

Family Law Section

NEWSLETTER

Winter 2006

Family Law Newsletter Editorial Committee

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EDITOR'S NOTE

Opinions and positions stated in signed material are those of the author and not by fact of publication necessarily those of The Missouri Bar or the Family Law Section Newsletter. Original and fully current sources of authority should be researched.

VIEWS FROM THE CHAIR

By Carla G. Holste, Jefferson City

In my first article as chair of the Family Law Section, I expressed a desire to actively work together as a Section to realize improvements in the area of family law. We need to find new and creative ways to address high-conflict cases. We must continue to develop new procedures for protecting children whose parents are going through divorces. Our annual Family Law Conference in August provides opportunities not only for continuing education for practitioners, but for challenging ourselves to “think outside the box.”

I would encourage each of you to set aside time on your calendars to attend the Family Law Conference this year. The dates are August 3-6 at the Lodge of the Four Seasons in Lake Ozark. There are going to be new and exciting speakers and topics, ranging from virtual visitation to international adoptions to working sessions on the drafting of documents related to the distribution of retirement plans, and many other topics. Our keynote speaker is Don Saposnek, who will speak on developing parenting plans that actually address the unique circumstances of each particular case rather than “cookie cutter” parenting plans.

These conferences are always well-attended, highly informative and worth every dime spent! I always enjoy hearing from others, especially when we are fortunate enough to have members of the judiciary speak to us. When you get the conference brochure, take some time to read through it and send in your registration.

The conference is one way we get something valuable for ourselves. I would also like to challenge the Section to start thinking of ways we can give back to others. We know all too well how emotionally draining domestic relations cases are for our clients. At our spring meeting on May 12, I am going to ask those attending to brainstorm about ways we can provide some assistance for those who



suffer the most – children. Be creative and come to the meeting in May with your ideas.

Included in this newsletter is a nomination form for Family Law Practitioner of the Year. I would like to have all nominations submitted by the May meeting. This is an opportunity to recognize a fellow practitioner who has made a significant contribution to the area of family law. Many of us devote substantial hours to our practices and we need to acknowledge those who have made contributions that were outstanding and which improved the practice. The form will also be on The Missouri Bar website under the Family Law Section. Please give this serious consideration and submit your nomination. The recipient will be announced at the Family Law Conference in August.

Another matter to keep in mind is new legislation. This year, there are far more proposed bills addressing family law than in recent years. I am asking for volunteers to be at the Capitol during the first two weeks in May so that, if we need to talk to legislators about any bills at that time, we can do so. If you are willing to help out, please email me at carla.h@carsoncoil.com.

Immigration in the Bushes

*by Mira Mdivani
Overland Park, KS*

Introduction

Immigration in the bushes? Let me explain: immigration agents sitting in the bushes at 2:00 a.m. watching what is going on inside the house in order to investigate who lives there and what the relationships are. What does this have to do with family law? Not much, unless at least one of the people in the investigated family was born outside the U.S. and is seeking an immigration benefit, such as U.S. permanent residence or citizenship status. Then, family and immigration lawyers have something to talk about!

No Magical Transformation Through Marriage to a U.S. Citizen

Contrary to popular belief, marriage of a foreign national to a U.S. citizen in itself does not magically transform the newlywed into a U.S. citizen or permanent resident. Nor does the marriage, in itself, entitle the foreign national to work or stay in the U.S. Marriage creates an opportunity, in most cases, for the U.S. spouse to file an Immigrant Petition for the foreign spouse. If the foreign spouse came to the U.S. with a visa and otherwise is not prohibited from adjusting status in the U.S., the foreign spouse can apply for permanent residence in the U.S. While U.S. Citizenship and Immigration Services (USCIS) looks into the application, the foreign spouse can also apply for permission to work.

