NFLR
NEVADA FAMILY LAW REPORT

Volume 19, Issue 1 Spring 2006

WELCOME TO THE NEW NFLR!

The Executive Council of the State Bar of Nevada's Family Law Section is pleased to present to you the latest *Nevada Family Law Report*, long-missed by our section as a regularly-issued publication. In its revival as a quarterly report, we tip our hats to our predecessors, who labored before us in creating and maintaining its rich content and format. We are now lucky to have a few individuals with some time in their schedule to again work on the *Report*, and in it we hope to cover topics from the north, south and rural practice regions on a variety of issues for your information, and possibly as citeable authority.

This Spring 2006 issue is open in focus, with articles on financial issues, starting with a detailed article about the new Bankruptcy Law changes and its impact on family law issues, followed by one on divorce financial planning. Consistent with our desire to cover other areas, the ADR option of collaborative law is presented, along with commentary about increasing salaries and the limitations of the legislative presumptive maximum amounts for child support.

This is a publication for our entire Family Law Section. If you want to see space devoted to a particular issue, then ask our editorial staff, or better yet, write a few words for publication. The direction of the *Report* is open to your needs, so tell us what you want covered.

The Family Law Section Executive Council

IN THIS ISSUE:

NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada. Subscription price for non-section members is $35, payable in advance annually from January 1 to December 31. There are no prorations.

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.

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Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

State Bar of Nevada 78th Annual Meeting at the Grand Hyatt Kaua'i Resort and Spa

Did you know that this year, the State Bar of Nevada's Annual Meeting, scheduled for June 21-24, 2006, will feature a special **Family Law track**? Did you know that all Family Law Section Members who register for and attend the meeting will receive a **$250 room credit**, applied directly to their hotel bill, courtesy of the Family Law Section?

Well, now you do! Don't miss this chance to see Kauai, the gorgeous "Garden Isle" of Hawaii, from the comfort of a fabulous resort. You can also attend up to 13 hours of CLE, including two ethics hours, have breakfast with Supreme Court Chief Justice Robert Rose, join a golf tournament, attend a banquet and a 70s Disco party, and much, much more.

You'll have plenty of things to do outside our planned events as well. Kauai was made for enjoyment! Take an ATV tour, take a few snorkeling dips from the comfort of a catamaran, go horseback riding, see waterfalls and extinct volcanoes, and visit filming locations from movies such as Raiders of the Lost Ark or Jurassic Park.

For more information, and to see some pictures of what you'll miss if you don't join us, check out the back cover of this edition of the NFLR, visit the State Bar of Nevada's website at **www.nvbar.org** and choose "Annual Meeting," or simply call us at **1-800-254-2797** and ask to have a brochure sent to you.

Don't delay, because early-bird registration at a savings of $50 off our standard CLE tuition ends on May 1, 2006, and you must make your room reservation by May 29, 2006 to take advantage of our fabulous rates at this "Hawaiian Classic" resort.

BANKRUPTCY AND FAMILY LAW AFTER ENACTMENT OF BAPCPA

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 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).

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BANKRUPTCY
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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

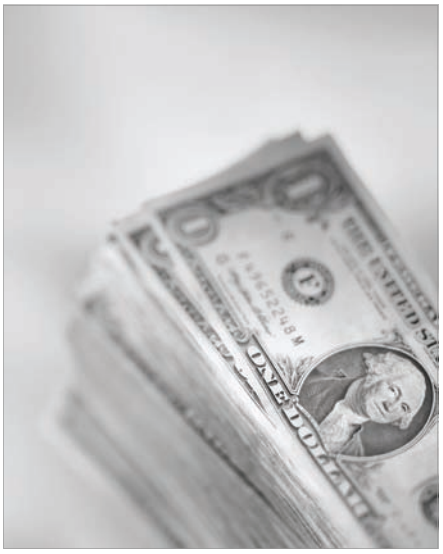
One of the greatest protections the bankruptcy code offers a debtor is the automatic stay. Once a debtor files bankruptcy, all collection and enforcement actions against the debtor are automatically halted due to the provisions of 11 U.S.C. § 362. However, § 362 has been edited to create many new exceptions 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. 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 the support 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.

Marjorie A. Guymon, Esq. ***is a founding partner of*** **GOLDSMITH & GUYMON, P.C.** *Learn more about their firm at* **www.goldguylaw.com.** *Thanks to Shelley D. Krohn, Esq., Shareholder, and Andrew Root, J.D., for their assistance in writing this article.*

A 4-PERCENT SOLUTION TO LUMP SUM DIVORCE AGREEMENTS

By Melissa Attanasio, CDFA

Divorce proceedings are complicated enough. But very often the divorcing spouses and their advisors can get stuck over one important number -- the appropriate discount rate to use when calculating lump-sum buyouts or present value equalization payments. In the former situation, the contentious issue is often seen when one spouse is willing to accept a lump-sum payment in exchange for his or her right to the marital portion of a pension (especially if that lump-sum buyout is expected to provide an income stream that will last a lifetime). In the latter situation, it commonly arises when the high-income spouse would like to do a lump-sum equalization payment instead of paying spousal support.

