CLE PRESENTATION

INTERSECTION OF FAMILY LAW AND BANKRUPTCY LAW

I. COMMON DIFFERENT TYPES OF BANKRUPTCY CASES:

A. Individual Chapter 7-Liquidation:

1. A Chapter 7 liquidation is usually an approximately 90 day legal process whereby a Chapter 7 Trustee is appointed to investigate the Debtor's assets and if they find un-exempt assets the Trustee will sell said assets to pay creditors via a pro-rata distribution. If the Debtor's assets are fully exempt (i.e. protected) by applicable state exemptions (in California CCP 703 et. seq. or 704 et. seq.) then the Trustee will issue a report of no distribution. As long as no party objects to the Debtor's discharge (i.e. Injunctive Order relieving the Debtor of their obligation to pay their debts), the Debtor will receive a discharge 60 days after the first 11 U.S.C. 341(a) meeting of creditors.

B. Chapter 13 – 36-60 Month Repayment Plan:

1. This is a legal process, whereby an individual will file a bankruptcy petition and propose and the court will subsequently confirm a 36-60 Month Plan of repayment. This type of bankruptcy is commonly used to repay mortgage arrears to get current and stop a foreclosure, and/or pay back taxes over 60 months, or save a car from repossession by spreading the current vehicle loan over 60 months and reducing the interest rate. The Debtor will need to pay all priority taxes and domestic support obligations owed within 60 months through the plan.

C. Individual Chapter 11 – Reorganization:

1. Chapter 11's primary purpose is to allow businesses or corporations in financial distress, to continue to operate while they reorganize or restructure their debts. An individual with an exceptionally complicated financial picture can also utilize Chapter 11. A Chapter 11 in sum is a legal process whereby the Creditors are stayed from collecting and the Debtor is allowed time to act as the Trustee (i.e. Debtor in Possession) and with court approval the Debtor can sell assets, refinance debts, negotiate different terms on debts, and propose a plan of repayment to repay his creditors some or all of his/her debts, which is why it is called a reorganization.

II. THE AUTOMATIC STAY (i.e. 11 U.S.C. § 362 et. seq.):

A. Effect of the Stay:

1. The filing of a petition with the Bankruptcy Court instantaneously shields the debtor from most acts by creditors to collect on debts owed as of that date. Filing automatically invokes the automatic stay under § 362(a) of the Bankruptcy Code. As a result, the debtor's estate is preserved for all creditors. The stay protects both the debtor, who gets relief, and the creditors as a group, whose claims are protected against other creditors who could otherwise pursue their own remedies. It puts a stop to the typical creditor's "race to the courthouse," and replaces it in a Chapter 7 context with an "equitable distribution of all of the assets of the bankruptcy estate." Unfortunately for a non-filing spouse, a Bankruptcy filing takes away the critical right of the family court to continue with a divorce action with regard to property division:

2. Acts taken in violation of the stay are void:
"Acts taken in violation of the Stay are void, not voidable." *Schwartz v. United States* (In re Schwartz), 954 F.2d 569 (9th Cir.1992).

B. Common Acts Which Are Stayed:

1. Continuing a Judicial Proceeding (11 U.S.C. § 362(a)(1)):
This means that if you are currently involved in any lawsuit, administrative action, or dissolution proceeding, the case must be stayed pending the conclusion of the bankruptcy or until the Creditor / Spouse obtains an Order for relief from the Stay.

2. Enforcement of Judgment against Debtor or Estate Property (11 U.S.C. §362(a)(2):
This means that any act to place a Judgment Lien, Levy, or garnish Debtor's property or property of the Estate based upon a Judgment received prior to the bankruptcy filing is forbidden.

3. Acts to Obtain Possession of or Exercise Control over Estate Property (11 U.S.C. 362(a)(3):
Acts to obtain possession of property of the estate or from the estate or to exercise control over property of the estate. The Automatic Stay is not limited to judicial or legal attempts by a creditor to obtain the collateral securing an obligation.

