What's a "Marital Agreement"?

Subject to the general rules governing the actions of persons standing in a "confidential relationship," spouses in an ongoing marriage may enter into any transaction or agreement with each other as they might if unmarried. [Ca Fam § 721(a) & (b)]

Again, so long as the subject is "lawful," spouses may make enforceable marital agreements for a variety of reasons. Often, the objectives are similar to those of parties to a premarital agreement.

A common purpose of marital agreements is to modify or prevent the application of California community property law to all or some portion of the spouses' property or income (Ca Fam § 1500) or to change the character of their property from community property to separate property or vice versa ("transmutation" agreements, Ca Fam § 850 et seq.)

A related purpose of marital agreements is to preserve the estate of a spouse intact for his or her heirs and free from succession claims of the surviving spouse. [Ca Probate §§ 140-147]

Limitations On Marital Agreements

Public Policy Restraints: Marital agreements historically have been subject to several public policy restraints: i.e., the agreement is unenforceable to the extent it "promotes dissolution," waives or limits child or spousal support, impinges on the court's exercise of jurisdiction to adjudicate child support or child custody, "alters legal relations" incident to marriage, or provides for "fault"-based penalties at marriage dissolution. [Ca Fam § 1620]

Note - Spousal Support Waivers:

It is an open question whether a provision in a marital agreement may later be held to be invalid on grounds that such provision violates California public policy. [See Marriage of Bonds (2000) 24 Cal.4th 1, 29, 99 Cal.Rptr.2d 252, 271 (comparing policy interests applicable to marital settlement agreements vs. premarital agreements)--"multiple differences in the statutes regulating each type of agreement suggest that the Legislature contemplated different standards for each type of agreement"]

General Contract Law Requirements: Subject to certain exceptions and special considerations, general principles of contract law apply to make any marital contract voidable for fraud, duress, undue influence, etc., or because otherwise lacking the minimum requirements for a valid contract.

Writing Requirement: No single statute mandates that valid marital agreements be in writing. As a practical matter, however, a writing will be required for most marital agreements because of the interplay between several discrete Code sections. [See, e.g., Ca Fam § 852(a)--writing required for post-1984 property transmutations; Ca Probate § 142(a)--writing required for waivers of surviving spouse rights under Ca Probate § 141(a); and Ca Civil § 1624 (general statute of frauds)]

Contract Consideration:

The spouses' mutual consent itself amounts to sufficient consideration for a marital agreement. [Ca Fam § 3580].

"Confidentiality" Limitations:

Pursuant to Ca Fam § 721(b), in interspousal transations, a "confidential relationship" (i.e., the reposing of trust and confidence in the integrity and fidelity of another) is presumed to exist between husband and wife by reason of the marital relationship. It seems implicit from Ca Fam §§ 1100(e) and 2102 that the presumptive continuing confidential relationship cannot be rebutted (e.g., by proof the parties intended to deal at arm's length or otherwise allegedly did not repose trust and confidence in each other).

For so long as the intraspousal confidential relationship continues, it imposes a "duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." [Ca Fam § 721(b)]

By virtue of § 721(b), spouses stand in a fiduciary relationship, subject to the same rights and duties of nonmarital business partners as provided in Ca Corp §§ 16403, 16404 and 16503 (including, but not limited to, access and inspection rights, full disclosure obligations, accountability obligations, etc.). In particular, they owe each other fiduciary duties of disclosure regarding all material facts and information regarding the existence, characterization and valuation of assets and debts in which the community has or may have an interest; and, upon request, must provide equal access to all information pertaining thereto. [Ca Fam §§ 721(b), 1100(e)]

The Family Code expressly delineates the duties arising out of the marital "confidential relationship". These intraspousal duties apply to contracts made from and after the marriage ceremony (i.e., even on the date of marriage). In exercising management and control of the community assets and liabilities, each spouse "shall act with respect to the other spouse" in accordance with the general fiduciary relationship standards specified in Ca Fam § 721(b) [Ca Fam § 1100(e)]

These duties include, but are not limited to, the following:

Access To Books And Records:

Providing each spouse access at all times to any books kept regarding a community property transaction for purposes of inspection and copying. [Ca Fam § 721(b)(1)]

Truthful Accounting:

Rendering upon request, "true and full information" about all things affecting transactions concerning community property (except that this obligation imposes no independent duty to keep detailed books and records of community property transactions). [Ca Fam § 721(b)(2)]

Sharing Of Benefits And Profits:

Accounting to each other and holding as trustee for the other any "benefit or profit" derived from community property transactions made without the other spouse's consent. [Ca Fam § 721(b)(3)]

Full Disclosure Of Material Facts:

Making full disclosure to each 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 debts for which the community is or may be liable, and providing equal access to all information, records and books pertaining to the value and character of those assets and debts, upon request. [Ca Fam § 1100(e)]

Pursuant to Ca Fam § 721(b), in interspousal transations, a "confidential relationship" (i.e., the reposing of trust and confidence in the integrity and fidelity of another) is presumed to exist between husband and wife by reason of the marital relationship.

