

COOPER-GORDON LLP
Summer 2009 Newsletter

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Welcome to the Summer 2009 edition of our newsletter. In this issue we want to let people know that our law clerk Nolan Hiett has taken a leave of absence, and he is sorely missed. We are looking forward to welcoming him back to work shortly, when he will commence again to handle much of the document preparation and client interfacing in our Family Law, Probate and Estates cases.

Please return to our web site periodically to check out our new blog entries and follow Frieda Gordon on Twitter. By adding these two new features, Cooper-Gordon is able to provide up-to-the-minute news with regard to our law practice in the areas of probate, trusts,

conservatorships and family law, as well as personal items of interest.

Additionally, up-to-the-minute changes in the law are now routine and can be found in our new section entitled "What's New at Cooper-Gordon," which should provide much information to the interested public. Please let us know if you have any suggestions for further improvement. On a personal note, Katherine Su, our senior associate, just returned from scaling the wall of Half Dome in Yosemite National Park! We are all extremely impressed with her prowess, especially as it is her first time backpacking. She says she loves backpacking and can't wait to go again. Avery and

Frieda just returned from a too-brief trip to the Central Coast for some sea-side relaxation, swimming, lounging and eating fabulous gourmet food at a hilltop bed and breakfast in the middle of a vineyard and, of course, wine tasting. They made many new friends and acquainted themselves with many new wineries and wines.

extra money to go around.

B So, more than ever, it is important to try to mediate or collaborate on your Family Law and Probate matters, or at least try to negotiate a settlement that will be reasonable under the circumstances, if not desirable.

Frieda and Avery both continue to be appointed by the Court to represent children in family law and probate matters as well as proposed conservatees in probate matters. These areas of law are highly specialized and, although often very difficult cases, they usually provide for a highly rewarding practice.

OPTIONS FOR SETTLEMENT WHEN THE MARITAL
ESTATE IS UPSIDE DOWN

Avery and Frieda continue to be extremely busy in their practices, despite the downturn in the economy. Cases become more difficult to settle and no one is happy with the results after a court trial, because, regardless of the Parties' financial situation, there is no

ecause it is of such great universal interest to our clients and potential clients, this month we want to provide information about resolving cases in which the debt is greater than the value of the assets.

The process of obtaining a legal separation or divorce is already a highly stressful and emotionally draining process for the Parties involved. In addition to adjusting to their newly single lives, there may also be the issues of child custody, child visitation, child support, spousal support, property division, and/or attorney's fees and costs involved. Theses issues (where applicable)

must of course be resolved one way or another, whether through litigation or a settlement agreement, before a Judgment can be reached, and before the Parties can truly move on with their lives. Recently, Frieda had a very favorable result in an extremely difficult divorce case involving every possible issue of custody, support, domestic violence, tracing and commingling of separate and community assets and debts, sanctions for violating the court policy of encouraging settlements and attorneys' fees and costs. Trial took about 20 days over a 2½ year period.

While these issues are already difficult and complicated enough to resolve, in today's economic climate, many couples going through the legal separation or divorce process are finding that the issue of property division is further complicated due to the fact that the community estate is "upside down". This is a situation in which the total debts of the community estate exceed the total value of the assets of the community estate. Thus, even if the Parties were to liquidate all of the

community assets, they would not be able to satisfy all of the community debts. To resolve this increasingly common problem in today's times, Parties and/or the attorneys have been forced to find creative solutions to resolving the problem of the upside down community estate.

There are various options available to those Parties who are seeking settlement of the issue of property division which are not otherwise available to those Parties who are allowing the courts to decide the issue. This is due to the fact that pursuant to *California Family Code* Section 2550, Parties are permitted to stipulate to an unequal division of the community estate. Without the agreement of the Parties to an unequal division of community estate, the courts are bound by *California Family Code* Section 2550 to divide the community estate of the parties equally. In other words, while the courts must award and/or divide

the community assets and debts so as to effect an overall equal division of the community estate, Parties may agree to an allocation and/or division of the community assets and debts which are not generally equal, thereby giving the Parties more freedom to devise creative ways of allocating the community's assets and debts to effect the most fair division of the community estate, that are otherwise available to those Parties going through the litigation process.

