

# 18

## Marital Agreements

Debra S. Frank

- I. DEFINITION; RELATED TERMS §18.1
- II. OTHER SPOUSAL AGREEMENTS COMPARED §18.2
- III. STATUTORY AUTHORITY §18.3
- IV. SUBJECTS; VALIDITY §18.4
  - A. Transmutation of Community Property to Separate Property §18.5
  - B. Transmutation of One Spouse's Separate Property to Community Property or to Separate Property of Other Spouse §18.6
  - C. Property Settlements §18.7
  - D. Waiver of Rights in Deceased Spouse's Estate §18.8
  - E. Waiver of Joint and Survivor Annuity or Survivor Benefits Under Private Retirement Plan §18.9
  - F. Spousal Support §18.10
  - G. Child Custody and Visitation §18.11
  - H. Child Support §18.12
    - I. Attorney Fees §18.13
  - J. Personal Aspects of Marriage §18.14
- V. CREDITORS' RIGHTS §18.15
- VI. REPRESENTATION ISSUES
  - A. Avoiding Dual Representation §18.16
  - B. Dealing With Unrepresented Party §18.17
- VII. REQUIREMENTS
  - A. Family Code §852
    - 1. Writing §18.18
    - 2. Express Declaration by Spouse Whose Interest Is Adversely Affected §18.19
    - 3. Recording §18.20
    - 4. Exceptions
      - a. Gifts of Certain Tangible Articles §18.21
      - b. Commingled Property §18.22
      - c. Pre-1985 Agreements §18.23
  - B. Dealings in Accordance With Fiduciary Relationship Standard §18.24
  - C. Basic Contract Law
    - 1. Capacity §18.25
    - 2. Consent §18.26
    - 3. Lawful Object §18.27
    - 4. No Consideration Required §18.28

## VIII. DRAFTING THE AGREEMENT

- A. Structure, Format, Style **§18.29**
  - B. Introductory Provisions
    - 1. Form: Identification of Parties **§18.30**
    - 2. Form: No Separation or Dissolution Contemplated **§18.31**
    - 3. Form: Purpose of Agreement **§18.32**
    - 4. Form: Disclosures of Property and Financial Obligations **§18.33**
  - C. Substantive Provisions
    - 1. Form: All Property to Be Separate Property **§18.34**
    - 2. Form: Waivers of Joint and Survivor Annuities and Survivor Benefits **§18.35**
    - 3. Form: Joint Accounts and Other Community Property **§18.36**
    - 4. Form: Gifts Made to Parties Jointly **§18.37**
    - 5. Form: Gifts and Other Transfers Between Parties **§18.38**
    - 6. Form: Transmutation of One Spouse's Separate Property to Community Property **§18.39**
    - 7. Form: Transmutation of Community Property to One Spouse's Separate Property **§18.40**
    - 8. Form: Transmutation of One Spouse's Separate Property to Separate Property of Other Spouse **§18.41**
    - 9. Form: Debts **§18.42**
    - 10. Form: Income Tax Returns **§18.43**
  - D. General Provisions
    - 1. Form: Execution, Acknowledgment, and Delivery of Documents **§18.44**
    - 2. Form: Waiver of Rights on Death of Other Party **§18.45**
    - 3. Form: Entire Agreement **§18.46**
    - 4. Form: Binding Effect of Agreement **§18.47**
    - 5. Form: Amendment or Revocation by Subsequent Agreement **§18.48**
    - 6. Form: Governing Law **§18.49**
    - 7. Form: Severability in Event of Partial Invalidity **§18.50**
    - 8. Form: Interpreting Agreement **§18.50A**
    - 9. Form: Future Attorney Fees and Costs Related to Agreement **§18.51**
    - 10. Form: Effective Date of Agreement **§18.52**
    - 11. Legal Representation
      - a. Form: Each Party Independently Represented **§18.53**
      - b. Form: One Party Unrepresented by Counsel **§18.54**
    - 12. Form: Signatures and Dates **§18.55**
- IX. FORM: COMPLETE SAMPLE AGREEMENT **§18.56**

**§18.1 I. DEFINITION; RELATED TERMS**

A marital agreement is an interspousal agreement, executed during an intact marriage, that affects marital rights and obligations. The term “marital agreement” has the same meaning as the term “postnuptial agreement.”

The term “marital agreement” is often used interchangeably with the term “transmutation agreement.” Although the two have similar meanings, a marital agreement is potentially somewhat broader in scope than a transmutation agreement. Transmutation agreements are governed by Fam C §§850–853. Under those sections, a transmutation agreement is an agreement between spouses that changes the character of real or personal property of a spouse, from community to separate, from separate to community, or from the separate property of one spouse to the separate property of the other spouse. See Fam C §850. A marital agreement can, likewise, change the character of property, but it may potentially be able to do things that a transmutation agreement cannot, *e.g.*, waive or limit rights in a deceased spouse’s estate (see §18.10).

**NOTE►** The principles and statutes applicable to agreements made during an intact marriage also apply with respect to agreements made during the course of an intact domestic partnership that has been registered with the Secretary of State. See generally Fam C §§143, 297.5(a).

## §18.2 II. OTHER SPOUSAL AGREEMENTS COMPARED

Although premarital agreements (see chap 17) and marital settlement agreements (see chaps 1–16) also concern marital rights, there are important differences between such contracts and marital agreements. Premarital agreements (also called “antenuptial” or “prenuptial” agreements) are agreements made between prospective spouses in contemplation of marriage and to be effective on marriage (Fam C §1610(a)), whereas marital agreements are made between spouses during marriage. Like marital agreements, marital settlement agreements are made during marriage, but they are made in contemplation of dissolution, legal separation, or nullity, rather than for an intact marriage.

As with agreements made in contemplation of dissolution, spouses negotiating marital agreements must adhere to the general rules governing fiduciary relationships. Fam C §§721, 1100; *Marriage of Bonds* (2000) 24 CA4th 1, 27. Although a marital agreement is not subject to express statutory disclosure requirements such as those applicable to couples involved in a marital dissolution (see, *e.g.*, Fam C §§2104–2105), parties in a fiduciary relationship owe one another a duty of full disclosure, and particularly a duty to not misrepresent or conceal facts that materially affect the value of assets. See *Marriage of Burkle* (2006) 139 CA4th 712, 729; *Mar-*

*riage of Fossum* (2011) 192 CA4th 336, 344. See also Fam C §1100(e); *Marriage of Georgiou & Leslie* (2013) 218 CA4th 561, 569 (discussing fiduciary duty in general).

### §18.3 III. STATUTORY AUTHORITY

Family Code §850 authorizes spouses to transmute community property to the separate property of either spouse, separate property of either spouse to community property, and separate property of one spouse to separate property of the other spouse. Family Code §1500 provides that the property rights of spouses prescribed by statute may be altered by a premarital agreement or another marital property agreement.

