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BANKRUPTCY LAW FOR FAMILY LAW PRACTITIONERS

By Joanne Reisman, Esq

Overview of Bankruptcy Law as Modified by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)

For this article we will only be discussing the two forms of Bankruptcy which are commonly used by consumer debtors, Chapter 7 (Liquidation) and Chapter 13 (Debt Repayment Plan).¹ This article will also focus on significant changes to Bankruptcy Law under the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).²

In a Chapter 7, the traditional liquidation form of bankruptcy, a debtor files a bankruptcy petition listing critical information about the debtor's assets, debts, income and living expenses which are assessed as of the date of filing.³ Approximately 30 days after the filing a hearing known as a 341(a) "first meeting of the creditors" is conducted where the debtor attends and answers questions under oath posed by the bankruptcy trustee assigned to their case.⁴ Creditors may also attend and ask brief questions. The trustee looks for nonexempt property and improper payments to creditors or property transfers that the trustee can avoid to recuperate the money or property. Property of a debtor will only be liquidated if the fair market value of the property exceeds the amount of the debtor's related exemption, the amount of any related secured debts, and the costs of sale. See figure #1 for a list of Oregon exemptions.⁵ As a general rule of thumb, the trustee won't get involved with liquidating property if the trustee can't net at least \$1,000.00 from the sale.

If all property is without net value and there are no transfers to be avoided, the trustee will declare the case a "no asset" case and make no payments to the unsecured creditors. Secured creditors retain their security interests and the debtor will be required to either elect to reaffirm the secured debt which continues their obligation to pay the debt or they can elect to surrender the secured property and be relieved from further obligation. Creditors may offer better terms to the debtor to encourage reaffirming but the creditor is not obligated to negotiate.

If the case is an "asset" case, the creditors will be advised to file "proofs of claim" and will wait for the trustee to liquidate the non-

exempt assets and pay them their pro-rata shares of the proceeds.

Following the 341(a) meeting there is a waiting period of 60 days to see if any of the creditors want to challenge the debtor's right to get bankruptcy relief by filing a complaint either objecting to the discharge of a particular debt (11 USC §523) or discharge generally (11 USC §727).⁶ Such complaints are rare due to the expense involved and the fact that the law favors granting the debtor relief absent a clear showing that the exceptions apply.

In a Chapter 13 a debtor with regular income enters into a plan to pay back all or a portion of their debts over a period of 3-5 years. The plan must pass two tests. First is the "best interest" test which means that the debtor must pay the creditors back as much as they would receive if the debtor's unsecured nonexempt assets had been liquidated in a chapter 7 on the date of filing. The second test is the disposable income test which requires the debtor to pay to the creditors that portion of his income that exceeds the medium income determined by federal guidelines (the means test) or the amount his income exceeds his actual budget, whichever is greater. The debtor makes monthly payments to the trustee which covers a trustee fee, the debtor's attorney fees and provides payments to the creditors.

Chapter 7 is generally the preferred remedy. It's faster and cheaper, taking about 4 months, as compared to 3 to 5 years in a chapter 13. The chapter 7 debtor can begin rebuilding their credit sooner. In a chapter 13 there is a risk that something could change. If the debtor's situation worsens, they might not finish the plan and the case will be dismissed without a final discharge. There is also a chance that the debtor's income will improve, and the debtor will be required to modify their plan and pay more to their creditors.

A chapter 13 may be needed in some situations. Chapter 7 is not an option if the debtor filed bankruptcy in the prior 8 years, but the debtor can still file a chapter 13.⁷ Debtors with household incomes that exceed the federal standards face a "presumption of abuse" and cannot use chapter 7. (See Figure #2 for the medium income levels currently used in Oregon.) Debtors can "buy back" their assets which have values in excess of their exemption amounts by paying the excess through a chapter 13.⁸ A chapter 13 is useful for curing mortgage arrears, protecting co-debtors, and modifying claims of secured creditors. A chapter 13 also discharges debts that are otherwise not dischargeable in a chapter 7 such as obligations, other than support, arising from a divorce or legal separation and some penalties associated with willful and malicious injuries.⁹

FACTORS TO FOCUS ON WHEN SCREENING A FAMILY LAW CASE FOR POTENTIAL BANKRUPTCY ISSUES.

Domestic breakups redistribute family income over two households causing a severe strain on clients with debt issues. Family law practitioners need to consider referring clients for bankruptcy when a client ends up with so much debt that there is little hope they can pay off the debt or where they would be under such a strain to pay off the debt that they will be jeopardizing their long term financial survival. As a general rule of thumb, if a client is carrying more than \$10,000 in unsecured debt or has a secured debt payments they can't make which will result in a repossession and a large deficiency judgment, it is time to consider bankruptcy.

Clients may resist seeking bankruptcy help due to worry about damaged credit scores or post bankruptcy stigmas. Although a bankruptcy will be reported on the client's credit history for 10 years, nearly all clients report substantially improved credit situations within 2-3 years of their bankruptcies. Clients need to be educated that the minimum monthly payments they are fighting to maintain are designed to perpetuate their debt and will result in them paying far more than their original purchases were worth.

SCREENING FOR BANKRUPTCY/DEBT ISSUES

1. Obtain the client's credit report. Free credit reports can be obtained once a year at <https://www.annualcreditreport.com>. If the spouse does not consent to a joint credit report a request should be made for the spouse's credit report.¹⁰
2. Have your client prepare a household budget that is realistic. Figure out what the client's monthly net income is after taxes. If the client is going through a divorce, the budget will need to represent the budget after separation.
3. Review the client's asset portfolio to see if the client has net assets in excess of their allowed exemptions. (See exemptions in figure #1).

With this data you will begin to see if a client might benefit from a bankruptcy to clean up their liabilities during a domestic break up (or prior to a new marriage). View the data with a worst case scenario perspective. Assume any assignment of debts to the other domestic partner will fail, and the debts will fall back on your client.¹¹ Remember that it might be harder for your client to file a bankruptcy in the future after they have built up their income or acquired nonexempt assets. It might be better to do a bankruptcy during the course of the breakup, and clean up

the mess, then try to assign the debt and risk an unpleasant surprise later when the former domestic partner defaults.

