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Getting Paid in Tough Economic Times

Letter from the Editor <i>Tifanne E. E. Wolter</i>	2
Ethics and Practice of Collecting a Fee Owed by a Client <i>William Joanis and Stacey Keenan</i>	3
Ethical Rules and Best Practices to Assist with Avoiding Collections in Family Law Cases <i>Jack Dewalt and Melissa Chawla</i>	10
Collection Tools for the Tenacious Lawyer <i>Shannon M. Fitzpatrick</i>	14
The Sheriff's Levy: An Underutilized Collection Option <i>Karen Terese Kugler</i>	23
Tips and Tidbits on Enforcing Property Settlements in Dissolution Actions <i>Pete Radosevich</i>	28
IV-D Child Support Enforcement and Collections <i>Melissa Rossow, Jennifer Stanfield and Thomas P. Kelly</i>	31
International Child Support Enforcement and Collections <i>Allison Maxim</i>	53

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Letter from the Editor

Tifanne E. E. Wolter

This is the first edition of the Family Law Forum for the season. This edition is also my first as Publication's Chair. Last spring I was elected to be Co-Chair with Linda Wold. Linda has been the Publication's Chair for many years and has worked very hard to make the Forum the quality publication we all know it to be. Linda has had to step down as the Chair due to medical reasons. I only hope I will be able to do as good of a job as she. I'd also like to give a big Thank You to Larry McGee for stepping up and assisting me with producing this edition.

In a down economy, collecting receivables from former clients and assisting current clients in collecting their assets and support payments can be a daunting task. The purpose of this edition is to inform you of the processes available for collection. I hope that these articles provide you with the knowledge you need to begin collecting, or offer you some new tips or suggestions to help with your current efforts.

We have not yet chosen a topic for the next edition. We anticipate a January 2012 publication date. If you have any suggestions for topics or would like to join the publication's committee, please feel free to contact me or Larry McGee at larry.mcgee@courts.state.mn.us.

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Ethics and Practice of Collecting a Fee Owed By a Client

William Joanis and Stacey Keenan

The private practice of law is a rewarding profession, but it is also a business. Family law provides its own challenges. The issues are personal and volatile. The clients are often not familiar with engaging the services of a lawyer. Expectations, fueled by enmity toward the other party with whom love has reversed course, can escalate expense beyond expectation or resources. But the lawyer's overhead, student loans, and mortgage payments are relentless, and fees must be collected so others may be served.

The ethical rules governing charging and collecting a fee from a client are fairly simple.¹ The fee must be fair and the client must understand the basis for it in advance. A written statement concerning the terms of the engagement is not always required,² but even where not required, it reduces the possibility of misunderstanding and in the parlance of our business clients, constitutes "best practices."³

Of particular concern in the relationship between a lawyer and a client is the advantage a lawyer obtains by the very nature of the attorney client relationship. If the fee is not paid, the lawyer is constrained, but not prohibited from using client confidences to collect the fee.⁴ Resolution of fee disputes is discussed in Comment [9] to Minnesota Rules 1.5, it provides in part "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary,

the lawyer should conscientiously consider submitting to it." Fee arbitration is available in some districts through the Minnesota State Bar Association. While arbitration is required in some states such as, Alaska, California, Maine, New Jersey, South Carolina and Wyoming, a pilot program in Minnesota mandating arbitration of fee matters in three bar districts was allowed to lapse in 1999.⁵ Voluntary arbitration is still available in some counties⁶, and can be included in the engagement letter or after the issue arises.⁷

Not surprisingly, ongoing clients may not be sued for fees, as it violates Minnesota Rule 1.7(a) Conflict of Interest: Current Clients.⁸ Accordingly, if the attempt to collect is going to escalate beyond gentle and less than gentle reminders, the representation of the client must first be terminated.⁹ This will possibly require Court approval in a litigated matter.¹⁰

It is universally accepted that the best way to collect a fee is to obtain the necessary money before the work begins, in the form of a deposit to your trust account. Ideally, the engagement letter should provide that rather than having the client refresh the trust account, the original deposit should be retained in the trust account to be applied to the last bill. Other means of avoiding the need to sever ties with a client and still get paid are to send frequent bills and keep the client informed as to the expenses being incurred. Some practice management products, such as Clio, allow the client to view digital (pdf) versions of the documents in their file, and even their bills, online (in

“the cloud”). The more the lawyer communicates with the client, the more the client will understand what is occurring and why it is so expensive .

But while planning may be everything, and as John F. Kennedy may have said, “the best time to build a roof is when the sun is out,” the quote attributed to Mike Tyson says it all, “everyone has a plan 'till they get punched in the mouth.” Even a careful lawyer, with stringent intake procedures, a well-crafted engagement agreement, and frequent transparent billing, may end up with an unpaid bill. So, what do you do if your client hasn't paid and the future prospects are looking dim? The first approach should be an email message, a phone call, or a letter to the client to discuss the unpaid balance. However, statistics show that collection on an unpaid bill tends to diminishes dramatically after sixty days have passed from the time of initial billing. At some point the decision should be made to withdraw from representation¹¹, return the client's file, which is an ethical¹² and statutory obligation¹³, and decide what to do next.

Ethical complaints are commonly filed where there is an underlying fee dispute, but the Lawyers Professional Responsibility Board may find that in addition to the fee dispute there is a related ethical violation, such as the lawyer's lack of communication, missed deadlines, or a breach of confidentiality. While a violation of the Rules of Professional Conduct does not give rise to a private action against an attorney,¹⁴ in the end, the ethical inquiry may be more costly than the fee being pursued.

The decision to proceed with collection of a fee is ever-changing. Each time a bill is sent, the reaction needs to be assessed. If payments are delayed, the client should be asked about it. Follow up phone calls and

email or letters are appropriate. But at what point does a lawyer drop the matter? Overt collection efforts? Mediation? Arbitration? Suit?

The decision to not pursue any collection efforts may make the attorney feel “played” and result in lost revenue. This is hard for the solo attorney to absorb, and unfair to the other partners in a firm. There are benefits to dropping collection, though, after a certain number of communications with a client regarding an unpaid bill have transpired. It saves the lawyer's time for what the lawyer does for a business, for clients who do pay. It avoids the inconvenience of dealing with what is probably a disintegrated personal relationship with a client. As a representative of a malpractice carrier once remarked, most clients who don't pay are either unhappy or unable to pay. In either instance, pushing the former client to the limit does not foretell a positive ending.

If the decision is made to collect, the first question is, who should be in charge of the collection effort? Should the lawyer who created the problem be in charge or should someone else in the office take the lead? Perhaps even an outside collection agent should take the lead? Some authorities believe strongly that it must be a third party to be effective.¹⁵ The notion being that the person who did the work will not want to be adverse to a former client, and will not be objective. Conversely, as suggested above in the discussion of malpractice or ethics claims, suing a client is not always the wisest thing to do. If the firm collects its own debts, it will not have to comply with the Fair Debt Collection Practices Act, but it should still be careful how it approaches the client. If a third party is involved, there should be even greater concern over the perceived aggressiveness of the efforts.

One way to prompt a client to stay on top of a bill, and avoid the size of an unpaid bill from spiraling, is to charge interest. This will also mitigate the cost of a “slow pay,” provided the client is not a “no pay,” in which unpaid interest is just another paper cut suffered from the client's failure to pay a bill. An attorney who charges a client interest at an annual rate of more than 8 percent will be subject to lawyer discipline for failure to comply with any truth-in-lending requirements or disclosures. However, 18% has been upheld where in addition to a detailed engagement agreement, the client was provided with a “Statement Explanation and Truth-In-Lending Disclosure.”¹⁶ The Agreement with the client in that case provided for a 1.5 percent monthly finance charge on past due attorney fees and was determined to be an open-end credit plan, and therefore not usurious.¹⁷ Two distinguishing factors were that the amount of the debt was not definitely fixed at the time the retainer agreement was signed and the agreement contemplated installment payments.¹⁸

The attorney's lien is an effective means to collecting fees. Governed by statute,¹⁹ the rule is that if a client recovers money as a result of an attorney's services, the attorney has a lien on the recovery as security for fees owed by the client. The lien can be especially helpful in a family law case.²⁰

Under Minn. Stat. § 481.13, a lien for attorneys' fees agreed on in divorce proceeding becomes impressed on a lump-sum alimony payment ordered by a divorce decree. Such a lien attaches to a lump-sum alimony award immediately on issuance of the decree, and where notice of intention to claim the lien is promptly served on the defendant, the subsequent stipulation of the parties and order of the court eliminating the lump-sum payment and providing for

installments cannot nullify attorney's rights.²¹

An attorney's lien may be established, and the amount of the lien determined, summarily by the court on the application of the lien claimant. In the summary proceeding to establish and determine the amount of an attorney lien under, the trial court is not required to entertain defenses of legal malpractice and breach of fiduciary duty.²² This does not, however, bar the former clients from litigating the legal malpractice claims in a separate civil suit.²³

Fee arbitration is a realistic alternative, as is mediation. Because ADR will probably be a step in any law suit to collect fees, there seems to be no harm in trying it when letters, calls, emails, and other lesser means fail. The final option is to sue.

If the decision is made to sue there are a number of considerations. Were there complaints about the services? Any problems with the invoices? Any communications, including email, you may not want the client to reveal? Will you lose business from friends or associates of the former client? Should you sue in Conciliation Court or District Court?

The limitations period to sue a client on a legal bill is six years.²⁴ Not coincidentally or insignificantly, the limitation period for a client to sue on legal malpractice claim is also six years.²⁵

If you do sue, you will not want to revisit each time entry and expense. Because you presumably have been sending invoices to which the client has not responded, the cause of action is not only collection of a debt but also on an account stated. Suing on an account stated basis relieves some of the evidentiary obstacles to proving the amount of the fees owed.²⁶

Assuming that one has burned the bridge with a former client, dodged any malpractice claim or ethics charge, and incurred the time and expense of going to court, the entry of the judgment is meaningless, unless it is collected. While the information garnered in most family law cases regarding assets is substantial²⁷, the nearly universal truths of collection remain that for most people the only assets at risk in collection of a judgment are wages and bank accounts, and chapter 7 of the bankruptcy Code²⁸ is just another lawyer²⁹ away for your former client and your fees not being paid anyway.³⁰

Notes

¹Minnesota Rules of Professional Conduct 1.5 provides in part:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. ... (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.... If a client disputes the amount of the fee that has been earned, the lawyer shall take reasonable and prompt action to resolve the dispute. (emphasis added.)

In certain practice areas or for particular matters, written engagement agreements are required. For example, Minnesota Rules of Professional Conduct 1.5(d) requires a written agreement in a contingent fee matter, 11 U.S.C. § 528(a)(1) requires a written agreement in the representation of a bankruptcy debtor, and in other practice areas have similar requirements.

²The preference for a written engagement agreement on a generalized basis at one time came with an incentive. Minnesota Lawyers

Professional Responsibility Board Opinion No. 4, adopted in 1973, in addressing a lawyer's withdrawal from representation for nonpayment of fee, required lawyers who failed to enter into written fee agreement to justify their withdrawal for nonpayment of fees by proving the client's noncompliance with the oral fee arrangement by a standard of clear and convincing evidence. This Opinion was one of the many that fell in light of the Panel File No. 99-42 decision and was repealed October 25, 2002.

³Minnesota Rules 1.5, Comment [2]

⁴RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client. (b) A lawyer may reveal information relating to the representation of a client if: ...

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

Comment [9] to Rule 1.6 provides:

A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

⁵Martin Cole, Fee Disputes, Bench & B. of Minn., March 2011, at 14-15.

⁶The Hennepin County Bar Association offers a legal fee arbitration program to parties disputing legal fees for legal services. To use this fee arbitration program, both parties must first agree in writing to submit their dispute to the HCBA program for binding arbitration. The fees are reasonable. For disputes of \$7,500 or less each party pays \$50. The fee doubles for disputes over that amount. Ramsey County has three-person panels to hear and decide fee disputes.

⁷But beware of Minn. Rules of Prof'l Conduct 8.4 (i), which makes it an ethical violation to renege

on that provision of an engagement agreement.

⁸*In re Szymialis*, 557 N.W.2d 554, 556 (Minn. 1997) See also, Timothy Burke, Don't Sue a Client for Fees, *Minnesota Lawyer* (August 6, 2007).

⁹Minn. Rules of Prof'l Conduct 1.16 (2011)

DECLINING OR TERMINATING

REPRESENTATION, provides in part:

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

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

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

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

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

Comment [8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

¹⁰But See *De Beer v. Callahan*, 2006 Minn. App. Unpub. LEXIS 1051 (Minn. Ct. App. 2006) (Lawyer's withdrawal from representation three weeks before a scheduled trial date did not violate as the client's failure to pay outstanding attorney fees justified the lawyer's withdrawal; withdrawal for nonpayment was fully covered in the parties' fee agreement, and the lawyer provided the required notice.

¹¹The client may discharge an attorney at any time, with or without cause. It has been said to be a "nearly absolute" right, William Wernz, *Minnesota Legal Ethics: A Treatise* (2011) at 77. The exception to that right, however, remains elusive. Interestingly, the Minnesota Rules of

Professional Conduct, which incorporate the rule allowing a client to discharge an attorney, provide in part: A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged. Meaning, if you are removed from a file by the client, you lose your starring role in the client's drama.

¹²Minn. Rules of Prof'l Conduct 1.16 (d) through (g). See also, *In re X.Y.* 529 N.W.2d 688 (Minn. 1995).(A director's admonishment of an attorney was proper where the determination that the attorney acted unprofessionally was not clearly erroneous due to his delay in transferring a client's files and his attempt to charge her for copying expenses.)

¹³Minn. Stat. 481.14

¹⁴*L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989).

¹⁵See Edward Poll, *Collecting Your Fee: Getting Paid from Intake to Invoice*, \$9.05, 2003.

¹⁶*Peterson v. Gustafson*, 584 N.W.2d. 660 (Minn. Ct. App. 1998)

¹⁷*Id.*

¹⁸"Appellant relies on *Katz & Lange, Ltd. v. Beugen*, 356 N.W.2d 733, 735 (Minn. App. 1984) (holding that a 12% annual interest rate charged by an attorney in a dissolution case was usurious and disallowing all finance charges, but refusing to cancel the underlying debt). Appellant's reliance is misplaced, however. Katz is distinguishable on its facts. In Katz, "there was no agreement between [attorney and client] regarding finance charges" and the attorney charged interest first at six percent, then raised the interest rate to twelve percent. *Id.* at 734. Unlike respondent, the attorney in Katz made no attempt to comply with the truth-in-lending requirements. This compliance is mandated when there is no written agreement and the interest charged is more than eight percent; however, where there is compliance, higher interest rates have been not only contemplated but accepted. See, e.g., Opinion No. 16 of the Lawyers' Professional Responsibility Board, entitled "Interest and Late Charges on Attorneys Fees" ("An attorney who charges a client interest at an annual rate of more than 8 percent will be subject to lawyer discipline for failure to comply

with any truth-in-lending requirements or disclosures.””

Peterson v. Gustafson, 584 N.W.2d 660 (Minn. Ct. App. 1998)

¹⁹Minn. Stat. § 518A.38, subd. 1, states, in pertinent part: "The court may make any child support order a lien or charge upon the property of the obligor, either at the time of the entry of the judgment or by subsequent order upon proper application." Additionally, Minn. Stat. § 518A.71 (2010) states that "[i]n all cases when maintenance or support payments are ordered, the court may require sufficient security to be given for the payment of them according to the terms of the order." Based upon the plain language of the child-support statute, it was well within the district court's discretion to order a lien on appellant's property to ensure future child-support payments.

²⁰Minn. Stat. § 518A.38 allows the district court to "impose a lien on the obligor's property to assure payment of future child support." *Ulrich v. Ulrich*, 400 N.W.2d 213, 217-18 (Minn. App. 1987) (emphasis added). n1 Minn. Stat. § 518A.38 authorizes the district court to establish a trust to assure future child-support payments, and is appropriate [*6] where the obligor has "repeatedly fail[ed] to meet his court-ordered support obligations." *Id.* (quoting *Gabrielson v. Gabrielson*, 363 N.W.2d 814, 816 (Minn. App. 1985)). This court has previously determined that HN6it is not an abuse of discretion for the district court to order that a child-support obligor's lien on a marital homestead be reduced by the amount of any unpaid child-support obligation at the time the lien is to be paid out to the obligor. *Cavegn v. Cavegn*, 378 N.W.2d 636, 637-39 (Minn. App. 1985).

Ewert v. Ewert, 2011 Minn. App. Unpub. LEXIS 446, 5-6 (Minn. Ct. App. May 9, 2011).