In both instances, the discount rate that is used can make a major difference in the buyout amount. The payor spouse might argue for a high discount rate such as 8%-- being that the average annual rate of return of a diversified investment portfolio comprised of 50% stocks and 50% bonds exceeded that over the past 30 years (based on the thought that the receiving spouse can earn that going forward.) Not so with payee spouse. He or she might want a guaranteed rate, such as the PBGC (Pension Benefit Guarantee Corp.) rate, the type commonly used by pension plans.

Those are not the only rates to latch onto when gearing up for negotiations, either. There are a slew of them that the parties often select. Among them are the GATT rate, the interest rate of a AAA-rated corporate bond, or the rate of return provided by a 30-year U.S. Treasury Bond.

So the question for advisors becomes, "Is there a reasonable discount rate to use that both parties can agree to?" Perhaps. Consider the results of historical research that has been done within the financial community which looks at what withdrawal rate can be used to "guarantee" that an account will remain solvent over the long-term (a 30-year period).

Most of the studies show that withdrawing an inflation-adjusted 3% to 5% of one's portfolio annually would be safe. Here's how two of the most extensive studies determined that:

> Three professors at Trinity University examined different withdrawal rates and asset allocations between 1926 and 1995. They found that a 3% annual withdrawal rate was successful at maintaining assets over the long-term in stock-heavy portfolios (between 50% and 100% of the assets were in stocks). When withdrawals were increased to 4% annually, success was in the mid-to-high 90% range depending on the stock allocation. (When the portfolio was

100% bonds, the success rate was only 80% at 4% withdrawals.)

El Cajon-based financial planner, William Bengen, also extensively studied different withdrawal rates and asset allocation combinations over different market and economic cycles. He found that 4.1% was safe as an annual withdrawal rate for portfolios containing 50% to 75% stock allocations in order for the funds to last 30 years.

It would be worthwhile to consider this research when seriously negotiating a divorce settlement. Although the circumstances of each case vary, when a lump-sum buyout is intended to provide a lifetime (defined as 30 years) income stream, thinking 3% to 4.5% annual withdrawals seems safe.

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Melissa Attanasio is a Certified Divorce Financial Analyst. She can be reached at ATTANASIO FINANCIAL STRATEGIES GROUP OF WACHOVIA SECURITIES at 702-562-3928 and **www.Attanasio.wbsec.com.** Wachovia Securities, LLC is a member of the NYSE & SIPC.

Articles Are Invited!

The Family Law Section wants you to write for the *Nevada Family Law Report.*

The next release of the NFLR is expected in June, 2006, with a submission deadline of May 15, 2006.

Please contact Bob Cerceo at bobcerceo@aol.com

with your proposed articles anytime before the next submission date. We're targeting articles between 350 words and 1500 words, but we're always flexible if the information requires more space.

COLLABORATIVE FAMILY LAW PRACTICE - MAKING RAPID PROGRESS IN NEVADA

by Lisa C. Wright, CDFA™, CFP®

There is a growing movement across Nevada among professionals working in the field of divorce called collaborative family law practice. This new approach to settling divorces stems from the belief that the current adversarial method brutalizes everyone it touches and hurts families. While this approach is relatively new to Nevada, it is well-established in other areas of the country and Canada and is growing rapidly around the globe.

The process of divorce is truly multidimensional, having legal, emotional and financial consequences. No professional can be expert in all three areas. Hailed as the wave of the future, the collaborative method brings together the skills of lawyers, financial advisors and mental health coaches in an atmosphere

of teamwork and advocacy as opposed to taking sides and "fighting it out" in court. Each professional discipline has a valuable role in the process. The efficiency of this interdisciplinary model has become a saving grace for people who divorce, not to mention a refreshing alternative for practitioners.

The collaborative approach can achieve effective and timely settlements because all parties to the divorce agree from the outset to avoid litigating in court, which further helps to reduce costs to the clients in dollars and cents. All of this contributes to maximizing the financial resources of the family for the future and minimizing the "scars" of divorce so that everyone has a better chance for a healthier start to their new life.

After more than two years of a tireless grassroots effort at education and outreach by a small group of very dedicated people, Collaborative Professionals of Nevada (CPN) was officially established in March of 2005 to formally establish standards of practice, protocols and codes of ethics for collaborative family practice in Nevada. Since then CPN, on a shoestring budget, has sponsored two three-day interdisciplinary trainings, a comprehensive mediation training and speaking engagements at the Ely Family Law Conference as well as to other professional groups. CPN currently has liaisons to family court in both Washoe and Clark counties and is working closely with the judiciary, who have been supportive of the process for the most part. In addition, CPN has been profiled a number of times in local newspaper and television interviews which have been instrumental in bringing several new cases to Practitioner members. There are currently about a dozen collaborative divorces in progress right now, a number which will undoubtedly increase as our marketing and speaking engagements continue and our exposure and visibility in the region widen.