The family law practitioner that suspects that bankruptcy is a possibility either for their client or the domestic partner of the client, should refer the client to a bankruptcy specialist early in the case, because there will need to be a strategic determination as to whether the bankruptcy needs to be filed before the domestic relationship breaks up, or afterwards. If a pre-dissolution bankruptcy is a better solution, then the divorce will need to be postponed. Where a post divorce bankruptcy is the preferred, the bankruptcy practitioner can assist the divorce attorney in proposing a division of assets that will best benefit the client in the event of a post divorce bankruptcy.

SPECIFIC BANKRUPTCY ISSUES WHICH CONCERN FAMILY LAW PRACTITIONERS

Marital Status and filing

Only married heterosexual debtors can file a joint bankruptcy. All other debtors will be filing as separate individuals. A married debtor can also file separately and the other spouse is not required to file.

Marital/Relationship Status and the Means Test

The 2005 BAPCPA introduced a “means test” which involves comparing the debtor’s total “household income” to a federal schedule of medium household incomes (Figure 2).¹² If the debtor’s household income exceeds the federal medium income for the debtor’s geographical location, it is presumed that allowing chapter 7 bankruptcy relief to the debtor would be an abuse of the bankruptcy law.¹³ The debtor is instead redirected to a chapter 13 debt payment plan.

“Household income” is broadly defined and can include the income from spouses, friends, domestic partners, family members, and adult children that reside with the debtor. Not everyone that lives together is considered part of the debtor’s household. In a roommate situation where there is no personal connection, just a business arrangement to share rent and household expense, the income of the roommate would not be included in the debtor’s household income¹⁴. Where there is a pattern of shared expenses, joint bank accounts, joint ownership of assets, and the parties handle bills and other financial matters on a family level, this may constitute a single household for bankruptcy purposes. Married people living together might be presumed to be in the same household. Married people living separately are arguably living in separate households. The ultimate determination will be based on examining all the facts of the relationship.¹⁵

Bankruptcy Property Issues and the Effect of Marital Status

If only one spouse files, the bankruptcy court will assess the debts and property of the filing spouse the same way it would for an unmarried debtor, by looking at state law to determine what property that spouse owns. In Oregon this means that a spouse will be deemed to have property rights in property titled in their name. For property that is untitled, it may be a question of fact. In bankruptcy the court does not enforce a spouse’s marital interest in the property of the other spouse that would arise in a divorce proceeding

Timing Issues for Filing a Bankruptcy:

A bankruptcy court recognizes a transfer of a property interest ordered by a state court as of the date the decree or order is entered and will treat the property as being owned by the transferee if the Judgment is entered prior to the bankruptcy filing.¹⁶ The language of the divorce or legal separation decree is controlling as to ownership even if the property has not been re-titled into the name of the recipient spouse. A judgment awarding part of a pension subject to a future QDRO is sufficient to transfer the interest in the pension as of the date the Judgment is entered to the recipient spouse. (The interest is not enforceable until the QDRO is entered but the interest is vested bankruptcy purposes.)

If the debtor’s plan for bankruptcy is dependent on the post divorce property division, the dissolution or legal separation judgment needs to be entered before the bankruptcy is filed.

Conversely, a debtor that wants the pre-divorce property arrangement to control must file before the decree is entered. **VERY IMPORTANT:** The debtor’s attorney needs to make sure that no subsequent decree changing the property arrangement is entered during the 180 day period after the bankruptcy is filed. Otherwise, under 11 USC §541(a) 5, the bankruptcy estate will retroactively incorporate any property interest that accrues to the debtor within 180 days after the filing of the bankruptcy petition. This is a potential malpractice trap that can easily be avoided by simple delaying the entry of the decree.

Every case is different and must be analyzed early in the process to see if there is any advantage to filing bankruptcy before the divorce or separation is final or afterwards.¹⁷ Timing could raise or lower household income for purposes of passing the means test. Pre-dissolution joint ownership of property might allow higher combined property exemptions which may be advantageous in some situations while in others the post dissolution division of property allows a more favorable application of the exemptions.¹⁸ A dissolution client contemplating a joint bankruptcy with their spouse should get independent counsel and not

Continued on the next page

assume that what their spouse is contemplating is also in their best interest.

Effect of Changing Residence Prior to Bankruptcy.

Moving out of the residence could impact a debtor's homestead exemption. ORS 18.395 allows the displaced debtor to retain their homestead exemption if at the time the bankruptcy is filed, their spouse, parent or child occupies the residence **or** they can show that their absence is a temporary removal or temporary absence with the intention to reoccupy the same as a homestead **or** it has been under a year since their removal or absence from the property or the sale of the property. This could be a trap for a debtor spouse that moves out of the family home while a divorce drags on for a couple of years, receives the home at the end of the divorce and files for bankruptcy without taking steps to reoccupy the home as their residence or otherwise establish their right to a homestead exemption before filing.

Which court a client will file in is determined by examining in what state the client maintained a principal residence, principal assets, a business or domicile, for the greater portion of the 180 day period prior to the filing. The location of the client's case however does not necessarily control the property exemptions that the debtor will be able to utilize.

The 2005 BAPCPA added provisions to prevent forum shopping for better exemption treatment. Under 11 USC §522 the debtor must use the exemption laws for the state where they have been domiciled continuously for the past two years (730 days) prior to the date of filing. If they don't have two continuous years then they must use the exemptions of the prior domicile where they lived for 180 days prior to the 730 day period, or for the longer portion of the 180 days than in any other place. The rules for the homestead exemption have further limitations. A debtor can only claim a maximum of \$136,875 for their homestead exemption if they haven't lived in their house for at least 1215 days prior to the date of filing.

Do Family Lawyers Giving Debt Related Advice Constitute "Debt Relief Agencies" Who Are Subject to Bankruptcy Regulations?