As far as families go, normally the most blessed ones are the most careless ones. I have seen Canadians and Brits coming to the U.S. on visa waivers (no visa required, just show your passport), marrying, and staying without filing anything with the USCIS, only to find out years later that they must face harsh consequences for having stayed in the U.S. illegally. For example, if such spouse stays in the U.S. without status for one year and then leaves, a 10-year bar applies. In plain English, this may happen to a foreign national who has been living in Kansas City for the past five years with her U.S. citizen husband and their three U.S. citizen children. She then travels with her family to Canada for a vacation. Upon trying to come back to the U.S., the immigration officer on the border tells the shocked family that Mommy cannot

go back home to Kansas City, and that she must spend 10 years outside the U.S. The U.S. spouse can file a waiver of the 10-year bar, but it may take months or even years before USCIS grants it.

Seven Years of Separation

If you ever get involved with advising a couple before they get married, do not forget to ask where each of your clients was born. If the answer is “outside of the U.S.,” we need to talk. Let’s imagine a situation where a U.S. lawful permanent resident (or “green card” holder) from Kansas City is in love with a woman who lives in Mexico. Can she immigrate to the United States legally? Of course! He can file a petition for her immediately. How long will it take before she can come here legally? Seven years! What!???? Yes, seven years, because there are not enough immigrant visa numbers in that category for Mexico. Can something be done to change the situation? Maybe – if your lawful permanent resident client is eligible to apply for U.S. citizenship, he should do so. Once he is a U.S. citizen, the process of bringing the loved one to the U.S. legally will take less time – depending on circumstances, approximately one year or less in some cases.

Immigration Marriage Fraud Act

Remember those guys in the bushes? I mean, the Immigration and Customs Enforcement (ICE) agents investigating who lives in the house, etc. Why are they there? Because under the Immigration Marriage Fraud Act, foreign nationals applying for an immigration benefit based on marriage, such as a green card, bear the burden of proof with respect to whether or not the marriage was entered into in good faith. It is not enough to present USCIS with a marriage certificate – it is best to file as much evidence as possible: pictures, joint leases and mortgages, joint bills, joint bank accounts, affidavits of family and friends. Immigration lawyers joke that USCIS wants to make sure that if things are not going well financially, both spouses go bankrupt. This is one of the reasons why family lawyers need to be

Immigration in the Bushes

(Continued)

careful when drafting prenuptial agreements: If viewed from the point of view of an immigration officer, might the agreement create an appearance that the marriage is not a true union, but a vehicle for one of the parties to gain permanent residence in the United States?

Timing is Everything

Let's say your U.S. citizen client and her French boyfriend (who is in the United States on a student visa) go to Mexico for spring vacation. Things go so well that they decide not to wait any more and tie the knot, which they do two weeks after coming back to Kansas City. Then, she files an immigration petition for him, he files his "green card" application, and several months later they go to an interview with an immigration officer. They are not nervous – it is a beautiful case, with tons of evidence of good faith marriage, dating, commingling resources, living together, etc. Suddenly, an officer says to the French husband, "Well, it looks like you committed immigration fraud, so I can't approve this case. Your U.S. citizen wife can file a waiver with evidence that the denial will cause her extreme hardship – and please note that separation of family members is not 'extreme' hardship under immigration law. If you fail to submit it or to prove extreme hardship, we will deny your case, and you will be subject to deportation." The U.S. citizen wife says, "This is absurd — we were not involved in any fraud!" What the couple is against here is the U.S. immigration law, which presumes the worst about all the foreigners. If a non-immigrant (such as a French husband on a student visa) enters the U.S. and shows immigrant intent (such as marrying a U.S. citizen) within 30 days of entry, there is a **presumption** of immigration fraud. If marriage occurs within 30 to 60 days of entry, the presumption becomes **rebuttable**. After 60 days, there is no presumption. So timing is everything!