4. Acts to Create, Perfect or enforce a Lien (11 U.S.C. § 362(a)(4)&(5):
The Stay forbids any acts to create, perfect or enforce a lien against property of the estate or against the debtor, except for the filing of a Mechanic's Lien.

5. Acts to recover a claim arising prior to the bankruptcy 11 U.S.C. §362(a)(6):
This includes phone calls, collection letters, and demands for payment and/or any act to force payment from a debtor for a pre-bankruptcy debt.

6. Collection of any set-off (11 U.S.C. § 362(a)(7):

C. Family Law Exceptions to the Automatic Stay:

1. 11 U.S.C. § 362(b): The filing of bankruptcy petition does not stay the following:

- § 362(b)(2)(A) 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;

- § 362(b)(2)(B) of the collection of a domestic support obligation from property that is not property of the estate;

-§ 362(b)(2)(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;

-§ 362(b)(2)(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 USCS § 666(a)(16)];

-§ 362(b)(2)(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 [42 USCS § 666(a)(7)];

2. PRACTICE TIP: The Stay does not affect most dissolution proceedings, however it does bar any acts of a non-filing Spouse to take, control, and/or divide property of the bankruptcy estate. Therefore, the Marital Dissolution proceedings do not need to be stopped upon the filing of a bankruptcy proceeding if the only actions are to determine child support, custody/visitation, modify support order, or proceed with divorce without dividing estate property. However, if you are going after estate property (i.e. assets owned by Debtor before filing) then you need to seek relief from the stay to avoid possible sanctions for violating the stay.

3. PRACTICE TIP: A non-filing spouse should immediately consult a bankruptcy attorney, as there are strict deadlines and rights to be preserved.

4. PRACTICE TIP: Get a comfort order (i.e. Order for Relief from the Stay), before proceeding to decide issues regarding division and/or classification of property.

D. Lifting the Automatic Stay:

1. A 11 U.S.C. § 362(d)(1) Motion for Relief from the Stay:
Section 362(d)(1) governs relief from stay in this instance, and provides that "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[.]"

Determination of whether cause exists for stay relief is made on a case-by-case basis, because the Bankruptcy Code does not define "cause." *Christensen v. Tucson Estates, Inc.* (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir. 1990).

2. Abstention:
If one spouse files for bankruptcy in the middle of a divorce, the other spouse cannot lift the automatic stay to allow the divorce to proceed with regard to property division. The spouse's relief with regard to property division is to seek abstention. See *In re Jacobs*, 2010 Bankr. LEXIS 2737 (Case No. 10-12785) (Bankr. S. Dist. Ohio 2010), where the abstention doctrine was invoked to allow the lifting of the automation stay to allow divorce court to consider proper division of property after debtor failed to comply with property payments to ex-spouse pursuant to a dissolution proceeding. If the Bankruptcy Court refuses to abstain then the state court judge must wait to divide property until after the bankruptcy is completed.

See also *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985) "It is appropriate for bankruptcy courts to avoid incursions into family law matters 'out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.' *In re Graham*, 14 Bankr. 246, 248 (Bankr. W.D. Ky. 1981). See also *In re Howard*, 27 Bankr. 894, 895-96 (Bankr. W.D. Ky. 1983) [bankruptcy court granted relief from the automatic stay to debtor's ex-wife, who had alleged that the property settlement was fraudulently induced]; cf. *Schulze v. Schulze*, 15 Bankr. 106, 109 (Bankr. S.D. Ohio 1981) (granting debtor's wife relief from the automatic stay in order to complete state proceedings for divorce, child custody, and property division)."

PRACTICE TIP: Ask for abstention early on, as there is a better chance Bankruptcy Court will allow Family Law to decide.