An attorney advising clients with consumer debts about bankruptcy issues may be acting as a "debt relief agency" (DRA)¹⁹ under the BAPCPA. If an attorney qualifies as a DRA various rules and penalty provisions apply under 11 USC 526 (restrictions), 11 USC 537 (disclosures) and 11 USC 528 (requirements). While the categorization of an attorney as a DRA is mostly intended for attorneys working directly with a client to prepare a bankruptcy case, the language is broad enough to encompass attorneys giving bankruptcy related advice to any person who is an "assisted person"²⁰ even if it is not for the immediate purpose of

filing a bankruptcy, but rather how to deal with a spouse that might file.

11 USC 528 requires a DRA to include in any advertising that they are a "debt relief agency." Whether or not attorneys are debt relief agencies, and under what circumstances, continues to be debated. *Hersh v. United States*, 121808 FED5, 07-10226 (December 18, 2008) (FN5). The requirement has been held to be constitutional but there does not seem to be much effort to enforce the advertising rules against attorneys.

11 USC 526(a)(4) further prohibits DRAs from advising clients "to incur more debt in contemplation" of filing for bankruptcy or for the purpose of paying an attorney or bankruptcy petition preparer fee. This overly broad restriction has been deemed unconstitutionally vague in Oregon and other jurisdictions. *Olsen v. Gonzales*, 350 B.R. 906, 912 (D. Or. 2006), *aff'd* on reconsideration, 368 B.R. 886 (D. Or. 2007) 394 B.R. 274 (Attorneys are perfectly within their rights to advise clients to take reasonable steps to protect their legal interests such as borrowing against an asset to raise money to pay for their bankruptcy.)²¹

Avoidance of Prior Property Transfers in Bankruptcy

Bankruptcy law provides that a bankruptcy trustee can void certain transfers of property or money to prevent a debtor from manipulating payments to preferred creditors or from selling or giving away property to close associates for less than the property's value in anticipation of filing a bankruptcy.

Preferential Transfers (Voidable Debt Payments)

Preferential transfers are transfers of a debtor's property to a creditor, or to the benefit of a creditor, for payment of a prior debt, which result in the creditor receiving more than the creditor would have received in a Chapter 7 Bankruptcy if the property had not been transferred. In consumer bankruptcies, debt payments of \$600.00 or more to a single creditor in the 90 day period before filing are voidable preferential transfers. If the payment was on a debt owed to an insider, such as a close family member or business associate, transfers made between 90 days and 1 year prior to filing can be avoided. 11 USC 547.

Pre-filing payments in the nature of domestic support obligations (as defined in Section 101(14A) of the Bankruptcy Code), such as alimony, maintenance, support, or divisions of property are excepted from a bankruptcy trustee's avoidance action. 11 USC 547(c)(7) ("to the extent such transfer was a bona fide payment of a debt for a domestic support obligation")²²

Fraudulent Transfers

The trustee may avoid transfers of property or obligations made or incurred by the debtor *within two years*²³

prior to filing a bankruptcy, if made or incurred *with actual intent to hinder, delay, or defraud creditors*, or, if less than fair value for the property was received, and the debtor was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result. 11 USC 548. Voidable transfers would include transfers of property for less than fair market value, large gifts and large charitable contributions.²⁴

Property transfers made pursuant to a court order or decree

Property divisions ordered by a trial judge in a domestic relations proceeding are not controlled by the debtors so they are not “intended” by the debtors and therefore won’t be viewed as fraudulent voidable events. They are also not payments of prior debts so they are not preferential transfers either.

Absent evidence of fraud or collusion, the ownership of property will be based on how it was divided or awarded by the court. Conversely, the failure to specify changes of property ownership in a judgment can result in property not being deemed transferred for bankruptcy purposes. A subsequent transfer of property not awarded in a judgment by the debtor to the former domestic partner could be disallowed by the bankruptcy court as a preferential transfer if the transfer occurs within the year preceding the bankruptcy filing.²⁵ If the decree leaves property in the parties’ joint names, each party retains a present interest in the property that can be sold off to pay the creditors of the party that files bankruptcy. A non-debtor co-owner will still receive sales proceeds for their share, but they will not be able to prevent the trustee from taking and selling the property. An equalizing judgment awarded to a debtor creates an account receivable which the trustee can take and use to pay creditors.²⁶

Informal or Negotiated Property Transfers

Judgments which incorporate negotiated property settlements or agreements are subject to scrutiny since these agreements are entered into voluntarily by the parties. In a subsequent bankruptcy of one of the litigants, it would be a question of fact as to whether such a settlement was voidable or not. A bankruptcy trustee will examine the agreement to see if the division was fair and not made for the sole purpose of hindering, delaying, or defrauding creditors.

Informal transfers between spouses, even if done in anticipation of a divorce or legal separation with a written agreement, will not receive the same treatment as a division ordered by the court and will be subject to the same time limitations and scrutiny as any other pre-filing transfer made by a debtor with the possibility that the transfer can be voided as a preferential or fraudulent transfer.

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Editor: Daniel R. Murphy
P.O. Box 3151
Albany, OR 97321
(541) 974-0567
murphyk9@comcast.net

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication

for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author’s own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

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Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

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March 15, 2009	April 2009
May 15, 2009	June 2009

Bankruptcy treatment of Debt Obligations (Not in the Nature of Support)

Prior to the 2005 BAPCPA, if an obligated spouse initiated a bankruptcy, the obligee spouse had to initiate a proceeding to prevent the discharge of the marital debt and the court would then do a balancing test of the hardship on the debtor spouse versus the hardship on the obligee spouse to determine whether or not to grant a discharge of the debt. This process has been eliminated. Obligations to pay any debts owed to a spouse, former spouse, or child of the debtor, which are not otherwise “domestic support obligations” that were incurred by the debtor in the course of a divorce or separation, are not dischargeable in a chapter 7 proceeding. 11 USC §523 (a) 15. However, these obligations can be discharged in a chapter 13 bankruptcy. 11 USC 1328(a)(2). Case law defines such obligations to include situations where a spouse is ordered to pay a creditor of the other spouse. Additional “hold harmless” language is not necessary to characterize the obligation as being for the benefit of the former spouse.

