

Brief Summary of California's "Default Premarital Agreement"

By Catherine Conner

The following summary of applicable California laws regarding property, income, children, and estate planning sets out the "rules" that will be applied upon death or divorce if you do not create your own. These rules are what some people think of as your "default premarital agreement". In other words, these are the provisions that will apply if you **do not** enter into a written agreement changing them.

Generally, when you marry without a premarital agreement, each of you basically belongs to an entity called "the community". This means that your skills and efforts belong to "the community" such that your earnings/salaries are jointly owned. This does not mean that everything you owned before you got married (your separate property) automatically becomes community property; in fact community property law has built in protections for your separate property. For some people, this is all they need to know and they choose not to create premarital agreements. For others, it is important to change certain of the general rules to suit their unique situations, goals and expectations for the marriage.

If you and your prospective spouse decide you wish to enter a private premarital agreement setting out your own "rules", you should begin this process well in advance of your marriage (at least 60 days before the wedding).

But before you do, remember that the rules set out below will apply if you **do not** enter into a premarital agreement, and may give you and your spouse-to-be all the protection you feel that you need.

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 that traces the separate property acquisition 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, it remains your separate property. However, 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 do not put your spouse's name on title, it will remain your separate property. However, if 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). This 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 to 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 makes payments 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 ("take the place of") support.)

Support

1. Each spouse has a duty to financially support the other, which is called "spousal support".. After separation, one spouse could very well need spousal support. If the two of them cannot agree on an appropriate spousal support arrangement, a court can order it. The amount and duration of support, if not agreed to by the parties, will be 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 (so "grossly unfair" that it "shocks" the "conscience" of the court) not to order it.

Estate planning issues

1. The way spouses hold title to property, or the way property is characterized by California law or a premarital agreement can affect distribution of property upon the 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 (or "default") laws. Separate property has separate intestate provisions.

Children

1. Each parent is entitled to spend time with the children ("custody and visitation"). Upon a separation, the court determines custody according to the best interest of the child.

2. Child support is payable according to a standardized formula. (This is a very broad summary of the law).

3. The right to spend time with each parent and the right to be supported by each parent belongs to your children, not to you and the court is obligated to protect children's best interests. Therefore premarital agreements cannot waive, dictate or otherwise attempt to alter the authority of the court to make orders regarding children.