

**ILLINOIS INSTITUTE FOR  
CONTINUING LEGAL EDUCATION  
BANKRUPTCY STRATEGIES  
AND ETHICAL CONCERNS  
IN THE CONTEXT OF MARRIAGE**

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## **BANKRUPTCY STRATEGIES AND ETHICAL CONCERNS IN THE CONTEXT OF MARRIAGE**

### I. Bankruptcy Strategies in the Context of Marriage

#### A. Relevant Definitions of the United States Bankruptcy Code (“Code”):

##### 1. Section 101(10A): The term “current monthly income”

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism. 11 U.S.C.A. § 101 (West).

2. Section 101(13): The term “debtor” means person or municipality concerning which a case under this title has been commenced. 11 U.S.C.A. § 101 (West).

##### 3. Section 101(14)(A) – Domestic Support Obligation:

(14A) The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

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

(ii) a governmental unit;

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

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

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

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

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

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt. 11 U.S.C.A. § 101 (West).

4. Section 101(41): The term “person” includes individual, partnership, and corporation,...11 U.S.C.A. § 101 (West)

B. Eligibility to be a Debtor in Bankruptcy

1. Section 109 - Who may be a Debtor:

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 . . .

\* \* \*

(d) Only a . . . person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker)... may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400 may be a debtor under chapter 13 of this title.

(f) Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.

\* \* \*

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

(2) [Not relevant for these seminar materials]

(3) [Not relevant for these seminar materials]

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that

the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1). 11 U.S.C.A. § 109 (West)

*Note:* that the Debtor must also complete a post bankruptcy filing personal financial management instructional course in order to receive a discharge. See Section on Discharge *infra*.

## 2. Section 1304 - Debtor engaged in business

(a) A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.

(b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.

(c) A debtor engaged in business shall perform the duties of the trustee specified in section 704(a)(8) of this title. 11 U.S.C.A. § 1304 (West)

See *also*, the Legislative History to Section 109 which contains commentary relative to the ability of a Chapter 13 Debtor who operates a small business to file. “Whether a small business operated by a husband and wife, the so-called “mom and pop grocery store,” will be a partnership and thus excluded from Chapter 13, or a business owned by an individual, will have to be determined on the facts of each case. Even if partnership papers have not been filed, for example, the issue will be whether the assets of the grocery store are for the benefit of all creditors of the debtor or only for business creditors, and whether such assets may be the subject of a Chapter 13 proceeding. The intent of the section is to follow current law that a partnership by estoppel may be adjudicated in bankruptcy and therefore would not prevent a Chapter 13 debtor from subjecting assets in such a partnership to the reach of all creditors in a Chapter 13 case. However, if the partnership is found to be a partnership by agreement, even informal agreement, then a separate entity exists and the assets of that entity would be

exempt from a case under Chapter 13.” *House Report No. 95-595, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 318-20 (1977).*

*See also: In re Krokos*, 12 B.R. 520 (Bankr. S.D.N.Y. 1981). Bankruptcy trustee contested eligibility of debtors to obtain the benefit of Chapter 13 on the ground that they were not attempting to seek relief as two individuals but as partners of business partnership. The Bankruptcy Court, Howard Schwartzberg, J., held that husband and wife operating “mom and pop” grocery store, who were admittedly jointly liable to their trade creditors, who both signed certificate for partners, and who both signed lease before they became “mom and pop,” could not file jointly under guise as individuals pursuant to Bankruptcy Code chapter governing adjustment of debts of individual with regular income when in fact they held themselves out to the public as partners.

### 3. Rule 1016 - Death or Incompetency of Debtor

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. Fed. R. Bankr. P. 1016.

*Note:* Pursuant to Sections 101 and 109, a decedent's or incompetent person's estate cannot file for protection under the United States Bankruptcy Code. However, once a bankruptcy case has been properly filed by a living, competent debtor, a subsequent death or finding of incompetency of that debtor does not abate a liquidation case under Chapter 7.

*See also. In re Gridley*, 25 C.B.C.2d 858, 131 B.R. 447 (Bankr. D.S.D. 1991). Rule 1016 does not grant to the court the same discretion to dismiss a chapter 7 case as is given in chapter 11, 12, or 13 cases. Death does not abate the chapter 7 case.

*See also. In re Querner*, 7 F.3d. 1199, 30 C.B.C. 231 (5<sup>th</sup> Cir. 1993). A court has the discretion to permit a chapter 13 case to continue after the death of the debtor and retains exclusive jurisdiction over property of the estate.