Bankruptcy Treatment of Domestic Support Obligations

Obligations which are “domestic support obligations,” cannot be discharged in either a chapter 7 or chapter 13 proceeding. 11 U.S.C. §523(a)(5) The BAPCPA amendments widened the definition of a “domestic support obligation” to encompass almost all obligations that can arise under a settlement agreement or divorce dissolution decree. 11 U.S.C. §101(14A). This would include debts that accrued “before, on, or after the date of the order for relief” issued under the bankruptcy code and owed to or recoverable by a spouse or former spouse.

The definition of a “domestic support obligation” now found under 11 USC § 101 (14A) was broadened under the BAPCPA. The definition now applies to:

- A support debt that accrues before, on, or after the date of the order for relief (filing of the bankruptcy) and includes interest;
- Debts owed to or recoverable by a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or a governmental unit;
- Debts in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;
- A debt established or subject to establishment before, on, or after the date of the bankruptcy fil-

ing pursuant to a separation agreement, divorce decree, or property settlement agreement; or an order of a court of record; or a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and is not assigned to a non-governmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.

- A debt assigned voluntarily to a non-government entity for collection when assigned by a spouse, former spouse, child of debtor, of a child’s parent, guardian or responsible relative.

The bankruptcy court has the power to determine if a debt obligation is in the nature of support and is not bound by state law. Qualifying a debt obligation as being in the “nature of support” in a Judgment will not convert a property settlement obligation into a domestic support obligation. However, since one of the factors the bankruptcy court looks at is the party’s intent, the terminology used to label the obligation may indicate the intent that it be characterized as support.²⁷

Attorney fees awarded pursuant to a dissolution judgment or judgment of legal separation to a spouse or former spouse may constitute a form of “domestic support obligation” and therefore may be non-dischargeable under 11 U.S.C. §523(a)(5).²⁸ Attorney fees obligations which are not deemed to be “domestic support obligations” could still qualify as debts excepted from discharge under §523(a)(15) and won’t be dischargeable in a Chapter 7 proceeding (but would be discharged in a chapter 13).

Under the 2005 BAPCPA domestic support obligations have been elevated as the highest priority debt, second only to some fees that need to be paid first to the bankruptcy trustee to administer the estate. 11 USC §507. Being a priority debt means that in Chapter 7 liquidation, the debt must be paid in full before payments to other lower priority creditors can be considered. Support arrearages must be paid before the debtor’s attorney gets paid and before the IRS receives payments for delinquent taxes. New procedures have been implemented to insure that the support recipient is contacted and assisted by the bankruptcy trustee and understand the process of filing a proof of claim, which is a necessary to receiving payments from the bankruptcy estate. 11 USC §704(c)(1)(A)(I)

A chapter 13 plan must provide that the support obligation owed to the debtor’s spouse, former spouse, or child, absent some other agreement by the creditor, be paid in full. 11 USC § 1322(a)(2). (A support obligation assigned to a government unit doesn’t have to be paid in full, but all of the debtor’s income paid into the plan must be applied to

pay the debt and the balance remains dischargeable. 11 USC §1322(a)(4). The chapter 13 debtor must stay current with their ongoing support payments or risk having their case dismissed or converted to a chapter 7.

Given the greater protection afforded to “domestic support obligations” then other obligations that arise from a dissolution or legal separation, it might make more sense strategically to protect your client’s interest in seeing a debt obligation paid, by requiring the other spouse to pay spousal support to your client which is sufficient to cover the debt payments after taxes rather than ordering the other spouse to assume and pay the obligations directly. The bankruptcy court can still scrutinize the arrangement and make a determination as to whether the arrangement is truly in the nature of support.²⁹

Importance of reviewing a Chapter 13 plan prior to the confirmation hearing

Even though domestic support obligations are exempt from discharge and have a high priority for receiving payment, the recipient spouse needs to be aware that a confirmation of a Chapter 13 plan binds the debtor and all creditors to its terms, even if one of its provisions is improper and no party has objected to confirmation.³⁰ It is important that the debtor’s former spouse carefully examine a Chapter 13 plan filed by the debtor to ensure that it contains no objectionable provisions.

Automatic Stay

When a bankruptcy is filed an automatic stay goes into effect which prevents legal actions affecting the debtor relating to antecedent debts including attempts to collect debts, perfect security interests, and reclaim secured property. It also prevents any actions affecting property of the estate. 11 USC §362(a). Exceptions to the automatic stay are found in 11 USC §362(b). A practitioner should stop all legal activities which concern the debtor until the practitioner has established that either the course of action they wish to take falls under one of the exceptions or they have secured a relief from stay order from the bankruptcy court. A violation of an automatic stay can result in damages being assessed against the creditor.

The §362(b) exceptions allow the commencement or continuation of a civil action or proceeding:

- To establish paternity;
- To establishment or modify domestic support orders
- Which pertain to child custody or visitation;
- For the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate;³¹
- Which relates to domestic violence;

With respect to support enforcement, the stay does not prevent:

- The collection of a domestic support obligation from property that is not property of the estate;
- The withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
- Withholding, suspension, or restriction of a driver’s license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;
- Reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;
- The interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

While the collection of support arrearages can continue during a Chapter 7 case, a domestic support obligation creditor is prohibited from collecting pre-petition support arrears when a Chapter 13 plan proposes to pay those obligations in full, and the debtor is performing under the plan.

Mortgage and Trust Deed Foreclosures

If the only debt concern of a client is a home foreclosure with a single lender and the client does not want to try to cure the arrearages with a chapter 13 bankruptcy, the client should consider just walking away without a bankruptcy filing. Most lenders prefer to pursue speedier non-judicial foreclosure proceedings thereby waiving their right to obtain a deficiency judgment. This is not the case if there are additional lenders involved. The secondary lender will most likely be under secured and will instead seek a judgement against the debtor which will require bankruptcy relief to avoid.