### §18.4 IV. SUBJECTS; VALIDITY

Marital agreements enable spouses to structure their marital relationship—during marriage, on dissolution, and on death—in ways different from those otherwise provided by law. The validity of various provisions, however, depends to a significant extent on the specific subjects addressed. Courts will not enforce provisions that (1) purport to waive statutory child support obligations or to bind the court regarding child custody or visitation or (2) violate public policy. For cases that have articulated this view in the context of dissolution- or support-related proceedings, see *Elkind v Byck* (1968) 68 C2d 453, 457; *Marriage of Sabine & Toshio M.* (2007) 153 CA4th 1203, 1212; *Marriage of Weiss* (1996) 42 CA4th 106, 117; *County of Shasta v Caruthers* (1995) 31 CA4th 1838; *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1026.

### §18.5 A. Transmutation of Community Property to Separate Property

A marital agreement may transmute community property of the spouses to separate property of either spouse. Fam C §850(a). The broadest example is a marital agreement providing that all property of either party (including earnings during marriage and before separation) and any items acquired by the party with those earnings will be his or her separate property. More narrowly, an agreement may simply transmute a particular item of property (*e.g.*, an automobile) from community to separate property.

Likewise, an agreement may transmute a community interest in separate property to a separate interest. For example, it may provide that a residence owned by one spouse before marriage will remain entirely the separate property of that spouse despite the use of community funds for loan payments or improvements, thereby avoiding the *Moore/Marsden* apportionment of separate and community interests. See *Marriage of Moore* (1980) 28 C3d 366; *Marriage of Marsden* (1982) 130 CA3d 426; *Bono v Clark* (2002) 103 CA4th 1409; *Marriage of Allen* (2002) 96 CA4th 497; *Marriage of Wolfe* (2001) 91 CA4th 962; Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §5.25 (Cal CEB).

### **§18.6 B. Transmutation of One Spouse's Separate Property to Community Property or to Separate Property of Other Spouse**

A marital agreement may transmute one spouse's separate property to community property or to separate property of the other spouse. Fam C §850(b)–(c). The parties may agree, for example, that property owned by one spouse before marriage, or received by one spouse by gift or inheritance during marriage and before separation, will be the parties' community property.

### **§18.7 C. Property Settlements**

There is a strong public policy interest in fostering and protecting marriages. Accordingly, contracts that promote dissolution are prohibited. *Glickman v Collins* (1975) 13 C3d 852, 857. An agreement promotes dissolution if it provides for a transfer of property of substantial value only in the event of dissolution. *Marriage of Higgason* (1973) 10 C3d 476, 485, disapproved on other grounds in *Marriage of Dawley* (1976) 17 C3d 342, 352. See, e.g., *Marriage of Dajani* (1988) 204 CA3d 1387; *Marriage of Noghrey* (1985) 169 CA3d 326. For a more detailed discussion of how courts viewed the term “promotive of dissolution,” see chap 17.

### **§18.8 D. Waiver of Rights in Deceased Spouse's Estate**

Marital agreements in second marriages often seek to preserve a spouse's estate for his or her children from a prior relationship. Such efforts often include marital agreement provisions that transmute community property to separate property, e.g., a provision avoiding creation of a

community property interest in a separate property residence by virtue of loan payments made with community funds (see §18.5). Additionally, marital agreements often include a waiver of rights on the death of the other spouse under Prob C §§140–147. The attorney should consult those sections for the governing law and requirements. For a sample waiver provision, see the form in §18.45.

### **§18.9 E. Waiver of Joint and Survivor Annuity or Survivor Benefits Under Private Retirement Plan**

The rights of a nonparticipant spouse to receive a joint and survivor annuity or survivor benefits under a private retirement plan following the participant spouse's death can be waived in a marital agreement. However, the waiver will be effective only if certain requirements, including the execution of specified forms available from the plan administrator and sometimes acknowledgment by a notary of the waiving spouse's signature, are met. See IRC §417(a)(1)–(2), (6); 29 USC §1055(c)(1)–(2), (7). Note that waiver of a right to a joint and survivor annuity or survivor benefits under the federal Retirement Equity Act of 1984 (REA) (Pub L 98–397, 98 Stat 1426) is not a transmutation of the community property rights of the person executing the waiver. Fam C §853(b). For a sample waiver provision, see the form in §18.35.

### **§18.10 F. Spousal Support**

The case law on waivers of spousal support has generally addressed *premarital* agreements, and it is unclear whether the same analysis would apply to marital agreements. The court in *Marriage of Pendleton & Fireman* (2000) 24 C4th 39, found that premarital waivers of spousal support are not per se unenforceable and, at least in the circumstances presented in that case, could be enforced without violating any public policy (see §17.4). Legislation enacted after *Pendleton & Fireman* (Fam C §1612) added section (c) to that statute, providing that “[a]ny provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement.” The amended statute, however, is not retroac-

tively applicable to premarital agreements executed before its 2002 operative date. *Marriage of Howell* (2011) 195 CA4th 1062, 1077. See *Marriage of Hill & Dittmer* (2011) 202 CA4th 1046, 1056 (discussing *Howell*).

Note that premarital agreement cases have addressed the situation of support after a spousal separation or marital dissolution, rather than during an *ongoing* marriage in which the parties are living together. By statute, each spouse contracts towards the other a duty of support *during* an ongoing marriage, and it does not appear that this statutory duty may be waived in either a premarital agreement or marital agreement. See Fam C §720.

### §18.11 G. Child Custody and Visitation

Although parents may agree between themselves about child custody and visitation, the court has continuing jurisdiction to award or modify custody in the child's best interests, regardless of the parties' agreement. *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1026. Generally, the parents of a child may not terminate one parent's parental rights by stipulation. See *Marriage of Jackson* (2006) 136 CA4th 980, 991; *Kristine M. v David P.* (2006) 135 CA4th 783, 792.

### §18.12 H. Child Support

A marital agreement provision addressing child support will not be binding on the courts. See *Elkind v Byck* (1968) 68 C2d 453; *County of Shasta v Caruthers* (1995) 31 CA4th 1838. See also Fam C §1612(b) (child's right to support may not be adversely affected by *premarital* agreement); *K.M. v E.G.* (2005) 37 C4th 130, 144. This rule applies to support for disabled as well as nondisabled adult children. *Marriage of Lambe & Meehan* (1995) 37 CA4th 388. If parties agree to continue to support an adult child and neither parent exercises "primary physical responsibility," it is inappropriate to apply the child support guideline. *Edwards v Edwards* (2008) 162 CA4th 136, 144.

### §18.13 I. Attorney Fees

A marital agreement waiver of attorney fees in future litigation will not be enforceable to the extent that the subsequent dispute involves the welfare of children. See *Marriage of Joseph* (1990) 217 CA3d 1277. Thus, a marital agreement waiver of attorney fees will clearly not be enforceable with respect to litigation of custody, visitation, or child support issues.

It is unclear, however, to what extent such a waiver might otherwise be enforceable. It appears that the rationale in *Joseph* is that it would be inconsistent to enforce an agreement on waiver of attorney fees with respect to an issue on which the parties cannot by agreement divest the court of jurisdiction. This suggests that such a waiver in a marital agreement might also be unenforceable on the issue of spousal support, because the parties apparently cannot waive or limit spousal support for purposes of an ongoing marriage in a marital agreement (see §18.10).