²¹*McDonald v. Johnson*, 229 Minn. 119, 38 N.W.2d 196 (1949)

²²The attorney's lien statute provides that a lien "may be established, and the amount of the lien may be determined, summarily by the court . . . on the application of the lien claimant." Minn. Stat. § 481.13, subd. 1(c) (2006) (emphasis added). Before the legislature amended section 481.13 in 2002, the statute distinguished between a proceeding to establish a lien and a proceeding

to enforce a lien. Minn. Stat. § 481.13(3) (2000); 2002 Minn. Laws ch. 403, § 2, at 1707. The amendment to section 481.13 eliminated the distinction between establishment and enforcement and provided that a lien may be established and its amount [*4] summarily determined by the court. Minn. Stat. § 481.13, subd. 1(c) (2002); *Paulson*, 699 N.W.2d at 6. The statute thus requires the district court to hold a summary proceeding rather than a full trial. *Paulson*, 699 N.W.2d at 6.

In the summary proceeding, "clients must be given an adequate opportunity to contest the facts regarding the attorney's fees." *Boline v. Doty*, 345 N.W.2d 285, 289 (Minn. App. 1984). This ability to contest the facts relating to the fees includes the opportunity to cross-examine an attorney about the amount of time spent on the case and the validity of the charges. *Gaughan v. Gaughan*, 450 N.W.2d 338, 343 (Minn. App. 1990).

Although a client may challenge facts in the summary proceeding, legal defenses are limited. In *Paulson*, this court held that legal malpractice could not be raised as a defense to a motion for an attorney's lien. 699 N.W.2d at 8. Permitting a malpractice defense would "impermissibly transform a summary-lien proceeding into a lengthy malpractice trial." *Id.* Instead, a client's malpractice claims must be raised in a separate action. [*5] *Id.* *Maus v. Galic*, 2007 Minn. App. Unpub. LEXIS 419, 3-5 (Minn. Ct. App. 2007) ²³*Id.*

²⁴Minn. Stat. § 541.05(1) (2010)(upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed).

²⁵Minn. Stat. § 541.05(5)(2010)(for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated)(although possibly metaphorically accurate, legal malpractice presumably falling within the "other" category, as opposed to being a form of criminal conversation); *Howe v. Fredrikson & Byron, P.A.*, 2007 Minn. App. Unpub. LEXIS 1182 (Minn. Ct. App. 2007); *May v. First National Bank of North Dakota*, 427 N.W.2d 285, 288 (Minn. App. 1988), review denied (Minn. Oct. 26, 1988). There is generally no tolling of the limitation period in a divorce case. The supreme court held that a plaintiff could sue an attorney

who negligently drafted an MTA as soon as the MTA is incorporated into a dissolution decree., *Gunufson v. Swanson*, No. C4-95-1446, 1996 Minn. LEXIS 857, 1996 WL 686121, at *1 (Minn. Nov. 20, 1996).

²⁶The account-stated doctrine is an alternative means of establishing liability for a debt other than recovery pursuant to a contract claim. *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984).

An account stated is a manifestation of an agreement between a debtor and a creditor that a stated amount is an accurate computation of an amount due. *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 345 (Minn. App. 1997), review denied 1998 Minn. LEXIS 90 (Minn. Feb. 19, 1998). It constitutes prima facie evidence of the debtor's liability and can be challenged only by a showing of fraud or mistake. *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977). "A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent." *Lampert Lumber Co. v. Ram Constr.*, 413 N.W.2d 878, 883 (Minn. App. 1987).

²⁷Parties to a marriage dissolution have a duty to disclose all assets and liabilities completely and accurately. *Bollenbach v. Bollenbach*, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970) and *Doering v. Doering (In re Doering)*, 629 N.W.2d 124, 130 (Minn. Ct. App. 2001). This is generally true in other areas of family law in addition to divorce matters. For example, Minnesota Statute section 519.11's requirement of "full and fair disclosure of the earnings and property of each party." *Bollenbach v. Bollenbach*, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970).

²⁸85% of consumer bankruptcy cases in Minnesota are filed under chapter 7. An even greater percentage of all consumer debt discharged in Minnesota is discharged pursuant to chapter 7.

²⁹Who, incidentally, is required to be paid in full before filing the chapter 7 bankruptcy case.

³⁰Not to mention the possibility of having your payment subject to the claw back provisions of 11 U.S.C. §547 as a preferential transfer if your former client files for bankruptcy within 90 days of making a payment on your bill.



Bill Joanis and Stacey Keenan practice law together at Joanis Keenan, which handles bankruptcy, business, and family law matters. The firm handles most family law matters and frequently assist unmarried people entering or leaving a relationship, as they deal with issues over the division of assets (i.e., \$513.076 cases), child support and custody, and parenting time. Joanis Keenan, 701 Fourth Ave S., Suite 500, Minneapolis, MN 55415 Phone: (612) 337-9010. Bill can be reached at joanis@joaniskeenan.com and Stacey can be reached at stacey@joaniskeenan.com. For more on the firm see www.joaniskeenan.com.

Ethical Rules and Best Practices to Assist with Avoiding Collections in Family Law Cases

Jack DeWalt and Melissa Chawla


Ask a family law attorney to name the issues we frequently confront yet learned nothing about in law school, and many of us are likely to put fee collection issues at the top of our list. The topic does not lend itself well to classroom instruction because individualized methods and personal comfort zones for managing fees over the course of a family law case tend to develop with time and experience, yet it is central in our practices. Our clients are typically in the midst of a transition of some variety with financial implications, and very often have not planned for the expense of retaining counsel. Further, our cases tend to play out against a backdrop of emotion and may not reflect financial realities. A good starting point for developing an effective strategy for avoiding collections is careful consideration of the ethics rules implicated when we must collect fees from our clients. This article will highlight a few key provisions in the Rules of Professional Conduct relevant to the topic of fee and collections, and offer some basic practice tips for staying out of collections with our family law clients.

As a general rule, the Minnesota Rules of Professional Conduct provide that a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.¹ The rule sets forth the various factors to be considered in determining the reasonableness of a fee, such as the time and labor required, the novelty and difficulty of the questions

involved, and the skill requisite to perform the legal service properly, as well as the experience, reputation and ability of the lawyer or lawyers performing the services.²

This rule, Rule 1.5, also requires a lawyer to communicate to the client, preferably in writing, before or within a reasonable time after commencing the representation, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible.³ Any changes in the basis or rate of the fee or expenses must be communicated to the client.⁴ An additional provision to note from this rule is the specific prohibition against certain contingency fees in domestic relations matters. Specifically, a lawyer shall not enter into an arrangement for, charge, or collect any fee in a domestic relations matter, which is contingent upon securing a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.⁵

The Minnesota Rules of Professional Conduct also address the mechanics of properly safekeeping client funds. Pursuant to Rule 1.15(b), a lawyer shall withdraw earned fees within a reasonable time after the fees have been earned, and provide the client with written notice of the time, amount and purpose of the withdrawal of the funds, and an accounting of the funds in the trust account.⁶ Notably, if the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person



claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.⁷ If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.⁸

A key ethics rule with which the family law attorney should be familiar is Rule 1.16 of the Minnesota Rules of Professional Conduct, dealing with terminating representation. Particularly in our high conflict cases, there are numerous and varied reasons why we might need to terminate the representation but, at times, a withdrawal must occur simply because a client runs out of funds. In such cases, Rule 1.16 provides a lawyer may withdraw from representing a client if the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.⁹ In addition, withdrawal is permitted only if it can be accomplished without material adverse effect on the interests of the client.¹⁰ What constitutes a material adverse effect on the interests of the client for purposes of this rule will turn on the facts and circumstances of the particular case.¹¹ In the event the representation is terminated, Rule 1.16 requires a lawyer to take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.¹²

With this framework of applicable rules in mind, the process of managing a case with the goal of avoiding a collection scenario

begins at the initial consultation with a potential client. At the initial meeting, the attorney should inform the potential client not only of the attorney's fee structure, and the fee structure for any support staff who may be assisting on the case, but also of the attorney's expectations of the client as to when fees should be paid, whether payment plans are an option for the client, and whether the initial retainer will need to be replenished in the future. This discussion should be confirmed in writing at the outset of the case, consistent with Rule 1.5 of the Minnesota Rules of Professional Conduct.

When there is uncertainty about the client's ability to pay fees on an ongoing basis, an "evergreen" retainer is a useful tool for the attorney to consider. An evergreen retainer allows the attorney to withdraw from a case if the client's funds in the attorney's trust account fall below a set amount and is not replenished by the client within a previously agreed upon timeframe. If it becomes necessary for the attorney to withdraw from representing the client, the remaining funds within the trust account can be applied to the client's outstanding fee balance before the remainder, if any, is returned to the client. Again, these arrangements should be clearly explained to the client and confirmed in writing.

During the course of representing a client, best practice requires that the attorney provide the client with detailed, monthly billing statements in accordance with Rule 1.15 of the Minnesota Rules of Professional Conduct, to ensure that the client understands what amount is being billed, and why. By reviewing and explaining the monthly statement to the client, the attorney is given an opportunity to monitor the client's trust account balance, and also to anticipate upcoming costs in the case that will likely arise.

When the retainer has either been depleted, or is anticipated to be depleted within the next billing cycle, the attorney should communicate with the client regarding acceptable options going forward, such as the client paying the outstanding balance in full and committing to paying each subsequent month's fees and costs in full, or paying the outstanding balance in full and replenishing the original retainer amount against future fees and costs. These options should be presented to the client in written correspondence accompanying the billing statement. The attorney-client relationship is well-served by also following up with a conversation regarding the status of the client's account, rather than relying exclusively upon the written communication. The conflict-avoidant, disorganized, or overly stressed client may not be consistently reviewing written correspondence, and the conversation will provide the attorney and client an opportunity to discuss solutions that will work best for the case.

The decision whether to offer alternatives to the client will depend upon factors particular to the case, including the relationship the attorney has with the client, the client's payment history, and the procedural posture of the case. If the case is near completion, the attorney may be more inclined to allow the client to follow a monthly plan of paying each month's outstanding balance in full. If the case is not near completion, and is likely to generate a large amount of future fees, the best course of action is to ask for the original retainer amount to be replenished with the current balance also being paid in full, and repeating this process as long as necessary.

Throughout the case, best practice to avoid collections requires diligent case management and attention to fees. For example, an attorney may implement a policy whereby if a case has not resolved sixty (60)

days prior to a pre-trial conference, a discussion with the client will occur regarding the likely fees and costs associated with a possible trial. Those estimated fees and costs should include not only the attorney's time and expenses, but also any potential fees and costs for experts or other third parties, as well as consideration of potential post-trial expenses such as drafting proposed orders and appeal costs. A discussion of this sort can inform both the attorney and the client as to whether the client is able and willing to assume the financial burden of trial, and gives the attorney an opportunity to understand how the client expects to pay the anticipated fees and costs. Of note, if third party experts will be utilized, and the expert requires their retainer agreement to be signed directly by the attorney, the attorney should obtain additional funds from the client, prior to signing the agreement, in an amount sufficient to offset the expert's fees and costs. By doing this, the attorney guards against a situation where either the attorney, or the attorney's firm, becomes individually responsible for the expert's outstanding bill in the event the client fail to pay those fees and costs.

Another example of diligent case management is requiring the client to deposit a trial retainer at least sixty (60) to ninety (90) days prior to trial, assuming the case has not resolved. Such a policy often presents financial challenges for the client approaching trial, but the attorney must consider the unlikely prospect of the client being in an improved financial situation after the trial occurs and the attorney's services have been rendered. By requiring a trial retainer, the attorney is protected against having a large account receivable owed at the conclusion of the trial, and is also forcing the client to be realistic about the financial costs associated with the trial itself. If the client

does not pay the requested trial retainer in a timely fashion, the attorney should withdraw from the case as far in advance of trial as possible to avoid any material adverse effect on the interests of the client, as contemplated by Rule 1.16. Though the attorney should assess the impact of a withdrawal on a case-by-case basis, ideally the withdrawal would occur at least forty-five (45) days prior to trial, and no later than thirty (30) days prior to trial. If, on the other hand, the attorney decides against requiring a trial retainer, or continues to represent the client despite the non-payment of a requested trial retainer, the attorney should have sufficient assurances of payment occurring at an agreeable time, the specifics of which should be confirmed in writing.

Despite the attorney's best efforts, many of us may end up in situations where there is an account receivable owed by a client who has insufficient funds to pay the amount due. At such times, the attorney may wish to consider alternatives short of sending the matter to collections. When appropriate, the attorney can negotiate a payment plan directly with the client, with the contingency that if the client does not adhere to the payment plan, the matter will immediately be sent to collections. Another option for the attorney is to propose reducing the total amount owed by the client, in exchange for the client paying the reduced amount in full.

In conclusion, best practice in this area means active case management and communication with the client. The process begins with the initial consultation, continues with the monthly billing, and involves anticipating upcoming events and dates in the case that may require either the retainer amount to be replenished or a deposit of additional sums into the retainer. As with many aspects of the practice of law, what is being described is much more of an art than a science, and there

is always room for improvement. The foregoing practice tips are meant to be illustrative, rather than comprehensive, and are offered to highlight general principles for an attorney to adapt and employ in managing a case with the goal of avoiding a large collection scenario.

Notes

¹ Minn. R. Prof. Conduct 1.5(a)

² Minn. R. Prof. Conduct 1.5(a)(1)-(8)

³ Minn. R. Prof. Conduct 1.5(b)

⁴ *Id.*

⁵ Minn. R. Prof. Conduct 1.5(d)

⁶ Minn. R. prof. Conduct 1.15(b)

⁷ *Id.*

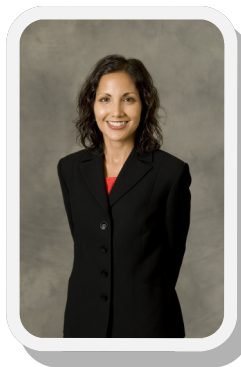
⁸ *Id.*

⁹ Minn. R. Prof. Conduct 1.16(b)(5)

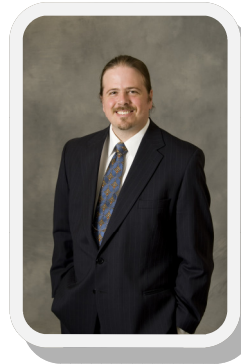
¹⁰ Minn. R. Prof. Conduct 1.16(b)(1)

¹¹ *See, e.g., Spearman v. Salminen*, 379 N.W.2d 627, 632 (Minn. App. 1986)

¹² Minn. R. Prof. Conduct 1.16(d)



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Collection Tools for the Tenacious Lawyer

Shannon M. Fitzpatrick

It is the rare family attorney who is always paid in full. Try as we might to keep our retainers replenished or to withdraw before we get in too deep, there is always that case, or those cases, where for whatever reason, the ledger falls further and further into the red.

The prudent attorney never “carries” any client. Be selective in client interviews, get a retainer that will cover at least through the first billing cycle, and manage receivables with timely billing. Our malpractice insurers can provide exemplar client intake and fee management protocols with tips on avoiding fee disputes. Minnesota Lawyers Mutual, for example, has a useful online publication called *Fee Dispute Issues and Tips in Minnesota*.

Ideally we would have no aged receivables, but even the most practiced family law attorneys – for whatever reason – have receivables owed by clients. Many firms have a collections manager who is responsible for following up on past due balances. They have a strict schedule for calling, writing, calling again, writing again, and so on until the matter is resolved, often by a payment plan. Other attorneys do their own collections, with or without an established procedure.

If we’ve been unsuccessful in working directly with our recalcitrant client, what are our options if we decide to pursue collection? Fee collection practices range from doing nothing to litigation. Malpractice insurers advise against suing clients for fear of reciprocal claims of malpractice. At times,

however, it may be appropriate to invoke one or more fee collection options.

This article will focus on two approaches: attorney’s liens and litigation. We will not address fee arbitration or mediation, which are encouraged by comment 9 to Rule 1.5 of the Minnesota Rules of Professional Responsibility.¹

Attorney’s Liens

Family law attorneys commonly assert attorney’s liens to assist in collection of unpaid legal bills. Minnesota Statutes §481.13, Subd. 1, grants an attorney an inchoate lien “in any money or property” which the attorney recovered on behalf of the client.² The purpose of the statute is to protect attorneys whose clients have agreed to pay fees by imposing a lien.³ The theory behind the lien is that a litigant should not be permitted to enjoy the fruits of an attorney’s services without paying for those services.⁴

An important consideration before asserting an attorney’s lien is the status of the relationship with the client. Rule 1.7 of the Rules of Professional Conduct prohibits an attorney from taking an action that is directly adverse to the client without the client’s informed consent.⁵ This suggests that a lawyer may run afoul of the rule by asserting a lien against a current client. Unless the client agrees to the lien via a valid conflicts waiver, the prudent course is to file the lien only against former clients.