4. Section 1307 - Conversion or dismissal

\* \* \*

(d) Except as provided in subsection (f) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 or 12 of this title.

(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

(f) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

(g) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter. 11 U.S.C.A. § 1307 (West).

*Note:* The 2011 Collier Pamphlet Edition Bankruptcy Code and the United States Bankruptcy Code found on Westlaw differ as to the subsection identified in 1307(d). Collier's identifies the subsection as (e) whereas Westlaw identifies the subsection as (f).

C. Joint Filing

1. Section 302 – Joint Cases

(a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.

(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated. 11 U.S.C.A. § 302 (West)

*See also:* Section 302 provides for the filing of a joint petition by a husband and wife in Chapter 7, 11, 12 and 13 cases. Joint administration is merely administrative in nature. In contrast, substantive consolidation means that separately filed cases are treated as one case causing a substantive impact upon the debtors' and creditors' rights. 1 Collier Pamphlet Edition 2011, p. 116 (Alan N. Resnick & Henry J. Somme eds., Matthew Bender).

*Note:* Technically, unless substantively consolidated, a joint petition creates two separate bankruptcy estates, which will have two separate distributions.

*Note:* However, in our experience, courts treat a joint petition as a substantively consolidated case and the technicality noted above is generally honored in the breach.

2. Fed. R. Bankr. P. 1015 – Consolation or Joint Administration of Cases Pending in Same Court

(a) Cases involving same debtor

If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.

(b) Cases Involving Two or More Related Debtors

If a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of a husband and wife shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the



court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

(c) Expediting and protective orders

When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay. Fed. R. Bankr. P. 1015

- a. Rule 1015 applies to both voluntary and involuntary bankruptcy petitions. 2 Collier Pamphlet Edition 2011, p. 55 (Alan N. Resnick & Henry J. Somme eds., Matthew Bender).

3. Relevant Case Law

- a. 2011 Collier Pamphlet Edition Bankruptcy Code cites *In re Crowell*, 13 C.B.C.2d 878, 53 B.R. 555 (Bankr. M.D. Tenn. 1985) – for the proposition that both spouses must agree to the filing of a joint case. One spouse may not file a petition for the other without the other’s knowledge or consent. 1 Alan N. Resnick & Henry J. Sommer, Collier Pamphlet Edition 2011, p. 117 (Matthew Bender).
- b. *In re Olson*, 253 B.R. 73 (B.A.P. 9<sup>th</sup> Cir. 2000). A chapter 13 petition may not be amended to add a spouse as a debtor. To obtain joint relief, a spouse must file a petition and seek joint administration under Rule 1015(b)(1).
- c. *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004). Same sex spouses cannot file a joint petition due to the operation of the federal Defense of Marriage Act.

*Note:* In part due to the decision of President Obama’s Administration to stop enforcing the Defense of Marriage Act (“DOMA”), and the increase in the number of states providing same sex couples with the same rights, responsibilities and obligations as married couples, regional U.S. Trustee’s Offices have either decided not to pursue or have lost motions to dismiss joint petitions filed by same sex couples in those jurisdictions allowing same sex marriages/unions/civil unions. See

also, *In re Somers*, 448 B.R. 677 (Bankr. S.D.N.Y. 2011); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011); *In re Roll*, 400 B.R. 674 (Bankr. W.D. Wis. 2008);

- d. *In re Blair*, 226 B.R. 502 (Bankr. D. Me. 1998). Substantive consolidation of spouses' cases may be denied when one spouse, who has the ability to make substantial payments to his creditors, seeks merely to dilute his repayment potential by consolidating the estates.
- e. *In re Reider*, 31 F.3d 1102, 31 C.B.C.2d 1409 (11<sup>th</sup> Cir. 1994). In determining whether spouses' should be consolidated, court looks to not only whether there is a substantial identity between assets, liabilities and the handling of the financial affairs, but also considers whether any harm may result from the grant or denial of the motion.
- f. *In re Benny*, 842 F.2d 1147, 18 C.B.C.2d 841 (9<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 1014, 109 S. Ct. 806, 102 L. Ed. 2d 796 (1989). Creditors may not file a joint involuntary case against two spouses.
- g. *In re Gale*, 177 B.R. 531 (Bankr. E.D. Mich. 1995). An involuntary petition which joins two chapter 7 debtors is a technical error warranting severance rather than dismissal.