Joanne Reisman, a sole practitioner based in Portland, Oregon, received her BA from UCLA in Business/Economics (cum laude) in 1980 and then her JD from Northwestern School of Law at Lewis and Clark College in 1983. For 26 years she has practiced law in Oregon developing a general civil practice that covers Bankruptcy, Family Law, Estate Planning and Probate, Business, Real Estate and Personal Injury Law. She is fluent in Spanish and offers all services in both English and Spanish.

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Other resources:

- OSB Family Law CLE, Chapter 21: Bankruptcy and Family Law, 2008 Supplement (Todd Trierweiler, Michelle Freed, Eric Marshack)
- Jonathan Levy, Bankruptcy and Estate Planning in Oregon, OR. EST. PL. & ADMIN.
- SEC. NEWSLETTER, April 2007
- Divorce & Bankruptcy (A Summary) By Gregory P. Oliveros, Attorney at Law, Clackamas, Oregon

Figure 1 (see below)

Oregon Exemptions

Federal Bankruptcy Law allows each state to elect to have state exemptions be used in bankruptcy proceedings in lieu of federal bankruptcy exemptions. Oregon has elected to use Oregon exemptions. The relevant exemptions for Oregon are:

Type of exemption	Amount of exemption for single debtor	Amount of exemption for married couple	ORS Citation
Books, pictures, musical instruments, art objects, collections	\$600	\$600.00 each spouse or \$1200 combined	18.345(1)(a) 18.345(3)
Wearing Apparel, Jewelry, Personal Items	\$1,800.00	\$1,800 each spouse or \$3,600 combined	18.345(1)(b) 18.345(3)
Tools of the Trade (used for work or profession generally does not include vehicle unless vehicle has special commercial function like a dump truck)	\$3,000.00	\$3,000 each spouse or \$6,000 combined	18.345(1)(c) 18.345(3)
Motor Vehicle	\$2,150 per person for a owned vehicle	\$2,150 per person for two separate vehicles or \$4,300.00 combined for one vehicle	18.345(1)(d) 18.345(3)
Domestic Animals	\$1,000.00 total value plus 60 days of food	\$1,000.00 total value plus 60 days of food	18.345(1)(e)
Household goods, furnishings and provisions (Food & Fuel for 60 days)	\$3,000 per household	\$3,000.00 per household	18.345(1)(f)
Professionally prescribed health aids for debtor or dependents	unlimited	unlimited	18.345(1)(h)
Spousal support, child support received or owed to debtor	unlimited	unlimited	18.345(1)(l)
Award under any crime victim reparation law.	unlimited	unlimited	18.345(1)(j)
Bodily Injury Claims or Payments	\$10,000 (lessor of \$7,500 or 75% when debt is child support)	\$10,000 per person (lessor of \$7,500 or 75% when debt is child support)	18.345(1)(k) 18.345(4)
Compensation for lost earnings of the debtor or for a person that supported debtor	Amount reasonably necessary to support of the debtor or dependent of debtor	Amount reasonably necessary to support of the debtor or dependent of debtor	18.345(1)(l)
Veteran's Benefits & Loans	100%	100%	18.345(1)(m)
Earned Income Credit	100%	100%	18.345(1)(n)
Liquid Assets/Personal Property not otherwise exempted such as: • Cash • Funds in a bank account • CD or other investment • Utility/Apartment Deposits	\$400.00 total (can be shared for multiple items or applied to one item)	\$400.00 each or \$800 combined	18.345(1)(o) 18.345 (3)

Homestead - Traditional Home with Land	\$30,000 w/single owner	\$36,900 if spouses jointly own	18.395
Mobile Home or House Boat with Land Owned	\$23,000.00	\$30,000	18.428(1)
Mobile Home or House Boat without Land	\$20,000.00	\$27,0000	18.428(5)
Exempt Proceeds from a Sale of a Homestead when proceeds used to buy another house within one year. Money not invested in a home or spent in 1 year reverts to bankruptcy estate	\$30,000/\$23,000 /\$20,000 depending on the type of property held	\$36,600/\$30,000 /\$27,000 depending on the type of property held	18.395(2)
Denial of Homestead Exemption	Court's discretion when debt is for child support	Court's discretion when debt is for child support	18.398
One rifle or shot gun and one pistol	up to \$1,000.00 value	up to \$1,000.00 value per person	ORS 18.362
Tax Refunds (owing or potentially owing to you at the time the case is filed)	Not exempt except earned income credit portion	Not exempt except earned income credit portion	
Aid to Disabled Persons	100%	100%	ORS 412.610
Certain Annuity Policy Benefits	Partial	Partial	743.049
Burial Lots sold by a non-profit corporation	100%	100%	65.870
Health & Disability Benefits	100%	100%	743.050
Cash surrender value of life insurance (beneficiary not the estate of the insured)	100%		743.046(3)
Life Insurance Proceeds - Group (beneficiary not the estate of the insured)	100%	100%	743.047
The categories below and pay outs from these sources are exempt from execution as stated. Payments received and deposited in debtor's bank account only retain exempt status up to a combined total maximum of \$7,500.00 pursuant to ORS 18.385			
Qualified Pension Plans and Tax Deferred Retirement Accounts	100% (75% when debt is child support)	100% (75% when debt is child support)	18.358 18.358(3)(b)
Wages	Greater of \$196 per week or 75% of total wages is exempt	Greater of \$196 per week or 75% of total wage is exempt (per person)	ORS 18.375 and 18.385 (only 18.385 (2) - (4) portion is exempt in bank account)
PERS retirement	100% (75% when debt is child support)	100% (75% when debt is child support)	ORS 238.445
Vocational Rehabilitation Payments	100%	100%	ORS 344.580
College Savings Accounts	100%	100%	ORS 348.863(2)
Emergency Service worker benefit			ORS 401.405
Veteran's State Loan Funds	100%	100%	ORS 407.595
Various grants of public assistance			ORS 411.760
State medical assistance			ORS 414.095
Workmen's Compensation Benefits	100% (75% when debt is child support)	100% (75% when debt is child support)	ORS 656.234 ORS 18.345(4)
Unemployment Compensation Benefits	100% (75% when debt is child support)	100% (75% when debt is child support)	ORS 657.855 ORS 18.345(4)
Fraternal Society Benefits			748.207
Social Security Benefits	100%	100%	42 U.S.C. §407