Collaborative Professionals of Nevada has two levels of membership. General members are those who support the process and who may offer ancillary services such as business valuations, QDROs or mortgage services. Practitioner members have qualified by education, experience, training and endorsement by peers to participate fully in collaborative divorce cases and who have earned the right to market their services as such. Practitioner members are lawyers, financial specialists or mental health coaches. To date, there are about fifty (50) practitioner members throughout the state who work in local practice groups, and the number is growing steadily.

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Lisa C. Wright, CDFA™, CFP®, a Certified Divorce Financial Analyst, is the Co-Chair, Representing Southern Nevada for the Collaborative Professionals of Nevada. For more information, please visit the CPN website-in-progress at **www.CollaborativeProfessionals.com** and the **International Academy of Collaborative Professionals at www.CollaborativePractice.com.**

NEVADA HAS EFFECTIVELY LOWERED CHILD SUPPORT ACROSS THE BOARD

by Marshal S. Willick, Esq.

From time to time, the NFLR has historically noted the progress of inflation and its effect on child support awards that run into the "presumptive ceiling" set out in NRS 125B.070.

Although inflation has been quite low recently, the effects are cumulative. In 1987, when the child support statute was enacted, the CPI was 113.8. As of December, 2005, the CPI was 196.8. Accordingly, the value of money has changed so that a $500 child support award today has only $289.13 worth of purchasing power in 1987 dollars.

Put another way, the inflation-adjusted equivalent of the $500 presumptive cap in "1987 dollars," as of December, 2005, is $864.67. A child support award would have to be that high today to equal the value of a $500 award back in 1987. Such awards were common at that time, but given the restructuring of the child support statute in 2001, no one pays over $800 in child support today unless his income is over $150,000 per year. This state has, thus, effectively lowered child support for all children in all cases.

Some background is useful to understand what went wrong, and why. In 1992, and again in 1997, Child Support Statute Review Committees found that Nevada's child support statutes provided a low-to-moderate sum of support for children, compared with the guidelines of other states. The proponents of the 2001 change in the statute were concerned that the old $500 presumptive "cap" just had to go, and they traded away, making the baselines move to an inflation-indexed starting position in order to get that change.

In other words, they abandoned the $750 that inflation had changed the 1987 limit into, and reset it at $500, in ***2001 dollars***. It was a terrible deal, and a disaster for the children of all middle- (and above-) income parents in this state. The 2001 statute effectively reduced the support provided by our statute by a third, making child support as calculated in Nevada virtually a joke.

To illustrate, a wage-earner making $50,000 per year has a theoretical child support obligation of 18% of his gross income under NRS 125B.070 – a percentage figure that was ***already*** on the average-to-low side. That percentage corresponds to $750 per month. But after the 2001 changes, the presumptive maximum reduces the support paid by such a person to $547 (as of 2005). The wage-earner no longer pays anything close to 18% of his income to support the child – the presumptive ceiling lowers support to 13%.

And the effect only gets worse as income increases. The bracketed income figures provide for tiny increases across income ranges. The $150,000-per-year wage-earner, if paying 18%, would provide $2,250 per month in child support. Under the 2001 changes, however, that person pays only $877 per month – a whopping 7% of his monthly income.

Theoretically, lawyers can note the absurdity of such support figures, and judges can vary upward from them. The crush of the docket and the inherent ease of resting on defaults, however, makes variance rare even when non-custodial parents make several hundreds of thousands of dollars per year, and when variance ***is*** granted, the dollar sum of the change is often trivial.

The further the gap between the percentage calculation and the presumptive maximum, the greater is the betrayal of children's basic entitlement to share in the income of both their parents for their support. Those who pushed through the 2001 changes were well-intentioned, but basic math, and the realistic cost of raising children, has proven that they erred big-time, and the children of Nevada are paying the price for that error – every month, in every case.

It is time for the Legislature to take another look at the child support statutes, and for someone to have the courage to suggest that $877 per month is an obscenely low child support figure for a non-custodial parent earning $150,000 or $200,000 per year.

The solution is simple – the presumptive maximums should be reset to their inflation-adjusted equivalencies from when the child support statute was first passed. Support for someone making $50,000 per year would be reset to $750, and so on up the income brackets. That is not any kind of "jump" – it is only undoing the ***decrease*** that custodial parents, and their children, have suffered with since 2001. It is long overdue.

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Marshal S. Willick, Esq. is the principal of the WILLICK LAW GROUP, a family law and domestic relations firm, and can be reached through the firm's website at **www.WillickLawGroup.com**.

78th Annual Meeting

Grand Hyatt Kauai Resort and Spa, Hawaii

Wed. June 21 - Sat. June 24, 2006

This year's meeting offers a special Friday **Family Law Track** with a special speaker recruited and paid for by the Family Law Section Executive Council. **Family Law Section members registering for the convention and staying at the Grand Hyatt Kauai will receive a $250 room credit applied directly to their hotel bill.**

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State Bar of Nevada
600 E. Charleston Blvd.
Las Vegas, NV 89104

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