### §18.14 J. Personal Aspects of Marriage

Inclusion of provisions in a marital agreement regarding personal aspects of the parties' marriage is not recommended. Beyond the reluctance of courts to regulate such matters generally, case law has held that contracts purporting to alter the legal incidents of marriage are void and unenforceable as against public policy. See, e.g., *Marriage of Mehren & Dargan* (2004) 118 CA4th 1167, 1171 (property forfeiture provision in postmarital agreement for use of illegal drugs was invalid); *Diosdado v Diosdado* (2002) 97 CA4th 470 (contract imposing damages of \$50,000 on spouse who is unfaithful is unenforceable as against public policy of no-fault divorce); *Borelli v Brusseau* (1993) 12 CA4th 647 (contract by which husband promised to transfer certain property to wife in exchange for in-home care of him for duration of illness).

The court in *Borelli*, for example, found that the agreement violated public policy because the wife was legally obligated to provide such support without compensation beyond that (e.g., community property rights) arising from the marital relation itself. See also *Brooks v Brooks* (1941) 48 CA2d 347 (services as nurse and housekeeper); *Estate of Sonnicksen* (1937) 23 CA2d 475 (nursing services and companionship). Similarly, agreements between spouses modifying or eliminating their mutual obligation of fidelity under Fam C §720 would likely be void and unenforceable. See *Marriage of Ramirez* (2008) 165 CA4th 751, 756 (spouse's intent from outset of marriage to ignore marital obligation of fidelity may support finding of fraud sufficient to grant nullity of marriage).

### §18.15 V. CREDITORS' RIGHTS

The recording or nonrecording of a marital agreement affecting real property rights has the same effect as the recording or nonrecording of a grant of real property. Fam C §1502(b). Under bona fide purchaser rules, a



transmutation of real property is not effective regarding third parties without notice of the transmutation unless it is recorded. Fam C §852(b). See CC §1217. Thus, a marital agreement affecting real property rights and any deed executed in accordance with the agreement should be recorded to provide constructive notice to third parties. See CC §1213. If the agreement is to be recorded, the parties' signatures should be notarized.

In addition to being subject to bona fide purchaser rules for real property transmutations, a marital agreement is also subject to the Uniform Voidable Transactions Act (CC §§3439–3439.12); *Mejia v Reed* (2003) 31 C4th 657; *Filip v Bucurenciu* (2005) 129 CA4th 825, 838. The Act gives a creditor the right to avoid a property transfer to the extent necessary to satisfy its claim when the transfer was made

- With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- Without receiving a reasonably equivalent value in exchange for the transfer as long as the debtor (1) was engaged or was about to engage in a business or a transaction for which the debtor's remaining assets were unreasonably small in relation to the business or transaction or (2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. In determining actual intent, consideration may be given, among other things, to the factors described in CC §§3439.04, 3439.07(a); *Reddy v Gonzalez* (1992) 8 CA4th 118, 122.

A marital agreement may also protect the property of one spouse from the creditors of the other on debts incurred by the other during marriage. The California Supreme Court has suggested that, as long as creditors are given proper notice, a *premarital* agreement that provides that each spouse's earnings and acquisitions during marriage will be his or her separate property may preclude creditors of one spouse from taking the earnings and acquisitions of the other because those earnings and acquisitions would not be community property. *Marriage of Dawley* (1976) 17 C3d 342, 357. The same rationale probably applies to a *marital* agreement. Proper notice probably requires, however, that the creditor be informed about the agreement at or before the time a debt is incurred. See *State Bd. of Equalization v Woo* (2000) 82 CA4th 481 (marital agreement entered into after wife received notice that her earnings would be garnished to pay husband's tax debt, but before she went to work, was invalid and unenforceable; agreement did not prevent garnishment of her earnings to pay sales tax (and interest and penalties) assessed against husband).

In any event, it seems clear that spouses cannot divest the right of a creditor to look to both spouses for satisfaction of a community debt simply by attempting to allocate responsibility for paying the debt as between themselves *after* the debt has been incurred. See *Marriage of Nassimi* (2016) 3 CA5th 667, 690 (court noted that spouse or former spouse cannot transform debt incurred by community into separate debt by refusing to participate and forcing other spouse to bear entire burden of protecting community's interest).

## VI. REPRESENTATION ISSUES

### §18.16 A. Avoiding Dual Representation

Because of the almost certain conflict of interest between the spouses, each party to a marital agreement should have his or her own attorney. When parties have a potential conflict of interest, an attorney may not represent both of them without the informed written consent of each. Cal Rules of Prof Cond 1.7. See also *Marriage of Friedman* (2002) 100 CA4th 65 (attorney representing one spouse only (husband) who advised other spouse (wife) to seek her own representation was not required to obtain signed waiver of conflict as he did not represent both parties; marital agreement entered into to protect assets of wife who herself was attorney). Even with the requisite consent, dual representation greatly increases the possibility that the agreement will later be set aside.

### §18.17 B. Dealing With Unrepresented Party

From the start, communication with an unrepresented party to a marital agreement should include advising that party, preferably in writing, that the interests of the two spouses are adverse, that the attorney represents the interests of his or her client alone, and that the other party is strongly encouraged to seek independent legal advice. This advice should be repeated before the unrepresented party's signing of a proposed marital agreement.

If the unrepresented spouse continues to refuse to obtain legal advice before signing the agreement, he or she should be asked to sign an acknowledgment, set forth as a provision of the agreement, stating that the unrepresented party was advised to obtain independent counsel and that the advice was voluntarily rejected. For a sample provision, see the form in §18.54.

## VII. REQUIREMENTS

### A. Family Code §852

#### §18.18 1. Writing

A transmutation of real or personal property is not valid unless made in writing. Fam C §852(a). See generally *Marriage of Bowvino* (2015) 241 CA4th 1411 (real property—residence); *Marriage of Lafkas* (2015) 237 CA4th 921 (personal property—partnership agreement). The requirement of an express written transmutation should be considered absolute; *e.g.*,



unlike the Statute of Frauds, there is no exception for “part performance.” *Marriage of Benson* (2005) 36 C4th 1096, 1100; *Estate of MacDonald* (1990) 51 C3d 262, 268. On the limited exceptions to the requirement of a writing, see §§18.21–18.23.

## §18.19      2. Express Declaration by Spouse Whose Interest Is Adversely Affected

A transmutation of real or personal property must include an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. Fam C §852(a). To be an “express declaration” for purposes of Fam C §852(a), the writing must contain language expressly stating that the characterization or ownership of the property is being changed. *Estate of MacDonald* (1990) 51 C3d 262, 272. See *Marriage of Valli* (2014) 58 C4th 1396, 1406 (life insurance policy purchased during marriage was subject to transmutation requirements and remained community property absent evidence of express declaration of transmutation).