First Step: Notice of Intention to Claim a Lien

An attorney's lien can be placed on both real and personal property that was awarded in the dissolution action. The procedure for perfecting the lien varies depending on which type of property is involved. With either type, the first step is to file a Notice of Intention to Claim a Lien as directed by Minn. Stat. §481.13, subd. 2.⁶ If the lien is on real estate that was awarded to the client, the notice must be filed in the office of the County Recorder or Registrar of Titles.⁷ If the lien is claimed on the client's interest in personal property, the notice must be filed in the "same manner as a security interest."⁸ Security interests are perfected by filing with the Secretary of State.⁹

There are three critical deadlines for perfecting attorney's liens on real property. The first is that the notice of intent to claim a lien must be filed no more than 120 days after the "last item of claim," that is, after doing the last of the work.¹⁰ Then, within 30 days of filing the notice of intent, the attorney must serve written notice of the lien to the real property's owner either personally or by certified mail.¹¹ If the proper notice is not given within the proper time, the lien is void. Within one year of filing of the notice of intent, the attorney also must file "a complaint or an answer with the court administrator."¹²

Second Step: Notice of Motion and Motion to Establish and Enforce Attorney's Lien

The requirement of filing a "complaint or answer" with the Court Administrator has taken the shape of a motion in the same case in which the attorney has represented the client. After obtaining a hearing date, the attorney serves and files a Notice of Motion and Motion to Establish Attorney's Lien along with a supporting affidavit. The motion should request the court to summarily

establish an attorney's lien on behalf of the lawyer/law firm in the amount of the unpaid fees plus continuing interest (if provided for in the fee agreement) upon the client's interest in any and all real property involved in or affected by the proceeding and on the proceeds of such property. The motion also should request an evidentiary hearing in the event that the lien is not summarily established and that judgment be entered against the client in the amount requested for unpaid attorney's fees. If the fee agreement has provided for attorney's fees and costs in the event of an action to collect fees, the motion also should request that judgment for attorney's fees and costs be entered in an amount to be determined upon submission of an affidavit, or at an evidentiary hearing, for costs, disbursements and attorney's fees incurred. It is not necessary to include a request for a lien on personal property, as the statute does not require judicial action for asserting an attorney's lien on personal property. Nevertheless, there is no downside to including personal property in the motion and many attorneys do.

Next: Summary Proceeding

Proceedings under Minn. Stat. § 481.13 are, by statute, summary, that is, abbreviated. A summary proceeding is "any proceeding by which a controversy is settled . . . in a prompt . . . manner, without the aid of a jury."¹³ Evidentiary hearings are rarely, if ever granted. Counterclaims for malpractice will not be heard, although they can be asserted in a separate action. However, due process requires that the client must have a "meaningful opportunity to be heard."¹⁴ The Minnesota Supreme Court has held that "although Minn. Stat. Sec. 481.13 calls for a summary proceeding, where an attorney produces evidence to support a claimed attorney's fee, a client must be allowed to challenge that evidence. To hold otherwise would permit attorneys to present their time

sheets, billing statements, or other evidence to the trial court unchallenged, and then be awarded an attorneys' lien. Such a result does not comport with due process and fair play.”¹⁵ The leeway afforded a client to challenge the attorney's fees claimed varies from court to court and on the facts specific to each case. In *Gaughan v. Gaughan*, 450 N.W.2d 338, 343 (Minn. App., 1990), for example, the client was granted the opportunity to cross-examine his attorney about the amount of time spent on the case and the validity of the charges. In another example, the client was allowed to depose the attorney to gather facts about the lien.¹⁶

In setting the amount of the attorney's lien, the court must consider the fee agreement between the attorney and client, as well as the reasonableness and necessity of the claimed fees.¹⁷ Whether fees are reasonable is a question of fact. “In determining the reasonableness of the hours and the reasonableness of the hourly rates, the court considers; ‘all relevant circumstances.’”¹⁸ “Factors considered in determining reasonableness include “the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.”¹⁹

Each case is likely to stand on its own facts. Where the fee agreement has been detailed and explicit, the client has been afforded numerous opportunities to contest the bill and but does not until the motion is brought, the court will be less inclined to let the client belatedly object to the bill.

Once the attorney's lien is determined by the court, the court will order that judgment be entered against the client and that a lien has

been established. The attorney should then file an affidavit of identification of the judgment debtor with the court administrator and ask for the judgment to be docketed.²⁰ The affidavit of identification must state the “full name, occupation, place of residence, and post office address of the judgment debtor, to the best of affiant's information and belief.” If the judgment debtor has real property in another county, the attorney should request a “transcript of the docket” to be docketed in the other county or counties. To be effective against registered real property, the judgment must be recorded pursuant to Minn. Stat. § 508.63 and 508A.63.

You Can File But You Can't Foreclose an Attorney's Lien on a Homestead

Prior to April 4, 2003, the Lawyers Professional Responsibility Board opined in Opinion No. 14 that it was unethical to file an attorney's lien against a client's homestead unless the attorney first obtained a valid waiver of the client's homestead exemption. The opinion was based on the 1981 case *Northwestern National Bank v. Kroll*, 306 N.W.2d 104 (Minn. 1981) and former Code of Professional Responsibility DR 7-102(a) (2). In *Kroll*, the Minnesota Supreme Court held that attorney's liens did not attach to homestead property because of the statutory homestead exemption in Minn. Stat. §510.01. Minnesota Statutes §510.01 provides that homestead property is, with certain exceptions, “exempt from seizure or sale under legal process . . .” Disciplinary Rule 7-102(a)l, in turn, prohibited lawyers from knowingly advancing a claim that is unwarranted under existing law.²¹ The rationale for forbidding foreclosure was that satisfying an attorney's lien from statutorily protected proceeds of a homestead was frivolous and in bad faith after the *Kroll* decision. Less clear was the rationale for prohibiting lawyers from merely filing

attorney liens.²²

With the 2003 repeal of Opinion No. 14, it is no longer unethical to *file* attorney liens on homestead property. However, *foreclosure* of the lien is still ethically prohibited unless the client's equity exceeds the current exemption of \$365,000. Consequently, attorneys must wait for the property to be sold before their lien can be satisfied from the client's homestead. Notably, no such prohibition exists with respect to non-homestead real property, such as vacation homes or cabins.

How is an Attorney's Lien Enforced Against Personal Property?

The attorney's lien statute does not address how a lien on personal property should be enforced. However, since the lien is security for a debt, the attorney may use any available method for foreclosing on a security interest, including a forced sale.²³

Suing a Client

There is no debate as to whether an attorney may sue a current client for unpaid fees. Simply put, don't do it. Suing is directly adverse to a current client and is strictly prohibited by MRPC 1.7. The same is not true for former clients. At times, suing a former client is the only collection tool available. One major caveat, however, is the risk that the client may counterclaim for malpractice or other claims, such as breach of fiduciary duty or even breach of contract (for excessive, unnecessary, and unauthorized work). Hence, attorneys are advised to weigh the amount of the outstanding bill against the likelihood of defeating a counterclaim and the chances of actually collecting the fees. If the lawyers' representation has resulted in a substantially favorable outcome for the client, the risk of a malpractice counterclaim is reduced. However, in family law cases where results often are mixed, there is a

higher degree of risk.

Most common causes of action

Where there is a fee agreement between the attorney and former client, the attorney can assert claims for breach of contract and for account stated. If there is no fee agreement, the attorney may assert a claim for account stated, in addition to unjust enrichment.

An account stated cause of action is based on a "manifestation" of an agreement between the attorney and the former client and that the amount sought by the attorney is an accurate computation of an amount due.²⁴ The former client is deemed to have manifested an agreement to pay the billed fees by continuing the lawyer's engagement for an "unreasonably long time" without protest or complaint of the bills.²⁵ The fact that a client has not paid the bill is not considered an objection of the nonpayment "is based solely on the ground of inability to pay."²⁶ Nor do general complaints about billing constitute objection; instead, a debtor must specifically object to the correctness of the account rendered.²⁷

What constitutes a reasonable time within which a client must object to the billed fees depends on the particular facts of each case. Factors include the nature of the transaction, the relation of the parties, the parties' distance from each other and the means of communication between them, and the parties' business capacity, intelligence, and the usual course of their business.²⁸ The question is usually determined by the jury.²⁹ However, if the facts are undisputed, the question is exclusively for a court and summary judgment may be appropriate.³⁰

Depending on the facts, interest may be included in an account stated even if the fee agreement did not specify that interest would be charged. The general rule is that liability

for interest is purely a matter of contract.³¹ However, an exception exists under the doctrine of accounts stated. Failure to protest a bill that clearly charges interest for an unreasonably long time is considered a manifestation of assent.³² The client's silent acquiescence is deemed an implied promise to pay those charges.³³

Unjust enrichment is an equitable remedy available where there is no fee agreement. To establish an unjust enrichment claim, the unpaid attorney must show that the former client knowingly received or obtained something of value for which the client in equity and good conscience should pay.³⁴ This doctrine is not available where there is a valid fee agreement between the attorney and client.³⁵

You've Got a Judgment, Now What?³⁶

Judgment Lien

Assuming you have won a judgment for unpaid legal fees, what comes next? If the judgment is from conciliation court, the judgment first must be "transcribed" to the district court. To obtain a transcript of judgment, send a letter to the appropriate court administrator, including your case number and title, your name, address, phone, a completed Affidavit of Identification³⁷ and the required fee (currently \$30 in Hennepin County). The Affidavit of Identification must state the full name, occupation, place of residence and business, and post office address of the judgment debtor, to the best of affiant's information and belief.³⁸

If the judgment already is in the district court, a transcript of judgment is not needed. Simply file an Affidavit of Identification. Once the affidavit is filed, the judgment becomes a lien on all real property in the county "then or thereafter owned by the judgment debtor."³⁹ For registered land,

however, the judgment must be recorded pursuant to Minn. Stat. §§ 508.63 and 508A.63 before the lien takes effect. The judgment survives, and the lien continues, for ten years after entry. They may be renewed for another ten years, provided that an action on the judgment is commenced before the ten years has expired.

For real estate the debtor client may own in other counties, the judgment creditor must request one or more transcripts from the original district court and file the transcript(s) with the court administrator(s) in the other county or counties.

The same prohibitions that apply to foreclosing on an attorney's lien also pertain to judgment liens. However, both types of liens must be paid to convey clear title to a buyer.

Other Alternatives

It goes without saying that settlement with the client is always a possibility. A common practice to is to offer a discount if the unpaid fees or judgment is paid immediately or within a specified time frame.

Garnishment of bank accounts and wages also is an available collection tool pursuant to Minn. Stat. §§ 571.71 et seq. Under this statute, a judgment creditor may issue a garnishment summons any time after judgment enters.⁴⁰ Garnishment also is available at any time 45 days or more after service of the summons and complaint and where the attorney could have, but has not, obtained a judgment by default pursuant to Minn.R.Civ.P. 55.01(a).⁴¹ In this instance, the attorney must follow precisely the notice requirements set forth in Minn. Stat. § 571.71 (2). The garnishment procedures that must be followed are outlined in detail in the Minn. Stat. Chapter 571 and are outside the scope of this article. The garnishment statute also

contains several suggested forms.⁴² A useful garnishment guide can be found at 26 Minn. Prac., Collections Handbook § 11:1 (2010 ed.).

Writ of Execution

A judgment for unpaid legal fees may be enforced by execution at any time within ten (10) years after the entry of the judgment.⁴³ In short, this means that a sheriff who is provided with a Writ of Execution must levy on, seize or otherwise take control of the judgment debtor's property. The Writ of Execution is obtained from the Court Administrator of the court or courts where the judgment is docketed. After the Writ or Execution has been issued, it must be endorsed by judgment creditor or his attorney. The writ itself is then delivered to the office of the Sheriff of the county where the judgment debtor's real or personal property is located. Pursuant to Minn. Stat. §550.051, a writ of execution is good for 180 days.

All property, real and personal, including rights and shares in stock, money, bank accounts, credits, negotiable instruments and other evidences of debt is subject to being seized by the sheriff. As a practical matter, the sheriff should be provided with a specific list of property or bank accounts which belong to the debtor, and/or the name of the debtor's employer. If the judgment creditor is unable to determine what assets the debtor owns, the creditor may request the court administrator to issue an order for disclosure.⁴⁴ This order requires the debtor to reveal all non-exempt property and financial information within 10 days. If the debtor fails to respond, an order to show cause may be requested. This requires the judgment debtor to appear in court and explain why the order for disclosure was disobeyed. The judgment debtor also may seek an order that requires the debtor to appear and answer

questions concerning his property before a judge or a referee as provided in Minn. Stat. § 575.01 (Proceedings Supplementary to Execution).

With sufficient information and the Writ of Execution, the sheriff can "levy" the debtor's property. However, the sheriff cannot break into the debtor's home to collect an item subject to levy. If the sheriff is unable to levy the assets within 180 days after the sheriff receives the writ, the writ will be returned "unsatisfied."

Property that the sheriff is able to seize is sold at an execution sale. An execution sale on real property is similar to a mortgage foreclosure proceeding. Personal property seized on execution is to be sold at a public sale. The procedure for levying on both types of execution sale is set forth in Minn. Stat. §§ 550.18 et seq. Executing on homestead property, however, is subject to special procedures outlined in Minn. Stat. § 550.175. Any money collected by the sheriff, less the expense and fees charged in making the levy, must be paid to the judgment creditor or the judgment creditor's attorney upon demand.⁴⁵

Attorney's Summary Execution of Judgment Debts

Another potential useful collection tool is the procedure called "summary execution." Through this procedure, a judgment creditor may reach money owed by a third party to the judgment debtor, including earnings. This remedy is governed by Minn. Stat. Chapter 551. The statute allows the creditor's attorney (but not the creditor herself) to levy on wages or other funds owed to the judgment debtor. One advantage of this procedure is that the sheriff's office need not be involved. The attorney first must obtain a writ of execution issued under section 550.04. The execution then can be served by personal service upon the third party, as well

as by registered or certified mail. The procedure can be used to collect on any judgment debt, but no more than \$10,000.00 may be recovered in each levy exercise. Section 551.04, Subd. 3, lists property that is not subject to attachment by a writ of summary execution.⁴⁶

Final Word

Despite the varied collection tools available, invariably there will be cases where the former client debtor is judgment proof. He or she may have few or no viable assets and/or may be unemployed or with public assistance as the only source of income. In cases like these, there is little one can do to recover unpaid fees, at least in the short term. However, court judgments and liens are valid for 10 years. Over that time, a person's financial circumstances may change. Additionally, the Minnesota Supreme Court recently held that a judgment may be renewed multiple times by bringing an action on a judgment.⁴⁷ The tenacious lawyer ultimately may collect some or all of the fees owed to him or her.

Notes

¹ Comment 9 to MRPC 1.5 provides:
If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

² Minn. Stat. § 481.13, Subdivision 1, provides:
Generally. (a) An attorney has a lien for compensation whether the agreement for

compensation is expressed or implied (1) upon the cause of action from the time of the service of the summons in the action, or the commencement of the proceeding, and (2) upon the interest of the attorney's client in any money or property involved in or affected by any action or proceeding in which the attorney may have been employed, from the commencement of the action or proceeding, and, as against third parties, from the time of filing the notice of the lien claim, as provided in this section.

³ *Boline v. Doty*, 345 N.W.2d 285, 288 (Minn.App.1984).

⁴ *Schroeder Siegfried Ryan and Vidas v. Modem Electronic Products, Inc.*, 295 N.W.2d 514 (Minn. 1980).

⁵ Comment 6 to MRPC 1.7.

⁶ Subdivision 2 of Minn. Stat. §481.13, perfection of lien, states:

(a) If the lien is claimed on the client's interest in real property involved in or affected by the action or proceeding, a notice of intention to claim a lien on the property must be filed in the office of the county recorder or registrar of titles, where appropriate, and noted on the certificate or certificates of title affected, in and for the county where the real property is located. Within 30 days of filing a lien on real property, the claimant must prepare and deliver a written notice of the filing personally or by certified mail to the owner of the real property or the owner's authorized agent. A person who fails to provide the required notice shall not have the lien and remedy provided by this section. Upon receipt of payment in full of the debt which gave rise to the lien, the lienholder shall deliver within 30 days a recordable satisfaction and release of lien to the owner of the real property or the owner's authorized agent. No notice of intent to claim a lien may be filed more than 120 days after the last item of claim.

(b) If the lien is claimed on the client's interest in personal property involved in or affected by the action or proceeding, the notice must be filed in the same manner as provided by law for the filing of a security interest.

⁷ Minn. Stat. §481.13, Subd. 2(a).

⁸ *Id.*

⁹ Minn. Stat. §§ 336.9-312(a)-501(b).

¹⁰ Minn. Stat. §481.13, Subd. 2(a).

¹¹ *Id.*

¹² Minn. Stat. §481.13, Subd. 3.

¹³ *Boline*, 345 N.W.2d at 289 (quoting Black's Law Dictionary 1084 (rev. 5th ed. 1979)).

¹⁴ *Id.*

¹⁵ *Gaughan v. Gaughan*, 450 N.W.2d 338, 343 (Minn. App., 1990). It should be noted that the client's opportunity to "challenge" an attorney's fees does not necessarily mean a challenge within the context of the motion to establish an attorney's lien. The client may have had adequate opportunity to challenge the fees throughout the course of the underlying action. The wording of the fee agreement may be significant, as well as the content of any communications with the client about the unpaid fees.

¹⁶ *Paul v. Brown*, No. A08-0515 (Minn. App. 1/6/2009) (Minn. App., 2009).