III. TRUSTEE'S AVOIDANCE POWERS:

A. Avoiding Unperfected Property Interests:

One avoiding power of the Trustee that is sometimes involved with family law is the ability of the Trustee to avoid unperfected or unsecured property interests, including property interests that a family law court would recognize as belonging to a non-debtor spouse. The avoiding powers are very powerful tools to wrest assets away from Debtors to assist the payment to the creditors. The status which §544(a) of the Bankruptcy Code confers upon the trustee in bankruptcy is that of "the ideal creditor, irreproachable and without notice, armed cap-a-pie

with every right and power which is conferred by the law of the state upon its most favored creditor who has acquired a lien by legal or equitable proceedings." *In re Waynesboro Motor Co*., 60 F.2d 668, 669 (S.D. Miss. 1932).

1. 11 U.S.C. 544(b):
The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an allowed unsecured claim.

a. MSA set Aside Under California Uniform Fraudulent Transfer Act (UFTA):
It was settled state law that transfer accomplished through marital settlement agreement could be avoided as fraudulent transfer pursuant to California's Uniform Fraudulent Transfer Act (UFTA), Cal. Civ. Code § 3439.04(a)(1), which applied in bankruptcy by way of 11 USC § 544(b). *Wolkowitz v. Beverly* (In re Beverly), 374 B.R. 221, 233 (B.A.P. 9th Cir. 2007), aff'd in part, 551 F.3d 1092 (9th Cir. 2008).

2. Avoidance of Unperfected Liens:
Where the ex-spouse who owns the home with the lien files bankruptcy, unless that lien is recorded/memorialized on the real estate title then the bankruptcy trustee can avoid the lien and take an interest in the property to the extent of the value of the lien.

B. Fraudulent Transfers:

Under Bankruptcy Law, any transfer of property can be questioned by a bankruptcy trustee, who, under Section 548(a)(1)(B) of the Bankruptcy Code, has the power to seek the return of any property transferred while the debtor was insolvent or that made them insolvent, if the debtor did not receive reasonably equivalent value in return for the transfer two years prior to the filing of the bankruptcy. Further, as discussed above, a bankruptcy trustee can also "borrow" the California Uniform Fraudulent Transfers Act (Cal. Civ. Code § 3439.04(a)(1)), under 11 U.S.C. § 544(b)(1) to seek return of property for up to four years for constructive fraud (i.e. no intent to defraud creditors, but almost the identical elements of § 548), and up to 4 years, or 1 year after the transfer was discovery, but never to exceed 7 years if "actual intent" to hinder and/or delay creditors is found. See Cal. Civ. § 3439.09.

1. Presumption of Valid Transfer Due to Final MSA Absent Extrinsic Fraud:
When a party is awarded property in a divorce, can a bankruptcy trustee later question that transfer as "fraudulent?"

Yes, however, not without extrinsic fraud. In a case where a bankruptcy debtor (ex-wife) had received $800 in property in a contested divorce case where her spouse received over $10,000 in property, and where the ex-wife's bankruptcy trustee sought to void the property transfer to the husband under bankruptcy law, arguing that the award of property had been made by the family court judge where the ex-wife had failed to cooperate in discovery of her assets and the award was therefore somewhat punitive. The 9th Circuit Court of Appeals concluded that the Trustee challenging a dissolution judgment under these circumstances was required to allege and prove extrinsic fraud, because all judgments in a contested divorce case were final and,

absent a showing of fraud, established "fair market value" under the circumstance of a divorce decree. *Batlan v. Bledsoe*, (In re Bledsoe), 569 F.3d 1106 (9th Cir. 2009).

C. Avoidance of Preferential Payments (11 U.S.C. § 547):

1. Under 11 U.S.C. § 547, one of the most powerful rights a bankruptcy trustee has is to seek return of any payments made to a creditor within the 90 days prior to the filing of the bankruptcy:
These preferential transfers are subject to many defenses, such as the fact that the transfer was made in the ordinary course of business or in the ordinary course of the relationship between the debtor. The trustee, however, only has to show that the transfer was made within the applicable time period, that the debtor was insolvent at the time and that the payment was made for an antecedent debt. The defenses have to be pleaded and proved by the defendant. Unfortunately, one of the largest targets for a trustee in a divorce situation is any payment made to debtor's divorce attorney within 90 days of the bankruptcy filing.

