

What's A Marital Settlement Agreement (MSA)?

Through a "marital settlement" agreement ("MSA,") sometimes referred to as "marital termination" agreement, spouses (or registered domestic partners) seeking a legal separation, dissolution or judgment of nullity attempt to resolve their contested disputes and claims. A comprehensive marital settlement agreement usually provides for all of the following:

- Characterization of property interests and characterization and division of the community estate (assets and debts);
- Adjustment of reimbursement claims and income tax issues;
- Payment of child support, spousal support and attorney fees and costs;
- Child custody and visitation; and
- Certain waivers and indemnification agreements between the spouses.

Separate Attorneys Advisable

Independent legal representation for the respective spouses is not a formal "requirement." But, to narrow the possible grounds to void the agreement, each spouse should have the benefit of independent legal advice during the negotiation, drafting and execution stages. Courts are likely to carefully scrutinize marital settlement agreements affecting substantial rights and obligations when one party represents themselves. (see Ca Fam § 2122; see Ch. 16).

At the very least, an unrepresented spouse should be encouraged to seek independent legal advice before signing; and, if he or she declines such advice, should be asked to sign an acknowledgment verifying he or she voluntarily and knowingly rejected that advice and understands the drafting attorney only represented the other spouse.

Mandatory Declarations Of Disclosure

Exchange of statutorily-required "*preliminary*" and "*final*" "declarations of disclosure" (Ca Fam § 2100 et seq.) is an essential step toward the consummation of an effective MSA and entry of judgment thereon.

An exchange of prescribed "*preliminary*" disclosure declarations is mandatory and not waivable (Ca Fam § 2104).

And, unless excused by the court for good cause, "*final*" declarations of disclosure must be exchanged before or at the time the parties enter into an agreement resolving property or support issues (Ca Fam § 2105(a)). While, subject to statutory conditions, the parties may stipulate to a waiver of the final declarations of disclosure, the waiver

does not limit their underlying fiduciary disclosure obligations--i.e., it simply amounts to a representation that those disclosures have been made (see Ca Fam § 2105(d)).

Typical Contents Of A Marital Settlement Agreement

Since the facts and circumstances of each case vary, where the issues involved include, custody, visitation, support, property division, debt division, or other similar issues, a marital settlement agreement should be carefully drafted to meet the needs of the particular parties involved.

Here are some of the typical contents of an MSA:

1. Identity of parties and recital of facts (including statistical facts of the marriage).
2. Identity of property, distribution of community estate, and confirmation of separate property.
3. Provision for payment of debts and adjustment of reimbursement claims.
4. Custody of children and visitation rights.
5. Child support, including provision for medical, dental, and special educational or other needs (if any); and, if applicable, including agreement as to the support of adult children
6. Spousal support (including, as applicable, provisions for life insurance, survivor annuities, and the like); or waiver of spousal support.
7. Attorneys' and experts' fees and costs.
8. Tax provisions
9. Effect of reconciliation.
10. Judicial action contemplated.
11. Warranties.
12. After-discovered property.
13. Waiver of rights, including rights in deceased spouse's estate.
14. Modification, revocation or termination.
15. Costs of enforcement.
16. Execution of related documents.
17. Effective date.
18. Acknowledgments (e.g., of independent legal advice or that independent representation was voluntarily and knowingly declined).
19. Choice of law.
20. "Severability" clause.

21. Execution by parties.
22. Execution by counsel.

Limitations On Validity Of A Marital Settlement Agreement

Marital settlement agreements "occupy a favored position" in California law. Generally, therefore, an MSA that is "not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court." However there are some limitations which must be kept in mind when drafting an MSA.

Child Support: Marital settlement agreements cannot abridge the parents' mutual statutory child support obligation or impinge on the court's jurisdiction to award child support.

Child Custody: Marital settlement agreements cannot limit a court's exercise of custody jurisdiction over the minor children of the marriage.

Religious Upbringing: To the extent a marital settlement agreement purports to prescribe the religious upbringing of the parties' minor children, it is probably unenforceable. [Marriage of Weiss (1996) 42 Cal.App.4th 106, 114-115, 118, 49 Cal.Rptr.2d 339, 344-345, 347]

Damages: A marital settlement agreement is unenforceable as violating the public policy underlying California's no-fault dissolution laws to the extent it requires one spouse to pay damages to the other. [See Marriage of Mehren & Dargan (2004) 118 Cal.App.4th 1167, 1171-1172, 13 Cal.Rptr.3d 522, 524-525; Diosdado v. Diosdado (2002) 97 Cal.App.4th 470, 474, 118 Cal.Rptr.2d 494, 496-497]

Law Prohibiting Promotion Of Dissolution Or Altering Legal Relations Don't Apply: Once the marriage has truly broken down and is beyond redemption from a social standpoint, the limitations against contracts "promoting dissolution" and/or "altering legal relations" do not apply. Indeed, marital settlement agreements dividing property and otherwise settling the parties' rights and obligations for dissolution purposes are regarded favorably under California law since they advance the strong public policy favoring settlement over litigation.

