruises (this time), the police refused to press charges and Tom was let off the hook! Susan was left feeling hopeless and scared.

DEFINING DOMESTIC VIOLENCE

What does the above scenario tell us? For one thing, appearances can be deceptive. And it is all too often these "public" appearances that contribute to a society that protects Tom and colludes with him in allowing the abuse to continue. For another, domestic violence is not only about broken bones and black and blue marks. It is a cohesive pattern of coercive controls that encompasses verbal and emotional abuse, sexual coercion, psychological manipulation, intimidation, using male privilege, using children, control of economic resources, minimizing, denying, blaming and isolation. The coexistence of these controlling behaviors serve to remind the victim subliminally of the potential for physical abuse and to undermine her independence.

Abusive behaviors are intentional, not the result of uncontrolled rage or impulse. The primary goal of abusive behaviors is to impose one's will upon another. It is a desperate attempt to maintain control of the relationship. For example, one batterer described how he pushed his partner against the wall and pounded the wall on either side of her head. He purposefully wanted to avoid any visible physical injury to her or damage to property, but intended to ensure that she clearly understood his message of intimidation.

When assessing for domestic violence, it is important to not only gain information about the individual abusive incidents, but to determine the overall patterns of behavior that characteristic the relationship. Lenore Walker, an expert in the field, identified the pattern as the "cycle of violence" – a tension-building phase which precedes the acute battering incident, followed by a loving contrition phase. However, in many cases, there does not seem to be a discernible pattern and the abuse occurs without any recognizable warning or pattern.

In summary, violence occurs in the context of continuous intimidation and coercion and is linked to attempts to dominate and control.

THE CLAIM OF SEXUALLY SYMMETRICAL PARTNERSHIP VIOLENCE

Is domestic violence gender-neutral? Some studies have reported that violence by women toward their male partners is as prevalent as violence toward female partners. There is a large body of contradictory evidence from courts, police, women shelters, divorce records, emergency room patients and research which demonstrates that the occurrence of adult violence in the home usually involves males as aggressors toward females. Defenders of the sexual-symmetry-of-violence thesis do not deny these results, but they question their representativeness and contend that data from police, courts, hospitals and social service agencies are suspect because men are reluctant to report violence by their wives. However, criminal victimization surveys using national probability samples similarly indicate that women are much more often victimized than men, even though men were likelier than women to call the police after assaults by intimate partners and more likely to press charges against their spouses. As noted by a group of leading experts in marital violence in their 1992 published report entitled "The Myth of Sexual Symmetry in Marital Violence," what those who argue that men are reluctant or ashamed to report their wives assault because of shame or chivalry overlook is that women have their own reasons to be reticent, fearing the loss of a jailed or alienated husband's economic support as well as his vengeance.

Moreover, enormous differences in meaning and consequences exist between a woman "pummeling" her laughing husband in an attempt to convey strong feelings and a man "pummeling" his weeping wife in an attempt to punish her for not doing what he wants. In addition, men are usually larger in size than women, and the most frequent reason for violence reported by women is self-defense. Consequently, it is necessary to analyze the abusive event in a holistic manner, with attention to the entire sequences of distinct acts as well as associated motives, intentions and consequences, all of which must in turn be situated within the wider context of the relationship.

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Domestic Violence

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CHARACTERISTICS OF THE ABUSER

For years, the common belief was that abusers were uneducated brutes from lower socioeconomic classes and suffered from some kind of individual psychopathology. Contrary to this stereotype, many men who abuse their partners are well educated, financially well off, and are very social and outgoing, though they are so only superficially. Batterers do not become emotionally close with others. Most batterers use violence to express a pervasive inner feeling of powerlessness. They generally have no guilty feelings about it, although they may feel shame, fright or anger at being exposed. They are relatively inarticulate about their feelings, impulsive, irritable, explosive and immature, behaving like a child who does not comprehend that he did anything wrong.

David Adams, co-founder and president of Emerge: a Men's Counseling Service on Domestic Violence, is a nationally known expert on counseling assaultive husbands. Adams has put together a descriptive profile of the "abusive husband" which has implications for those who work in the criminal and civil justice systems. According to Adams, abusers typically present as canny, even-tempered people who are well regarded at their place of employment and in their community. Few, if any, abusive husbands characterize themselves as abusive and have a tendency to deny or minimize their problems, similar to that seen by the alcoholic. While some men rationalize their violence, others merely lie about it or perceive it as self-defense rather than violence. Adams says the most common manipulation pattern of the abusive man is to project blame for the violence onto his wife, e.g., "she drove me to it," "she really knows how to push my buttons." When intervenors get caught up in the abuser's depiction of himself as the victim and shift the focus onto the partner's behavior, it prevents the abuser from recognizing that he has choices in how he responds to her. As noted by Adams, the abuser often manipulatively seeks allies in his attempts to monitor and police his wife's behavior, e.g., his father. One man said "I could never accept her the way she was; I always felt I had to

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Domestic Abuse

cont'd. from page 15

correct her. And it was easy for me to find other people to agree with me."

Other red flags to recognize include jealousy and possessiveness, and the manipulation of children. The latter rears its ugly head in the form of husbands misusing child visitations as a way of gaining access to their wives or contesting custody or child support agreements as a bargaining tactic designed to coerce their partners to reconcile or drop criminal complaints.

Lenora Greenbaum Ucko, a well-known human resources consultant, notes that while love can have many meanings, batterers often equate it with pride, insecurity, poor self-image, jealousy, shame, threats to masculinity and a reassertion of that masculinity. Nowhere in this definition of "love" is there any connection with concern for his partner's welfare, dignity, personhood or testimony. Abusive behavior indicates concern only for himself, not love for her.

IMPACT OF ABUSE

Indicators of psychological distress experienced by battered women include fear of repeated abuse, intrusion symptoms including flashbacks and nightmares, avoidance responses including loss of memory or denial/ minimization of abuse experience, anxiety, sleep difficulty, hypervigilance, difficulty concentrating, anger, shame and believing one is bad and worthless, lowered self-esteem, morbid hatred, and self-medicating behaviors.

Abused women also experience changes in basic core beliefs about the world, themselves and others. Typically there are changes in the assumption of safety and a loss of view of the world as meaningful.

Why do so many abused women seem to remain in the "victim" role and find it so difficult to leave the relationship? These women commonly develop an attachment and dependency on their abusive partner. While there was "love" and attachment that developed in the initial stages of the relationship, there becomes an increased attachment after abuse because of a decrease in sense of self-worth and increased isolation which creates a greater forced dependency upon the abuser. Women also stay because it is often safer than leaving, they are financially and emotionally strapped, have children, and are ambivalent and unaware of their choices. In addition, because of the intermittent nature of abuse with resulting periods of positive and peaceful interaction between the battered woman and her partner, the woman does come to believe that she has some control and that her partner will change his abusive ways.

It is factors other than abuse that explain why some women become less psychologically traumatized or less obstructed in their efforts to escape or protect themselves. These include institutional responses; personal strengths; tangible assets including educational; occupational and economic resources; social supports; and prior victimization.

MEN'S AND WOMEN'S ATTITUDES

Spousal abuse has been endemic for centuries. We do not really know whether there is more or less now than in centuries past. What has changed is how we perceive the problem. In her 1988 book, *Heroes of Their Own Lives; the Politics and History of Family Violence*, Linda Gordon notes that family violence as been historically and politically constructed; the definition of domestic violence, and appropriate responses to it develop and vary according to political moods and the force of certain political movements. Consequently, male and female attitudes play a critical role in shaping the course of their behavior in an abusive situation. Abuse occurs within a social context of male power and female oppression. The actions of the abuser and abused are reflective of octal norms and social resources. Attitudes that support male supremacy, the patriarchal social system and inadequate legal protection are significant causal factors of violence against women.

Battering is currently viewed primarily as a social rather than a psychological problem. It is largely premised on the belief that no woman deserves to be beaten or abused and that the batterer is solely responsible for his actions. Yet, beatings, murder, threats, indignities and psychological torment are routine for women in a large number of partnerships today. What does this prevalence of violence in so many relationships say about our society?

Historically, society has viewed men as deserving of special privileges and condoned them as the final arbiters of women's behavior. Many men still believe that the world at large, and especially other men, expect

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Domestic Abuse

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them to resort to abusive behaviors to get their own way. "Cultural conditioning" leads men to be high achievers, emotionally tough, dominant over women, and possessive of people and things. Men who outwardly express their feminine side or who are perceived as being "too soft" in their relationships are often labeled "wimps," "weak" and "p__y whipped."

In short, society does not hold batterers accountable for their behaviors.

Socialization that makes women's self-esteem dependent on their roles as wives and mothers and creates economic and psychological dependency on their husbands shapes women's attitudes. Women often interpret the abuse against them as stemming from their own limitations. They internalize their husbands' dissatisfaction with them and think that if only they try harder, the violence will cease. Moreover, because society sees women as being valuable only in a relationship, they remain in abusive relationships paying a high cost.