D. Turnover Powers (11 U.S.C. § 542):

1. The bankruptcy trustee has the authority to seek turnover of any property of the estate. 11 U.S.C. § 542. Since property of the estate consists of all property brought into the estate, this would include a retainer paid to an attorney for services rendered in any upcoming divorce action. Therefore, a Chapter 7 Trustee can seek the turnover of all non-exempt funds held in a Divorce Attorney's Trust Account.

IV. DISCHARGE OF DEBTS:

A. Effect of a Discharge Injunction:

The discharge voids any judgment obtained at any time to the extent that the judgment determines the personal liability of the debtor with respect to the discharged debt. The discharge also operates as an injunction (the violation of which may be punishable by contempt) against action of any kind to collect, recover or off-set a discharged debt as a personal liability of the debtor, or to recover that debt from the property of the debtor. Accordingly, all collection efforts regarding a discharged debt are prohibited by this injunction. See 11 U.S.C. § 524.

B. Non-Marital Exceptions to Discharge Injunction:

The most important non-marital exceptions to the Discharge Order are:

1. The debtor, with intent to hinder or defraud, has transferred or destroyed his or her property or has allowed someone else to do so. See 11 U.S.C. § 727(a)(2);

2. The debtor has destroyed, falsified or failed to keep records regarding the debtor's financial condition or business transactions, unless such failure was justified under all of the circumstances. See 11 U.S.C. § 727(a)(3);

3. The debtor knowingly and fraudulently, in connection with his or her case, made a false oath, used a false claim, or offered to give or receive a bribe, or withheld records from an officer of the estate. See 11 U.S.C. § 727(a)(4);

4. The debtor fails to satisfactorily explain any loss of assets necessary to meet the debtor's liabilities. See 11 U.S.C. § 727(a)(5);

5. The debtor has been granted a discharge under a Chapter 7 or Chapter 11 case which was commenced within eight years before the date of the filing of the present petition. See 11 U.S.C. § 727(a)(8);

6. The debtor has been granted a discharge under Chapter 13 within six years before the date of the filing of the prior petition, unless payments under the plan in such case totaled at least— (A) 100 percent of the allowed unsecured claims in such case; or (i) 70 percent of such claims; and (ii)the plan was proposed by the debtor in good faith, and was the debtor's best effort. See 11 U.S.C. § 727(a)(9);

7. The specific debt to be not discharged was incurred via fraud. See 11 U.S.C. 523(a)(2).

8. The specific debt to be not discharged was incurred via for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. See 11 U.S.C. 523(a)(4); or

9. The specific debt to be not discharged was incurred as a result of Willful or Malicious injury by the Debtor to another entity or the property of another entity. See 11 U.S.C. 523(a)(6).

-NOTE: Willful and Malicious Injury to the Property of a creditor will be discharged in a Chapter 13, but not in a Chapter 7. Willful and Malicious personal injury is not discharged in both Chapter 7 and 13.

-A Credit must file an Adversary Proceeding prior to the Discharge to have a debt determined not discharged under 11 U.S.C. 523(a)(2); (a)(4); and (a)(6), otherwise said debts are discharged.

C. Family Law Related Exceptions to Discharge in a Chapter 7 Case:

The marital "exceptions to discharge" are found in Section 523(a)(5) and (a)(15).

1. <u>Domestic Support Obligations are Not Discharged (11 U.S.C. 523(a)(5)):</u>

a. <u>Definition of a Domestic Support Obligation</u>:
11 U.S.C. § 101(14A) defines what a domestic support obligation is: (a) a debt owed to or recoverable by a spouse, former spouse, or child of a debtor or such child's parent, legal guardian, or responsible relative, or a governmental unit; (b) in the nature of alimony, maintenance, or support of such spouse, former spouse or child, without regard to whether such debt is expressly so designated; (c) established under a separation agreement, divorce decree or property settlement agreement, or an order of a court of record; and (d) not assigned other than for collection purposes.

b. Issues with Classification of Domestic Support Obligations:
The labels used by Family Law Attorneys in the MSA are not controlling. Federal Bankruptcy law – not State law controls whether a debt is determined to be a domestic support obligation and thus excepted from discharge or entitled to priority treatment.