The writing need not use the term “transmutation” or any other particular word or expression. *MacDonald*, 51 C3d at 273; *Marriage of Lund* (2009) 174 CA4th 40, 51 (marital agreement entered into “for estate planning” purposes transmuted separate property to community property without word “transmutation” in agreement); *Marriage of Holtemann* (2008) 166 CA4th 1166. But the transmutation must be established by the writing alone, without reliance on extrinsic evidence of an intent to transmute. *MacDonald*, 51 C3d at 273. See *Marriage of Bonvino* (2015) 241 CA4th 1411 (residence purchased with husband’s separate property and titled as his sole and separate property was not subject to reimbursement provisions of Fam C §2640(b) given no written declaration changing property’s character to community property); *Marriage of Lafkas* (2015) 237 CA4th 921 (modified partnership agreement adding wife as partner was not valid transmutation of husband’s partnership interest because agreement did not contain express declaration that property’s character was being changed); *Lund*, 174 CA4th at 51; *Marriage of Holtemann, supra* (transmutation agreement and trust made during marriage as part of estate plan validly transmuted husband’s separate to community property on dissolution, subject to potential Fam C §2640 reimbursement); *Marriage of Starkman* (2005) 129 CA4th 659 (transfer of husband’s separate property into revocable trust as part of estate plan insufficient for transmutation despite language in trust and assignment agreements indicating transferred property

was community property); *Marriage of Barneson* (1999) 69 CA4th 583 (husband's written instructions that broker "transfer" stock into wife's name and "journal" stock in husband's account into wife's account insufficient for transmutation given failure to state expressly that characterization or ownership was being changed).

On the requirement that a spouse who gains an advantage in an interspousal transaction must prove that the alleged transmutation was not the product of undue influence, see §18.26.

### **§18.20 3. Recording**

A transmutation of real property is not effective regarding third parties without notice of the transmutation unless it is recorded. Fam C §852(b).

#### **4. Exceptions**

### **§18.21 a. Gifts of Certain Tangible Articles**

Family Code §852 does not apply to a gift of clothing, wearing apparel, jewelry, or another tangible article of a personal nature that is used solely or principally by the recipient and that is not substantial in value taking into account the circumstances of the marriage. Fam C §852(c). For representative cases that have construed whether particular items were articles "of a personal nature" that were "not substantial" in value, see, *e.g.*, *Marriage of Buie & Neighbors* (2009) 179 CA4th 1170, 1175 (automobile did not qualify) and *Marriage of Steinberger* (2001) 91 CA4th 1449, 1465 (diamond ring did not qualify).

### **§18.22 b. Commingled Property**

Family Code §852 does not affect the law governing characterization of property in which separate property and community property are commingled or otherwise combined. Fam C §852(d). See, *e.g.*, *Marriage of Weaver* (2005) 127 CA4th 858, 871.

### **§18.23 c. Pre-1985 Agreements**

Family Code §852 does not apply to marital agreements made before January 1, 1985, which are governed by prior law. Fam C §852(e). Prior law permitted oral marital agreements and even implied agreements. See *Marriage of Schoettgen* (1986) 183 CA3d 1, 9.

**§18.24      B. Dealings in Accordance With Fiduciary Relationship Standard**

In negotiating a marital agreement, spouses are required to act toward each other in accordance with the general rules governing fiduciary relationships. They have a duty of the highest good faith and fair dealing and are subject to the same rights and duties as nonmarital business partners. Fam C §721(b). This duty includes (Fam C §721):

- Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying;
- Rendering on request true and full information of all things affecting any transaction that concerns the community property (but this does





not impose a duty on either spouse to keep detailed books and records of community property transactions); and

- Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse that concerns the community property.

In addition, each spouse must do the following, on request (Fam C §1100(e)):

- Make full disclosure to the other of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and all debts for which the community is or may be liable; and
- Provide equal access to all information, records, and books pertaining to the character and value of those assets and debts.

For a case summarizing the extent to which spouses are subject to fiduciary duties in their property transactions and discussing burden of proof issues at trial, see *Marriage of Prentis-Margulis & Margulis* (2011) 198 CA4th 1252, 1269 (in dividing community property at dissolution trial, when nonmanaging spouse has prima facie evidence that community assets disappeared after separation while under managing spouse's control, managing spouse has burden of proof to account for those assets).

## C. Basic Contract Law

### §18.25 1. Capacity

A valid contract requires parties legally capable of contracting. CC §1550(1). A minor who is married or who has entered into a domestic partnership is legally capable of contracting. Fam C §§1501, 7002(a).

### §18.26 2. Consent

To be valid, a contract must be the product of the free, mutual consent of the parties, communicated by each to the other. CC §§1550(2), 1565. An apparent consent is invalid when obtained through duress, menace, fraud, undue influence, or mistake. CC §1567. See, e.g., *Marriage of Balcof* (2006) 141 CA4th 1509, 1523 (husband acted under duress in executing transmutation agreement during marriage).

Because of the requirements of Fam C §721(b) (confidential relationship of spouses requires that neither take any unfair advantage of the

other), when an interspousal transaction advantages one spouse over the other, a presumption of undue influence arises. See *Marriage of Fossum* (2011) 192 CA4th 336, 344; *Starr v Starr* (2010) 189 CA4th 277, 281; *Marriage of Mathews* (2005) 133 CA4th 624; *Marriage of Delaney* (2003) 111 CA4th 991; *Marriage of Haines* (1995) 33 CA4th 277, 287. For a factually distinguishable case, see *Marriage of Burkle* (2006) 139 CA4th 712 (presumption of undue influence does not arise in interspousal transaction unless one spouse obtains *unfair* advantage or obtains property for which consideration is absent or clearly inadequate; division of assets not unfair simply because it is unequal).

The presumption of undue influence can be overcome by proof that the transaction was freely and voluntarily made, with knowledge of all relevant facts and a complete understanding of the effect of the transaction. *Haines*, 33 CA4th at 296.

### §18.27 3. Lawful Object

To be valid, a contract must have a lawful object. CC §§1550(3), 1596. Among the provisions most likely to make a marital contract, or at least part of it, unlawful are substantial property settlements (see §18.7).

### §18.28 4. No Consideration Required

A transmutation may occur with or without consideration. Fam C §850.

## VIII. DRAFTING THE AGREEMENT

### §18.29 A. Structure, Format, Style

The structure, format, and style of a marital agreement are similar to those for a marital settlement agreement. See §§4.5–4.7. The marital agreement should contain:

- **Introductory provisions.** These include, *e.g.*, identification of the parties, the purpose of the agreement, and disclosures. See §§18.30–18.33.
- **Substantive provisions.** These form the main body of the agreement and address the particular issues it covers, typically property issues. See §§18.34–18.43.
- **General provisions.** These address such matters as execution, acknowledgment, and delivery of documents; and waivers of rights on the death of the other party. See §§18.44–18.55.

## B. Introductory Provisions

### §18.30 1. Form: Identification of Parties

This agreement is made between \_\_[name]\_\_, hereafter referred to as “Husband,” and \_\_[name]\_\_, hereafter referred to as “Wife.”

### §18.31 2. Form: No Separation or Dissolution Contemplated

The parties do not presently contemplate a separation or dissolution of marriage.

### §18.32 3. Form: Purpose of Agreement

The purpose of this agreement is \_\_[e.g., to define the parties’ respective property rights. Specifically, it precludes the creation of any community property, except as it expressly provides]\_\_. The parties intend by this agreement to change the characterization (as community or separate property) or ownership of property they own.