Spousal Support Waivers: There is no prohibition against a waiver of postdissolution spousal support. If the spouses separate by agreement, neither owes the other a duty of support unless they otherwise agree (Ca Fam § 4302); and any right to support after dissolution exists, if at all, only under the terms of the judgment. Thus, a voluntary,

knowing and intelligent waiver of support in a marital settlement agreement will be enforced according to its terms.

But Note: A MSA provision waiving spousal support after a "lengthy" marriage will probably receive close judicial scrutiny (Marriage of Moore (1980) 113 Cal.App.3d 22, 27, 169 Cal.Rptr. 619, 622); and is subject to set-aside if induced through fraud, duress, mistake or other recognized grounds for relief. [See Marriage of Olsen (1994) 24 Cal.App.4th 1702, 1706-1707, 30 Cal.Rptr.2d 306, 308-309]

Fiduciary Obligations Of The Parties Must Be Respected: The "confidential relationship" between spouses carries attendant fiduciary obligations in intraspousal transactions and in the management and control of the community estate (Ca Fam §§ 721(b), 1100(e)). All "confidential relationship"/fiduciary duties (including broad disclosure obligations) continue postseparation until the community estate is distributed and support and professional fee issues are resolved. [Ca Fam §§ 2102, 1100(e)]

Compliance With General Contract Law: Subject to limited statutory exceptions, marital settlement agreements (like all spousal contracts) must comply with general principles of contract law. The contract law defenses include (among other things) mistake, failure of consideration, unlawfulness of the contract and prejudice to the public interest (Ca Civil § 1689). Other general contract concepts which may be relevant in drafting or enforcing a marital settlement agreement are:

Voluntary And Knowing Consent: Each party's consent must be voluntary and knowledgeable, given free of fraud, undue influence, duress, menace, or mistake. [Ca Civil §§ 1566-1579]

Lawful Objectives: As mentioned above, the major limitations on the "object" of a marital settlement agreement are that it cannot derogate from the statutory child support duty or divest the court of child support or child custody jurisdiction.

Consideration: As a general rule, marital settlement agreements must be supported by sufficient consideration. [Ca Civil §§ 1550, 1605-1615] However, this requirement is usually easily satisfied; it is enough that the parties have given their mutual promises and assent. [Ca Fam § 3580]

Community Property Pension Benefits

Private ("ERISA"), Government, And Church Pension Plans

State court orders dividing community property interests in private ("ERISA") pensions are enforceable against the plan and may require the plan to make payments directly to

a nonemployee former spouse (or other "alternate payee"), provided the order is established as a "Qualified Domestic Relations Order" (a "QDRO").

QDROs are likewise binding on government and church plans. [See 26 USCA § 414(p)(11)]

But Note - Not Applicable To Domestic Partnerships: California law cannot change federal law and thus can have no effect on ERISA. Consequently, notwithstanding Ca Fam § 297.5, registered domestic partners are not eligible for a QDRO in a dissolution community property division (ERISA does not recognize domestic partners as "alternate payees").

The MSA should explicitly require the property division judgment to be reduced to a QDRO and to be promptly submitted to the plan administrator. (But so as not to burden the plan administrator with unrelated matters, it is advisable to reduce the QDRO to a separate order)

The parties should stipulate to a reservation of jurisdiction pending a determination that the state court order qualifies as a QDRO; and the MSA should provide that the parties may obtain a modification of the pension division order in the event the plan administrator determines the order is not a QDRO (thus allowing the parties a "second chance" at obtaining a QDRO).

Additionally, pending entry of a QDRO, counsel for the nonparticipant ("alternate payee") spouse should inquire of the plan administrator whether the IRS has made an attempt to levy on the participant spouse's interest in the plan. An intervening IRS levy to recoup the participant spouse's tax delinquencies will be enforceable against the participant's full interest in the plan--including the nonparticipant spouse's community property interest. [See *In re McIntyre* (9th Cir. 2000) 222 F.3d 655, 660; *United States v. Sawaf* (6th Cir. 1996) 74 F.3d 119, 124-125]

Federal Civil Service Retirement Benefits:

Federal law fully respects community property interests in Federal Civil Service Retirement System ("CSRS") benefits, and divorced spouses of federal employees are eligible for survivor annuities if a court order or court-approved property settlement so provides. [1984 Civil Service Retirement Spouse Equity Act, Pub.L. 98-615]

MSA provisions dividing community property interests in CSRS benefits must clearly distinguish between retirement benefits and death and survivor benefits. Under 5 USCA § 8341(h)(1), a deceased employee's former spouse will receive a survivor annuity "if

and to the extent expressly provided for . . . in terms of any decree of divorce or annulment or any court order or court-approved marital settlement agreement incident to such decree." Applicable regulations additionally require that the court order state either that the former spouse is entitled to a survivor annuity or direct the employee to provide the former spouse with such an annuity; and further make clear that employee retirement benefits do not include survivor annuities. [See 5 CFR §§ 838.1003, 838.1004(c)(2)]

Failure to differentiate between retirement and death benefits in the MSA therefore can result in the nonemployee former spouse losing valuable rights otherwise intended.