¹⁷ See, e.g., *Roehrdanz v. Schlink*, 368 N.W.2d 409, 412-13 (Minn.App. 1985) (upholding finding that fees already paid were sufficient compensation for legal services rendered, where attorney did not inform client of proper hourly rates, time spent, or charge allocated to particular service, and evidence was insufficient to establish oral fee agreement)

¹⁸ *State v. Paulson*, 188 N.W.2d 424, 426 (1971)

¹⁹ *Id.* These factors are similar to Minn. R. Prof. Conduct 1.5(a), which states, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee." The rule sets out a non-exclusive list of factors to consider, including the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

²⁰ Minn. Stat. §548.09, Subd. 2.

²¹ Rule 3.1 of the Minnesota Rules of Professional Conduct carries forth this prohibition for the most part.

²² K. Jorgenson, *Repeal of Homestead Lien Ethics Opinion*, *Bench & Bar*, May/June 2003.

²³ *Id.* at 421-422.

²⁴ See, e.g., *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn.App.1984); *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 345 (Minn.App.1997), review denied (Minn. Feb. 19, 1998).

²⁵ See *Joseph V. Edeskuty & Assocs. v. Jacksonville Kraft Paper Co.*, 702 F.Supp. 741, 748 (D.Minn.1988) (applying Minnesota law).

²⁶ 1A C.J.S. *Account Stated* § 19 (2005); see *Kenyon Co. v. Johnson*, 144 Minn. 48, 50-51, 174 N.W. 436, 437 (1919) (concluding that defendants did not object to invoices by telling plaintiff that "they did not have the money to pay for the [goods]").

²⁷ *Lampert Lumber Co. v. Ram Constr.*, 413 N.W.2d 878, 883 (Minn.App.1987) (concluding that appellants failed to object to the interest rate on a debt by making "complain[ts] about the billing generally"); *Kenyon Co.*, 144 Minn. at 51, 174 N.W. at 437 (holding that defendants failed to object because they did not timely "challenge the correctness of the account").

²⁸ 1 *Am.Jur.2d Accounts & Accounting* § 40 (2005) (footnotes omitted).

²⁹ *Id.*

³⁰ *Id.*; see also *American Druggists Ins. v. Thompson LumberCo.*, 349 N.W.2d 569, 573 (Minn. App. 1984).

³¹ *Tate v. Ballard*, 243 Minn. 353, 68 N.W.2d 261 (1954).

³² *American Druggists Ins. v. Thompson LumberCo.*, 349 N.W.2d at 573 (citations omitted).

³³ *Id.*

³⁴ *City of Maple Grove v. Marketline Const. Capital, LLC*, 802 N.W.2d 809, 817 (Minn.App.2011).

³⁵See *Stein v. O'Brien*, 565 N.W.2d 472, 474–75 (Minn.App.1997).

³⁶The reader is cautioned that this article is merely an overview of the collection tools available to an attorney who is seeking to collect fees. This should not be relied upon for a complete description of applicable rules and procedures.

³⁷A form is available on-line at the Minnesota Judicial Branch website, <http://www.mncourts.gov/default.aspx?page=513&item=225&itemType=formDetails>.

³⁸Minn. Stat. § 548.09, subd. 2.

³⁹Minn. Stat. § 548.09, subd. 1.

⁴⁰Minn. Stat. § 571.71(3).

⁴¹Minn. Stat. § 571.71(2).

⁴²E.g., Minn. Stat. §§ 571.74 (garnishment summons and notice to debtor), 571.75 (garnishee disclosure) and others.

⁴³Minn. Stat. §§ 550.01 and 550.02.

⁴⁴Minn. Stat. § 550.011.

⁴⁵Minn. Stat. § 550.10.

⁴⁶Minn. Stat. § 551.04, Subd. 3 exempts the following property from attachment by summary execution

1. Any indebtedness or money due to the judgment debtor, unless at the time of the service of the writ of execution the same is due absolutely or does not depend on any contingency;
2. Any judgment owing by the third party to the judgment debtor, if the third party or the third party's property is liable on an execution levy upon the judgment;
3. Any debt owing by the third party to the judgment debtor for which any negotiable instrument has been issued or endorsed by the third party;
4. Any indebtedness or money due to the judgment debtor where the judgment debtor is a bank, savings bank, trust company, credit union, savings association, or industrial loan and thrift company with deposit liabilities;
5. Any indebtedness or money due to the judgment debtor with a cumulative value of less than \$10; and
6. Any disposable earnings, indebtedness, or money that is exempt under Minnesota or federal law.

⁴⁷*Dahlin v. Kroening*, 796 N.W.2d 503, 509 (Minn. 2011).

Shannon M. Fitzpatrick is a family law attorney practicing in Minneapolis, Minnesota. Prior to opening her solo family law practice in 2007, Ms. Fitzpatrick was a civil litigator for 24 years, primarily in Boston, MA. Minnesota is her home state. She graduated from the University of Minnesota (summa cum laude) and earned her law degree at Georgetown University Law Center (magna cum laude). Ms. Fitzpatrick has a husband of 32 years, two grown children, one standard poodle and three cats.

The Sheriff's Levy: An Underutilized Collection Option

Karen Terese Kugler

Can I make a confession?¹ I hate collections work. I am a family law attorney. When I hear acronyms like FDCPA (Fair Debt Collections Practice Act), and the words “garnishment” and “levy,” I can feel the migraine begin to form in my head. However, while collection work may literally be a headache, in these tough economic times unpaid receivables are a problem that almost all family law attorneys encounter. Familiarizing yourself with Minn. Stat. § 481, 550, 551 & 571 is a necessity unless you plan to outsource your collections work.

So, after you have obtained a judgment, how do you actually collect on that judgment? If your debtor has financial assets such as bank and investment accounts, you may want to consider a levy. Before you seek a levy, it is important to understand that certain property is exempt from levy. These exemptions are listed in part in Minn. Stat. § 550.37. Here is a list of common levy exemptions:

	Business (“tools of trade”)	Minn. Stat. § 550.37, Subd. 6	\$5,000.00	\$11,000.00
	Insurance Benefits due to death of spouse or parent ³	Minn. Stat. § 550.37, Subd. 10	\$20,000.00	\$44,000.00
	Manufactured home	Minn. Stat. § 550.37, Subd. 12	---	---
	Motor Vehicle ⁴	Minn. Stat. § 550.37, Subd 12a	\$2,000.00	\$4,400.00
	Earnings not subject to garnishment	Minn. Stat. § 550.37, Subd 13	---	---
	Public assistance	Minn. Stat. § 550.37, Subd 14	---	---
	Accrued Interest	Minn. Stat. § 550.37, Subd. 23	\$4,000.00	\$8,800.00
	Employee Benefits (including, but not limited to retirement accounts such as IRAs and pensions)	Minn. Stat. § 550.37, Subd. 24	\$30,000.00	\$66,000.00
Property	Statute	Original exemption limit	Current exemption limit²	
Credit Extended	Minn. Stat. § 325G.22, Subd. 1	\$3,000.00	\$6,600.00	
Personal Goods	Minn. Stat. § 550.37, Subd. 4	\$4,500.00	\$9,900.00	
Wedding Ring	Minn. Stat. § 550.37, Subd. 4	\$1,225.00	\$2,695.00	

If you have determined that a levy is a viable option for collection, you should first obtain a writ of execution (prior to seeking to levy or garnish a debtor's funds). To obtain the writ, simply write to the court administrator in the county of your judgment and request the writ. Enclose the correct fee for the writ with your request.⁵

After you have obtained your writ, you can proceed with a garnishment or levy. Many of you may be familiar with the option of an attorney's levy pursuant to Minn. Stat. §551.05. However, levying funds under this section has one key limitation – the levy cannot exceed \$10,000. Minn. Stat. § 551.05. Fortunately, there is no such \$10,000 maximum limit for a sheriff's levy, which makes it a perfect option for large judgments.

Sheriff's levies are governed by Minn. Stat. § 550.135. Minn. Stat. § 550.135 directs us to use statutory forms to proceed with a sheriff's levy. The forms required are:

Financial Institutions Execution Disclosure, Notice of Levy and Instructions, and Exemption Notice.⁶ The Financial Institutions Execution Disclosure form requirements can be found in Minn. Stat. §550.143, Subd. 2. The Notice of Levy and Instructions form requirements can be found in Minn. Stat. §550.143, Subd. 3a & 3b. The Exemption Notice form requirements can be found in Minn. Stat. §550.143, Subd. 3c. However, before you begin the arduous task of drafting these forms, I recommend that you first contact the civil division of the sheriff's office. In addition to finding out the initial fee that you should provide the sheriff's office for the sheriff's levy, you should also ask if the office would prefer to draft the documents for the sheriff's levy.

Many sheriff's offices have their own forms that they utilize for sheriff's levies and allowing them to draft the forms for you will save you a great deal of time and effort.

To obtain your levy you will provide the sheriff's office with the levy forms (if you are drafting them), the **original** writ of execution, a check for the financial institution,⁷ and a check for the sheriff's office for a portion of their fee.⁸ In addition to providing these items to the sheriff's office you should provide them with identifying information regarding the debtor and information about the financial institution and the account(s) to be levied.

It is important to be prepared for the debtor to claim that an exemption applies, even if an exemption is not applicable. If the debtor completes an Exemption Notice and provides the notice to you, you have only six (6) business days from the date of receipt of the Exemption Notice to object and request a hearing. Minn. Stat. § 550.143, Subd. 5. Thus, you may want to prepare the Notice of Objection and Notice of Hearing in advance, in case the debtor claims an exemption. See Minn. Stat. §550.143, Subd. 7.

The sheriff's office will collect a fee for collecting funds for your firm pursuant to sheriff's levy. In my opinion, this fee is a small price to pay for the wonderful assistance that you will receive from the sheriff's office. A sheriff's levy is an efficient and effective way to collect on judgments you have obtained on behalf of your firm.

SAMPLE LETTER FOR WRIT

October 14, 2011

Civil Filing – Family Court
Ramsey County Courthouse, Suite 160
15 West Kellogg Boulevard
Saint Paul, MN 55102

Re: Doe v. Doe
Court File No.: FA-00-0000

Dear Court Administrator:

Enclosed please find a check in the amount of \$55.00 for a Writ of Execution in the above entitled matter. Please direct the Writ to the Sheriff of Ramsey County and mail it to our office at the above address.

If you have any questions, or if I could provide further information, please call our office.

Very truly yours,

Your Name

Enclosure

SAMPLE LETTER TO SHERIFF'S OFFICE

October 14, 2011

Ramsey County Sheriff
ATTN: Civil Division
Law Enforcement Center
425 Grove Street
St. Paul, MN 55101

Re: Request for Bank Levy –Jane Doe
Court File No.: # FA-00-0000

Dear Civil Division:

Enclosed, for processing in connection with the above-referenced matter, please the following documents:

1. Financial Institutions Execution Disclosure;
2. Original Writ of Execution, which has been endorsed by the attorney for the creditor;
3. Notice of Levy and Instructions;
4. Exemption Notice (2 copies) to be served upon the financial institution;
5. A check in the amount of \$15 payable to the financial institution; and
6. A check in the amount of \$70 payable to Ramsey County Sheriff as and for a deposit.

In addition, please note the following information:

Name & Address of Judgment Creditor

Your Firm Name
Your Firm Address
Town, MN 55113
Phone: (651) 123-1234
Fax: (651) 123-4321

Name & Address of Judgment Debtor

Jane Doe
123 Bankruptcy Place
St. Paul, MN55116
SS#:111-11-1111
DOB:January 1, 1950

Name & Address of the Financial Institution

ABC Bank
123 Main Street, Suite 321
St. Paul, MN 55101
(651) 555-5555
Fax: (651) 555-1234

Judgment Debtor’s Account # with Financial Institution

#12345678

Thank you in advance for your prompt attention to this matter. If you have any questions, please feel free to contact me.

Sincerely,

Your Firm Name

Your Name

Enclosures

Notes

¹No, not a confession of judgment. Sorry, just a little collection law humor there. Yes, I apologize for the horrific pun.

²The dollar amounts are adjusted periodically, with the current amounts being reported by the Minnesota Department of Commerce. Updated amounts can be found here: <http://mn.gov/commerce/banking-and-finance/topics/interest-rates/adjustments-dollar-amounts.jsp>

³There is an additional exemption for dependent insurance benefits.

⁴There are additional exemptions for vehicles modified for disability.

⁵I have provided a sample letter. **Please be aware, the fee for a writ of execution varies by county.** See this link to find the fee for your county: <http://www.mncourts.gov/default.aspx?page=1020>

⁶Two copies of the Exemption Notice are to be served upon the financial institution

⁷The current fee for the financial institution is \$15. See Minn. Stat. § 550.135, Subd. 5.

⁸I have provided a sample letter.

Karen Terese Kugler is a family law attorney at J. Oakes Family Law in Roseville, Minnesota. Ms. Kugler is currently Chair Elect of the family law section of the Minnesota State Bar Association (MSBA) and is co-chair of the family law section of the Ramsey County Bar Association (RCBA). Ms. Kugler is a 2002 graduate of the University of Minnesota Law School and received her B.A. in Economics from Carthage College Magna Cum Laude in 1999. She can be reached via telephone at (651) 628-0265 or by email at karenkugler@joakesfamilylaw.com or karen_atty@yahoo.com.

Tips and Tidbits on Enforcing Property Settlements in Dissolution Actions

Pete Radosevich


So you got a pretty good settlement for your divorce client. Now what? How are you going to make sure your client gets the property awarded to her in the divorce decree? A good divorce lawyer knows that a divorce decree is a tool- and how you use that tool to protect your client is a skill of its own.

Many divorce settlements involve big, tangible divisions of property. For example, suppose your client was awarded part of a retirement plan. Easy, right? Draft a QDRO; get the funds. But what if your client was also awarded the motorcycle; the antique coffee mill; some jewelry, and a cash balancing payment of \$12,000.00? How do you get this stuff for your client, often from a former spouse reluctant to participate?

The first thing I do when a dissolution is started is notify the retirement people that a divorce is pending and the spouse's retirement assets may become in play. Often, the plan administrator will send you a note saying that they will not allow the participant to withdraw any funds from the retirement account for 18 months. They'll also copy the participant, who will then know your client has an attorney who means business and will protect the client. I would also consider notifying the bank of joint accounts and other funds, to prevent liquidation or depletion of those funds- especially lines of credit. If you've made it difficult for the spouse to move funds around prior to the divorce decree, it's much easier to use those funds later as leverage to make sure your client

receives the property she was awarded.

Most personal property should be exchanged before the decree is final. Once the decree is entered, it can be difficult collecting personal property. Using a writ of execution from the court can be very effective. The writ gives the sheriff the authority to enforce the decree. For a fee, the sheriff will accompany your client to retrieve the property (don't think the sheriff will actually get the property for you- that's very, very rare. Most likely, you will have to arrange all the details for retrieval, and the sheriff will stand around to prevent trouble.) When applying to the Court for a writ of execution, be very thorough with your evidence. For example, suppose your client was awarded the family camper. Just after the decree, the spouse moves the camper to hunting land 'up north'. Your client is afraid she'll never see the camper again. Finding such property is not impossible. First, verify the location of the camper. Your client probably knows where the spouse's hunting property is, or other places where a spouse may try to hide property. Look at the property on 'Google earth'. If you see the camper on the property, include that information in your letter request to the Court Administrator. The more specific your evidence is, the more likely you'll retrieve the property on the first try. The sheriff will charge you for each attempt, and if you need to hire people to help actually move the property, you'll need to pay them, too. Thorough preparation is the key to effective property retrieval using writs of execution.



Knowledge is power. Ask the spouse to fill out the Court's Financial Disclosure form, available on the Court's website. You have the option of serving the form on the spouse, or asking the Court to issue an order for disclosure. Both are effective, and give you powerful enforcement options. The form itself asks probing questions about financial and personal property. If the form is not returned within 10 days, or, (more likely) the form is returned but is incomplete or evasive, you can ask the Court to order the spouse to appear in Court. Submit an affidavit to the Court asking for an Order to Show Cause why the spouse should not be held in contempt. Again, the forms are available on the court's website. Be very specific in your affidavit. It pays to have strong evidence that the spouse was hiding assets or was intentionally vague or incomplete in filling out the Financial Disclosure form.

For example, you know that your spouse has a boat motor, but didn't list the motor on his disclosure. In addition to your client's sworn statement, attach a receipt for the motor, or copy of the manual, or a photograph to the affidavit for an OTSC. If the Court orders the spouse to appear, ask the Judge if you may inquire. Use the opportunity to get specific details about the property. Ask the spouse what happened to the motor. He'll probably say the motor was sold to a friend. Keep inquiring. What friend? How much? When? What did you do with the proceeds? Eventually, you will have a substantial amount of valuable information about the spouse's assets and property- all under oath and under penalty of perjury. If the spouse is not forthcoming with the truth (i.e. lying) you should be able to show the Judge that the spouse is in contempt of court. If that happens, you have put your client in a very powerful position- the spouse will most likely be ordered to produce the property or face jail time.