*[Add, if desired, the following to provide that current agreement replaces earlier agreement]*

The parties previously entered into a/an \_\_[specify type of agreement]\_\_ agreement on \_\_[date]\_\_, a copy of which is attached for reference. The parties have acted consistently with that agreement and performed all duties and obligations required by that agreement. The parties now want to enter into a new and different agreement that will, on execution by the parties and their respective counsel, become the parties’ operative agreement, thereby replacing and superseding the earlier agreement dated \_\_[date]\_\_.

*Comment:* To meet the requirements of Fam C §852, the marital agreement must contain language expressly stating that the characterization or ownership of property is being changed. See §18.19. This form contains express language to that effect. The optional paragraph may be used if the marital agreement is intended to replace an earlier agreement of the parties, such as a premarital agreement or prior marital agreement.

### §18.33 4. Form: Disclosures of Property and Financial Obligations

Exhibit \_\_[e.g., A]\_\_ is a list of the property in which Husband has an interest with a value exceeding \_\_[e.g., \$500]\_\_, along with the

**extent and value of each such interest, and of his financial obligations that exceed \_\_[e.g., \$500]\_\_, along with the amount of each such financial obligation.**

**Exhibit \_\_[e.g., B]\_\_ is a list of the property in which Wife has an interest with a value exceeding \_\_[e.g., \$500]\_\_, along with the extent and value of each such interest, and of her financial obligations that exceed \_\_[e.g., \$500]\_\_, along with the amount of each such financial obligation.**

*[Add one or more of the following optional provisions]*

*[Option 1: If values and amounts in exhibits are only approximate]*

**The parties have provided full disclosures of all property and financial obligations in Exhibits \_\_[e.g., A and B]\_\_. The values presented there are only approximate, however, and may be considerably higher or lower than the actual values. They are provided only to indicate values generally and are not intended to be relied on as exact indications.**

*[Option 2: To acknowledge confidential relationship and disclosure duty]*

**The parties acknowledge their understanding that they are subject to a “fiduciary duty” as defined by California Family Code §§721 and 1100, which includes, but is not limited to, the obligation to make full disclosure of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books pertaining to the character and value of those assets and debts, on request. The parties further acknowledge that each of them has conscientiously endeavored to fulfill the duties of disclosure imposed on each of them by the above-referenced Family Code sections with respect to this Agreement.**

*[Option 3: To acknowledge contents of and entry into agreement]*

**The parties acknowledge and agree that they are aware of the contents of this Agreement and have entered into this Agreement freely and voluntarily, without duress, undue influence, fraud, or coercion of any kind.**

*Comment:* In drafting marital agreements, the parties are under a duty of the highest good faith and fair dealing, requiring that neither take any

unfair advantage of the other. Fam C §721(b). Each party must make full disclosure to the other party of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest, and of debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, on request. See Fam C §1100(e). A full and accurate disclosure of property and financial obligations will be a significant step in fulfilling this duty, as discussed in §§18.24 and 18.26. See, *e.g.*, *Marriage of Haines* (1995) 33 CA4th 277, 296 (presumption of undue influence that arises when interspousal transaction advantages one spouse over the other can be overcome by proof that transaction was freely and voluntarily made, with knowledge of all relevant facts and complete understanding of effect of transaction). The first optional addition is provided because in many cases it is impractical to establish a precise value for assets, *e.g.*, business interests. The second and third optional additions are provided, respectively, to clarify that the parties understand the scope of their disclosure responsibilities, and to acknowledge voluntary entry into the agreement.

### C. Substantive Provisions

#### §18.34 1. Form: All Property to Be Separate Property

**All property of either party will be entirely his or her separate property** \_\_\_\_, *except as provided in paragraph(s) number(s)* \_\_\_\_. **The parties acknowledge that, as a result of this agreement, certain assets and interests that would otherwise have been the parties' community property, belonging equally to each of them, will be one party's separate property. These include, but are not limited to,** \_\_\_\_, *e.g., earnings resulting from the efforts of either party during marriage and before separation; assets acquired with such earnings; increased values in separate property resulting from the application of such earnings, or from the efforts of either party, during marriage and before separation; certain assets or interests acquired by loan or extension of credit during marriage and before separation; and certain commingled funds* \_\_\_\_,

*Comment:* This provision is the essence of any marital agreement designed to preclude the creation of community property. Use of such a provision was approved by the California Supreme Court in *Marriage of Dawley* (1976) 17 C3d 342. Such a provision can change earnings during

marriage and before separation, and assets acquired with such earnings, from community to separate property and eliminate the following problems:

- The *Moore/Marsden* apportionment of separate and community interests when community funds are used for loan payments or improvements on separate property assets. See *Marriage of Moore* (1980) 28 C3d 366; *Bono v Clark* (2002) 103 CA4th 1409; *Marriage of Allen* (2002) 96 CA4th 497; *Marriage of Wolfe* (2001) 91 CA4th 962; *Marriage of Marsden* (1982) 130 CA3d 426; Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §5.25 (Cal CEB).
- The expensive *Pereira/Van Camp* analysis that an accountant would otherwise have to perform to determine whether, and to what extent, community efforts have increased the value of separate property. See *Pereira v Pereira* (1909) 156 C 1; *Van Camp v Van Camp* (1921) 53 CA 17; Practice Under Fam Code §5.16.
- The creation of community property when funds are borrowed, even for separate property purposes, and the lender is deemed to have been relying for payment on community property. See *Gudelj v Gudelj* (1953) 41 C2d 202; *Marriage of Grinius* (1985) 166 CA3d 1179; Practice Under Fam Code §5.18.

If there are to be any exceptions to the preclusion of community property, they should be set out in separate provisions. The above provision should include a cross-reference to those provisions. See, *e.g.*, the forms in §§18.36 and 18.37.

## **§18.35      2. Form: Waivers of Joint and Survivor Annuities and Survivor Benefits**

**Each party understands that he or she may become entitled, under federal law or the terms of the other's retirement plan, to receive a joint and survivor annuity or survivor benefits under that plan on the other's death. Each party hereby waives all of his or her rights to such benefits; consents to the designation by the other party of any beneficiaries and to any subsequent change of beneficiaries without the waiving party's further waiver or consent; acknowledges his or her awareness that this waiver may result in his or her loss of joint and survivor annuity or survivor benefits; and agrees to execute before a plan representative or notary public all necessary waivers and consents requested by the other party within the time periods specified by law for these waivers to be effective.**

*Comment:* Any waiver of the rights of a nonparticipant spouse to receive a joint and survivor annuity or survivor benefits under a private retirement plan following the participant spouse's death will be effective only if certain requirements, including the execution of specified forms available from the plan administrator, are met. Thus, the party waiving such rights must be sure to execute the appropriate retirement plan forms, even if the provision in this section is included in a marital agreement. For the requirements for plans subject to ERISA, see IRC §417(a)(1)–(2), (6); 29 USC §1055(c)(1)–(2), (7).