State Public (STRS, PERS, JRL, CERL) Pension Plans:

As with private pension and retirement benefits, community property interests in state public employee retirement plans (under the State Teachers' Retirement System Defined Benefit Program or Cash Balance Benefit Program, the Public Employees' Retirement System, the Judges' Retirement Law, the County Employees Retirement Law, or similar public employee benefit plan enactments) must be disposed of in a marriage dissolution or legal separation proceeding in a manner that will ensure each party receives his or her full community property share (Ca Fam § 2610). Generally, upon the nonemployee spouse's agreement, the family court must divide the community interest in the plan into two separate member and nonmember accounts, to be administered separately; and the nonmember's account becomes payable when he or she is eligible to "retire" as defined by the applicable law. [Ca Fam § 2610(a)(3); see Ca Educ § 22650 et seq. & § 27400 et seq. (STRS); Ca Govt § 21290 et seq. (PERS); Ca Govt § 75050 et seq. (JRL); and Ca Govt § 31685 et seq. (CERL, applicable only if adopted by county board of supervisors)]

STRS, PERS, JRL and CERL community property division orders are enforceable against the plan only if made in compliance with the statutes governing the respective plans. Marital settlement agreements providing for division and payment of community property interests in these benefits must therefore follow the statutory requirements. Note carefully that the applicable statutes all provide that any retirement benefit in the particular plan that is not explicitly awarded by the judgment shall be deemed the exclusive property of the member spouse. [Ca Educ §§ 22652(b) & 27402(b) (STRS); Ca Govt § 21290(b) (PERS); Ca Govt § 75050(b) (JRL); Ca Govt § 31685(b) (CERL)]

Military Pensions

Pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA, 10 USCA § 1408), state courts are fully empowered to divide military retirement pay as

community property; and state court domestic relations community property division and support orders are fully enforceable against the military.

Although the USFSPA grants state courts the power to divide military retirement pay, its language is still preemptive regarding the limits of state court jurisdiction. State court authority to treat military retirement pay as community property extends only to the military member's "disposable retired pay" as defined by the Act. [10 USCA § 1408(c)(1); *Mansell v. Mansell* (1989) 490 U.S. 581, 588-589, 109 S.Ct. 2023, 2028-2029]

Further, of the "disposable retired pay" subject to the court's jurisdiction, only a maximum of 50% can be ordered payable for support and a property division. (The court's order cannot exceed the 50% limit even with the member's consent.) [10 USCA § 1408(e)(1)]

"Gillmore Rights":

Once pension benefits mature (whether a private or public benefit plan), the court cannot, over the nonemployee spouse's objection, order the nonemployee spouse to defer receipt of his or her community property interest in the benefits until the employee spouse actually retires. The choice as to when community property payments in a matured pension should commence is a valuable property right which belongs to the nonemployee spouse. [*Marriage of Gillmore* (1981) 29 Cal.3d 418, 424-425, 174 Cal.Rptr. 493, 496-497; *Marriage of Cornejo* (1996) 13 Cal.4th 381, 383, 53 Cal.Rptr.2d 81, 83]

By the same token, like any other property rights in a dissolution action, the nonemployee spouse's right to commence receiving his or her share of a matured pension (i.e., "Gillmore rights") may be bargained away in a MSA. However, an effective waiver of "Gillmore rights" is narrowly construed: The MSA on its face must manifest the parties' clear intention that the employee spouse has full control over the date payments to the nonemployee spouse shall begin. [*Marriage of Crook* (1992) 2 Cal.App.4th 1606, 1612, 3 Cal.Rptr.2d 905, 908]

Waivers Of Surviving Spouse Rights Under Ca Probate § 141(a)

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)]

Waivable Rights In Post-1984 Agreements: 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)]

Also - unless the agreement otherwise provides, a waiver governed by Ca Probate §§ 140-146 of "all rights" in the property or estate of a present or prospective spouse (or a "complete property settlement" entered into after or in anticipation of separation, dissolution or nullity of marriage) is a waiver of the rights described in Ca Probate § 141(a). [Ca Probate § 145]

Formalities Required: 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)] However, lack of consideration is not a defense to enforcement. [Ca Probate § 142(c)(1)] Also - 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)]

"Absolute" vs. "Discretionary" Enforcement Of The Waiver: 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.

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)]

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)]

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)]

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)]

Unconscionability: 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)]