Whether a debt is actually in the nature of support is a factual determination made by the bankruptcy court as a matter of federal bankruptcy law. *Beaupied v. Chang* (In re Chang), 163 F.3d 1138, 1140 (9th Cir. 2000). The overriding general considerations guiding a bankruptcy court in deciding whether a debt is in the nature of support are the intent of the parties . . . in fixing the obligation and the purpose of the obligation in light of the parties' circumstances at that time. COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 6.04[2], at p. 6-32 (2008). See also Friedkin *v. Sternberg* (In re Sternberg), 85 F.3d 1400, 1405 (9th Cir. 1996). The primary circumstance with which the bankruptcy court is concerned is whether the recipient spouse actually needed support at the time of the divorce. *In re Sternberg*, 85 F.3d at 1405. This involves an inquiry into the relative incomes of the parties at the time of the divorce. *Id.*

2. Equalization Payments Not Discharged in Chapter 7, 11, or 12 (11 U.S.C. 523(a)(15):
In enacting § 523(a)(15), Congress appeared concerned with ensuring that the debtor spouse's bankruptcy did not deprive the non-debtor spouse of property that she needed to rely on for her livelihood: "If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support . . . ." *Peery v. Escobar* (In re Peery), No. AZ-18-1311-FLB, 2019 Bankr. LEXIS 2441, at *12-13 n.4 (B.A.P. 9th Cir. Aug. 2, 2019) (citing *In re Francis*, 505 B.R. at 919 [quoting 140 Cong. Rec. H 10770 (Oct. 4, 1994]).

D. Debts Discharged in Chapter 13 but Not in a Chapter 7, 11, or 12:

1. Equalization payments discharged in Chapter 13:
While a debt of the kind described in § 523(a)(15) is nondischargeable in chapters 7, 11 and 12, the expanded discharge provided for in chapter 13 cases covers debts such as this. Therefore, if the equalization payment is not a domestic support obligation, it would constitute a debt under § 523(a)(15), and could be discharged in debtor's chapter 13, even if not paid. However, to obtain a discharge, a chapter 13 debtor must complete all payments under the plan unless certain exceptions are found to apply. See § 1328. *Perez v. Jimenez* (In re Jimenez), No. NC-12-1425-JuTaPa, 2013 Bankr. LEXIS 4777, at *4 n.3 (B.A.P. 9th Cir. Aug. 12, 2013).

2. Filing of a Proof of Claim in a Chapter 13:
If the non-filing spouse does not participate in the process, often their rights will be waived or at least compromised. The Proof of Claim for a Chapter 13 Tenant/debtor is attached with the first notice a creditor receives from the Bankruptcy Court announcing the filing. The creditor must file a Proof of Claim within 120 days after the petition was filed or the proof of claim may not be honored.

E. Section 1307(c)(11) – Effect of Post-Petition Domestic Support Defaults:

In connection with a Chapter 13 plan filed by a former spouse where a domestic support obligation is ordered, under Section 1307(c)(11), the debtor could diligently make all payments under the Chapter 13 plan and still not get his discharge if that debtor has fallen behind on payment obligations under the domestic support order. The debtor must certify to the bankruptcy court at the end of the payment plan that they are current on post-petition domestic support obligations or the court will not enter the discharge order.

V. PROPERTY RIGHTS OF A NON-BANKRUPTCY SPOUSE:

A. Property of the Estate:

Under the Bankruptcy Code, property of the bankruptcy estate includes all interests of the debtor and the debtor's spouse in community property, as of the commencement of the bankruptcy case, that is (A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable. 11 U.S.C.S. § 541 (a)(2).

B. What Property Does the Non-Bankruptcy Spouse Retain?

While 11 U.S.C. § 541 defines what interests of the debtor must be transferred to the bankruptcy estate, it does not address "the threshold questions of the existence and scope of the debtor's interest in a given asset." *State of California v. Farmers Markets, Inc.* (In re Farmers Markets, Inc.), 792 F.2d 1400, 1402 (9th Cir. 1986). Rather, bankruptcy courts are required to look to state property law, in this case California property law, to determine the property which is to be included in the bankruptcy estate. See *Butner v. United States*, 440 U.S. 48, 55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979).