The Courts are not collection agencies, and are reluctant to hold a former spouse in contempt for simply failing to drop off some personal property. When applying for an OTSC for contempt, focus on the 'contempt' portion of the motion and not on the 'judgment' part. The Judge will not be sympathetic to you just because you're not happy that your ex has not returned some personal property. But the Courts get quite testy when a spouse is actively 'thumbing her nose' at a Court's order. Remind the Judge that our system of American justice will fall apart quickly if there are no repercussions for disobeying a Court order.

Some aggressive attorneys will use depositions to obtain information from a former spouse. Post-decree depositions are powerful. They are also expensive. If the situation would benefit from the expense of a deposition, plan your deposition questions carefully. Take a tip from psychological evaluations- ask each question two or three different ways. Be ready to inquire in depth with specific, detailed follow-up questions. Remember the 5-W's of journalism- who, what, when, where, and why. If depositions become necessary, it's usually because the former spouse is very reluctant. As the deposer, you need to be aggressive. If you're not willing to be aggressive, find someone who is- consider hiring a personal injury attorney or a debt collection attorney to handle the deposition.

There's one more tool I have used many times in my family practice: private investigators. A private detective needs to be licensed by the State, **or be employed by an attorney**. That's significant, because as an attorney, you have the ability to hire someone to exclusively investigate legal matters without being a licensed investigator. (See Minnesota statutes §326.3341 (4)). I have used several friends who enjoy being

part-time Jim Rockfords. There are also a number of very qualified private companies to hire. Not only can private investigators find detailed information about personal property and assets, but the information can be used as a very persuasive tool to convince a former spouse to settle a dispute. My favorite use of a private investigator involved a former spouse who was not paying child support because a back injury prevented him from working. My PI spent a quick morning following the former spouse around with a video camera, as he went from cash-paying plumbing job to cash-paying plumbing job. Confronted with the tape, the spouse promptly started paying his support.

These are just a few tips and tidbits to consider when trying to collect property following a divorce. Remember, getting the settlement is the easy part. Most clients will be forever grateful when you obtain real, tangible results following a dissolution. It's a skill worth developing.

Pete Radosevich is a personal injury, litigation, and divorce attorney in the Duluth area. He can be reached at 218-879-0008 or at Pete@RadosevichLaw.com.

I-VD Child Support Enforcement and Collections

Melissa Rossow, Jennifer Stanfield and Thomas P. Kelly

This article is not meant to be an advertisement for the Minnesota Child Support IV-D Program offered in all 87 counties (however we do have many tools available to us that are not available anywhere else, and for some people our services are free and for others our services are incredibly cheap). Rather, the purpose of this article is to share some information about enforcement and collections tools that are available to collect child support obligations.

The first third of this article, “Enforcement and Collections Tools in the Toolbox of the IV-D Child Support Program,” which was written by Melissa Rossow, is a little history of the IV-D Program and the enforcement and collections remedies in the counties’ IV-D child support tool boxes. Some of these tools are exclusive to the counties, but some are available to you and to your clients. The second third of this article, “Unique Enforcement Tools at Your Fingertips,” written by Jennifer Stanfield, discusses some of the more unique child support enforcement tools that are not exclusive to the IV-D Program. The last third of this article, “The Contempt Remedy in Child Support Enforcement,” was written by Tom Kelly and is an in-depth discussion of the area of civil contempt as it relates to child support enforcement.

We hope that this article reminds you that Child Support Professionals, made up of County Attorneys, Assistant County Attorneys and Child Support Workers are out here, focusing on child support collections

and available for your clients (whether your client owes or receives child support). We don’t bite, we are from the government and we are truly here to help, and we are only a quick phone call or email away.

Enforcement Tools In the Toolbox Of The IV-D Child Support Program

All States are required to have a IV-D Child Support Program to receive Federal funding for welfare programs. Congress enacted Title IV-D of the Social Security Act in 1975, found at 42 U.S.C. section 651-669 and 45 C.F.R. sections 301-308, which sets forth the framework of the IV-D program. Throughout the years, there have been many changes and mandates in the IV-D program, many of which include mandates for States to enact laws for certain enforcement and collections tools.

When a case is opened in a county, the county must determine what needs to happen and take the next logical step. If, at the time of the public assistance referral¹ or nonpublic assistance application for IV-D services, there is no child support order, the county must establish an order. This occurs through a paternity adjudication if there has been no paternity adjudication, or through an establishment of support if there has been a paternity adjudication through a Recognition of Parentage or the child was born during a marriage. If, at the time of the referral or application, there is a court order that addresses child support, the county must enforce the child support part of the order.

There are many tools available to enforce and collect child support in Minnesota. Some of these tools are available to the IV-D Child Support Program exclusively, and other tools are available to private attorneys and pro se litigants. Some tools are known as “administrative” tools, like income withholding and tax offsets, others are “judicial” tools, and there is a third category of the “quasi-judicial” tools. See Gerber v. Gerber, 714 N.W.2d 702 (Minn. Jun 01, 2006).

When counties have child support orders to enforce, either after establishing a new order or when a party has an existing order at the time IV-D services are opened, they use the least intrusive enforcement or collections tools first. If those work, then the case just clicks along and the county receipts payments in and disperses payments out. When payments are missed, more intrusive enforcement or collections tools are used.

In Ramsey County, we have the enforcement or collections tools categorized in 5 separate categories (A-E) from the least intrusive to the most intrusive, and we start enforcing cases with the least intrusive enforcement or collection tool. Some counties may put some of the enforcement or collection tools in a slightly different order for their case management, but all start with the least intrusive and move up.

Category A

Income Withholding - Income withholding is an administrative tool, the least intrusive tool, and is the most commonly used tool. Interestingly enough, income withholding is the only enforcement remedy used for collecting current support as all other enforcement remedies are used for collecting arrears, or current support combined with arrears. According to Minnesota Statutes, Section 518A.53, every order for child

support must address income withholding (either order it or waive it). When a county child support office receives an income withholding order that starts, changes, or terminates income withholding, the county notifies the employer listed in the county automated IV-D system (PRISM). Income withholding usually starts, changes, or terminates within 6 weeks of that notice.

To have income withholding in place, the case must be an open IV-D case, or be a non-IV-D income withholding only services case which charges \$15.00 per month for income withholding services only.

Medical Support - Use of the National Medical Support Notice (NMSN) is the next least intrusive tool. Pursuant to Minnesota Statutes, section 518A.41, every child support order must assign or reserve the responsibility for health care coverage and uninsured and unreimbursed health care expenses. One or both parents may be ordered to provide medical support by providing insurance or cash payments. When the county receives an order with health care coverage ordered, the county investigates whether the coverage is already in place, and if not, it sends the NMSN to the employer to place the child on the parent’s coverage.

Income withholding is used for medical support if one party owes the other party for reimbursement of the cost of the health care coverage, if there is no basic support to offset. The medical support offset in Minnesota Statutes, section 518A.41, subdivision 16 should not be ordered in the body of the court order. The offset is administrative. Ordering the offset will create havoc for future modifications and cost-of-living adjustments (COLAs) as the offset amount ordered will be the basis for future modifications and COLAs. Rather, if you must, mention the offset in the findings, but leave the pure obligations in the order.

Finally, Minnesota Statutes, section 518A.41, subdivisions 17 and 18 describe how the unreimbursed or uninsured medical expenses are collected. The long and the short of this process is that the obligated party must be provided notice and copies of the expenses and have an opportunity to pay the expenses, enter into a payment plan to pay the expenses gradually, or file a motion to contest or set a payment amount. This enforcement or collection remedy is available to both IV-D cases and cases that are not within the IV-D system.

Category B

Federal Tax Intercept – Federal Tax Intercept is an automatic procedure that is used when the obligor is a minimum of \$500.00 in arrears. The obligor’s federal tax refund or rebate is intercepted and applied towards any arrears owed. The Federal Tax Intercept Law can be found at 42 United States Code, section 664, and is also run through the PRISM system and is only available to agencies with ties to the Federal government, not individuals.

State Tax Offset – The Minnesota State Tax Offset, is also known as Revenue Recapture is found in Minnesota Statutes, sections 270A. 01, 270A.12, and 518A.61, and is an automatic procedure that is used when the obligor is a minimum of \$25.00 in arrears. The obligor’s state tax refund or rebate is intercepted and applied towards any support arrears owed. This is run through the PRISM system and is only available to agencies, not individuals.

Category C

Credit Bureau Reporting - Federal law mandates the automatic reporting of arrears in individual cases to credit bureaus. DHS has set the policy to report arrears to the

credit bureaus when an obligor is 3 months in arrears. A notice is sent and may be contested prior to the reporting occurring. 42 United States Code, section 666 (a)(7) and DHS Policy.

Driver’s License Suspension – When a child support obligor is a minimum of 3 months in arrears and not in compliance with a written payment agreement, the court or the public authority can direct the Commissioner of Public Safety to suspend a driver’s license of an obligor. When there is an open IV-D case, an administrative notice is sent to the child support obligor with the ability to contest in court within 30 days of the notice. The obligor may also contact the county child support office to see if he or she can enter into a payment agreement² with the county to avoid the suspension.

If the notice is not contested in court and no payment agreement has been entered, 90 days after the original notice, the Commissioner of Public Safety will be directed to suspend the driver’s license. If the notice is contested in court, and the court agrees that the license should be suspended, the court will direct the Commissioner of Public Safety to suspend the license. A private attorney or pro se litigant may move the court for the suspension of a driver’s license for the same reasons as well. Minnesota Statutes, section 518A.65.

Financial Institution Data Match (FIDM) – When a child support obligor is a minimum of 5 months in arrears and not in compliance with a previously executed written payment agreement, and the county has previously submitted the arrears for the Federal Tax Intercept remedy, the county may levy against bank and other financial accounts in an amount up to the total amount of arrears.

Eligible cases identified by PRISM, the

financial institution is to notify the county of whether there is an active account and is supposed to let the county know how much money is in the account. The county then can select the account to be frozen, and a notice is then sent out to the obligor. The obligor has 30 days to contest the FIDM levy by filing a motion, including in the motion that there is a mistake of fact or the funds are subject to an exemption. If there is a contest, the court can determine whether the account should be released to the public authority in whole or in part, or the levy lifted. If there is no contest, the funds are applied to the arrears. Minnesota Statutes, sections 552.04, 552.06, 13B.06.

Motor Vehicle Lien - When a child support obligor is a minimum of 3 months in arrears and not in compliance with a written payment agreement, the court or the public authority can direct the Commissioner of Public Safety to enter a lien in the name of the obligee (for nonpublic assistance arrears) or the State (for public assistance arrears). When there is an open IV-D case, an administrative notice is sent to the child support obligor with the ability to contest in court within 30 days of the notice. The obligor may also contact the county child support office to see if he or she can enter into a payment agreement with the county to avoid the entry of the lien.

If the notice is not contested in court and no payment agreement has been entered, 90 days after the original notice, the Commissioner of Public Safety will be directed to enter a lien in the name of the obligee or the State accordingly. If the notice is contested in court, and the court agrees that the lien should be entered, the court will direct the Commissioner of Public Safety to enter the lien. A private attorney or pro se litigant may move the court for the entry of a lien for the same reasons as well. Minnesota Statutes, section 518A.65.

Occupational License Suspension – When a child support obligor is a minimum of 3 months in arrears and not in compliance with a written payment agreement, the court or the public authority can direct the licensing agency to suspend a license of an obligor who is or may be licensed by a licensing board. When there is an open IV-D case, an administrative notice is sent to the child support obligor with the ability to contest in court within 30 days of the notice. The obligor may also contact the county child support office to see if he or she can enter into a payment agreement with the county to avoid the suspension.

If the notice is not contested in court and no payment agreement has been entered, 90 days after the original notice, the licensing agency will be directed to suspend the occupational license. If the notice is contested in court, and the court agrees that the license should be suspended, the court will direct the licensing agency to suspend the license. A private attorney or pro se litigant may move the court for the suspension of an occupational license for the same reasons as well. Note that attorney license suspensions have additional requirements through the Lawyer’s Board of Professional Responsibility. Minnesota Statutes, section 518A.66.

Passport Non-Renewal – When an obligor is a minimum of \$2,500.00 in arrears for all of the cases that the obligor has combined, the obligor will be sent an administrative notice that the right to obtain or renew his or her passport will be suspended. This remedy is unique in that the only way to contest the suspension or request reinstatement is by contacting the Minnesota Department of Human Services, not the county child support office. The only time the county gets involved is when the issue is brought to the attention of the court. 42 United States Code, section 652 (k), and 22 Code of Federal

Regulations, section 51.70 and DHS Policy.

Recreational License – When an obligor is a minimum of 6 months in arrears and not in compliance with a written payment agreement, and after substantial enforcement remedies have been attempted, the county, a private attorney, or a pro se litigant can move the court to bar the obligor’s receipt of a recreational license. If the court agrees that the recreational license should be suspended, the court directs the Department of Natural Resources to bar the obligor’s recreational license. To lift the bar to the receipt of the recreational license, the court must issue an order. The counties refer to this process as court in and court out, because a recreational license suspension requires a motion and a court order, unlike driver’s and occupational license suspensions which may occur after notice and a period to contest. Minnesota Statutes, section 518A.68. For more information about recreational license suspension, see Jennifer Stanfield’s portion of the article below.

Student Grant Denial – The public authority may request that an obligor’s student grant be held if the obligor is a minimum of 30 days in arrears and not in compliance with a written payment agreement. The obligor may pay the arrears or contact the county to see if entering into a payment agreement will lift the hold on the grant. This is a remedy only available to the county IV-D child support programs. Minnesota Statutes, section §136A.21, subdivision 2(5).

Category D

Civil Contempt – When an obligor is a minimum of 3 months in arrears, the county, a private attorney, or a pro se litigant, may bring an action to hold the obligor in constructive civil contempt of court for the failure to pay the child support obligation and

follow the court order. The action is initiated with an Order to Show Cause, and there are two stages of hearings. For more information about contempt, see Tom Kelly’s portion of this article below. Employer contempt is also available for cases in which the employer either fails to withhold income or withholds and fails to remit the payments. See Jennifer Stanfield’s portion of this article below for more information about employer contempt.

Category E

Administrative Seek Employment Orders – In open IV-D cases, when the public authority cannot verify that the obligor has a job, the obligor is in a minimum of 3 months of arrears, and the obligor is not in compliance with a written payment agreement, the public authority may move the court for a seek employment order for the obligor to report 5 job searches per week to the public authority or provide verification of any reason for noncompliance with the requirement. The duration of the seek employment order shall not exceed 3 months, and is usually followed by a review hearing. 42 United States Code, section 666(a)(4); Minnesota Statutes, section 518A.64.

Criminal Contempt – A person who willfully and knowingly fails to pay a court ordered child support obligation that the obligor has the ability to pay is subject to a finding of criminal contempt and a conviction of a misdemeanor. Ramsey County pursues civil contempt and criminal nonsupport (prosecution) rather than the criminal contempt tool. Minnesota Statutes, section 588.20.

Federal Prosecution/Criminal Non-Support – When an obligor willfully fails to pay child support for a minimum of one year or the arrears are more than \$5,000.00, and the obligor goes to another state with the intent

to avoid paying the support, the United States Attorney's Office may prosecute the obligor in Federal Court. A fine or imprisonment from 6 months to 2 years may be imposed, depending on the nature of the offense. 18 United States Code, section 228.

Security and Sequestration – The county, a private attorney or pro se litigant may request that the court require “sufficient security” to be given for the payment of support. If such security is not given, the court may sequester the obligor’s “personal estate and the rents and profits of real estate” of the obligor and appoint a receiver of them. Minnesota Statutes, section 518A.71.

State Prosecution/Criminal Non-Support – When an obligor knowingly fails to provide either care or support to a child, the obligor can be prosecuted for criminal nonsupport. The charge can be a misdemeanor, gross misdemeanor or felony depending on the period of time the obligor is in violation (180 days in arrears or 9 times the monthly support for a felony). Before prosecution, an attempt at civil contempt is required. If convicted, an obligor may be sentenced to jail time or pay a fine, or both. Prosecution is done by the County Attorney’s office. Minnesota Statutes, section 609.375.

In addition to all of these full IV-D child support services above, some parties only need the collection and disbursement of support and do not want to have an open IV-D case. Non-IV-D Income Withholding Only Services/Partial Services are available to parties who want the income withholding service, but do not want the rest of the IV-D services. Minnesota Statutes, section 518A.53, subdivision 4 (c). There is an additional \$15 per month fee charged to the obligor on the case for this service. The county does not send out the initial or subsequent income withholding notices for

these cases; that is up to the parties to do because the case is not an open IV-D case. However, after the parties send out the income withholding notice, the county sends out a subsequent income withholding notice for the additional \$15 per month fee.

The county’s only function in these cases is to receipt in and disburse out the income withholding.

