GIMME BACK MY BULLETS!
When Worlds Collide: Bankruptcy Court v. Family Court
By: C. "Luke" Gunnstaks

1. The spooky spectre of BANKRUPTCY(!) is often used in the content of divorce proceedings in an attempt to throw an unbalancing economic and psychological variable into an otherwise foreseeably somewhat-predictable equation.

2. The implicit threat of BANKRUPTCY may be used not just to exert undue influence in the context of a marital property division, but also in relation to each party's relative bargaining position in regard to tangential issues in any accompanying Suit Affecting the Parent-Child Relationship.

3. Not only issues of specific rights of conservatorship, but also issues of custodial rights, temporary spousal support, child support, costs of insurance premiums, post-divorce alimony and attorney fees are often discounted at the bargaining table in light of the extra-added-value "super-sized" doom-and-gloom scenarios introduced into the usually depressing but occasionally-righteously-joy-inspiring scenario of DIVORCE by the always-depressing, credit-ruining, asset-devouring, morale-sucking Black Hole of BANKRUPTCY.

4. Let us not forget that the great unknown vacuum void of BANKRUPTCY also has tangential immeasurable psychological impact on EACH side's attorney(s) and introduces inherent unspoken conflicts of interest between each attorney's own financial self-interest and each attorney's duty to the client as a zealous advocate. Each attorney may hear subliminal, if not actual, internal voices advising withdrawal from the case within milliseconds of hearing the word "Bankruptcy", regardless of the foreseeable negative legal consequences of such withdrawal to the client, even if it is the other party contemplating filing the Bankruptcy.

5. When such interests are in conflict, the client still needs access to justice and the attorney still needs to be paid. There should be no conflict as long as the attorney is equally zealous in pursuit of his own fees as he is in pursuit of the client's legitimate goals.

6. If the attorney is the client's metaphorical hired gun, and the client is unable to pay for metaphorical bullets due to a bankruptcy filing which ties up the funds in the community estate, then the money for bullets has to come from somewhere else. Few attorneys will pay for their own bullets with money out of their own pockets. Such decisions are hard to justify to partners or spouses or to oneself, though zealous advocacy may demand that it occur.

7. The new Bankruptcy Act is much less disruptive for family law cases than its predecessor, but is generally dimly understood, if at all, by general practitioners or the family bar, and is often no better understood by State District Court Judges, who are often perceived as cringing at the thought of federal preemption even as they embrace the opportunity to move quickly on to the next (non-bankruptcy-burdened) case on their docket.

8. In the context of ongoing Family Court litigation, filing Bankruptcy is obviously a tactical last resort of a desperate spouse who has fallen at least one step behind in Family Court and who wishes to buy time, protection, and/or leverage in the Family Law proceeding. In dealing with such a situation, a family practitioner should remember that one can still stay one step ahead of the filing party by carefully navigating through the procedural minefield of the Bankruptcy Court, and if one jumps through all the necessary hoops, one can indeed be there waiting on the other side when the filing party emerges from Bankruptcy, or has had the bankruptcy

dismissed for failure to comply with his or her own set of procedural requirements imposed by the Bankruptcy Court.

9. The Federal Courts in general, including the Bankruptcy Courts, tend to be loath to tie up their resources in a contested family law case, and it would be wise to put the Court on notice of all the potential complexities of the family litigation that could lead to extra complications, extra witnesses, and extra time related to any sophisticated legal mud-slinging involved amongst the multiple parties, in the event a party seeks to escape from a perceived hostile State Court Judge by seeking a Final Divorce Decree in Bankruptcy Court.

10. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Reform Act") defines "Domestic Support Obligation" as:

> [A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable non-bankruptcy law notwithstanding any other provision of this title, that is
>
> A) owed to or recoverable by-
> i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> ii) a government unit;
> B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
> C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
> i) a separation agreement, divorce decree, or property settlement agreement;
> ii) an order of a court of record; or
> iii) a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and
> D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting debt. 11 U.S.C. § 101(14A) (2005).

If properly worded to come within this definition, such language may include any non-property-division obligation. 11 U.S.C. § 101(14A) (2005).