Turning to California law, it is clear that property acquired in joint form during marriage is presumed to be community property. See Cal. Fam. Code §§ 760, 2581. On the other hand, property that is separate at the time of marriage retains its separate character throughout the marriage, even if it is transmuted from one form to another. *Dumas v. Mantle* (in Re Mantle), 153 F.3d 1082, 1084-85 (9th Cir. 1998) (citing, *Hicks v. Hicks*, 211 Cal. App. 2d 144, 151, 27 Cal. Rptr. 307 (1962)).

For purposes of § 541(a)(2), all community property not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate. In *Miller v. Walpin* (In re Miller), 167 B.R. 202 (Bankr. C.D. Cal. 1994), the California Superior Court had dissolved the marriage, but retained jurisdiction to divide the community property. Before such division occurred, the wife filed for bankruptcy. "Under California law, the event which terminates liability of community property for community debts as well as debts of the other spouse is division of the community property, not dissolution of the status of the marriage." *Id.* at 208. Thus, the bankruptcy court held that all community property of the divorcing couple was property of the bankruptcy estate where division of the community property had not occurred as of the date the bankruptcy was filed. *Dumas v. Mantle* (in Re Mantle), 153 F.3d 1082, 1085 (9th Cir. 1998).

C. *In Re Brace* Decision – Recent California Supreme Court Answer to Ninth Circuit's Certified Question Regarding Whether Non-Spouse's Interest in Real Property Held as Joint Tenants by Husband and Wife is Property of the Other Spouse's Bankruptcy Estate:

In *Brace v. Speier* (In re Brace), the Ninth Circuit certified the following question to the Supreme Court of California: "Does the form of title presumption set forth in section 662 of the California Evidence Code overcome the community property presumption set forth in section 760 of the California Family Code in Chapter 7 bankruptcy cases where: (1) the debtor husband and non-debtor wife acquire property from a third party as joint tenants; (2) the deed to that property conveys the property at issue to the debtor husband and non-debtor wife as joint tenants; and (3) the interests of the debtor and non-debtor spouse are aligned against the trustee of the bankruptcy estate?" No. 17-60032 (9th Cir. Nov. 8, 2018) (order certifying question).

The *Brace* case involved the interaction between California's "community property" presumption, which presumes that property purchased by a married couple is community property, and the "form of title" presumption, which says that the holder of legal title to property is presumed to have all beneficial title to that property. In the bankruptcy context, the community property presumption causes the entirety of the property to enter the bankruptcy estate of either debtor/spouse. Also relevant to the court's analysis was the transmutation statute, section 850 of the California Family Code, which permits a married couple to alter the nature of their community property to property owned separately by either spouse thereby subjecting only the debtor-spouse's interest to bankruptcy creditors.

In *In re Brace*, 9 Cal. 5th 903, 470 P.3d 15 (July 23, 2020), the California Supreme Court issued an opinion answering questions posed by the Ninth Circuit Court of Appeals in *Brace v. Speier* (In re Brace), 908 F.3d 531 (9th Cir. 2018). In sum, the Court held that:

> (1) The "form of title" presumption in California Evidence Code § 662 does not apply when it conflicts with the community property presumption in California Family Code § 760.
>
> (2) Property acquired by spouses as joint tenants, with community funds, before January 1, 1975, is presumed to be separate property.
>
> (3) Property acquired by spouses as joint tenants, with community funds, on or after January 1, 1975, is presumed to be community property.
>
> (4) A grant deed from a third party, in itself, is not sufficient to overcome the community property presumption. What is required depends on whether the property was acquired before or after January 1, 1985.
>
> (5) If the property was acquired before January 1, 1985, the community property presumption may be rebutted by substantial evidence of an oral or written agreement or a common understanding between the spouses. A court may consider the fact that title was taken as joint tenants as part of its determination as to whether such an agreement or understanding existed.