Continued on the next page

Figure 2

Means Test

Medium Family Income for Oregon as of March 15, 2009

Household size	Type of household	2009 medium family income for Oregon (Combined gross income of all household members)
1	Single person (no dependents, children or domestic partner in the household)	\$45,176
2	Married couple (whether one or both file) or single with one child or single with a domestic partner	56,317
3	Married with one child or single with two children or single with a domestic partner and a child	61,046
4	Married with two children, or single with three children or single with a domestic partner and two children	72,735
Additional		For each addition family member add \$6,900

Endnotes

- 1 Other bankruptcy chapters are: Chapter 9 (reorganization of municipalities), Chapter 11 (complex reorganization often used by corporations or partnerships), Chapter 12 (special debt repayment plan for farmer's and fisherman) and (new) Chapter 15 (covers "cross-border" international situations).
- 2 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub.L. 109-8, 119 Stat. 23, enacted April 20, 2005)
- 3 There is a 6 month look back at the debtor's income to determine his average income as of the filing date and there is a 180 day period following the filing where additional property acquired from an inheritance, domestic relations divorce or property settlement, or life insurance proceeds, will be captured as part of the estate. 11 U.S.C. § 541(a)(5)
- 4 11 USC 341(a)
- 5 Currently Oregon law prevents residents from using the exemptions under the Federal Bankruptcy Law. ORS 18.300. There is currently legislation pending which if passed, will allow Oregonians to select either the Oregon or federal exemptions.
- 6 If your domestic relations client has a claim against a spouse or other party which arose from fraudulent activity 11 USC §523(a)(2) or (a)(4) or wilful and malicious injury §523(a)(6), be aware that to prevent the discharge of the claim the client would need to file a complaint within the 60 day period after the 341(a) meeting of the creditors.
- 7 A debtor won't get a discharge in a chapter 13 if it has been less than four years since their prior bankruptcy filing but they can still get other temporary relief such as stopping garnishments, preventing home foreclosures, and avoiding contractual obligations.
- 8 Thus a debtor who has a little bit of equity above their home- stead exemption could retain their home by paying an amount equivalent to this excess equity into the chapter 13 plan over a period of 3-5 years and they would be discharged from the remaining balance of unsecured debt.
- 9 Not all penalties for willful and malicious injuries can be discharged in a chapter 13.
- 10 Credit reports do not show all debts. Debts in the other spouse's name only will not appear. Your client's debts and debts your client is jointly obligated on will show up. Medical, utility, and small business debts often are not be reported to credit bureaus. Have the client to check the credit report and provide a supplemental list of additional debts. Depose the other domestic partner for additional debt information.
- 11 Only debts that are joint with the other domestic partner or solely in your client's name will fall back on your client. Debts only in the other partner's name cannot come back on your client unless the creditor obtains a legal ruling that the debt was a family debt for which both spouses and their property are liable. ORS 108.040
- 12 This web site has links to the federal census data and IRS expense tables that are used for the means test: <http://www.usdoj.gov/ust/eo/bapcpa/20090315/meanstesting.htm>
- 13 There are ways to rebut the presumption of abuse but it is complex and beyond the scope of this article.
- 14 The debtor reports only the portion of expenses that they pay on their Schedule J list of expenses.
- 15 This is an area that is not well defined and is still evolving under case law.
- 16 The language in the Judgement must adequately identify the nature of the property interest to be transferred and the recipient.

- 17 Similarly couples contemplating marriage where one or both are carrying considerable debt should seek counseling as whether one or both should consider a bankruptcy before consummating the marriage.
- 18 For example, if a married couple jointly owns a car worth \$4,300, by filing jointly they can combine their vehicle exemptions and exempt the fully \$4,300.00 of car's value. After the divorce, they could then enter into a divorce settlement that award the car to either one of the parties. Had the divorce occurred first, the party receiving the vehicle in the subsequent bankruptcy would only be able to exempt \$2,150.00 of car's value and would end up owing the trustee \$2,150 if they wanted to retain the car.
- 19 A "debt relief agency" (DRA) is defined as "any person who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110." 11 U.S.C. § 101(12A). An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000." 11 U.S.C. § 101(3). Further, "bankruptcy assistance" is defined as:
- [A]ny goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.
- 11 U.S.C. § 101(4A).
- 20 See endnote 18.
- 21 See also, *Connecticut Bar Ass'n v. U.S.*, 394 B.R. 274 (D. Conn. 2008) (Holding that the US is enjoined from enforcing section 526(a)(4) (giving advice that leads to incurring more debt) as it applies to attorneys. The defendants are further enjoined from enforcing section 528(a)(3) and (a)(4) (required advertising provisions) as applied to attorneys representing clients other than consumer debtors filing for bankruptcy.)
- 22 There are other categories of transfers detailed in 11 USC 547 ©) that are protected from the trustee's avoidance powers.
- 23 Malpractice Trap: While the federal bankruptcy law provides a two year period for looking at fraudulent transfers, the federal court can also utilize state law and Oregon law provides that a creditor can after fraudulent conveyances of real property for up to 4 years (1 year for personal property) so the longer period under Oregon Law would apply to real property transfers. Transfers to a "self-settled trust or similar device" made up 10 years before filing may be voidable.
- 24 11 USC §548 protects charitable contributions up to 15% of a debtors income and possibly more if the debtor can show a prior history of larger contributions.
- 25 If the corrective transfer is done more than a year before the bankruptcy it will not be set aside, but the practitioner should advise the clients that the transfer may have resulted in a taxable gift and they should consult a tax professional.
- 26 A small amount up to \$400.00 could be claimed exempt under ORS18.345(1)(o).
- 27 *In re Sternberg*, 85 F3d 1400, 1405 (9th Cir 1996).
- 28 *In re Chang*, 163 F3d 1138, 1140-1142 (9th Cir 1998), *cert. denied*, 526 US 1149 (1999). *Kubera v. Kubera*, 200 BR 13,17-18 (Bankr WDNY 1996) (Attorney fees related to the property distribution were dischargeable but the portion related to litigation over maintenance and support was not.) *Macy v. Macy*, 114 F3d 1, 2 (1st Cir 1997) (Fees connected with collecting alimony and child support were not dischargeable.) *In re Lombardo*, 224 BR 774,783-784 (Bankr SD Cal 1998) (Attorney fees in a paternity suit were not dischargeable.)
- 29 See *In re Jenkins*, 94 BR 355 (Bankr ED Pa 1988) (In a short duration marriage (less than two years) it is not likely that state court would order the low income spouse to pay support to the higher earning spouse.)
- 30 See, e.g., *In re Pardee*, 218 BR 916 (9th Cir BAP 1998), *affd.* 187 F3d 648 (9th Cir 1999).
- 31 It is not a violation of the stay to file a dissolution petition requesting a particular division of the marital property. The violation would occur if a judgment or court order were to issue with respect to the property without first obtaining a relief from stay.

