

## **PREMARITAL AND MARITAL AGREEMENTS**

### **Introduction**

Not only for first time marriages but also for successive marriages, couples should give some consideration to what the institution of marriage bestows on each of them as spouses (and now to a similar degree for registered "civil unions" between same sex couples).

Most people have no doubt heard of premarital (prenuptial) or "ante-nuptial" agreements. But there are other agreements married couples can make during the marriage as well as when divorcing. Agreements between married couples in California are permitted subject to various legal restrictions. Generally speaking, couples can freely make agreements dealing with property, but they cannot make agreements altering their legal relations (Family Code § 1620). This article will discuss several types of agreements that can be made between couples before, during and after their marriage.

### **Premarital (Prenuptial) Agreements**

If you or your spouse has property going into a marriage, (and there are plenty of couples entering marriages these days with property and children from a prior marriage), you may want to consider a premarital agreement in order to preserve pre-existing property rights and/or interests for your children and other legal heirs.

Prenuptial agreements are governed by statute (Uniform Premarital Agreement Act, Family Code § 1610 et seq.) As there are specific subjects that may be covered in a premarital agreement, it is always best to contact an attorney familiar with the law to draft the agreement.

Examples of permitted subjects are property rights, rights incident to property (such as rents and appreciation), earnings during the marriage, and spousal support in the event of a divorce. One subject that is not allowed in the agreement is the right of a child to child support (you may not waive the payment of any future child support should the marriage end). However, as long as certain conditions are met, the subject of spousal support and maintenance can be included in the agreement. If the premarital agreement is drafted carefully and both spouses have independent legal counsel, these agreements are generally enforced even if challenged at a later time should the marriage end.

### **Marital Agreements**

Once you are married, you and your spouse may enter into a marital agreement ("postnuptial agreement"). Couples can agree to affect their marital rights incident to their marriage, both during their lifetime and even after their death.

The big difference between premarital agreements and marital agreements concerns the fiduciary or confidential relationship the spouses have to one another, created by the marriage (Family Code §§ 721(b), 1100(c)). Once married, both spouses become a fiduciary to the other. As such, imposed on each spouse is the duty of highest good faith and fair dealing with the other spouse, and neither spouse can take any unfair advantage of the other. Included in this fiduciary relationship is the

requirement that both spouses provide the other with full disclosure of any and all information pertaining to issues contained in the agreement. Marital agreements, if challenged at a later date, impose on the spouse defending the agreement a greater burden of proof that the agreement is not unfair to the other spouse. By contrast, there is no fiduciary relationship presumed between **prospective spouses**, and accordingly, there is no presumption of undue influence created by a fiduciary relationship if a premarital agreement is later challenged.

If the spouses are making an agreement that includes rights after death, (usually waiver of rights set forth in the California Probate Code) they must make sure the agreement complies with the applicable sections of the Code. Further, if spouses are making agreements affecting their respective rights to pension benefits, they must comply with the United States Code (federal law). These can be complicated issues and it is always best to have an attorney familiar with the law draft the agreement.

One example of a marital agreement is a **transmutation agreement**, where spouses agree to change the character of a property from community to separate or separate to community. For instance, if the husband owned a house before marriage, (his separate property) and after the marriage he wants to make the house a community asset, (he and his wife own the house jointly), an agreement to effect the change from separate to community is called a transmutation agreement. The law regarding transmutation agreements is very specific, and unless all the conditions are met, the agreement can be set aside at a later time.

Another type of marital agreement is an **immediate separation agreement**, where a separating couple may enter into a written agreement providing for an immediate separation and support (child and/or spousal) pending a divorce.

### **Marital Settlement Agreements**

The third type of marital agreement is a marital settlement agreement, commonly referred to as a "MSA". This is an agreement entered into by couples upon divorce. As part of the divorce judgment, the MSA contains provisions resolving the divorcing couple's property issues, parenting schedules, support amounts and any other topic affecting the couples' rights after the marriage. As with the other agreements discussed in this article, it is always best to have a knowledgeable attorney or attorneys prepare the agreement, as there are now quite cumbersome and specific requirements in California and unless the law is complied with, your MSA could be unenforceable at a later date.

### **Conclusion**

A good marriage requires open communication and understanding. Sometimes couples are reluctant to discuss (either before or after their marriage) sensitive issues involving their respective rights that accrue during the marriage, let alone make an agreement affecting their rights. However, it is often beneficial to openly discuss these issues with your spouse and in some cases make a written agreement defining the terms of your agreed marital rights and obligations. That way important rights and obligations are clarified before a conflict arises.