(6) If the property was acquired on or after January 1, 1985, there must be a written transmutation that satisfies the requirements of Family Code § 852. A grant deed, in itself, is not sufficient to transmute community property into separate property.

In re Brace, 9 Cal. 5th 903, 940-945 (2020).

VI. ACTS IN CONTEMPLATION OF A BANKRUPTCY FILING:

A. Agreements Regarding Lifting the Automatic Stay:

Any agreement to deny a Debtor the right to the Automatic Stay will be void based not only on public policy grounds, but it is not the Debtor's right to waive.

"This Court recognizes that the avoidance of bankruptcy proceedings is a laudable objective and should be encouraged whenever possible, but must, nevertheless reject this argument as well. It is a well settled principal that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy. See *In re Kriger*, 2 B.R. 19, 23, 5 B.C.D. 1380, 1382 (Bankr.D. Ore. 1979); *In re George*, 15 B.R. 247, 248 (Bankr. N.D.Ohio 1981); see also *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966); In re Weitzen, 3 F. Supp. 698 (S.D.N.Y. 1933)." *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983).

However, one can make agreements regarding acts that are not subject to the stay pursuant to 11 U.S.C. § 362(b) to avoid unnecessary reliefs from the stay motions.

B. Language in Support Obligations to Help with Dischargeability Pursuant to 11 U.S.C. § 523(a)(5):

1. More than mere labels:
Practitioners will not find success by placing simple declarations of nondischargeability in documents. But rather, divorce documentation will provide the greatest protection against bankruptcy discharge if there are references to the existence and importance of the factors related to nondischargeability under § 523(a)(5).

2. Show Intent to be DSO:
Divorce documentation should include a statement of intent to provide for spousal and/or child support.

3. Draft Payments to be Paid to Spouse Not a 3rd Party:
When possible, payment obligations should run to a spouse rather than to a third party creditors as § 523(a) expressly applies only to debts payable to a spouse, former spouse or dependent child of the debtor. 11 U.S.C. § 523(a)(5); see *In re Townsend*, 177 B.R. at 904. In the alternative, the decree or agreement incident to divorce should require the spouse charged with paying the marital obligation to indemnify and hold the other spouse harmless for payments made to the third party creditor as part of the support obligation. Cf. *Stegall v. Stegall* (In re Stegall), 188 B.R. 597, 598 (Bankr. W.D. Mo. 1995)(no debt to former spouse exists as to marital debt as decree lacked hold harmless

or indemnification provisions; therefore, discharge exception of § 523(a)(15) not applicable); accord *Salyers v. Richardson* (In re Richardson), 212 B.R. 842 (Bankr. E.D. Ky. 1997).

4. Have Payments Cease upon Death or Remarriage:
When possible, terminate payments upon death or remarriage, as courts are more likely to find such payments to be in the nature of support.

C. Language to Place in MSA to Prevent Discharging Tax Liability:

BAPCPA limited a potential to create a nondischargeable obligation with respect to payment of marital income tax obligations under Section 523(a)(14). An indemnification and hold harmless provision by one spouse to pay the community federal income tax obligations should be nondischargeable under § 523(a)(14) if the tax obligation itself is nondischargeable. As a general rule, federal income tax obligations due for the three years preceding the bankruptcy filing will be nondischargeable. See 11 U.S.C. § 507(a)(8) and § 523(a)(1). Accordingly, such a provision may afford the debtor spouse some limited protection.

VII. FAMILY LAW ATTORNEY'S FEE LIENS:

A. Effect of Discharge on Lien:

With regards to a validly recorded and perfected secured claim, a bankruptcy discharge order has zero effect on the lien itself. See *In re Springer*, No. AZ-11-1444-JuPaD, 2012 Bankr. LEXIS 1031, at *10-12 (B.A.P. 9th Cir. Mar. 9, 2012) ("Debtor misunderstands the treatment of secured claims in a bankruptcy case vis-a-vis her discharge … although debtor's personal liability on the note was discharged in her bankruptcy, the lien against her property remained in force. Accordingly, her lien creditor could enforce its lien against her property after debtor received her discharge." citing to *Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991) ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim — namely, an action against the debtor in personam — while leaving intact another — namely, an action against the debtor in rem.")