Presumption Of Undue Influence: To the extent a marital agreement made during the Ca Fam § 721(b) confidential relationship gives one spouse an advantage over the other (i.e., an improved position, a favorable opportunity, or other gain, benefit or profit), it is presumptively a product of undue influence and inadequate consideration.

However, the undue influence presumption is rebuttable. Once the presumption arises (from proof of confidential relationship and evidence of advantage to other spouse), the burden shifts to the spouse who obtained an advantage to prove no undue influence was exercised (i.e., that contestant spouse voluntarily and knowingly consented). The presumption of undue influence may be rebutted by proof that the aggrieved spouse

freely and voluntarily entered into the transaction, with full knowledge of all the facts and with a complete understanding of the effect of the transaction. Whether the presumption has been overcome is a question for the trier of fact; its decision will be upheld on appeal so long as supported by substantial evidence.

The following are some factors the court would likely consider in determining whether the presumption of undue influence has been rebutted in a particular case:

Full Disclosure Of All Relevant Facts:

Evidence that the spouse who secured the advantage fully and fairly disclosed all of the relevant facts concerning the nature and effect of the transaction is sufficient rebuttal proof. "Full disclosure" for this purpose refers to both the value and the character of property subject to the agreement; and to the specific rights the aggrieved spouse is purportedly surrendering under the agreement. [Ca Fam §§ 721(b)(1)-(3), 1100(e)]

Opportunity For Independent Legal Advice:

Evidence that the spouse who secured the advantage provided the aggrieved spouse with the opportunity to obtain independent legal advice as to his or her rights in the premises of the transaction may be persuasive in overcoming the undue influence presumption. However, while probative, proof that the aggrieved spouse had separate legal counsel, or the opportunity to obtain such advice, is not essential to a rebuttal of the undue influence presumption.

Other Evidence Of Voluntary And Knowing Execution:

Any other proof that the contestant spouse voluntarily and knowingly negotiated the transaction, without instigation or pressure by the other (or at the other's direction) is likewise a sufficient rebuttal.

Statute Of Limitations Not A Bar:

Marital agreements procured through undue influence remain voidable for the duration of the confidential relationship.

Transmutation Agreements (Marital Contracts Changing Status Of Property)

Spouses may agree during marriage to change (or "transmute") the ownership status of any or all of their property (presently owned or thereafter acquired)--i.e., they may convert separate into community property, community into separate property, or separate property of one into separate property of the other--with or without

consideration. [Ca Fam § 850(a),(b) & (c); see also Ca Fam § 1500--marital property rights prescribed by statute may be altered by premarital or other marital property agreement]

Transmutation Agreements After 1984: Except for personal property items of nominal value, a transmutation of real or personal property on or after January 1, 1985 is valid only if made "in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest is adversely affected." [Ca Fam § 852(a) & (c)]

However, compliance with the § 852 express declaration formalities does not alone establish that a valid transmutation has occurred: The transaction is also subject to the rules governing fiduciary relationships and, therefore, when characterization is disputed, the advantaged spouse has the burden of proving the alleged transmutation was not the product of undue influence. Further, a real property transmutation is valid as against third parties without notice thereof only if properly recorded. [Ca Fam § 852(b)]

Transmutation Agreements Before 1985: Transmutations alleged to have occurred before 1985 are not subject to the stringent § 852 formalities. Rather, prior law applies, pursuant to which such transmutation may be proved by oral agreement or even by implication from the spouses' conduct. [Ca Fam § 852(e)]

Effect Of Transmutation Agreement On Obligations To Third Parties

Transmutation agreements are subject to the laws governing "fraudulent transfers"--i.e., the Uniform Fraudulent Transfer Act (Ca Civil § 3439 et seq.). [Ca Fam § 851] The Uniform Fraudulent Transfer Act gives creditors the right to avoid property transfers to the extent necessary to satisfy their claims when:

- The transfer was made with fraudulent intent (i.e., with "actual intent to hinder, delay, or defraud" a creditor); or
- The transfer was made without receiving a "reasonably equivalent value in exchange" and the debtor either (1) was engaged in (or about to engage in) a business or transaction "for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or (2) intended to incur (or reasonably believed he or she would incur) debts "beyond his or her ability to pay as they become due"; or
- The transfer was made without receiving a "reasonably equivalent value in exchange" and the debtor was insolvent at the time of the

transfer or became insolvent as a result thereof (Ca Civil §§ 3439.04, 3439.05, 3439.07, 3439.08). [See Ca Civil § 3439 et seq.]