2008 Changes in Adoption Agency Licensing and Adoptive Family Requirements

*By Kathie G. Stocker, Social Worker,
Holt International Children's Services*

On October 17, 2008, the State of Oregon enacted new licensing requirements for all adoption agencies. These rules in turn will affect your clients, as there are new standards for adoptive families as well. I will highlight the main areas of interest in this article.

To see the rules in their entirety, please check our website: www.oregonadoptionagencies.org

These rules apply to all families who adopt in Oregon and will be in effect with home studies written from April 17, 2009 onward. The state will not approve any home studies after that date that does not meet the new requirements.

For the home study:

- Individual as well as joint interview required.
- Family's home must comply with the DHS Safety Checklist (CF979) which includes requirement for smoke detectors in all bedrooms, posted evacuation plan, safe storage of chemicals, medications and firearms, etc.
- The family needs to have received a minimum of ten hours of training independent of the home study that covers the following: possible short and long term effects of prenatal exposure to drugs, alcohol and poor nutrition; effects of separation and loss; normal child and adolescent development; what research indicates about the potential effect on a child's development of physical abuse, sexual abuse, neglect, institutionalization, and multiple caregivers; issues related to race, culture and identity; acculturation, assimilation, and, if applicable, the effects of having been adopted internationally; emotional adjustment of adopted children and their families, including attachment and psychological issues of children who have experienced abuse, neglect, or trauma; and in the case of an international adoption, the process and needs of children awaiting adoption.
- Under OAR 413-215-0456, six hours of the above training must be completed prior to the home study being completed. The additional hours will be documented in the family's court report.

- The Coalition of Oregon Adoption Agencies will list classes on their website which meet these standards.
- A post placement visit must occur within the first 30 days following placement for a domestic adoption. In the case of international adoption, the post placement visit is done between one to four months after arrival with all family members present.
- Agencies must provide families with all the necessary documents so that their attorney can finalize the adoption in a timely manner.

There is also a change to the criminal history regulations. All families will submit fingerprints to the DHS Criminal Record Unit along with their criminal history release form via adoption home study agency. All fingerprints will be sent to the FBI for processing. In addition, families must indicate if they have lived outside of the state in the last five years, and, if so, where. Child Abuse Checks will be run for every state that the family has lived in for the last five years.

After obtaining the reports, the CRU will send agencies a report indicating whether or not the family is approved for adoption. Agencies will no longer be able to make their own determinations in regards to criminal or child abuse history. This process is now taking approximately six weeks to complete, so please have your clients start this early on so as to not delay their home study.

These new regulations should serve to better prepare families for the realities of adoption and also let them know where they can find resources after their child is in the home. In the past, families who adopt independently have not found a connection for any post adoption services, but often need them. The training will also help families to better understand open adoption and what their responsibilities are with a mediated open adoption agreement. Agencies will be providing families with information about local resources, as well as the existence of a federal tax credit and the importance of prompt finalization of their adoption.

The Coalition of Oregon Adoption Agencies (COAA) is a group of Oregon licensed adoption agencies who meet monthly to share information on our practices; discuss legislation regarding adoption; network; support; train; work to accurately portray adoption in the media; and educate regarding adoption in the community. COAA is composed of agencies involved in both domestic and international adoptions; including agencies placing Oregon's waiting children. The Department of Human Services participates in an advisory role.

Kathie G. Stocker is currently President of COAA and has been a social worker for Holt International Children's Services for 15 years. She is also a state representative for the North American Council on Adoptable Children and a board member of Northwest Adoptive Families Association.

Tech Tips for Lawyers: How to Use Your Phone for Dictation and More

By Kristen LaMont, Esq

Wouldn't it be great to walk out of court and immediately dictate a quick note or letter, add a billing slip, and calendar your next court date? Better yet, what if your transcription was already waiting for you when you arrived back at the office?

My favorite tool to capture ideas, set reminders and draft short letters or notes to the file is www.jott.com. It is refreshingly simple. Just call Jott, say your message and Jott transcribes your words into text and sends your text to the destination you choose. You can make notes, add items to your to-do lists, calendar events, dictate and send emails and (my favorite) send yourself text message reminders that arrive on the date and time you choose. I use it to keep track of personal reminders too. If I need to pick up the dry cleaning on Friday, I have Jott text a message to me as I

leave work that day to remind me. One drawback is that Jott limits the length of your dictation. You won't be able to dictate long letters or notes with this application.

Jott integrates smoothly with iPhone, Outlook, BlackBerry, iGoogle, Google calendar and a number of other applications. You can try Jott free for a week and the basic service is only \$3.95/month.

Other phone dictation options that you might find interesting include [ReQall](#), [Message Shuttle](#) and [Dial Dictate](#). ReQall offers features similar to Jott and the service is free. Message Shuttle offers a free phone-to-email messaging service. Dial Dictate from NCH Software captures phone dictation of any length and emails you (or your assistant) an audio file. Both Message Shuttle and Dial Dictate audio files are formatted to work with your transcription gear. You can also transcribe dictation audio files using speech recognition software, such as [Dragon Naturally Speaking](#) from Nuance.