Given the magnitude of the problem, it is unlikely that psychotherapeutic approaches alone can successfully address it. People are microcosms of society. As a social problem, its causes are located in society's condonation of violence and the reluctance of the police, courts and attorneys to intervene on behalf of victims of domestic violence.

RESPONSE OF LEGAL SYSTEM

What is the proper role of law when dealing with family disputes and violence?

The woman is usually the initial victim. Violence rarely takes place if an individual who is not a family member is present.

When these assaults take place, there are several factors that have historically influenced the response which the woman will take. These include fear of retaliation by her spouse, as well as the availability of local law enforcement officers and the legal system, viable alternative safe houses, ability to survive economically in a separate household, and help from the medical profession.

Availability of educated law enforcement personnel, legal assistance and laws that clearly state that abuse will not be tolerated are basic requirements needed for victims of battering and their families. These services address the victims' need for safety, as well as the need for information concerning their rights and available civil and criminal protection.

There is an ongoing need for improved response from local law enforcement officers. Historically, law enforcement officers have been critically perceived as either hostile or uncaring toward victims of spouse abuse. Many officers still hold traditional views of women and are reluctant to arrest perpetrators in spousal abuse cases. When policy mandates that an arrest can only be made if there are visible signs of battering or a witness to attest to the abuse, police officers can nevertheless play a critical role in diffusing an intense encounter by sending a clear message to the perpetrator that acts and threats of violence are unacceptable to the community. Police officers who think that violence is precipitated by some recent behavior of one or both of the parties and that prevention is simple may minimize the seriousness of the problem. Over and over, battered women complain that police officers side with the batterer, only talking to him or having him walk him around the block to "cool off."

The ability of individual perpetrators to conceal or justify their violence is facilitated by a criminal justice system that has historically ignored or blamed the battered woman. This results in letting the abuser off the hook.

The word "family" is derived from the Roman word familia, signifying the totality of slaves belonging to an individual. Wives were part of this totality and were considered property of and subject to the control of the male head-of-the-household. If a woman attempted to assert herself, it was expected that the husband beat her to keep her in line. This is evident in a series of North Carolina cases in the late 1800s. In *State v Black* it was stated that a husband is responsible for the acts of his wife. The only limitations placed upon this use of force was that it not cause permanent injury and that he not hit his wife with a switch thicker than his thumb. Common law saw the marriage contract as an incorporation of the legal rights of women into those of their husbands. The

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Domestic Violence
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very legal existence of the woman was suspended during marriage and became known as the Law of Coverture.

Although the American legal system has progressed to become increasingly more active in the enforcement of criminal and civil laws in domestic violence situations, it nonetheless remains a large problem. Indeed, lawyers play a critical role in providing victims with information concerning their rights, for example, what civil and criminal protections are available to them.

Likewise, standards set by prosecutors for accepting a case for trial are very strict and narrow; evidence problems are critical, as is time and money.

TREATMENT AND SPECIALIZED SERVICES

When translated into treatment methods, working with and teaching men to be non-violent, accompanied by efforts to increase social and legal consequences are favored. Programs that help men change social attitudes that force them into rigid sex roles, and that dictate behavior and limit their freedom of choice and expression are also favored.

With respect to battered women, current approaches favor action-oriented solutions, with a focus on developing emotional and material wherewithal to enable the woman to remove herself from the abusive relationship. Specialized services for battered women include emergency housing, legal and financial assistance, hotline and referral services, and sensitive and appropriate emergency room and police intervention.

UPDATE ON CASE STUDY

Tom continued to exhibit abusive behaviors toward Susan, such as extraordinary anger, rage, jealousy, threats, and physical and verbal abuse. The more that Susan tried to accommodate him, the more distant and violent he became. Susan pleaded with Tom to seek counseling. Tom was unwilling to examine or change his behavior.

Divorce became the only solution for Tom and Susan. During the divorce proceedings, Tom used inappropriate control of property and the legal process to further harass and intimidate Susan.

It took Susan a long time to recover emotionally and financially. She went back to Tom several times after they separated hoping that he would change. Tom continued to promise Susan the possibility of a future together while minimizing his past behaviors. Susan finally faced the reality of their relationship and recognized the importance of cutting all ties with Tom. She is currently rebuilding her self-esteem and working on defining the elements of a healthy relationship.

Tom moved back into a protective situation where he was shielded from growing and taking responsibility for his actions. He failed to confront these difficult issues and continued to blame his partners for the failure of their relationships. Tom is likely to continue to repeat these patterns of behavior.

SUMMARY

Violence is a system of tactics used to control the victim. The goal of abusive behavior is to impose one's will upon another. Feelings of anger, frustration, hostility and insecurity do not cause a person to be violent. Rigid attitudes about sex roles that define who the man is and who he thinks she "should" be contribute to these feelings. Minimizing, denying and blaming others for one's acts of violence is an attempt to avoid taking responsibility for one's behavior. Although the use of abusive tactics often gets the abuser what he wants, it has negative effects on the woman and relationship. Abusive men do not see the real consequences of their behavior – costs in the lack of intimacy and respect in their relationship. It is possible to achieve nonviolent relationships only when they are based on equality. These relationships are partnerships that involve shared decision-making and mutual respect. Ultimately, we all must determine in our own lives what constitutes acceptable and unacceptable behaviors.

Spousal abuse will disappear only when social attitudes about men and women change and when our culture stops condoning the use of physical or emotional violence as a legitimate way to solve problems.

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Bankruptcy and Family Law After Enactment of BAPCPA

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By Marjorie A. Guymon, Esq.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (also known in some circles as the Bankruptcy Abuse Reform Fiasco (BARF)), went into effect on October 17, 2005, and applies to cases filed on or after October 17, 2005. The Reform was far-reaching, and the full effects will not be known until all the provisions have been fully interpreted. One of the main goals of the legislation was to severely limit the effect of bankruptcy on a debt incurred during a divorce or separation for the support of a child or spouse. Under the amended Code, these debts have been defined much more broadly than before and have been made nearly impervious to the effects of a bankruptcy. As a consequence, the new bankruptcy law will have a significant effect on the practice of family law. Thus, if you are a family law practitioner, it would be best for you to become familiar with these changes.

This article will attempt to summarize all of the new provisions that will interact with the field of family law. As you will see, the gist of the new law is that it is now harder for a debtor to avoid domestic support obligations through bankruptcy, and it is also easier now for domestic support creditors to collect payments.

Nondischargeability

One of the major changes affects the dischargeability of certain debts. The primary goal of the new bankruptcy law is to provide a debtor with a fresh start. This is done by discharging all or many of a consumer debtor's prepetition obligations. However, there are some kinds of debt that have never been dischargeable. Prior to the reform, 11 U.S.C. § 523 excepted most kinds of debts that had anything to do with child support, alimony, maintenance or support of any spouse. However, § 523(a)(15) used to have an exception that would allow a debtor to seek to discharge certain obligations owed to a spouse or child that were not technically for the support or maintenance of the spouse. For example, a property distribution or debt division obligation arising from a divorce decree would normally be dischargeable under § 523(a)(15), unless the creditor spouse timely filed an objection based upon the exceptions found in the old § 523 (a)(15)(A) or (B). This entailed a balancing of hardship between allowing the debtor a discharge and its effect on the creditor spouse as compared to denying the discharge and its effect on the debtor.

The new law takes away the balancing of hardships in subparagraphs (A) and (B) between the debtor and creditor spouse. Therefore, in a Chapter 7 case, it is safe to state that any domestic support obligation will be nondischargeable. The term domestic support obligation is defined very broadly to include all debts to a spouse, former spouse or child incurred during a divorce or separation regardless of whether the debt is designated as a "support" obligation or not. (Also included in the definition is interest that accrues on the underlying debt pursuant to nonbankruptcy law.) 11 U.S.C. §101(14A). Non-support obligations are still dischargeable in a Chapter 13

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BAPCPA
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case, but such cases are limited to instances where a Chapter 13 plan is confirmed and completed. In other words, under the old Code a debtor could potentially discharge non-support claims in a Chapter 13 without completing a confirmed plan if there were sufficient facts to support a hardship discharge. This is no longer an option available to Chapter 13 debtors. 11 U.S.C. §1328(a).

Another change in regards to the dischargeability of domestic support obligations is in the timing. Before it was up to the creditor spouse/plaintiff to demonstrate that the debtor incurred the debt in connection with a divorce or separation. 11 U.S.C. §523(a)(5). Additionally, the plaintiff would have to file a complaint objecting to the discharge within 60 days of the first meeting of creditors. Now such a complaint can be filed at any time. 11 U.S.C. §523(c).