### §18.36 3. Form: Joint Accounts and Other Community Property

**The parties will maintain at least one joint account in both their names, from which joint living expenses will be paid. “Joint living expenses”** \_\_[e.g., include, but are not limited to, food at home, household supplies, utilities, telephone, laundry and cleaning, joint entertainment, and joint gifts to third parties]\_\_\_. **The parties will contribute to such accounts the amounts needed for their joint expenses. Contributions will be** \_\_[equal/in proportion to the parties' respective gross incomes]\_\_\_. \_\_[The parties will fully disclose their incomes to each other to carry out the apportionment of contributions to joint expenses]\_\_.

**Despite any other provision of this agreement, the following will be the parties' community property:**

**(a) All amounts deposited into the joint accounts, including any increases in those amounts; and**

**(b) Any property acquired with amounts withdrawn from the joint accounts, including, but not limited to, any income produced by the property, increases in its value, and proceeds from its sale.**

### §18.37 4. Form: Gifts Made to Parties Jointly

**Despite any other provision of this agreement, gifts made to the parties jointly will be their community property.**

### §18.38 5. Form: Gifts and Other Transfers Between Parties

**Any gift between the parties of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or**

**principally by the party to whom the gift is made and that has a value, at the time of the gift, of less than \_\_[dollar amount]\_\_ will be valid without the requirement of a writing and will be the separate property of the recipient. Other gifts and transfers between the parties will be valid only if accompanied by an express declaration in writing that is made, joined in, consented to, or accepted by the party whose interest in the property is adversely affected.**

*Comment:* Under California law, spouses may transmute community property to separate property of either spouse, separate property of either spouse to community property, or separate property of one spouse to separate property of the other. Fam C §850. To be valid, such a transmutation generally requires a writing. Fam C §852. The writing requirement does not apply, however, to a gift between spouses of clothing, wearing apparel, jewelry, or another tangible article of a personal nature that is used solely or principally by the recipient and that is not substantial in value taking into account the circumstances of the marriage. Fam C §852(c). See §18.21.

Including a provision like this in the marital agreement may clarify the law for the parties. Further, substituting a maximum dollar amount for the requirement that an item not be substantial in value, taking into account the circumstances of the marriage, may simplify understanding and implementation of the provision. Selecting a relatively low dollar amount may serve to avoid litigation over whether a gift was intended by requiring a writing in most instances.

### **§18.39      6. Form: Transmutation of One Spouse's Separate Property to Community Property**

**The assets listed in Exhibit \_\_[e.g., C]\_\_ are separate property assets of \_\_[Husband/Wife]\_\_ that are hereby transmuted by this agreement to community property assets of the parties.**

**\_\_[Wife/Husband]\_\_ hereby \_\_[waives/reserves]\_\_ the right to claim reimbursement under Fam C §2640(b) if a proceeding is ever brought by either party to terminate their marriage or to seek legal separation.**

*Comment:* A provision transmuting one spouse's separate property to community property should specify whether the spouse whose property is to be transmuted is waiving or reserving a right to claim reimbursement under Fam C §2640(b). This form includes such a provision.



**§18.40      7. Form: Transmutation of Community Property to One Spouse's Separate Property**

The assets listed in Exhibit \_\_[e.g., D]\_\_ are community property assets of the parties that are hereby transmuted by this agreement to separate property assets of \_\_[Husband/Wife]\_\_.

**§18.41      8. Form: Transmutation of One Spouse's Separate Property to Separate Property of Other Spouse**

The assets listed in Exhibit \_\_[e.g., E]\_\_ are separate property assets of \_\_[Husband/Wife]\_\_ that are hereby transmuted by this agreement to separate property assets of \_\_[Wife/Husband]\_\_. \_\_[Wife/Husband]\_\_ hereby \_\_[waives/reserves]\_\_ the right to claim reimbursement under Fam C §2640(c) if a proceeding is ever brought by either party to terminate their marriage or to seek legal separation.

*Comment:* A provision transmuting one spouse's separate property to the other spouse's separate property should specify whether the spouse whose property is to be transmuted is waiving or reserving a right to claim reimbursement under Fam C §2640(c). This form includes such a provision.

**§18.42      9. Form: Debts**

Each debt existing as of the effective date of this agreement will be the separate debt of the party who incurred it. Each debt incurred on or after the effective date of this agreement, including credit cards, charge accounts, and other loans or extensions of credit, will be the separate debt of the party who incurred it unless the parties acquire the debt in their joint names.

*Comment:* Under Fam C §910, the community estate is normally liable for debts incurred by either spouse, either before or during marriage, regardless of whether one or both spouses are parties to the debt. This provision is designed to ensure that the only debts for which the property of both parties might be liable will be those incurred jointly. If the parties wish to make any exceptions, they should specify them.

For this provision to be enforceable against a creditor probably requires that the creditor be provided notice of the provision at or before the time the debt is incurred. See *Marriage of Dawley* (1976) 17 C3d 342, 357. See also §18.15.

## §18.43 10. Form: Income Tax Returns

**The parties will file joint federal and state income tax returns for tax years for which** \_\_ *[the parties agree to do so/*either party so elects]*]* \_\_ *[If one party elects to file joint returns and the other does not, the second party will pay the first party the additional amount of income tax obligation incurred by the first party as the result of filing separate returns.]* \_\_ **For each tax return to be filed jointly, the proportion of the income tax obligation to be borne by each party will be the amount of income tax obligation that that party would have had if the parties had not filed jointly, divided by the sum of the amounts of income tax obligation that the two parties would have had in that event. Once each party's respective share of the income tax obligation on any joint return is determined, adjustments will be made between the parties, in connection with distribution of any refund or payment of any amount owing and taking into account the parties' respective shares under law of any credits for income taxes withheld and estimated taxes paid, so that each party bears his or her respective share of the income tax obligation. The expense of preparation of the parties' joint federal and state income tax returns will be shared by the parties** \_\_ *[in the same proportions as the total income tax obligation for that year is borne by them under the terms of this provision/equally]* \_\_ **“Income tax obligation” as used in this provision means the total income tax owed before any credits for taxes withheld or estimated taxes paid.**

*Comment:* This provision divides the benefit of filing jointly in accordance with the parties' respective shares of their total income tax obligation had they not filed jointly. Thus, for example, if one party would have paid 70 percent of the sum of the amounts payable by them had they filed individually, that party will receive 70 percent of the benefit gained by the joint filing and will bear 70 percent of the income tax obligation on the joint return.

## D. General Provisions

### §18.44 1. Form: Execution, Acknowledgment, and Delivery of Documents

To accomplish the intent of this agreement, each party will, at the other's request, execute, acknowledge, or deliver any instrument reasonably necessary to carry out the provisions of this agreement.

### §18.45 2. Form: Waiver of Rights on Death of Other Party

\_\_*[Except as otherwise provided in this agreement, each]*\_\_ party hereby waives the right to receive any property or rights whatsoever on the death of the other, unless such right is created or affirmed by the other under a last will and testament or other written document executed after the effective date of this agreement. Each party believes that he or she has received a fair and reasonable disclosure of the property and financial obligations of the other party. Each party's waiver is intended to be an enforceable waiver of that party's rights under Probate Code §§140–147.