Some of you may be wondering whether spousal maintenance can be enforced and collected in the IV-D Child Support Program. Many of the enforcement tools above are available for the enforcement and collection of spousal maintenance too, but, if a party wants the IV-D Child Support Program to enforce and collect spousal maintenance, there must also be a child support obligation at the same time.

If the case was initially a IV-D case with both child support and spousal maintenance, at the point where the child support obligation is paid in full but spousal maintenance is still due and owing, the case “flips” in the PRISM system to a spousal maintenance only SMO (spousal maintenance only) case. The county’s only function in SMO cases is to receipt in and disburse out the income withholding or payments made to the child support payment center. Like income withholding only services, the county does not send out the initial or subsequent income withholding notices, except for the \$15 income withholding only fee.

If the case was not initially a IV-D case, there is no child support due and owing, and a party wants the IV-D child support program to enforce and collect spousal maintenance, the county’s only involvement is to take the application for SMO services and receipt in and disburse out the income withholding or

payments made to the payment center. Like income withholding only services, the county does not send out the initial or subsequent income withholding notices, except for the \$15 income withholding only fee.

At the point where there is no child support still owing, or if there never was child support owing, the county cannot use any enforcement or collections tools for the spousal maintenance obligation other than income withholding. If the spousal maintenance obligee wishes to enforce the obligation, many of the enforcement and collections tools above are available, such as any of the license suspensions and contempt. But again, the county cannot be involved in that effort.

There are a lot of powerful tools in the IV-D child support toolbox. The hope is that with reasonable orders and reasonable expectations, these tools can remain in the toolbox. But, when they are needed, they are taken out and applied to the case to enforce and collect support.

Unique Enforcement Tools At Your Fingertips

A difficult child support enforcement case getting you down? Don't just assume you can only bring a civil contempt action to collect on past due support for your client. Whether you are a private or public attorney working in the area of child support enforcement and collection, there are many options available to you. This section will explore unique enforcement tools that you can look at when determining what your next legal action will be. The following unique enforcement tools will be covered:

- Recreational License Suspension
- Workman's Compensation
- Sequestration and Trusts
- Employer Contempt

1. Recreational License Suspension

A recreational license is a license issued by the Department of Natural Resources pursuant to Minnesota Statutes Sections 97B.301, 97B.401, 97B.501, 97B.515, 97B.601, 97B.715, 97B.721, 97B.801, 97C.301 and 97C.305. Many Obligor in the State of Minnesota hunt or fish as a recreational activity. By filing a Motion to Suspend a Recreational License pursuant to Minn. Stat. §518A.68, you can use the threat of this type of license suspension as a tool to collect child support. If you are the County, your support officers have the ability to check the PRISM system to see if the Obligor has had or does currently have a recreational license in the State of Minnesota through the Department of Natural Resources. However in order to this, you must meet certain requirements under the statute as follows:

- File a Motion with the Court;
- Obligor is in arrears in an amount equal to or greater than six times total monthly support payments AND;
- Obligor is not in compliance with a written payment agreement AND;
- Other substantial enforcement mechanisms have been attempted but have not resulted in compliance.

Unlike driver's license suspension, you have to file a Motion for this type of enforcement tool. Proof to the court that the Obligor is six months behind can be shown by filing a payment record or a spreadsheet showing lack of payments and what is owing. If the Obligor has an already existing payment plan (this can be from an earlier recreational license suspension or another type of payment plan related to driver's license and/or FIDM levy), you would attach a copy of that signed payment plan or court order. If there is not an existing payment plan then an Affidavit from the Support Officer or an Obligee stating that the Obligor has failed to enter into one also suffices.

Note: The statute does not indicate you are required to have an already existing payment plan to suspend a recreational license. If there is one in existence, you only need to show that the Obligor is in default of it. The intent behind this portion of the statute was to prevent recreational license suspensions on individuals who may be six months behind but yet making their monthly payments in full.

You will also need to show that substantial enforcement remedies have taken place before you bring this motion. This means the amount of remedies you have attempted. An Affidavit from the Support Officer or the Obligees stating what has been done will work. For example, substantial enforcement mechanisms could include but not limited to:

- Income withholding;
- Credit Bureau Reporting;
- Revenue Recapture;
- Passport Denial;
- Levy;
- Driver's license or Occupational License suspension and;
- Contempt

At the time of the hearing, the Obligor will want to enter into a payment plan or try and settle to avoid suspension. This is encouraged if the payment plan is reasonable. Payment plans can be for the court ordered amount, a gradual plan or less than the amount depending on the circumstances. When negotiating a payment plan, remember that the court is required to, "...take into consideration the amount of the arrearages, the amount of the current support order, any pending request for modification, and the earnings of the Obligor." See Minn. Stat. §518A.69. In addition, "the Court, child support magistrate, or public authority shall consider the individual financial circumstances of each Obligor in evaluating

the Obligor's ability to pay any proposed payment agreement and shall propose a reasonable payment agreement tailored to the individual financial circumstances of each Obligor." Id. Finally, the Court has the authority to do a graduated payment plan as well under this same statute.

What happens if the Obligor enters into a payment plan and then defaults on that plan? The only remedy is to file another Motion. This time however, you will have the added evidence of the Obligor defaulting on yet another payment plan.

What happens if the court suspends the Obligor's recreational licenses for failure to pay support and then the Obligor starts paying? The first step is to enter into a recreational license payment plan. The second step is to obtain an order for the Obligor to obtain his/her recreational license (s) back. In order to do so, you have to file something with the court. Pursuant to Minn. Stat. § 518A.68(c), the Obligor may provide proof to the court that the Obligor is in compliance with all written payment agreements, and within 15 days of receipt of that proof, the Court shall notify the commissioner of natural resources that the recreational license should no longer be suspended nor should receipt be barred. Many Obligor's will have no idea that they can do this themselves and have no knowledge of what proof to provide. Often the County is contacted by the Obligor who wants his/her recreational license back due to consistent payments. In that circumstance, it is recommended that the County file the proof. Unfortunately this statute does not provide any help on what type of proof or notice should be provided. The general consensus is to file an Ex Parte Motion and Affidavit which includes proof of compliance with a payment plan, payment record and a proposed order with the court.

Important reminder: Make sure that any order that is issued by the court that suspends or reinstates a recreational license orders Court Administration to fax a copy of that order to the Department of Natural Resources at **ATTN: Enforcement, 500 Lafayette Road, Saint Paul, Minnesota 55115 and or fax (651) 297-8851**. Failure to do so will result in no suspension or reinstatement of the license as there is currently not an automated system in place.

NOTE: There is currently no Minnesota case law published or unpublished that deals directly with recreational license suspension.

Overall, this can be a very helpful enforcement tool, particularly for Obligor who reside in Minnesota and often hunt and fish here.

2. Workman's Compensation

If an Obligor gets injured on the job and is unable to work there is still a way for you to ensure that he/she keeps paying. Often, if the Obligor has been injured on the job he/she will likely get some form of workman's compensation. Workman's compensation benefits can come in the form of payments for a period of time (weekly, monthly, etc.) or in the form of a lump sum. It is considered gross income for purposes of support.³ Information on workman's compensation is usually obtained from an Obligee, employer, workman's compensation attorney or the Obligor.

The first step is for you to find out the name of the employer, date of injury, name of insurer/adjusting agency and claim number. The employer's attorney should be able to provide you with some information like the claim number or the name of the Obligor's attorney. Once you have discovered all the information, there are judicial remedies and

administrative remedies you can use in a workman's compensation scenario to try and collect on support.

Administrative Remedies: Proceeding administratively is typically the easiest and a relatively pain free method of getting support paid when an Obligor is receiving benefits or a lump sum settlement. First you will want to send a notice of income withholding as well as a lump sum withholding notice to all payor of funds, employer, insurers and attorneys. This will ensure all appropriate parties are notified and you can start getting support from regular income withholding and a lump sum if the Obligor is awarded one.⁴ A payor of funds is obligated by statute to abide by these withholding notices once notified.⁵ It is very rare that the employer/payor of funds will not honor the County's income withholding notices. In addition, you will also likely be asked to sign a stipulation/order if the case settles even if you have not formally intervened since you have notified the parties of a claim by serving an income withholding notice.

Judicial Remedies: If proceeding administratively is not working, and/or you have a history with this employer, attorney, etc. which has not gone well, consider intervening in the actual workman's compensation case as a claimant. Once you intervene in the court action, all parties are obligated to speak with you about any settlement, court case and have you as a signatory to a stipulation.

Sometimes however, you might find out that the Obligor has received a workman's compensation payment/settlement and failed to notify the parties. All hope is not lost! You can proceed by filing a sequestration motion against the Obligor in District Court pursuant to Minn. Stat. §518A.71. Minnesota courts have upheld this method of collection on

workman's compensation settlements received by Obligor's in support cases both published and unpublished as follows:

- An Obligor's lump sum worker's compensation settlement is subject to sequestration for payment of child support arrears. Lukaswicz n/k/a Davis v. Lukaswicz, 494 N.W. 2d 507 (Minn. App. 1993), and
- The County may sequester workman's compensation for payment on arrearages. Grothe v. Grothe, (Unpub.), C8-92-1998, F&C, filed 4-20-93 (Minn. App. 1993).

For more information on the sequestration process, see the sequestration section of this article.

In circumstances where a lump sum award is given to the Obligor out of a workman's compensation case, you will typically be contacted by the attorneys to negotiate the settlement whether you do a lump sum withholding notice or intervene in the actual case. Negotiating a lump sum can affect the Obligor's incentive to settle his case without delay and risk of hearing. Priority is given to payment of the Obligor's attorney's fees before any money can be negotiated.

Before you finalize any negotiated lump sum, make sure that the Obligee has been contacted if the money is owed to her.⁶ Also make sure that the Obligor and his/her attorney know how much is going towards the Obligor's arrears and what effect this payment will have on the balance.

Important reminder: If you are not agreeing to waive the remaining balance in exchange for a negotiated lump sum, language needs to be present in the signed stipulation/order that says this. Otherwise, the standard language often indicates that this award finalizes the claim of arrears that the Obligor owes.

3. Sequestration And Trusts

Sometimes an Obligor who stops paying his support obligation will find him/herself in a position to receive a lump sum of money. This may be from a variety of sources, such as money from a personal injury settlement, sale of home/property, or inheritance, etc. Can you get access to those funds before the Obligor spends it all? Absolutely! But the key is to catch it as soon as you can and bring a sequestration motion against the Obligor pursuant to Minn. Stat. §518A.71.⁷

Often information about an Obligor's lump sum comes to the County through a phone call from the Obligee or the Obligor. Without contact from someone outside the County, the County has no ability to know whether someone is receiving a lump sum settlement. Once you receive this information, by acting quickly, you have a higher probability of getting some of the money to pay the arrears off owing on the case.

Minn. Stat. §518A.71, indicates that property of the Obligor can be sequestered (See also Minn. Stat. §518A.38).⁸ The exact wording of the statute as follows:

In all cases when maintenance or support payments are ordered, the court may require sufficient security to be given for the payment of them according to the terms of the order. Upon neglect or refusal to give security, or upon failure to pay the maintenance or support, the court may sequester the Obligor's personal estate and the rents and profits of real estate of the Obligor, and appoint a receiver of them. The court may cause the personal estate and the rents and profits of the real estate to be applied according to the terms of the order.

The Minnesota Court of Appeals and the

Supreme Court have upheld the use of this statute to sequester property of the Obligor to be applied for support purposes. While many of the cases are unpublished, it still indicates the court's inclination to uphold sequestration motions to pay both past support arrears and to secure future payment of support. Below is a brief summary of those cases:

- It is within the trial court's discretion to sequester the balance in Obligor's savings account (\$17,500.00 which remained from a personal injury settlement of \$75,000.00) to insure payment of future alimony. Peterson v. Peterson, 231 N.W.2d 85 (Minn. 1975).
- Sequestration of \$100,000.00 from Obligor's estate as security for future support reasonable where Obligor has failed to pay child support previously, has extravagant spending habits, and has attempted to secrete assets. State of Minnesota, by its agent, County of Anoka, o/b/o Nelson v. Johnson, (Unpub), CS-94-1165, F&C filed 12-13-94 (Minn. App. 1994).
- It was proper for court to order sequestration of proceeds from an anticipated sale of Obligor's property to ensure future payments of support. Obligor paid a judgment for arrearages but has history of non-support and no specific plan for meeting the obligation in the future. Long n/k/a Blatz v. Long, (Unpub.), CX-95-43, F&C filed 8-8-95 (Minn.App. 1985).
- Court may impose lien on Obligor's property to assure payment of future support. Ulrich v. Ulrich, 400 N.W.2d 213 (Minn. App. 1987).
- Trial court can sequester proceeds from sale of an Obligor's homestead to pay child support. Application of Jensen, 414 N.W.2d 742 (Minn. App. 1987).

- Proper for ALJ to sequester proceeds of an Obligor's personal injury lawsuit to secure payment of support. Bowers and County of Anoka v. Vizenor, (Unpub.), C0-98-440, F&C filed 6-4-02 (Minn. App. 2002).
- It was proper for district court to apply Obligor's share of the equity in a homestead to child support arrears and the remainder to be held in trust as security for future child support payments. Ellsworth v. Bastyr, (Unpub.), A04-365, F&C filed 1-18-05 (Minn. App. 2005).

Keep in mind some of the following examples where a sequestration motion would be appropriate. But remember, this is not an all inclusive list!

- Personal Injury settlement;
- Sale of Property proceeds;
- Lottery winnings;
- Inheritance from an estate (Note: You cannot intervene in a probate case if the Obligor is not the one who is deceased. If the Obligor is a beneficiary and is to receive a lump sum you must do a sequestration motion);
- Social Security Disability (RSDI not SSI!!) (Note: This is only used if you have a situation where the Social Security Administration has issued a lump sum award to an Obligor and missed your lump sum income withholding), and;
- Workman's Compensation.

If you are concerned that the Obligor upon filing of the motion will immediately get rid of the funds, file an Ex parte Motion, Affidavit and Proposed Order asking that the court issue a temporary order preventing the Obligor from dispersing the funds until a hearing is held on your sequestration motion. Then also include the formal sequestration motion with a hearing date, affidavit,

payment record and memorandum of law as part of the overall packet.

If the funds the Obligor receives are above and beyond what the arrears balance is, the Obligor continues to have an ongoing support obligation, and the Obligor has an inconsistent payment history, you might want to consider a motion to put the excess funds into a trust account to pay future support pursuant to Minn. Stat. §518A.63.⁹ The public authority can be appointed as a trustee once the trust has been set up.¹⁰ A motion to put the excess funds into a trust fund pursuant to this statute can be initiated if you have concerns about future payments. However, before you do so you must ensure that your agency is willing to take on this task as trustee and that the trust itself is set up correctly with the bank. You will need to work one on one with a bank representative who will be able to help you; the Obligee and the Obligor get this set up correctly. This is not a common motion that is used, but it can be, and should not be ignored if the facts of your case really warrant this.

4. Employer Contempt

After an Obligor's employment verification, employer's get notice to do child support income withholding and sometimes either fail to withhold or withhold from the Obligor's paycheck without sending money into the payment center. Unfortunately, this happens more often than we would like to believe.

Minn. Stat. §518A.73, allows an employer to be found in civil contempt. It is presumed that an employer, trustee or payor of funds is in contempt of court if they intentionally failed to withhold child support after receiving the income withholding notice and/or failed to respond to an enforcement notice for medical support OR pay stubs or documentation shows they withheld support and intentionally failed to remit support. This type of action is initiated by service of

an Order to Show Cause and Motion for Contempt by service upon the employer, payor of funds or trustee.

Businesses often try to get out of income withholding by saying they are not an employer or a payor of funds. This is quite common for Obligor's who are contract employees. As a result, the agency spends quite a bit of time trying to get income withholding initiated. If the payor of funds is contesting the withholding notice, a letter is often sent defining what a payor of funds is along with a failure to withhold notice.

Pursuant to Minn. Stat. §518A.53, a payor of funds is defined as:

... any person or entity that provides funds to an Obligor, including an employer as defined under chapter 24 of the Internal Revenue Code, section 3401(d), an independent contractor, payor of worker's compensation benefits or unemployment benefits, or a financial institution as defined in section [13B.06](#).

As you can see a contractor is defined as a payor of funds. Most of the time, once the Failure to Withhold notice is sent along with this definition (or many phone calls from the support officer), the withholding will start. However, sometimes it does not. What do you do if you know the Obligor is working and no withholding is being done?

Pursuant to Minn. Stat. §518A.53 and §518A.73, an income withholding notice or a medical enforcement notice is binding upon the employer, payor of funds or trustee. See Minn. Stat. §518A.53 which further defines the requirements of a withholding notice. Assuming that the requirements of notice to the employer, payor of funds and trustee have been met, employer contempt can be initiated. Even though the statute presumes contempt for failure to withhold, it is important to gather the following documents

as evidence to support your Motion and Order to Show Cause:

- Copy or copies of both income withholding notices and failure to withhold notices sent;
- Copies of the support order along with the Appendix A;
- Employer verification document that has been filled out (or not);
- An Affidavit from the Support Officer detailing any conversations had with either the employer or Obligor (sometimes the Obligor will have called and indicated he has tried to get it in place).