Foreign Adoptions

If your clients want to adopt a child from abroad, you can tell them this: It can be done

with some countries but not with others, and you need to have a lot of patience and resources to go through with a foreign adoption. It is best to work through a reputable adoption agency. The agency should be able to guide your client through procedures abroad, while the family practitioner can handle the U.S. state adoption part, and the immigration practitioner can resolve issues related to the child's visa and U.S. citizenship. There are several critical things to know about foreign adoptions. First, the child cannot be older than 16 years old for the adoption to have any immigration impact, unless he or she is a sibling under 18 of an already adopted child. Second, if the child is not an orphan, the adoptive parents will have to physically live with the child for two years before the child is able to immigrate to the U.S. Third, Overland Park, Kansas-based lawyer Kathleen Harvey, who is an expert on foreign adoptions, always says something to the effect of, "This stuff is complex and involves a child's life, so do not attempt at home and get an expert to handle it."

Violence Against Women Act

The issue of violence and extreme mental cruelty often comes up in families where one spouse is a U.S. citizen and the other is not, but needs the U.S. citizen to sponsor a visa or a green card. When a foreign spouse (in most cases, a woman) is abused, she often does not break out of the cycle of violence. In part, this is caused by their dependence on the abuser for almost everything: shelter, food, transportation, money, social contacts and, most importantly, information. Often, abusers use their power to file or not file an immigrant petition for the woman as a carrot and stick tool to justify abuse, and they brainwash them into believing that they have to stay with them or be deported. Recent studies show that 83% of battered immigrant women never even call the police.

Often, abusers harass their immigrant victims through courts, threatening to take away their children. However, family practitioners should be aware that immigrant survivors of domestic violence are covered under the Violence Against Women Act

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(VAWA). Under VAWA, an abused woman can file a self-petition for her green card if she can show: (1) she entered into marriage in good faith; (2) she has good moral character; and (3) she was subjected to physical abuse or extreme mental cruelty. A woman does not need to stay married to the abuser. VAWA empowers abused survivors to leave their abusers and build a life in this country on their own. Family practitioners should know that the woman is protected from deportation even while her petition is pending, and the fact that she yet does not have legal status in this country cannot be used against her in divorce and custody determinations.

Conclusion

There are so many more things to talk about: special immigrant juvenile status for

orphaned or abandoned children, timing of fiancée's visas if a fiancée has kids, and on and on. However, the space given to me is limited. If I have convinced you to ask where your clients were born as part of your initial consultation, and either to learn as much as possible about immigration law or to involve immigration lawyers where immigration issues may arise, that's what I was going for. Otherwise, I hope you will have fun serving your U.S.-born clients who fall in love with foreigners or foreign-born clients. Just wait until holiday season and see your office get filled with French chocolate, Mexican tres leches cakes, Russian honey ginger cookies, and other signs of appreciation from those who would be lost in the sea of family and immigration law without you.

The Effect of the Bankruptcy Amendments on Family Law

by Jacob W. Stauffer
Kansas City

Consumer bankruptcy and family law issues have always had a significant degree of overlap and interplay. Among the sweeping changes to the consumer bankruptcy law recently enacted by Congress, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "the act") is a slant that interplays and overlaps even more dramatically in favor of family law concerns and domestic support creditors.

The Way Things Were

Prior to the enactment of BAPCPA, family law matters were specifically dealt with under the Bankruptcy Code in a number of ways, but most importantly in the non-dischargeability provisions of 11 U.S.C. §§ 523(a)(5) and (15). These provisions acted as exceptions to the general rule that a Chapter 7 debtor is entitled to a discharge of all debts upon distribution of the debtor's non-exempt assets to creditors. Old § 523(a)(5) provided that a debt to a spouse, former spouse or child of the debtor for alimony, maintenance or support in connection with a separation agreement, divorce decree or other court order was not dischargeable in bankruptcy unless such debt has been assigned to another entity or such debt includes a liability that is not in the nature of alimony, maintenance or support.

Added by the 1994 amendments to the Bankruptcy Code, old § 523(a)(5) provided that a debt incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other court order was not dischargeable in bankruptcy unless: (1) the debtor does not have the ability to pay such debt with income or property not reasonably necessary to preserve and maintain a business if the debtor is engaged in a business, or (2) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse or child of the debtor.