Priority

11 U.S.C. § 507 addresses the priority with which every debt is treated under a bankruptcy case. A debt which is treated with a higher priority than a secondary or subordinate debt must be paid in full before the subordinate debt receives any payment. Under the new Code, domestic support obligations are now accorded the first priority status, after all secured debts are paid, but before other priority debts such as trustee's fees and attorney's fees, unpaid wages, and taxes. Prior to the reform, support debts were given the seventh priority. This change is a huge advance for support creditors, as they will be paid before any other unsecured creditor, including trustees and attorneys.

Automatic stay

One of the greatest protections the bankruptcy code offers a debtor is the automatic stay. Once a debtor files bankruptcy, all collection and enforcement actions against the debtor are automatically halted due to the provisions of 11 U.S.C. § 362. However, § 362 has been edited to create many new exceptions to the automatic stay for proceedings that are related to support obligations. Specifically, the following eight types of proceedings are now exempted from the automatic stay: (1) action to establish child custody or visitation; (2) dissolution of marriage; (3) domestic violence; (4) withholding of income that is property of the bankrupt estate for payment of domestic support obligations; (5) suspension of drivers' licenses and professional licenses; (6) reporting of overdue support owed by a parent to certain consumer reporting agencies; (7) interception of specified tax refunds; and (8) enforcement of medical obligations under tile IV, part D (Child support and Establishment of Paternity) of the Social Security Act.

Consumer Counseling and Debt Management Certification

In practice, prior to the new code, debtors would often file an incomplete bankruptcy or "face filing" at the last minute in order to stop a foreclosure. The new code has hindered these emergency filings by requiring that debtors partake in credit counseling prior to filing. Bankruptcy judges have held that the language of the act is absolutely rigid in this requirement for credit counseling prior to filing, and it has led to some upset debtors, attorneys and judges.

Protection from preference actions

Another area where support obligations are strengthened against bankruptcy is in the realm of preferences. A preference occurs in bankruptcy when the debtor has "preferred" one of his creditors (by paying them money) to the exclusion of other creditors. More specifically, when a payment is made to a creditor within 90 days of filing bankruptcy that gives a creditor more than they would receive under a Chapter 7 bankruptcy[1], that payment is normally avoidable, and the money paid can be recovered for the benefit of all creditors. Even under the old code, however, there was an exception made for support payments. Payments toward a support obligation normally would not be avoidable, no matter how much was paid. This provision has been strengthened even further under the new code by inclusion of a much broader definition of the kind of domestic support obligation that is covered.

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BAPCPA

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As with the other provisions discussed above, what was formerly limited to support obligations has been expanded to most any kind of debt that arises under divorce or separation, including property divisions and hold-harmless obligations. 11 U.S.C. §547(c)(7).

Miscellaneous provisions

There are four additional changes which the BAPCPA has effected. First of all, new language has been inserted into §§ 1129, 1208, 1222, 1225, 1307, 1322, 1325, and 1328 to ensure that a Chapter 11, Chapter 12[2], or Chapter 13 debt-repayment plan cannot be confirmed by the court until it has been certified that the debtor has paid all domestic support obligations that have become payable postpetition. In addition, a case can be converted to a Chapter 7 or can be dismissed entirely if a failure to pay support payments is shown.

11 U.S.C. § 522 has also been amended to provide that property that is exempt from the bankruptcy estate is nonetheless reachable in order to satisfy a debt arising from nondischargeable domestic support obligations regardless of any provisions of nonbankruptcy law. Another change worth noting is that income payments for postpetition domestic support obligations are excluded from "disposable income" for purposes of a Chapter 12 confirmation plan.

Finally, the new code has set forth several affirmative duties for the bankruptcy trustee. Specifically, the trustee must provide written notice to the person who is owed support obligation of several rights they have in collecting the debt. The notice must also explain fully the impact that the debtor's bankruptcy will have on thesupport obligation. Most importantly, the trustee must inform the creditor of the debtor's last known address and the name and address of the debtor's last known employer. 11 U.S.C. §704.

Notes:

1. Under Chapter 7, the assets are spent first in satisfaction of secured claims, such as a mortgage or car payment. Thereafter, administrative costs arising from the bankruptcy will be paid in full, then priority unsecured and then general unsecured creditors. Debtors normally do not have much money left over to pay general unsecured creditors in full, let alone any distribution. As such, if the debtor paid a large amount to a general unsecured creditor within 90 days of bankruptcy, chances are good that the creditor received more than he would have under a Chapter 7 priority distribution scheme.

2. Chapter 12 bankruptcies are reserved for farmers.

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Summary:

BAPCPA changes to the Bankruptcy Code affecting family law:

- Broadens the definition of domestic support obligations to include more types of debt that are nondischargeable and eliminates the exceptions to nondischargeability that previously were available for certain support-related debts; § 523(a).
- Unsecured claims for domestic support obligations are given first priority status; § 507(a)(1).
- Excepts from the automatic stay eight different kinds of domestic proceedings; § 362.
- Broadens the definition of domestic support obligations to include more types of debts that cannot be avoided by the trustee as a preferential transfer; §547.
- Court confirmation of a debt repayment plan is conditioned upon a certification that the debtor has paid in full all support obligations that have become due after the petition filing date; §§ 1129, 1208, 1222, 1225, 1307, 1322, 1325, and 1328.
- No discharge in Chapter 13 without certification that all domestic support obligations are paid per plan terms; § 1328(a).
- Modifies guidelines governing property exempt from the bankruptcy estate to declare such property liable for a debt arising from domestic support obligations; §522.
- Excludes income payments for postpetition domestic support obligations from "disposable income" for purposes of a Chapter 12 confirmation plan; § 1225(b)(2)(A).
- Gives affirmative duties to the trustee to notify domestic support creditors and the relevant state agencies of relevant information such as the status of the debtor's bankruptcy and last known address; §§ 704, 1106, 1202, 1302.

CONTEXT IS EVERYTHING: DOMESTIC VIOLENCE IN THE REAL WORLD[1]

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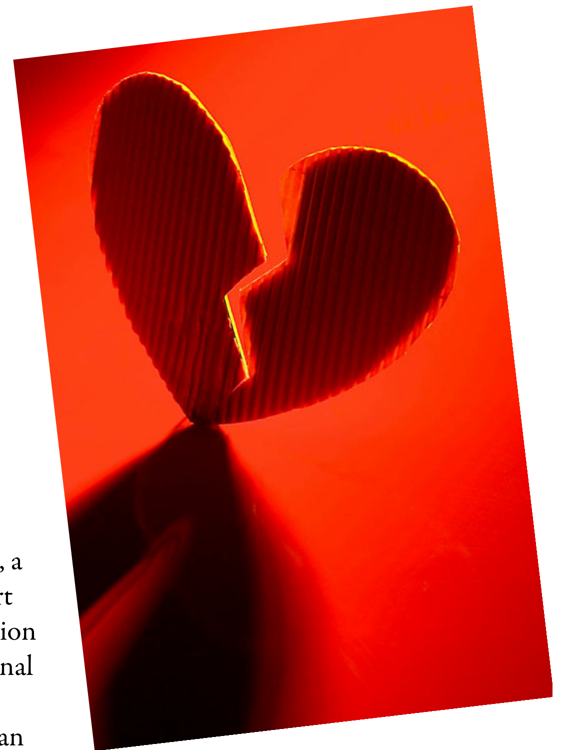
By Billie Lee Dunford-Jackson, J.D., and Hon. Scott Jordan[2]

Introduction

The effective issuance and enforcement of custody and visitation orders, protection orders, and various other domestic relations orders, and the effective delivery of services to victims of domestic violence and their children, require all systems, including advocates, child protection workers, attorneys, the judiciary, law enforcement, and prosecution, to work in concert to achieve the best and safest outcomes for them. However, effective collaboration to achieve this outcome requires an understanding among the systems about the meaning of domestic violence. These various systems often define domestic violence in vastly different ways, which leads to confusion among them in advocating for and issuing and enforcing orders and delivering services. This system confusion not only makes an already complex domestic violence case even more complex, but also impedes the overall goal of achieving safe outcomes for victims of domestic violence and their children.

What is Domestic Violence?

As currently used, this term has two related but distinct meanings. It can refer to any single instance of physical or emotional maltreatment by one intimate partner against the other. Or, it can refer to a course of conduct by one partner intended to assert and maintain control and power over the other. This course of conduct includes the use of physical harm and the threat of harm, but it involves a panoply of other control strategies as well. The course-of-conduct meaning is sometimes referred to as true domestic violence, in that it has the potential for much more universal, long-lasting and severe consequences for its victims and their children.