B. Types of Family Law Attorney Fee Liens:

1. Family Law Real Property Attorney Lien (FLARPL):
Under the provisions of Cal. Fam. Code § 2033, a FLARPL attaches only to the encumbering party's interest in the community property and does not require any subsequent action by the Family Law court to be effective. If the attorney asserting the lien fails to comply with the notice requirements (including specifying the amount of attorney fees to be secured by the lien) of Cal. Fam. Code § 2033, the lien will be invalid *ab initio*. *Toscana v. Toscana*, 2002 WL 226124 (2002); see also *Kipperman v. Sutherland* (In re Bush), 356 B.R. 28 (Bankr. S.D. Cal. 2006) (Notice of the § 2033 lien must be served personally on the other party at least 15 days before recordation of the encumbrance). *In re Scott*, 400 B.R. 257, 263 (Bankr. C.D. Cal. 2009).

a). FLARPL Cannot be Stripped via a 11 U.S.C. § 522(f) Motion:

> A Family Law Attorney's Real Property Lien ("FLARPL") created under Cal. Fam. Code § 2033 falls squarely within the definition of a statutory lien. A "statutory lien" is a lien "arising solely by force of a statute on specified circumstances or conditions, . . . but does not include a security interest or judicial lien." 11 U.S.C. § 101(53). *In re Scott*, 400 B.R. 257, 263 (Bankr. C.D. Cal. 2009). Thus, a FLARPL is a statutory lien and not avoidable under 11 U.S.C. § 522(f)(1). *Id.* at 266.

2. Attorney's Charging Lien:

If the Debtor's share of the community property was subject to a lien under state law at the time the bankruptcy petition was filed, that property enters the estate subject to the lien. *Broach v. Michell* (In re Bouzas), 294 B.R. 318, 321 (Bankr. N.D. Cal. 2003). The lien remains on the property unless some provision of bankruptcy law permits it to be avoided. California law governs whether the Debtor's share of the community property is subject to the attorney's charging lien on the petition date. *Butner v. United States*, 440 U.S. 48, 55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979). See *In re Southern California Plastics, Inc.*, 208 B.R. 178, 181, n.3 (Bankr. 9th Cir. 1997).

In the Ninth Circuit, an attorney's charging lien is enforceable in bankruptcy even if the judgment has not been rendered at the time the bankruptcy petition is filed. See *In re Pacific Far East Line, Inc.*, 654 F.2d 664 (9th Cir. 1981). In Pacific Far East Line, prior to filing a petition seeking relief under chapter XI of the Bankruptcy Act (the predecessor statute to the Bankruptcy Code), the debtor entered into a contingent fee agreement with an attorney. The attorney performed substantial services pre-petition. The case was settled just after the bankruptcy filing. The attorney claimed an attorney's charging lien in the settlement proceeds under the contingent fee agreement. *Id.*

The Creditors' Committee objected, contending that the attorney had at best a general, unsecured claim for his pre-petition services and an administrative claim for his post-petition services. The bankruptcy court rejected this contention. The Pacific Far East Line court concluded that, under California law, an attorney's charging lien survived the bankruptcy filing. 654 F.2d at 668-670; see also *Saltarelli & Steponovich v. Douglas*, 40 Cal. App. 4th 1, 5-8, 46 Cal. Rptr. 2d 683 (1995) (holding that debtor/client's bankruptcy discharge did not eliminate attorney's charging lien on debtor/client's prospective recovery in lawsuit filed pre-petition).

3. Trustee's Ability to Object to Attorney's Liens:

A Chapter 7 Trustee can object to a lien under their avoidance powers discussed above. However, if the Court determines there is a valid lien, which was properly recorded in accordance with the applicable statutory requirements, then said lien will survive avoidance and discharge.