



# THE ENFORCER

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## **Do I really need to know about Bankruptcy and Domestic Relations? What every Family Law Practitioner must know regarding the Automatic Stay—Part 1**

**Y**ou have spent months chasing your client's former spouse for collection of unpaid child and spousal support. On the day of the contempt hearing you receive a notice informing you that he has filed for bankruptcy. Now what? Can I proceed with the hearing? Can the Judge hold him in contempt? And which contempt, civil or criminal?

You vaguely remember that when somebody files for bankruptcy, all collection efforts are supposed to stop (the automatic stay). However, if they fit within one of the exceptions in the bankruptcy code, you can proceed. Ugh?! Does the bankruptcy code allow the support payer to walk away from his or her support obligations? Here's how the automatic stay affects divorce and family law proceedings.

### **The Automatic Stay**

The automatic stay is one of the most important parts of the Bankruptcy Code and is the chief benefit of filing for bankruptcy. It bars most actions by creditors to enforce a claim against the debtor or the debtor's property. It arises automatically upon the filing of the bankruptcy petition.

Examples of actions which are barred include:

- Entry of a property settlement by the state court without the consent of the Bankruptcy trustee;
- Collection of the debtor's income if the debtor has filed for relief under Chapter 13;
- Seizure of the debtor's property to the extent it is property of the Bankruptcy estate; and
- Any action not specifically excepted from the automatic stay.

Therefore, if, in the middle of the divorce, a party files for bankruptcy, the state court will be unable to divide the marital estate without permission from the bankruptcy court. Also, the debtor's property will become property of the bankruptcy estate and may be administered by the bankruptcy trustee.

### **Actions Which May be Prohibited by the Automatic Stay**

There are several proceedings which are not clearly allowed by the automatic stay nor prohibited. The most common of these gray areas are contempt proceedings. Currently, the law is very fact specific and unsettled in this area. A minority of courts have strictly interpreted the automatic stay to preclude proceedings to enforce the provisions of a contempt order.

However, the majority have held that the enforcement of a civil contempt order is not affected by the automatic stay, provided its primary purpose is to uphold the court's dignity. Accordingly, the courts' analysis has focused on whether the contempt order was an attempt to extract money from the debtor (civil contempt), or an attempt to uphold the dignity of the court (criminal contempt). It should be noted that criminal contempt actions are specifically allowed by the automatic stay (11 U.S.C. §362(b)(1)). The courts have proceeded on a case by case analysis, with each decision often hinging on the timing, nature and specific language of the contempt order.

The rule for determining whether a contempt proceeding is civil or criminal is set forth in the case of *Sword v Sword*, 399 Mich. 367 (1976):

If the court contemplates coercion and the order reflects the remedial aspect of the contempt proceeding by setting forth conditions with which defendant may reasonably be expected to comply and thereby obtain release, the contempt proceeding is civil. *Id* at 387.

This raises the issue of whether the support payer can purge himself from the contempt. In a Chapter 7 case, the debtor retains control over his post bankruptcy petition wages.



However, in petitions filed under Chapter 11 or 13, the debtor's wages are property of the estate. As such, he does not have the ability to purge his contempt by payment. An order of the Circuit Court compelling a Chapter 13 debtor to pay money which is property of the Bankruptcy estate would likely run afoul of the automatic stay.

### **Actions Permitted by the Automatic Stay**

The automatic stay has specific exceptions which allow:

- Commencement or continuation of a paternity action (§362(b)(2)(A)(i));
- The establishment or modification of a support order (§362(b)(2)(A)(ii));
- The dissolution of marriage, unless such a proceeding seeks to determine the division of property that is property of the estate (§362(b)(2)(A)(iv));
- An action/hearing regarding domestic violence, child custody or visitation (§362(b)(2)(A)(v));
- The collection of alimony, maintenance or support from property that is NOT property of the estate (§362(b)(2)(B)) [Emphasis Added];

- An action regarding withholding of income for payment of support (§362(b)(2)(C));
- The reporting of overdue support owed by a parent to a consumer reporting agency (§362(b)(2)(E)).

You will notice that several of the exceptions hinge on whether property is part of the estate. When a person files for bankruptcy, an estate is created which is administered by the bankruptcy trustee. If the person filed a Chapter 7, the estate DOES NOT include the debtor's post-petition income. Therefore, a Chapter 7 debtor's wages can be attached for post Bankruptcy enforcement. But if the debtor filed a Chapter 13, all of the debtor's income, pre- and post-petition, is part of the bankruptcy estate. Although you can't attach his income, you do have a remedy of seeking to have the Chapter 13 petition dismissed if the debtor does not pay his current support obligation.

### **Conclusion**

Receiving a bankruptcy notice does not mean that support enforcement must cease. Rather, it means that support enforcement efforts must conform with the provisions of the bankruptcy code.

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