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Divorce in a Struggling Economy

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Orange County (along with our entire nation) is facing unprecedented times. Hardest hit by these difficult times is the area of family law, and in particular divorce. At least for the foreseeable future, the economy and financial instability will be the driving forces in the area of California divorce law. With this in mind, family law practitioners must appropriately prepare and counsel their clients from the outset, to assist them in making decisions that minimize the impact of the current financial and economic conditions. Divorce lawyers must also think creatively to find solutions to problems and issues that divorcing couples face. Smart case management and early identification of financial difficulties can lead to satisfied clients even in the most difficult of economies and personal upheaval.

A major financial concern for parties seeking a divorce today involves the family residence. Often the family residence must be sold during a divorce, because neither party can afford to maintain the home individually. Traditionally, the parties then share the profits of the sale. However, due to the economic crisis, many divorcing parties have homes with negative equity – where the mortgage exceeds the current market value of the home. If neither party can continue to maintain the family residence, the parties must either sell or allow the property to fall into foreclosure. Either way, if the family residence is the main asset of the family, the parties are often left with only debt to divide.

One option, where the marital residence has negative value, is for the spouses to agree to defer the sale of the marital home for some period of time, in the hope that the value will increase before the agreed sale date. Under this scenario, the spouses must agree on such things as which spouse will reside in the residence during this period, and who will cover the cost of the mortgage and other expenses associated with the asset, such as property taxes and maintenance. With some creative planning and good counsel, these issues can usually be worked out as long as there is a measure of cooperation between the parties. This can provide a solution that hopefully will work for the financial benefit of both parties in the long run. However, it should be noted that this option is only available as part of a stipulated resolution; the Court does not have the power to make such an order absent the agreement of the parties. If the court is required to make the decision, the options are to order the property sold, or to award the asset to one or other of the spouses, and then make

appropriate orders regarding equalization payments, credit and reimbursements.

The financial problems that divorcing couples face in today's economy are also exacerbated by the fact that many families in recent years have lived, and continue to live, beyond their means. Attempting to support two households with the same amount of income is difficult enough where the parties live within their means. Doing so becomes impossible where the parties have expenses exceeding income. Prudent financial planning requires cutting expenses to the bare minimum, and sometimes, dipping into savings or even borrowing funds in the short term to make ends meet while the divorce is being finalized. Sometimes bankruptcy is an option of last resort.

Regardless of the negative value of the family residence and other assets, all community assets must be sold or allocated to one of the spouses. Generally, each party is awarded an equal portion of the community debt, while balancing the award of community assets. Sometimes a spouse is willing to take on more of the community debt if that spouse is awarded a greater share of the community assets. This is one creative approach to dispense with negative assets; however, it is not always a feasible solution. This approach only works when there are sufficient assets to balance out the significant debt the parties share.

In today's economy, parties are often not only in a negative financial situation with respect to the family residence, but in totality. This can be seen when there is a lack of savings and investments, or when the debt significantly outweighs the parties' investments. In some circumstances, one party may have the good fortune of having separate property assets (assets acquired before marriage, after separation, or by gift or inheritance). Sometimes the spouse with separate assets may be willing to accept an unequal division of the community assets and debts to assist the other spouse in getting back on his or her feet. Achieving this type of arrangement, which is not necessarily mandated by the law, requires the parties' agreement and cooperation. When a divorce resolves by agreement, the parties can, for the most part, agree to anything; when the case is decided by the Court, the bench officer's hands are tied by the constraints of the law, and there is less room for creativity and novel approaches. The bench officer must seek to do what the law mandates, not what may be morally correct.

Many parties seeking a divorce today have difficulty paying attorney's fees. Recently, we are seeing a trend where not only the "out-spouse" (usually the spouse who stayed home to care for the children) is unable to afford counsel, the "in-spouse" or breadwinner is struggling to pay his or her attorney's fees too, not to mention contributing to the attorney's fees of the other spouse. In these cases, the parties are faced with the prospect of handling the divorce themselves (in pro per) or accumulating more debt. For many clients the latter is the only option, due to the complex issues that arise in most dissolutions. It is likely that if the parties attempt to represent themselves and the issues are not handled appropriately, they will ultimately spend more on attorney's fees to fix the mistakes they created while representing themselves.

Another common situation seen today involves spouses who are forced to continue residing together through the dissolution process, due to a lack of financial resources. This may lead to a higher conflict rate, because the parties do not have the freedom to emotionally, mentally and physically separate from their soon-to-be ex-spouse. If parties are faced with this issue, it is strongly recommended they seek counseling to help deal with the emotional upheaval. In these situations, it is even more imperative that the cases get on track toward settlement so the parties can plan for their future. If they have an understanding of what assets, debts and support they are to receive, they can begin to move on with their lives, and thus begin the healing process.

When parties are provided with effective counsel early in the divorce process, they can make appropriate financial planning decisions to help get their case on the path toward settlement, thereby limiting the issues that must be litigated. With early planning and creative lawyering, most divorcing spouses will be able to navigate through the dissolution process in the most cost effective and least stressful manner possible.

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Nicole Whyte, a Certified Family Law Specialist, is an AV Rated attorney by Martindale-Hubbell and voted Super Lawyer for the past two years. She is a Senior and Founding Partner of Bremer Whyte Brown & O'Meara, LLP, an 80-plus member law firm with full-service offices in Los Angeles, Newport Beach, Northern California, Las Vegas, San Diego, Arizona, and Riverside. Ms. Whyte has experience in all aspects of litigation, with a focus in the areas of family law, complex civil litigation, trucking law, and insurance defense. Ms. Whyte has successfully tried and handled hundreds of complex, multi-million dollar lawsuits. Ms. Whyte has written and lectured extensively in the areas of construction defect and family law, with many published articles and a published book on divorce. Ms. Whyte is a member of the family, construction and insurance sections of the Orange County Bar Association and the American Bar Association. She is a Master Benchner and past Officer of the Robert A. Banyard Inn of Court. Ms. Whyte has served as settlement officer to the Orange County Superior Courts and as a private mediator. She has had the privilege of representing privately owned and publicly traded businesses in trial across California, Nevada and Washington. She serves as west coast trial counsel to Waste Management, a Fortune 500 company, and also participates on their behalf in mock trials across the country. Ms. Whyte is licensed to practice law in California, Nevada, Washington D.C. and South Africa. Ms. Whyte is a regularly featured speaker at seminars throughout the United States. To reach Ms. Whyte, please call 949.221.1000 or email nwhyte@bremerandwhyte.com.



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