*Note:* A joint filing is authorized as between married spouses in a state recognized marital relationship. As the states pass legislation to recognize civil unions and similar relationships, such couples should be authorized to make a joint filing pursuant to Section 302.

- 4. Means Test - Section 707(b) of the Code not only establishes the need for a "Means Test" but also discusses the presumption of abuse which arises if the Debtor(s) fail the means test.
  - a. The Means Test was developed by Congress after extensive lobbying to ensure that financially capable debtors were required to proceed under Chapter 13 versus Chapter 7.

- b. The Means Test is a mathematical calculation which takes into account, among other items, a debtor's household size, all sources of income, geographical location and certain adjusted expenses.
- c. These adjusted, allowable expenses can be deducted from the income of the Debtors and include, among other items, education expenses of children and secured debt and other necessary expenses as set forth by the IRS.
- d. If presumption of abuse arises, Section 707(b)(2)(B)(i) allows the Debtor(s) to rebut the presumption of abuse by demonstrating "special circumstances" such as ". . .serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances . . . justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." 11 U.S.C.A. § 707 (West).
- e. However, even if the Debtor(s) qualify under the Means Test or are able to rebut the presumption of abuse, a court may still consider the "Totality of the Circumstances Test" set forth in 11 U.S.C. 707(b)(3) (West). This usually arises within the context of a U.S. Trustee's Office Motion to Dismiss.
- f. The Means Test is not applicable in cases involving Debtor's who have primarily business debt.
- g. You may refer to Chapter 13 Trustee Glenn Sterns' website for a discussion of the Means Test as it relates to Chapter 13 cases:  
[http://www.lisle13.com.cnchost.com/Means\\_test\\_over\\_view.pdf](http://www.lisle13.com.cnchost.com/Means_test_over_view.pdf)

5. Property of the Estate

- a. 11 U.S.C. 541 (West) sets forth which property of the Debtor(s) comprise the Debtor(s) Bankruptcy Estate and includes, but is not limited to, the following:
  - (1) All legal or equitable interests of the debtor in solely owned property of any kind as of the Date of Bankruptcy ("DOB"), with the bankruptcy estate having only such interest as the debtor has in such property of the DOB,

- (2) certain property acquired by the debtor within 180 days of DOB,
  - (3) certain property transferred by the debtor before bankruptcy and recovered by the bankruptcy trustee and/or by the Debtor-in-Possession (“DIP”), and
  - (4) all income on property of the bankruptcy estate.
  - (5) certain interests of the Debtor and the Debtor’s spouse in community property.
- b. Special circumstances apply where debtors filing in Illinois have interests in property located in other states or have moved to Illinois from other states prior to filing for bankruptcy protection in Illinois. These issues will include both property of the state and exemptions.

See *also*: Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* ¶ 4.01[6]. “Personal property generally retains its classification even though it is moved from state to state. Consequently, the ownership of an asset held in a common law form that is brought into a community property state does not change, even though the asset would have been a community property asset if it had been acquired in the community property state. Conversely, community property brought into a common law state continues to be community property.”

6. Legal issues for counsel to review when considering the benefits of a joint bankruptcy petition versus two separate bankruptcy petitions:
- a. Solely owned personal property;
  - b. Jointly owned personal property;
  - c. Real Property:
    - (1) Joint Tenants With Right Of Survivorship
    - (2) Tenants by Entirety as to debtors’ marital residence

- (3) Tenants in Common
- (4) Community Property
- (5) Land Trusts

d. Community Property

7. Section 362 - Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.  
11 U.S.C.A. § 362 (West)

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

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

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

\* \* \*

(E) of the 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 . . . 11 U.S.C.A. § 362 (West).

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or



(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.  
11 U.S.C.A. § 362 (West).

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date

as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any

other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording. 11 U.S.C.A. § 362 (West).

8. Discharge/Dischargeability of Debt

- a. Section 523 grants creditors the statutory authority to challenge the dischargeability of a creditor's particular debt.
- b. Section 727 grants creditors the statutory authority to object to the discharge of the Debtor as to all of the debtor's debt.

*Note:* Counsel should review and discuss all of the exceptions to discharge set forth within Section 523, and all of the objections to discharge set forth in Section 727 with the married couple in order to determine whether one of the spouse's actions may result in an exception to the dischargeability of a particular debt pursuant to Section 523 or an objection to discharge pursuant to Section 727.