However, courts broadly construed the § 523(a)(5) exceptions to include debts payable to third parties and debts from which the debtor is to hold a former spouse harmless in a separation agreement or divorce decree where such awards were found to be in the nature of support or maintenance. As such, the majority of obligations, whether owed directly to the debtor's former spouse or to a third party, would have been found to be not dischargeable under § 523(a)(5) if the failure to pay would impair the non-debtor's ability to maintain his or her standard of living or provide support for the couple's children.¹ Section 523(a)(15) had the ability to broaden

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the scope of non-dischargeable family law debts even further where the debtor had the ability to pay for such debts. Between the two provisions, it was difficult for debtors to escape family law liabilities through bankruptcy.

Additionally, family law claimants were afforded other privileged treatment. Under § 522(c), family law creditors were entitled to reach exempt assets that were out of the reach of other creditors. Under § 507(a)(7), family law claimants were entitled to priority over other unsecured claims. The automatic stay of § 362 was relaxed to allow family law claimants to pursue the collection of alimony, maintenance or support from property that was not property of the estate.

The Way Things Are Now

Despite the fact that nearly every debt or obligation that might be awarded through a separation agreement or divorce decree was not dischargeable in bankruptcy proceedings and that a debtor on the losing end of an untenable divorce award might only be able to reduce his or her liabilities if she could not support himself or herself, Congress, through BAPCPA, essentially eliminated bankruptcy as an option for a debtor needing to get out from under divorce obligations. Following BAPCPA, family law concerns and exceptions permeate numerous facets of the consumer provisions of the new Bankruptcy Code.

Even with the protections in the old Bankruptcy Code, it is evident from the text of BAPCPA that Congress considered family law claimants to be a vulnerable class deserving of greater protection in bankruptcy.

The act has eliminated the bifurcation of support obligations and property settlements and instead treats both debtors for support obligations and property settlements the same way support obligations used to be treated. New § 523(a)(5) provides that a debt "for a domestic support obligation" is not dischargeable.² New § 523(a)(15) provides that a debt "to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement,

divorce decree or other order of a court of record, or a determination made in accordance with state or territorial law by a governmental unit" is not dischargeable. Accordingly, there is no longer a balancing test as there used to be in old § 523(a)(15) and family law obligations, whether support obligations or property settlements, are not dischargeable. While the prior §§ 523(a)(5) and (15) were able to prevent the discharge of the vast majority of family law obligations, Congress has now made it even more difficult.

The act also expands the exceptions from the automatic stay for domestic support obligations. Section 362(b)(2) provides that the automatic stay does not work to stay proceedings (1) for the establishment of paternity, (2) for establishment or modification of an order for domestic support obligations, (3) concerning child custody or visitation, or (4) for dissolution of marriage except to the extent it seeks to divide property of the estate. More importantly, §§ 362(b)(2)(B) and (C) provide that the collection of domestic support obligations are not stayed and neither is the garnishment of post-petition income for the payment of domestic support obligations. Moreover, the withholding or restriction of driver's, professional or recreational licenses under § 466(a)(16) of the Social Security Act for failure to pay domestic support obligations is not stayed.³ Nor is the interception of tax refunds under §§ 464 and 466(a)(3) of the Social Security Act.⁴ Also, the reporting of delinquent domestic support obligations to credit agencies and the enforcement of medical obligations is not stayed.⁵

Section 507(a) of the Bankruptcy Code has been amended to elevate domestic support obligations from seventh among priority unsecured claims to first among priority unsecured claims. Accordingly, domestic support obligations are paid only after the fees and expenses of a trustee in bankruptcy cases.