The rights waived include, but are not limited to, rights to any of the following:

- (a) Property that would pass from the decedent by intestate succession;
- (b) Property that would pass from the decedent by testamentary disposition;
- (c) A probate homestead;
- (d) The setting aside of exempt property;
- (e) A family allowance;
- (f) The setting aside of an estate;
- (g) An election to take community or quasi-community property against the decedent's will;
- (h) The statutory share of an omitted spouse;

**(i) An appointment as executor or administrator of the decedent's estate, except as the nominee of a third party legally entitled to make such a nomination;**

**(j) Property that would pass from the decedent by nonprobate transfer, such as the survivorship interest under a joint tenancy, a Totten trust account, or a payable-on-death account; and**

**(k) Proceeds as beneficiary of any type of insurance policy.**

*Comment:* This provision assumes that the parties desire the broadest possible waiver of rights that otherwise might accrue to the surviving party on the death of the other, except by a writing of the decedent executed after the effective date of the agreement. If that is not their intent, the provision should be modified accordingly. Regardless of what provision, if any, is used, no waiver such as this can take the place of a careful review and possible revision by the client of his or her estate plan, particularly with respect to any previously executed wills and beneficiary designations.

### **§18.46      3. Form: Entire Agreement**

**This agreement contains the entire agreement of the parties on these matters, superseding any previous agreement between them.**

### **§18.47      4. Form: Binding Effect of Agreement**

**This agreement will inure to the benefit of, and be binding on, the parties' respective devisees, heirs, personal representatives, assigns, and successors in interest.**

### **§18.48      5. Form: Amendment or Revocation by Subsequent Agreement**

**This agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or revocation will be enforceable without consideration.**

### **§18.49      6. Form: Governing Law**

**This agreement will be governed by, and interpreted in accordance with, California law.**

**§18.50      7. Form: Severability in Event of Partial Invalidity**

If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

**§18.50A      8. Form: Interpreting Agreement**

This agreement is the result of the joint efforts of both parties and their attorneys. The agreement and each of its provisions will be interpreted fairly, simply, and not strictly for or against either party.

*Comment:* If ambiguity or uncertainty in the agreement cannot otherwise be reconciled, a provision must be construed strictly against the party whose agent prepared the instrument or the ambiguous portion. CC §1654; *Marriage of Williams* (1972) 29 CA3d 368, 378. This provision expresses the parties' intent to prohibit application of that rule in interpretation by the court of their marital agreement and thereby tends, when applied, to aid the party whose attorney drafted the agreement.

**§18.51      9. Form: Future Attorney Fees and Costs Related to Agreement**

If either party reasonably retains counsel for purposes related to this agreement, including, but not limited to, enforcing or preventing the breach of any provision, seeking damages for any alleged breach, and seeking a declaration of his or her rights or obligations under the agreement, and the matter is settled by a judicial determination, including arbitration, the prevailing party will be awarded reasonable attorney fees and costs.

**§18.52      10. Form: Effective Date of Agreement**

The effective date of this agreement will be the date of its execution by the second of the parties to do so.

**11. Legal Representation****§18.53      a. Form: Each Party Independently Represented**

Each party has been represented in the negotiations and in preparation of this agreement by an independent attorney of his or her own

**choosing: Husband by \_\_[name]\_\_ and Wife by \_\_[name]\_\_. Each party has carefully read this agreement in its entirety, and his or her attorney has fully explained its contents and legal effect.**

*Comment:* When a party has consulted with an attorney but has not actually been represented by him or her, the provision should be modified accordingly.

**§18.54      b. Form: One Party Unrepresented by Counsel**

**This agreement has been prepared by \_\_[name]\_\_, attorney for \_\_[Husband/Wife]\_\_. \_\_[Wife/Husband]\_\_ has not been represented in the negotiation or preparation of this agreement. \_\_[Wife/Husband]\_\_ acknowledges that \_\_[Husband's/Wife's]\_\_ attorney has informed \_\_[her/him]\_\_ that the attorney represents only \_\_[Husband/Wife]\_\_, that \_\_[Wife/Husband]\_\_ has the right to obtain independent legal advice, and that \_\_[Wife/Husband]\_\_ should do so, but that \_\_[she/he]\_\_ has voluntarily declined to obtain such advice. \_\_[Wife/Husband]\_\_ further acknowledges that \_\_[she/he]\_\_ has carefully read this agreement in its entirety and voluntarily chooses to execute it.**

*Comment:* Dealing with an unrepresented party presents special dangers. The attorney should give the unrepresented party the advice set forth in this provision, preferably in writing.

**§18.55      12. Form: Signatures and Dates**

**The foregoing is agreed to by:**

Date: \_\_\_\_\_  
\_\_\_\_\_  
**Husband**

Date: \_\_\_\_\_  
\_\_\_\_\_  
**Wife**

**Approved as conforming to the agreement of the parties:**

Date: \_\_\_\_\_  
\_\_\_\_\_  
**Attorney for Husband**

Date: \_\_\_\_\_

\_\_\_\_\_  
Attorney for Wife

**§18.56 IX. FORM: COMPLETE SAMPLE AGREEMENT**  
**MARITAL AGREEMENT**

**1. IDENTIFICATION OF PARTIES.** This agreement is made between ALVIN MOSS, hereafter referred to as “Husband,” and STEPHANIE BUSKIRK, hereafter referred to as “Wife.”

**2. ACKNOWLEDGMENT OF CONFIDENTIAL RELATIONSHIP.** The parties acknowledge their understanding that they are subject to a “fiduciary duty” as defined by California Family Code §§721 and 1100, which includes, but is not limited to, the obligation to make full disclosure of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books pertaining to the character and value of those assets and debts, on request. The parties further acknowledge that each of them has conscientiously endeavored to fulfill the duties of disclosure imposed on each of them by the above-referenced Family Code sections with respect to this Agreement.

**3. VOLUNTARY AND INFORMED CONSENT IN ENTERING INTO AGREEMENT.** The parties acknowledge and agree that they are aware of the contents of this Agreement and have entered into this Agreement freely and voluntarily, without duress, undue influence, fraud, or coercion of any kind.

**4. NO SEPARATION OR DISSOLUTION CONTEMPLATED.** The parties do not presently contemplate a separation or dissolution of marriage.

**5. PURPOSE OF AGREEMENT.** The purpose of this agreement is to define the parties’ respective property rights. Specifically, it precludes the creation of any community property, except as it expressly provides. The parties intend by this agreement to change the characterization (as community or separate property) or ownership of property they own.

**6. DISCLOSURES OF PROPERTY AND FINANCIAL OBLIGATIONS.** Exhibit A is a list of the property in which Husband has an interest

with a value exceeding \$500, along with the extent and value of each such interest, and of his financial obligations that exceed \$500, along with the amount of each such financial obligation.

Exhibit B is a list of the property in which Wife has an interest with a value exceeding \$500, along with the extent and value of each such interest, and of her financial obligations that exceed \$500, along with the amount of each such financial obligation.

Each party has provided a full disclosure of property and financial obligations in Exhibits A and B. The values presented there, however, are only approximate and may be considerably higher or lower than the actual values. They are provided only to indicate values generally and are not intended to be relied on as exact indications.