For example, Husband and Wife's only community assets and debts are a house which is worth \$400,000, encumbered by a \$500,000 purchase money mortgage, and a bank account with a balance of \$200,000. Husband agrees to give the house to Wife, subject to the mortgage secured by the residence. Pursuant to *California Family Code* Section 2550, if the house and mortgage are assigned to Wife, the Court would theoretically be required to award \$150,000 of the \$200,000 in the bank account to Wife as well. This is because, despite the fact

that Wife is receiving the home, she is also being assigned the mortgage on the home which exceeds the value of the home by \$100,000. In effect, this means that Wife's net in this assigned is -\$100,000, while Husband's net, receiving neither property or debt through this assignment, is zero. To ensure an *equal overall division* of the community property, the Court would be required to award \$150,000 to Wife of the bank account funds and only \$50,000 to Husband, so that Wife's net would be \$50,000 (despite receiving the house as well) while Husband's net was also \$50,000. But of course, if Wife then short sold the home or the lender was otherwise willing to forgive all or a portion of the loan, the benefit received to Wife from this "equal" division of the community estate would actually be greater than one-half. On the other hand, if the Parties were settling the issue of property division, they could agree to give the house to Wife, subject to the mortgage, but to assign

a "zero" value to the home, and then they could simply divide the bank account equally. This division, while technically not *mathematically equal*, would be an otherwise fair division of the community assets and debts, as it was Wife's *choice* to take the home with the encumbrance. If she goes into default, she could simply execute a deed in lieu of foreclosure whereby she would transfer all interest in the home to the lender and avoid foreclosure. Since the mortgage is a *purchase money mortgage*, the debt is a no-recourse loan, and therefore, the loan would be satisfied, and Wife would be no worse off by her assumption of the debt if it became due (e.g., she defaulted.)

The Parties entering into a settlement agreement could also agree to include a provision in their settlement agreement that reserves the Court's jurisdiction to divide and award a particular asset for a certain period of time. Thus, the Parties could divide the remainder of the community estate, while continuing to hold some assets and/or debts

outstanding to wait for conditions to improve prior to division. For example, again using the scenario discussed above, the Parties could agree to divide the bank account equally, reserving jurisdiction over the division and/or allocation of the house and the mortgage. The Parties could then wait for the house's value to increase sufficiently to either "break even" on a sale of the home or even profit from it.

When the Parties are entering into a settlement agreement with regard to an upside down community estate, the Parties could also agree to an unequal division of the community estate in exchange for waiving other rights. For example, the Parties could agree for one spouse to assume a larger portion of the community debt in exchange for the other spouse's waiver of the right to spousal support.

OT he Parties could also agree for one or both of the Parties to pay the premiums for an annuity, and agree to use the proceeds of the annuity to pay certain community debts. If the Parties agree to a certain allocation of debts to each Party, the Parties could agree to indemnify the other Party for any liability arising out of the responsible Party's failure to pay the community, including the requirement that the responsible Party obtain a bond for the debt amount or that he or she maintain a life insurance policy on himself or herself naming the other Party the beneficiary, so that in the event of the responsible Party's death, the surviving Party would receive funds sufficient to satisfy the

debt.

ur firm has handled and continues to handle countless cases involving negative asset estates as well as complicated tracing and commingling issues in divorce situations. We would be happy to consult with you as the prospective client regarding these types of issues and look forward to having the opportunity to answer your questions and provide you with a plan for achieving your desired result in this regard.

Next newsletter, we will discuss developing technology (email, facebook, twitter, blogs, etc.) and how it can help or hurt the family law litigant.