Sections 407 and 1302 have been amended to place the duty on the trustee to provide notice to a domestic support creditor that such creditor is entitled to use state collection services and to provide the contact information for such services. Additionally, the trustee

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must explain the creditor's rights in the proceedings, notify the state enforcement service of the domestic claim, notify the state enforcement service of the debtor's discharge and address for the debtor and debtor's employer, and identify those debts reaffirmed or found to be non-dischargeable.

Section 1322 has been amended to require that if a Chapter 13 plan provides for less than full payment of domestic support obligations that have been assigned to a governmental unit or are owed directly to a governmental unit, that the plan provide for the payment of all the debtor's projected disposable income for a five-year period under the plan, as opposed to a shorter three-year period allowed in other cases. Section 1325(a)(8) has been added to the Bankruptcy Code to require as a condition of confirmation of a Chapter 13 plan that the debtor has paid all amounts required to be paid under a domestic support obligation that arose after the date of the bankruptcy petition.

The Effects

While BAPCPA undeniably increases the priority of family law claims and makes it even more difficult to discharge obligations, critics of the act have stated that because the reality of the vast majority of Chapter 7 cases is that the debtor has no unencumbered assets, the fact is that the act has elevated the priority of family law claims to "first in line to receive nothing."⁶ Others have criticized the fact that BAPCPA has expanded the range of non-dischargeable debts, increasing the number of competing claims with which support creditors will have to contend to collect on their claims following a discharge.⁷ The second criticism is more pertinent. The effect of BAPCPA is to force more debtors into Chapter 13, where obtaining a discharge is more difficult because, historically, the majority of debtors do not complete their plans. Despite the fact that Congress has chosen to protect family law debts from discharge, they have expanded the amount of competing claims not subject to discharge. Accordingly, difficulties in collecting family law debts may be even greater than they were prior to the enactment of BAPCPA.

Footnotes

1. Margaret Mahoney, *Debts, Divorce, and Disarray in Bankruptcy*, 73 UMKC L. REV. 83.

2. The term "domestic support obligation" is defined in 101(14A) of the Bankruptcy Code as follows:

The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –

(A) owed to or recoverable by —

(i) a spouse, former spouse, or child of debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable bankruptcy law by a governmental unit; and

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

3. 11 U.S.C. § 362(b)(2)(D).

4. § 362(b)(F).

5. § 362(b)(E) and (G).

6. Trisha L. Baggs, *Bankruptcy Reform of 2001: A Hollow Victory for Creditor-Spouses*, 34 ARIZ. ST. L.J. 967, 977 (2002).

7. Bryan W. Leach, *The Unfinished Business of Bankruptcy Reform: A Proposal to Improve the Treatment of Support Creditors*, 115 YALE L.J. 247.

What Do You Think? Joint Custody: Placebo Panacea?

by Allan F. Stewart
Clayton

Editor's Note: In this column we endeavor to present a point to evoke your thoughts and elicit your opinions. Selected replies will then be published in the following issue of the newsletter. The opinions expressed in this column are not necessarily those of The Missouri Bar, the Family Law Section, or even the author. All responses should be sent to Allan F. Stewart, 222 S. Central, Suite 900, Clayton, MO 63105.

Joint custody has evolved from its inception with the enactment of the Uniform Marriage and Dissolution of Marriage Act of 1973 (§ 453.300, et. seq.) to the preferred custody determination. Missouri's legal framework has moved during the past three decades from custody to one parent and visitation to the other with a presumption that children of tender years (generally under 7), and particularly girls, should be in the custody of the mother to the current statutory framework that creates a preference for joint legal and joint physical custody (§ 452.375.5). Current case law and statutory provisions place a heavy burden on the parent or court that suggests something other than joint legal and physical custody (§§ 452.375.4, 452.375.5, 452.375.6, and 452.375.8, RSMo). In moving toward this strong preference for joint custody, have we as lawyers, legislators, and judges overlooked the realities of parental conflict on dissolution of marriage? Have we tried too hard to create a "feel good" environment in family court? Have we in the preference for joint custody adopted a placebo panacea to avoid the true nature of child custody conflict?