**7. ALL PROPERTY TO BE SEPARATE PROPERTY.** All property of either party will be entirely his or her separate property, except as provided in paragraphs 9 and 10. The parties acknowledge that, as a result of this agreement, certain assets and interests that would otherwise have been the parties' community property, belonging equally to each of them, will be one party's separate property. These include, but are not limited to, earnings resulting from the efforts of either party during marriage and before separation; assets acquired with such earnings; increased values in separate property resulting from the application of such earnings, or from the efforts of either party, during marriage and before separation; certain assets or interests acquired by loan or extension of credit during marriage and before separation; and certain commingled funds.

**8. WAIVERS OF JOINT AND SURVIVOR ANNUITIES AND DEATH BENEFITS.** Each party understands that he or she may become entitled, under federal law or the terms of the other's retirement plan, to receive a joint and survivor annuity or other death benefits under that plan on the other's death. Each party hereby waives all of his or her rights to such benefits; consents to the designation by the other party of any beneficiaries and to any subsequent change of beneficiaries without the waiving party's further waiver or consent; acknowledges his or her awareness that this waiver may result in his or her loss of joint and survivor annuity or other death benefits; and agrees to execute before a plan representative or notary public all necessary waivers and consents requested by the other party within the time periods specified by law for these waivers to be effective.



**9. JOINT ACCOUNTS AND OTHER COMMUNITY PROPERTY.** The parties will maintain at least one joint account in both their names, from which joint living expenses will be paid. “Joint living expenses” include, but are not limited to, food at home, household supplies, utilities, telephone, laundry and cleaning, joint entertainment, and joint gifts to third parties. The parties will contribute to such accounts the amounts needed for their joint expenses. Contributions will be equal.

Despite any other provision of this agreement, the following will be the parties’ community property:

(a) All amounts deposited into the joint accounts, including any increases in those amounts; and

(b) Any property acquired with amounts withdrawn from the joint accounts, including, but not limited to, any income produced by the property, increases in its value, and proceeds from its sale.

**10. GIFTS MADE TO PARTIES JOINTLY.** Despite any other provision of this agreement, gifts made to the parties jointly will be their community property.

**11. GIFTS AND OTHER TRANSFERS BETWEEN PARTIES.** Any gift between the parties of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the party to whom the gift is made and that has a value, at the time of the gift, of less than \$1000 will be valid without the requirement of a writing and will be the separate property of the recipient. Other gifts and transfers between the parties will be valid only if accompanied by an express declaration in writing that is made, joined in, consented to, or accepted by the party whose interest in the property is adversely affected.

**12. DEBTS.** Each debt existing as of the effective date of this agreement will be the separate debt of the party who incurred it. Each debt incurred on or after the effective date of this agreement, including credit cards, charge accounts, and other loans or extensions of credit, will be the separate debt of the party who incurred it unless the parties acquire the debt in their joint names.

**13. INCOME TAX RETURNS.** The parties will file joint federal and state income tax returns for tax years for which the parties agree to

do so. If one party elects to file joint returns and the other does not, the second party will pay the first party the additional amount of income tax obligation incurred by the first party as the result of filing separate returns. For each tax return to be filed jointly, the proportion of the income tax obligation to be borne by each party will be the amount of income tax obligation that that party would have had if the parties had not filed jointly, divided by the sum of the amounts of income tax obligation that the two parties would have had in that event. Once each party's respective share of the income tax obligation on any joint return is determined, adjustments will be made between the parties, in connection with distribution of any refund or payment of any amount owing and taking into account the parties' respective shares under law of any credits for income taxes withheld and estimated taxes paid, so that each party bears his or her respective share of the income tax obligation. The expense of preparation of the parties' joint federal and state income tax returns will be shared by the parties equally. "Income tax obligation" as used in this provision means the total income tax owed before any credits for taxes withheld or estimated taxes paid.

**14. EXECUTION, ACKNOWLEDGMENT, AND DELIVERY OF DOCUMENTS.** To accomplish the intent of this agreement, each party will, at the other's request, execute, acknowledge, or deliver any instrument reasonably necessary to carry out the provisions of this agreement.

**15. WAIVER OF RIGHTS ON DEATH OF OTHER PARTY.** Each party hereby waives the right to receive any property or rights whatsoever on the death of the other, unless that right is created or affirmed by the other under a will or other written document executed after the effective date of this agreement. Each party believes that he or she has received a fair and reasonable disclosure of the property and financial obligations of the other party. Each party's waiver is intended to be an enforceable waiver of that party's rights under Probate Code §§140–147.

The rights waived include, but are not limited to, rights to any of the following:

(a) Property that would pass from the decedent by intestate succession;

(b) Property that would pass from the decedent by testamentary disposition;

- (c) A probate homestead;
- (d) The setting aside of exempt property;
- (e) A family allowance;
- (f) The setting aside of an estate;
- (g) An election to take community or quasi-community property against the decedent's will;
- (h) The statutory share of an omitted spouse;
- (i) An appointment as executor or administrator of the decedent's estate, except as the nominee of a third party legally entitled to make such a nomination;
- (j) Property that would pass from the decedent by nonprobate transfer, such as the survivorship interest under a joint tenancy, a Totten trust account, or a payable-on-death account; and
- (k) Proceeds as beneficiary of any type of insurance policy.

**16. ENTIRE AGREEMENT.** This agreement contains the entire agreement of the parties on these matters, superseding any previous agreement between them.

**17. BINDING EFFECT OF AGREEMENT.** This agreement will inure to the benefit of, and be binding on, the parties' respective devisees, heirs, personal representatives, assigns, and successors in interest.

**18. AMENDMENT OR REVOCATION BY SUBSEQUENT AGREEMENT.** This agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or revocation will be enforceable without consideration.

**19. GOVERNING LAW.** This agreement will be governed by, and interpreted in accordance with, California law.

**20. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY.** If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

**21. INTERPRETING AGREEMENT.** This agreement is the result of the joint efforts of both parties and their attorneys. The agreement and each of its provisions will be interpreted fairly, simply, and not strictly for or against either party.

**22. FUTURE ATTORNEY FEES AND COSTS RELATED TO AGREEMENT.** If either party reasonably retains counsel for purposes related to this agreement, including, but not limited to, enforcing or preventing the breach of any provision, seeking damages for any alleged breach, and seeking a declaration of his or her rights or obligations under the agreement, and the matter is settled by a judicial determination, including arbitration, the prevailing party will be awarded reasonable attorney fees and costs.

**23. EFFECTIVE DATE OF AGREEMENT.** The effective date of this agreement will be the date of its execution by the second of the parties to do so.

**24. LEGAL REPRESENTATION.** Each party has been represented in the negotiations and in preparation of this agreement by an independent attorney of his or her own choosing: Husband by Walter Hargrove and Wife by Wilma Jenkins. Each party has carefully read this agreement in its entirety, and his or her attorney has fully explained its contents and legal effect.

The foregoing is agreed to by:

Date: \_\_\_\_\_  
\_\_\_\_\_ Husband

Date: \_\_\_\_\_  
\_\_\_\_\_ Wife

Approved as conforming to the agreement of the parties:

Date: \_\_\_\_\_  
\_\_\_\_\_ Attorney for Husband

Date: \_\_\_\_\_  
\_\_\_\_\_ Attorney for Wife