A failure to withhold employer contempt can be effective to get the employer's attention but it can also be difficult to prove and not worth the time/cost that goes into it. Often, just a letter from the County Attorney's Office or a private attorney threatening employer contempt will get their attention. In addition, it is a rarity that the Obligor is paying the full support obligation on his/her own per month, so there are really two enforcement issues going on. Both the employer and the Obligor may be in civil contempt. In this circumstance, employer contempt may not be beneficial and a civil contempt action directly against the Obligor would be the preferred method. After all, at the end of the day, the Obligor is the person responsible for ensuring and making his/her child support payments each month. While it is greatly frowned upon for an employer not to withhold, if the Obligor is truly working and the money is not coming out of his/her paychecks, ultimately the responsibility rests on the Obligor's shoulders.

However, an employer contempt action based upon proof of pay stubs or documentation showing they withheld support and intentionally failed to remit it is another story.¹¹ Most of the time, the County becomes aware this is happening when a

phone call is made to the Obligor asking where they payments for support are or when the County initiates a civil contempt against the Obligor. If you are threatening jail time against an Obligor and support has been withheld, they are usually more than happy to provide proof that support has been withheld from their paychecks. Unfortunately, many will be concerned about losing their jobs. It is then important to remind them and the employer, that Minn. Stat. §518A.53, states that:

A payor of funds shall not discharge, or refuse to hire, or otherwise discipline an employee as a result of wage or salary withholding authorized by this section.

If the court finds an employer, payor of funds or a trustee to be in contempt of court, what are the sanctions that can be imposed? You will be surprised at the amount of sanctions as allowed by statute. Minn. Stat. §518A.53, §518A.73 and Chapter 588 define this.

Under Minn. Stat. §518A.53, they are listed as follows:

- Payor of funds shall be liable to the Obligee for any amounts required to be withheld.
- Payor of funds that fails to withhold or transfer funds in accordance with this section is also liable to the Obligee for interest on the funds at the rate applicable to judgments under section [549.09](#), computed from the date the funds were required to be withheld or transferred.
- Payor of funds is liable for reasonable attorney fees of the Obligee or public authority incurred in enforcing the liability under this paragraph.
- Payor of funds that has failed to comply with the requirements of this section is subject to contempt sanctions under section [518A.73](#).

- If the payor of funds is an employer or independent contractor and violates this subdivision, a court may award the Obligor twice the wages lost as a result of this violation.
- If a court finds a payor of funds violated this subdivision, the court shall impose a civil fine of not less than \$500. The liabilities in this paragraph apply to intentional noncompliance with this section.

Under Minn. Stat. §518A.73, they are listed as:

- Employer, trustee, or payor of funds is liable to the Obligee or the agency responsible for child support enforcement for any amounts required to be withheld that were not paid.
- The court may enter judgment against the employer, trustee, or payor of funds for support not withheld or remitted.
- An employer, trustee, or payor of funds found guilty of contempt shall be punished by a fine of not more than \$250 as provided in chapter 588.
- The court may also impose other contempt sanctions authorized under chapter 588.

Chapter 588 is the general civil contempt chapter. If you were to refer back to that chapter, it would imply that the court can issue warrants for non-appearance in Court against an employer, payor of funds, or trustee. In addition, if the person is guilty of the contempt, the court could impose a fine of not more than \$250, or by imprisonment in the county jail, workhouse, or work farm for not more than six months, or by both. That means that an employer, payor of funds or a trustee can actually be imprisoned by the court!!! Though it is unlikely a court will impose such a sanction, it is nice to know that this can be used.

For employers, payor of funds or trustees, failure to withhold support or remit payments taken already from an Obligor can result in pretty serious sanctions. That is why often a letter threatening the action is effective.

Overall, utilizing this enforcement action for nonpayment of support can be effective if you have the facts to support it.

NOTE: There is currently no Minnesota case law published or unpublished that deals directly with employer contempt.

As you can see, there are unique enforcement actions out there that do not involve automatically going straight to a civil contempt action. Using them can be an excellent way to get unpaid support to an Obligee or to the State of Minnesota for assistance reimbursement if you are able to do so.

The Contempt Remedy In Child Support Enforcement

A child support order creates an expectation of payment and compliance. For attorneys and legal assistants in private practice, assistant county attorneys and county support workers the goal must be to obtain support orders¹² that accurately and clearly define the child support obligor's child support obligation¹³ without creating unreasonable expectations, unnecessary litigation, and uncollectible arrears.¹⁴ Assuming a properly established order for support, the use of the contempt remedy can be a potent method of collecting child support.

General Contempt Law and Procedure

The Public Authority, that is to say each county child support agency, and its legal representative the county attorney's office,

not only has statutory authority to prosecute contempt matters in all IV-D child support cases when appropriate, the county attorney has a statutory duty to do so.¹⁵ The county attorney has standing to bring an action seeking to find a child support obligor in constructive civil contempt for failing to pay a court-ordered child support and arrearage obligation.¹⁶ Minn. Stat. sec. 393.07, subd. 9 states:

When directed by a judge of district court or when a person under court order is in default in making child support payments to another person who has custody of the child for whom such payments have been ordered, the local social services agency **shall** take such steps as may be necessary to compel the person in default on such payments to make them; to take such steps as may be necessary to compel such persons to make reimbursement to comply with the order of the court when in default; and to institute, if necessary, **contempt proceedings on behalf of such person or persons to whom money or property is ordered to be paid or delivered. It shall be the duty of the county attorney to conduct such contempt when directed by a judge of the district or county court or when requested by the local social services agency.**

Id. (emphasis added); *see, also*, Minn. Stat. Sec. 518A.49 (b) (public authority has a pecuniary interest in all IV-D child support cases¹⁷, as well as an interest in the welfare of the child; it may intervene as a matter of right). Minn. Stat. sec. 518A.72, subd. 1 states:

If a person against whom an order or decree for support has been entered under this chapter, Chapter 256,

Chapter 518, or a comparable law from another jurisdiction, is in arrears in court-ordered child support or maintenance payments in an amount equal to or greater than three times and maintenance payments and is not in compliance with a written payment plan approved by the court, a child support magistrate, or the public authority, **the person may be cited and punished by the court** for contempt under section 518A.39, chapter 588, or this section.

In *Hopp v. Hopp*, 156 N.W.2d 212, 279 Minn. 170 (1968), the seminal child support contempt case, Justice Robert Sheran began his legal analysis by highlighting nonsupport as a serious social issue :

The frequency of divorce and the difficulties often experienced in making effective court decrees providing for the support of the wife and children present a serious social problem. Given the burden of meeting this problem, trial judges must be provided with the tools demanded by the job. In many of these cases, use of its power to make confinement the alternative to compliance with its orders is essential to trial court's function.

Id., 165 N.W.2d at 215, 279 Minn. at 172.¹⁸

Although Minnesota law clearly allows for criminal contempts and criminal prosecution for failure to pay child support, the most common remedy pursued is still one of civil contempt.¹⁹ The distinction between civil and criminal contempt has been called “elusive” but Minnesota courts have generally followed a rather simple distinction – if the contempt seeks to punish with a definite term of incarceration that must be served, the

contempt is punitive or criminal. If, on the other hand, the contempt seeks to use incarceration only as a means to coerce compliance with purge conditions, the contempt is remedial and civil in nature. Mower County Human Services on Behalf of Swancutt v. Swancutt, 551 N.W.2d 219, 222 (Minn. 1996).²⁰

Minnesota courts have statutory authority to enforce maintenance and child support obligations using civil contempt proceedings. Engelby v. Engelby, 479 N.W.2d 424, 426 (Minn. App. 1992). Minnesota law states a very clear statutory presumption that the obligor has income:

from a source sufficient to pay the maintenance or support order. A child support or maintenance order constitutes prima facie evidence that the obligor has the ability to pay the award. ***If the obligor disobeys the order, it is prima facie evidence of contempt.***

Id., citing Minn. Stat. Sec. 518.24 (now 518A.71; emphasis added). The obligor has the burden to prove inability to comply with the order. Hopp, 279 Minn. 170, 174-75, 156 N.W.2d 212, 216-17 (1968); Engelby, 479 N.W.2d at 426. The contempt remedy, particularly in the context of child support cases, is intended to be “speedy, efficient and sufficiently flexible to the problem at hand” and should not be “frustrated by delay and formalism.” Hopp, 279 Minn. at 174, 156 N.W.2d at 216.

Under Minn. Stat. Sec. 518A.32, subd. 1, it is “rebuttably presumed that a parent can be employed on a full-time basis.”²¹ The Minnesota Supreme Court has consistently held that it is proper to look at an obligor’s earning capacity, financial status and earnings history, and to disregard any inability to pay that is voluntary on the part

of the obligor. Ronay v. Ronay, 369 N.W.2d 12, 14 (Minn. App. 1985), citing Hopp, 279 Minn. at 176-77, 156 N.W.2d at 217-18 (1968)²²; Meisner v. Meisner, 220 Minn. 559, 560, 20 N.W.2d 486, 487 (1945); *see, also*, Ryerson v. Ryerson, 194 Minn. 350, 351-52, 260 N.W. 530, 530-31 (1935). If the contemnor fails to make a good faith attempt to conform to the contempt order and purging conditions, the burden to show compliance or good faith effort is not sustained. Hopp, 279 Minn. at 175, 156 N.W.2d at 217. There is no statutory requirement that the court determine how a contemnor access the money necessary to meet the purge conditions, only that it determine that the contemnor is able to meet them. Marriage of Crockarell, 631 N.W.2d 829, 837 (Minn. App. 2001).

Finally, an obligor cannot avoid a support obligation by voluntarily incurring new liabilities, including obligations to a second family. *See* Weinand v. Weinand, 286 Minn. 303, 307, 175 N.W.2d 506, 509 (1970); Williams v. Williams, 221 Minn. 441, 442-43, 22 N.W.2d 212, 213 (1946). Every support order must have attached to it enumerated notices required by Minn. Stat. Sec. 518.68—the so-called “Appendix A”. In Appendix A, Section 4, paragraphs (d) and (e), all obligors are given notice that “the payment of support . . . takes priority over payment of debts and other obligations, as well as the fact that “a party who accepts additional obligations of support does so with knowledge of the party’s prior [support] obligation. . . .”

The district court has broad discretion to hold an individual in contempt. Erickson v. Erickson, 385 N.W.2d 301, 304 (Minn. 1986). Contempt findings are reviewed under an abuse of discretion standard. Mower County Human Servs v. Swancutt, 551 N.W.2d 219, 222 (Minn. 1996). Factual findings in a contempt order will be reversed only if found to be clearly erroneous. *Id.*;

Minn. R. Civ. P. 52.01. In reviewing a contempt order, appellate courts consider whether the order “was arbitrary or unreasonable” or whether it finds support in the record.” *Gustafson v. Gustafson*, 414 N.W.2d 235, 237 (Minn. App. 1987) (quoting *Meisner v. Meisner*, 220 Minn. 559, 560-61, 20 N.W.2d 486, 488 (1945)). “Civil contempt sanctions are intended to operate in a prospective manner and are “designed to compel future compliance with a court order.””, *Swancutt*, 551 N.W.2d at 222.

Minnesota has robust procedural and notice requirements in place for bringing a contempt action, typically requiring personal service of an order to show cause on the alleged contemnor accompanied by a motion with appropriate supporting affidavits.²³ If done properly, the alleged contemnor should have clear notice of the child support order in question, details of the failure to comply, as well as a date to appear personally before the court. *Hopp* and other Minnesota cases detail a general requirement of at least an initial hearing to determine contempt and to clearly outline conditions which must be met to avoid further sanction, a “second” hearing at which “the party charged with non-performance [will] be given an opportunity to show compliance or his reasons for failure,” a determination by the court whether conditional confinement will induce compliance, and an order for incarceration which sets conditions of release with which an obligor can comply. *Id.*, 279 Minn at 174, 156 N.W.2d at 216; *Mahady v. Mahady*, 448 N.W.2d 888, 891 (Minn. App. 1989); *Swancutt*, 551 N.W.2d at 222-24.

If at the second hearing the court makes a determination that incarceration is “a real possibility”, the hearing should be suspended to allow the obligor the opportunity to seek legal representation, either from private counsel or court-appointed counsel if the obligor financially qualifies. *Cox v. Slama*,

355 N.W.2d 401, 403 (Minn. 1984). In allowing for the appointment of counsel for the child support obligor in danger of being incarcerated in a contempt action, the Minnesota Supreme Court in *Cox* did not deem it necessary to address the right to counsel on constitutional grounds. The Court instead relied on its “supervisory powers to ensure the fair administration of justice.” *Cox*, 355 N.W.2d at 345.

Typical Contempt Policies in Minnesota

The use of the contempt remedy can vary dramatically from county to county depending on the availability of child support workers and county attorneys. Smaller counties may have very limited access to a county attorney who can devote sufficient time to regularly bring contempt actions. Larger counties, on the other hand, may have the luxury of attorneys who specialize in both civil and criminal child support enforcement. However, there are procedures and practices that should more or less be standard throughout the state.

Each child support case is assigned a child support officer (CSO)²⁴ whose job it is to monitor compliance with a support order. CSOs have access to a statewide computer system that will generate work lists of cases to review with no payments. CSOs will try to contact child support obligors and their employers by phone in an attempt to solve a non-payment issue. A CSO will also typically send out 30 and then 60 day delinquency notices, or send failure to withhold child support notices to an employer or payor of funds.²⁵ A CSO receiving a notice of employment termination from an employer will attempt to send an obligor a letter requesting new employment. It is safe to say that cases that might otherwise meet the statutory criteria for bringing a contempt action will not be pursued if the CSO obtains information confirming that an obligor is

disabled or incarcerated, or otherwise involuntarily unemployed.²⁶ It is also safe to say that child support obligors who maintain regular contact with their child support officers by timely reporting any injuries, disabilities or changes in employment are a lot less likely to be the subject of a contempt action.²⁷ In sum, the best advice any attorney can give a client on child support issues, particularly a client with a child support obligation monitored by a county child support agency, is to develop and maintain a good working relationship with their CSO.

The U.S. Supreme Court weighs in on contempt procedures

In *Turner v. Rogers*, 564 U.S. ___, 131 S. Ct. 2507, 180 L.Ed. 2d 254 (2011), the Supreme Court of the United States, held that the Sixth Amendment right to counsel applies only to criminal cases, and that the Due Process Clause of the Fourteenth Amendment does not automatically grant an indigent defendant in a child support civil contempt action the right to a state-appointed counsel, even if incarceration is threatened. *Turner*, 564 U.S. ___, 131 S.Ct. 2507, 2517-2519, 180 L.Ed2d 254 (2011). However, *Turner* also reversed and remanded the contempt finding and incarceration of a defendant where the state had failed to provide adequate procedural safeguards such as adequate notice of the importance of ability to pay, the use of a form (or the equivalent) to elicit financial information, fair opportunity to be present and respond to questions about financial status, and an express finding by the court of the ability to pay. *Id.*, 564 U.S. ___, 131 S.Ct. 2507, 2519-20, 180 L.Ed.2d 254 (2011). While Minnesota's contempt law and procedure is arguably more than adequate, even in light of *Turner*, the Supreme Court Advisory Committee on General Rules of Practice has already made rule change recommendations consistent with *Turner's* holdings.²⁸

Contempt: An Ineffective Strategy?

The *Turner* court also noted that the use of contempt enforcement to insure payment of child support has been "criticized" by experts, and has even been labeled an "ineffective strategy" by the Federal Department of Health and Human Services (DHHS), even DHHS acknowledged that "coercive enforcement remedies, such as contempt, have a role to play." *Rogers*, 564 U.S. ___, 131 S.Ct. 2507, 2517, 180 L.Ed.2d 254 (2011). The dissent in *Turner* while acknowledging the criticism that the contempt remedy is too often brought to bear against the genuinely poor child support obligor stated:

Because of the difficulties in collecting payment through traditional enforcement mechanisms, many States also use civil contempt proceedings to coerce "deadbeats" into paying what they owe. The States that use civil contempt with the threat of detention find it a "highly effective" tool for collecting child support when nothing else works. For example, Virginia, which uses civil contempt as "a last resort," reports that in 2010 "deadbeats" paid approximately \$13 million "either before a court hearing to avoid a contempt finding or after a court hearing to purge the contempt finding." Other States confirm that the mere threat of imprisonment is often quite effective because most contemnors "will pay ... rather than go to jail." (Many judges ... report that the prospect of [detention] often causes obligors to discover previously undisclosed resources that they can use to make child support payments").

Turner, 564 U.S. ___, 131 S. Ct. 2507, 2526-27, 180 L. Ed. 2d 452 (2011) (citations omitted).