Tech Tips for Lawyers will be a regular feature highlighting practical technology tips for family law practice. Kristin LaMont is a solo practitioner in Salem who spends far too much time on the web and enjoys integrating technology into her practice.

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OREGON COURT OF APPEALS

Note: If you are reading this on the computer while on line you can click on the blue hot links and you will be taken directly to the case on the Appellate website. If you cannot directly click on the link, depress the “Ctrl” Button and click at the same time.

DOMESTIC PARTNERSHIP

In the Matter of the Domestic Partnership of Jan Elaine Branam, Respondent, and Randy O’Neil Beaver, Appellant, 225 Or App 630 (2009) A133414 / <http://www.publications.ojd.state.or.us/A133414.htm>

Trial Judge: Pat Wolke, Josephine County

Opinion: Armstrong, P. J.

Beaver appeals from a judgment to dissolve his domestic partnership with Branam, and assigns error to the trial court’s property division that gave each party an equal share of the appreciated value of the home in which the parties had lived, but reimbursed Branam the money she had paid to purchase the home. Beaver also assigns error to the court’s refusal to admit into evidence a letter from Branam’s attorney.

Held: The trial court did not err in determining that the parties intended to share the home equally and dividing the appreciated value of the home equally. Likewise, the court correctly determined that the parties did not intend to share the purchase price of the home, and thus did not err in reimbursing Branam the money she had paid to purchase the home. In addition, even if the trial court erred in excluding the letter from Branam’s attorney, the letter would not alter the Court of Appeals decision on *de novo* review. Affirmed.

CHILD SUPPORT / SPOUSAL SUPPORT

In the Matter of the Marriage of Jill Carmen Talik, Petitioner-Respondent, and David Andrew Talik, Respondent-Appellant, 226 Or App 67 (2009) A134376

<http://www.publications.ojd.state.or.us/A134376.htm>

Trial Judge: Ronald Poole, Douglas County

Opinion: Barron, J. pro tempore.

Husband appeals a judgment of dissolution, assigning error to the trial court’s calculation of the amount of child support and its order denying him compensatory spousal support and limiting his parenting time. Husband argues that the trial court erred in calculating wife’s income, and his own income, and that that error rendered the amount of child support ordered erroneous. Husband contends that his contribution to wife’s career and his role as primary caregiver to their children entitled him to an award of compensatory support and a greater amount of parenting time.

Held: The trial court correctly limited husband’s parenting time based on uncontroverted evidence of abusive behavior on husband’s part directed toward the children. The court also correctly calculated the amount of child support based upon the testimony of wife’s accountant, who testified as to wife’s income, and a vocational counselor who testified as to husband’s earning potential. Husband’s contention that his income would be lower than the trial court determined was speculative and insufficient to render the trial court’s determination erroneous.

Finally, the court correctly denied husband compensatory support because, during the marriage, husband had used funds from the marital estate to pay off his own student loans, leaving wife with a substantial amount of her own student loan debt at the time of dissolution; moreover, husband had the economic capability to be self-sufficient without spousal support based on his working as a teacher and real estate broker. Affirmed.

CUSTODY

In the Matter of the Marriage of Lauren Ann Nguyen, Appellant, and Jerry Duy Nguyen, Respondent below, and Paul Miller and Judith Miller, Respondents, 226 Or App 183 (2009) A138531

<http://www.publications.ojd.state.or.us/A138531.htm>

Trial Judge: Keith R. Raines, Washington County

Opinion: Schuman, J.

Mother appeals a judgment granting custody of her child, T, to mother's parents. The trial court initially concluded that neither mother nor father could adequately care for T and awarded temporary custody to grandparents, who at that time were witnesses at the custody hearing but not parties to the case. Six months later, the court granted grandparents' motion to intervene, finding that they had established the child-parent relationship that is a prerequisite to participating as third parties in a custody action. The court subsequently awarded grandparents sole legal and physical custody of T and gave mother and father each limited parenting time. On appeal, mother argues, among other things, that the trial court erred in concluding that grandparents rebutted the presumption under ORS 109.119 that mother acts in T's best interest.

Held: Under the totality of the circumstances, including grandparents' failure to prove by a preponderance of the evidence that mother was currently unable or unwilling to adequately parent or that circumstances detrimental to T presently existed if grandparents were not awarded relief, grandparents did not rebut the statutory presumption that mother acts in T's best interest, and therefore mother cannot be deprived of custody in favor of grandparents. Reversed and remanded. CA 02.25

SPOUSAL SUPPORT / ATTORNEY FEES

In the Matter of the Marriage of Samuel Wayne Boyd, Respondent, and Lori Kay Boyd, Appellant, 226 Or App 292 (2009) A135183

<http://www.publications.ojd.state.or.us/A135183.htm>

Trial Judge: Daniel R. Murphy, Linn County

Opinion: Edmonds, P. J.

Wife appeals from a judgment dissolving the parties' marriage. ORS 107.105. She assigns error to the trial court's property distribution, award of spousal support, and award of attorney fees. In 2000, wife's stepfather deeded to her a 50 percent interest in some unimproved lots in Monroe, Oregon, known as the "brickyard property." Wife first contends that "[t]he trial court erred in including the Brickyard property in its calculation of equitable division of the marital assets of the marriage." Next, wife contends that the facts support an indefinite spousal support award of more than \$200 per month. Finally, wife contends that the trial court abused its discretion in awarding husband \$13,274.70 in attorney fees and costs.

Held: (1) Excluding the brickyard property from the marital estate produces a more equitable division of assets, and none of the other considerations justify including the brickyard property in wife's share of the marital estate. (2) In light of the length of the parties' marriage, wife's age, wife's limited education, the disparity in the parties' income, and the impairment of wife's earning capacity because of her absence from the job market, we conclude that indefinite spousal support in the amount of \$750 per month is proper so that wife can have a standard of living that is not overly disproportionate to that enjoyed during the marriage. (3) The trial court had discretion to award attorney fees to husband under ORS 20.075 based on wife's conduct. Dissolution judgment modified to increase indefinite maintenance spousal support to wife to \$750 per month; otherwise affirmed. CA 03.04