- c. Section 727 – Discharge (Chapter 7)

(a) The court shall grant the debtor a discharge, unless--

\* \* \*

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the

bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.) . . . 11 U.S.C.A. § 727 (West).

d. Section 524 – Effect of Discharge

(a) A discharge in a case under this title—

\* \* \*

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541 (a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228 (a)(1), or 1328 (a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523 (c) and 523 (d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge. 11 U.C.S. § 524 (West).

e. Section 1141 – Effect of Confirmation (Chapter 11)

(3) The confirmation of a plan does not discharge a debtor if

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title. 11 U.S.C.A. § 1141 (West).

f. Section 1328 – Discharge (Chapter 13)

\* \* \*

(g)(1) The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.

(2) Paragraph (1) shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional course by reason of the requirements of paragraph (1).

(3) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in paragraph (2) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. 11 U.S.C.A. § 1328 (West).

9. Section 522 – Exemptions

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is—

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and



(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d). 11 U.S.C.A. § 522 (West)

*Note:* Illinois has exercised its right as a sovereign state to “opt out” from Federal Exemptions. If state law permits debtors to elect the federal bankruptcy exemptions, husband and wife debtors must both elect either the federal or state exemptions under section 522(b)(2) or (3). If there is a conflict or no specific election is made, they are deemed to have elected the federal exemptions of section 522(b)(2), specified in section 522(d).

- a. Illinois – has “opted out” of the Federal Exemption scheme and only allows debtors to file using those exemptions recognized by the State of Illinois
- b. Wisconsin – Wisconsin law allows debtors to elect to take either the Federal Exemptions or the Wisconsin State Exemptions.
- c. If the husband and wife file separately and their cases are not ordered to be jointly administered, can one spouse take advantage of the Federal Exemptions and one spouse take advantage of the State Exemptions?
- d. Homestead exemption in situation where spouses do not reside in the marital residence as of DOB

#### 10. Section 524(c) - Reaffirmation Agreements

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property. 11 U.S.C.A. § 524 (West).

- a. Note: In a Joint Petition make sure that the debtor does not reaffirm any debt for property he/she would not be likely to receive in a divorce.

D. Economic concerns:

1. In order to avoid the cost of paying two separate bankruptcy petition filing fees, spouses are allowed to file one joint petition and pay only one bankruptcy petition filing fee.
2. However, is this beneficial in a joint Chapter 11 or 13 case if the two estates are not likely to be substantively consolidated?

II. Ethical Issues and Concerns

A. Competence

1. Rule 1.1 – Competence – ILCS Supreme Court Rules of Professional Conduct of 2010

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. IL ST S CT RPC Rule 1.1.

2. Note: *In re Hall-Walker*, 2011 Bankr. LEXIS 573 (Bankr. N.D. Ill. February 22, 2011) (Cox, B.J.) – §362(k) – Automatic Stay; Remedies for Violation – Efforts to enforce prepetition debt in domestic relations case was a willful violation of stay. Ex-husband's attorney, who had notice of debtor's bankruptcy case, and who continued an October 14, 2010 status hearing in the domestic relations court, after the date of bankruptcy, was a willful violation of the automatic stay, as §362(a) operates to stay the continuation of all judicial proceedings, which included the maintenance of

collection actions filed in state court. Pursuant to Judge Cox, Bankruptcy Judge, the attorney failed to seek the advice of her law firm's bankruptcy group until the motion for violation of the automatic stay was filed.

B. Undivided Loyalty of an Attorney

1. Right of each and every client

C. Conflict of Interest

1. Rule 1.7 – Conflict of Interest: Current Clients – ILCS Supreme Court Rules of Professional Conduct of 2010

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

IL ST S CT RPC Rule 1.7.

2. Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules – ILCS Supreme Court Rules of Professional Conduct of 2010

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek

the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them. IL ST S CT RPC Rule 1.8.

3. Duty of attorney to act without a conflict of interest

D. Confidentiality of Information

1. Rule 1.6 – Confidentiality of Information – ILCS Supreme Court Rules of Professional Conduct, 2010

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules. IL ST S CT RPC Rule 1.6.

2. Joint Representation of Married Individuals or Individuals in a Civil Union – no confidentiality of information between joint clients. Any information disclosed to the attorney by one joint client is not confidential as to the other joint client.



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