When a domestic violence case enters the legal system, whether in the form of victims and their children seeking services at a domestic violence shelter, a 911 call, a report to child protection services, a criminal prosecution, an application for an order of protection, or a divorce or other family action, understanding the meaning of the conduct in the particular case is crucial. Without a clear grasp of the nature of the violence involved and the context from which it came, lawyers and judges run the risk of misunderstanding the behavior of the parties and harming rather than helping the family members as a result of their intervention.

Casual observers may miss the pattern that emerges from course-of-conduct domestic violence. To them,

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Context is Everything

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domestic violence may appear to be a series of isolated incidents where one partner to a relationship, acting out of anger, or perhaps in response to some action on the part of the other, strikes out and causes that other physical injury. Some conflicts between partners do in fact happen that way. In order to understand the nature of a relationship earmarked by conflict, it is necessary first to consider the context of the violent behavior to determine whether it exemplifies true domestic violence. And that determination hinges upon a clear grasp of the dimensions and dynamics of domestic violence.

The Context of The Behavior

An analysis of the context out of which violent behavior arises is crucial. Otherwise, intervention could further endanger victims of ongoing violence, embolden the perpetrators of such violence by seeming to give them permission to continue their violent behavior, and expose the children of the relationship to further risk of physical and other types of harm. The context of violence encompasses three elements, all of which must be considered together:

- The offender's **intent** in using violence;
- The **meaning** of the violence to the victim; and
- The **effect** of the act on the victim.

The Intent of the Perpetrator

Those who use physical violence in an intimate relationship may be acting from any of several motivations. A perpetrator may be suffering a mental incapacity which calls for clinical intervention; may tend to use violence to resolve conflict in general social contacts; may be acting out of stress, anger, or poor impulse control as a one-time assailant; may be acting in self-defense or in response to battering; or may be a true domestic violence abuser, motivated by the intent to exert power and control over the other partner in the relationship. How can you tell which is which?

A generally violent fighter, unlike a batterer or someone responding to battering, uses violence in many contexts and relationships, including against random victims. Such individuals generally have poor communication skills and a paucity of problem-solving tools and so tend to default to violence when faced with any problem. Violent fighters are at risk of abuse of alcohol or drugs and often have criminal or employment histories that document their use of aggression in multiple contexts.

A one-time perpetrator does not characteristically or routinely react in violence against either the target victim or others and does not use other tactics to obtain and maintain power and control over the target victim. Generally the violence is neither aggravated nor performed in response to ongoing abuse from the victim. Such people tend at the time of the assault to be suffering unusually high stress in some area of life, whether physical or emotional.

A violent response to a pattern of violence and intimidation to which an individual has been subjected may constitute self-defense, and thus be non-criminal, or may be retaliatory in nature. The level of violence generally increases in response to the degree and length of the violent behavior directed at this individual, sometimes rising to extreme and even lethal levels. Perpetrators of this form of violence, however, seldom harm children or other family members and do not act violently to others in society.

A true domestic violence batterer uses an ongoing constellation of power and control tactics, of which violence is only one, to intimidate and threaten the victim into compliance. The other tactics may include such strategies as threats, economic control, isolation, insults and emotional abuse. These actions are based upon the abuser's belief that he or she is entitled to control the victim and often the children as well. Such a batterer generally uses violence only to the extent that other tactics appear to be ineffective; thus violent episodes often erupt in response to a victim's attempts to assert independence or to disagree with the perpetrator. However, even in the absence of violence, the power and control tactics, and the threats that such controlling tactics will escalate into violence, are always present. The violence in these relationships often escalates in severity and frequency over the years. Moreover, controlling batterers commonly become more violent at or immediately after separation from their victims, when they perceive their control to be threatened. They tend to be jealous in the extreme and to believe that they cannot live without their victims. Although their violence is not caused by drug or alcohol abuse, substance abuse may escalate the level of violence. Separate interventions to address both the violence and the substance abuse are necessary when both problems are present.

The Impact and Meaning of Violence to the Victim

It is readily apparent that the meaning and effect of the violence to the victim in each of these settings varies dramatically. Unlike the victims of the other types of violence, only the victim of the true domestic violence batterer lives with the constant risk of further violence and the unremitting potential of lethality. These victims

(cont'd. on page 24)

Context is Everything

cont'd. from page 23

also suffer the ever-present threat of nonviolent abuse and intimidation. For them, there are no normal times.

The Dynamics of Domestic Violence

As indicated above, true domestic violence is an intentional pattern of coercive behavior, patterned and repetitive, in which the batterer engages with the sole purpose of achieving and maintaining power and control over the victim. The instruments the batterer selects to achieve this goal are designed to induce fear in and to punish the victim for noncompliance. Although women and men engage equally in conflict in the other contexts described above, study after study has shown that most true domestic violence batterers are men; and the great majority of victims of this type of abuse are women[3]. Thus to the batterer, separation constitutes loss of control and is a time to escalate the use of his abusive tactics in order to:

- Reestablish control;
- Recapture what he perceives as his rightful ownership over the victim;
- Retaliate against her for what he perceives as her betrayal;
- Take revenge for his perceived loss of integrity because of her betrayal, and in extreme cases, if all else fails, to destroy her and sometimes the rest of the family and himself.

It is the common practice of true batterers to engage in rule-making. They believe it is their right to compose and enforce the rules by which their victims and children are to live; and they further believe that they have the right to use violence and threats of violence as necessary to enforce their rules. The rules have one purpose and one purpose only: control of the victim. However, the scope and detail of the rules vary from batterer to batterer, as do the tactics used to enforce the rules. Common enforcement tactics include coercion, intimidation, degradation, exploitation, and violence, often interspersed with gifts and promises to change.

Since batterers' partners do not necessarily comply willingly, the rules are not self-implementing. These abusers commonly make strategic use of enforcement, engaging in a cost/benefits analysis that includes the importance of the rule; the efficacy of a given control tactic; the risk of inflicting injury that cannot be concealed; and the concomitant risk of intervention, with social and legal consequences. Thus, the standard explanation that abuse results from uncontrollable anger or provocation has no validity in these circumstances.

In response, victims engage in a process of their own, continually analyzing which rules are crucial and must be obeyed to the letter; and which rules they can resist, and when and how and to what degree. Their decisions whether to comply or resist a particular rule hinge on a number of factors, including:

- Their cultural and religious beliefs;
- The extent to which compliance compromises their integrity or safety;
- The risks versus the benefits (for themselves and their children) of compliance or resistance in a given situation;
- Legal, financial, social and other options and resources which may facilitate resistance;
- The opportunity to reflect and develop a safety plan;
- Supports and connections which may make resistance possible and feasible; and
- Hope that things can and will change.

In cases of true domestic violence, the batterer often seeks to maintain his control even after the relationship has ended and a court order has been entered. Tactics may include stalking or spying; courting the victim with flowers, letters, or gifts; withholding or delaying support; or undermining the victim's relationship with employer or friends. When there are children, the batterer may visit erratically to prevent the victim from making other plans; make unilateral parental decisions regarding such things as tattoos, piercing, or

(cont'd. on page 25)

Context is Everything

cont'd. from page 24

dramatic changes in hair style; keep the children from attending planned activities; and undermine the custodial parent's relationship with the children.

Impact on Children

In cases involving children, the system's primary concerns are the safety of the children and their best interests. Children's best interests are served when both their own physical and emotional safety, and that of their primary caretaker, are assured. Coupled with responsibility for their children, non-abusing parents must have both the autonomy and authority to act on their children's behalf, without interference by the batterer, and the resources to protect their children and meet their needs. Systems can best accomplish these results by familiarizing themselves with the resources available to victims, children, and batterers in their communities; crafting or advocating for visitation orders with sufficient specificity and enforceability to assure the physical and emotional safety of children and their primary caretakers; and, when appropriate, allowing maximum access to the non-custodial parent consistent with safety requirements for children and their custodial parent alike. Systems that accomplish these results, and that enforce the terms of orders stringently, most surely protect the safety of children and their primary caretakers and do the best job realizing children's best interests.

Conclusion

Whenever there are allegations of domestic violence, the systems that victims and their children reach out to must make a number of important decisions. Because such allegations are often denied, determining whether the violence actually occurred, and what it really means, is one of the first and most critical issues in achieving the best and safest outcomes for the targets of violence and their children. It is imperative that all systems involved in any domestic violence-related case understand both the true nature of domestic violence and the dynamics of the individual case, provide safe and appropriate services, and advocate for and create orders that assure the safety and protect the rights of all family members. Getting it wrong is likely to have drastic consequences.

Endnotes:

1. The original version of this article appeared in the National Council of Juvenile and Family Court Judges' Today magazine, Winter 2003, and was drawn largely from portions of *Enhancing Judicial Skills in Domestic Violence Cases,* the curriculum of the National Judicial Institute, a joint project of the National Council of Juvenile and Family Court Judges (NCJFCJ) and the Family Violence Prevention Fund (FVPF). Barbara Hart, JD, and Loretta Frederick, JD, are the Institute faculty members primarily responsible for developing and presenting the portions of the curriculum upon which this article is based.

