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The Division of the Community During Divorce Proceedings

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Few events in life are as stressful as divorce. After years of emotional, physical and mental investment in the marriage, the parties are left to start separate new lives, and divide up that which was acquired during the course of the marriage. However, with good legal counsel, and the assistance of qualified experts, such as appraisers and accountants, the parties may successfully navigate the difficult decisions and procedures involved in the division of the community assets and debts.

California is a community property state. As such, the trial court must equally divide the community estate of the parties, unless a different agreement exists. The parties' property rights fall within two categories; separate or community property. Separate property includes all property owned by the person before the marriage; property acquired by the person after marriage by gift, bequest, devise or descent; and the rents, issues and profits of such property. Community property is all property acquired by a married person, during the marriage, while living in the State of California.

When a party files for divorce, the first order of business is the preparation of an exhaustive inventory of all assets and debts existing at the time of filing. The trial court will ultimately be called upon to characterize these assets and debts as either separate or community property. The characterization of the assets can be an extremely adversarial and expensive procedure. Although California Law provides that neither party has an interest in the other's separate property, a party may contribute separate property to the community, and/or community property to the other party as separate. Where a spouse contributes separate property to the community, and that spouse can identify the separate source of the property, that party is entitled to a reimbursement. A classic example of this is where a spouse has used his or her separate property (for example savings acquired prior to marriage) for the down payment on the purchase of a family residence. However, tracing the source of the funds may often involve trying to reconstruct financial and other records from decades back, that may not be readily available. The importance of parties to a marriage keeping comprehensive records of all assets and liabilities from both before and during the marriage cannot be under estimated, whether or not divorce is contemplated.

The trial court sets values to community property using a "fair market value" analysis, representing the sum to which a willing seller and willing buyer would agree. The parties each present expert opinion on the value of the assets at issue, and the court weighs the testimony in making a decision. Where the value of the assets at issue is significant, the importance of retaining a highly qualified and respected expert cannot be underestimated.

More difficult assets to evaluate in the division process are long term assets such as pensions and insurance. California law presumes that rights acquired in a pension and/or retirement plan during the marriage are community property. California case law also provides a formula by which an actuary may allocate in a mixed retirement plan the separate and community portions. Once again, retention of a highly qualified expert is essential.

Insurance policies also must be carefully evaluated. First the court determines whether the insurance policy is a whole life or term life policy. The value of whole life insurance is valued based upon the cash surrender value of the policy at the time of trial. Term life insurance, on the other hand, may or may not be characterized as a community asset. Some courts take the position that term life insurance has a present value, whereas other courts take the opposite view.

The trial court must also divide the community debt, by first distinguishing separate debt from community debt, and then equally dividing the community debt. The division of the debts and the law pertaining to this area has the propensity to cause great resentment among the parties. California law provides that the community is liable for all debt acquired by either spouse before or during the marriage, regardless of whether or not a spouse had management and/or control over the property, and regardless of whether or not one or both of the spouses are parties to the debt or to a judgment resulting from the debt. Therefore, it matters not that the debt was incurred by one party unknown to the other. The parties are equally responsible.

With the guidance of a skilled legal practitioner and competent experts, the parties may successfully obtain a division of the community estate, and look forward to starting their new lives as single individuals. GT

Nicole Whyte is founding principal of the law firm of Bremer Whyte Brown & O'Meara LLP, located in Newport Beach, California. Admitted to the California State Bar in 1991, and the Nevada State Bar in 2000, Ms. Whyte has extensive experience in all aspects of litigation, including the specialty areas of construction defect litigation, premises liability, personal injury, general liability and intellectual property (trademark and copyright infringement) and family law.