Limitations On Waivers Of Surviving Spouse Rights In Deceased Spouse's Estate

As of January 1, 1985, any marital contract provision affecting rights of the surviving spouse on the death of the other spouse, as specified in Ca Probate § 141(a), is invalid unless it satisfies Ca Probate §§ 140-146. [Ca Probate § 147(a)]

Pursuant to CA Probate § 141(a), "surviving spouse" rights to any of the following may be waived (in whole or in part) by marital contract:

- Intestate succession: Property that would pass from the decedent by intestate succession. [Prob.C § 141(a)(1)]
- Prior testamentary disposition: Property that would pass from the decedent by testamentary disposition in a will executed before the waiver. [Ca Probate § 141(a)(2)]
- Probate homestead: The right to a probate homestead (Ca Probate § 6520 et seq.). [Ca Probate § 141(a)(3)]
- Exempt property set-aside: The right to have exempt property set aside (Ca Probate § 6510). [Ca Probate § 141(a)(4)]
- Family allowance: The right to a probate family allowance (Ca Probate § 6540 et seq.). [Ca Probate § 141(a)(5)]
- "Small estate set-aside": The right to have an estate set aside under Ca Probate § 6600 et seq. ("small estate set-aside to surviving spouse and/or minor children"). [Ca Probate § 141(a)(6)]
- Election to take against will: The right to elect to take community or quasi-community property against the decedent's will. [Ca Probate § 141(a)(7)]
- "Omitted spouse" rights: The right to take the statutory share of an omitted ("pretermitted") spouse (Ca Probate § 6560). [Ca Probate § 141(a)(8)]
- Estate representative appointment: The right to be appointed as personal representative of the deceased spouse's estate (Ca Probate §§ 8420, 8461). [Ca Probate § 141(a)(9)]
- Interest in property passing by nonprobate transfer: An interest in property that is the subject of a nonprobate transfer on death under Ca Probate § 5000 et seq. [Ca Probate § 141(a)(10)]

Nothing in Ca Probate §§ 140-147 affects or limits the waiver or manner of waiver of rights other than those referred to above, including but not limited to the right to property

that would pass from the decedent to the surviving spouse by nonprobate transfer (i.e., joint tenancy assets, Totten Trust accounts, or payable on death accounts). [Ca Probate § 141(b)]

Formalities In Creating The Agreement

The § 141(a) waivers (above) are effective only if in writing and signed by the surviving spouse (the spouse against whom the waiver operates). [Ca Probate § 142(a)] In addition, validity of the waiver requires compliance with normal contract rules, e.g., contractual capacity and valid consent; and its enforcement against the surviving spouse is subject to ordinary contract defenses (unsound mind, duress, fraud, undue influence, etc.). [Ca Probate § 142(c)]

Note: A minor intending to marry has the capacity to make a valid § 141(a) waiver; but the waiver takes effect only upon the marriage. [Ca Probate § 142(c)(2)]

Enforcement Of The Waivers By The Court

Depending upon the underlying circumstances, a waiver subject to Ca Probate §§ 140-147 is enforceable either "as of right" or in the court's discretion.

Enforcement As Of Right: A valid waiver under Ca Probate § 142 is enforceable as a matter of right unless the surviving spouse proves either of the following [Ca Probate § 143]:

- Inadequate disclosures: A "fair and reasonable disclosure" of the deceased spouse's property or financial obligations was not provided to the surviving spouse prior to signing of the waiver . . . unless such "fair and reasonable" disclosure was itself waived by the surviving spouse after advice by independent legal counsel. [Ca Probate § 143(a)(1)] OR
- Absence of independent counsel: The surviving spouse was not represented by independent legal counsel when he or she signed the waiver. [Ca Probate § 143(a)(2)]

Discretionary Enforcement:

Even if the surviving spouse waiver is not enforceable "as of right" (above), it may be enforceable in the court's discretion. [Ca Probate § 144] Discretionary enforcement requires a finding of either of the following (Ca Probate § 144):

- "Fair and reasonable": At the time it was signed, the waiver made a "fair and reasonable" disposition of the rights of the surviving spouse. [Ca Probate § 144(a)(1)] OR
- Knowing relinquishment of rights: The surviving spouse had, or reasonably should have had, an adequate knowledge of the deceased spouse's property and financial obligations . . . and the deceased spouse complied with the "confidential relationship" standard of care under Ca Fam § 721(b). [Ca Probate § 144(a)(2)]

Notwithstanding findings under § 144(a)(1) or (a)(2), the court has discretion to refuse enforcement on "unconscionability" grounds. [Ca Probate § 144(b)] Specifically, if after considering all "relevant facts and circumstances," the court finds enforcement of the waiver pursuant to Ca Probate § 144(a) would be "unconscionable" under the circumstances existing at the time enforcement is sought, it may (i) refuse enforcement, (ii) enforce the remainder of the waiver without the unconscionable provisions, or (iii) limit application of the unconscionable provisions to avoid an unconscionable result. [Ca Probate § 144(b)]

Alteration, Amendment, Or Revocation Of The Agreement

Waivers governed by Ca Probate §§ 140-146 may only be "altered, amended, or revoked" by a subsequent written agreement signed by each spouse that complies with Ca Probate § 142 and that is enforceable under Ca Probate §§ 143 or 144(a)(1). [See Ca Probate § 146]