The custody statute provides in § 452.375.4 that "the General Assembly finds and declares that it is the public policy of this State that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child..." Section 452.375.5 provides "the Court shall consider each of the following as follows:

- (1) Joint physical and joint legal custody to both parents...;
- (2) Joint physical custody with one parent granted sole legal custody...
- (3) Joint legal custody with one party granted sole physical custody ...
- (4) Sole custody to either parent ...

(5) Third party custody or visitation ..."

Section 452.375.6 of the statute requires that "if the parties have not agreed to a custodial arrangement or the Court determines that such an arrangement is not in the best interest of the child then Court shall include a written finding in the Judgment or Order based on the public policy in subsection 4. . . ."

These statutory provisions clearly make it an uphill trek with great burden for the parent or judge who does not go along with the preference for joint custody. With these requirements, has the legislature sent us to the "Emerald City" of child custody? More significantly, do we as family law practitioners find ourselves pushing joint custody in situations where it is not warranted just to avoid the conflict and the workload created by statute? Do not mistake me. I firmly believe that in the majority of cases joint custody is the best outcome for the parents and children. I like to believe that there are a vast number of divorced parents who have been able to put aside their personal animosities to successfully co-parent their children. Of course, these are the parents we never see or hear from again after the dissolution. The concern I raise here is that we may look to joint custody as a panacea – that we may all too often, under the burdens imposed by the statutes and to avoid the unpleasantness of litigating custody disputes, try to pound the proverbial "square peg of joint custody into the round hole of parental inability to co-parent."

Is it time that we reexamine the strong tidal flow in favor of joint custody? At the very least should we analyze our form parenting plans? Every custody judgment must have a parenting plan. Each parenting plan must contain a mechanism for dispute resolution. Most plans offer mediation as the dispute resolution process. Mediation is non-binding and requires parental cooperation. Can we realistically expect parents who are in an ongoing battle for custodial control to put aside the desire to fight and "reason together?" If we are to continue to give joint custody to high conflict couples, shouldn't we offer as a method of dispute resolution binding arbitration or, as the AFCC suggests, "a parenting coordinator?" Or, more importantly, should we be more particular in making judgments of joint custody?

What do you think?

Case Summaries

by John W. Dennis
St. Louis

Limitations on mixing Uniform Interstate Family Support Act (UIFSA) action with custody issue. *Dawn M. Krasinski, a/k/a Dawn M. Peplinski, Appellant v. Kirk A. Rose, Respondent*, No. 86131 (Mo. App. E.D., November 1, 2005), Ahrens, J.

In 2002, the mother filed a petition under UIFSA against putative father. The case was initiated in Michigan, where mother and children lived. The prosecutor in Montgomery County, Missouri, took the case forward. She sought the establishment of paternity and child support. The father countered by filing a request for declaration of paternity, child custody, visitation and support in Lincoln County, Missouri. The mother sought dismissal of the father's case because of the lack of subject matter jurisdiction. The father successfully sought the consolidation of the two cases. Ultimately, the trial court determined paternity, set child support and entered a judgment for custody and visitation.

The father sought a judgment for contempt for denial of his visitation and an abatement of child support. The trial court entered a judgment abating the child support and finding the mother in contempt for denial of visitation. The mother appealed, again asserting the trial court's lack of subject matter jurisdiction to enter the custody judgment and, therefore, the abatement of support and contempt judgment.

Held: Reversed. "The question of whether the state of Missouri has jurisdiction to determine the child custody issue in the present care is one we review *de novo*." The opinion notes that none of the jurisdictional criteria for entry of the judgment under the Uniform Child Custody Jurisdiction Act exist here. Michigan is the home state of the children. The children are receiving financial aid from the state of Michigan. All evidence of the children's circumstances is in Michigan. No emergency jurisdiction issues apply.

Therefore, the "Missouri court was without subject matter jurisdiction, pursuant to section 452.450.1, to decide child custody matters with respect to the two minor children of mother and father."