2. Billie Lee Dunford-Jackson, JD, is a Co-Director of the Family Violence Department of the NCJFCJ; Hon. Scott Jordan is a senior District Court Judge in Reno, NV, where he served 12 years on the bench, a member of the NCJFCJ, and is on the National Judicial Institute faculty.

3. Matthew R. Durose et al., U.S. Dep't of Justice, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances* 1 (June 2005, NCJ 207846) (reporting that the majority (73%) of family violence victims were female and that males were 83% of spouse murderers and 75% of murderers who killed a boyfriend or girlfriend); Shannan M. Catalano, U.S. Dep't of Justice, *National Crime Victimization Survey: Criminal Victimization, 2004* 10, (Sept. 2005, NCJ 210674) (reporting that of offenders victimizing females, 21% were intimates of the female victim, as compared to offenders victimizing males, of which only 4% were intimates of the male victim.

Parenting Coordination in Domestic Violence Cases

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by Hon. Dale R. Koch and Amy Pincolini-Ford, J.D.

Parenting coordination is an emerging alternative dispute resolution technique being used to address the problems of highly litigious "high-conflict families" (Zollo, N. & Thompson, R., 2006) and overburdened, overworked, and under-resourced family court systems. This article examines parenting coordination in high-conflict cases, the difference between high-conflict and domestic violence cases, the safety implications of parenting coordination for abused parents and their children, and the different approaches being used to enhance the safety of abused parents and their children.

What is Parenting Coordination?

Parenting coordination seeks to assist high-conflict parents to implement their parenting plan, monitor compliance with the details of the plan, resolve conflicts regarding their children and the parenting plan in a timely manner, and protect and sustain safe, healthy, and meaningful parent-child relationships (AFCC Task Force, 2006). Parenting coordination is child focused (AFCC Task Force, 2006) and is designed to resolve disputes between high-conflict parents arising out of an agreed-upon parenting plan, or, in cases where the parties cannot agree, a child custody and visitation order entered by the court. Rather than go back to court to resolve problems arising out of the parenting plan or court order, such as changes to or clarification of parenting time, exchanges of the children, or alterations to the children's appearance (AFCC Task Force, 2006), the parties may elect to use parenting coordination to resolve these issues or may be court ordered to do so.

Concerns have been raised about the courts' use of parenting coordination as an inappropriate delegation of judicial decision-making. While those concerns are legitimate, they can be largely alleviated by ensuring that judicial oversight continues in those cases and that the parties have expedited access to the court in the event that there is disagreement with a decision made by the coordinator, as well as if the need arises either to replace or terminate the use of a parent coordinator. Thus, while enjoying the benefit of quick, regular, and more economical access to a parent coordinator to help parties resolve day-to-day questions and disputes, parties should not be prohibited from access to the judge handling their case.

The Role of the Parenting Coordinator

The role of the parenting coordinator is not to make major decisions that would change legal or physical custody from one parent to the other or that would substantially change a parenting plan or court order (AFCC Task Force, 2006). This type of decision-making is the court's function.

However, a parenting coordinator, if given authority by the court, may resolve or make recommendations about issues such as: health care management; child-rearing; education or daycare; enrichment and extracurricular activities; religious observances and education; children's travel and passport arrangements; communication between parties regarding the children; role of and contact with significant others and extended family; substance abuse assessment or testing for either or both parents; and parenting classes for either or both parents (AFCC Task Force, 2006). Whether parenting coordination is agreed upon by the

(cont'd. on page 27)

Parenting Coordination

cont'd. from page 26

parties or court ordered, it is incumbent upon the court to clarify with specificity the role of the parenting coordinator. This is especially true for domestic violence cases because parenting coordination was designed primarily for high-conflict cases.

High-Conflict vs. Domestic Violence Cases

Although the goals of parenting coordination may serve high-conflict cases well, parenting coordination presents safety concerns in domestic violence cases. The terms high-conflict and domestic violence are often used interchangeably within the courts and are often confused, even though these two terms have vastly different meanings (Jaffe, P.G., Crooks, C.V. & Wong, F.Q.F., 2005). "High-conflict" has been used to describe more intense and protracted disputes that require considerable court and community resources, and that are marked by a lack of trust between parents, a high level of anger, and a willingness to engage in repetitive litigation (Jaffe, P.G., Crooks, C.V. & Wong, F.Q.F., 2005). Because domestic violence cases are marked by many of these same traits, they are often lumped into definitions of high-conflict. However, the term domestic violence refers to an intentional pattern of coercive behavior, including physical violence, sexual violence, threats of harm, economic control, isolation, insults, and emotional control, within an intimate relationship in which one partner engages with the purpose of achieving power and control over the other partner (Jaffe, P.G., Crooks, C.V. & Wong, F.Q.F., 2005; Dunford-Jackson, B.L. & Jordan, S., 2006).

As a result of the confusion in and interchangeable use of these terms, domestic violence cases are many times labeled as high-conflict cases. However, the risks and responsive strategies to each type of case are different, although they may overlap. The crucial differences between high-conflict cases and domestic violence cases include, among other things:

1. In high-conflict cases, there is a relatively equal balance of power between the two parties, and the parties are not making safety-based decisions. However, in domestic violence cases this equality of power is not present, and the abused parent's decisions often hinge on whether such decisions will compromise their safety or that of their children.
2. The safety of the abused parent and children should be prioritized after separation in domestic violence cases; this is not necessarily a concern in high-conflict cases.
3. In high-conflict cases, generally the conflict does not provide the sole basis for choosing one parent as the sole physical or legal custodian of the children; however, in domestic violence cases, many states mandate by law that the violence alone does provide a basis for awarding physical or legal custody of the children to the non-abusive parent (see, e.g., Alaska Stat. § 25.24.150; S.D. Codified Laws § 25-4-45.5; and Wis. Code § 767.24).
4. In domestic violence cases, the abuser is likely to minimize and deny the violence and the abused parent may be unwilling or afraid to disclose the abuse or parenting concerns about the abuser; however, in high-conflict cases, both parents tend to be equally vocal about parenting issues (Dalton, C., Carbon, S. & Olesen, N., 2003).

Other Safety Concerns for Abused Parents and Children

In addition to the mislabeling of domestic violence cases as high-conflict cases, current parenting coordination laws also present safety concerns for abused parents and their children. For example:

1. Many states with parenting coordination laws or court rules call for parenting coordination specifically in high-conflict cases, which these laws and court rules tend to define as domestic violence cases; or they call for its use in domestic violence cases, without providing specific safety-focused practices and procedures (e.g., Arizona, Idaho, Kentucky, North Carolina, Ohio, and Oklahoma).
2. The parenting coordination process is not confidential, so abused parents and their children may be unwilling to disclose ongoing threats or acts of violence or parenting concerns about the abuser and may be at increased risk of harm if information is shared with the abusive parent (e.g., North Carolina and Oklahoma).

(cont'd. on page 28)

Parenting Coordination

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When information that puts a party at risk must be disclosed, the parenting coordinator should alert the party of the disclosure in advance so that the party can take any necessary safety precautions (Dalton, C., Drozd, L. & Wong, F.Q.F., 2004).

3. At least two states using parenting coordination also specifically allow parenting coordinators to exclude attorneys from parenting coordination conferences or interviews (e.g., Idaho and Kentucky). This raises the question as to whether this type of practice may interfere with both parties' due process rights.
4. Most states that allow parenting coordination in domestic violence cases do not address domestic violence training in the statute, court rule, or local rule authorizing parenting coordination; require that the parenting coordinator receive a minimal amount of training, such as one-time only training; or require training on topics such as anger management, which is an inappropriate intervention in domestic violence cases that could heighten the danger for abused parents and their children (Dalton, C., Drozd, L. & Wong, F.Q.F., 2004). This practice is especially problematic because domestic violence is a multifaceted issue and needs a parenting coordinator who understands its complexity. Training alone does not ensure that the parenting coordinator will be able to assess the presence of domestic violence, its impact on those directly and indirectly affected by it, and its implications for the parenting of each party (Dalton, C., Drozd, L. & Wong, F.Q.F, 2004), or to assess whether the abuser is using parenting coordination for continued access to the abused parent and children.
5. Several states do not require parenting coordinators to conduct separate interviews and sessions with parties in domestic violence cases (e.g., Idaho, Kentucky, and Oklahoma). This practice does not prioritize the safety of abused parents and their children or protect abused parents from potential intimidation or coercion by the abuser during parenting coordination.
6. Typically, both parties are required to share the costs of parenting coordination, which may be virtually impossible for an abused parent who has had to flee the abuse and may be starting over. While some states give the parenting coordinator authority to require one party to bear the costs of parenting coordination because of that party's behavior (e.g., North Carolina), it is unclear whether domestic violence can be the basis upon which to require an abuser to pay the entire cost of parenting coordination.

