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Premarital Agreement Guide

Our firm follows a comprehensive process when drafting a premarital agreement (or prenup). We aim to provide our clients with a prenup that works for their family and marriage, much more so than the one they would have dictated by California law without a prenup. Below are the areas that we have found help to both build a stronger relationship and reduce some of the stresses that can often impact a marriage:

Assets

1. Community Property. All assets acquired during the marriage are presumed to be community property. Income earned during the marriage from the efforts of either spouse is community property. This income can include earnings from employment. It can also include appreciation of assets that have occurred due to the efforts of a spouse to manage the assets. So, for example, assets that you own as separate property could acquire a community property interest if you manage them during the marriage (for example, a stock portfolio that spouse A has before marriage and does not contribute to is separate property and the appreciation is separate property; however, if spouse A is a full-time day trader that manages that stock portfolio, then the community would also acquire an interest due to spouse A's efforts during marriage).
2. Employment Benefits. All benefits that arise 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, 401(k) plans, sick and vacation pay, and stock/stock options/RSUs/restricted stock. If the benefits are not fully vested at the time of a separation, an allocation is made between the community and separate interests. If retirement or other benefits are earned before marriage or after separation in addition to during the marriage, those benefits will be allocated between the community and separate interests as well.
3. Separate Property. Separate property is either 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. The burden will be on you to prove that an asset is your separate property.

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4. Keeping Separate Property Separate. The best way to protect your separate property and keep it separate is to keep accurate records. If you have bank accounts that are your separate property because you owned them before marriage, or inherited them, keep them in your own name. Do not add any community property to those bank accounts (such as money you earn during the marriage). Similarly, do not add separate property to a joint bank account, or bank account started during marriage. When separate property and community property are “commingled,” they are much harder to trace. If you buy property with money that is your separate property, again you should keep accurate records so that you can trace the source of funds for the purchase. For example, if you write a check from a separate property account, keep a copy of the check and the receipt. It could be helpful to create a list of the property you owned before marriage (along with documentation regarding the purchase and source of funds used) before you get married.
5. Using Separate Property to Purchase Property in Joint Names. If you use separate property to acquire property in joint names during the marriage, you are only entitled to reimbursement for the separate property contributed (no interest or appreciation) and again, you must be able to trace the contribution back to the separate property source. You will only be entitled to get back the separate funds that you put into the purchase, and only to the extent that you are able to show that you used separate property funds. Thus, for example, if you contribute \$500,000 of money you had before marriage to a \$2,000,000 home purchased in joint names during marriage, upon divorce, assuming there is enough equity in the home, you would be reimbursed \$500,000.
6. Home Owned Prior to Marriage. If you own a home in your own name and community funds are used for mortgage payments, to pay down the principal on a loan, or to make improvements to the property, the community will acquire an interest in the property. In the case of mortgage payments, the community will acquire an interest in any 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. If you own a home which is not paid off and wish for it to remain your separate property, you will need to make the payments on the mortgage or loan from a separate property source (such as a separate property bank account). Any improvements to the property should also be made with your separate property.

If you change title to your separate property home during your marriage to joint name (such as during a refinance), then the above rule does not apply. In this case, it is treated like paragraph 5, above, and you would only be entitled to a reimbursement of your separate property contribution to the purchase, and only to the extent it could be traced to your separate property. If you wish for a home to remain your separate property, keep it in your name alone. People have been unpleasantly surprised to find that their separate property home is now community property, even though they only changed title for purposes of refinancing.

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7. Business Owned Prior to Marriage. 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. Value that is a result of your efforts during the marriage will be considered community property. If you own a business that runs itself (or is run by someone else other than you) and increases in value due to reasons other than your efforts, the increase may be considered to be your separate property. If you are involved in operating your separate property business, there is a possibility that the community will acquire an interest in your business.

Debts

8. Debts Incurred During Marriage. 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 spouse'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). This means that a spouse could incur a debt for a purpose the other spouse does not approve of and it would still be a community debt. This also means that a spouse could possibly incur a debt that the other spouse does not know about and it would still be community debt.
9. Separate Property Debts. Debts incurred before marriage remain the responsibility of the spouse 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 whether or not there were other assets/income available to pay it.)

Division of Assets and Debts Upon Divorce

10. Division of Community Property. If you divorce, the community assets and debts must be equally divided, unless you both agree to a different division. This equal division is subject to various adjustments as described above.

Support

11. Duty of Support. Each spouse owes a duty of support to the other. Support can be ordered after separation but before a divorce is finalized, as well as after a divorce is finalized. The amount and duration of support is set by the court and can depend upon a multitude of factors.
12. Waiver of Spousal Support. Under current law, spouses may waive the right to support upon divorce in a premarital agreement. Certain conditions must be met, including that

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each spouse be represented by an attorney for the premarital agreement. In contrast to a premarital agreement, under a postmarital agreement, there is no direct case law yet on whether spouses may waive or limit spousal support. That being said, we often provide waivers or limitations of spousal support in postmarital agreements, so long as the spouse waiving or limiting spousal support is receiving sufficient other assets or gifts, both parties are represented by counsel, and there is no duress in signing the postmarital agreement. It is important to understand that, under current California law, an agreement to waive spousal support will be assessed and scrutinized at the time the provision is challenged. A court can set aside a waiver of spousal support if enforcing it would be unconscionable at the time a spouse makes a request for spousal support during a divorce, regardless of whether that spouse knowingly waived spousal support without duress at the time he or she signed the premarital agreement.

This is intended to be a very general summary of California law, and that laws may be applied differently depending on the facts of an individual situation. Premarital and postmarital agreements can preclude creation of community property altogether, maintain the character of separate property, and waive or limit spousal support. They can also protect your property from the creditors of your spouse, or purposely change (transmute) the character of your property. Think carefully about how California marital property law might impact your property in the event you should divorce. You can then decide whether having a premarital (or postmarital agreement) might be something you should consider.

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