Furthermore, in the context of a family law case, in regard to such broadly-defined support obligations:

a) Domestic support obligations can not be discharged under any Chapter of the Code, 11 U.S.C. § 523(a)(5) (2005);
b) Domestic support obligations are payable as a first-priority claim in Chapter 7, subject only to the trustee's administrative costs, to the extent that a trustee administers any assets that could be used to pay support costs, 11 U.S.C. § 507(a)(1)(C) (2005);
c) Post-petition domestic support obligations must be timely paid after filing a Chapter 11, 12 or 13 case, under penalty of denial of confirmation and/or dismissal of case, 11 U.S.C. §§ 1112(b)(P), 1208(c)(10), and 1307(c)(11);
d) All domestic support obligations, even those owed prior to date of filing, must still be paid under the plan in a Chapter 11, 12, or 13 case before a discharge can be granted,

11 U.S.C. §§ 1141(d)(5), 1228(a) and 1328(a) (2005);

e) The automatic stay does not apply to the collection of domestic support obligations, to the extent that collection is pursued against property that is not property of the estate, and existing wage withholding orders remain in force, 11 U.S.C. § 362(b)(2) (2005);

f) Payment of "domestic support obligations" are exempt from a trustee's preference powers in Chapter 5 of the Code, 11 U.S.C. § 547(c)(7) (2005); and

g) Exempt property may be used to satisfy domestic support obligations *notwithstanding any State or Federal law to the contrary*. 11 U.S.C. § 522(c)(1) (2005); (overruling *In re Davis*, 170 F.3d 475 (5th Cir. 1999)).

As a result, bankruptcy courts may be a more efficient forum than state court for collection of domestic support obligations.

The Reform Act requires the Trustee to give written notice to the obligee of a domestic support claim of the right to use a state child support enforcement agency to collect child support during and after the insolvency proceedings. 11 U.S.C. § 1302(b)(6) (2005).

The Reform Act has attempted to limit the application of the automatic stay in family law cases involving domestic support obligations and custody issues. Under the new section 362(b)(2), the automatic stay does not apply in any following family law situations:

A) of the commencement or continuation of a civil action or proceeding –
   i) for the establishment of paternity;
   ii) for the establishment or modification of an order for domestic support obligations;
   iii) concerning child custody or visitations;
   iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
   v) regarding domestic violence;

B) of the collection of a domestic support obligation from property that is not property of the estate;

C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute. 11 U.S.C. § 362(b)(2) (2005) (emphasis added).

The Reform Act also clarifies that employer withholding orders are not effected by the automatic stay. 11 U.S.C. § 362(b)(2)(c) (2005). In addition neither the State Court's ability to suspend the debtor's license(s) for failure to pay child support, nor the interception of income tax refunds is prohibited by the automatic stay. *See* TEX.FAM.CODE ANN. §232.004; 11 U.S.C. § 362(b)(2)(D) and (E-F) (2005).

Under the Reform Act the Bankruptcy Code has been clarified such that, nothwithstanding other laws to the contrary, a debtor's exempt property will still be subject to liability for the debtor's domestic support obligations. 11 U.S.C. § 522(c)(1) (2005).

Bankruptcy Courts retain jurisdiction over the marital estate per se, but will allow relief from the automatic stay to allow a divorce to be granted in a state court, subject to review and approval by the Bankruptcy Court to the extent that the decree affects the bankruptcy estate and creditors. Accordingly, the divorce should specifically detail whether or not an obligation between spouses is a domestic support obligation, or for the benefit of a child or spouse in the nature of

support, or payable as a necessary for the support of a spouse or child. Furthermore, such obligations by a debtor should be ordered to be paid to the spouse rather than to a third party, since domestic support obligations may not be assigned. 11 U.S.C. § 101(14A)

All decrees should include indemnification language clarifying that qualifying obligations paid by the non-debtor spouse be indemnified by the debtor directly to the spouse as domestic support obligations.

There is much more to the subject than this brief overview has addressed, and I refer the reader to "The Bankruptcy Reform Act of 2005: Why Do They Call it BARF?" by Diana Friedman and Andrew Anderson, State Bar of Texas 31st Annual Advanced Family Law Course, August 2005, for a thorough discussion of the topic.

11. It is a well-known adage that "a good attorney knows the law; a great attorney knows the judge", and that alone is a good enough reason for any practitioner who is unfamiliar with the particular Bankruptcy Judge involved to consult with competent counsel who practices before that Court on a regular basis.

12. That's what I've done, and that's what I'll do again, if necessary.

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"Bomb Iran" "Most requested song in U.S." 1980 (Vince Vance and The VALIANTS)
2500 + assorted other Venues 1980-1988 (Vince Vance and The VALIANTS, Sgt. Fury & The VALIANT Allstars)

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