These concerns raise the question whether the use of parent coordinators is ever appropriate in cases involving domestic violence, which mirror the same concerns that were initially raised about the use of mediation in domestic violence cases in Multnomah County, Oregon. However, the Multnomah County experience showed that with appropriate training, procedures, safeguards, and opt-out provisions in place, mediation can improve the outcomes for victims of domestic violence over those which they might otherwise experience in contested court proceedings. Thus, although clearly not appropriate in many cases involving a history of domestic violence, mediation may be a useful tool if thoughtfully used by the courts in custody and parenting time disputes.

Although the parent coordinator movement is a much more recent concept and its use not widespread, with the proper use of the same tools developed in the mediation context, it should not be rejected out of hand in all domestic violence cases. However, its appropriateness is predicated upon ensuring that the primary focus is the safety of abused parents and their children.

Safety-Driven Approaches

In an attempt to provide safety for abused parents and their children and to acknowledge the differences between high-conflict and domestic violence cases, the Association of Family and Conciliation Courts' (AFCC) *Guidelines for Parenting Coordination* (*Guidelines*), set forth specific practices and procedures for parenting coordination in cases with domestic violence that are separate and different from the parenting coordination practices and procedures in high-conflict cases. Such practices and procedures include requiring parenting coordinators to:

(cont'd. on page 29)

Parenting Coordination

cont'd. from page 28

1. screen prospective cases routinely for domestic violence;
2. decline domestic violence cases if they do not have the expertise and procedures in place to manage coercive tactics and the imbalance of power and control in such cases;
3. be trained on domestic violence and child maltreatment on a continual basis;
4. tailor techniques used in order to avoid giving the abuser the opportunity to continue the pattern of power, control, and coercion;
5. conduct interviews and sessions with parties separately;
6. adhere to all protection orders; and
7. take whatever measures are necessary to ensure the safety of the parties, their children, and the parenting coordinator (AFCC Task Force, 2006).

Another approach to increasing the safety of abused parents and their children who may elect or be required to use parenting coordination is to provide an opt-out provision. For example, in Texas parties are allowed to opt out of parenting coordination on the basis of domestic violence. When a party opts out for this reason, parenting coordination can go forward only if the court finds that the objection is not supported by the evidence. When parenting coordination goes forward, the court must require safety measures be taken, such as ensuring that the parties not be required to have face-to-face contact and that parties be placed in separate rooms during parenting coordination.

Conclusion

A key component to making these safety-driven approaches work is to provide implementation guidance for states and parenting coordinators. For example, more guidance is needed about screening effectively for domestic violence and conducting interviews and sessions with parties separately. Without implementation guidance, the safety of abused parents and their children may be compromised.

Although parenting coordination was designed for high-conflict cases, the prevalence of domestic violence cases mislabeled as high-conflict cases means that parenting coordinators are often working with domestic violence cases even if not identified as such. Making parenting coordination safe for abused parents and their children requires that states and parenting coordinators prioritize the safety of abused parents and their children.

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Principal Residence Principles

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by Susan L. Myers, Esq.

The marital residence often is the main asset in a divorce. The parties and their advisors need to consider the current Nevada real estate market when making decisions regarding how to handle the house. Of course, some clients will have equity in their house, and counsel should be aware of the tax implications. This article will discuss a few of the financial and tax considerations regarding the family home to keep in mind as you advise your clients.

Just Because Your Spouse Got the House, Doesn't Mean You're Off the Hook on the Debt

As home prices fall against the backdrop of adjustable-rate mortgages resetting, 100% financing, interest-only loans and maxed-out home equity lines of credit, you may be seeing more clients who are "upside-down" in their homes. My hairdresser told me recently that her brother had just gotten divorced, and that he was going to have to move in with her because he and his now-ex-wife owe more on the mortgage(s) than the house is worth, and can't afford to sell. The brother had quitclaimed his interest in their house to his ex-wife. The brother apparently did not realize that the transfer did not take him off the mortgage. The fact that he did not know this was more alarming because he was represented by counsel. In fairness, I do not know whether he was not advised, or just did not listen.

In any event, this scenario points out the need to make sure that clients understand that, in the eyes of the mortgage lender and credit bureaus, they cannot simply shift the responsibility to the spouse receiving the house by agreement or a court decree. Think back to your first-year contracts and civil procedure classes. The couple and the lender are parties to

(cont'd. on page 31)

Principal Residence

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a contract. However, the lender is not a party to the divorce. The divorcing spouses cannot compromise the rights of the lender, who relied on the credit history, assets and income of the couple. The court in the divorce case has no jurisdiction to compromise the lender's rights, and thus cannot require the lender to let one of the spouses out of the contract. So the spouse obtaining the interest in the house, and taking over the mortgage, needs to refinance or sell the house, which should be part of any property agreement or order relating to the disposition of the house. Otherwise (assuming the wife "got the house"), if the wife stops paying, the husband's credit is on the line, as could be his assets if it is a recourse loan.

The Dry Stuff: Tax Consequences of Transferring or Selling the Family Home

Transfers

Your client might want to know if there are tax consequences for transferring the residence to his or her spouse, or receiving his or her spouse's interest in the house. Generally, the answer is no. If a person transfers his or her interest in a marital residence while married, or to a former spouse if the transfer is incident to divorce, then there is no gain or loss recognized. IRC §1041(a). One exception: if the transferor spouse is a nonresident alien, the non-recognition rules do not apply. IRC §1041 (d).

Timing is everything in being able to take advantage of the non-recognition rules if the transfer is made after the divorce (or annulment) is final. A transfer to a former spouse is incident to a divorce if the transfer: (a) occurs within one year after the date the marriage ceases, or (b) is related to the cessation of the marriage. IRC §1041(c). To be "related to the cessation of the marriage," both of these conditions must apply: (1) the transfer is made under the original or modified divorce or separation instrument, and (2) the transfer occurs within six years after the date your marriage ends. See IRS Publication 504, Divorced or Separated Individuals.[1]

Sales

So what happens when the residence is sold? As of May 6, 1997, taxpayers may exclude up to $250,000 ($500,000 for joint filers) of gain on the sale of a principal residence. To qualify for this exclusion, the taxpayer must have owned and used the home as his or her principal residence for periods aggregating at least two of the five years immediately prior to the sale. In addition, the exclusion may be used no more frequently than once every two years. A reduced exclusion is available if a husband and wife, or either as a result of divorce, must sell a marital residence before owning and using it two of the previous five years. Treas. Reg. 1.121-3(e) indicates that a divorce is an "unforeseen" circumstance. An unforeseen circumstance is an exception to the requirement that taxpayers must own and use a residence two of the last five years to qualify for the exclusion. Thus if the parties meet the requirements for the exclusion and sell the house before they divorce, they would report the gain in accordance with their agreement to split the proceeds assuming they file separately, and take the exclusion, up to the limit, accordingly.

If a spouse, or former spouse, sells a principal residence which was received in an IRC 1041 (property) transfer, then the ownership period from the transferor spouse is "tacked-on" to the transferee spouse's ownership period for purposes of satisfying the two-out-of-five-year rule. For example, if: 1) the husband owned and lived in the house for two years prior to marriage; 2) the marriage lasted only one year and, 3) at which time ownership was transferred to wife, then the wife would be able to "tack-on" her ex-husband's three-year ownership for purposes of the rules, but not his prior residency. Please note that divorce is an exception to the "owned and used" for the two-out-of-five-year rule. In the above example, if wife were to sell the property prior to having lived in it for two years, she would have to prorate the $250,000 exemption based on the number of qualifying months she both owned and lived in the residence.

This example further assumes that both spouses stay on the deed to the house as owners. It should be noted that a spouse's sole use of the marital residence prior to entry of the divorce decree may not be tacked onto the non-occupant spouse's use period, if the non-occupant

(cont'd. on page 32)

Principal Residence
cont'd. from page 31

spouse ultimately receives the residence. Additionally, a taxpayer may elect to not use the exclusion provisions.

In connection with any sale, the seller must know the basis in the property to determine whether there is, in fact, a gain. Assuming a transfer of the home after July 18, 1984, from a spouse or former spouse incident to a divorce, the transferee spouse's basis in the home is generally the same as the transferor spouse's adjusted basis just before the transferee spouse received it. If the house had been owned jointly and the transferor spouse transferred his or her interest therein to the other spouse, the transferee's basis in that interest is the same as the transferor's adjusted basis. The transferee keeps his or her basis in the half he or she already owned. The transferee's basis in the home is then the total of these two amounts.

