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## Premarital Agreements

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Q. I am a California resident who will soon be getting married. I recently received a substantial inheritance and am considering whether to ask my future spouse to sign a prenuptial agreement. What should I know about prenuptial agreements? Will a prenuptial agreement actually hold up in court, perhaps many years from now?

A. Premarital agreements, also known as “antenuptial” or “prenuptial” agreements, are agreements executed between prospective spouses in contemplation of marriage, which become effective upon marriage.

California is a “community property” state. Subject to certain exceptions, community property is defined as “all property acquired by a married person during marriage while domiciled in California.” Thus, any inheritance (or other property) you receive prior to marriage is your separate property.

Property acquired during marriage by “gift, bequest, devise, or descent” is one of several exceptions to the general definition of community property. Thus, your inheritance, even if it had been received during marriage, would be your separate property.

A writing is required to transmute – that is, change the characterization of – property from separate to community or from community to separate. Thus, a premarital agreement is not needed to prevent your pre-marriage inheritance from being transmuted to community property.

Life, however, is seldom that simple. Although the separate property inheritance you received before marriage will not become community

property unless you sign a transmutation agreement which changes its character from separate property to community property, other events may result in the creation of certain non-community property rights to which your spouse will be entitled.

Suppose, for example, the pre-marriage inheritance to which you refer is in the form of a residence, for example the home your parents owned and in which you grew up. Suppose further that there is a loan which is secured by the residence. Such a loan might be one you obtained after inheriting the residence, but before marriage, or one which was obtained during marriage. Absent a premarital agreement, each of these (as well as numerous other) scenarios will result in the creation of certain property rights to which your future spouse will be entitled.

Whether a divorce court will enforce a premarital agreement, perhaps many years from now, will depend on several factors, not the least of which is whether the premarital agreement was created in accordance with all then-existing laws.

Regarding possible future changes in the law, California’s Family Code provides that all statutory amendments are to apply retroactively, thus suggesting that, at a minimum, the continuing validity of premarital agreements is questionable. The argument against amendments which retroactively impair vested (e.g., contract) property rights is that such amendments violate the Due Process clause of the Constitution and, thus, are unenforceable. In any event, the apparent tension between California’s Family Code and the constitutional principle of due process all but ensure future litigation if California attempts to retroactively amend its premarital

agreements law. And even if California premarital agreement law is not amended, your future spouse will always be able to challenge whether the agreement is valid under the law that existed when the agreement was signed.

The bottom line: If your prospective future spouse agrees to, and does, sign a premarital agreement that complies with current law, and if the marriage fails at some time in the future, you should expect, at a minimum, that your spouse will challenge the validity of the premarital agreement. From a purely economic perspective, the question is whether (and by what margin) the cost of obtaining, and potentially judicially defending, a premarital agreement is more or less than the present and anticipated future value of the property to be protected. In any event, you should consult with an attorney well in advance of the date on which you plan to marry.

Earle Law Offices provides trial and appellate litigation, as well as non-litigation, legal services in the areas of bankruptcy, business law, constitutional and civil rights law, family law, real estate law, tax law, and trusts and estates.

\* Mr. Earle is licensed to practice law in all California state trial and appellate courts, the United States Supreme Court, the United States Court of Appeals for the Fourth and Ninth Circuits, federal trial courts in the Northern District of California, and the United States Tax Court. He has served as a Judge Pro Tempore for the Santa Clara Superior Court, and is also a licensed Real Estate Broker.

Mr. Earle received his law degree from the Santa Clara University School of Law, where he served as an Editor of the school's Law Review, and where he received awards for academic excellence. He received his undergraduate degree, with honors, in business administration from the University of La Verne.

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