

**BARRISTER'S CORNER**



**ATTY. KENNETH URSUA REYES**

# Management and control of community property after separation

half interest in the community estate." Fam. Code Sec. 1101(a). An impairment that falls under the foregoing code may be the result of a single transaction or a pattern or series of transactions which have caused a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.

A wide array of remedies is available under Family Code Sec. 1101. The court may order an accounting to determine the spouses' marital property and obligations, and it may determine the rights of ownership in community property. In addition, the court may order that title to certain community property be reformed to include the name of the claimant spouse. Furthermore, remedies for breach of the fiduciary duty by a spouse, shall include, but not be limited to, an award to the claimant spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty, plus attorney's fees and court costs. Fam. Code Sec. 1101(g). Under subsection g., attorney's fees and court costs are mandatory. If the breach by a spouse can be shown to have been done with fraud, oppression or malice, the

claimant spouse's remedies include an award of 100%, or an amount equal to 100%, of any asset undisclosed or transferred in breach of the fiduciary duty. Fam. Code Sec. 1101(h).

The relief afforded by Family Code Sec. 1101 is not exclusive. An aggrieved spouse may seek other remedies not outlined in the section. A spouse whose community property interests have been compromised as a result of his/her spouse's breach may maintain an action to set aside an unauthorized transfer or encumbrance of property, or to impose a constructive trust. Many options are indeed available for one who is faced with a breach of fiduciary duty by his/her spouse. If you are faced with a breach of the fiduciary duty by your spouse, it is important to consult an attorney as soon as possible to determine what avenues of relief to pursue.

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**DEBT RELIEF**



**ATTY. LAWRENCE YANG**

# Converting bankruptcy cases

A BANKRUPTCY petition filed under one chapter of the bankruptcy code may be converted into a petition under a different chapter of the code. The debtor himself can request the conversion, or the court itself by its own motion or the US Trustee or the trustee administering the bankruptcy estate, or any interested party may move to have a case converted to a different chapter of the code. § 706 states that the debtor may convert a case under chapter 7 to a case under chapter 11, 12, or 13 at any time, if the case has not been previously converted under § 1112, 1208, or 1307. Debtor's right to convert case is almost absolute if there has been no prior conversion. However, there have been cases where the court has denied debtor the right to convert where debtor has been found to be in bad faith. Hence, the right to convert is not 100% bullet-proof. But a debtor who has filed his original case in good faith should not see any obstacle to converting case if he so chooses as long as no prior conversions have occurred.

Several years ago, client spouse came to see me saying that she had filed a joint chapter 7 case with her husband

who was currently incarcerated. Husband was a chiropractor who was snagged by a sting operation of the district attorney's office involving fraudulent car accident claims. Since husband was in jail, the household could no longer pay debts and debtors decided to file chapter 7. The problem was that while debtor was in jail, debtors were unaware of the fact that the market value of their residence had risen substantially, creating a significant amount of nonexempt equity when they filed their chapter 7 case.

The chapter 7 trustee smelled blood after checking out the current market value of the residence. The nonexempt equity was more than \$100,000 as it turned out, so the trustee filed a motion to sell the residence.

After interviewing debtor's wife, I found out that her husband had no idea what the fair market value of their residence was because he was still in jail and had been in jail for the last two years. She herself had no idea what the market value was when they filed their chapter 7 case. I also found out that her husband was due to be released on probation in 2 months and his mother, who owned a small manufacturing business, was willing to offer her son a position as sales manager at a \$4,000 monthly salary. Thus, we filed a motion to convert their chapter 7 case into chapter 13. The chapter 7 trustee objected to conversion saying that debtors had no ability to fund a 100% chapter 13 plan because debtor was still

in jail and had no income. The court set the matter for hearing and invited the parties to brief the court as to their respective positions. We were able to submit evidence showing that debtor was about to be released on parole and was in fact about to be transferred to a half way house, that his mother owned a business and that the business was ready to offer debtor a position in the business as sales manager with a gross monthly income of \$4,000, making the 100% plan feasible. Debtors owed about \$100,000 of credit card debt but they were willing to pay that in full over 60 months. The projected monthly net income of the household was short \$1,500 monthly but debtor's mother was willing to help out by contributing that amount to the household so that her son could start life again without losing his house to the chapter 7 trustee. The court requested further evidence, and a second hearing was set.

Finally, the court granted debtor's motion to convert to chapter 13 under § 706. On the other hand, a chapter 13 case may be converted to a chapter 7 case under § 1307 (a). We will discuss this next week.

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# New law: Visa petitions survive...

PAGE B2 ◀

The unfairness of the so-called "Widow Penalty" provided much of the impetus for this new legislation. Under prior law, the surviving spouse of a US Citizen who had petitioned her for a green card could, with limited exceptions, only obtain the green card if the marriage had lasted two years before the US Citizen Petitioner denied. This rule created anomalous and arbitrary results, giving rise to many law suits challenging the fairness of a law that would deny the green card to a widow (even the widow of a US Serviceman killed in Iraq in one famous case) solely because the marriage did not last two years before the Petitioner's unfortunate death. The new law removed the requirement that the marriage must have lasted two years, allowing for the wid-

owed beneficiary of a petition filed by a US citizen to obtain a green card as long as the widow did not subsequently remarry.