Losses, Short Sales and Mortgage Forgiveness: Debt Relief

Refinancing a home in the current credit environment may be difficult, especially for a divorcing person who must now rely on one income. If there is not sufficient equity, your client, or your client and his or her spouse, might have to sell the house at loss, meaning that the amount realized (selling price less selling expenses, such as commissions) is less than the adjusted basis of the home. A loss on the sale of a principal residence cannot be deducted.

But what if your client faces selling the marital residence at a loss but does not have the cash to pay off the mortgage? A short sale could be an option in certain situations. In a nutshell, a short sale is when the lender agrees to an arrangement whereby the house is sold for less than is owed. Each bank handles these a little differently, so your client needs to understand his or her lender's policies. Generally, the lender agrees to accept the proceeds of the sale of the house in lieu of a full payoff of the outstanding mortgage balance (but the lender also could require a promissory note for all or some of the balance). If the lender is forgiving a portion of the loan balance, this forgiveness will cause the issuance of a Form 1099 (income from discharge of indebtedness under IRC §108).

However, the Mortgage Forgiveness Debt Relief Act of 2007 (the "Act") provides some, well, relief, for homeowners who have mortgage debt discharged in connection with short sales, loan restructuring and foreclosures. The Act allows individuals to exclude from gross income any discharges of qualified principal residence indebtedness for discharges for a three-year window, i.e., tax years 2007 through 2009, if the loan balance was less than $2 million, or $1 million for a married person filing a separate return. As discussed in more detail in the Nevada Family Practice Manual (Second) 10.9-10.11, the Act has specific requirements, so if your client does not meet them, he or she could still be subject income from discharge of indebtedness.

Conclusion

While you are not a real estate or tax expert (and it is always a good idea to consult such attorneys or a CPA), it is important to at least be conversational with these principles when there is a marital home involved. In addition to the IRS publication relating specifically to divorced or separated individuals, IRS Publication 523, Selling Your Home, provides some good general information.

Endnote:

1. IRS Publications are available at www.IRS.gov.

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Understanding the Custody Evaluation: What Can Custody Evaluators Tell Us?

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by William O'Donohue, Ph.D., Brie Moore, Ph.D., and Lauren Tolle, M.A.

Rates of divorce have skyrocketed over the last 20 years, with the majority of cases involving children under the age of 18.[1] In these cases, the court must make a determination concerning a custody arrangement that protects what many states, including Nevada, call "the best interests of the child.[2]" Nevada has had a unique role in the history of divorce in the United States. As one of the first states to move toward a no fault divorce law, "going to Reno" became a popular euphemism for divorce, and for a few decades a small divorce industry developed in Reno.

Typically, the child's best interests are served in the context of joint custody or an arrangement that provides substantial contact with the both parents.[3] However, certain egregious factors, such as child abuse, emotional instability, or excessive inter-parent conflict, may render a joint custody arrangement unsuitable to protect the child's best interest.

Mental health professionals are increasingly asked to provide recommendations regarding the placement of children. Researchers have discovered that many child custody evaluators often do not adhere to recommended assessment practices.[4] Instead, evaluators frequently over-rely on clinical judgment, which can be riddled with bias and subjective influence.[5] Furthermore, there are currently no clearly defined – let alone reinforced – standards for determining competence and training in child custody evaluators.[6] The guidelines provided by various organizations (e.g., the American Psychological Association) are often vague (e.g., "multiple sources of information must be used" – but provide no information on what these should be). It is therefore vital that judges and attorneys become informed consumers of child custody evaluators and evaluations. Informed consumers can weed out poorly constructed evaluations that are based on clinical judgment, faulty logic, and problematic assessment strategies, rather than systematic arguments soundly grounded on the best empirical knowledge available in this area. The purpose of this article is to provide a model to help attorneys better understand what components should be present in quality custody evaluations.

Egregious Parenting Factors

O'Donohue, Beitz, and Cummings[7] have suggested six factors, based on empirical literature of children's adjustment post-divorce, that are thought of as egregious parenting factors. The reasoning is that no parent is perfect, and a custody evaluation should not be a laundry list of minor imperfections. Instead, the standard should be identification of major problems that affect the best interests of the child. These factors should be taken into account when conducting custody evaluations. We present and discuss each below so that attorneys, judges, and child advocates can be informed consumers of custody evaluations. These factors are:

1. A history of or potential for future child abuse or neglect;
2. Poor parent-child attachment;

(cont'd. on page 34)

Custody Evaluation

cont'd. from page 33

3. Poor parenting skills (developmentally sensitive);
4. Emotional instability/mental disorder of the parent;
5. Environmental instability; and,
6. Exaggerated conflict.

1. Child Abuse.

When keeping in mind that the purpose of custody evaluations are to keep the best interest of the child in mind, it is clear that placing a child with an abusive parent would not be in their best interest. A quality evaluation would assess for the presence of factors that have been shown to differentiate abusive families from non-abusive families. However, it is important to note that mental health professionals have no special ability to make definitive judgments about contested matters of historical fact. If one parent alleges that the other neglected their child in the past, the mental health professional can collect some relevant information but has no crystal ball to look into the past and tell definitely what happened. If the report does this, the attorney should see this as a serious error. However, the psychologist may give some pertinent information within their expertise. For example, abusive families typically manifest more negative emotional tone (i.e., not happy and overtly cheerful), more difficult child behaviors (i.e., the child acts out more than is the norm, is more irritable or agitated), and more inappropriate parental response to the child's good behavior (i.e., parent ignores positive behavior).[8]

2. Attachment.

A healthy, secure attachment to parents plays an important role in the functioning of children and adolescents.[9,10] Attachment is defined as "any form of behavior that results in a person attaining or maintaining proximity to some other clearly identified individual who is conceived of as better able to cope with the world. It is most obvious whenever the person is frightened, fatigued or sick, and is assuaged by comforting and caregiving" (i.e., a child is frightened, cries and seeks a parent to whom they are closely attached for soothing).[11] Separations from a caregiver to whom the child is attached are considered detrimental to development, and can involve problems with peer relationships, aggression, poor school performance and self-esteem.[9,12-14] Currently, there are inadequate assessments for measuring child-parent attachment. Direct observation of parent-child interactions is frequently recommended. To protect against subjective value judgments by evaluators, it is recommended that evaluators focus on types of emotions expressed, how conflict is managed, and how parents attempt to control or direct their child's behavior.[15] However, as a caveat, psychologists have no assessment methods which can validly measure attachment with accuracy. At best they can provide fallible clinical judgment.

3. Parenting Skills.

Deficits in parenting skills that can be harmful to a child's well being need to be assessed and reported. Parenting skills involve logistics from changing a diaper, to being able to appropriately discipline children of various ages, to soothing a child when they are frightened. Three parenting styles have been identified by Baumrind[16] which differentially affect child development:

1) Authoritarian parenting is associated with low warmth, high control, frequent use of punishment, and lack of consideration of child views;
2) Permissive parents are unconditionally accepting of children's behavior without attempting to modify it along prosocial lines; and
3) Authoritative parents are warm, involved, consistently enforce developmentally appropriate expectations and favor reinforcement over punishment to control behavior.

Studies show that preschool through adolescent children who are raised by authoritative parents fare better on virtually every indicator of psychological health than peers raised by nonauthoritative parents.[17] The Child-Rearing Practices Report[18] and the Alabama Parenting Questionnaire[19] are among the best choices available for standardized assessment.

4. Emotional Instability.

Four mental health problems among adults are of particular concern when understanding the consequences of divorce:

1) depression;
2) anti-social behavior;

(cont'd. on page 35)

Custody Evaluation

cont'd. from page 34

3) major mental illness (i.e., schizophrenia and bipolar disorder); and
4) personality disorders.[20]

When parents' mental health problems are related to children's functioning, measurement of parental psychopathology is clinically and legally relevant to the evaluation of child custody or placement (i.e., a depressed parent may not be able to be as emotionally available for their child as a non-depressed parent, but also may be). The evaluator needs both to make an accurate diagnosis (making clear how each DSMIVR diagnostic criterion is met), as well as make the case of how this mental health problem affects the child's best interest. This is best done by a thorough clinical interview assessing child and parental psychopathology, particularly psychotic, mood, anxiety, impulse control, and personality disorders as defined by the Diagnostic and Statistical Manual of Mental Disorders. However, not all mental disorders affect the child's best interest (e.g., simple phobias) so this is not a game of diagnostic "gotcha."

5. Environmental Instability.

Environmental stability is important for promoting child security.[21] Many factors fall under the umbrella of an "instable environment," including severe economic hardship, lack of monitoring, parents' lack of routine and parents' schedules and whether or not they facilitate child needs. This is clinically and legally relevant to the evaluation of child custody or placement. Some good measures include home observation, collateral contacts and testing such as the FACES IV,[22] the Family Assessment Measure[23] and the Family Environment Scale.[24]

6. Parental Conflict.

Parental conflict is associated with deleterious effects on child and adolescent functioning and has been shown to be a stronger predictor of adjustment than family structure.[25] Studies show that approximately 25 percent of parents are in "high conflict" post divorce, which results in severe adjustment problems for children with effects seen into adulthood.[26] One of the most overt forms of parental conflict is parental violence and other acts of marital aggression, exposure to which is the most harmful for children. Parents can inappropriately triangulate their children in their war against their ex-spouse. A good assessment will use a thorough history, collateral contacts, direct observation and the use of standardized measures, such as the Conflict Tactics Scale,[27] to assess parental conflict.