"It follows that the judgment of child support abatement and contempt based upon mother's

alleged failure to comply with the visitation and custody provisions ... was also void."

Drafting judgments and agreements when funds are to be paid upon the occurrence of future events. *Virginia Murray, Respondent v. John Murray, Appellant*, No. 85867 (Mo. App. E.D., November 15, 2005), Baker, P.J.

At the time of the parties' divorce in 1996, the judgment called for the husband to receive the sum of \$18,500 within: (1) 11 years from the date of judgment; (2) youngest child turning 18 years of age or became emancipated; or (3) until wife remarried, whichever occurred first. That judgment also became a lien on the real estate that the wife was awarded. In subsequent years, the trial court determined that the husband had failed to pay \$14,225.37 in separate child support obligations.

In 2003, the wife ran a garnishment on husband's bank account for the child support arrearage. At that time, the parties entered into an agreement that the husband would begin paying \$300 per month toward the arrearage, and the wife would release the garnishment.

In 2004, the wife refinanced the mortgage on the real estate. In the process, the title company held \$18,500 to satisfy the aforesaid judgment lien against the property in favor of the husband. The wife had a garnishment issued on the funds for the husband's unpaid child support debt.

The husband filed a motion to quash the garnishment on a number of grounds, including that the 2003 agreement constituted a waiver of the full amount being due immediately. He also asserted that a garnishment may not be had on a debt not yet due, i.e., since he had no present right to demand payment from wife before one of three triggering events occurred, execution of the garnishment was improper. The trial court denied the motion to quash and the husband appealed.

Held: Reversed. As to the "waiver" argument: "There was no prohibition of any other garnishment, nor any provision for (wife) to waive her right to demand the full outstanding amount due at any time." The wife's agreement to take \$300 per month only obligated her to

release the garnishment on the husband's bank account, which she did.

As to debt not yet due: "Missouri law holds that garnishees may set off any matured and liquidated claims they hold against judgment debtors. *Wenneker v. Physicians Multispecialty Group, Inc.*, 814 S.W.2d 294, 296 (Mo. banc 1991). Garnishment is a legal process through which a holder of a judgment may apply sums which others owe the judgment debtors to the satisfaction of the judgment. *Id.* It is said that the garnishor stands in the shoes of the judgment debtor. *Id.* It follows that the garnishor may reach the indebtedness which the garnishee has a present obligation to pay to the judgment debtor at the time of service, and nothing beyond this. *Id.* The governing principle is that the right of a garnishing creditor against a garnishee cannot be greater than the right of the judgment debtor against the garnishee. *Davis v. Thompson*, 619 S.W.2d 754,756 (Mo. App. W.D. 1981)."

Since the husband did not have any present right to the payment of the money held in his favor by the title company, the funds could not be subject to garnishment. "Under Section 525.260, a debt which is not due until 2007 cannot be subject to garnishment in 2004. Therefore, execution on the debt was not proper."

Author's Note: Then please do not give husband the money until it is due.

Subject matter jurisdiction under UCCJA. *Melissa Elaine Pirisky, Appellant v. Adrian Dennis Meyer, Respondent, No. 86594 (Mo. banc, November 22, 2005), White, J.*

The parties were divorced in 1994 in Cape Girardeau. In 1996, the mother and child relocated to Arizona. In 2003, father obtained a modification order from the Missouri court "... awarding joint physical custody and setting out specific periods of visitation." Thereafter, the mother refused to allow the father's visitation, so he sought a transfer of custody. The mother unsuccessfully sought the assumption of jurisdiction over the case in Arizona. Then, she allowed the Missouri matter

to proceed by default. Custody was transferred, and the mother appealed on the basis that subject matter jurisdiction lies in Arizona.

Held: Affirmed. "There are only two states that would have jurisdiction of this case pursuant to the UCCJA: Arizona, the minor child's home state where he had resided with mother since 1996, and Missouri, father's residence and the jurisdiction where the initial custody decree and subsequent enforcement and modification orders were issued."