Statistics in Minnesota do not support the argument that contempt is an ineffective enforcement strategy. The Department of Human Services, Child Support Enforcement Division (DHS), routinely tracks child support collections through contempt enforcement. For example, DHS statistics show that from July 1, 2001 through June 30, 2010, the eight largest counties in Minnesota reported contempt orders on 7,703 child support cases. Measuring receipts on accruing child support orders on those cases 12 months before and 12 months after entry of the contempt order, receipts on accruals increased from \$12,203,413.60 to \$21,223,409.30.²⁹ More recently, DHS statistics show that in Federal Fiscal Year 2010, the total number of child support cases in Minnesota with reported contempt orders was 3,898.³⁰ Again, measuring receipts on accruing child support orders on those cases 12 months prior to the entry of the contempt order and 12 months after the entry of the order, receipts on accruals increased from \$5,007,071 to \$8,947,799.11.³¹

Bios of the Authors

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Notes

¹Certain forms of Public assistance are assigned to the State. This assignment requires a referral to the county IV-D child support program and requires the recipient of public assistance to cooperate with the establishment of and enforcement of a child support order. The assigned forms of public assistance, are outlined in Minnesota Statutes, section 256.741, subdivision 2, as MFIP, Medical Assistance, MinnesotaCare, Child Care Assistance, and IV-E Foster Care.

²Many enforcement and collections tools state that the tool may be used if the obligor is not in compliance with a written payment agreement.

Minnesota Statutes, section 518A.69 defines that a payment agreement should take into consideration the amount of arrears, the amount of current support, whether there is a pending modification motion, what the obligor earns, and the financial circumstances of each obligor. Payment agreements should be reasonable and tailored to the individual case, and graduated payment agreements may be considered.

³Minn. Stat. §518A.29(a), defines gross income as, "... any form of periodic payment to an individual, including, but not limited to, salaries, wages, commissions, self-employment income under section [518A.30](#), **worker's compensation**,...

⁴Minn. Stat. §518A.46, subd 5(6)(i), indicates that the agency has the ability to do income withholding on lump sum payments.

⁵Minn. Stat. §518A.53, defines payor of funds responsibilities which includes abiding by notice of lump sum payment withholding and regular income withholding notices.

⁶Pursuant to Minn. Stat. §518A.62, App at 5, you cannot without the consent of the Obligee accept anything less than the full payment of arrears without that person's consent.

⁷Sequestration can be used to pay both an arrears balance owing or to secure future support payments.

⁸Minn. Stat. §518A.38 also supports this statute. It states, "The court may make any child support order a lien or charge upon the property of the obligor, either at the time of the entry of the judgment or by subsequent order upon proper application.

⁹The court has found in an unpublished case that such trusts can be used to assure future child support where the Obligor has repeatedly failed to meet his court ordered payments and where obligor has not had sufficient funds in the past to make child support payments and it does not appear he will have the funds to do so in the near future. See [Ellsworth v. Bastyr](#), (Unpub.), A04-365, F&C filed 1-18-05 (Minn. App. 2005), citing [Gabrielson](#), 363 N.W.2d 814, 816-17 (Minn. App. 1985) and [Resch](#), 381 N.W.2d 460 (Minn. App. 1986).

¹⁰Pursuant to Minn. Stat. §518A.63, subd. e, "the public authority responsible for support enforcement may represent a person entitled to receive support or maintenance or both in court proceedings initiated under this section to enforce compliance with a support order or combined maintenance and support orders."

¹¹Many if not all County based employer contempt actions are based upon this prong of the statute.

¹²Minn. Stat. Sec. 518A.26, subd. 21 defines "support order" as:

... a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or administrative agency of competent jurisdiction:

(1) for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing state;

(2) for a child and the parent with whom the child is living, that provides for monetary support, child care, medical support including expenses for confinement and pregnancy, arrearages, or reimbursement; or

(3) for the maintenance of a spouse or former spouse.

(b) The support order may include related costs and fees, interest and penalties, income withholding, and other relief. This definition applies to orders issued under this chapter and chapters 256, 257, 518, and 518C.

¹³Minn. Stat. Sec. 518A.26, subd. 20 defines "child support" as:

an amount for basic support, child care support, and medical support pursuant to:

(1) an award in a dissolution, legal separation, annulment, or parentage proceeding for the care, support and education of any child of the marriage or of the parties to the proceeding;

(2) a contribution by parents ordered under section 256.87, or

(3) support ordered under chapter 518B or 518C.

¹⁴This is consistent with the Minnesota

Department of Human Services Arrears Prevention and Management Policy issued September 28, 2007 directing counties to develop and use an arrears management policy "because of the ever increasing accumulation of uncollectible child support arrears."

¹⁵[See](#) Minn. Stat. Sec. 518A.26, subd. 18.

¹⁶Constructive civil contempt is not conduct that occurs in the court's presence. The court has no first hand knowledge of such conduct, which in the child support context is almost always disobedience of a lawful order requiring payment of child support.

[See](#), generally, Minn. Stat. Sec. 588.01, subd. 3.

¹⁷IV-D case means a case where a party has assigned to the states rights to child support because of the receipt of public assistance as defined in Minn. Stat. Sec. 256.741 or has applied for child support services under title IV-D of the Social Security Act, 42 U.S.C. 654 (4). Minn. Stat. Sec. 518A.26, subd. 10.

¹⁸[Hopp](#) tells us that a civil contempt proceeding

Must meet the following requirements:

- (a) the court must have jurisdiction over the subject matter and the person;
- (b) there must be a clear definition of the acts to be performed;
- (c) there must be notice of the acts to be performed and a reasonable time within which to comply;
- (d) there must be an application by the party seeking enforcement giving specific grounds for complaint;
- (e) there must be a hearing, after due notice, to give the nonperforming party an opportunity to show compliance or the reasons for failure;
- (f) there must be a formal determination by the court of failure to comply and, if so, whether conditional confinement will aid compliance;
- (g) there must be an opportunity for the nonperforming party to show inability to comply despite a good faith effort; and
- (h) the contemnor must have an ability to gain release through compliance or a good faith effort to comply.

Id., 279 Minn. 174-75, 156 N.W.2d at 216-17.

¹⁹Indeed, the Minnesota Court of Appeals has ruled that before a criminal prosecution can take place, there must be an attempt to obtain a court order holding the obligor in civil contempt for failing to pay support during the time period specified in the criminal complaint. *State v. Nelson*, 671 N.W.2d 586, 591 (Minn. App. 2003) (citing Minn. Stat. Sec. 609.375).

²⁰In the context of civil contempt, incarceration is a remedy with a purpose – it is specifically not meant to be punishment for punishment’s sake. That role is left for the criminal contempt and criminal non-support prosecution. This has long been the United States Supreme Court’s view on the subject. *See, e.g., Shillitani v. United States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966) (“While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor’s willingness to [comply with the order].”).

²¹“[F]ull time” means 40 hours of work in a week except in those industries, trades, or professions in which most employers, due to custom, practice, or agreement, use a normal work week of more or less than 40 hours in a week.” Minn. Stat. Sec. 518A.32, subd. 1.

²²“[T]he trial judge [can] refuse to accept inability to perform as an excuse for failure to comply if he is satisfied that the party directed to pay has not made a reasonable effort by means of his own selection to conform to an order well within his inherent, but

unexercised, capacities[.]”

²³Minn. R. Pract. 309.01. The comments to this rule note that “[s]ervice of the order to show cause upon the person provides jurisdiction for the issuance of a writ of attachment or bench warrant if necessary, and meets the requirement for an opportunity to be heard.” (citations omitted).

²⁴Not all counties use the job title “child support officer” for this position. For the purposes of this article “child support officer” will be used generically to avoid confusion.

²⁵*See* Minn. Stat. Sec. 518A.53, subd. 1. One of the most pervasive myths surrounding income withholding for child support is that it only applies to employers. Yet Minnesota’s income withholding statute actually refers to withholding from a “payor of funds” which is defined broadly to include “any person or entity that provides funds to an obligor. . .”

²⁶In Minnesota, unemployment benefits are also subject to child support income withholding, although these benefits are often significantly lower than the obligor’s regular pay. Often the receipt of unemployment benefits will prompt the bringing of a modification motion over a contempt action.

²⁷Note also that child support obligors are required by law to report “within ten days of any change: . . . [the] name, address, and telephone number of the employer.” Minn. Stat. Sec. 518.68, subd. 2 (part of the notices required in what is commonly known as “Appendix A” attached to every support order).

²⁸*In re: Supreme Court Advisory Committee on General Rules of Practice*, Recommendations, Amendment to Rule 309.04, Findings, p.46 (Minn. September 28, 2011).

²⁹Source data obtained through Minnesota Department of Human Services Child Support Enforcement Division Data Warehouse report.

³⁰Federal Fiscal Year 2010 began October 1, 2009 and ended September 30, 2010

³¹Source data obtained through Minnesota Department of Human Services Child Support Enforcement Division Data Warehouse report.

International Child Support Enforcement and Collection

Allison Maxim

Enforcing and collecting child support can be difficult when parties live in the same county or state, even with county support agencies that provide enforcement and collection services. International enforcement and collection of child support can seem virtually impossible, especially for low income obligees. Consider the following case examples:

Lydia, a French citizen, was granted physical custody of the daughter she shares with Alexandre, the child's father, pursuant to a French court order issued after a hearing. The order requires Alexandre to pay 200 Euros per month in child support. After paying child support for two years, Alexandre, moves to Minnesota and stops paying child support. Lydia is disabled and her only income is public assistance. The loss of child support has been detrimental to her and her daughter's ability to meet very basic needs.

Ben, a stay at home father was divorced in Minnesota from Maria, a physician and Israeli citizen. The Minnesota Judgment and Decree requires Maria to pay Ben child support in the amount of \$1,250 per month. Shortly after the divorce Maria goes to Israel and does not return to Minnesota. The children remain with Ben in Minnesota. Ben is owed \$13,750 in arrears.

common scenarios. International enforcement and collection of child support involves both state and federal laws and treaties with foreign nations. This article applies the current laws that address international child support enforcement and collections to the two case examples above.

The Uniform Interstate Family Support Act (UIFSA)¹ provides a legal vehicle to enforce a foreign court order, such as the French order governing child support in Lydia's case. Under UIFSA, "state" is defined in part as "a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this chapter or the procedures under the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act"^{2,3}

The Minnesota Court determines whether a foreign court has enacted a law or established procedures substantially similar to Minnesota's UIFSA by examining the foreign court's law and procedure.⁴ Given the language difference between the United States and France, this begs the practical question of how a French mother of modest means proves to the Minnesota Court that France has substantially conforming laws and procedures. Obtaining certified translations to submit to the Court are costly and time consuming.

In a mobile society such as ours, these are

Under UIFSA, Lydia has a few options for

submitting the French order to the appropriate court or agency in Minnesota to enforce the order and collect child support. The easiest and least costly for her is to contact her local child support agency or the French Central Authority to inquire whether they provide services such as initiating contact with a foreign child support enforcement agency. If that is the case, the French authorities may contact the appropriate Minnesota county child enforcement agency to effect the enforcement and collection of child support. The Minnesota child support agency can pursue administrative procedures to enforce a foreign order without first registering the order.⁵ Another option for Lydia is to file an enforcement action in her local court in France if French law and procedure provides for such an action. The UIFSA provides that tribunals of different states may communicate to effect the enforcement of child support orders.⁶

A third option for Lydia would be to send a translated copy of the French child support order to the enforcement agency in the county in which Alexandre lives. County support enforcement agencies are required to provide services to a requesting obligee.⁷ The county agency must (1) take steps necessary to enable the appropriate Court to establish jurisdiction over the obligor; (2) obtain a hearing date from the Court; (3) take steps to obtain all relevant information, including income information; (4) provide the obligor notice of the enforcement proceeding; and (5) communicate with the obligee about the status of enforcement efforts.⁸ The child support agency may take certain enforcement actions to collect support arrears assuming the case meets required criteria. Subject to due process safeguards, the child support agency may pursue collections through the following actions without directly involving the courts⁹;

- Withholding income from the obligor's pay check
- Pursuing contempt proceedings for nonpayment of support
- Reporting nonpayment of child support to a credit bureau
- Seizing assets, including financial accounts
- Obtaining a lien against property
- Suspending the obligor's driver's license, occupational license, or recreational license
- Suspending or denying the obligor a passport
- Denying the obligor student grants
- Intercepting state or federal tax refunds

Finally, UIFSA provides that a support order of another state may be registered in Minnesota for enforcement purposes.¹⁰ Minnesota Statutes section 518C.602 lays out the procedure for registering the French order. After registration is accomplished, the French order is enforceable in the same manner and subject to the same procedures as an order issued in a Minnesota Court.¹¹ To effectuate registration, Lydia could retain an attorney in Minnesota. Unless an attorney is willing to assist her on a pro bono basis, this is her most costly option. Practical issues to consider for an attorney taking such a case are determining who is responsible for obtaining a certified translation of the French order and any other documents, the costs of translating documents, and how the attorney will communicate with the client if the client is not a fluent English speaker. The U.S. Consulate of the foreign country in which the client lives may be helpful in assisting with communications between attorney and client.

While states routinely enforce and collect upon child support orders issued by foreign jurisdictions, there is a lack of reciprocal enforcement when a court order originating from the United States is reviewed abroad.¹²

To ameliorate the lack of enforcement, the United States has begun entering into international reciprocity agreements with foreign countries for the purposes of enforcing child support orders. Currently the United States has reciprocity agreements with several countries, including Israel. States may also enter into agreements with foreign countries to enforce and collect on child support judgments across international borders. Minnesota has reciprocity agreements with the following countries: Australia, Austria, Czech Republic, El Salvador, Finland, Germany, Hungary, Ireland, Israel, Netherlands, Norway, Poland, Portugal, Slovak Republic, Sweden, Switzerland, United Kingdom and Canada: Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan and Yukon Territories.

Such international child support agreements outline procedures for enforcing child support orders across borders. Because there is a reciprocity agreement with Israel for the enforcement and collection of child support, Ben, in the above example, may seek enforcement on his own or through his local county child support agency, which can then assist with enforcement and collections through Israel's Department of Justice.¹³ Israel would proceed under the local law, the Foreign Judgments Enforcement Law.¹⁴ When the official request is made to Israel in Ben's child support enforcement case, officials in Israel would first review the case to ensure that the child support order was issued in compliance with the Foreign Judgments Enforcement Law. It must have been issued within a period of less than five years, been properly served upon Maria in Israel, be enforceable in Israel, and not contrary to public policy.

Assuming Ben's order is in compliance with

Israeli law, the Legal Aid Department of Israel appoints an attorney for the foreign applicant who submits to the Israeli family court an official application for enforcement of the foreign judgment. Applicants like Ben would submit certified translated copies of an official application form, a certified copy of the child support order, a power of attorney for the Israeli attorney to act on his behalf, original divorce certificate, children's birth certificates, and details identifying Maria.¹⁵

The road to enforcing and collecting client's like Lydia and Ben's child support orders may be long and fraught with bureaucratic delay. However, there are legal mechanisms in place for parents seeking to enforce and collect across international borders. With the United States Senate recently approving the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, it appears enforcement and collection of international child support has become a priority and future procedures will likely be implemented to enforce and collect across borders with greater ease.

Notes

¹Legislation has been introduced in the Minnesota Congress amending UIFSA. See 2011 MN S.F. 1175 and 2011 MN H.F. 1198. The proposed amendments include the addition of provisions related to the

Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007 and recently approved by the United States Senate on September 29, 2010.

²Uniform Reciprocal Enforcement of Support Act (URESA) and Revised Uniform Reciprocal Enforcement of Support Act (RURESA) remain in effect in a handful of states.

³Minn. Stat. §518C.101, Subd. (s)(2) (2005).

⁴See *Grave v. Shubert*, C5-00-399, 2000 WL 1221343 (Minn. Ct. App. August 29, 2000). In this case the Court evaluated whether England's laws

governing child support were sufficiently similar to the UIFSA.

⁵Minn. Stat. §518C.502 (2005).

⁶Minn. Stat. §518C.317 (2005).

⁷Minn. Stat. §518C.307 (2005).

⁸*Id.*

⁹For a comprehensive explanation of the mechanisms available to a child support agency for collection of child support, the Handbook on Child Support Enforcement is available from the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement: http://www.acf.hhs.gov/programs/cse/pubs/2005/handbook_on_cse.pdf

¹⁰Minn. Stat. §518C.601 (2005).

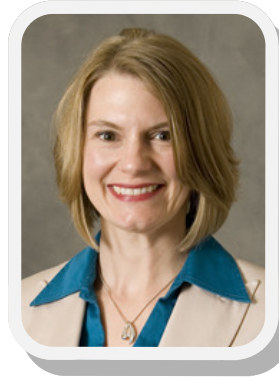
¹¹Minn. Stat. §518C.603 (2005).

¹²See Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, 24 J. Am. Acad. Matrim. Law. 33, 34 (2011).

¹³See <http://www.acf.hhs.gov/programs/cse/international> for information on all reciprocating countries agreements and procedures for enforcing child support.

¹⁴See <http://www.justice.gov.il/MOJEng/SiuaMishpati/NosiimBetipulenu/OverseasMaintenance.htm>.

¹⁵*See Id.*



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