

MEMO

TO: NLTA Legislation Committee

FROM: Roy

DATE: 1/24/08

RE: LB1085



I am reviewing LB1085, now introduced into the 2008 session:

1. My conclusion is that this bill is worthy of NLTA support to clean up the mess brought about by LB554 the 2007 legislature. Essentially, 1085 brings back into the law the “creditor’s statement” with which we have all been familiar but also maintains the idea from 2007 for the “HHS statement”, now as an alternative.

2. What LB1085 does?

- A. It is an omnibus bill treating the Parenting Act – was essentially a new law from the 2007 legislature, found in Chapter 43, Article 29. While the 1085 mostly deals with this 2007 law, Section 6 on pages 10 through 15 makes amendments to Neb. Rev. Stat. 42-371. It is Section 6 which is of interest to the NLTA.
- B. Section 6 makes specific amendments to 42-371 as to what this statute says about liens formed by court orders in dissolution actions in which child support/spousal support payments are ordered. I can make several statements about Section 6 which fairly well explains what it intends:
- C. The first statement is that 42-371, before 1993, provided that “support liens” could only be released by application to and an order from the court. Simply, if the judgment debtor wanted to release the support lien on specific real property, example, that debtor had to get court approval. Then, in 1993, 42-371 was amended to provide the “scheme” in which the judgment creditor could provide a statement saying “that all child support payments or spousal support payments are current”, and this statement by the judgment creditor become “*prima facie* evidence that such payments are in fact current”. This statement by the creditor was then, traditionally, filed in the district court file of the dissolution. The title searcher would then find this and be able to report that all of the payments referred to as being “current” then had the same effect of a lien release the same as if a court had so ordered.

Over time, this statement by the judgment creditor, in common language which was couched in the form of a release or subordination, became just that. NOTE: This creditor statement from 1993 was always an alternative to the court providing a release. NOTE ALSO: Much debate could center upon whether this 1993 amendment was worthwhile, but over the years it has worked fairly well.

- D. The second statement is all about what LB554/2007, did to 42-371. Simply, it got rid of the 1993 “creditor’s statement” and replaced that entirely with something similar which involved HHS. However, the section within 42-371 as amended by 554 (which is Section (2)(a)) is badly written and does not include even basic language which the old 1993 amendment recited. 554 says that a statement from HHS, obviously reciting that support order payments are current, was to be accompanied by a “partial or total release of the judgment or subordination”. All of this was to then be filed “in the county office where the lien is registered”. The obvious problems from this 2007 amendment are: Who is responsible to get the statement from HHS and file it? The judgment creditor is specifically not included but he or she should be? The language referring to a partial or total release is confusing when what is intended by this section is only the reference to past and currently paid support order payments? That there should be a partial or total release based on a past history of current payments is, basically, nonsensical? What is the reference to the county office where this paperwork is to be filed? Simply stated, 554 made a big mess out of 42-371. Since what we are doing here in the NLTA is a title searching exercise, remember that our objective is always to make sure our laws are complete and straightforward so that the title person has some certainty in examining the record. You will not get that with 554.
- E. The third statement is that 1085 attempts to bring back in the old 1993 amendment (that is good), and it attempts to more particularly describe the various situations about getting a release (payments are current and the parties agree, payments are not current and the parties agree, and so forth). At least this tries to bring clarity to the statute in all of these potential situations.

3. **What to do about 1085?** While I have suggested (above) that 1085 should be supported, it needs a lot of work. Let me tackle this by posing the problem and a suggestion:

- A. To keep the 2007 HHS statement or not? This should be the first question asked. I suppose that the reason for 554/2007 is that some judgment debtor must have had difficulty trying to get a “creditor statement/1993” and thus thought the better approach was to get such a statement from HHS. But, the very reason for the 1993 amendment was to bring into the mix the judgment creditor to see if a friendly recitation could be made. The judgment debtor has always had the right under 42-371 to make his or her case to the court by filing a motion for a release/subordination. My suggestion is that **if the will of the NLTA is that 554/2007 has some merit, then keep it and revise it as it has now been written into 1085.**
- B. Payments are current and the parties agree. This is 1085(2)(a). This section is essentially the 1993 amendment. This section is now improved from 1993 in that the statement issued by the judgment creditor is actually in the form of a “release” rather than the “current statement” serving for that purpose. However, “filing this in the county office where the lien is registered” is not acceptable. The 1993 idea about filing all of this within the dissolution file should be maintained - we have plenty of problems with lay people trying to figure out where things are filed and we do not need to inject another one of those problems into the law. Title people are comfortable searching “support liens” by viewing what might be in the court file. I can just see this sentence being mistakenly interpreted as the county clerk or the register of deeds or even HHS. Additionally, some other recitations should be added to this section (in other words, items which we could just as well have had written into the 1993 amendment), to include: **The paper should represent that there is an agreement between the creditor and debtor. Maybe both the creditor and debtor ought to sign the statement (after all, it is the debtor who is going to request this)? Consider once again where you would like to have this paper filed (I said above that it should be filed in the court file, but you might consider this).**
- C. If there is an agreement but payments are not current. This is section (b). This is a recitation of the old law. **Once again, there is a deficiency here about what should be filed with the court?** Is this a representation that the parties agree but the payments are not current - I suppose so. **There should be a reference in here about the kind of notice to be given to the judgment creditor before the court entertains the motion.** The last long sentence, again, is a recitation of the old law.

- D. If the parties do not agree but payments are current. This is section (3)(a). This is essentially to incorporate the “mess” of 554/2007. Reading it, these obvious problems pop up: **The lien should not be released by a simple filing without any showing that the judgment creditor is involved - even if the payments are current. A discussion should be had as to exactly what a current certified copy from HHS is supposed to recite; and, how to get it if that has become a problem. Reference has to be made to under what circumstances the use of this HHS statement would then result in either a partial or total release of the judgment? Again, where this paper is to be filed (“not in the county office as it now reads” has to be considered).** By the way, I cannot relate to the language of “lien is registered”. I do not know of any Nebraska general law that requires a lien issued by a court to be registered before it becomes effective against real property of the judgment debtor?
- E. If the parties do not agree and payments are not current. This is (3)(b). This requires court approval. Note that in this section there is a specific reference to serving a copy of the application and notice of hearing and so forth. This is a recitation of the language which was brought into 42-371 from 554/2007. Simply, if this language is important (it is) for this provision then it should be for the one mentioned above.

4. **More thoughts:**

- A. I can remember well the reason for the 1993 amendment which was authored by Senator Beutler (now Mayor). He wanted the statute to be changed so that the judgment debtor did not have to hire a lawyer and go to court just to get a statement that he was current in payment of support. In 1993, it was the title association that insisted upon this “creditor’s statement” including the reference to “*prima facie* evidence”. The reason, is so that the title person looking at the record had some assurance that this unilateral statement provided by the judgment creditor was in fact worthy.
- B. The breakdown in 1085 into the four parts (current agree, not current agree, current disagree, not current disagree) is probably the right approach, but when you get to this particularity, you have to be scrupulous as to what you are saying. Much may have been left to practice under the old law but now 1085 will require attention to all of these details.

- C. I am not entirely sure about the difficulty that is now perceived by the association if we were left with 554/2007? I have heard that HHS might not want to “certify”? Or, it just may be difficult to get a paper out of HHS? What is clear is that the recitation in 554 is a big uncertainty for a title person.

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