

## **Brief Summary of California's "Premarital Agreement"**

The following is the "premarital agreement" you are entering with your prospective spouse, if you do not agree to something else in writing. This summarizes the applicable California laws regarding property, income, children, and estate planning that will be applied upon death or divorce. If you decide you wish to enter a private premarital agreement changing any of these provisions, you should start to do so well in advance of your marriage (at least 60 days before the wedding).

### **Assets**

1. All assets acquired during the marriage are presumed to be community property. Income earned during the marriage from the efforts of the parties is community property.
2. All benefits which come from either spouse's employment during the marriage are community property to the extent they are earned and/or accrued during the marriage. This can include retirement benefits, pensions, savings plans, stock purchase plans, 401k plans, sick and vacation pay, and stock options. If the benefits are not fully vested at the time of a separation, an allocation is made between the community and separate interests.
3. Separate property is a) property owned before marriage, b) acquired during marriage by gift or inheritance, or c) acquired after separation. Earnings, income or appreciation from separate property sources remains separate property. If there is a dispute about whether an asset is separate property, you must have proof that you acquired the separate property in one of these ways, and have documentation to trace the separate property back to the original source.
4. If you use separate property to acquire property in joint names during the marriage, you are only entitled to reimbursement for the amount of the separate property contributed (no interest or appreciation) and again, you must be able to trace the contribution back to the separate property source.
5. If you own a business prior to marriage, the community may acquire an interest in the business if the business increases in value during the marriage, depending upon the reason for the increase in value.
6. If you own a home in your own name and community funds are used for mortgage payments or to pay down the principal on a loan, the community will acquire an interest in the appreciation in the value of the property, but only in the ratio that the amount paid on principal bears to the total purchase price. The community will also be reimbursed for the amount paid down on principal. (These rules do not apply if title is changed to joint names, such as for refinancing. Then the rule listed in #4 above applies).

## **Debts**

1. Debts incurred during the marriage are presumed to be community property. The only debts which would normally not be community property are debts which are completely unrelated to the community (such as debts related to one person's separate property, support obligations, gifts or expenses related to a romantic relationship other than the marriage, or criminal acts which did not have a financial benefit to the community). These means that a spouse could incur a debt for a purpose the other spouse does not approve and it would still be a community debt.
2. Debts incurred before marriage remain the responsibility of the person who originally incurred them. If community funds are used to pay these debts, sometimes there is a right of reimbursement for the community and sometimes not (special rules apply depending upon the type of debt and other assets/income which was available to pay it.)

## **Division of Assets and Debts Upon Divorce**

1. If you divorce, the community assets and debts are equally divided, subject to various adjustments as described above.
2. If you own a home together and one spouse continues to reside in the home after separation, that spouse could owe "rent" to the community, subject to an offset for payment of the costs of the home.
3. If one spouse pays on community debts after separation, he or she will generally be reimbursed for those payments (the biggest exception would be if the debt payments are in lieu of support.)

## **Support**

1. Each spouse owes a duty of support to the other. Support can be ordered after separation. The amount and duration of support is set by the court and can depend upon a multitude of factors.
2. Spouses are currently permitted to waive the right to support upon divorce in a premarital agreement. Certain conditions must be met, including that each spouse be represented by an attorney for the premarital agreement. In addition, a court could later order spousal support even if it was waived if it would be unconscionable not to order it.

## **Estate planning issues**

1. The form of the property can affect disposition of property upon death of a spouse. For example, joint tenancy property automatically becomes the property of the survivor. Community property is distributed according to the will or trust of the spouse, or if neither exists, per intestate laws. Separate property has separate intestate provisions.

## **Children**

1. Each parent is entitled to custody of the children. Upon a separation, the court determines custody according to the best interest of the child. Child support is payable according to a standardized formula. (This is a very broad summary of the law).
2. Premarital agreements cannot waive or change the authority of the court to make orders of the court regarding children.