Top Ten Evaluation Questions to Ask when Looking at a Custody Evaluation

1. **Has the evaluator been clear on the overall model they have used to determine the best interest of the child?** Did they look at any of the six factors mentioned above? If not, what is their model of factors affecting the children's best interests? Is the model of child's best interests complete and does it have a good argument supporting it?

2. **Does the evaluator clearly connect assessment information with their inferences and conclusions?** If anyone receives a diagnosis, is the evaluator clear on how the specific diagnostic criteria were met? If the evaluator gives a recommendation (sole custody) does the evaluator provide a clear and valid argument on how specific findings of their evaluation (e.g., parent diagnosis) led to this conclusion? Do they consider other arguments and contrary facts, if any?

3. **Does the evaluator use valid psychological assessment methods to gather information?** Methods such as the Rorschach inkblot test, Child Apperception Test, Draw a House-Tree-Person and many instruments developed for custody such as the Bricklin Perceptual Scales [30] have very problematic psychometrics.[25] If these are used, then the evaluation's conclusions are a problem.

4. **Does the evaluator gather and use all reasonably relevant information?** Have they spoken to teachers and pediatricians about their views of the child's best interests? If they recommend placement in a setting, have they directly observed this and the individuals in that setting? (The first author recently was involved in a custody dispute in which one evaluator recommended an

(cont'd. on page 36)

Custody Evaluation

cont'd. from page 35

out-of-state placement but had no contact with the principals in that setting, no direct observation of this setting and had not evaluated the claims about the alleged problematic quality of the setting.)

5. **How does the evaluator deal with value issues?** Mental health professionals generally are not experts in this. If one parent wants music lessons for the child and the other baseball practice (assuming both can't be done), does the mental health professional make a value judgment regarding the relative merit of these two activities? Custody evaluations often involve value decisions and, at a minimum, the evaluator should explicate his or her argument regarding these.

6. **Does the evaluator use concepts that are not sound or quite controversial?** The mental health field has a lot of variability and too much problematic quality, and thus some constructs (e.g., inner child) are not well-accepted in the field.

7. **Does the evaluator seem biased?** Some evaluators may side with one gender; some may be reactive to some kinds of issues (e.g., infidelity). Remember that evaluators are human, too, and as such, bring their own biases. Good evaluations should fairly document and then evaluate the concerns of each parent about how the other parent meets the children's best interests. In this section of the report the attorney or judge should evaluate for potential biases by seeing if the logic in dismissing or accepting claims is systematically faulty.

8. **How did the evaluator handle the idiosyncratic features that usually arise in each case?** Is the reasoning explicit, sound and grounded on research? For example, the first author has been faced with issues of pornography usage. There is no explicit research on this in custody evaluations. I reasoned explicitly in the report that some hidden (from the children) use was allowable (otherwise, if the standard were higher, there would need to be a lot more foster care placements given the size of the pornography industry) provided three conditions are met: 1) the pornography is not deviant; 2) its usage is not so excessive that it interferes with quality of parent-child relationship; and 3) the usage by the parent remains outside the child's knowledge.

9. **Did the evaluator try to make decisions about matters of fact that mental health professionals have no specialized knowledge about?** If the mother is claiming that an unwitnessed and unreported physical abuse incident happened to her nine years ago, and the father is denying that, this contested factual matter is beyond the expertise of the mental health professional to settle. Still, we have witnessed reports in which the mental health professional attempts to settle these.

10. **Is the report developmentally sensitive?** If multiple children are involved, does it contain separate arguments for the best interest of each child? Is it sensitive to particular unique developmental needs and how these can be addressed now and in the future? Is it appropriately forward-looking? If the child is three years old now, does it consider issues that can arise when the child is a teenager?

Article Summary

Custody evaluations are difficult. Conducting a sound one is important, given the lives it affects but can also be difficult, given the state of knowledge in the field. Evaluations, like most human products, vary in quality. This article attempts to provide an insider prospective so that attorneys and judges can better assess the quality of the evaluations they see.

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(cont'd. on page 37)

Custody Evaluation

cont'd. from page 36

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Getting Paid Through an Attorney's Lien After *Argentena*

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by Marshal Willick, Esq.

In *Argentena v. Jolley Urga*, 125 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 40, Sept. 24, 2009), the Nevada Supreme Court effectively made it more difficult for attorneys to collect on either retaining or charging liens. The primary holding of the case was that in the absence of an enforceable charging lien, a client's request to liquidate a retaining lien, or a client's consent to the District Court's adjudication of a retaining lien, the District Court lacks jurisdiction to adjudicate an attorney/client dispute as to fees owed.

Partially overruling precedent from the past 50 years, the court found that no valid charging lien could be applied when no recovery was obtained for the client (as when the client's case was purely defensive, and no money judgment was obtained from the opponent). Further, the court found that any summary adjudication would be reversible error in the absence of a "basis for its decision in awarding the fees" as to reasonableness of the fees charged in light of the factors recited in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) and *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005). Finally, the court found that the summary adjudication process would be entirely improper if a malpractice claim was pending by the client.

Reader plvlaw1 has written in to our website www.willicklawgroup.com, asking: "If we adjusted our retainer agreement to include language that we can pursue judgment of a lien through the case for which we are retained, will that be adequate to allow pursuit of the judgment without the necessity of filing an independent action?"

The answer is "yes," but altering the retainer agreement is not enough to cope with all that *Argentena* requires. In addition to two changes to a standard retainer agreement, a motion seeking adjudication of an attorney's lien, and the resulting order, are now required to be much more detailed.

The two necessary changes to retainer agreements should include, immediately below the recitation of the firm's fee schedule, words to the effect:

> Client agrees that these fees are reasonable on the basis of Attorney's ability, training, education, experience, professional standing and skill, and the difficulty, intricacy, importance, and time and skill required to perform the work to be done.

(cont'd. on page 39)

ARGENTENA

cont'd. from page 38

This term mirrors the necessary considerations of an attorney's fee award under *Brunzell* and *Wilfong*. In addition, every retainer agreement should have a section as to liens and adjudication. Our model language reads:

> Client hereby grants Attorney a lien on any and all claims or causes of action that are related to the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums due and owing to Attorney at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement, or otherwise. Any amounts received by Attorney's office on Client's behalf may be used to pay Client's account.
>
> Attorney will retain possession of Client's file and all information therein until full payment of all costs, expenses, and fees for legal services, subject to turnover or destruction of the file as set out in Paragraph ___. Client consents to the district court's adjudication of any such lien in the underlying action without requiring the filing of a separate action.

And since an adjudication would be reversible without findings under those cases, any motion for adjudication should make representations as to the required factors, and any order adjudicating a lien should include findings, as to:

1. *The Qualities of the Advocate*:
2. *The Character of the Work to Be Done*:
3. *The Work Actually Performed by the Lawyer*:
4. *The Result:*

Finally, there is language within *Argentena* indicating that if the client wishes to assert a malpractice claim against an attorney, the summary adjudication procedure is not available. Another reader has asked why that could not be made a matter of contract, as well.

Presuming it's allowable, such an adjustment would further modify the sentence in the "Liens and Adjudications" section of a retainer agreement to read:

> Client consents to the district court's adjudication of any such lien in the underlying action without requiring the filing of a separate action, regardless of whether any other action might be or has been filed by either Attorney or Client against the other, including any action alleging malpractice.

Such a modification warrants a clear and strongly-worded warning, usually at the end of the agreement:

> This Agreement is a formal legal contract for Attorney's services. It protects both you and your attorney, is intended to prevent misunderstandings, and it may vary the law otherwise applicable to attorney's liens and resolution of fee disputes. **DO NOT SIGN THIS AGREEMENT UNTIL YOU HAVE READ IT THOROUGHLY AND ARE SURE YOU UNDERSTAND ITS TERMS.** If you do not understand it or if it does not contain all the agreements discussed, please call it to our attention and be sure this written Agreement contains **all** terms you believe are in effect between us. You have an absolute right to discuss this agreement with independent counsel (or any other advisor) before entering into this agreement, and we encourage you to do so.

All of this extra work is a burden, but it is still a lot faster, easier and cheaper than filing a separate action for recovery against a client and therefore actually in the interest of both attorney and client so that any disputes as to fees owed can be expeditiously, efficiently and economically resolved.

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