In addition to removing the "Widow Penalty," the new law expands its protections to additional categories of beneficiaries, as long as they were residing in the US on the date the Petitioner passed away and continue to reside in the US, including: Unmarried sons and daughters of Citizens, Spouses and unmarried sons and daughter of green card holders, married sons and daughters of citizens, and brothers and sisters of citizens. Children of such beneficiaries may also be included derivatively if they continue to meet the definition of "child" under the law at the time the priority date becomes current.

Beyond the regular family cat-

egories, the new law also preserves eligibility for derivative beneficiaries of employment-based categories, where the principal Beneficiary has passed away during the process. This rule would allow for the spouse and children of a worker whose I-140 is pending or has been approved to continue to seek adjustment of status to permanent resident even though the worker under petition passes away. This provision will help avoid the extremely unfortunate situation where a family has been residing in the US for many years while awaiting their green cards through the "labor certification" and I-140 process, only to have their children uprooted from school and forced to depart the US following the tragic loss of their parent.

Additionally, the new law will

provide ongoing availability of benefits to the surviving direct and derivative beneficiaries of refugee and asylee petitions, as well as the dependent beneficiaries of deceased "U" and "T" visa holders. The new law also makes clear that in any case where the petition is found to survive the death of the petitioner or "qualifying relative," the regular affidavit of support requirements do not apply, allowing for substitute sponsors

on the affidavit of support in such cases.

While the USCIS will most likely drag its feet in issuing its regulations to implement this new law, the law is effective immediately. In the interim, the USCIS may attempt to restrict the law's applicability through issuing its own internal memoranda, however, individuals impacted by the new law may seek to benefit from its provisions and assert eligibility under the "plain

language" of the statute right away. After all, Congress makes the laws and the USCIS' duty is to simply carry them out.

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# Are we out of it...

PAGE B3 ◀

(what else is new?), and hovering on the 10,000 mark after its precipitous fall in the recent past, amid the greatest, harrowing financial scandals and con jobs of all time in Wall Street. Remember Madoff and his ilk? Nearly everyone who had any dollar invested in Wall Street lost big with retirees and small investors seeing their next eggs disappear in a cloud of smoke. The greatest challenge for Wall Street these days is not financial in nature. It is the absence of soul. The same is true for capitalism. Its failure stares us all in the face.

The reality on the ground is much different though. The employment picture is still bleak with more than 10% of the American work force unemployed. Federal, state and city as well as private sector budget cuts are still coming and are already marrow deep. Mandated furloughs are cutting deeply into incomes. Workers who get to keep their jobs after massive corporate layoffs, do not know whether to rejoice because they get to keep their jobs or cry in

depair since now they get to do the work of those who were asked to leave, maybe 2 to 3 people's jobs, at less pay. Welcome to Stressville! A sword seems to hang over one's head as you wait for the next round of layoffs. There was a time when companies kept you and valued you for your loyalty and contribution. Now, soulless corporate greed dictates that they ax their older employees to save on pension costs and hire new graduates instead for smaller pay, all in the name of profit.

It's a domino effect. Since healthcare providers have suffered massive losses in enrollment because of the moribund state of affairs in the business sector, they have no choice but to increase the fees they charge their remaining members in order to operate efficiently and as lean as they can and keep their heads above water.

The malls may be full of people but the shopping itself is much, much less, with just the basics at reasonable prices being snapped up. The discount stores are encountering competition from high-end stores

who are slashing their prices at almost the same level as the discount stores. It is bloody out there in the retail world with everyone competing for the consumer's dollar. This competition will come to a head this holiday season when retailers will have to pull out all the stops to gain market share.

On a personal note, I saw a friend's shop in a well-known shopping mall with the big sign, "Quitting Business!" and I felt sad for her and all other entrepreneurs who have no choice but to throw in the towel. The string of shops she operated with such panache and glamor, has been successful for more than 2 decades until this recession came along. I am sure she is fine and will be back with a vengeance. She just needs some time to bask in the calm and sunshine that comes after a storm.

There may be encouraging signs, that is, if the media is to be believed, but the full scale and impact of this recession on the ground with ordinary people, is far from over. Just ask your colleagues, friends and neighbors. We may need to assess the situation with a wary eye, filtering propaganda from truth while reading between the lines, and treading even more carefully during this long and slippery road to recovery.

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# President signs law cancelling...

PAGE B1 ◀

some relief. The President's passing of the law grants much needed help to many immigrant families.

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# Have You Asked What Your Loved Ones Want for Christmas?

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# People and Events



NITA CAPINA JAURIGUE'S 80th BIRTHDAY. (From L-R) First row: Cedric, Joyce, Second row: Ayi, Nita Capina Jaurigue, Clarissa, Third Row: Phread, Wynnie, Mike, Vanessa, Casey, Ladelle, Krystina, Chris, Dave, Jil, Jean, Miriam, Ces, Bert.