"Under section 452.450.1(4) while the physical presence of the child is insufficient alone to confer jurisdiction, it is also not required."

Since the Arizona court declined jurisdiction and the father had maintained his Missouri residency in the state of original jurisdiction, the court had subject matter jurisdiction over the custody issue.

Order of protection. *Patricia S. Barazi v. Michael J. Eckoldt, Respondent, No. 85510 (Mo. App. E.D., December 20, 2005), Cohen, J.*

This was an action for an adult abuse order of protection. This summary is provided because of dicta within the opinion. The case itself simply affirms the fact that "... a trial court commits reversible error when it fails to hold an evidentiary hearing in an order of protection case involving a contested issue."

The petitioner sought an order of protection in Missouri. The case was dismissed without giving the petitioner a hearing.

The petitioner had previously obtained an order of protection in the State of Alaska. It appears the trial court believed that the registration of that foreign judgment would adequately remedy the petitioner's claim. Dicta: "While it is true that a person protected by an order of protection from another state may register that order in Missouri, the Adult Abuse Act does not contain any provisions that would prevent the entry of an order of protection in this state simply because an order of protection has already been entered in another state."

Family Law Conference

August 3-5, 2006
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- Collecting Attorney's Fees
- The Role of a GAL in an Adoption
- View from the Bench: Role of a GAL in Family Court Cases

Concurrent Sessions

- QDRO
- Using a Mental Health Expert
- How to Use a Psychological Evaluation
- Preparing for Life after Litigation
- Family Law Legislation
- Representing the Natural Parents in Abuse/Neglect Cases

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Basic Skills

- The Client
- The Case
- Property and Debts
- Adoption
- Form 14
- The Children
- Trial and Settlement
- Judgments

Ethics

- Ethical and Effective Motions Practice
- Ethics, Professionalism, and Civility
- Risk Management

Advanced Skills

- Military Personnel
- International Adoption
- Virtual Visitation
- Preservation of Error
- International Custody
- Bankruptcy
- Drafting Appellate Briefs
- The Committed Unwed
- Evolving Family Structures
- Elderly and Disabled Clients
- A View from the Bench
- Prenuptial Agreements
- Tax Matters and Ramifications
- Hard Core Mediation
- The Paternity Case
- Negotiation Techniques
- Forensic Accounting
- The 3 A's of Child Abuse
- Culture Clash: Clients from Other Cultures
- Personality Disorders and Parenting Plans



MoBarCLE, the Family Law Section
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are proud to present this quality seminar

<p style="text-align: center;">2006 FAMILY LAW PRACTITIONER OF THE YEAR NOMINATING FORM</p>
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The Family Law Section and the Missouri Bar presents an annual award to honor a family law lawyer who has demonstrated an exceptional degree of competence, skill, integrity, commitment, and dedication toward the improvement and advancement of the practice of family law and the children and families involved in family law matters.

Nomination criteria should include:

Demonstrated excellence in negotiation and trial practice

Participation and leadership in local and statewide family law related efforts

Demonstrated commitment to those involved and affected by family law matters

Name of Nominee: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Name of Nominator: _____

(Please attach a statement which describes the nominee's accomplishments and provides information to support consideration for the award as described in the purpose and criteria statement above.)

The President of the Missouri Bar will present the 2006 Family Law Practitioner of the Year Award during the Annual Meeting Awards Banquet on September 29, 2006 in St. Louis.

The form must be returned no later than May 12, 2006 to:

Carla G. Holste, Esq.

Carson & Coil, P.C.

P.O. Box 28

515 East High Street

Jefferson City, MO 65102

(573) 636-2177

(573) 636-7119 (fax)

email: carla.h@carsoncoil.com

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Return completed application and membership fee to:***

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Membership in the Family Law Section is \$20 per year.
Please include membership fee with your application.

Family Law Section Newsletter

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